

**Bias on the Bench:  
How Judges' Legal Backgrounds Influence Their Decisions**

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## **Abstract**

The ideal conception of a judge is that of a neutral arbitrator. However, there exist good reasons to believe that personal characteristics, including professional experiences, bias judges. Such suspicions inspired two hypotheses: (1) judges that are former prosecutors are biased in favor of the government in criminal appeals; (2) judges that are former criminal defense attorneys are biased in favor of the criminal appellant. These hypotheses were tested by gathering professional information about state supreme court judges in the south during the years from 1995 until 1998. That was then matched to an existing database that recorded those judges' demographics and decisions in criminal appeals during that time. Logistic regressions of that data revealed that despite when other characteristics, including gender, race, and legal experience, were accounted for, criminal defense remained a statistically significant predictor. Judges with a background in criminal defense were more likely to reverse criminal court decisions. In contrast, prosecutorial experience was not a good predictor of how a judge ruled. Judges that had backgrounds in prosecution did not rule much differently than those that did not have such a background.

Keywords: judicial bias, implicit bias, judicial behavior, judicial background, criminal appeals, state supreme courts

## Introduction

When trying a case, a common phrase among criminal attorneys, both prosecuting and defending, is *It all depends on the judge*. In other words “a judges’ opinions may shape and determine the outcome of every case” (Nugent 1994:4).

The job of a judge is summarized as that of a neutral arbitrator. They are not to be biased towards either counsel arguing before them. However, judges are human and humans have personal preferences that subconsciously creep into their decisions. Former Supreme Court Justice Benjamin N. Cardozo observed, with regards to himself and his fellow judges, “We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own,” and elaborated, “[d]eep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex instincts and emotions and habits and convictions” (Braman 2009:vii, Mills 1999:16). Such subjectivity could be a shortcoming to what is supposed to be an impartial system. This could put the accused at a disadvantage.

The following pages explore judicial bias with regards to criminal defense and prosecutorial experience. It is well-established by academics that bias, prejudice, and personal preference an intrinsic part of the subconscious human thought processes (Charon 1989, Nugent 1994, Wilentz 1985). These are shaped by various factors including not only characteristics, such as gender and race, but

also personal experiences, which would include those that are professionally shaped. Scholarly research suggests that such biases do extend to judges. However, these findings are dated by several decades. That leads into the purpose of this paper: to explore modern judicial biases, particularly in reference to professional socialization. I chose to focus on if prosecutorial and criminal defense backgrounds promote either pro-government conviction or pro-defendant acquittals, respectively.

To test whether those professional backgrounds are correlated with how judges rule, I focused on criminal appeals in the supreme courts in the south. I researched the backgrounds, including professional, of the judges that sat on those benches from the year 1995 to 1998. I then matched those judges to their gender, race, and amount of legal experience, as recorded by the State Supreme Court Data Project. I then cross referenced how those characteristics correlated with the judges' votes (Brace and Hall 2009).

Upon analysis I found that judges that were former criminal defense attorneys were greatly more likely to vote in favor of the criminal appellant than were judges that were and were not former prosecutors. Given this, convicted individuals, when given the opportunity, should appeal their cases before judges that were formerly defense attorneys for a better chance to reverse the lower courts' decisions. However, overall the likelihood of a ruling being overturned, despite the background of the judge, is still low.

## Literature Review

### The Role of the Judge

The judge has a variety of duties within the United States judicial system. The overarching theme and most important of all of those duties, however, is the impartial liaison.

I divide and summarize judges' duties into three categories: (1) jury trial, (2) bench trial, and (3) appellate proceedings.

The most prevalent doctrine defines judicial impartiality as the absence of "hostile feeling or spirit of ill will," the presence of "undue friendship of favoritism," or "the leaning of the mind or an inclination toward one person or another" (46 *American Jurisprudence* 2d § 167). This paper will use those same definitions.

In the jury trial, the judge acts as a mediator between the interests of the accused and the interests of the state. He merely oversees that the trial is used as a process by which the prosecution attempts to prove guilt. The judge insures that the rules and regulations that shape these proceedings are followed – he issues orders, moderates examination, responds to counsels' objections and concerns, and charges the jury with their tasks. He does not decide the outcome of the case, rather a jury of twelve of the defendant's peers does so. During these proceedings, the judge has the "duty to maintain impartiality" between the prosecution and defense counsels, even though he will not make the final decision. No "family,

social, political, or other relationships” should influence a judge’s behavior or his decisions. This impartiality serves to reinforce the public’s confidence in the judiciary and the evenhandedness of justice (ABA 2016).

When jury trials are not used, the criminal courts instead utilize bench trials. In a bench trial, a judge, or sometimes a panel of judges, decides the defendant’s guilt or innocence, rather than a group of peers. In these situations, individuals that are arms of the state and more so the defendants’ superiors, rather than peers, decide whether or not the prosecution proved the accused guilty. A judge in this setting is charged not only with all of the duties that he would enforce in a jury trial, described above, but also with rendering a verdict. These decisions, as with any other decisions that judges make, should uphold the constitutional ideal of judicial impartiality (*Word v. Village of Monroeville* 1972). The classical liberal view of the law holds that the law is separate from the constraints of society and thus judges should settle disputes in a way that disregards those informal constraints (Mills 1999:16).

Finally, in appellate proceedings, also referred to as “error correction courts,” it is up to a panel of judges to decide whether the law was applied correctly in the lower courts. Appellate courts only review select cases. Appellate judges review the facts of the case already set forth during trial and do not consider any new material, save for case precedents. When necessary, they interpret and develop the law. When judges rule, the panel need consider whether

the duties of the lower court judge were fulfilled, including that of impartiality (Brewer et al. 2012).

### **Bias on the Bench**

Because of the singularity or small scale of judicial rulings, as opposed to a twelve-person consensus, there exists suspicion about possible judicial influences, the severity of those influences, and how those influences might put the accused at a disadvantage. This inspires an important question: are judges biased, and if so, how? In an ideal courtroom setting “judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors” (Nugent 1994:4, Wilentz 1985:221). But if judges are biased, then deferring a case to the bench in the hopes of a more favorable outcome, as trial lawyers reason, may be unfounded. The choice to argue before a judge or a panel of judges because of a higher degree of confidence in their impartiality, as opposed to that of a jury, might not be an improvement if judges cannot by themselves separate their preferences from the objective facts. This could potentially bias what is supposed to be an impartial judicial system.

Various studies indicate that presented with the same information in court, judges might come to different conclusions about a case than would a jury. In some cases, the judges’ familiarity with the system – experience with counsel or

police witnesses, the judge's discovery of the defendant's records that are irrelevant to trial, the judge's familiarity with the accused outside of the realm of the case, exposure to ultimately inadmissible evidence, knowledge of the discussion of a plea agreement – might cause bias (Guggenheim and Hertz 1998:571, Sanborn 1992:562). Because of these circumstances and biases, decisions may not be accurately judged as beyond a reasonable doubt.

