

# DOES PROSECUTORIAL EXPERIENCE “BALANCE OUT” A JUDGE’S LIBERAL TENDENCIES?\*

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*Conclusive evidence of a relationship between background characteristics such as gender, race, or religion and specific judicial decisions has been hard to come by. Studies that find a correlation between prosecutorial experience and increased support for conservative positions have been an exception to this pattern. The presumption that former prosecutors make more-conservative judges permeates media accounts of judicial nominees and may affect judicial selection processes. After examining forty years of criminal cases from the Supreme Court and the U.S. Courts of Appeals, I find no relationship between prosecutorial background and a propensity for favoring conservative outcomes. Judicial ideology remains the better predictor of future judicial behavior in criminal cases.*

The recent appointment of Sonia Sotomayor to the Supreme Court drew considerable attention to her former career as a New York assistant district attorney. To be sure, pundits and legal observers did not make formal causal claims about how Sotomayor’s prosecutorial experience would affect her future decisions. That said, media profiles of Sotomayor routinely inferred that this experience would make her more conservative on criminal justice issues than her otherwise liberal views would suggest. For example, a *Los Angeles Times* profile quoted Sotomayor’s former colleagues describing her as a “zealous prosecutor” whose “experiences combating crime” made her “something of a law-and-order judge” (Oliphant, 2009). In the same article, New York University law professor Kenji Yoshino stated that Sotomayor’s experience as a prosecutor “balances out her liberal tendencies.” A *Washington Post* profile noted that her prosecutorial experience would make her “unique” among her colleagues in regard to the consideration of criminal justice issues (Goldstein et al., 2009), while an editorial by her former colleague Hugh H. Mo in *Politico* argued the importance of “her real world experience . . . as a skilled legal practitioner who not only ruthlessly pursued justice for victims of violent crimes but understood the root causes of crime and how to curb it” (Mo, 2009). Finally, Ohio State Law Professor Douglas Berman, author of the well-regarded Sentencing Law and Policy blog, mused that:

While everyone else talks about how different Judge Sotomayor is from other Justices, I will be thinking about what the notable parallels between Judge Sotomayor and Justice Alito—in particular their shared history as prosecutors—might mean for the criminal justice side of the SCOTUS docket (Berman, 2009).

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This presumed relationship between prosecutorial experience and future decision making falls under the broader umbrella of the social background model, a framework for judging in which extralegal characteristics, rather than the law itself, largely determine the outcome of legal conflicts lacking obvious answers. Among the public and the media, the social background model's popularity likely comes from its clear and salient, if not necessarily valid, heuristics. The premise that prosecutorial background predicts judicial behavior may also affect judicial selection. In criminal-law-and-procedure issues, liberal positions are often less popular than conservative ones. As such, liberal judicial candidates and nominees may face an asymmetric risk of being labeled "soft on crime," while liberal executives might require additional political capital to get them confirmed (Baum, 2003). Experience as a prosecutor, by contrast, may reassure relevant politicians or issue publics that a nominee or candidate's general liberalism, at least in the area of criminal law, will be tempered by pragmatism or "toughness," which they associate with prior prosecutorial experience. President Obama, for example, appears to have adopted this rhetorical strategy in his selection of Justice Sotomayor. For these and other reasons, the appointment of prosecutors to the bench is a common occurrence by both Democrats and Republicans; Goldman et al. (2000), for example, found that roughly 40 percent of President Clinton's lower-court appointees had a prosecutorial background.

Though popular among the public and the media, the social background model has fared considerably worse in empirical legal studies. While some older studies focused on social background and found meaningful relationships (Tate, 1981; Ulmer, 1975), political science has largely come to focus on the role of ideological attitudes in predicting judicial decisions, at least for appellate judges insulated from public opinion, and in issue areas where a liberal-conservative ideological axis can be sensibly applied. Given these assumptions, the "attitudinal model" (Segal and Spaeth, 2002) has proven remarkably robust in explaining much of the aggregate variance in judicial decisions. By contrast, other aspects of the social background model, such as race, gender, and religion, have generated what one leading survey of the field labels "mixed results" (Heise, 2002), in which multiple studies provide confusing or contradictory pictures on the relationships—or lack thereof—between these variables and particular outcome patterns.

Significantly, the smaller set of older studies that specifically tests the effects of prosecutorial experience on judging—at least at the Supreme Court level—do not suffer from mixed results (Nagel, 1962; Tate, 1981; Tate and Handberg, 1991). Instead, they present a clear, if moderate effect: judges who have been prosecutors are more likely to side with the government in criminal cases. However, the results of these studies should be treated with caution, as they suffer from incomplete data, outdated methods, and omitted-variable bias. Journalists who produce profiles on nominees such as Sotomayor may, of course, rely on their own heuristics rather than empirical legal scholarship. If they did search the existing literature, however, it would only confirm their likely intuitions.

This article reexamines the purported relationship between prosecutorial experience and a propensity for making conservative judicial decisions. I do so with two goals in mind. First, while political science has understandably embraced the attitudinal model almost to the exclusion of other social background factors, it is clear that ideology cannot be the last word on explaining either judicial decisions or judicial behavior more broadly understood. In recent years, empirical investigations of other social background factors have begun to bear fruit either by using more sophisticated methodological techniques (Boyd, Epstein, and Martin, 2010) or by reducing incomparability and examining more narrowly defined issue areas (Brudney, Schiavoni, and Merritt, 1999; Schneider 2002, 2005; Sisk, Heise, and Morriss, 1998). In a similar vein, I seek to expand our understanding of when social background factors provide additional purchase on predicting behavior and when they do not, using the best in contemporary data sets and methods. Second, social science is at its most useful when it attempts to verify empirical claims employed (often casually) by the media and relevant elites in their discussion of political events. The selection of judges is important business; politicians and the public alike should have the best available information when it comes to predicting judicial behavior. The current literature on prosecutorial experience and judicial decision making, however, does not meet that standard.

