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ESSAY

ISRAEL'S SUPREME COURT APPELLATE JURISDICTION: AN EMPIRICAL STUDY

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This Essay reports the results of an empirical study of the Israel Supreme Court (ISC). It covers the outcomes of 3,562 cases (as of this writing), all decided in 2006 and 2007, and describes the cases by subject area, litigant-pair characteristics, and source of jurisdiction—mandatory or discretionary. In mandatory-jurisdiction cases ending with clear affirmances or reversals, the ISC affirmed lower court rulings in about 75% of district court criminal case appeals and about 67% of district court civil case appeals. In discretionary-jurisdiction cases, the ISC rarely granted review. It agreed to review about 6% of petitions in criminal cases and about 15% of petitions in civil cases. In discretionary cases in which the ISC did grant review, it tended to reverse at a much higher rate than in mandatory-jurisdiction cases, with an affirmance rate of 55% in criminal cases and 31% in civil cases. Combining denials of review with affirmances resulted in criminal case litigants obtaining relief from the ISC in 2.3% of appellate filings, and civil case litigants obtaining relief in 11.0% of appellate filings. The government fared far better than other litigants in obtaining reversals of lower court rulings and in securing review of those rulings. Sentencing issues dominated the criminal docket, and criminal cases predominated over civil cases. Reversal rates were not substantially different from those in cases with analogous jurisdiction in U.S. state courts of last resort except in discretionary-jurisdiction civil cases. The ISC tended to reverse such cases at a higher rate than U.S. courts.

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INTRODUCTION

Studies analyzing appellate cases dominate common law legal scholarship. Standard articles analyze legal doctrine manifested in appellate-level case opinions, often suggesting improved analysis. Quantitative study of appellate outcomes is less common but not infrequent. Two lines of quantitative analysis have grown in recent years. First, recent legal and political science literature highlights the importance of distinguishing between mandatory and discretionary jurisdiction in analyzing appellate court behavior. In addition to jurisdiction's theoretical importance in designing the appeals process,[1] basic case characteristics such as reversal rates and dissent rates are associated with jurisdictional source.[2] Models of judicial behavior, including models of United States Supreme Court justices' behavior, may be questionable if they fail to account for discretionary case selection.[3] Second, recent studies of U.S. federal and state intermediate

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1 *See, e.g.*, Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review Versus Direct Appeal*, 39 J. LEGAL STUD. 63 (2010).

2 Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source*, 89 B.U. L. REV. 1451, 1454–55 (2009).

3 *See* Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda*, 71 J. POL. 574, 574–76 (2009) (demonstrating that congressional preferences influence the Supreme Court's decisions on grants of certiorari); Jonathan P. Kastellec & Jeffrey R. Lax, *Case Selection and the Study of Judicial Politics*, 3 J. EMPIRICAL LEGAL STUD. 407, 408 (2008) ("[T]he Court's selection process raises the potential for selection bias in the inferences we draw from its cases."). Failure to account for the mechanism by which courts filter the opinions that are publicly available can also lead to questionable results. *See* Denise M. Keele, Robert W. Malmsheimer, Donald W. Floyd &

appellate courts show a strong tendency of appellate courts to affirm lower-court decisions, but with defendants faring better on civil appeals than plaintiffs.[4] Such asymmetric outcomes are of obvious interest and resonate with a line of analysis dating back at least to Marc Galanter's classic article, *Why the "Haves" Come Out Ahead.*[5]

This Essay contributes to both lines of analysis through a study of Israeli Supreme Court (ISC) decisions.[6] The ISC is of interest because it sits atop a high-quality common law legal system and has, in addition to other duties, substantial appellate discretionary and mandatory jurisdiction. In some cases, it has mandatory jurisdiction as the sole appellate court available to litigants.[7] In other cases, the ISC provides a second level of appellate review in which its jurisdiction is discretionary.[8]

A synergistic benefit of the above analyses is that they require a rare statistical description of a broad class of ISC case outcomes—all

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Lianjun Zhang, *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 234–36 (2009).

4 Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 125 (2001) [hereinafter *Appeal from Jury or Judge Trial*]; Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 947 [hereinafter *Plaintiphobia*]; Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 659 (2004); Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 137 (2009).

5 Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 125 (1974) (explaining the litigation advantages enjoyed by wealthy, professional, and culturally dominant "repeat players").

6 Previous empirical studies conducted with respect to the ISC include the following: GAD BARZILAI, EPHRAIM YUCHTMAN-YAAR & ZEEV SEGAL, THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC (1994) (Hebrew); Yoav Dotan, *Do the "Haves" Still Come Out Ahead? Resource Inequalities in Ideological Courts: The Case of the Israeli High Court of Justice*, 33 LAW & SOC'Y REV. 1059 (1999); Yoav Dotan & Menachem Hofnung, *Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements*, 23 LAW & POL'Y 1 (2001); Meron Gross & Yoram Shachar, *How Are Supreme Court Panels Selected – A Quantitative Analysis*, 29 HEBREW U. L. REV. 567 (1999) (Hebrew); Menachem Hofnung & Keren Weinshall Margel, *Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice*, 7 J. Empirical Legal Stud. 664 (2010); Eli Salzberger, *Acting Justices in the Supreme Court and Judicial Independence – Theoretical Analysis and Empirical Findings*, 19 BAR ILAN L. REV. 541 (2003) (Hebrew); Yoram Shachar, Meron Gross & Ron Haris, *Anatomy of Discourse and Disagreements in the Israeli Supreme Court – A Quantitative Analysis*, 20 TEL AVIV U. L. REV. 749 (1997) (Hebrew); Yoram Shachar, Ron Haris & Meron Gross, *Reference Patterns of the Supreme Court – A Quantitative Analysis*, 27 HEBREW U. L. REV. 119 (1996); Yoram Shacher, Meron Gross & Chanan Goldshmidt, *100 Leading Precedents – A Quantitative Analysis*, 7 HAIFA U. L. REV. 243 (2003) (Hebrew); Keren Weinshall-Margel, Supreme Court Decision-Making: An Empirical and Comparative Perspective from Israel (June 29, 2010) (unpublished manuscript) (on file with authors) [hereinafter *Comparative Perspective*], *available at* http://ssrn.com/abstract=1632646.

7 *See* Courts Law (Consolidated Version), 5744-1984, 38 LSI 271, § 41(a) (1983–1984).

8 *See id.* § 41(b).

of the appealed civil and criminal cases for which the Israeli Judicial Authority (IJA) database supplies information. Although such description of case outcomes may seem mundane, case results should be of substantial practical interest. For example, it is surely of interest to U.S. attorneys bringing product liability cases in federal court to know that plaintiff appeals of losses at trial pursued to conclusion resulted in reversal in 12% of such appeals, but that analogous defendant appeals resulted in reversal in 38% of such appeals.[9] Israeli attorneys likely are no less interested in systematic information about how the masses of cases fare on appeal. Moreover, in recent times the ISC has been the object of public debate in Israel,[10] and therefore findings regarding its performance are of interest to both decision makers and the public at large.

Our results provide new insights, but also confirm some results reported by the 1996 Shachar–Gross study[11] for the ISC as well as for other appellate courts. In cases in which the ISC has mandatory jurisdiction, we find the expected "affirmed effect"—affirmance rates in both civil and criminal cases were about 70%, similar to rates found in other courts with mandatory jurisdiction. In cases over which the ISC has discretionary jurisdiction, we find lower affirmance rates—about 55% in reviewed criminal cases and about 31% in reviewed civil cases. In exercising its discretionary jurisdiction, the ISC rarely granted review. It agreed to review on the merits about 6% of criminal cases and about 15% of civil cases. Unlike studies of U.S. federal and state courts,[12] we find no strong evidence of asymmetric civil-case reversal rates based on plaintiff versus defendant status. We do, however, find the government to be a highly successful litigant, both in obtaining

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9 *Plaintiphobia*, *supra* note 4, at 954 tbl.2.

10 Until the early 1990s, the ISC enjoyed a high level of legitimacy among the Israeli public and was one of the most popular state institutions. In a 1994 study, over two-thirds of respondents viewed the ISC as representative of the common citizen. *See* BARZILAI ET AL., *supra* note 6, at 211. Over the course of the last decade, we have been witness to a decrease in public trust of the ISC. In a 2008 study conducted by Arye Rattner and Meir Ya'ish, only 48% of Jewish respondents and 53% of Arab respondents expressed trust in the ISC, while a parallel study, conducted by Rattner in 2000, showed that 80% of Jewish respondents and 66% of Arab respondents expressed trust in the ISC. *See Poll: Decline in Public Confidence in Government Institutions*, HAARETZ.COM http://www.haaretz.co.il/hasite/spages/972853.html (last visited Mar. 13, 2011) (Hebrew).

Due to the decrease in public legitimacy, the role and status of the ISC became much more controversial and moved, in recent years, to the center stage of the political debate. Questions regarding the nomination of justices, the ISC jurisdiction, its power of judicial review, and, more generally, judicial activism, are currently hotly debated among Israeli politicians, raising great public and media interest. For an elaborate discussion, see MENACHEM MAUTNER, LAW & CULTURE IN ISRAEL IN THE BEGINNING OF THE 21ST CENTURY (2008) (Hebrew).

11 Yoram Shachar & Miron Gross, *Acceptance and Rejection of Appeals to the Supreme Court: Quantitative Analyses*, 13 LEGAL STUD. 329, 335–38 (1996) (Hebrew).