One study compared the differences between the rulings of judges and juries and concluded that these differences were the byproduct of different standards for beyond a reasonable doubt. A number of times when judges and juries were presented with the same information, they came to different conclusions. The researchers thought that the juries were the fairer and more just triers. The case law suggested that this trend existed because judges are more likely to consider certain insufficient evidence (such as that of what Guggenheim and Hertz and Sanborn outlined) to be significant when a jury would not think it so. Judges' standards for beyond a reasonable doubt differ from juries with the former more easily convinced of undoubtable guilt. This tendency favors the government's case more heavily (Guggenheim and Hertz 1998).

Further and in another study, *The American Jury*, Kalven and Ziesel (1967) evaluated the possible differences in decisions between juries and judges. The researchers evaluated jury trial statistics, conducted jury simulations, conducted post-trial juror interviews from those simulations, and mailed

questionnaires to trial judges, asking for their verdicts in the hypothetical cases tried in the simulations. While the judge and the jury agreed on a verdict most of the time, in those cases where the judge differed from the jury in his opinions about guilt, he would have convicted the defendant where the jury acquitted him. The divergence between judge and jury decisions, Kalven and Ziesel thought, had to do with personal opinions about the accused, differences in opinion about law, and, as was already established, variations of individual's definitions of reasonable doubt.

### **The Socialization of Judges**

Various scholars believe that this difference in decision-making exists because socialization processes produce certain characteristics, which develop into biased attitudes that inform biased decisions (Canon 1972). Some examples of such characteristics include gender, race, political party, prior work experience, etc.

Judges' gender may or may not influence their decisions, depending on which research one consults. In those studies that did find a correlation between judges' genders and their decisions, women were more inclined to favor the government's case. For example, in a study about judges' sentencing decisions, researchers referenced sentencing records and they found that gender was weakly correlated with the harshness of the punishment imposed. Female judges were

slightly more putative than their male counterparts. Women weighed context more heavily. After contextualizing cases, including the defendants' characteristics and record, they were more likely to incarcerate the guilty and these incarcerations were on average longer. According to the researchers, this could be because the female socialization process emphasizes pragmatic and personal, moralistic concerns (Steffensmeier and Herbert 1999). These pragmatic concerns would promote a practical and concrete, rather than theoretical, approach to a given problem. That practical and concrete approach would be punishment. Combine that with the role of moralist, who tries to teach and promote morality, and that may bias a female judge to be more putative. This would put the accused at a disadvantage.

Additionally, women that sat on state supreme court benches most commonly favored the government when the case before them was of female concern (Allen and Wall 1993). This would include, for example, sex discrimination. This is logical given the history of the women's liberation movement. As a part of a gender that has been historically discriminated against, these kinds of cases might be more personal for the female judges reviewing them. Given their high status on the bench, they overcame such discrimination. This may bias women in the bench to rule in a way that they believe promotes women's rights, despite what the accused's defense is.

In other kinds of cases, women were extreme on their positions, whether that be liberal or conservative. Their opinion was not easily changed in deliberation with the bench. (Allen and Wall 1993).

But in other findings, gender was not an influential factor. With regards to one study about federal court judges and their influence on civil rights and prisoner cases, those judges that were female were marginally more likely to favor the claimant. The researchers qualified the outcome of their data by explaining that there were not many female judges to begin with, therefore no assertively defined conclusion can be made (Ashenfelter et al. 1995). This conclusion is interesting because it appears to contradict Allen and Wall's (1993) finding that women strongly favored the government in civil rights, specifically sex discrimination, cases. It is important to keep in mind that Allen and Wall (1993) looked only at a subset of discrimination cases. It may be that when other types of discrimination cases are accounted for, this trend disappears. However, this lack of correlation is interesting because civil rights and general discrimination cases are parallel to sex discrimination cases in that someone's rights are being overlooked due to some element of that person. One, including the defense, might falsely believe that female judges would sympathize with such cases.

Similarly, research varies about whether judges' race bias their decisions. In one study about criminal sentencing in Pennsylvania, the differences between

the ways in which Caucasian and African American judges decided sentences were negligible; they “weighted case and offender information in similar ways when making punishment decisions” (Steffensmeier and Britt 2002:749). Although judges weighed information similarly, African American judges were more likely to take that same information and impose a harsher sentence on offenders. The researches proposed that this might be due to those African American judges’ socialization processes stemming from their role as conservative elites, their sensitivity towards constituents’ criticisms, or heightened awareness about the harms of crime (Steffensmeier and Britt 2002). Such socialization processes would prime those African American judges into being tougher on crime.

Another study regarding sentencing behavior between judges of different races had mixed findings. With regards to the decisions about whether to incarcerate a defendant, African American judges treated African American and Caucasian defendants generally equally. Caucasian judges did show marginal preference and leniency towards Caucasian defendants. But with regards to sentencing, African American judges were slightly more inclined to be lenient towards African Americans and Caucasian judges imposed mostly equally severe sentences. Given these findings, overall there was little difference in racial discrimination towards defendants whether it be African American or Caucasian

judges (Welch, Combs, and Gruhl 1988). Other comparable studies on the impact of trial judges' race rendered similar conclusions (Spohn 1990, Uhlman 1971).

These characteristics that I just described above – gender and race – are what I call “inherent characteristics.” These factors are innate. They cannot be changed, or at least are not easily changed. Thus any socialization from characteristics which result in biases are presumably innate as well. If they do bias judges, there is little one can do to change something that is inherent to their identity, aside from being consciously aware of its possible effects. And as was previously mentioned, Irwin and Real (2010) found that even while judges can make efforts to disregard such biases, it is hard to do so. These biases are embedded into a person starting from birth and it is hard for a person to consciously battle something that is a subconscious constant. However, he can try educate himself about how these characteristics influence his decisions, since they are associated with particular leanings.

In contrast, some characteristics are acquired as a person goes on living his life. I label those “acquired characteristics.” They include factors such as a judge's political party, religion, prior work experience, etc. These factors are embodied as a person encounters certain events and makes particular choices. Unlike inherent characteristics, these are taken on in a more conscious manner. Supposedly, a person consciously chooses what party to affiliate with, what religion to follow, and what jobs to pursue. And if a person so chooses, he can

counter these characteristics about himself by exposing and associating himself with other acquired characteristics. He can also account for such biases he might have, since certain characteristics are associated with particular ideological leanings. However, it is possible that those biases could be the consequence of some other, underlying characteristic, including an inherent one.