Examining four decades worth of criminal law and procedure decisions made by both Supreme Court justices and judges on the U.S. Courts of Appeals, I test the systematic impact of prosecutorial background on judicial decision making under multiple specifications. Controlling for ideology and other relevant variables, I find no relationship between prosecutorial background and a greater propensity for siding with the government. While only time will tell if Justice Sotomayor’s approach to deciding criminal justice cases will be closer to Justice Alito than to Justice Stevens, evidence of a general relationship between prosecutorial background and conservative decision outcomes is decidedly lacking. While prosecutorial background may, perhaps, impact other aspects of judicial behavior, when it comes to predicting criminal-case decisions in the aggregate, it is ideology rather than professional background that best explains outcomes.

## INDIVIDUAL BACKGROUND AND JUDICIAL DECISION MAKING

There are at least two mechanisms that might connect prior prosecutorial experience with more conservative judicial decisions. First, time spent as a prosecutor might socialize and shape an attorney’s ideological attitudes toward crime and criminal issues. Socialization has been defined as “the process by which a person acquires the values, attitudes, and behavior patterns of the ongoing social system . . . [or] in a more precise way, to connote a period of time when a person is formally trained to perform a specific task or function” (Carp and Wheeler, 1972:359). The theory of how individual or career background variables might socialize judges is simple and intuitive: formative experiences shape judicial attitudes toward law and politics, which in turn

shape judicial decision making (Segal and Spaeth, 1993:231). This formulation is usually referred to as the “social background model.” Given the salience of social background factors in society at large, scholars understandably moved to examine the effect of race, gender, and religion (e.g., Davis, Haire, and Songer, 1993; Feldman, 2006; Welch, Combs, and Gruhl, 1988), as well as region and career background (Nagel, 1962; Tate, 1981; Tate and Handberg, 1991; Ulmer, 1975).<sup>1</sup> Social background hypotheses also generate attractive heuristics for the media to discuss. Consider, for example, the discussions in both 2005 and 2009 as to the implications of adding additional Roman Catholic justices to the Supreme Court (Cooperman, 2005; Kissling, 2009).<sup>2</sup>

While previous studies examining the effect of prosecutorial experience do not present explicit theories as to why it would lead to more-conservative outcomes, it is easy to formulate a reasonable socialization hypothesis. Liberal rulings on criminal procedure tend to limit what the government can do during the administration of justice, and sometimes raise the costs of prosecution. In his dissent in *Miranda v. Arizona* (1966), for example, Justice Harlan worries that the Court “impairs, if they will not eventually serve wholly to frustrate, an instrument of law enforcement [the confession] that has long and quite reasonably been thought worth the price paid for it” (384 U.S. 436, at 516). Working prosecutors might come to view such constitutional restrictions in a similar light, retaining a more pragmatic and less “liberal” approach toward these constitutional protections once they are on the bench.

However, unlike race or gender, workplace experience is chosen rather than constitutive. As such, the purported connection between such experience and conservative outcomes might instead be explained by a second mechanism, recruitment. Undoubtedly, prosecutors come from both political parties—particularly in places where prosecutorial jobs are viewed as stepping-stones to elected office—and it would be foolish to assume that only conservatives become prosecutors. However, it may be true that the field does not normally attract individuals who are liberal on criminal justice issues. Nominees with prosecutorial experience might thus be liberal in their views regarding equal protection or the economy, but more conservative than the average liberal on criminal justice issues—a fact that would not be captured by the global and admittedly crude measures of judicial ideology used in empirical legal studies.

This second mechanism does not easily fit in the paradigm of the social background model, which purports to predict and explain attitudes and behavior.

<sup>1</sup> A few scholars have additionally considered how a Supreme Court justice’s former career as a politician, prosecutor, or judge might create a “role orientation” that intervenes between attitudes and decision making (Brudney and Ditslear, 2001; Gibson, 1978; Rowland and Carp, 1996). Studies of role orientation, however, have not been widespread.

<sup>2</sup> In a recent example, University of Wisconsin law professor Ann Althouse posed the following hypothetical question for nominee Sotomayor in the *New York Times*: “If a diverse array of justices is desirable, should we not be concerned that if you are confirmed, six out of the nine justices will be Roman Catholics?” (Althouse, 2009).

Unfortunately, distinguishing whether socialization or recruitment would explain a particular statistical correlation is extremely difficult, since we lack data on the actual attitudes and legal policy positions of nominees before and after their time as prosecutors. Successful explanation is thus implausible, if not impossible. However, predictive value is useful in and of itself, even if we cannot fully explain causation. The attitudinal model, for example, does not purport to explain why a judge has liberal or conservative views; as Segal and Spaeth note regarding the frequent use of presidential appointment as a proxy for ideological attitudes, “President Reagan nominated Antonin Scalia because Scalia is a staunch conservative; Scalia is not a staunch conservative because he was nominated by Reagan” (Segal and Spaeth, 1993:232). Despite this, ideological measures well predict judicial behavior (granting certain assumptions) and have generated a host of useful theories and findings.

The predictive value of most social background factors, however, has been modest at best. Sisk, Heise, and Morriss (1998), for example, relate the standard social background theory regarding how a judge’s race might socialize his attitudes toward criminal defendants:

Examination of the possible influence of racial background on judicial behavior remains a standard in empirical research . . . . [T]he thesis has been that African American judges would be more liberal, and that liberal attitudes might make them “more sympathetic to criminal defendants than white judges are, since liberal views are associated with support for the underdog and the poor, which defendants disproportionately are” (Sisk, Heise, and Morriss, 1998:1454).

