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Actual Versus Perceived Performance of Judges

Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi

Perceptions of judges ought to be based on their performance. Yet, few studies of the relation between perceived and actual judicial performance exist. Those claiming judicial bias should be especially sensitive to the relation between perception and performance. Judges perceived by the public or by the legal community as disfavoring a group may be regarded as biased, but that perception is unfair if the judges' votes in cases do not disfavor the group. For example, it may be unfair to accuse an appellate judge of pro-state bias in criminal cases if the judge votes for defendants at a higher rate than several other judges on the same court. This article addresses whether perception matches reality. Several studies have examined perceptions of judges and courts by surveying the public about its confidence in a particular court.¹ Our study differs because it compares perceptions of individual justices with their actual voting patterns.

Incomplete samples are one source of distorted claims about judicial behavior. Excluding a particular group of outcomes,

such as unanimous decisions, can lead to questionable results.² Studies regularly report that a judge's political affiliation, race, or sex is associated with case outcomes—results that sometimes raise inferences of bias.³ At the trial-court level, most studies are limited to available opinions, a known source of possible distortion.⁴ These studies also tend to exclude cases that end via settlement, which is the modal outcome in civil litigation.⁵ Several trial-court-level studies that use complete case samples and find no political or other effects suggest the importance of complete case samples.⁶

At the appellate level, samples may exclude screening decisions by courts with discretionary jurisdiction. Judges' screening decisions in discretionary cases—the decisions whether to grant full review of cases—often are not publicly available.⁷ Yet these screening decisions can comprise the bulk of a judge's work.⁸ Also, studies may not account for the nonrandom aspects of assignment, with variation in outcome demonstrated when analysts consider the effects of nonrandom

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Footnotes

1. E.g., Charles M. Cameron & Jee-Kwang Park, *How Will They Vote? Predicting the Future Behavior of Supreme Court Nominees, 1937-2006*, 6 J. EMPIRICAL LEGAL STUD. 485 (2009) (using preconfirmation information to assess justices' political ideology and predict their future behavior on the U.S. Supreme Court); James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507 (2007) (assessing perceptions of the U.S. Supreme Court).
2. Kevin R. Tully & E. Phelps Gay, *Louisiana Supreme Court Defended: A Rebuttal of the Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281, 289 (2009) (criticizing study of individual justices for excluding all unanimous cases from the data).

3. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006).
4. Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 234-36 (2009).
5. See generally Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009).
6. See, e.g., Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995); Brian T. Fitzpatrick, *Judicial Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 188 (2010) (political party of the presiding judge is not associated with outcomes of employment discrimination litigation); Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1337 (1998).
7. Significant differences exist in judges' screening behavior. Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Case Selection and Dissent in Courts of Last Resort: An Empirical Study of the Israel Supreme Court*, in EMPIRICAL STUDIES OF JUDICIAL SYSTEMS (Yun-chien Chang ed. forthcoming 2013).
8. See Eisenberg, Fisher & Rosen-Zvi, *supra* note 7, at tbl.1-2 (showing less than 15% of discretionary civil or criminal appeals are granted review by the Israel Supreme Court); *The Statistics*, 125 HARV. L. REV. 362, 369 (2011) (showing 1.1% of petitions to U.S. Supreme Court are granted review).

assignment.⁹ Some studies of judiciaries, run at the behest of special-interest groups, seem to have little interest in presenting a balanced picture of judicial behavior.¹⁰

Are perceptions of judicial performance accurate if the sample used to assess judges' behavior is complete, no screening of cases is present, random assignment is used or nonrandom assignment features are accounted for, and an interest group is not trying to shape perceptions? This article uses such a sample to compare actual judicial performance with perceptions of judicial behavior, as reflected in 2,106 responses to a survey of 166 actors in the Israeli legal community. To gauge actual judicial performance, we use two full years (2006 and 2007) of criminal cases decided by the Israeli Supreme Court (ISC). The sample consists of 1,410 mandatory-jurisdiction criminal cases and 48 discretionary-jurisdiction criminal cases. We compare justices' actual behavior in criminal cases to survey respondents' rankings of those justices. The results suggest little association between the reality of judicial performance in the mass of cases and perceptions of that performance by the legal community. Because actual performance in the mass of criminal cases is not associated with perceived performance, we explore alternative sources of perceptions: media reports, votes in discretionary-jurisdiction cases, and differences among surveyed respondent groups.

Although our study is limited to one country, the results suggest caution in concluding that judges favor one group or the other—one possible definition of bias. The limited association between perception and reality suggests that claims of bias should be based on careful analysis of judges' actual behavior, rather than on either casual observation or only a few cases.

This article first provides background information about the Israeli judiciary. It then presents survey results regarding the Israeli legal community's perceptions of 16 ISC justices' tendencies in criminal cases. The survey asked respondents the degree to which they believe individual justices are favorable to the state or to defendants. We then compare the survey results with justices' actual voting patterns in criminal cases. The article explores the differences between perceptions and reality.

THE ISRAELI JUDICIARY¹¹

Israel is a unitary state with a single system of traditional courts of general jurisdiction, as well as other tribunals or authorities with judicial power that have jurisdiction limited by subject matter or persons covered. Within the traditional

courts, the judiciary law establishes three levels of courts: the ISC, district courts, and magistrate courts.¹² District courts and magistrate courts are trial courts; the ISC functions as both an appellate court and as the High Court of Justice (HCJ). In its HCJ capacity, the ISC operates as a court of first and last instance, primarily in areas relating to government behavior. Because the ISC's HCJ function is not as an appellate court, this study excludes those cases. The study does consider HCJ information relating to workload (in contrast to HCJ outcomes) because the HCJ workload can affect justices' assignments to appellate cases.