Of those acquired characteristics studied in the past, many were correlated with certain judicial decisions. When a judge makes a decision, he takes into consideration his experiences in the courtroom as well as his personal and other institutional experiences (Grossman 1966). With regards to a study about federal supreme court judges, the most statistically significant factors that influenced their attitudes about decisions were acquired characteristics. Those included political party, liberalism, whether the judge was a former prosecutor, and whether the judge was a former businessman. The democrats, stronger liberals, those that were not former prosecutors, and those that were not former businessmen were more likely to favor the accused, or the more liberal position (Nagel 1962, 1974). In C. Neal Tate's 1981 study about the correlation between the characteristics of Supreme Court justices and their patterns of voting about civil rights cases, he found that two of the most significant predictors were party affiliation and prosecutorial experience. Those who were Democrats and were without prosecutorial experience were more likely to rule in favor of the more liberal position. Further research highlights the tendencies of judges that were

former prosecutors to favor the government's claims and less receptive to the claimants (Johnston 1976). Finally, an analysis of Georgia judges found that those that were former prosecutors were more likely to incarcerate offenders (Myers 1988).

Despite these identified characteristics and their role in judicial biases, it is important to emphasize that this decision process is not, usually, a judge consciously weighing the facts of the case against their preferences. Most judges do try to resist those temptations (Irwin and Real 2010). In fact, they like to believe themselves "consistently objective, impartial, and fair" (Nugent 1994).

However, there exists in the human mind barriers to truly objective decisions. The brain simplifies concepts so as to avoid information overload. It takes knowledge and past experience so as to categorize concepts and create expectations. However, these schemata can result in an interpretation that oversimplifies the circumstances (Nugent 1994 citing Charon 1989).

Those simplification mechanisms result in implicit biases. Implicit biases are assumed associations unconsciously embedded into thought processes. Implicit biases strongly influence decision-making and despite significant, conscious efforts towards disregarding these biases, they still persist. In turn, such biases unintentionally result in intuitive decisions that exhibit discriminatory behavior (Irwin and Real 2010).

That sometimes biased and oversimplified interpretation does take into consideration the law, but it is also constrained by how a judge perceives the law via his personal preferences and experience as a social being (Braman 2009, Mills 1999). This creates a problem because despite these biases, the ultimate role of a judge is supposed to be that of a neutral arbitrator that delivers fair justice, but he might not be able to do so (Federal Judiciary 2014).

Applying that to the concept at hand, a judge might universally categorize crime as something bad. When presented with a criminal case, he immediately, although unconsciously, references this category so that the undertones of the case, despite circumstances, are bad. This would put the accused at a disadvantage.

Such decisions are not legally unfounded, necessarily. Judges, when they make their decisions, reportedly think that they use the appropriate legal criteria. Their legal education heavily emphasized the rules and constraints of legal reasoning. But while the training and socialization associated with legal education emphasized legal accuracy, that does not mean that legal accuracy and personal biases are mutually exclusive. What is termed the “motivated reasoning model” suggests that judges make legal decisions in the context of both their personal policy preferences and what the law dictates (Braman 2009:30). Those personal preferences and biases act as informational filters through which a case is processed (Baum 1997); Rowland and Carp 1996). That filter allows for a judge

to rule in a way that is both legally sound and amenable to their personal preferences. It is essentially confirmation bias.

### **Shortcomings of Prior Literature**

When considering these inherent and acquired characteristics, it is important to keep several shortcomings in mind. There might be an alternate cause for these correlations, given the multilayered and complex nature of a person's identity. There might be overlap between factors. Two or more factors might work together to formulate bias, for example race and political party affiliation (Canon 1972). Additionally, just because a particular characteristic and judges' decisions correlate does not mean that the characteristic causes the decision, there could be a confounding factor, nor does it mean that it is applicable to all judges (Grossman 1966). Rather, the characteristic might reinforce existing attitudes (Nagel 1974).

Many of the existing studies about judicial bias vary in scope. Certain studies focused on specific kinds of judges – district, state, federal, and Supreme Court). Some research centered on particular kinds of cases brought before the court – criminal and civil. All of the studies focused on different locations within the United States. Because the samples for these studies are not the same, universal conclusions cannot be made.

Finally, it need be pointed out that there is a lack of recent research about judicial bias, especially about the influences of prior work experience. Many of the studies about judicial bias that are commonly referenced, including some of those mentioned above, are dated by as many as several decades. Given their age, their findings might not be accurate in the modern judicial sphere. Those trends previously recorded might have shifted or disappeared altogether.

Overall, existing literature indicates that there exists characteristics that influence judges' decisions. Those characteristics include those that are outside of judges' control, such as gender and race, as well as those that judges essentially choose, such as political leanings and former professions. These biases become inadvertently become imbedded in the ways in which judges think. They manifest themselves particularly in judges' decisions, which leads into my specific concerns about how judges' former legal professions might impact their rulings.

## **Hypotheses**

The literature outlined above indicates that there are, to some extent, judicial biases. These biases may affect how judges rule, and if they do, this is a shortcoming in what is supposed to be an impartial judicial system that does not entertain feelings of dislike or favoritism towards one counsel over the other (*Word v. Village of Monroeville* 1972, Am. Jur. 2d 1964). Therefore, it is

important that the possibility of judicial bias be explored, especially given the absence of recent literature about it.

Bias permeates a multiplicity of professional activities. When an individual partakes in a given profession, he adapts to that particular environment. Repetition of certain activities and ideas subconsciously resigns and assimilates the person so as to accept those conditions of the profession into his personal thought processes. Professional life becomes interwoven with personal life (Langerock 1915). A dramatic and obvious example would be that of a drafted soldier who at first disapproved of battle but then came to see the necessity of it. Another example would be a medical student that begins school as a proponent of alternative medicine, but when he graduates abandons that view. I expect that this extends to legal backgrounds.

I am interested in how a judge's prosecutorial and criminal defense experience affects his decisions in criminal proceedings. Past research highlights the impact of socialization processes, on formulating bias. Each legal profession carries with it a socialization process and education that emphasizes certain concerns (Braman 2009). Because judges worked in environments that stressed such interests, those biases may have been internalized and will show up in their decisions. However, all of these judges now sit on the bench, which espouse the same concern for the accurate, objective interpretation of the law. Combine this present concern as a judge with the concerns that were embedded in judges during

their former legal roles, and judges have competing concerns. Sometimes, but not all of the time, one concern will outweigh the other, which would result in a slight correlation between certain characteristics and rulings.