12 *See* sources cited *supra* note 4.

review and in obtaining reversal of judgments it appealed. In both mandatory-jurisdiction cases and discretionary-jurisdiction criminal cases, ISC reversal rates were similar to those of U.S. state supreme courts. In discretionary-jurisdiction civil cases, the ISC reversed at a significantly higher rate than U.S. state courts and at a significantly higher rate than the ISC reversed discretionary criminal cases.

Part I of this Essay reviews the relevant literature on litigation outcomes. Part II provides relevant background information about the Israeli court system. Part III discusses our hypotheses, Part IV reports the results, which are discussed in Part V, and the final Part concludes.

I
PRIOR LITERATURE

Prior studies show substantial differences in appellate case outcomes depending on whether jurisdiction is mandatory or discretionary, as well as on which party appealed.

A. Reversal Rates Vary by Jurisdictional Source

In a study of approximately 7,000 U.S. state supreme court opinions issued in 2003, Eisenberg and Miller report an aggregate reversal rate of 28.1% in mandatory-jurisdiction cases.[13] Reversal rates in federal appellate court cases with published opinions reportedly are about one-third.[14] A study covering one hundred years (1870–1970) with a sample of approximately 6,000 opinions from sixteen U.S. state supreme courts reported a mandatory-jurisdiction case reversal rate of 36.8% in published opinions.[15] Studies that are not limited to available opinions report lower reversal rates, presumably because courts select the cases in which to issue opinions. In studies of U.S. federal courts of appeals, the reversal rate for tried cases is about 20%.[16] For U.S. state intermediate appellate courts—courts with largely mandatory jurisdiction—reversal rates in tried cases are about 32%.[17]

In discretionary-jurisdiction cases, Eisenberg and Miller report an aggregate reversal rate of 51.6%,[18] and the hundred-year study

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13 Eisenberg & Miller, *supra* note 2, at 1454.

14 Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 517–18 (1989).

15 Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1201 (1978).

16 *See Appeal from Jury or Judge Trial*, *supra* note 4, at 131 (showing overall reversal rate of 20.7% of federal tort and contract trials from fiscal years 1988 through 1997); *Plaintiphobia*, *supra* note 4, at 952 tbl.1 (showing overall reversal rate of 18.4% of federal civil trials from fiscal years 1988 through 1997).

17 Eisenberg & Heise, *supra* note 4, at 134 tbl. 2 (showing overall trial reversal rate of 32.1% of state tort, contract, and property trials disposed of in 2001).

18 Eisenberg & Miller, *supra* note 2, at 1454.

showed a discretionary case reversal rate of 50.0%.[19] The U.S. Supreme Court, with a nearly entirely discretionary docket, reverses or vacates over 77% of the cases it accepts for discretionary review.[20]

Due to procedural and structural differences, comparison of reversal rates across countries can only be suggestive. Nevertheless, courts of last resort with discretionary jurisdiction in other countries also reverse a substantial fraction of cases they review on the merits. The Taiwan Supreme Court (TSC) exercises discretionary jurisdiction (de facto or de jure) over cases first reviewed by an intermediate appellate court. In a study of 1,836 civil cases adjudicated by the TSC from 1996 through 2008, the appellant prevailed in 652 of 1,836 cases, a reversal rate of 35.5%.[21] This rate includes procedural dismissals. If one excludes procedural dismissals, the reversal rate was 68.4% (652 of 953 cases on the merits).[22] France's Court of Cassation effectively screens cases for nonadmissibility ("inadmissible or not founded on serious grounds") and excludes full review of about 30% of civil cases on this ground.[23] Of the civil cases granted full review and not withdrawn or forfeited, about 47% result in quashing the lower court's decision.[24]

B. Reversal Rates Vary by the Party Appealing

The overall reversal rates described above mask asymmetry depending on whether the plaintiff or the defendant was the appealing party. In U.S. intermediate appellate courts with largely mandatory jurisdiction, asymmetries generally exist in the rate at which plaintiffs and defendants achieve reversals of trial court rulings. In appeals from federal court trials, reversal rates in appeals by defendants are higher than reversal rates in appeals by plaintiffs. In a ten-year period, the reversal rate for appeals by defendants was 32.5%, compared

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19 Note, *supra* note 15, at 1201.

20 *See, e.g.*, *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 505 tbl.II(D) (2004) (showing that out of the seventy-six cases the Court reviewed on writ of certiorari and disposed of by full opinion, it reversed 64.5% and vacated 13.2%). The Court vacated 95.2% of the forty-two cases it disposed of by memorandum orders. *Id.* This figure excludes a handful of specialized dispositions. *Id.* at 505 n.o.

21 Theodore Eisenberg & Kuo-Chang Huang, *The Effect of Rules Shifting Supreme Court Jurisdiction from Mandatory to Discretionary—An Empirical Lesson from Taiwan*, INT'L REV. L. & ECON. (forthcoming 2011) (manuscript at 12 tbl.2).

22 *Id.* Interestingly, the reversal rate was not significantly influenced by legislation seeking to give the TSC greater control over its docket apparently because the TSC had already seized de facto control over its docket before the legislative reform. *See id.* at 30–31.

23 *About the Court*, COUR DE CASSATION, www.courdecassation.fr/about_the_court_9256.html (last visited Mar. 5, 2011).

24 SECRÉTARIAT GÉNÉRAL, ANNUAIRE STATISTIQUE DE LA JUSTICE 27 (2008) (Fr.) (2006 data) (reporting annually on statistics of the French legal system).

to 12.0% for appeals by plaintiffs.[25] The defendant advantage pervades case categories, with defendants faring better than plaintiffs in almost every class of case.[26] A similar asymmetry was found in U.S. state courts, with defendants obtaining reversals in 41.5% of their appeals compared to plaintiffs obtaining reversals in 21.5% of their appeals.[27] The prodefendant pattern persisted in every studied case category but one.[28]

As a litigant, the government has characteristics in addition to its plaintiff–defendant status. Prior research suggests that the government may be an especially formidable litigant. Not only can it construct legal rules favorable to it through legislation, but once in court, the government is difficult to defeat. For example, the government appears to fare better as an antitrust litigant.[29] The pattern of tort and employment discrimination litigation outcomes is somewhat more favorable to government defendants than to private defendants,[30] though the evidence is mixed.[31] The clearest evidence that the government is different is in the higher trial rate in litigation against the government.[32] At the appellate level, the study of 100 years of state supreme court opinions found that city and state governments were relatively successful as appellate litigants.[33] But a study of appellate outcomes of trial appeals covering every trial in forty-six counties found no statistically significant government effect.[34]

In Israel, a prior study showed a progovernment tendency. In a study of 7,147 Israeli Supreme Court cases representing 40% of all cases published in the years 1948–1994, Shachar and Gross report a variance in reversal rates of trial rulings between state and nonstate actors. In criminal appeals, the State secured reversal in 70.1% of the cases it appealed. Criminal defendants, in contrast, secured reversal

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25 *Plaintiphobia*, *supra* note 4, at 952 tbl.1.

26 *See id.* at 952–54 (showing prodefendant differential for nearly every case category); *see also* Eisenberg, *supra* note 4, at 672 tbl.4 (showing prodefendant differential for each major case category).

27 Eisenberg & Heise, *supra* note 4, at 134 tbl.2.

28 *Id.* (product liability).

29 George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 52–53 (1984) (comparing prior studies and noting higher government success rate).

30 Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 775–76 (1988).

31 Theodore Eisenberg & Henry Farber, *The Government as Litigant: Further Tests of the Case Selection Model*, 5 AM. L. & ECON. REV. 94, 119–27 (2003).

32 *See id.*

33 *See* Stanton Wheeler, Bliss Cartwright, Robert A. Kagan & Lawrence M. Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC'Y REV. 403, 418 (1987).

34 Eisenberg & Heise, *supra* note 4, at 141–44 (finding no significant government variable in regression models of reversal of trial outcomes on appeal).

in only 34.9% of the cases reported. In civil appeals, reversal rates in appeals initiated by nonstate actors—whether plaintiffs or defendants at the trial court level—against the State were 31.2%. Reversal rates in appeals by the State were 53%.[35]

II
THE ISRAELI JUDICIARY

Israel is a unitary state with a single system of regular law courts of general jurisdiction with appellate review of decisions, as well as other tribunals or authorities with judicial power. The institutions other than regular law courts have jurisdiction limited by subject matter or persons covered. Of the regular law courts, the judiciary law establishes three levels of courts: the Supreme Court, district courts, and magistrates' courts.[36] District courts and magistrates' court are trial courts; the Supreme Court functions as both an appellate court and High Court of Justice.[37] The Judiciary portion of the Basic Law strives to assure judicial independence through methods of selecting judges, terms of office, and independence of other branches of government. There are no juries.

The twenty-nine magistrates' courts are the basic trial courts. Magistrate courts serve the locality and district in which they sit. They generally have criminal jurisdiction over offenses with a potential punishment of a fine or up to seven years 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 and possession of real property. Magistrates' courts also serve as traffic courts, municipal courts, family courts, and small claims courts. Generally, a single judge presides in each case unless the President of the magistrates' court directs that a panel of three judges hear the case instead.[38]

District courts have jurisdiction in any matter that is not within the sole jurisdiction of another court. The six district courts sit in Jerusalem, Tel Aviv, Haifa, Beersheva, Nazareth, and Petah-Tikva.