The basic trial courts are the 29 magistrate courts. Magistrate courts serve the locality and district in which they sit, and they generally have criminal jurisdiction over offenses with a potential punishment of up to seven years of imprisonment. They have civil jurisdiction in matters involving up to a specified monetary amount—currently 2.5 million shekels (approximately U.S. \$690,000)—as well as over the use, possession, and division of real property. Magistrate courts also serve as traffic courts, municipal courts, family courts, and small-claims courts. A single judge usually presides in each case unless the president of the magistrate court directs a panel of three judges to hear the case.¹³

Six local district courts have residual jurisdiction in any matter that is not within the sole jurisdiction of another court.¹⁴ As courts of first instance, district courts exercise jurisdiction over criminal cases punishable by more than seven years' imprisonment. District courts' civil jurisdiction extends to matters in which more than 2.5 million shekels are in dispute. District courts also serve as administrative courts and hear cases that deal with, inter alia, companies and partnerships, arbitrations, prisoners' petitions, and appeals on tax matters. These courts have appellate jurisdiction over magistrate court judgments.¹⁵

The ISC has jurisdiction to hear criminal and civil appeals from judgments of the district courts. Cases that begin in a district court are appealable, as of right, to the ISC. Other matters, particularly the mass of cases that begin in the magistrate courts, may be appealed only with the Court's permission. The ISC's decisions are binding on lower courts, and Israel adheres to the principle of *stare decisis*.¹⁶ The ISC generally sits in panels comprising three justices. The president or the deputy president of the Court may expand the size of the panel to any uneven number of justices, but that happened so rarely during

9. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 394 (2010); Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMPIRICAL LEGAL STUD. 574 (2010).

10. Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969, 970 (2009).

11. The description of the Israeli judiciary is based on the description in Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects*, 9 J. EMPIRICAL LEGAL STUD. 246 (2012).

12. See generally Courts Law (Consolidated Version), 5744-1984, 38

LSI 271 (1983-1984) (Isr.).

13. *Id.* ch. 2, art. 3.

14. Ordinances of Courts (Establishment of The Central District Court), 2007, KT 6585, 824 (Isr.).

15. Generally, a panel is composed of a single district-court judge, though a panel of three judges hears appeals of magistrate court judgments and cases of first instance when the offense is punishable by ten or more years of imprisonment. A three-judge panel also sits when the president or deputy president of the district court so directs. Courts Law (Consolidated Version) ch. 2, art. 2.

16. Basic Law: The Judiciary, 5744-1984, SH No. 1110 p. 78, § 20 (Isr.).

the two years examined in this study that it did not require further consideration.¹⁷

Courts sitting on appeal, whether district courts or the ISC, are formally authorized to adjudicate issues of both fact and law, but they seldom intervene in factual matters and tend to limit their judgment to questions of law.¹⁸ The underlying rationale is that on appeal, judges usually are not directly exposed to witnesses and other types of evidence. This does not negate the ability of the appellate court to examine whether the factual basis for the decision of the lower court is anchored on sound evidentiary foundations, but the de facto appeal practice is not one of de novo review.¹⁹ Our study focuses primarily on mandatory criminal appeals, which are regulated in a slightly different manner than civil appeals under Israeli law. We describe only the criminal appeals process here and refer the reader to our description of civil appeals elsewhere.²⁰

In criminal cases, a verdict issued by the district court sitting in the first instance can be appealed to the ISC as a matter of right.²¹ A verdict issued by the magistrate court in the first instance can be appealed to the district court as a matter of right. In Israel, both prosecution and defense have symmetrical rights of appeal, as the prosecution is authorized to appeal a defendant's acquittal. When a case is initiated in the magistrate court and appealed to the district court, both the prosecution and the defense can petition the ISC for a second appellate review.²²

The requirements governing discretionary ISC appellate review laid down in *Chenion Haifa v. Matzat Or*,²³ the most cited precedent in Israeli caselaw,²⁴ apply to criminal and civil cases.²⁵ *Chenion Haifa* states that the ISC should grant discretionary review only when significant legal or public issues are at stake that transcend the interests of the litigating parties. Such legal or public issues may include, for example, conflicting rulings by lower courts or matters of constitutional significance. Under this standard, the lower-court result should not affect the decision to grant a discretionary appeal. Therefore, according to the standard of review, a defendant's argument concerning the stigmatizing effect of conviction²⁶ or even the

severity of punishment are not grounds for a second appellate review.²⁷

A single justice usually reviews a request for discretionary appeal, but a panel of three justices can also review the request.²⁸ When a three-justice panel reviews the request, the panel is authorized to treat the request as an actual appeal and can decide the case on its merits.²⁹ As discussed previously, discretionary appeals are usually based on a preliminary screening by a single justice, a process we explore elsewhere.³⁰

PERCEPTIONS OF ISC JUSTICES

Methodology

We used an online survey to ask members of the Israeli legal community their opinions of the degree to which individual justices favored the state or defendants in criminal cases. The survey's first part asked respondents to rate each justice based on the respondent's view of the justice's pro-prosecution or pro-defendant tendencies. The second part asked respondents about their position in the Israeli legal community.³¹ In an initial survey of the Israeli legal community in September and October 2011 and in a follow-up survey limited to law students in November 2011, recipients were invited to participate through an email containing a hyperlink to an online survey site. The invitations were sent to the following: (1) faculty members of all university and college law schools in Israel; (2) all alumni of Tel Aviv University Law Faculty; (3) approximately 150 current law students at Tel Aviv University belonging to the classes of 2012 through 2014, as well as advanced-degree students; (4) all public defenders in Israel; (5) many prominent law firms operating in Israel; (6) a select group of prestigious criminal lawyers; and (7) the Attorney General's office. We lacked direct access to public prosecutors; therefore, we requested that the Attorney General's office assist us in internally distributing the survey. It is unclear whether the survey was distributed, and we suspect that it was not. The few responses we received from public prosecutors were probably due to their parallel affiliations (such as Tel Aviv University alumni). The online software allowed a recipient to provide

17. Each panel also has the power to decide to expand its size, and the Court can also decide to initiate a "further hearing" in which a panel of five or more justices will rehear a case decided by a smaller ISC panel. A single justice may hear petitions for injunctions, temporary restraining orders, or other interim rulings, as well as for an order nisi, but a single justice may not refuse to grant an order nisi or make it contingent on only some of its assertions. A single justice may hear appeals against interim rulings by district courts or against the verdict of a single district-court judge hearing an appeal from a case in a magistrate's court. Courts Law (Consolidated Version) §§ 26, 30.

18. See CrimA 4297/98 Hershtik v. State of Israel 54(4) PD 673, 682 (2000) (Isr.).

19. See CrimA 125/50 Ya'akovitch v. Attorney General 6(1) PD 514 (1952) (Isr.).

20. Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Israel's Supreme Court Appellate Jurisdiction: An Empirical Study*, 96 CORNELL L. REV. 693, 700-04 (2011).

