

# How Common are Judicial Electoral Cycles in Criminal Sentencing?\*

Christian Dippel<sup>†</sup>

Michael Poyker<sup>‡</sup>

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## Abstract

Existing empirical evidence suggests a pervasive pattern of judicial electoral cycles in criminal sentencing: judges appear to pass more punitive sentences when they are up for re-election, consistent with models of signaling where voters have more punitive preferences than judges. However, this pervasive evidence comes from only three states, primarily because states differ considerably in how accessible they make their data. We are able to verify existing results, but, having collected data from eight additional states that are comparable in their level of detail and time span covered, we find that existing results do not replicate in any of them.

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<sup>†</sup>University of California, Los Angeles, and NBER.

<sup>‡</sup>Columbia University.

# 1 Introduction

Elected judges are a distinctly American phenomenon among Western democracies. From a political economy perspective, there are good arguments against having them. In particular, while they may promote policy congruence between judge and voter preferences, such congruence may not be desirable if judicial decisions are meant to be based only on the facts and the law. There is also a worry that judge elections create inconsistent sentencing behavior if judges give more weight to voter preferences closer to elections, which may also give special interest groups more influence over judicial sentencing. Elections may even reduce the quality of judges if re-election pressures deter highly qualified judges from entering (Lim, 2013).

These considerations have always made judicial elections controversial. As early as 1835 [de Tocqueville](#) predicted that they “will sooner or later lead to disastrous results, and that some day it will become clear that to reduce the independence of magistrates in this way is to attack not only the judicial power but the democratic republic itself” (p310, ch8). They have remained controversial since. In 2015, the Supreme Court ruled that states could prohibit judges from soliciting funds for their election campaigns,<sup>1</sup> and Chief Justice Roberts wrote in the majority opinion that “judges are not politicians, even when they come to the bench by way of the ballot. A state may assure its people that judges will apply the law without fear or favour, and without having personally asked anyone for money.”

The potential pitfalls of electing judges have motivated a body of empirical research into the effects of this practice. One line of research has focused on voters. [Lim and Snyder \(2015\)](#) for instance show that in partisan elections, partisan affiliation trumps judge quality (measured by third party evaluations) in determining re-election probabilities, and conclude that judge elections should at least be non-partisan. Another line of research has focused on judges, and in particular on whether judges pass more punitive sentences when they are up for re-election: Early work by [Hall \(1992, 1995\)](#) shows evidence of such electoral cycles among state supreme court justices. More recent empirical work has tended to focus on states’ lower trial courts because these handle a vastly larger number of cases than states’ appellate or supreme courts.<sup>2</sup> [Huber and Gordon](#)

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<sup>1</sup>In *Williams-Yulee vs. Florida Bar*, 575 U.S.

<sup>2</sup>Trial courts are the states’ lower criminal courts. They hear the majority of all criminal cases in the U.S. and can sentence defendants to long prison sentences and in some states even to death.

(2004), [Gordon and Huber \(2007\)](#), [Berdejó and Yuchtman \(2013\)](#), and [Park \(2017\)](#) all show evidence of electoral cycles. In fact, we could find no study that shows the absence of such an effect in trial court data. As a result, the current body of literature can be summarized as showing a pervasive pattern of judicial electoral cycles in criminal sentencing. The problem with such a conclusion is that the combined evidence above comes from only three states—Kansas, Pennsylvania, and Washington— and each study used data from just one state. It is easy to see why this is so: Because trial court data is managed by each state’s sentencing commission individually, it is costly to collect, and to make internally consistent, data from a combination of states.