Empirical studies, however, have found little evidence to support this theory. A judge’s race appears to have little effect on appellate decision making (Uhlman, 1978; Walker and Barrow, 1985), sentencing (Spohn, 1990; Welch, Combs, and Gruhl, 1988), or legal reasoning (Sisk, Heise, and Morriss, 1998). Nor is race unique in its minimal predictive power. Studies that assess the value of gender as a predictor of behavior have produced as many null findings as they have positive ones (Boyd, Epstein, and Martin, 2010). Moreover, not only do social background studies often conflict in regards to whether background characteristics systematically predict judicial decision making, but they also rely on widely different sources of data, ranging from discrimination cases (Davis, Haire, and Songer, 1993) to sentencing decisions (Kritzer and Uhlman, 1977) to criminal convictions (Gruhl, Spohn, and Welch, 1981), making summary statements regarding the impact of social background variables even more difficult to generate. Little surprise, then, that quantitatively minded political scientists have largely, though not completely, shifted to the attitudinal model in their attempts to predict judicial outcomes.

In recent years, the small number of successful social background studies have focused on narrower slices of case law, finding limited but important relationships such as the effect of gender on sex-discrimination-case outcomes (Boyd, Epstein, and

Martin, 2010), the effect of “elite” educational and personal backgrounds on tax (Schneider, 2002, 2005) or National Labor Relations Board adjudications (Brudney, Schiavoni, and Merritt, 1999), and the effects that both criminal defense experience and judicial experience had on judicial reactions to the federal sentencing guidelines (Sisk, Heise, and Morriss, 1998). As Brudney, Schiavoni, and Merritt (1999) conclude regarding the likely future of social background research:

From a scholarly perspective, our analyses suggest that intensive exploration of a single subject matter can best crystallize the complex cross-currents of judicial behavior. Analysis of a data set that focuses on one field of substantive law, and on subdivisions of case outcomes within that field, makes it easier to identify the demographic, socioeconomic, and occupational experiences that appear to influence judicial decisionmaking (pp. 1762-63).

Given all of these problems, it is perhaps surprising that the literature on prosecutorial experience has shown a clear and consistent effect: judges with prosecutorial experience are more likely to reach the conservative outcome than those without such experience (Nagel, 1962; Tate, 1981; Tate and Handberg, 1991). The earliest study, by Stuart Nagel (1962), explores “the empirical relationships between various background and attitudinal characteristics of judges and their decisions in criminal cases.” In a sample of criminal-law-and-procedure rulings from 1955 decided by a mix of federal and state judges, Nagel found that former prosecutors were 14 percent more likely to vote against the defendant.

In 1981, C. Neal Tate performed a more sophisticated multivariate analysis, examining factors that affected Supreme Court decision making in civil-liberties and economic cases between 1946 and 1977. In a social background model that also included age, region, religion, judicial experience, administrative experience, and political experience, Tate found that prosecutorial experience had a strong and negative impact on the likelihood that a justice would favor the “underdog” or liberal position in civil-rights and civil-liberties cases (Tate, 1981). In a later study, Tate and Roger Handberg (1991) more broadly reexamined the impact of background variables in a data set of nonunanimous Supreme Court civil-liberties and economic cases decided between 1916 and 1988. As with Tate’s prior study, they found that prosecutorial experience decreased the likelihood of a liberal decision, although the impact was weaker than before (Tate and Handberg, 1991:472).

Why has this subset of the social background literature produced consistent results when the rest has not? Perhaps the socialization experiences created by prosecutorial experience are narrower and more stable across different individuals than those created by socialization of race, gender, religion, or region. It may also be the case that the relationship between prosecutors’ purported pragmatic distrust of liberal criminal-procedure rules and a higher rate of conservative decision making is better theoretically grounded than other such hypotheses. It is also possible that the prosecutorial studies have simply uncovered a recruitment effect that does not occur with more constitutive characteristics.

Another possibility, however, is that these studies are methodologically flawed. First, they do not adequately control for a judge's likely ideological predispositions. The more recent Tate and Handberg study does its best—using the party of the appointing president and the “ideological intentions” of that president (1991:464-67) as an attempt to control for such propensities. These controls do not, however, meet the standards set by more contemporary measures of ideological attitudes, such as Segal-Cover (1989) or Martin-Quinn (2002) scores. The models also suffer from omitted-variable bias, lacking adequate controls for variables that legal scholars now believe systematically affect judicial decision making, such as issue salience (Epstein and Segal, 2000), the Supreme Court's penchant for reversing the cases it takes (Perry, 1991), or the relative resources of the parties to the suit (Sheehan, Mishler, and Songer, 1992). Finally, these studies relied solely on the rarified tier of Supreme Court decisions, making broader generalization problematic. Expanding the analysis to the U.S. Court of Appeals (as I do here) would provide greater confidence in its findings. Effects previously attributed to background characteristics, such as prosecutorial experience, may thus disappear once better models are used.

Revisiting the purported relationship between prosecutorial background and judicial decisions serves two goals. First, it continues to advance the narrower predictive approach to testing the social background model advocated by Brudney, Schiavoni, and Merritt (1999), looking for specific, targeted relationships in data sets narrower than “all cases,” or even “civil rights and liberties cases.” Will prosecutorial experience become another building block in this new vein of research? Alternatively, is this instead an area where the attitudinal model best predicts outcomes, or will the analysis suggest, as Ashenfelder, Eisenberg, and Schwab (1995) found in their study of district court outcomes, that both social background variables and ideology have little impact whatsoever?