21. See Courts Law (Consolidated Version) § 41(a).

22. Unlike the situation in civil cases, interim trial-court decisions in

criminal cases cannot be appealed except under limited circumstances, such as judicial disqualification. Criminal Procedure Law (Consolidated Version), 5742-1982, 36 LSI 35, §§ 146-47 (1981-1982) (Isr.).

23. CA 103/82 *Chenion Haifa v. Matzat Or* 36(3) PD 123 (1982) (Isr.).

24. See Eisenberg, Fisher & Rosen-Zvi, *supra* note 20, at 702 n.48.

25. See DC 4927/92 *State of Israel v. Ben Yehuda* (unpublished opinion) (1992) (Isr.).

26. CrimA 1245/93 *Shtarkman v. State of Israel* 47(2) PD 177 (1993) (Isr.).

27. DC 3251/91 *Yishai v. State of Israel* PD 45(5) 441 (1991) (Isr.). Prior work questions adherence to the *Chenion Haifa* standards. Eisenberg, Fisher & Rosen-Zvi, *supra* note 20, at 720.

28. Criminal Procedure Rules, 5734-1974, § 44(7) (Isr.).

29. Criminal Procedure Law (Consolidated Version), 5742-1982, 36 LSI 35, § 205 (1981-1982) (Isr.).

30. Eisenberg, Fisher & Rosen-Zvi, *supra* note 7.

31. The survey appears as an appendix to Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Actual Versus Perceived Performance of Judges*, 35 SEATTLE L. REV. 615 (2012).

only one response per justice.

The survey asked respondents to “rank each justice according to your view of their pro prosecution or pro defendant views” on a five-point scale, which was coded as follows:

- Very pro prosecution: 1
- Somewhat pro prosecution: 2
- Neither pro prosecution nor pro defendant: 3
- Somewhat pro defendant: 4
- Very pro defendant: 5

Respondents could reply that they had “no opinion” about a justice. The survey included all 16 ISC justices who served in 2006 to 2007.

The survey’s second part asked respondents to self-identify with one of the following groups (each group’s number of respondents is in parentheses): (a) private practitioner with an emphasis on civil law (civil attorneys) (23); (b) private practitioner with an emphasis on criminal law (criminal attorneys) (16); (c) law professor (23); (d) state attorney (6); (e) public defender (16); (f) law student (73); and (g) other (9). For some purposes, we combined the criminal attorneys and public defenders into a single group labeled “defense lawyers.” We aggregated these groups because they represent criminal defendants and might be expected to have similar views of justices.

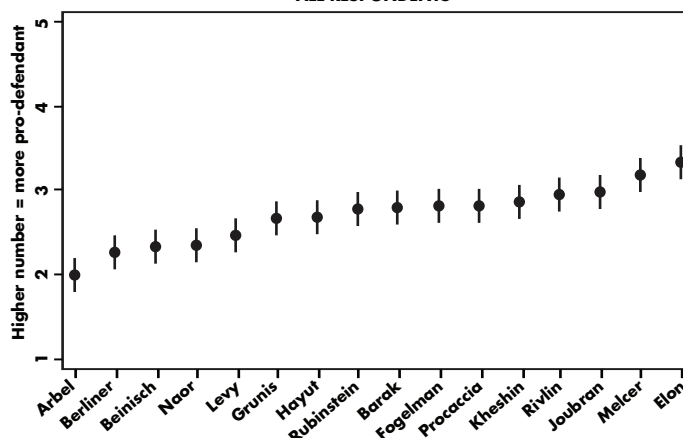
The results of our earlier work—used in the analysis below—describe the actual pattern of justices’ votes³² and were not made publicly available until the survey period closed. The surveys yielded 2,656 responses pertaining to individual justices provided by 166 respondents. We removed the “no opinion” responses from the analysis, resulting in 2,106 responses. The “Total” column in Table 1 shows the responses for each justice less the “no opinion” responses, which ranged from a high of 158 for Justice Barak to a low of 94 for Justice Berliner. The “Total” row in Table 1 shows the number of responses from each respondent group without the “no opinion” responses. When appropriate, our analysis accounts for the nonindependence of observations by the same respondent. Due to the sampling process, we cannot be sure that the respondents are a random draw from the Israeli legal community, and our findings are subject to this limitation. Although we solicited a broad range of respondents, we could not ensure responses to our invitations.

Survey Results

Table 1 and Figure 1 report the pattern of results by justice and respondent group. The first row of Table 1 shows the mean responses of the respondent groups for each justice on the five-point scale described previously. The second row shows the number of respondents with respect to that justice. For example, the first two rows of the “Civil Attorneys” column show that civil attorneys had a mean response of 1.91 based on 23 respondents with respect to Justice Arbel.

The overall mean of the 2,106 responses was 2.70, which is

FIGURE 1.
MEANS AND 95% CONFIDENCE INTERVALS OF PERCEPTIONS OF JUSTICES
ALL RESPONDENTS



Note: The figure shows the results of a survey of the Israeli legal community in the fall of 2011 that asked about the respondents’ perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state. The y-axis shows the mean response for each justice across all survey respondents. The lines represent the 95% confidence intervals for each justice. Justices are ordered along in x-axis in ascending order of pro-defendant perception.

somewhat below the nominally neutral response of three on the survey’s five-point scale. Given that the ISC affirmed over 80% of the mandatory criminal appeals,³³ it is understandable why the respondents regarded justices as being somewhat favorable to the state. Indeed, only the state attorneys’ responses averaged above three, and their mean of 3.03 barely exceeds that number.

Figure 1 shows the mean response for each justice, designated by the filled circles, and a measure of the uncertainty in the responses. The uncertainty measure consists of the upper and lower 95% confidence intervals, indicated by the lines emanating from the circles. The mean responses are taken from the justice means in Table 1. The x-axis depicts the justices, with the justice perceived as most favorable to the state appearing closest to the origin and the justice perceived as most favorable to defendants included as the last justice on the x-axis. Thus, Justice Arbel was perceived as most favorable to the state and Justice Elon was perceived as least favorable. The confidence intervals suggest that statistically significant differences exist for several pairs of justices. For example, no overlap in confidence intervals exists for Justice Arbel and any justice other than Justice Berliner. Only two justices have lower 95% confidence intervals that exclude three, but several justices have upper 95% confidence intervals that exclude three.