Before I state my hypotheses, I want to make clear that I in no way mean to insinuate that judges completely disregard the law in favor of decisions that rest entirely on their personal preferences. Nor do I mean to suggest that judges are unique from other humans with an ability to make completely objective decisions that in no way incorporate any biases. As was mentioned previously, biases and personal preferences are filters through which decisions are made. I hypothesize that the nature of a judge's professional background is correlated, although not strongly, with how he rules. Judges are still constrained by what the law allows. They cannot completely disregard law so that their preferences are fulfilled.

Further, there are limitations to hypotheses about people's decisions. There are many confounding factors. Here, that would be other characteristics and choice. Prosecution and criminal defense may largely overlap with some other characteristic, such as race and gender. In these circumstances, it is hard to separate the effects of the two on each other and independently. Also important, people do choose their professions (which could also have to do with characteristics). People might select a particular professions based on inclinations that already exist. For example, those that are "law and order" types are more likely to become a prosecutor than those sympathetic with the accused; those that

are a member of a disadvantaged group may be more likely to become a criminal defense attorney. In these circumstances, people are essentially primed for such careers. This makes it difficult to disentangle whether associations between professional backgrounds and behavior on the bench is a consequence of that background or the result of an underlying attitude that explains both the behavior and the career choice.

*Hypothesis (1): Judges with prosecutorial experience are more likely to rule in favor of the government and against the accused.*

Prosecution emphasizes the need for law and order – strict adherence to the status quo, punishment as a deterrent, battling the high crime rate, etc. Those ideals extend beyond mere adherence and into execution. It is not enough for prosecutors to acknowledge the need for law and order, they must act upon it. Prosecutors' daily jobs are to win their cases and demonstrate the guilt of every person brought into custody. Their skill and success is measured by a conviction rate. Such performances might have blurred the lines between the professional proclivities of the profession and those of the people that fulfill that profession. After having been a prosecutor and seeing the accused in nothing but a shadow of guilty, judges, I believe, internalized such partiality and they subconsciously

make decisions under its influence. As a consequence, I expect many of their judicial rulings will be in favor of the government and against the accused.

*Hypothesis (2): Judges with criminal defense backgrounds will be more to rule in favor of the accused and against the government.*

In contrast, the criminal defense profession questions the status quo that is set by the government. Defense attorneys defend what the government has labeled as deviant. Every day, the defense emphasizes second chances and the benefit of the doubt, extralegal factors that influence criminality, etc. Criminal defense, as a profession, requires a perception towards clients as ones of reasonable doubt. They argue for the exact opposite of what prosecutors do. But similar to prosecutors, criminal defense attorneys' performances are evaluated by an acquittal rate. This acquittal rate gives incentive for defense attorneys to work diligently towards a case that paints the accused in a more positive light. After having done the research and investigation necessary to successfully argue such a perception, they might begin to believe it themselves. Further, defense attorneys need dispute every point brought up by the prosecution against their clients. As defense attorneys become judges, they may transfer such a critical evaluation of the prosecution to the bench. Given these reasons, I anticipate that judges that

were former criminal defense attorneys were primed into a mode of thought that favors the accused, and this will be evident in those judges' rulings.

## **Methods**

### **Scope**

To test these hypotheses, I needed and sought out those cases that were criminal in nature as well as presented to and decided by judges. I could then see how those judges' characteristics compared to their rulings. These criteria immediately excluded the lower criminal courts. There defendants have a choice in how the case is presented to the court and decided, either by way of a jury trial, in which a panel of peers decides the outcome of the case, or by way of a bench trial, in which a judge decides. That choice introduces the possibility of significant selection bias in a sample of the lower courts. The accused and their counsel likely make an informed decision about which type of trial would most benefit them. The accused and their counsel might elect for a specific kind of trial because of the nature of the case, the reputation of a particular judge for being more lenient or harsher on defendants, etc. That would mean a notable fraction of certain kinds of cases would go before select judges. The defendants, and not the researcher, would pre-select the sample. The results from this selection I would expect to be largely skewed, in comparison to a purely random sample, so that

many of the judges had specific characteristics and their votes were mostly in favor of the defendant.

Given these limitations, I instead examined criminal appeals before the state supreme courts. Under these circumstances, when the convicted chooses to appeal, his case goes directly to a predetermined panel of judges of which he has no control over.

I narrowed the scope further and chose to focus on the south. I could not do all state supreme courts because of data collection constraints. Certain states do not have much information available about their supreme court judges. Given that, I needed a subsample and I chose the south, which happened to have more information available about judges. For the purposes of this paper, then, those states in the south include Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

### **Data Collection**

These kinds of cases in the specified region are recorded in the State Supreme Court Data Project (SSCDP), managed by Paul Brace and Melinda Gann Hall of Rice University's and Michigan State University's political science departments, respectively (2009). The Project, in its Judge Level Dataset version, recorded all of the votes cast in all of the cases before all of the United States' state supreme courts between the years of 1995 and 1998. The information in that

dataset includes a variety of information about those cases, including the general issue, the location of the case, the judges that voted in that case, and whether those judges voted to affirm or reverse the lower court's decision.

I first edited SSCDP to meet the requirements of the scope of this research. I deleted all of those cases in the dataset that were not criminal, since the scope of this research focuses solely on criminal appeals. Then I limited those criminal cases to only those appealed by a person accused, indicted, suspected or convicted of a crime. Finally, I limited those cases that remained to only those states in the south. Seventy-four judges voted on those cases that were left.

In order to run my analysis, I needed demographic and background information about those 74 judges. While SSCDP provides some information on judges, it does not include all of the data required to test my hypotheses – specifically, information on judges' professional backgrounds are not included. Paul Brace provided me with a partnering dataset, Court Composition, to that of the Judge Level Dataset version of the Project. That dataset detailed demographic information about the judges, including their age, party, gender, and race, all information that was found relevant in prior literature. I then scavenged state supreme courts' websites, obituaries, news articles, law school archives and encyclopedias of people's profiles so that the expanded dataset included information on whether or not they had a background in prosecution, criminal defense, legal aid, white collar, private practice, the military, the legislature,

and/or teaching. I also recorded where the judges attended law school and when their next election to the bench was.

Some judges had more information available about them than did others. When that situation arose, I filled in what information I could find about the judge and left the variables of which I could find no information blank.

Criminal defense was a variable that was often difficult to code because there was a greater level of uncertainty. If a judge was formerly employed as a public defender or a firm that exclusively practiced criminal defense, then that judge was easily coded as a former criminal defense attorney. But if a judge was employed by a private firm that included the practice area of criminal defense, I counted that as a criminal defense background also because he was exposed to those ideals. However, many of the private firms that the judges practiced at had little information, if any, available about them. In those circumstances, I could not definitively determine whether that judge practiced criminal and thus I coded those as having none of such experience.