Second, the study addresses the popular and apparently enduring contention that prosecutorial background has predictive value for future judicial decision making, as recently seen in coverage of the Sotomayor nomination. While the social background model has not produced clear or consistent empirical results, it remains popular among those segments of the public, the media, and legal elites who are not familiar with empirical legal studies, i.e., most people. Moreover, this belief undoubtedly plays a role in how governors or presidents sell their nominees, or how candidates for judicial election sell themselves. By revisiting a venerable literature in need of updating, I hope to provide a clearer answer as to whether these beliefs are justified.

## PROSECUTORIAL EXPERIENCE AND JUDICIAL DECISION MAKING— DECISION MODELS

While prior studies testing for prosecutorial impact used a broader set of civil-rights and civil-liberties decisions, here I specifically select for criminal cases. I do so to provide a better test for the prosecutorial hypothesis. There is no good reason to expect former prosecutors to have more conservative views on the First Amendment, racial

equality, or abortion than other judges, unless one accepts the somewhat dubious theory that career experience as a prosecutor universally socializes one to support the “powerful” over the “little guy,” in the language of standard attitudinal coding (Segal and Spaeth, 2002), or that the prosecutorial career attracts lawyers who are universally more conservative than their fellows. By contrast, restricting the scope of the analysis to criminal cases makes better theoretical sense. If one believes that socialization drives the relationship between work experience and outcomes, it is reasonable to assume that prosecutors might react skeptically toward liberal rulings that constrain their own institutional powers. Such skepticism might endure after their rise to the bench, influencing their broader worldview in criminal cases. By contrast, if it is recruitment that drives such a relationship, it may very well be that a prosecutorial position is a poor fit for someone with highly liberal views on criminal law and procedure, but not for individuals with liberal views on the economy, free speech, or abortion. Furthermore, focusing on criminal-procedure cases speaks to the area of case law that pundits, media accounts, and politicians consider most relevant to a prosecutorial background. Finally, narrowing the case set reduces, though certainly does not remove, the dangers of incomparability, which Brudney, Schiavoni, and Merritt (1999) and Sisk, Heise, and Morriss (1998) argue is important for teasing out meaningful statistical relationships.

In what follows, I describe two sets of judicial-decision-outcome models: one for the U.S. Courts of Appeals, and another for the Supreme Court. Previous studies focused only on the Supreme Court, which while certainly important, controls only a very small percentage of appeals in the federal court system. Including U.S. Court of Appeals judges will permit the study to draw broader inferences about judicial behavior.

**Appeals Courts—Individual Effects.** First, the model must consider how individual judicial characteristics might impact decision outcomes. The primary hypothesis states that prior prosecutorial experience should make a pro-government or “conservative” decision more likely. Less clear, though, is the particular shape of this relationship. Nagel (1962) and Tate (1981) measure prosecutorial experience in dichotomous terms, either assuming that the socializing effect takes place after a short period of time, and that there is no difference between a one- and fifteen-year career, or that the simple dichotomous fact of choosing a prosecutorial career (or not) explains any effect found. However, a dichotomous variable may be inappropriate. Prosecutorial socialization might instead have a linear effect, where each additional year on the job increases the probability of support for the government on the bench. Alternatively, socializing effects may taper off after some length of time, as a judge with twenty years of experience as a prosecutor might not, in fact, be twice as inclined to take conservative positions as someone with ten years on the job. A third option, then, is to envision a nonlinear relationship, where each additional year of prosecutorial experience adds less to the propensity for a conservative vote than the year before it. Given that I do not know a priori which of these three specifications is superior, I test each in turn.



There are other individual characteristics to include in the appellate model. Both Tate (1981) and Tate and Handberg (1991) found that previous judicial experience made Supreme Court justices somewhat more likely to support liberal positions, although the effect was stronger in economic decisions than in rights-and-liberties cases (Tate and Handberg, 1991). Again assuming no particular shape for the relationship between judicial experience and decision outcomes, I employ each of the three specifications discussed above—dichotomous, linear, and nonlinear—used for the prosecutorial variable. In line with previous findings, I expect prior judicial background to increase the likelihood of a pro-defendant decision.

The decision model also controls for judicial ideology. Doing so requires making a number of assumptions, but ones that past research suggests are reasonable ones. Assuming that judges have legal policy goals (Baum, 1997), that these goals have ideological dimensions, that the correct legal outcome at the appellate or Supreme Court level is often ambiguous, and that a single ideological dimension predominates (Poole, 2003), we would expect judicial decisions to be affected by a judge’s ideological preferences. Prior work on the U.S. Court of Appeals has clearly shown that judicial ideology is a useful predictor of judicial decision making. For example, ideological distance increases the likelihood that an appellate judge will not support a legal rule proposed by another circuit (Klein 2002:74), or will author a separate opinion from the panel majority (Hettinger, Lindquist, and Martinek, 2007; Maltzman, Spriggs, and Wahlbeck, 2000:63). Ideology is a stronger predictor of judicial behavior when the legal area in question is salient (Collins, 2008; Hettinger, Lindquist, and Martinek, 2007) and where the primary fault lines within the doctrine in question match the standard liberal-conservative ideological paradigm (Haire, Songer, and Lindquist, 2003). Broadly speaking, criminal-law-and-procedure decisions meet both criteria. Intuitively, I hypothesize that more conservative judges will be less likely to side with the defendant.<sup>3</sup>

There may also be differences in how new, or “freshman,” judges rule in these cases. First, if socialization does lead former prosecutors to decide these cases differently, these effects might diminish or change in the face of *judicial* socialization (e.g., Carp and Wheeler, 1972). There may be a difference, then, between the decisions of newly appointed judges with prosecutorial experience and judges with additional years on the bench under their belt. Second, new judges may face an “acclimation effect” (Brenner and Hagle, 1996), in which their patterns of opinion writing or tendencies to author separate opinions (Hettinger, Lindquist, and Martinek, 2003) have more instability and variance than in later years. Both of these arguments dictate including a variable for freshman judges. Given that prior judicial experience has been thought to ameliorate the pro-government tendencies that allegedly come from prosecutorial

<sup>3</sup> One might wonder if ideology will differently impact criminal appeals that involve constitutional, as opposed to statutory issues. In the Supreme Court, at least, Ward Farnsworth has found a 97 percent correlation between the justices’ voting records in the two areas (Farnsworth, 2005:71). Such extraordinary agreement suggests that the two areas can be treated as a single group of cases.

experience (Tate, 1981; Tate and Handberg, 1991), I tentatively theorize that freshman judges, particularly those with prior prosecutorial experience, will be more likely to side with the government.