The groups with presumably greater experience and information about ISC activity perceived the court differently. Table 1 shows that perceptions of criminal attorneys and public defenders did not substantially differ in their means. The data also indicate that defense lawyers divide the justices into three groups, with five justices (Arbel, Berliner, Beinisch, Naor, and Levy) perceived as substantially pro-state, four justices (Rubin-

32. Eisenberg, Fisher & Rosen-Zvi, *supra* note 11.
33. Eisenberg, Fisher & Rosen-Zvi, *supra* note 11. Affirmance rates of about 80% in mandatory-jurisdiction criminal cases are not unusual. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dis-*

sent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source, 89 B.U. L. REV. 1451, 1479 tbl.4 (2009) (showing such rates in mandatory-jurisdiction criminal cases resolved by U.S. state supreme courts).

stein, Kheshin, Melcer, and Elon) perceived as moderately pro-defendant, and the remaining seven justices perceived as being between the other two groups.

The few state-attorney responses produced imprecise estimates. Nevertheless, a noticeable difference was their generally more pro-defendant perception of the ISC. Table 1 shows that their mean perception score was 3.03, which makes them the only group that regarded the justices as pro-defendant on our scale. Nine justices had mean perception scores of three or

more, so the pro-defendant average of state attorneys was not a consequence of extreme views of one or two justices. Within this generally more pro-defendant perception, state attorneys shared with defense lawyers the relative perceptions of Justices Arbel, Berliner, and Levy as being pro-state. Thus, the two groups with direct litigation experience—defense lawyers and state attorneys—while representing clients with opposing interests, shared a view of Justice Levy as being relatively pro-state. Law professors had the opposite perception of him. In

TABLE 1. PERCEIVED PROPENSITY OF VOTING FOR DEFENDANT OR STATE, BY JUSTICE AND RESPONDENT GROUP

JUSTICE	CIVIL ATTORNEYS	CRIMINAL ATTORNEYS	LAW PROFESSORS	LAW STUDENTS	PUBLIC DEFENDERS	STATE ATTORNEYS	OTHER	TOTAL
Arbel	1.91	1.40	1.53	2.34	1.63	2.17	2.25	1.98
	23	15	19	59	16	6	8	146
Barak	2.76	2.25	2.29	3.04	2.63	3.40	3.13	2.80
	21	16	21	71	16	5	8	158
Beinisch	2.09	1.56	1.68	2.88	1.88	2.83	2.57	2.35
	22	16	22	67	16	6	7	156
Berliner	2.00	2.20	2.21	3.00	1.15	2.50	2.80	2.28
	18	15	14	25	13	4	5	94
Elon	3.50	3.25	3.79	3.06	3.57	3.75	3.40	3.33
	16	12	14	49	14	4	5	114
Fogelman	2.83	2.85	2.43	3.11	2.46	3.00	3.00	2.83
	18	13	14	27	13	5	8	98
Grunis	2.53	2.56	2.47	2.78	2.79	2.75	3.00	2.69
	19	16	19	59	14	4	7	138
Hayut	2.57	2.29	2.29	2.89	2.73	3.00	3.00	2.69
	21	14	17	55	15	5	7	134
Joubran	3.10	2.73	2.50	3.20	3.00	2.60	2.71	2.99
	20	15	18	64	15	5	7	144
Kheshin, D	3.07	2.90	2.67	2.72	3.38	3.25	2.75	2.87
	14	10	12	53	13	4	4	110
Levy	2.22	1.53	3.05	2.76	2.00	2.00	3.00	2.47
	23	15	19	54	15	6	7	139
Melcer	2.94	3.83	3.29	2.94	3.31	3.80	3.67	3.20
	16	12	14	48	16	5	6	117
Naor	2.05	1.79	2.16	2.75	1.81	2.80	2.71	2.37
	22	14	19	63	16	5	7	146
Procaccia	2.64	2.33	2.50	3.20	2.20	3.50	3.13	2.83
	22	15	18	61	15	4	8	143
Rivlin	2.60	3.00	2.76	3.07	2.58	4.00	3.13	2.95
	15	16	17	54	12	4	8	126
Rubinstein	2.95	3.20	2.25	2.64	3.19	3.67	2.50	2.79
	22	15	20	56	16	6	8	143
Total	2.57	2.44	2.44	2.89	2.51	3.03	2.91	2.70
	312	229	277	865	235	78	110	2106

Note: The table shows the results of a survey of the Israeli legal community in the fall of 2011 that asked about the respondents' perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state.

contrast, the state attorneys' perception of Justice Joubran was closer to the perception of law professors than it was to the perception of defense lawyers. Defense lawyers regarded Justice Joubran as relatively pro-defendant, whereas law professors and state attorneys regarded him as more pro-state.

A consistent result across all groups was the pro-state perception of Justice Arbel. She was perceived as the most pro-state justice, or one of the most pro-state justices, by all groups. Justices Elon and Melcer were consistently regarded as pro-defendant, and a substantial group of justices was perceived as between the two extremes by all groups. Regression models, not reported here, confirm the pattern in Table 1. All justices were perceived to be more pro-defendant than Justice Arbel, and that those differences were statistically significant.

We defer possible explanations of the survey results until after we report the justices' actual votes.

ISC JUSTICES' ACTUAL PERFORMANCES COMPARED TO PERCEPTIONS

To compare perceptions with justices' actual voting behavior, we used the justices' votes in cases. We used data employed in earlier studies of ISC appellate cases, which included discussions of the data's limitations.³⁴ We describe here relevant aspects of the data.

The case outcomes with which we compare perceptions are mandatory- and discretionary-jurisdiction criminal cases decided by the ISC in the years 2006 and 2007. The study includes every ISC substantive opinion available online via the official Israel Judicial Authority (IJA) website for cases decided during that time period. Since the IJA website contains all of the cases decided by the ISC,³⁵ the resulting database provides a complete picture of ISC doctrinal decisional activity.