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35 *See* Shachar & Gross, *supra* note 11. The findings reported below can be understood as compatible with the findings of the Shachar–Gross study. However, one must proceed with caution in comparing the two studies, which were conducted using different methodologies and on very different databases. Our study included all Israeli Supreme Court cases both published and unpublished, whereas the Shachar–Gross study referred to 40% of published cases.

36 *See generally* Courts Law (Consolidated Version), 5744-1984, 38 LSI 271 (1983–1984) (setting forth provisions governing the composition and operation of the Israeli judiciary).

37 This study does not include cases in which the ISC functions in its capacity as the High Court of Justice.

38 Courts Law (Consolidated Version) ch. 2, art. 3.

The Petah-Tikva court was added in 2007.[39] As courts of first instance, district courts hear criminal cases in which the accused faces punishment of 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 hear cases dealing with, inter alia, companies and partnership, arbitration, prisoners' petitions, and appeals on tax matters, and serve as administrative courts. These courts also hear appeals of judgments of the magistrates' courts. Generally, a panel is composed of a single district court judge. A panel of three judges hears appeals of magistrates' courts' case judgments and hears cases in the first instance when the accused is charged with an offense punishable by imprisonment of ten or more years. A three-judge panel also sits when the President or Deputy President of the District Court so directs.[40]

The Supreme Court 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 Supreme Court. Other matters, particularly the mass of cases that begin in the magistrates' courts, may be appealed only with the Supreme Court's permission.[41] The Supreme Court's decisions are binding on lower courts, and Israel adheres to the principle of stare decisis.[42]

The Supreme Court generally sits in panels comprised of three justices. The President or the Deputy President of the Court may expand the size of the panel to any uneven number of justices. Each panel also has the power to decide to expand its size. 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 panel of the Supreme Court. A single justice may hear petitions for injunctions, temporary restraining orders, and other interim rulings, as well as for orders 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 of district courts or against the verdict of a single district court judge hearing an appeal from a case in a magistrate's court.[43]

Courts sitting on appeal, whether district courts or the ISC, are formally authorized to adjudicate both fact and law but seldom intervene in factual matters and tend to limit their judgment to questions of law. The underlying rationale is that appellate judges usually are

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39 Ordinances of Courts (Establishment of the Central District Court), 2007, KT 6585, 824.

40 Courts Law (Consolidated Version) ch. 2, art. 2.

41 *Id.* § 40; Basic Law: Judicature, 5744-1984, 38 LSI 101, ch. 2 (1983–1984).

42 *See* Basic Law: Judicature § 20.

43 *See* Courts Law (Consolidated Version) §§ 26, 30.

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 upon which the decision of the lower court is premised is anchored on sound evidentiary foundations, but the de facto appeal practice is not one of a de novo review. Our study refers both to civil and criminal appeals, which are regulated in a slightly differential manner under Israeli law. Therefore, we will address each of the categories separately.[44]

A. Civil Cases

In civil cases, any party harmed by the final decision of the court of first instance can appeal as of right to a court of higher instance. Thus, cases initiated in the magistrates' courts entail a right of appeal to the district courts, while cases commencing at the district courts are appealed as of right to the ISC.

In addition to the appeal as of right, litigants can petition the court for discretionary appeal in two types of situations: First, when they wish to challenge an interim decision on a pending case in the court of first instance. This category of cases was excluded from the study. Second, when they wish to challenge the final decision of a district court sitting as an appellate court.[45] Thus, when a case is initiated in a magistrate's court and appealed as of right to a district court, litigants can petition the ISC for a second level of appellate review.[46]

The requirements of discretionary appeal were laid down in the landmark case of *Chenion Haifa v. Matzat Or*,[47] the most cited precedent in Israeli case law.[48] According to the ISC's ruling in *Chenion Haifa*, it should grant discretionary appeal only when there are significant legal or public issues at stake that transcend the interests of the litigating parties. Such legal or public issues may include, for example, conflicting rulings by lower courts that were not settled by the ISC and matters of constitutional significance. The ISC stresses that the

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44 *See, e.g.*, CrimA 125/50 David Ya'akobovich v. State of Israel 5(1) PD 519 [1950].

45 This was the legal situation at the time period relevant for this study. *See* Courts Law (Consolidated Version) §§ 41, 52 (effective prior to the amendment described below). As of 2009, litigants in civil cases can no longer petition the court for discretionary appeal in all interim decisions. In 2008, the Courts Law was amended to include a restriction according to which the Minister of Justice is authorized to issue a decree stating types of decisions that are immune from interlocutory appeal. The Minister issued such a decree on March 7, 2009, stating such types of decisions including postponement of court hearings, size of judicial documents, and the like. *See* Courts Decree (Types of Decisions on Which No Interlocutory Appeal Would Be Granted), 2009.

46 *See* Courts Law (Consolidated Version) § 41(b).

47 CA 103/82 Chenion Haifa v. Matzat Or 36(3) PD 123 [1982].

48 According to Dinim Veod, an Israeli online legal database, the case has been cited in 1,187 cases—more than any other Israeli court ruling. *See Search Results*, DINIM VEOD, http://www.dinimveod.co.il (last updated Feb. 27, 2011) (search "case No. 103/82") (Hebrew).

outcome reached by the lower court—whether correct or erroneous, desirable or undesirable—is immaterial to the decision on the matter of granting a discretionary appeal.[49] In other words, at least in theory, the ISC should not take into consideration the merit of the lower-court ruling when deciding whether to grant a discretionary appeal.

When a request for discretionary appeal is filed, the ISC should proceed in two phases: first, examine whether the *Chenion Haifa* requirements[50] are satisfied. The general practice is for a single justice to decide this phase. The justice can decide to deny review and thus dismiss the case, or to grant review, leading to the second phase—a panel of three justices who then hear the appeal and decide on the merits. In practice, the boundaries between the two phases are blurred: The single justice often decides to deny review, grounding its decision not only on the *Chenion Haifa* requirements but also on the merits of the case. Similarly, the three-justice panel sitting on appeal sometimes rejects the case based on the procedural requirements laid out in *Chenion Haifa.*

B. Criminal Cases

In criminal cases, a verdict issued by the district court sitting in the first instance can be appealed as of right to the ISC.[51] A verdict issued by the magistrates' court in the first instance can be appealed as of right to the district court. In Israel, both prosecution and defense have symmetric rights of appeal, as the prosecution is authorized to appeal a defendant's acquittal.[52] Courts of appeals preside in panels of three judges.

When a case is initiated in the magistrates' court and appealed as of right to the district court, both the prosecution and the defense can petition the Israeli Supreme Court for a second appellate review. It should be noted that unlike in civil trials, interim trial court decisions

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49 *See* CA 103/82 Chenion Haifa v. Matzat Or 36(3) PD 123, 127–28 [1982].

50 *See id.*

51 *See* Courts Law (Consolidated Version) § 41(a).

52 Israeli law, which does not differentiate between appeals of acquittals and convictions, grants the prosecution the authority to appeal a defendant's acquittal. This authority is a matter of public debate in Israel. Just recently, a committee that was established to reexamine the authorization has delivered its report, approving the current situation. *See* THE REPORT OF THE COMM. TO RE-EXAMINE CRIMINAL CONVICTIONS BASED ON MAJORITY-OPINIONS & APPEALS OVER ACQUITTALS IN CRIMINAL TRIALS, http://www.justice.gov.il/MOJHeb/YeutzVehakika/News/Dochankar.htm (last visited Nov. 12, 2010) (Hebrew).

in criminal trials cannot be appealed,[53] with only limited exceptions such as judicial disqualification.[54]

The requirements of discretionary appeal laid down in *Chenion Haifa* apply to the criminal realm as well.[55] Namely, the result reached by the lower court should not play a role in the decision whether to grant or deny a discretionary appeal. Therefore, according to the law on the books, an argument made by the defendant concerning the stigmatizing effect of conviction[56] or even the severity of punishment does not substantiate a right to second appellate review.[57]

A request for discretionary appeal can be decided before a single justice or a panel of three justices.[58] The court is authorized to treat the request for appeal as an appeal and decide it on the merits.[59]

III
HYPOTHESES, DATA, AND METHODOLOGY

In this Part, we first suggest what the observed affirmance rate on appeal may be expected to look like in courts with mandatory appellate jurisdiction and then explore how discretionary jurisdiction might alter that expectation. We also formulate hypotheses about the relation between reversal rates and litigant status.

A. The Affirmed Effect

In the context of mandatory appeals, selection theory, which highlights the importance of nonrandom case selection at stages of legal proceedings, forecasts that appellate outcomes should act like trial outcomes.[60] Under simplifying assumptions, the theory forecasts a 50% reversal rate on appeal[61] because any tendency of appellate courts to affirm or reverse will be incorporated into the parties' decision whether to appeal or settle following the outcome at trial. The residue of cases remaining after the clearing effects of posttrial settle-

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53 Parties to the criminal trial sometimes try to bypass the prohibition on interlocutory appeals by filing petitions to the High Court of Justice, which is authorized to review petitions against state agents (including the judicial branch). The High Court of Justice is very reluctant to grant such petitions and does so only in very rare cases.