One other individual effect deserves inclusion. Though race has generally been a poor predictor of judicial behavior, studies researching the impact of gender have had more luck in finding significant relationships, especially in narrower areas such as in employment discrimination (Boyd, Epstein, and Martin, 2010; Davis, Haire, and Songer, 1993), labor disputes (Brudney, Schiavoni, and Merritt, 1999), and tax law (Schneider, 2002). In each of these studies, female judges were more likely to make “liberal” decisions, having a higher probability of siding with plaintiffs, unions, and taxpayers. As with prosecutorial experience, there are at least two different accounts of why female judges might decide cases differently than their male counterparts. Some feminist theorists have argued that men and women develop distinctly different worldviews, with women possessing a “different voice” that leads to contrasting views of human and societal connection (Gilligan, 1982). This all-encompassing worldview might lead to more empathy for the powerless, different views on sentencing or procedural justices, and so on. Others argue that men and women have had different socialization and development experiences, and thus rely on different information and possess different schemas in particular sets of circumstances, e.g., sex-discrimination cases, where these divergent life and work experiences are relevant (Gryski, Main, and Dixon, 1986; Thomas, 1989; Welch, 1985). This premise implies that gender would matter most in those legal areas where such divergent life experiences would be relevant; this would not, presuming the typical life and work experience of the average judge, include criminal cases. In general, gender has not been shown to have tangible effects on judicial outcomes in criminal cases (Davis, Haire, and Songer, 1993; Gruhl, Spohn, and Welch, 1981), but its success in some studies argues for its inclusion in this model.

***Appeals Courts—Case Effects.*** Case-level factors also play an important role in a judge’s decision (Segal, 1986). I include three such factors in the appellate decision model. First, I partially control for the resources of the various parties, assuming indigent individuals represented by appointed legal counsel should be more likely to lose their appeals than rich individuals or organizations that either have significant resources or are more likely to be “repeat players” (Galanter, 1974). Second, I provide a control for the resources of the prosecuting authority, hypothesizing that the greater resources of state and federal prosecutors should increase their chances of success relative to cases brought by local authorities. Third, I control for the direction of the decision of the lower court, accounting for the deference often given to district court judges by appellate courts.

***Appeals Court—Institutional Trends.*** The appellate model further controls for temporal and institutional factors, including the year the case was decided, capturing precedent and other factors that affect appellate-level decisions over time, and for the circuit in which the decision occurred, capturing differences in circuit rules or norms.

I have no directional hypotheses for any particular time trend or for any particular circuit. I also include controls for the Supreme Court’s recent treatment of a particular circuit’s criminal decisions. The chance of any particular court of appeals decision being reviewed and overturned by the Supreme Court is vanishingly small. That said, in theory, judges might worry that negative oversight would lead relevant audiences to lose confidence in their judgments and adversely impact their career paths (Baum, 2006; Caminker, 1994). I account for this possibility by controlling for the number of times over the past two years that the Supreme Court either reversed or vacated a circuit’s decisions in criminal cases. I hypothesize that as recent reversals in a liberal direction increase, the probability of a pro-defendant ruling increases, and vice-versa for recent reversals in a conservative direction.

Finally, the decision model must grapple with the collegial nature of the U.S. Courts of Appeals: judges care not only about their own views of law or legal policy, but also about the working relationships they have with judges on the immediate panel and in their circuit (e.g., Cross and Tiller, 2007). Hettlinger, Lindquist, and Martinek (2007), for example, have found that a circuit’s recent propensity for reversing district court decisions affected its present probability for the same. Since neither judicial ideology nor workload had significant explanatory power in their model (pp. 98-99), the authors assume that these circuit effects are best explained by a desire to be collegial.<sup>4</sup>

In practical terms, this means that judges may join a majority opinion with which they substantively disagree to promote comity among the panel or within the circuit. Collegiality might, therefore, mask the degree to which prosecutorial background shapes a judge’s sincere preferences, complicating the task of examining of whether former prosecutors feel differently about criminal cases than their fellow judges. To deal with this potential confounding effect, I run an alternative specification of my models in which I restrict the unit of analysis to votes by majority opinion authors. While this strategy does not completely control for collegiality effects, collegiality should have a stronger effect on a judge’s decisions to join opinions they did not write, and a lesser one on masking their sincere preferences in opinions they compose. The results for this specification are largely indistinguishable from the main model (see Appendix B; available via e-mail from the author).

**Supreme Court Model.** The Supreme Court model somewhat mirrors the appellate model at the level of individual effects. As before, the unit of analysis is the justice-vote in criminal cases. The Supreme Court model includes the same measures of both prosecutorial and judicial background employed in the court of appeals model. The model similarly includes a proxy measure for a judge’s ideology within a liberal-conservative spectrum. Given that Supreme Court decisions are not subject to further review and that modern Supreme Court justices have no further career aspirations, the

<sup>4</sup> This finding, note, contrasted with earlier studies that only examined civil-rights cases, as opposed to a broader sample of all cases (Haire, Songer, and Lindquist, 2003). As such, the more recent study does not negate the need to include ideology in this decision model, which will look at a subset of rulings that include significant rights-and-liberties concerns.