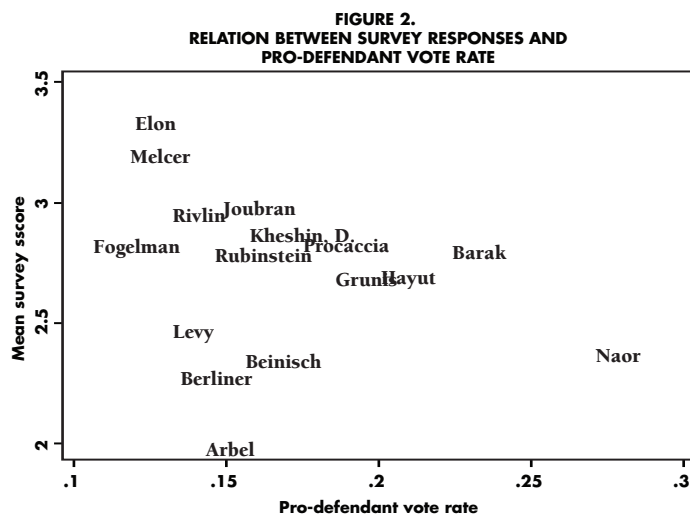
The cases identified by the above methods were coded by student research assistants. Before the student coding, the authors designed a data form to structure the coding. After review of the performance of the form and the students in an initial set of cases, the form was revised and a final form constructed. The students used that revised form to code the cases under our supervision.

The outcome variable is each justice's vote in each case. "Vote for defendant" is a dummy variable recording the direction of each justice's vote. A justice's vote favored the state if a justice voted to affirm a decision on an appeal brought by a defendant or reverse a decision on an appeal brought by the state. A vote favored the defendant if it was a vote to affirm a decision on an appeal brought by the state or to reverse a decision on an appeal brought by the defendant. A justice's vote could differ from the case's outcome if a justice dissented, which

rarely occurred in the ISC in the time period studied.³⁶ We excluded about 4.5% of votes in mandatory-jurisdiction criminal cases because they involved votes that we did not characterize as favoring the defendant or the state, such as "approved in part and denied in part."

Table 2, based on our earlier work,³⁷ reports each justice's votes for mandatory and discretionary cases. It also shows the number of each type of case (mandatory or discretionary) the justices voted in and each justice's rank, as measured by the justice's rate of voting for defendants. The dominant pattern was that the state was more successful than criminal defendants.³⁸ The lowest rate at which any justice voted in favor of the state was 72%, as shown in the first numerical column. The range of pro-defendant vote percentages was broader in discretionary cases, but these percentages were based on far fewer cases than the mandatory-case percentages. The ISC grants review in a small fraction of discretionary cases.

Regression analysis in our earlier work controlled for non-random aspects of case assignment—case-category specialization, workload, and seniority—as well as for the most serious crime present in a case, and the gender of defendants.³⁹ It confirmed that Table 2's mandatory-case columns provided a reasonable ordering of justices' tendencies to vote for the state or defendants. By exploiting the use of random case assignment and controlling for nonrandom aspects of case assignment, the methodology accounted for the varying merits of cases pre-



Note: The figure shows the relation between survey scores and justices' votes in mandatory-jurisdiction criminal cases. Survey scores are from the fall 2011 survey of the Israeli legal community shown in Table 1, which asked about respondents' perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state. The rates at which justices voted for the state's position in mandatory-jurisdiction criminal cases were based on cases decided by the ISC in the years 2006 and 2007.

34. Eisenberg, Fisher & Rosen-Zvi, *supra* note 7; Eisenberg, Fisher & Rosen-Zvi, *supra* note 11; Eisenberg, Fisher & Rosen-Zvi, *supra* note 20, at 709.

35. We tested the comprehensiveness and accuracy of the database by comparing it with data obtained from the ISC's secretariat. This comparison suggested that the IJA website data are indeed comprehensive, covering the full gamut of cases. The website does not include cases decided in camera. But since those cases are an insubstantial fraction of the cases decided by the Court, the omis-

sion does not materially affect the analysis here. See Courts Law (Consolidated Version), 5744-1984, 38 LSI 271, § 70(a) (1983-1984) (Isr.).

36. Eisenberg, Fisher & Rosen-Zvi, *supra* note 7.

37. Eisenberg, Fisher & Rosen-Zvi, *supra* note 11, at 283 tbl.18.

38. The state is more successful both in cases appealed by defendants and in cases appealed by the state. *Id.*

39. *Id.* at 279 tbl.17.

sented to justices. Differences in justices' rates of voting for the two parties are thus reasonably attributable to justices, not to case characteristics.

How do the perceptions compare with the justices' performances as reflected in Table 2? We first compare performance in mandatory-jurisdiction cases with survey scores. We then compare performance in discretionary-jurisdiction cases with survey scores.

Survey Scores and Mandatory-Jurisdiction Case Performance

Figure 2 shows the relation between survey scores and justices' votes in mandatory-jurisdiction cases. The data points in Figure 2, indicated by justices' names, represent each justice's rate of voting for defendants, as shown on the x-axis, and that justice's mean survey score, as shown on the y-axis. For example, Justice Naor voted for defendants in 27.8% of her cases, the highest rate of any justice. Her mean survey score, as shown in Table 1, was 2.37, well below the overall survey mean. Her combination of votes and survey scores is therefore represented by her location in the lower-right portion of Figure 2. If survey perceptions reflected justices' observed rates of voting for defendants, then the data points should flow from

lower left to upper right. That is, a justice with a relatively high rate of voting for defendants who is also perceived as being relatively pro-defendant should be located in the upper-right portion of the figure. A justice with a relatively low rate of voting for defendants who is also perceived as being relatively pro-state should be located in the lower-left portion of the figure.

The figure shows an unexpected pattern. The data flow, if anything, from upper left to lower right. A simple correlation coefficient was negative but insignificant (-.27; p = .307), suggesting little association between perceptions and voting patterns. Justices perceived as pro-defendant tended to vote for the state. Perceptions of Justice Naor were relatively pro-state, but her voting pattern was most favorable to defendants. Justices Elon and Melcer show the opposite combination: perceived to be pro-defendant but with low rates of voting for defendants. Justice Fogelman, who had the most pro-state voting pattern, was perceived to be relatively neutral. No justice who was perceived as being relatively pro-defendant (Justices Elon, Melcer, Joubran, and Rivlin) actually tended to vote for defendants.⁴⁰ Justice Arbel's position was distinctive. As Table 1 and Figure 1 show, she was the justice perceived to be the most pro-state. Yet she was average in her rate of pro-state votes. We conclude that