54 Criminal Procedure Law (Consolidated Version), 5742-1982, 36 LSI 35, §§ 146–147 (1981–1982).

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

56 CrimA 1245/93 Shtarkman v. State of Israel 47(2) PD 177 [1993].

57 DC 3251/91 Yishai v. State of Israel, PD 45(5) 441 (1991).

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

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

60 *Appeal from Jury or Judge Trial*, *supra* note 4, at 131–34.

61 Priest & Klein, *supra* note 29, at 29 (stating that selection model "applies indistinguishably to trial and appellate disputes").

ment and decisions to appeal would be expected to leave a close set of cases with an observed affirmance rate of about 50%.[62]

But no study of the mass of appeals reveals a 50% affirmance rate.[63] The tendency is to affirm at a higher rate, notwithstanding the case-selection process. The affirmed effect is consistent with appellate-court deference to trial-court decisions (deference often mandated by the standard of appellate review) and with observed rates of expert agreement (trial judges and appellate judges being presumed legal experts).[64] If every case were appealed, one might expect an affirmance rate of about 80% because of these factors—not far from the observed affirmance rate.[65] Case-selection processes are undoubtedly at work, but not to the extent of producing affirmance rates close to 50%. If the case-selection process is not clearing the easy cases so as to leave only close cases on appeal, it may be because appeal is not very costly.[66] Whatever the cause, based on deference, expert agreement rates,[67] and past research on appeals, we expect to observe affirmance rates that substantially exceed 50%, at least in mandatory cases.

B. The Distinction Between Issue-Based and Case-Based Adjudication

Discretionary review tends to shift courts' focus away from case-based adjudication, which emphasizes providing justice in individual cases, and toward issue-based adjudication.[68] Case-outcome patterns and judicial preferences should manifest themselves differently in the

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62 *Appeal from Jury or Judge Trial*, *supra* note 4, at 132–33. A subvariety of selection theory stresses information asymmetries between appellants and appellees and can forecast affirmance rates substantially different from 50%. The available data seem inconsistent with this theory. *Id.* at 132 n.12.

63 *See* sources cited *supra* note 4.

64 *Appeal from Jury or Judge Trial*, *supra* note 4, at 133.

65 *Id.*

66 *Id.* (citing RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 195 (1996)). Priest and Klein observe that a party's (presumably a defendant in most civil cases) greater interest in precedent might create differential stakes. Priest & Klein, *supra* note 29, at 54. This suggests that defendants would appeal less often for fear of establishing adverse appellate precedents. But prior work does not find a pronounced difference in the appeal rates of plaintiffs and defendants; thus this source of possible differential stakes or case selection is likely not substantial. *See Appeal from Jury or Judge Trial*, *supra* note 4, at 132 n.11.

67 *Cf.* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1153–54 (1992) (discussing the surprising rate of agreement between judges and juries).

68 *See* Lewis A. Kornhauser, *Modeling Collegial Courts. II. Legal Doctrine*, 8 J.L. ECON. & ORG. 441, 445–46 (1992); *see also* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 1 (1993) (explaining that case-based outcomes and issue-based outcomes may differ). As Eisenberg and Miller note, "The relationship is not perfect, of course. Judges with discretionary jurisdiction may select some cases on the basis of the facts, especially if they consider the matter impor-

two classes of adjudication with a less clear forecast of an affirmed effect in discretionary-jurisdiction cases. Courts probably are more inclined to grant review of cases where the issue is important simply because resolution of the issue affects many other cases, whereas case-based adjudication primarily affects only the litigants before the court.

Importance or other discretionary case-selection criteria often are associated with factors likely to be related to case outcomes. Cases generating conflicting lower-court rulings are important because nonuniformity may attract higher court review. The existence of lower-court conflict suggests that such cases may be more difficult to resolve than the mass of cases. Such discretionarily reviewed cases are therefore more likely to be reversed.[69] And human nature suggests that appellate judges are more likely to reach out to review lower-court cases with which they disagree.[70]

Other factors being equal, we would expect ISC reversal rates to be higher in discretionary-review cases than in mandatory-jurisdiction cases. But a key feature that distinguishes the ISC from U.S. state supreme courts and the TSC in Taiwan is that ISC mandatory jurisdiction is associated with the absence of prior appellate review.[71] In the United States and Taiwan, mandatory high-court jurisdiction can exist even when a case has had prior appellate review.[72] In Israel, cases that the ISC must review have not yet been reviewed by a lower appellate court. So in these cases, the ISC serves as both the first and last appellate court. In this sense, the ISC is similar to U.S. state supreme courts in states that do not have intermediate appellate courts (IAC).

One also expects the presence or absence of an IAC to influence the reversal rate. When IAC jurisdiction exists, a case appealed to a court of last resort has already been reviewed by an appellate court that, presumably, usually provided a correct ruling. This could depress the incentive to appeal to yet another court, at a nontrivial cost in time and money, because a strong signal about the propriety of the ruling of the court of first instance has already been delivered.[73] Thus, the flow of cases appealed to a court of last resort likely differs depending on whether IAC jurisdiction exists.

In addition, since a lower court has reviewed all discretionary-jurisdiction cases, the ISC's relative rate of reversal may also differ from U.S. appellate courts. The association of the jurisdictional basis for a case with the presence or absence of IAC review makes it difficult to

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tant . . . . Conversely, judges in mandatory cases will sometimes be primarily concerned with an issue rather than a case's outcome." Eisenberg & Miller, *supra* note 2, at 1460.

69 Eisenberg & Miller, *supra* note 2, at 1461.

70 *Id.*

71 *See Comparative Perspective*, *supra* note 6, at 16.

72 *See* Eisenberg & Huang, *supra* note 21, at 3.

73 *See* Note, *supra* note 15, at 1201–02.

confidently hypothesize about the relative rate of reversal in mandatory- and discretionary-jurisdiction cases. Regardless of the possible effects of IAC review, ISC judges, like other judges, likely tend to select for review cases with which they disagree, despite contrary rules emanating from the *Chenion Haifa* decision discussed above. We therefore expect reversal rates to be lower in mandatory-jurisdiction cases than in discretionary cases.

We expect the direction of the mandatory–discretionary reversal rate difference to be the same for civil and criminal cases. Judges selecting criminal as well as civil cases likely tend to select for review cases with which they disagree. And the focus on difficult or important issues in discretionary cases should tend to promote reversal in criminal as well as in civil cases.

C. Litigant Status

The U.S. results described above show a consistent pattern in both federal and state court of civil defendants faring better than civil plaintiffs on appeal. Reasons for this difference have been explored elsewhere and no smoking-gun explanation exists. By process of elimination, it has been hypothesized that appellate judges have a different worldview than trial court judges, which leads appellate courts to reverse plaintiff trial court victories at a higher rate than defendant trial court victories.[74] Appellate judges—removed from the day-to-day action in the trial court and working solely from a paper record—may perceive trial courts as more favorable to civil plaintiffs than trial courts in fact are. If the fact of sitting on an appellate court does generate a different worldview, then we expect the U.S results to be replicated in the ISC. In mandatory cases at least, the class of cases most studied in the United States, we might expect civil defendants to fare better on appeal than civil plaintiffs.

Reversal rates in criminal cases should be shaped by which party is appealing. In Israel, unlike the United States, prosecutors may appeal trial court outcomes favorable to criminal defendants, challenging both acquittal and leniency of sentencing. On average, the government resources available to prosecutors likely substantially exceed those available to the mass of criminal defendants, leading to a predicted government edge in probability of prevailing on appeal. In addition, the strong interest in liberty that one expects to generate appeals by criminal defendants should lead to an objectively weak group of appeals by criminal defendants, reinforcing the expected pattern of more progovernment appellate rulings.

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74 *See Plaintiphobia*, *supra* note 4.

In civil cases, as noted above, some evidence exists of governmental entities faring better than private entities. We expect the forces that lead to government litigation success to apply with at least as much force in Israel. The resources available to the government, the government's less direct need than private parties to be driven by the financial bottom line, the government's repeat-player experience, and the courts' existence as part of the government, however formally independent, all suggest that the government should be a relatively successful litigant. It is theoretically possible for some governmental features to be associated with lower levels of success. Perhaps the less direct financial constraints push government officials to litigate weak cases that a private party would forego. Although this likely occurs with some frequency, on balance the forces suggesting governmental litigation success likely outweigh the forces suggesting lower government litigation success.

D. The Data and Methodology

The time periods this study covers vary based on the criminal or civil nature of cases. Both classes of cases include at least seventeen months of data. The cases included in this study are: (1) for discretionary- and mandatory-jurisdiction criminal cases, all cases decided in the years 2006 and 2007; and (2) for discretionary and mandatory civil cases, all cases decided in 2007 and all cases decided in the months of August through December 2006. The study includes every ISC substantive opinion available online via the official IJA website for all cases decided in these time periods. Cases identified by the search that were not actual decisions granting review, denying review, or on the merits were eliminated from the sample. Under Israeli law prevailing in the years covered by the study, parties were permitted to file interlocutory appeals in civil proceedings on every decision made by the court in the course of the trial. Since these decisions do not represent the final ruling of the lower court, we separately analyzed the data by accounting for discretionary civil interlocutory appeals that appeared in our sample. The results, not reported here, do not materially differ from the results we report here using our full sample.[75] In

75 To account for interlocutory appeals, we first surveyed 298 discretionary civil appeals (approximately half of all such appeals in our sample), finding 79 interlocutory appeals. We then assessed whether the interlocutory appeals systematically differed from other appeals. Interlocutory appeals did not materially differ in the distribution of case types and types of litigants reported in Table 1, in the pattern of outcomes reported in Table 2, or in the impact of having a government litigant reported in Table 6. Interlocutory appeals did, however, incur a higher rate of reversal in cases granted review than that reported in Table 3. Accordingly, we estimate that excluding all interlocutory appeals would reduce the discretionary civil case reversal rate in Table 3 to approximately 52% from 68.5%, which is still statistically significantly higher than the reversal rate in mandatory civil cases. Similarly, the rate of granting review for interlocutory appeals was

criminal proceedings, this issue does not arise as interlocutory appeals are prohibited.[76]

Since the IJA website contains all of the cases decided by the ISC,[77] the resulting database of 3,562 decisions provides a complete picture of ISC doctrinal decisional activity in the periods covered. 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 data obtained from the IJA website is indeed comprehensive, covering the full gamut of criminal and civil cases.