**Table 1**  
**List of Variables and Expected Impact on Probability of a Liberal**  
**(Pro-Defendant) Decision for Criminal Cases**

<b>Appellate Model</b>		<b>Supreme Court Model</b>	
<i>Model Variables</i>	<i>Expected</i>	<i>Model Variables</i>	<i>Expected</i>
<i>Direction</i>		<i>Direction</i>	
Prosecutorial experience	-	Prosecutorial experience	-
Prior judicial experience	+	Prior judicial experience	+
Ideology (more conservative)	-	Ideology (more liberal)	+
Freshman judge	-	Lower-court liberal decision	-
Female	+	Federal versus local	-
Federal versus local	-	State versus local	-
State versus local	-	Saliency	none
Defendant has resources	+	Defendant has resources	+
Ideology of lower court (liberal)	+	Liberal SG amicus brief	+
USSC reversals (liberal)	+	Conservative SG amicus brief	-
USSC reversals (conservative)	-	Year	none
Year	none		
Circuit	none		

**Note:** “Expected direction” refers to whether the variable is expected to have a positive, negative, or no hypothesized impact on the probability of a liberal decision.

impact of sincere ideological preferences should be even stronger at the Supreme Court level (Segal and Cover, 1989; Segal and Spaeth, 2002). For each of these three variables, the hypothesized direction of impact is the same as in the appellate model. Gender and race were not included in the Supreme Court model, as there is insufficient variation among the justices to merit their inclusion.

The Supreme Court model also contains case-level variables, although somewhat different ones than the appellate model. First, the model controls for the resources of the relative parties, again including both the nature of the prosecuting authority and the relative resources of the criminal defendant. The hypothesized relationships for these variables are the same as in the appellate model. Second, it is well-established that the Supreme Court’s discretionary docket encourages its members to select appellate decisions that they wish to overturn (Perry, 1991; Segal and Spaeth, 2002). As such, the model includes a control for the ideological direction of the lower court’s decision. In tune with previous findings, the Supreme Court, at least within the issue area and time frame of this study, should be more likely to overturn appellate decisions that support the defendant. Third, the Supreme Court model includes a measure of political saliency, controlling for the possibility that the effect of ideology,

judicial background, or other variables differs for cases deemed politically salient (Collins, 2008). Salience has no predicted direction of impact on the dependent variable. Fourth, Supreme Court justices have been shown to disproportionately side with the solicitor general when he takes a position on the case before them (Caldeira and Wright, 1988; Johnson, 2003; McGuire, 1998). As such, the model controls for when the solicitor general files a brief of *amicus curiae* in favor of the prosecuting authority's position, as well as the much less frequent occurrence when such a brief is filed supporting the defendant. Finally, as with the appeals court model, I control for temporal trends.

Table 1 summarizes the variables in each model and provides the expected direction, if any, of their impact on the decision. A full account of the descriptive data appears in Appendix A (available via e-mail from the author).

## DATA, VARIABLES, AND MODEL SPECIFICATIONS

**Appeals Court Model.** For the appellate model's data, I use Songer's U.S. Courts of Appeals Database, which annually samples the universe of published appellate opinions from each federal circuit.<sup>5</sup> Drawing on cases decided from 1953 to 2002, I sort for criminal cases with signed opinions; the unit of analysis is the judicial vote. I drop 24 votes in which the database coders could not identify the decision outcome. To employ contemporary measures of judicial ideology, I drop 355 votes where the U.S. Court of Appeals judge was appointed before 1937 or where the district judge sitting by designation was appointed before 1945 (the years in which the model's judicial ideology measurements become available), as well as where the judge sitting by designation came from a specialized circuit for which no ideological measures are available. Finally, I drop 331 votes where the database both did not properly identify the judge in question and did not contain sufficient information to either locate the decision or identify the opinion author.<sup>6</sup> All in all, the final appellate data set contains 11,130 distinct criminal-procedure votes, including 822 votes made by district judges sitting by designation.<sup>7</sup>

The dependent variable employs Songer's coding for decision outcomes, which has three categories. The low and high outcomes present a clear victory for the government and the defendant, respectively. The middle category codes for ambiguous outcomes, such as where a defendant loses one motion within the decision but wins

<sup>5</sup> The Songer database randomly samples a fixed number of cases—15 before 1960, and 30 thereafter—from each circuit in each year. As such, sampling weights must be calculated (using the proportion of cases drawn against the universe of published cases from that circuit in a given year) to recreate the properties of random sampling. Weights were added to the model using Stata's "pweight" option, except when calculating predicting probabilities under CLARIFY, where the "aweight" option was used. For more details, see pages 8-10 of the original Songer codebook, available online at: [http://www.cas.sc.edu/poli/juri/cta\\_codebook.pdf](http://www.cas.sc.edu/poli/juri/cta_codebook.pdf). The database itself is available at <http://www.cas.sc.edu/poli/juri/appctdata.htm>.

<sup>6</sup> The large majority of these dropped judge-votes were made by district judges sitting for designation.

<sup>7</sup> Rerunning the model both containing a dummy variable for district judges and omitting these judges from the data produced no meaningful changes in the model estimates.

another. The dependent variable is thus deemed ordinal in nature, with each category being successively more favorable for the defendant than the category below it. As such, ordered logistic regression with robust standard errors clustered on the judge is an appropriate estimation model.<sup>8</sup>

I used data from the Appeals Court Attribute Database compiled by Zuk, Barrow, and Gryski to obtain information on judicial background variables.<sup>9</sup> I begin with the critical independent variable, prosecutorial background, which here requires at least one full year of service as a former state or local prosecutor; district, city, or county attorney; United States attorney; or special prosecutor.<sup>10</sup> As discussed above, prosecutorial experience might affect judicial decision making in a dichotomous, linear, or nonlinear fashion. I thus provide three iterations of this variable: first, a dummy variable for any judge who meets the coding criteria; second, a linear variable that counts the years of appropriate prosecutorial experience; and third, a variable that takes the square root of these years of experience. I specify a separate decision model for each of these three variations. Prior judicial experience is coded in similar fashion, given one or more years of prior service as a former state high- or lower-court judge, local or municipal judge, federal district judge, federal magistrate judge, or federal bankruptcy judge.