TABLE 2. RATE AND RANK OF JUSTICES' VOTING FOR STATE BY JURISDICTIONAL SOURCE

JUSTICE	MANDATORY CASES		DISCRETIONARY CASES		JUSTICE'S MANDATORY CASE RANK	JUSTICE'S DISCRETIONARY CASE RANK
	Rate favoring defendant	N	Rate favoring defendant	N		
Fogelman	.12	168	1.00	4	2	13
Elon	.13	167	.80	5	2	4
Melcer	.13	86	1.00	3	2	13
Levy	.14	829	.87	23	4	12
Rivlin	.14	142	.80	5	4	4
Arbel	.15	351	.82	17	6	8
Berliner	.15	274	.60	5	6	2
Joubran	.16	446	.80	20	8	4
Rubinstein	.16	434	.85	20	8	10
Beinisch	.17	150	.57	7	10	1
Kheshin, D.	.17	195	.80	5	10	4
Procaccia	.19	138	.85	13	12	10
Grunis	.20	169	1.00	5	13	13
Hayut	.21	215	.83	6	14	9
Barak	.23	43	1.00	1	15	13
Naor	.28	154	.60	5	16	2

Note: The table shows the rate at which each justice voted for the state's position in mandatory and discretionary criminal cases. A vote favored the state if it was to affirm an appeal brought by a defendant or to reverse an appeal brought by the state. A vote favored the defendant if it was to affirm an appeal brought by the state or to reverse an appeal brought by the defendant. The last two columns show the ordinal rank of each justice for mandatory and discretionary cases. The ordinal rank is based on the rate at which justices voted for the state in criminal cases, with a lower rank corresponding to voting more often for the state. The cases are mandatory- and discretionary-jurisdiction criminal cases decided by the ISC in the years 2006 and 2007.

40. Justices Levy and Berliner were perhaps the justices with the best match of perceptions of their voting tendency and their actual voting patterns. They were both perceived as being relatively pro-state, and both voted in favor of the state more than most other justices. Conversely, Justice Rivlin was perceived as fourth most

favorable to defendants, yet his voting pattern tended to be more pro-state. A substantial number of justices were perceived as being neither very pro-state nor very pro-defendant, and their voting patterns reflected that neutrality.

justices' actual voting patterns in mandatory criminal cases contribute nothing whatsoever to explaining perceptions of justices as being pro-state or pro-defendant.

Survey Scores and Discretionary-Jurisdiction Case Performance

We previously noted justices' significantly different voting patterns in mandatory and discretionary cases.⁴¹ Discretionary cases, for which basic statistics are reported in Table 2 above, therefore provide a second possible basis for explaining the survey-scores pattern. Figure 3 shows the relation between survey scores and justices' performance in discretionary cases. The data points are again indicated by justices' names, with justices' rates of voting for defendants (now in discretionary cases) shown on the x-axis and their mean survey scores shown on the y-axis. The expected pattern of data flow from lower left to upper right is recognizable, though imperfect. A justice with a relatively high rate of voting for defendants was generally perceived as being relatively pro-defendant.

A simple correlation coefficient was positive and nearly significant (.47; $p = .065$), suggesting a reasonably strong association between perceptions of justices as pro-state or pro-defendant and how justices voted in discretionary-jurisdiction cases. If one excludes the most outlying point in the figure, Justice Arbel (discussed below), the coefficient was .56 and significant at $p = .029$. However imperfect an association Figure 3 portrays, it is much closer than Figure 2's mandatory-case pattern in exhibiting the expected relation between survey scores and voting patterns.

RECONCILING PERCEPTIONS AND REALITY

The above results suggest two differing relations between perceptions and reality—a positive association between justices' votes in discretionary-jurisdiction cases and a negative, insignificant association in mandatory-jurisdiction cases. This Part explores that difference, as well as intergroup differences among survey respondents. It also adds a second possible source of influence regarding perceptions of justices' performances: coverage in the media.

Differences Based on Jurisdictional Source and Group Affiliation

It is plausible that justices' votes in discretionary cases would better explain survey scores than votes in mandatory cases. Justices are supposed to grant review in discretionary

cases based on each case's importance. Though this principle is often not honored,⁴² if a case's importance plays some role in discretionary-case selection, then the average discretionary case is likely more important than the average mandatory case. Thus, it is reasonable that a more important class of cases would play a greater role than mandatory cases in shaping the public's perceptions of judicial voting tendencies. Yet, the Court reviews so few discretionary cases compared to mandatory cases—about 3% the number of mandatory cases—that it is puzzling that discretionary cases influence the legal community's perception so heavily.

Another factor is likely to help explain the influence of discretionary cases. Attorneys and law students do not read and code all cases heard by the Court, and they are probably unaware of the patterns we report in mandatory cases. Mandatory cases therefore cannot be a basis for their perceptions, and discretionary cases may shape perceptions by default.

Even in discretionary cases, however, the perception and reality for Justice Arbel do not match. She is perceived as the most pro-state justice, which is not supported by her voting in either mandatory or discretionary cases. For many justices, the small number of discretionary cases they hear makes those cases an imprecise measure of the justices' behavior. But Justice Arbel has the fourth highest number of discretionary-case participations (17), and Table 2 shows that she ranks as the eighth most favorable justice for defendants (as well as the sixth most favorable in mandatory cases). Thus, the legal community's perception of her has no basis in these voting patterns. Justice Arbel served for several years (1996–2004) as the State Attorney of Israel and thus head of the State Attorney Office, which represents the state in court. Perceptions of Justice Arbel may be influenced more by her relatively recent association with the state than by her actual performance in criminal cases.⁴³

Some of the perception patterns may be explained not only by the justices' behavior but also by the survey respondents' characteristics. Table 1 shows law professors to have a relatively pro-state view of justices and state attorneys to have a relatively pro-defendant view of justices. We noted above that state attorneys differ significantly from both criminal lawyers and from public defenders.

The significant differences between the state attorneys and the defense lawyers may represent what psychology researchers call "naïve realism."⁴⁴ "[P]eople do not fully appreciate the subjective status of their own construals, and, as

41. Eisenberg, Fisher & Rosen-Zvi, *supra* note 11, at 283.

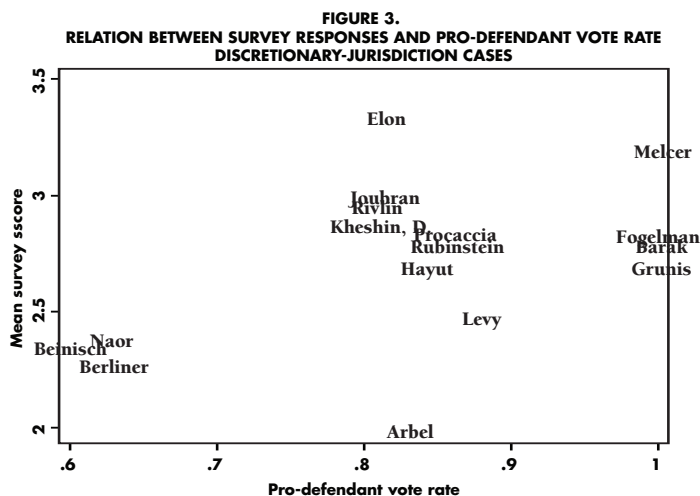
42. Eisenberg, Fisher & Rosen-Zvi, *supra* note 20, at 720.