In this paper, we test for judicial electoral cycles across ten states: Pennsylvania and Washington, which were the focus of previous research,<sup>3</sup> and eight additional ones where we were able to obtain sufficiently rich sentencing data, i.e., Alabama, Colorado, Georgia, Kentucky, North Carolina, Minnesota, Tennessee, and Virginia.<sup>4</sup> We are able to verify existing findings of judicial electoral cycles in Pennsylvania and Washington. However, we are unable to reproduce electoral cycles in the other eight states. This fact is not explained by institutional differences: Our sample includes two states with partisan elections, five states with non-partisan elections, two states with retention elections, and one state with only appointment-cycles.<sup>5</sup> This fact is also not driven by systematic differences in data quality or coding: Other patterns found in previous research show up consistently across states. Lastly, this fact is not driven by time trends in sentencing or the mechanics of judge elections because the data cover similar years in all states. Instead, electoral cycles in criminal sentencing appear to simply not exist in most states.

We contribute to the literature on court sentencing and judge behavior ([Posner, 2008](#); [Epstein, Landes, and Posner, 2013](#); [Ash, Chen, and Naidu, 2017](#); [Cohen and Yang, 2019](#)). Within this literature, we speak in particular to the previously cited works showing that judge elections lead to electoral cycles in sentencing. Where our data overlap with data used in that research, we replicate existing results to a large extent. Overall, however, we show that electoral cycles in sentencing do not appear to be present in most states. By contrast, we reproduce other findings from previous

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<sup>3</sup> Kansas, the third state considered in previous research, would have charged a data processing fee that was an order of magnitude larger than the next-most expensive, so that we decided against collecting it. We do not doubt the results would replicate in the use Kansas data since there are a number of papers from different researchers that use it ([Lim, 2013](#); [Gordon and Huber, 2007](#); [Park, 2017](#)).

<sup>4</sup> We requested court sentencing data from most states, but many states either have not digitized their sentencing data into a consistent data base, or do not share it, or do not track judge identifiers in their data.

<sup>5</sup>In retention elections, incumbents face only a yes/no vote and no challenger.

research consistently across states; for example, all states show evidence of racial biases in sentencing, i.e., of the defendant's race having a strong effect on sentence length over and above what the crime's severity and defendant's recidivism can explain; see [Abrams, Bertrand, and Mullainathan \(2012\)](#) and references therein. We also confirm that [Park's](#) finding that electoral cycles in Kansas courts are entirely driven by cases involving black defendants holds equally in Pennsylvania and Washington. to the best of our knowledge, this had not been shown outside of Kansas. A second substantive finding of our paper is therefore that wherever electoral sentencing cycles appear in the data, they appear to be driven by cases involving black defendants.

More broadly, our paper is a cautionary note on the ability to generalize findings from one observational-data setting to another, even when the settings appear to be highly comparable. Conceptually, using the very useful taxonomy of replication failures in [Clemens \(2017\)](#), our case is a failure of 'reproduction' or of 'robustness to extension', depending on whether one wants to think of judges in two U.S. states as being drawn from the same population or not. We do not view this failure as being driven by publication bias in the usual sense, as discussed e.g., in [Christensen and Miguel \(2018\)](#). Specifically, we do not think Kansas, Pennsylvania, and Washington were selectively chosen in previous research. Rather, it appears these states simply digitized relatively rich sentencing data and made it accessible earlier than other states did. We had no reason to expect the results to differ in other states, and we collected the other states' data with a different research question in mind ([Dippel and Poyker, 2019](#)). If anything, many states would have seemed *ex ante* more likely to exhibit electoral cycles than Pennsylvania, where electoral cycles are unusually long and retention elections shield incumbents from some of the electoral pressure. We also find little to no evidence for specification searching, another classic source of publication bias ([Leamer, 1983](#)): While the specification in [Huber and Gordon \(2004\)](#) slightly favors results in Pennsylvania, and that in [Berdejó and Yuchtman \(2013\)](#) slightly favors results in Washington, overall these two states are consistently the only ones that display evidence for judicial electoral cycles across a range of specifications. It seems to us that the failure of replication we encountered is a matter of chance, and that no one tested for electoral cycles in other states because this research question was viewed as having been answered. As our findings highlight, however, shoe leather remains the best way of affirming the external validity of any research finding ([Freedman, 1991](#)).