I merged these three datasets, the State Supreme Court Data Project's judge-level dataset, the partnering dataset of Court Composition, and my investigation into judges' professional backgrounds into one dataset. Merging these datasets allowed for me to compare court votes across a plentitude of judicial traits.

### **Method of Analysis: Logistic Regression**

In order to test my hypotheses, I ran logistic regressions using data analysis and statistical software. A logistic regression is a model in which the dependent variable is binary. That is applicable to this research because the dependent variable, pro-defendant votes, was a binary variable. That is, they were categorized into either affirmed or reversed. Because this is criminal appeals, a vote to affirm is in favor of the government's case for conviction; a vote to reverse is in favor of reviewing the defendant's sentence.

A logistic regression estimates the impact of the independent variables on the predicted probability that the dependent variable takes a particular value, that is, in the current case, that the judge casts a "pro-defendant" vote in a case. The most important independent variables of concern here are the demographic and professional characteristics of judges.

Given my hypotheses, I expect that judges with defense experience are more likely to vote for the criminal petitioner than judges without such experience, and that judges with prosecutorial experience will be less likely to do so.

One important complication for my analysis is that judges voted in more than one case, and that the votes cast by a particular judge are not independent: If there are unobserved, and therefore unmeasured, factors that affect a judge's decision process, these will be present for all of the votes cast by the judge. Put

differently, the votes cast by the same judge in different cases are likely not independent of one another, and as a result, the error term is likely not the same across judges. To account for this, I cluster standard errors by judge.

## **Analysis**

The results of the logistic regressions are detailed in Table 1. Logit coefficients cannot be interpreted directly. Therefore, I calculate the impact of the variables on the predicted probabilities of a pro-defendant vote, while holding all other variables at their mean.

My analysis focuses on trends within the sample as well as the two models' predicted probabilities that judges will vote for the criminal appellant – model (1) comparing the effects of prosecutorial experience versus criminal defense experience on southern state supreme court judges' votes in favor of the criminal appellant and model (2) comparing the effects of backgrounds in prosecutor or criminal defense, gender, race, and legal experience on those votes. The second model includes demographics because I wanted to make sure that any relationship found in model (1) was not simply the byproduct of another variable that happened to overlap with prosecutorial or defense experience.

As I indicated in my hypotheses, I expect these models to show that prosecutorial experience decreases a judge's likelihood to vote in favor of the criminal appellant while defense experience increases that probability.

### **Sample**

Before addressing the models, it is worth taking a look at the makeup of the sample. The composition of the sample is important to the model because trends within the former very well translate into trends within the latter.

In order to analyze those coming models as they relate to one another, the sample has to be the same. Model (1) required information about criminal defense and prosecutorial experience; model (2) needed that information, as well as that of gender, whether the judge was black, and legal experience. Model (2), which required more information, was the more restrictive model. The availability of the information about those four variables produced a dataset with 6,250 observations, or votes. Those votes were cast by 63 judges.

This sample can be analyzed by ways of the makeup of it in two ways. First, an analysis of the trends in terms of *votes*. Second, an analysis in terms of the *judges* that made those votes. Comparably, each of the characteristics of the sample discussed below were the same, give or take a few percentage points, whether it be comparing votes or judges. Given that, I will discuss the makeup of the sample in terms of the 63 judges since it is easier to imagine characteristics

assigned to people rather than their decisions. These characteristics are detailed in Figure 1, Figure 2, and Figure 3.

Six of the judges in the sample have criminal defense experience. In contrast, 22 of the judges are former prosecutors. There is only one judge in the sample that was both a prosecutor and defense attorney. Most of the judges, 36, were neither criminal defense nor prosecution.

Overall, there are more men than women in the sample, 51 versus 12. The gender distribution for both criminal defense and prosecution is greatly skewed towards men. More male judges than female judges have experience practicing defense and prosecution. There was only one female judge with defense experience. Three were former prosecutors.

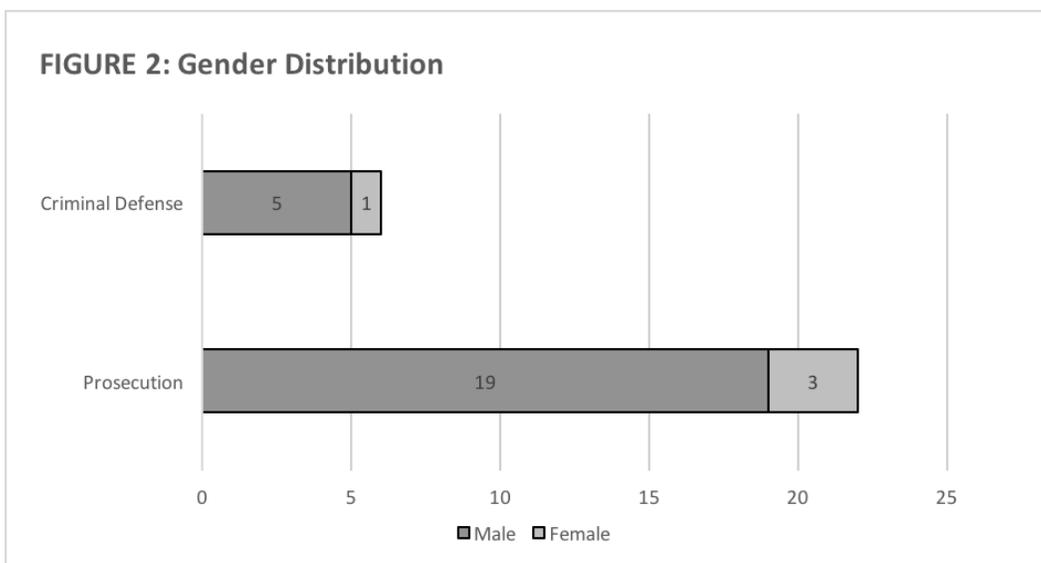
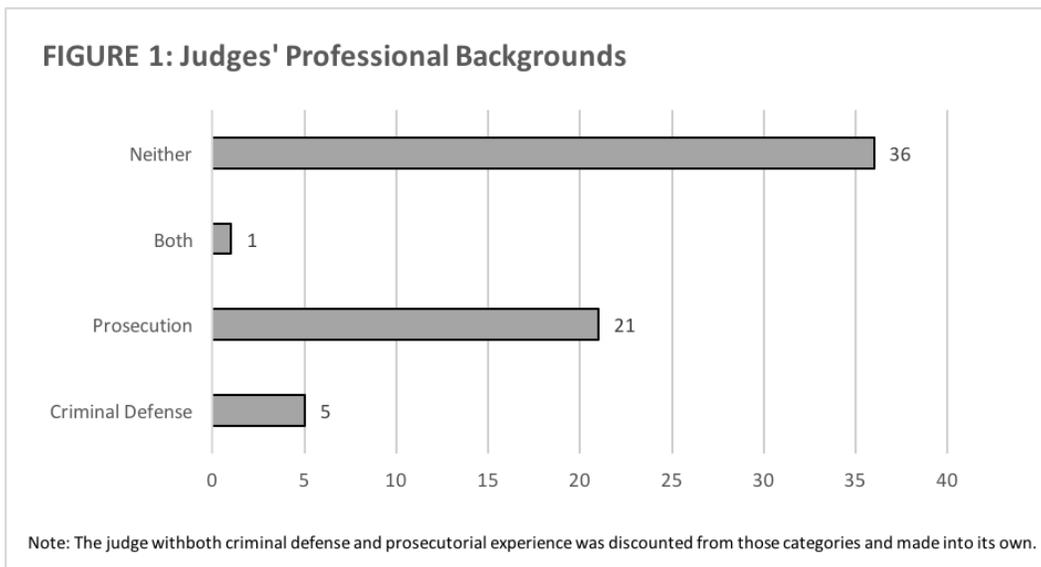
There are nine black judges in the sample. They were equally distributed between criminal defense, prosecution, and neither of the two.