43. A similar effect may be at work for Justice Beinisch. She served as the State Attorney of Israel from 1989 to 1995. Figure 2 indicates that perceptions of her do not match well with the rate at which she voted for defendants in mandatory-jurisdiction cases. She was the most pro-state justice in discretionary-jurisdiction cases, but that is based on only seven decisions. The pro-state view of her may stem from her prior position.

From 1972 to 1979, Justice Naor served as Deputy State Attorney in the Ministry of Justice. She is also regarded as relatively pro-state. Other justices have also served the government in high legal offices. Justice Barak served as Israel's Attorney General from

1975 to 1978, and Justice Rubinstein served as Attorney General from 1997 to 2004. Neither is perceived as very pro-state. There may be a difference between the way the public perceives former Attorneys General (less pro-state) compared to how the public perceives former state attorneys (more pro-state). Attorneys General have often publicly defied the government by refusing to represent the state when they thought the state was in the wrong. State attorneys, on the other hand, are not in a position to defy the state, and they are in charge of all the criminal trials.

44. Robert J. Robinson et al., *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 405 (1995).



Note: The figure shows the relation between survey scores and justices' votes in discretionary-jurisdiction criminal cases. Survey scores are from the fall 2011 survey of the Israeli legal community shown in Table 1, which asked about respondents' perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state. The rates at which justices voted for the state's position in discretionary-jurisdiction criminal cases were based on cases decided by the ISC in the years 2006 and 2007.

such, they do not make sufficient allowance for the uncertainties of construal when called on to make behavioral attributions and predictions about others.”⁴⁵ A similar effect has been reported in an experiment that assigns participants roles as defense lawyers or prosecutors.⁴⁶ If lawyers tend to identify with their clients' positions beyond the objective merits of their cases, then both state attorneys and defense lawyers may not fully appreciate the subjective status of their own views in shaping their perceptions of ISC justices. Their inflated perception of the merits of their clients' positions translates into an altered view of how the justices treat their clients. Defense

lawyers think the justices are more out of line with their clients' innocence or deserved lower sentences, and therefore, they tend to perceive justices as relatively pro-state. State attorneys think the justices are more out of line with the state's view of guilt or deserved higher sentences and therefore tend to perceive justices as relatively pro-defendant. Evidence exists that lawyers, like other people, also misperceive their own performance and behavior.⁴⁷

Perceptions and Media Coverage

Perceptions of legal performance can be shaped by media coverage,⁴⁸ so media characterizations of justices may influence perceptions of them. To explore this influence, we surveyed newspaper coverage of the 16 justices appearing in the questionnaire. The newspaper survey included all articles in two leading Israeli newspapers⁴⁹—*Yediot Aharonot* (Ynet) and *Ma'ariv* (NRG)—that are available online. These articles should reasonably reflect media coverage because the vast majority of articles published in the last decade in these central newspapers are available online. Our sample includes only articles relating to the criminal-case decisions of each of the justices, thereby excluding all references relating to other judicial activities (especially in the constitutional realm). In order not to skew the results, we did not double count similar articles that appeared in both newspapers. The time period included in the online survey was from 2003 through most of 2011. Table 3 shows the percentage of newspaper articles that reported pro-defendant tendencies out of the total pool of references to each of the justices.⁵⁰

As with the justices' votes in mandatory and discretionary cases, the question arises whether survey responses were associated with media reporting. Figure 4 shows the relation between justices' survey scores and the percentage of media

45. *Id.* at 404.

46. ANDREAS GLÖCKNER & CHRISTOPH ENGEL, MAX PLANCK INST. FOR RESEARCH ON COLLECTIVE GOODS, *ROLE INDUCED BIAS IN COURT: AN EXPERIMENTAL ANALYSIS* (2012), available at http://www.coll.mpg.de/pdf_dat/2010_37online.pdf.

47. Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 272 WASH. U. L.Q. 979, 980, 988 (1994) (finding, for example, that 32% of lawyers report that they never request court-ordered compensation in excess of normal hourly rates, but judges report that only 11% of lawyers never make such requests); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1504 (1998) (noting that “there is suggestive evidence that self-serving bias does affect lawyers and judges as well as other actors”); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 150 (1993) (finding self-serving interpretation of fairness in study that included law students).

48. E.g., WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, THE MEDIA, AND THE LITIGATION CRISIS* ch. 5 (2004). As claimed by Bogoch and Holzman-Gazit, “Not only is the media the main source of knowledge about law for the public at large, but it is also an important resource for legal professionals and members of the political elites as well.” Bryna Bogoch & Yifat Holzman-Gazit, *Mutual Bonds: Media Frames and the Israeli High Court of Justice*, 33 LAW & SOC. INQUIRY 53, 54 (2008).

49. According to the 2010 TGI Research survey, *Yediot Aharonot* and

Ma'ariv jointly enjoyed an exposure rate of 47.5% for all individuals above the age of 18. The biannual TGI survey measures newspaper readership among other topics. See Hagai Kraus, *TGI Survey: Israel Today Increases the Gap*, WALLA (Jan. 18, 2011), <http://b.walla.co.il/?w=/1781680>.

50. In addition to articles about the justices' general criminal-case decisions, special attention was focused on the press coverage of the high-profile case of former Israel President Moshe Katzav, who was convicted of rape and other charges in December 2010. Isabel Kershner, *Israeli Court Upholds Rape Conviction of Ex-President*, N.Y. TIMES, Nov. 10, 2011, at A8, available at <http://www.nytimes.com/2011/11/11/world/middleeast/israels-supreme-court-upholds-rape-conviction-of-ex-president.html>. ISC consideration of his appeal began on August 7, 2011, by Justices Arbel, Joubran, and Naor. The justices in the Katzav case received wide media coverage during the time our survey was conducted. Discussion in the media about the justices began when the panel was selected; thus, much of the coverage occurred before our survey. The defendant's conviction was upheld by the ISC panel on November 10, 2011. This media coverage included op-eds and profile articles that depicted both Justices Arbel and Naor as exhibiting strong pro-state tendencies, while Justice Joubran was overall portrayed as less pro-state. This may have affected the public perception with respect to these particular justices.