The data thus provide a sound basis for assessing the relation, in these cases, between jurisdiction and reversal rates, dissent rates, workload, and other attributes of ISC behavior. Even allowing for substantial limitations noted below, the cases we study are important. Israel adheres to the principle of stare decisis and thus the ISC's decisions are binding on lower courts. Therefore, cases that are appealed in the ISC announce and influence legal doctrine. They are the cases that provide reasoning and guidance to lower courts and litigants. If the pattern of outcomes varies by jurisdictional source in these cases, those findings are important in explaining the development of legal doctrine.

The database is subject to limitations. First, the study covers ISC appellate activity only in regular civil and criminal matters, thus omitting appeals regarding specialized courts including family courts, rabbinical courts, labor courts, and military courts. Second, the study omits ISC activity not involving the substance of the case, including actions on procedural matters as well as auxiliary issues such as judicial disqualification, contempt of court, damages for unjustified indictment, and court and attorney fees. Third, since the opinions cover only limited time periods, trends over time cannot be assessed.

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higher than for other appeals. We estimate that, if interlocutory appeals were excluded, the rate of granting review would fall to approximately 13% from the 15.3% reported in Table 6.

In 2008, the Courts Law of 1984 was amended, enabling the Minister of Justice to issue a decree announcing types of decisions for which interlocutory appeals would not be allowed. In 2009, the Minister issued such a decree thereby limiting the scope of interlocutory appeals. *See* sources cited *supra* note 45.

76 Parties occasionally attempt to bypass this prohibition by filing petitions to the Supreme Court sitting as the High Court of Justice. *See, e.g.*, HCJ 11339/05 The State of Israel v. The District Court of Beer Sheba (July 11, 2006) (unpublished decision) (petitioning to the High Court of Justice against the district court, to circumvent the lack of interlocutory appeals in criminal trials). However, these cases are both negligible in volume and external to the criminal appellate system.

77 The website does not include cases decided in camera, but since those cases are but a fraction of the cases decided by the Court, the omission does not materially affect the analysis here. *See* Courts Law (Consolidated Version), 5744-1984, 38 LSI 271, § 70(a) (1983–1984).

We thus examine only one slice, albeit the most important slice doctrinally, of a broader universe of ISC activity.

Another potential limitation of our study stems from selection effects. Most cases are not appealed. Settlements and other case-clearing activity persist at all levels of litigation. Nevertheless, at the appellate level, studies that begin with the mass of trial court outcomes and that do account for the decision to appeal suggest that more complete accounting does not alter the core results limited to the subset of appealed cases.[78]

The cases identified by the methods described above were coded by student research assistants. Prior to 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 the supervision of the authors.

E. Coding Case Outcomes

In coding the cases, the variable *affirmed* is coded as "1" for cases in which the ISC affirmed the lower-court ruling. This includes only cases in which the ISC unambiguously affirmed the ruling below. The variable *affirmed* treats cases recorded as having results consisting of "reversed," "reversed and vacated," and "vacated" and other ambiguous outcomes (see Table 2 below) as not being affirmed. In such cases, *affirmed* is coded as "0." Of course, dichotomous coding of appellate outcomes can be an oversimplification. This effect is cushioned in part by *affirmed* excluding, and treating as missing (for purposes of computing affirmance and reversal rates), cases recorded as having ambiguous results consisting of vacated or any "in part" combination of affirmed, reversed, and vacated (e.g., affirmed in part, reversed in part). It also treats as missing the following classes of cases: cases recorded as compromise verdicts, cases in which the appellate disposition was by consent, cases in which the parties reached a private compromise and the appeal was therefore not resolved on the merits, cases in which the appeal was withdrawn before ISC adjudication, and cases returned to the lower court for nonmerits reasons (coded as "Return to Court") and then recoded as part of the outcome category labeled "Other." The variable *reversed* is the opposite of *affirmed*, and is coded "1" when *affirmed* is "0" and "0" when *affirmed* is "1."[79] The other outcome studied is whether, in discretionary-jurisdic-

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78 *Plaintiphobia*, *supra* note 4, at 948–49; *see also* Eisenberg & Heise, *supra* note 4, at 121.

79 A *total affirmance* is more restrictive than an affirmance. It treats as nonaffirmances, and hence as reversals, some results treated as missing in defining *affirmed*. These results

tion cases, the ISC granted review. We use the variable *review granted* to code the decision whether to grant discretionary review. The variable has the value of "1" when the ISC granted review and "0" when it declined review. The variable *review denied* is the opposite of *review granted*, and is coded "1" when *review granted* is "0" and "0" when *review granted* is "1."

IV
RESULTS

We first report frequencies of the kinds of cases and the status of the parties. We then compare outcomes by jurisdictional source and explore the associations between outcomes and (1) plaintiff–defendant status (government–defendant status in criminal cases) and (2) party status as individual, corporation, or government.

A. Types of Cases and Party Status

Table 1 reports descriptive statistics about the characteristics of cases in the sample. Panel A shows the number of cases involving each case type, subdivided by whether the cases were civil or criminal and whether jurisdiction was mandatory or discretionary. Panel B provides a similar breakdown by legal status of appellant and appellee. In assigning cases to specific types, we used the first case type coded. The coding form allowed for multiple case types and other reasonable groupings accounting for multiple types within a case are possible. The single-type reporting convention used in the table achieves clarity at the cost of completeness.

Panel A shows that the three most frequent classes of mandatory-jurisdiction civil cases were property, contract, and tort, which together accounted for 301 of 571 (52.7%) of the mandatory-jurisdiction docket. The discretionary civil docket consisted more of cases raising issues of civil procedure, which comprised 136 of 598 (22.7%) of cases compared to 8.8% of the mandatory docket.

In both mandatory and discretionary criminal cases, appeals relating to sentence dominate the docket. Although our single-case type reporting in the table oversimplifies, it is not the source of the dominance of sentencing issues. Even if one focuses on cases in which sentencing was the *only* issue of a criminal appeal, sentencing dominates the ISC's criminal docket. In 413 of 931 (44.4%) discretionary criminal appeals, sentencing was the only basis for appeal and in 951 of 1,403 (67.8%) mandatory criminal appeals, sentencing was the only basis for appeal.

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are "affirmed and reversed," "affirmed, reversed, and vacated," and "affirmed and vacated." Using total affirmance rather than affirmance does not materially change our results.

TABLE 1. FREQUENCY OF CASE TYPES AND LITIGANT STATUS IN ISRAELI SUPREME COURT

A. Case type	Civil Cases			Criminal Cases	
Case type	Discretionary	Mandatory	Case type	Discretionary	Mandatory
Administrative law	17	39	Evidence	89	4
Associations	27	43	Procedure	111	16
Civil procedure	136	50	Sentence	501	1036
Contract	55	102	Substantive law	92	9
Debt	64	45	Verdict	138	338
Insurance	20	38	Total	931	1403
Miscellaneous	51	19			
Property	108	100			
Tax	11	36			
Tort	109	99			
Total	598	571			
B. Appellant v. Appellee characteristics					
Litigant pairs	Discretionary	Mandatory	Litigant pairs	Discretionary	Mandatory
Ind. v. ind.	144	155	Ind. v. ind.	4	9
Ind. v. corp.	121	128	Ind. v. corp.	0	0
Corp. v. ind.	65	69	Corp. v. ind.	0	0
Corp. v. corp.	54	75	Corp. v. corp.	0	1
Gov't. v. ind.	14	21	Gov't. v. ind.	12	191
Gov't. v. corp.	11	13	Gov't. v. corp.	0	2
Ind. v. gov't.	120	68	Ind. v. gov't.	904	1198
Corp. v. gov't.	25	38	Corp. v. gov't.	23	5
Other	55	30	Other	3	4
Total	609	597	Total	946	1410

Note. Panel A excludes cases 59 cases in which a case type was not clearly ascertainable. Source. Substantive opinions available from the IJA website for the periods of 2006 and 2007 stated in text.

Panel B of Table 1 shows the litigant pairs, with the appellant listed first in the table's first column. For obvious reasons, governments and individuals are the dominant litigant pairs in criminal cases. In civil cases, in the interest of simplifying the presentation, we again limit the groupings to one litigant pair per case. Individual appellants dominate in both mandatory and discretionary cases, comprising more than one-half of appellants in both categories. Corporations and government entities are also frequent parties, with the government appearing predominantly as an appellee.