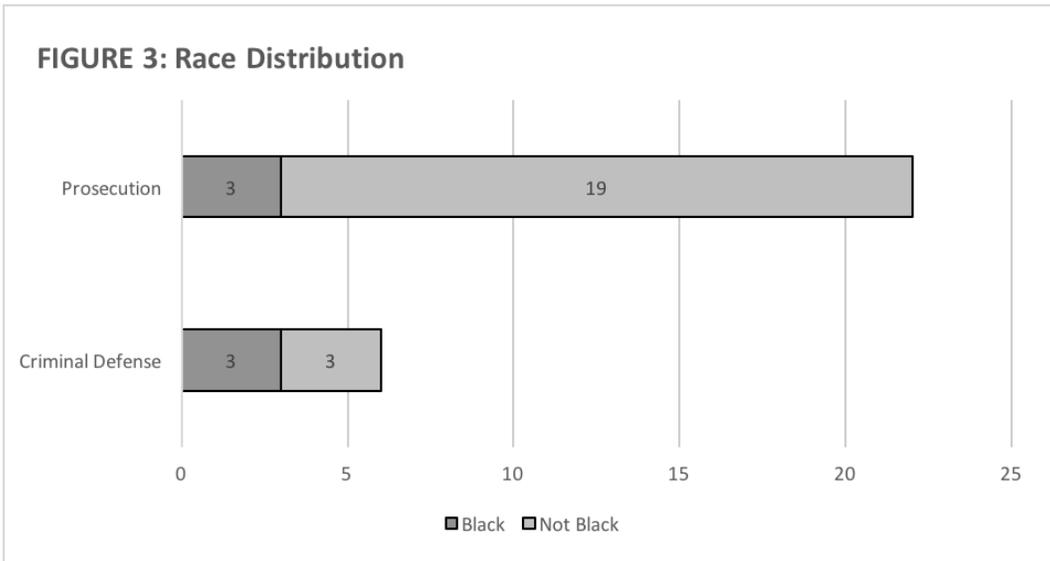
Of the 54 the non-black judges, 19 practiced prosecution, three practiced criminal defense, and 32 were neither prosecution nor criminal defense.

Finally, political party, race, and criminal defense are very much related within this sample. It so happened that those judges that are black and those that are democrats are perfectly correlated. All of the black judges in the sample are democrats.

Similarly, almost all of the judges that are former defense attorneys in this specific sample are also democrats.

With these details of the sample covered, I can now move onto analyses of my models. They are built to test my hypotheses that former criminal defense attorneys are more likely to vote for the criminal petitioner and former prosecution attorneys for the government. These models will focus on judges' votes, not the judges.





**TABLE 1: Results of Logit Regressions**

VARIABLE	MODEL (1)	MODEL (2)
Criminal Defense	1.014** (0.274)	0.449** (0.184)
Prosecutor	-0.202 (0.275)	-0.028 (0.158)
Gender		-0.079 (0.641)
Black		0.134 (0.140)
Legal Experience		0.023* (0.012)
Constant	-0.962** (0.179)	-1.502** (0.273)
Number of Cases	6250	6250

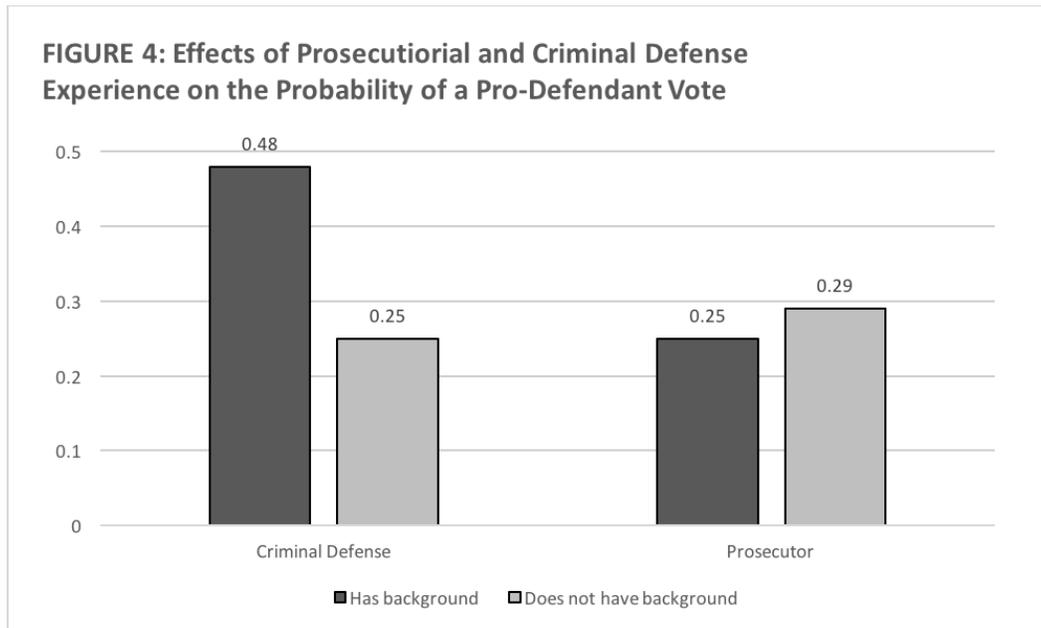
Note: \*\*Significant at  $p < 0.05$ , \*significant at  $p = 0.05$   
Robust standard errors in parentheses.