TABLE 3. NEWSPAPER COVERAGE OF ISC JUSTICES' CRIMINAL DECISIONS, 2003-2011

JUSTICE	MANDATORY CASES		DISCRETIONARY CASES
	NUMBER OF ARTICLES	NUMBER OF PRO-DEFENDANT	PERCENT OF PRO-DEFENDANT
Arbel	17	1	5.9
Barak	5	1	20.0
Beinisch	7	1	14.3
Berliner	16	2	12.5
Elon	6	4	66.7
Fogelman	4	2	50.0
Grunis	16	12	75.0
Hayut	9	2	22.2
Joubran	12	5	41.6
Kheshin, D.	5	3	60.0
Levy	1	1	6.3
Melcer	4	1	25.0
Naor	3	3	60.0
Procaccia	18	3	16.7
Rivlin	6	3	50.0
Rubinstein	7	2	28.6

Note: The table shows the rate at which each justice voted for the state's position in mandatory and discretionary criminal cases. A vote favored the state if it was to affirm an appeal brought by a defendant or to reverse an appeal brought by the state. A vote favored the defendant if it was to affirm an appeal brought by the state or to reverse an appeal brought by the defendant. The cases are mandatory- and discretionary-jurisdiction criminal cases decided by the ISC in the years 2006 and 2007.

stories portraying a justice as pro-defendant. The correlation coefficient was positive and nearly significant (.48; $p = .059$), suggesting a reasonable association between media coverage and perceptions. This result is similar to, but slightly stronger than, the association between survey scores and discretionary-case outcomes. If one excludes the most outlying justice in the figure, Justice Naor, the correlation coefficient was .61 and significant at $p = .017$. So both discretionary-case votes and media reports were associated with perceptions of justices to a much greater degree than mandatory-case votes.⁵¹ Discretionary-case outcomes and media reports were not linearly correlated (coefficient = .13; $p = .633$).

Media coverage is most helpful in explaining perceptions of Justice Arbel. Her votes in both mandatory- and discretionary-jurisdiction cases are not consistent with the perception of her as the most pro-state justice. She was mentioned in more articles than all but one of the justices in our media survey. Those articles, as shown in Table 3, may be the reason for the pro-

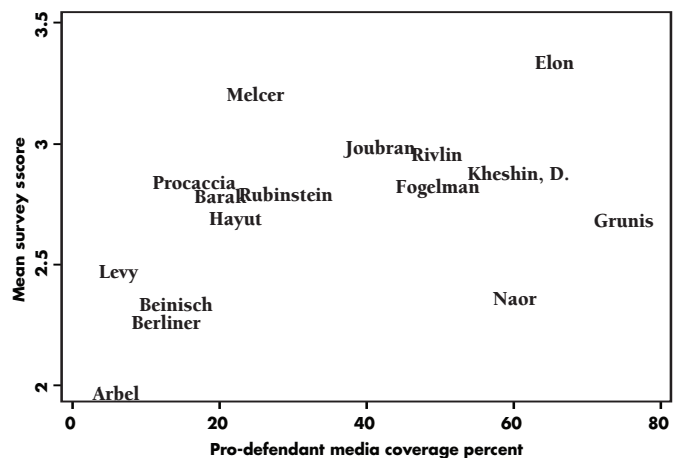
state perception. Although Justice Elon was referred to in fewer articles, the pattern of his media coverage may help explain the perception of him as pro-defendant despite his voting pattern in mandatory cases, which tended to favor the state.

The precision of the media-coverage survey score and discretionary-case survey score relations are subject to the limitation of small numbers of observations. Table 3 shows few newspaper stories for several justices, and Table 2 shows few discretionary cases for several justices. Nevertheless, the available evidence is that both media coverage and discretionary-case voting patterns better explain perceptions of justices than do voting patterns in the mass of criminal cases, which are reviewed under mandatory jurisdiction.

CONCLUSION

Recognizing the gap between perception of judges' voting activity and how they actually vote is important to fairly evaluate judges. We have presented evidence that a small number of discretionary cases and media reports shape perceptions more than the mass of mandatory-jurisdiction cases. The perception that a judge is biased toward the state or the defendant can be inconsistent with the judge's voting pattern in the mass of cases, as our data show for some ISC justices. As we demonstrated, Justice Arbel is perceived as the most pro-state justice with no basis for that perception in her voting record. Justice Naor is perceived as pro-state but in fact voted for defendants more than any other justice in mandatory-jurisdiction cases. Justices Elon and Melcer are perceived as pro-defendant with no basis for that in their voting pattern in mandatory-jurisdiction cases. Suggestions or innuendo that these justices are

FIGURE 4. RELATION BETWEEN SURVEY RESPONSES AND MEDIA COVERAGE



Note: The figure shows the relation between survey scores and media reporting about ISC justices in criminal cases. Survey scores are from the fall 2011 survey of the Israeli legal community shown in Table 1, which asked about respondents' perceptions of ISC justices as pro-state or pro-defendant. Responses were on an ordinal scale of one to five, with one being the most pro-state. Newspaper coverage was based on the media results reported in Table 3.

51. Characterization of justices in the media may be associated with an ISC institutional feature we explore elsewhere, justices' votes in cases in which they write the Court's opinion. Theodore Eisenberg, Talia Fisher & Issi Rozen-Zvi, *Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in*

the Israel Supreme Court, 19 PSYCHOL. PUB. POL'Y & L. (forthcoming Aug. 2013).

biased in favor of one party or the other in criminal cases might be demonstrably unfair.

Perceptions may be shaped by factors we cannot assess here, such as the dominance of a few cases that are regarded as important. Such cases surely influence the public's perceptions. But the full evaluation of a justice should include his or her behavior in the mass of cases as well as in the few. In the non-Israeli context, few studies thoroughly and objectively assess judicial behavior in a manner that would support claims of bias. Studies tend to lack full samples of judges' cases due to limitations of available opinions or nonpublic votes to grant review. Our Israel-based study demonstrates that such limitations can distort perceptions of judicial performance.



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