In line with recent studies that test for social background effects (Boyd, Epstein, and Martin, 2010), I employ Judicial Common Space (JCS) scores (Epstein et al., 2007) to control for the effects of presidential appointment and judicial ideology. JCS measures use the Giles method for scoring federal appellate and district judges (Giles, 2001), giving them a score that corresponds to their appointing president's DW-NOMINATE score,<sup>11</sup> except when senatorial courtesy dictates deviation from that presi-

<sup>8</sup> The dependent variable does fail the proportional-odds assumption in the ordinal logit model, and so the models were rerun using multinomial logit (see Appendix C; available via e-mail from the author). In general, the multinomial models did not present substantive differences in the sign, significance, or relative impact of the model coefficients. The primary difference is that judicial ideology is a strong and significant predictor in the comparison between pro-defendant and pro-government decisions, but a weak and insignificant predictor in the comparison between pro-defendant and "mixed" decisions. I thus opted to retain the ordinal regression results for the purpose of clearer presentation.

<sup>9</sup> The Auburn Appeals Court Attribute Database is freely available for download at <http://www.cas.sc.edu/poli/juri/auburndata.htm>. Some significant data cleaning was necessary for the two databases to properly sort along the unique identification numbers created for each appellate judge; random samples of the merged data were successfully checked against the Federal Judicial Center's online biography of federal judges, available at <http://www.fjc.gov/public/home.nsf/hisj>. This online database was also used to fill in missing background data, as well as for coding the attributes of district judges sitting by designation.

<sup>10</sup> My coding here specifically excludes prior experience as a member of the Justice Department, state or federal attorney general, state or federal solicitor general, city attorney, or corporation counsel as meeting the definition of prosecutorial experience. Admittedly, some of these positions deal with criminal issues, but none gain the sort of extensive prosecutorial experience I wish to test here. In cases where the title was somewhat amorphous (e.g., "county attorney"), the position was researched to see if the position entailed significant prosecutorial responsibilities. Data on the prosecutorial background of each judge was individually checked against data from the Federal Judicial Center, *supra* note 9, to ensure reliability.

<sup>11</sup> DW-NOMINATE scores are freely available at <http://www.voteview.com/DWNOMIN.HTM>.

dent’s ideal point.<sup>12</sup> JCS scores range from negative (liberal) to positive (conservative). Dummy variables were also created for freshman judges, in which judges who had two or less years of experience on the bench were coded as 1, and for gender, which codes female judges as 1.

To control for the effect of defendant resources, I use Songer’s litigant codings, which note evidence of poverty or a probable lack of resources.<sup>13</sup> When the defendant (normally the appellant) is an individual who is not coded as “presumed wealthy,” or when the opinion provides no evidence of noteworthy resources, I code defendant resources as 0; all other defendants, including individuals where there is information regarding personal wealth, or for groups or businesses, I code as 1. To include a measure of government resources in the model, I provide dummy variables for whether federal or state governments were the prosecuting authority, using local prosecutors as the reference category. The ideological direction of the trial court decision was scaled from 1 (conservative) to 2 (mixed) to 3 (liberal), and was calculated using the ideological direction of the appellate decision and the appellate treatment (e.g., affirm or reverse) of the lower court’s ruling. The controls for recent Supreme Court treatment of a circuit’s criminal decisions come from the online Supreme Court database (Spaeth et al., 2010). For each year, I select all Supreme Court criminal-case decisions that reverse, reverse and remand, vacate, and vacate and remand a given circuit’s prior decisions. I then sort this negative treatment into two variables: one that counts the running average of negative treatments in a liberal direction over the previous two terms, and one which so counts in a conservative direction.<sup>14</sup>

Finally, the model contains the year of the vote to control for temporal trends, as well as a set of separate dummy variables for the circuit in which the judge is located, with the First Circuit omitted as the reference category.

**Supreme Court Model.** For the Supreme Court model, I draw justice-votes from the Spaeth United States Supreme Court database, specifically the justice-centered version where the judicial decision is the unit of analysis. To employ a set of useful control variables compiled by Paul Collins,<sup>15</sup> I select justice-votes cast between 1946 and 1995. As with the appellate court model, I select for criminal cases. The dependent variable is a dummy variable coded as 1 for liberal or pro-defendant decisions, and

<sup>12</sup> Specifically, if the senator from the nominee’s home state is of the same party as the president, Giles assigns that judge the senator’s DW-NOMINATE score (or the average of two senators, if applicable), rather than the president’s. If neither Senator is of the president’s party, the judge is assigned the president’s score. See Epstein, Segal, and Westerland (2007:4-5) and Giles (2001) for more details.

<sup>13</sup> This variable is drawn from Songer’s APPEL1 and RESPOND1 variables, where the fifth of a five-digit code describes the litigant’s presumed resources. For more details, see the codebook for the Songer database at <http://www.cas.sc.edu/poli/juri/appctdata.htm>.

<sup>14</sup> The model was also run using a three-year running average and the raw reversal numbers from the previous term, as well as using a single variable, which subtracted the number of liberal reversals from the number of conservative reversals. These alternative specifications did not lead to any substantive differences in the model estimates.

<sup>15</sup> This version of the Spaeth database ranges from the start of the Vinson Court through 1995. It was compiled by Paul Collins, and is available on his homepage at <http://www.psci.unt.edu/~pmcollins/data.htm>.