### **Model (1): Prosecution & Criminal Defense**

I first ran a logistic regression comparing the criminal appeals votes of southern state supreme court judges who were former prosecutors to those that were criminal defense attorneys. Table 1 summarizes the output of Model (1) and Figure 3 depicts the predicted probabilities rendered from the model. I found that criminal defense backgrounds made judges much more likely to rule in favor of the criminal petitioner. In contrast, whether or not judges were former prosecutors did not have an effect on how they voted in these cases.

The predicted probability of a judge that was formerly criminal defense voting in favor of the criminal appellant is 48 percent. In contrast, those that were not criminal defense attorneys were predicted to rule in the same fashion only about 30 percent of the time. This difference was statistically significant, asserting that criminal defense backgrounds do correlate with judges' votes that favor the criminal petitioner. Such experience does seem to affect how judges vote, according to this model. These findings support my second hypothesis about the effects criminal defense experience on judges' votes, that those with it are more likely to vote for the criminal appellant.

Between the votes of judges that were and were not former prosecutors, there was only a four percent difference in their predicted probabilities of pro-petitioner votes. Overall, the predicted probability that they would to vote for the criminal appellant is 25 to 30 percent. This difference was not statistically



significant. That is to say, prosecutorial experience seemingly does not impact how judges vote, according to the model. Former prosecutors were about just as likely as those that were not former prosecutors to vote in favor of the criminal appellant. Such findings do not support my first hypothesis that prosecutorial experience biases judges in favor of the government respondent.

And then comparing the votes of former criminal defense attorneys to those of former prosecutors, there is also a noticeable difference. As was already mentioned, judges that formerly practiced defense are predicted to vote for the criminal appellant 48 percent of the time, as opposed to those that formerly practiced prosecution, who predictably vote the same only 29 percent of the time. While the findings about the latter were not statistically significant, data about

former criminal defense attorneys was. However, former literature accounted for certain demographics and so I did the same in the next model.

## **Model (2): Prosecution, Criminal Defense, Gender, Race, & Legal**

### **Experience**

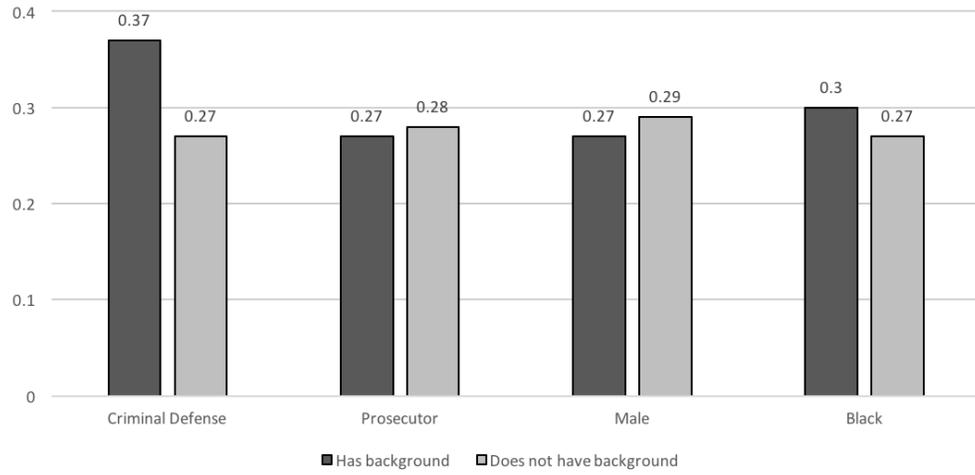
In the prior literature discussed, certain demographics, including gender, party, race, and age, were found to be significant predictors of how a judge rules on cases. Table 1 summarizes the output of Model (2) and Figure 4 illustrates the predicted probabilities rendered from the model.

Prosecutorial experience, when gender, race, and legal experience (which I substituted for age) are accounted for, is similar to the first model. Regardless of such experience, judges are likely to vote in favor of the government about 70 percent of the time. Also like the former model, that value is not statistically significant.

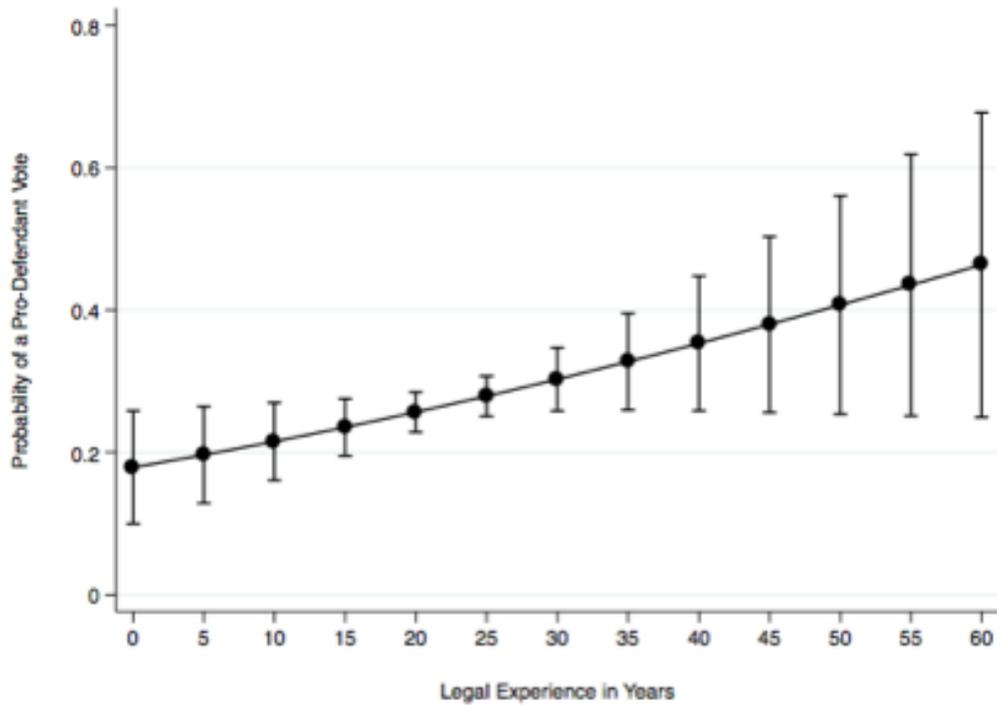
Judges with criminal defense experience are about 10 percent less likely to side with the criminal petitioner in this model than in the previous model. Those that do not have a background in defense are about just as likely in this model as they are in model (1) to vote for the criminal appellant. This variable remains statistically significant. Within model (2) it is the most predictive variable.

The next most predictive variable is legal experience. I substituted legal experience for what past literature considered as age. It is the one variable in

**FIGURE 5: Effects of Prosecution, Criminal Defense, Gender, and Race on the Probability of a Pro-Defendant Vote**



**FIGURE 6: Effects of Legal Experience on the Probability of a Pro-Defendant Vote**



model (2) that is not binary. Generally, the more legal experience judges have, the more liberal they were with their votes in favor of the criminal appellant.