Table 2 reports the outcomes of ISC cases. It is surprisingly difficult to construct a simple coding scheme for the outcome of cases.[80] Table 2 suggests this is true even on appeal. We address some of this complexity as discussed in Part III.E above to arrive at clear cases of affirmance or reversal. In discretionary cases, the dominant outcome is to either deny review or to deny review and indicate that, even if the

80 *See, e.g.*, Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 128 tbl.2 (2009) (showing twenty-nine different codes for outcomes of U.S. federal district court cases).

case had been reviewed on the merits, it would have been affirmed. In both civil and criminal mandatory-jurisdiction cases, affirmance is the dominant dispositive outcome on the merits. In mandatory civil cases, however, substantial activity occurs that likely indicates a settlement. Indeed, compromise or withdrawal occurred almost as often as simple reversal. This is consistent with U.S. findings of substantial numbers of appeals not reaching conclusion in the appellate court.[81]

TABLE 2. ISRAEL SUPREME COURT OUTCOMES

Outcome	Criminal discretionary	Civil discretionary	Criminal mandatory	Civil mandatory
Deny review	175	202	—	—
Deny review, would have affirmed	675	278	—	—
Grant review	16	9	—	—
Grant review, affirm	26	29	—	—
Grant review, reverse	21	63	—	—
Affirm	—	—	1023	230
Reverse	—	—	325	113
Affirm or reverse in part	—	—	31	35
Compromise verdict	—	8	14	39
Compromise or withdrawal	—	—	—	101
Reverse, affirm, or vacate with consent	—	—	—	13
Vacate	—	—	—	53
Other	33	20	17	13
Total	946	609	1410	597

Source. Substantive opinions available from the IJA website for the periods of 2006 and 2007 stated in text.

B. Appellate Outcomes by Jurisdictional Source

Table 3 reports, by jurisdictional source, separately for criminal and civil cases, the reversal rate for cases with a clear reversal or affirmance. Panel A summarizes discretionary-jurisdiction cases and includes the number of cases for which review was denied. Panel B summarizes mandatory-jurisdiction cases. For cases in which review was granted, two rows report data for each combination of jurisdiction and civil or criminal cases. The first row is the number of cases fitting the row and column description. The second is the percentage of cases reversed or affirmed given that review was granted. For discretionary cases, as indicated by the "Review denied" column, the most common outcome by far was denial of review.

Panel A shows that, conditional on review being granted in discretionary cases, 44.7% of criminal cases and 68.5% of civil cases were reversed. As expected in light of the discussion in Part III, these reversal rates noticeably exceed those in mandatory-jurisdiction cases. Panel B shows that, in mandatory criminal cases, the reversal rate was

81 *See, e.g.*, Eisenberg & Heise, *supra* note 4, at 123 (noting that just over one-half of appeals from trials culminated in a final appellate court decision).

24.1% compared to 32.9% in mandatory civil cases. Both of the discretionary/mandatory reversal-rate differences are highly statistically significant ($p < 0.005$). These results are consistent with the ISC granting review of discretionary cases (1) that are difficult and more prone to reversal and (2) in which the ISC justices disagree with the outcome below.

TABLE 3. ISRAEL SUPREME COURT CASE OUTCOMES

Type of case	Reverse	Affirm	Review denied	Total
A. Discretionary cases				
Criminal discretionary			850	850
	21	26		47
	44.7%	55.3%		100%
Civil discretionary			480	480
	63	29		92
	68.5%	31.5%		100%
B. Mandatory cases				
Criminal mandatory	325	1023		1348
	24.1%	75.9%		100%
Civil mandatory	113	230		343
	32.9%	67.1%		100%
Total	522	1308	1330	3160
	28.5%	71.5%		100%

Note. The 850 "review denied" criminal cases include 675 cases in which review was denied but the Court stated that full review would have resulted in affirmance. The 480 "review denied" civil cases include 278 cases in which review was denied but the Court stated that full review would have resulted in affirmance. Source: Substantive opinions available from the IJA website for the periods of 2006 and 2007 stated in text.

From a practical perspective, the high reversal rates in discretionary-jurisdiction cases are perhaps less important than the low rate at which parties succeed in obtaining ISC review. Table 3 shows that, in discretionary-jurisdiction criminal cases, review was denied in 850 of 897 cases in which review was sought. If one adds to these 850 cases the 26 affirmances when the ISC granted review, criminal defendants obtained relief from the ISC in 21 of 897 cases, or 2.3% of filings with the requisite information. The story in civil discretionary cases is similar. The ISC denied review in 480 out of 572 cases. The 29 affirmances in cases granted review mean that the result below was clearly reversed in 63 of 572 cases, or only 11.0% of appellate filings.

C. Mandatory-Jurisdiction Cases and Litigant Status

Table 4 reports reversal rates for mandatory civil cases, subdivided by the status of the parties, separately reported in the rows, and the party appealing, separately reported in the columns. The rows

include both a frequency count and percentages. The table does not show dramatically different rates of affirmance depending on whether the defendant or the plaintiff appealed, or for individuals and corporations. The largest defendant–plaintiff difference between affirmance rates (other than for the litigant pair "Other") is between plaintiffs and defendants in cases involving corporate appellants and individual appellees. Corporate appellant-plaintiffs litigating against individual defendants find their appeals usually failing, with an affirmance rate of 88.9%. Corporate appellant-defendants encounter affirmance rates of only 52.2%, a difference that is not statistically significant ($p = 0.103$).

TABLE 4. AFFIRMANCE RATE BY LITIGANT PAIRS AND APPELLANT STATUS, MANDATORY CIVIL CASES

	Party appealing	
Appellant/Appellee	Defendant	Plaintiff
Ind. v. ind.	81.8%	66.7%
	22	42
Ind. v. corp.	45.5%	73.3%
	11	30
Corp. v. ind.	52.2%	88.9%
	23	9
Corp. v. corp.	72.7%	76.2%
	11	21
Gov't. v. ind.	16.7%	0.0%
	12	1
Gov't. v. corp.	42.9%	—
	7	0
Ind. v. gov't.	75.0%	87.5%
	4	32
Corp. v. gov't.	100%	81.0%
	2	21
Other	57.1%	93.3%
	7	15
Total	57.6%	77.8%
	99	171

Note. Table is limited to cases with a clear affirmance or reversal. Source: Substantive opinions available from the IJA website for all cases decided in 2007 and all cases decided in the months of August through December 2006.

In his famous article *Why the "Haves" Come Out Ahead*, Marc Galanter argued that repeat players, namely litigants involved in similar litigation over time, fare better in litigation.[82] According to Galanter, many private entities, including financial institutions, insurance com-

82 Galanter, *supra* note 5, at 125.

panies, and large corporations, enjoy the advantages of repeat play and thus can operate in the courtroom in much the same way as the government. Subsequent empirical studies of trial and appellate courts have confirmed Galanter's basic findings.[83]

Our findings do not support a similar consistent procorporate effect in the ISC in its function as a court of appeal. Table 4 shows that when corporate plaintiffs appealed lower-court defeats against individual defendants, they rarely succeeded. The affirmance rate was almost 90%, though this rate is based on relatively few cases. Corporate defendants who appealed lower courts losses to individual plaintiffs did succeed in obtaining reversals in about 50% of appeals. The absence of a consistent procorporate effect in the ISC aligns with previous

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83 For studies conducted in the United States see, for example, Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 241 (1992) (analyzing both the published and unpublished decisions of the U.S. courts of appeals and finding that the overall success rate of the government was roughly four times higher than the success rate of individuals and two one-half times the success rate of businesses). A study of federal civil cases between the years 1971 and 1991 revealed that big businesses (Fortune 2000 companies) had a success rate of 71% as plaintiffs and 61% as defendants when facing all types of litigants in court, whereas nonbusiness litigants won only 64% of the time as plaintiff and a mere 28% of the time as defendant. *See* Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQUIRY 497, 558 (1996). Similarly, a study of diversity cases in federal courts found that in instances where litigants are of the same type (individual versus individual or corporate versus corporate), the plaintiff prevails 72% and 75% of the time, respectively; however, when corporate plaintiffs sue individuals, they win 91% of the time, but when individuals sue corporate plaintiffs, they win only 50% of the time. *See* Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. (SPECIAL ISSUE) S92, S103 tbl.3 (1997). More recent empirical work assessing Galanter's theory has focused on appellate courts at the state and federal levels. *See* Paul Brace & Melinda Gann Hall, *"Haves" Versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 LAW & SOC'Y REV. 393 (2001); *Plaintiphobia*, *supra* note 4; Donald R. Songer, Reginald S. Sheehan & Susan Brodie Haire, *Do the "Haves" Come Out Ahead over Time?: Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925–1988*, *in* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 85, 93 tbl.3.2 (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (describing a study of decisions from all circuits in the U.S. courts of appeals for a sixty-four-year period between 1925 and 1988 and finding that the federal government had a net advantage of 25.6%, state and local governments had a net advantage of 15.6%, businesses had a net advantage of negative 2.8%, and, at the bottom, individuals, with a net advantage of negative 12.6%); *see also* Eisenberg, *supra* note 4, at 681 ("The 'haves' may come out ahead on appeal but their greater success rate may be completely attributable to their having come out ahead below."). Several studies applying Galanter's theory to court decisions in other common law countries have generated similar findings. *See, e.g.*, Burton M. Atkins, *Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal*, 35 AM. J. POL. SCI. 881, 894–95 (1991) (surveying the English Court of Appeal and finding that the government enjoyed a 25% advantage over corporate litigants and corporations enjoyed a 14% advantage over individuals); Peter McCormick, *Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992*, 26 CAN. J. POL. SCI. 523, 532 (1993) (describing a study of the Canadian Supreme Court revealing that the government's net advantage was approximately 5% higher than that enjoyed by big business, 26% higher than the net advant age found for other businesses, and 30% higher than the success rate for individuals).