Both gender and race were not statistically significant predictors of judges' votes. Black judges versus those that were not and male versus female judges all had about a 30 percent likelihood of voting for the criminal appellant.

I excluded party affiliation from the model because it was so highly correlated with race and criminal defense, as was discussed above.

### **Interpretation**

I predicted that the socialization processes of prosecution and criminal defense would (1) bias the former to vote in favor of the government respondent and (2) the latter in favor of the appealing criminal. The models disprove my first hypothesis. The models confirm my second hypothesis.

I would like to first acknowledge the limitations of my sample, by which the two models are based off of. The sample was relatively small. While 6,025 votes sound like a more than sufficient sample, those votes come from only 63 judges. As was detailed above, of those 63 judges, there are only several women, several former defense attorneys, and several black judges. The number of former prosecutors, while a larger proportion than that of criminal defense, was still relatively small. This lack of diversity within the sample is of course not necessarily representative of the population of all state supreme court judges,

which means that the models are not necessarily representative of that population, either.

Additionally, and as was mentioned previously, it was hard to gather the necessary information about the judges. Particularly, it was hard to find information about the private firms that judges were a part of. If the firm went out of business and there was not much record of it, I could not determine if it was a firm that practiced criminal defense. The sample I have very well might include more judges that worked in a firm that offered criminal defense services.

With regards to interpretation about the models and what they show in relation to the information available, past literature indicated that gender, race, and age were good predictors of how judges would vote in criminal cases – female as well as black and younger judges were more likely to vote in favor of the accused. The models above contradict that. Gender and whether the judge is black make hardly any difference in how likely a judge is to vote for the criminal appellant. Neither of these variables are statistically significant. Legal experience (or age) here, like in past literature, was a good indicator of how a judge would vote in criminal appeals. However, past literature suggested that the older a judge is, the less likely he is to side with the accused; my model implies that the older, or more experience, a judge has, the *more* likely he is to vote for the criminal appellant.

This change in the significance of gender, race, and legal experience/age might be the result of changing stereotypical norms. Behavior rules, such as women being more liberal than men, Caucasians more conservative than minorities, and the younger more progressive than their elders, etc. are undergoing change in modern times. In fact, individuals are commonly encouraged to break those norms. This recent movement might prompt judges to be more aware about how their characteristics might influence their decisions, and they then attempt to consciously counter such effects.

Prosecutorial experience was not a statistically predictive variable in either model. This does not correspond with my first hypothesis. If I were to interpret this based on the scope of my predictions, this indicates that the socialization processes of prosecution do not necessarily favor one side. Another possibility is that there is no specific socialization process to prosecution. Alternatively, judges that are former prosecutors might be more aware of how their background affects their biases, and they therefore account for that bias in their conscious decisions.

However, I still want to point out the contrast between the predicted probability that former prosecutors will vote for the criminal appellant and the predicted probability that former defense attorneys vote the same. In model (1) there was a difference of 20 percent and in model (2) 10 percent. This is a large disparity. It is also interesting the miniscule difference between the judges with prosecutorial experience and those with not, considering that within the sample of

the latter are former defense attorneys, whose predicted probability was significantly higher and statistically significant.

Criminal defense experience in both model (1) and model (2) is a variable that predicts well the likelihood of judges to vote for the criminally accused appellant. Across both models, judges with that experience, in comparison to prosecution, gender, and race particularly, are the most likely to vote in favor of the criminal petitioner. This corresponds with my second hypothesis. While there is no way to know for certain if this is the byproduct of socialization processes specific to criminal defense, the fact that it remained significant even when demographics were accounted is noteworthy. Perhaps judges that previously practiced defense are so used to scrutinizing the government's case for flaws that it transfers over into their judicial decisions, making them nitpicky about the legal procedure, precedents, and evidence. Also, judges with criminal defense backgrounds may have developed not only sympathy, but empathy for the accused as they worked closely with their clients. These are only a couple of the possible sources of bias in criminal defense.

## **Conclusion**

Despite the defined role of judges as neutral arbitrators, lawyers commonly believe that the outcome of a case “depends on the judge.” Perhaps those neutral arbitrators are not so neutral. This paper investigates those lawyers’

suspicious. I began this paper with two predictions: (1) state supreme court judges that are former prosecutors are more likely to vote in favor of the government respondent and (2) state supreme court judges that are former criminal defense attorneys are more likely to vote in favor of the criminal appellant.

In order to test those hypotheses, I first consulted the existing literature. It revealed that humans in general are exposed to bias through socialization processes, including those of race, gender, political party religion, professional background, etc. Those socialization processes produce biases (Canon 1972). Judges are not exempt from such biases, even if they think they are or consciously resist them (Irwin and Real 2010, Nugent 1994). However, it is important to understand that despite the decisions reached, biased or unbiased, judges usually do have legal reasoning (Brahman 2009).

Using Brace and Hall's State Supreme Court Data Project (2009), I edited the existing database to meet the needs of my research. I eliminated all appeals that were not the appeals of those accused, indicted, or suspected or convicted of a crime; I limited those remaining cases to those only in the south. Of the judges that voted on the remaining cases, I supplemented further background information about them, including their professional experience. The dataset already included demographics such as gender, race, and age. Upon statistical analysis comparing those various characteristics to how the judges voted in criminal appeals, the data provided evidence that is consistent with my second hypothesis. Those judges that

were former criminal defense attorneys were much more likely to rule in favor of the criminal appellant. However, judges that were formerly prosecutors did not rule much differently from judges that did not have such a background.

So that future research may improve on the investigation summarized here, I offer several suggestions for future research. First, it would be useful to gather additional data from more recent time periods outside of 1995 to 1998. Even in such a short time period between then and now, trends are liable to change. Second, the scope might expand to judges of other regions as well as those of the nation as a whole. Different regions may have trends different from those found here. Third, other courts – lower, superior, civil, family, etc. – might want to be explored. Judges might make different decisions based on the court environment.

The practical consequence of such a trend as found here suggests that, when presented with the opportunity, the criminally accused and their counsels should attempt to try their case before a judge that was a former criminal defense attorney. There, they have a greater likelihood of a preferable ruling than if the case were in the hands of someone that did not have such a background. However, note that regardless of the background of the judge, the likelihood that a criminal appellant's ruling is overturned is low, under 50 percent.

Also, judges, especially those with a criminal defense background, need be wary of how their professional experiences might bias them. However, as was

already established, it is hard to dismiss certain filters that have been built into one's thought processes. When evaluating a case, all judges should try to be as objective as possible and disregard any personal preferences. Look to what the law says, not the what the gut perceives.

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