findings relating to the ISC's function as High Court of Justice. In Dotan's 1999 article, he found that in litigation before the Israeli High Court of Justice, the "haves" do not come out ahead.[84] Corporations enjoyed only a limited advantage in litigation outcomes over "have nots" (the group of "have nots" in the Dotan study was comprised of welfare service customers, immigrants, disabled individuals, and petitioners exempt from the duty to pay court fees).[85] Moreover, the study also found that when "have nots" were represented by legal counsel, the corporations did not enjoy any advantage whatsoever.[86]

The most extreme result in Table 4 is how well the government fares on appeal compared to other litigants. The two litigant pairs involving the government as a losing defendant that appeals are the least consistent with the expected "affirmed effect" on appeal.[87] That is, in most classes of mandatory-jurisdiction cases, the ISC tends to affirm the lower-court rulings whenever its holding represents a clear affirmance or reversal. However, when the government lost in the lower court and appealed as defendant, the affirmance rates are low. In cases in which the government-as-defendant appealed a lower-court loss to an individual plaintiff, only two cases in twelve were affirmed. In cases in which the government-as-defendant appealed a lower-court loss to corporate plaintiffs, three cases in seven were affirmed. The difference between affirmance rates in government-as-defendant-appellant cases and other defendant appeals is highly statistically significant ($p = 0.004$). This result persists as statistically significant in logistic regression models, with affirmance as the dependent variable and explanatory variables, litigant pairs, and case categories as dummy variables. Note also that when the government won in the lower court and the nongovernment party appealed to the ISC, the expected affirmed effect holds.

Mandatory-jurisdiction criminal cases followed a similar pattern. The government in such cases always serves as the prosecutor, analogous to the civil plaintiff who initiates a lawsuit. So, there is no opportunity to study the government as a defendant in criminal cases. But Israeli law does allow the government to appeal lower-court rulings in criminal cases.[88] We can therefore study the government as appellant

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84 *See* Dotan, *supra* note 6, at 1059 ("[I]n litigation before the Israeli High Court of Justice, the 'haves' enjoyed only a limited advantage over 'have nots' in litigation outcomes.").

85 *See id.* at 1069–71.

86 Dotan, *supra* note 6, at 1071–72, 1077.

87 These findings support the claim that the state is a unique type of litigant, qualitatively different from all nonstate litigants, including other repeat players. *See, e.g.*, Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, *in* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD?, *supra* note 83, at 343.

88 *See supra* note 52.

and compare it to the criminal defendant as appellant. Table 5 reports the results.

TABLE 5. AFFIRMANCE RATE BY GOVERNMENT STATUS, MANDATORY CRIMINAL CASES

Party appealing	Reversed	Affirmed	Total
Government	146	34	180
	81.1%	18.9%	100%
Defendant	173	975	1148
	15.1%	84.9%	100%
Total	319	1009	1328
	24.0%	76.0%	100%

Note. Table is limited to cases with a clear affirmance or reversal. Source. Substantive opinions available from the IJA website for all cases decided in 2006 and 2007.

The table shows that the government secured reversal in 81.1% of the 146 cases it appealed. Criminal defendants, in contrast, secured reversal in only 15.1% of the 975 cases they appealed. This result likely is a combination of two forces. First, the government is more selective than defendants in deciding which cases to appeal. Given the high personal stakes for defendants as well as the availability of public defense—for which funding is borne by the taxpayers—the tendency to appeal is strong and can dominate even in cases with weak chances of appellate success. But, even accounting for such selection, the ISC reversal rate for government appeals is high. Through either the government's careful selection of cases to appeal or the ISC's strong tendency to favor the government compared to lower courts—or both—the result is a reversal rate that is similar to the affirmance rate in cases appealed by criminal defendants.

D. Obtaining Discretionary Review and Party Status

A further question is whether the government succeeds more often than other litigants not only in obtaining reversals but also in securing ISC review of lower-court decisions in discretionary-jurisdiction cases. Table 6 shows the rate at which review was granted for cases with a clearly defined appellant in discretionary-jurisdiction cases.

Although the government sought ISC discretionary review in few cases, it proved substantially more successful than other parties in obtaining review when it sought it. Panel A shows that, in criminal cases, the government obtained review in 71.4% of the cases sought compared to a 5.6% review rate for defendants. Panel B shows that, in civil cases, the government obtained review in 47.4% of the cases sought compared to a 14.2% review rate for other parties. Both differ-

ences are highly statistically significant ($p = 0.001$). In cases not involving the government, the highest rate of review by a litigant pair in pairs with more than ten cases was 36.4% (8 of 22), representing cases involving corporate defendants that appealed lower-court losses to individual plaintiffs.

TABLE 6. DISCRETIONARY JURISDICTION GRANTS OF REVIEW

Party appealing	Review denied	Review granted	Total
A. Criminal cases			
Government	2	5	7
	28.6%	71.4%	100%
Defendant	806	48	854
	94.4%	5.6%	100%
Total	808	53	861
	93.8%	6.2%	100%
B. Civil cases			
Government	10	9	19
	52.6%	47.4%	100%
Non-government party	461	76	537
	85.9%	14.2%	100% (rounded)
Total	471	85	556
	84.7%	15.3%	100%

Note. Table is limited to cases with identifiable government vs. nongovernment status and with a clear outcome of review being granted or denied. Source. Substantive opinions available from the IJA website for the periods of 2006 and 2007 stated in text.

V
DISCUSSION

The ISC exhibits the expected affirmed effect in mandatory-jurisdiction cases and the expected greater reversal rate in discretionary-jurisdiction cases. In discretionary-jurisdiction cases, the result of greatest practical importance is the high rate at which discretionary review is denied, except when the government seeks review. This quantification of the denial rate may be of practical interest.

Denial-of-review's dominance has significant implications for further study of the ISC. Scholars wishing to test the effect of justices' policy preferences[89] or personal characteristics[90] should account for the process of selecting cases. Table 2 above shows that the most com-

89 *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

90 For a study of the effect of judges' personal characteristics at the Israeli trial court level, see Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment*, 7 J. EMPIRICAL LEGAL STUD. 403 (2010).

mon ISC outcome is denial of review, which accounts for more than one-third of its dispositions: more dispositions than clear affirmances and reversals on the merits combined. Without accounting for this selection process, it is difficult to be certain that study of merits dispositions alone accurately reflects a justice's body of work. For example, it is possible to implement policy preferences through voting to review or deny review of lower-court dispositions. In the extreme, the policy preferences of a justice who agrees with all lower court rulings and votes to deny review cannot be detected through observation of dispositions on the merits. The denial-of-review dominance is significant for yet another reason. Usually, the decision to review discretionary appeals is made by a single justice,[91] (informally) appointed to the task by the Chief Justice; this justice is replaced every few years. The implications of our findings are that one of the most important justices in the ISC is the one appointed to review discretionary appeals.

The low percentage of cases in which review is granted also indicates partial compliance with the Court's ruling in *Chenion Haifa*.[92] But the exceedingly high reversal rate among the cases in which review is granted indicates deviance from the *Chenion Haifa* requirement. Unless district courts in important cases tend to systematically err in a direction with which the ISC disagrees, there is no *ex ante* reason to think that important cases will generate reversal rates as high as the observed rates. One might think that, in important cases, district courts would be unusually deferential to ISC precedent since "new law" might be viewed as being more appropriately made by the ISC rather than district courts.

In addition to our findings' implications for Israeli courts, this study's data facilitate comparing the ISC with other courts. With due regard for the limits of intercountry comparisons, it is interesting to compare the ISC's outcomes with those of analogous U.S. courts. The 32.9% mandatory civil case reversal rate in Table 3 is a bit higher, but not dramatically so, than the reported reversal rates in the United States for mandatory-jurisdiction cases.[93] As noted in Part II, although the ISC is a court of last resort, in mandatory-jurisdiction cases it does not review the decisions of an intermediate appellate court. Mandatory ISC jurisdiction is associated with direct appeals from Israel's district courts.

The most appropriate comparison we can construct is with mandatory-jurisdiction cases in U.S. state supreme courts (SSCs) in

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91 *See* Courts Law (Consolidated Version), 5744-1984, 38 LSI 271, § 26(4) (1983–1984).

92 CA 103/82 Chenion Haifa v. Matzat Or 36(3) PD 123 [1982].

93 Eisenberg & Miller, *supra* note 2, at 1479–80 tbl.4 (finding an average reversal rate of 28.1% for mandatory-jurisdiction cases in U.S. state supreme courts).

states that do not have intermediate appellate courts. To facilitate that comparison, we alternatively code ISC outcomes using an additional case outcome variable that may more closely match the outcome coding in a study of SSCs in the United States. That coding treated vacated decisions as reversals. For purposes of this comparative analysis, we alternatively recode the mandatory civil case "vacated" outcomes (53 in Table 2) as reversals.

After reporting the alternative measures of the ISC results in the first two rows, Table 7 reports the reversal rates for mandatory-jurisdiction civil cases in U.S. SSCs in eleven states that lack intermediate appellate courts. The U.S. SSC data are from a study of every available SSC opinion in 2003 that used a similar methodology to code reversals and affirmances.[94]

TABLE 7. MANDATORY CIVIL CASE OUTCOMES IN THE ISRAEL SUPREME COURT AND IN U.S. STATE SUPREME COURTS WITHOUT INTERMEDIATE COURTS

	Number of cases	Reversal rate (%)	Lower 95% CI	Upper 95% CI
Israel Supreme Court				
Original outcome coding	343	32.9	27.9	37.9
Vacated cases coded as reversals	396	41.9	37.0	46.8
U.S. state courts				
Delaware	29	58.6	38.9	76.5
Maine	92	32.6	23.1	43.2
Montana	195	22.1	16.4	28.5
North Dakota	106	28.3	20.0	37.9
Nevada	32	40.6	23.7	59.4
Rhode Island	98	20.4	12.9	29.7
South Dakota	98	35.7	26.3	46.0
Vermont	75	33.3	22.9	45.2
Wyoming	94	28.7	19.9	39.0
Total, U.S state courts	819	29.3	26.2	32.6

Sources: Substantive opinions available from the IJA website for all cases decided in 2007 and all cases decided in the months of August through December 2006; data gathered for Eisenberg & Miller, *supra* note 2.

The ISC reversal rate varies significantly depending on the coding convention adopted for vacated cases. With our original coding—shown in the table's first ISC row—the reversal rate was 32.9%. With the alternative coding, the reversal rate increased to 41.9%. The 95% confidence intervals for the two ISC reversal rates, shown in the table's last two columns, overlap only slightly. So, the reversal rate depends substantially on the coding convention used for ISC dispositions recorded as "vacated."

94 *See id.*

Similarly, the comparison with SSCs depends on which coding convention is adopted. Under the alternative coding, the ISC reversal rate exceeds the rate of every SSC except Delaware, which only had twenty-nine mandatory civil opinions in 2003. The rate for the state SSCs combined is shown in Table 7's last row, which shows an aggregate reversal rate of 29.3% and a 95% confidence interval of 26.2% to 32.6%. The 95% confidence interval for the ISC, alternatively coded, is substantially and statistically significantly higher than that for the state SSCs combined. If the ISC "vacated" outcomes are excluded, then ISC reversal rates are similar to those of SSCs as a whole. Note also that variation in reversal rates exists across the eleven SSCs, with Delaware having the highest reversal rate by a significant margin.

In comparing mandatory criminal case outcomes, the "vacated" outcome issue does not arise because we did not record a "vacated" outcome for this class of cases. This makes the cross-country comparison simpler. Table 8 shows the ISC reversal rate of 24.1% compared to the aggregate state SSC rate of 20.8%.[95] The ISC 95% confidence interval overlaps with the aggregate SSC confidence interval and with each state court confidence interval except that of Rhode Island, which has a noticeably low reversal rate.

TABLE 8. MANDATORY CRIMINAL CASE OUTCOMES IN THE ISRAEL SUPREME COURT AND IN U.S. STATE SUPREME COURTS WITHOUT INTERMEDIATE COURTS

	Number of cases	Reversal rate	Lower 95% CI	Upper 95% CI
Israel Supreme Court	1348	24.1	21.8	26.4
U.S. state courts				
Delaware	38	23.7	11.4	40.2
Maine	33	30.3	15.6	48.7
Montana	109	17.4	10.8	25.9
North Dakota	44	11.4	3.8	24.6
Nevada	18	44.4	21.5	69.2
Rhode Island	47	8.5	2.4	20.4
South Dakota	28	10.7	2.3	28.2
Vermont	20	30.0	11.9	54.3
Wyoming	63	30.2	19.2	43.0
Total, U.S state courts	400	20.8	16.9	25.1

Sources: Substantive opinions available from the IJA website for all cases decided in 2006 and 2007; data gathered for Eisenberg & Miller, *supra* note 2.

In comparing discretionary cases, the absence of "vacated" outcomes in the ISC again promotes more direct comparison of the ISC with SSCs. Table 9 compares ISC reversal rates with reversal rates in discretionary-jurisdiction cases in those states that have intermediate

95 The reversal rate for the SSCs excluding capital punishment cases was 21.0%, with a 95% confidence interval of 17.0% to 25.3%.

appellate courts. To conserve space, we report only the aggregate rates for the forty-one state courts (Oklahoma and Texas have separate appellate courts for civil and criminal cases) included in the summary.

TABLE 9. DISCRETIONARY CRIMINAL AND CIVIL CASE OUTCOMES IN THE ISRAEL SUPREME COURT AND IN U.S. STATE SUPREME COURTS WITH INTERMEDIATE COURTS

	Number of cases	Reversal rate	Lower 95% CI	Upper 95% CI
A. Discretionary civil cases				
Israel Supreme Court	92	68.5%	58.8%	78.2%
U.S. state courts	1527	53.6%	51.0%	56.1%
B. Discretionary criminal cases				
Israel Supreme Court	47	44.7%	29.9%	59.4%
U.S. state courts	889	49.9%	46.6%	53.3%

Sources: Substantive opinions available from the IJA website for the periods of 2006 and 2007 stated in text; data gathered for Eisenberg & Miller, *supra* note 2.

Panel A shows a 68.5% reversal rate in ISC discretionary civil cases compared to a 53.6% aggregate reversal rate in SSCs. The 95% confidence intervals do not overlap; the difference is statistically significant. Panel B shows a 44.7% reversal rate in discretionary criminal cases compared to a 49.9% aggregate rate in SSCs. The 95% confidence intervals substantially overlap, and these rates are clearly not statistically significantly different.

So both mandatory and discretionary civil case reversal rates differ noticeably between the ISC and state SSCs, but neither mandatory nor discretionary criminal case reversal rates differ. For mandatory civil cases, we cannot exclude the possibility that the difference is small, depending on whether ISC vacated outcomes are in fact analogous to reversals. For discretionary civil cases, the high ISC reversal rate suggests that the ISC basically grants review to reverse cases with which its justices disagree.

One possible explanation is that the ISC appears to operate under a substantially greater burden of criminal cases than SSCs. Criminal cases comprise about 37% of mandatory SSC opinions.[96] In Israel, for the seventeen months for which we have data for both civil and criminal mandatory cases, criminal cases never comprised less than 49% of the mandatory docket and were, on average, about 64% of that docket. The ISC may lack adequate time to address discretionary civil cases other than those rulings the justices feel they cannot let stand. This would lead to low rates of granting discretionary review, as

96 Eisenberg & Miller, *supra* note 2, at 1492 tbl.7 (including capital punishment cases).

observed in Table 6, and little room to choose cases that justices agree with because of the cases' interest or importance.

The mandatory criminal docket might be expected to generate similar reversal-oriented pressure on the discretionary criminal docket. Yet that docket's reversal rate is substantially and significantly lower than the ISC discretionary civil reversal rate. Perhaps the ISC feels a greater need to review criminal than civil cases based on the importance of the issues. This would lead to the selection of a smaller proportion of cases based on the felt need to reverse the ruling below. Other forces may be at work, such as greater differences in preferences between ISC justices and district court judges in civil as opposed to criminal cases. But the pressure of the criminal docket surely influences the resources justices can devote to discretionary cases.

CONCLUSION

This study of ISC cases documents several important patterns. The ISC overwhelmingly tends to deny review when it has discretion to do so. Litigants might be advised that the chance of obtaining ISC review is, in general, quite small. This observed behavior complies with the requirements of *Chenion Haifa*. But the ISC's high rate of finding error in cases it reviews on a discretionary basis may indicate that the ISC is not adhering to its own criteria for selecting cases for review.

Our other major findings are: (1) in mandatory-jurisdiction cases, the ISC affirmed lower court rulings in a substantial majority of cases; (2) in discretionary cases in which the ISC granted review, it reversed at a much higher rate than in mandatory-jurisdiction cases; (3) sentencing issues dominated the criminal docket and criminal cases predominate over civil cases; and (4) the government was significantly more successful than other litigants in obtaining reversals of lower-court rulings and in securing review of those rulings.

This last finding can be explained in numerous ways: one is that the ISC is biased in favor of the State, either believing the State to be more diligent or due to proprosecutorial tendencies of the justices. Another possibility is the State's rigorous screening process (both as appellant and appellee), which leads to its cases being more meritorious than those of both individual litigants and corporations. A third option is that the district court exhibits an anti-State bias, which is then corrected by the ISC. Our study cannot support or discard any of the abovementioned hypotheses. This entails additional empirical research that we hope will be conducted in the future.

In comparing the ISC's behavior with that of other courts, reversal rates were similar to rates in cases with analogous jurisdiction in U.S. states' highest courts, except in discretionary-jurisdiction civil

cases. The ISC tended to reverse such cases at a higher rate than U.S. courts. In mandatory-jurisdiction cases, the ISC did not exhibit a consistent prodefendant pattern of reversal similar to that found in U.S. appellate courts with mandatory jurisdiction.[97] This suggests that the U.S. result is not an inherent characteristic of appellate processes. If a prodefendant pattern were an inherent characteristic, it should have been detected in Israel as well.

97 *See* sources cited *supra* note 4; *see also supra* Table 4.