0 for conservative or pro-government decisions. Unlike the U.S. Courts of Appeals model, there is no “middle” category; the literal handful of decision outcomes deemed by Spaeth as ideologically “unclassifiable” were dropped from the data, which ultimately contained 11,030 separate justice-votes. The dichotomous nature of the dependent variable calls for using logistic regression to estimate the model, with robust standard errors clustered on the justice.

Using the U.S. Supreme Court Justices database (Epstein et al., 2007), I construct the dichotomous, linear, and nonlinear measures of prosecutorial and judicial experience described in the prior section. The ideology of the justices was measured using Segal-Cover scores, which range from zero (most conservative) to one (most liberal), and code for the perceived ideology of the Supreme Court nominee through the examination of multiple newspaper editorials (Segal and Cover, 1989). Segal-Cover scores have limitations, as they assume a stable ideological stance throughout a justice’s career and are compiled from relatively few data points. However, they have the crucial benefit of being independent from judicial votes, which makes them well-suited for inclusion in models where a decision on the merits is the dependent variable. Moreover, they have been shown to have considerable predictive power in rights-and-liberties cases (Epstein and Mershon, 1996), such as those examined here.

As before, the Supreme Court model includes dummy variables for whether the case involved state, federal, or local prosecutors to control for government resources. The litigant resources of the criminal defendant rely on an ordinal scale developed by Sheehan, Mishler, and Songer (1992) and adapted by Collins (2008), where increasing numbers equate with increasing resources.<sup>16</sup> The ideological direction of the lower court’s decision is drawn from the appropriate dummy variable within the Spaeth database. Salience is captured using the approach suggested by Brenner and Arrington (2002), which measures in ordinal fashion whether the decision is featured on the front page of the *New York Times* the day after it was decided (Epstein and Segal, 2000), whether the decision makes *Congressional Quarterly’s* annual list of important cases (Brenner and Arrington, 2002), or both. Involvement by the solicitor general is controlled by the inclusion of two dummy variables, measuring whether the solicitor general files a brief supporting the liberal or the conservative position, respectively. As with the appellate model, potential temporal effects are controlled by a counter variable for the term in which the case was decided.

## RESULTS

The results for the three appeals court and three Supreme Court models can be seen in Tables 2 and 3, respectively.

In the U.S. Court of Appeals model, prosecutorial experience does not correlate with any particular pattern of outcomes; across the three specifications, the coefficient

<sup>16</sup> The classification of litigant resource groups, in ascending order, is coded as follows: 1 = poor individuals, 2 = minority individuals, 3 = other individuals, 4 = unions/interest groups, 5 = small businesses, 6 = businesses, 7 = corporations, 8 = local government, 9 = state government, 10 = federal government.



**Table 2**  
**Ordered Logit Estimates on the Probability of a Pro-Defendant Outcome**  
**in U.S Courts of Appeals Criminal Cases, 1953-2002**

	(1) Dummy Variable	(2) Square Root of Career Years	(3) Career Years
Prosecutorial experience	0.006 (0.050)	0.013 (0.020)	0.007 (0.006)
Prior judicial experience	-0.082 (0.052)	-0.015 (0.016)	-0.002 (0.004)
Ideology (conservative)	-0.377*** (0.083)	-0.384*** (0.083)	-0.386*** (0.083)
Freshman judge	0.080 (0.073)	0.082 (0.072)	0.081 (0.072)
Gender (female)	-0.062 (0.109)	-0.064 (0.109)	-0.064 (0.109)
Defendant resources	0.067 (0.087)	0.066 (0.087)	0.066 (0.087)
State jurisdiction	0.074 (0.165)	0.073 (0.165)	0.073 (0.165)
Federal jurisdiction	-0.153 (0.154)	-0.154 (0.154)	-0.154 (0.154)
Ideology of lower court (liberal)	0.566*** (0.037)	0.566*** (0.037)	0.566*** (0.037)
Two-year average liberal reversals	-0.157*** (0.042)	-0.156*** (0.042)	-0.156*** (0.042)
Two-year average conservative reversals	0.042 (0.026)	0.043 (0.026)	0.044 (0.026)
<i>N</i>	11,130	11,130	11,130

Robust standard errors in parentheses  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

**Note:** The dependent variable, the decision outcome, codes pro-government decisions as 1, mixed results as 2, and pro-defendant outcomes as 3. The data comes from the Songer Appellate Court Database and the Auburn judicial background dataset. Ideology is measured by Judicial Common Space (JCS) scores (Epstein et al., 2007), where increasing scores indicate increasing conservatism. The category of “local jurisdiction” was omitted from the model as the reference category. The constant, model cut-points, year, and circuit dummies were also omitted to conserve space.

is negligible, inconsistently signed, and statistically insignificant (see Table 2). Judicial experience is similarly unhelpful. By contrast, ideological measures are a strong predictor in these cases. As the attitudinal model would predict, liberal judges are more

likely to side with the defendant, while conservatives are more likely to side with the government. The impact of ideology can be made clearer using predicted probabilities. I employ the CLARIFY program developed for Stata (Tomz, Wittenberg, and King, 2001), simulating the probabilities for a pro-defendant vote when the ideology measure is at its data maximum (the most conservative judge) as well as its minimum, holding the other model variables at their mean.<sup>17</sup> For the most liberal judge, the simulated probability of a pro-defendant vote was 23.72 percent; by contrast, the most conservative judge had only a 15.82 percent probability of siding with the defendant.<sup>18</sup> While these changes are not overwhelming, given that defendants tend to lose their appeals regardless of who presides over their case, they are certainly meaningful.

The two other judicial background variables, namely, gender and “freshman” status, do not produce significant estimates. The lack of significance for the gender variable can support both the broader argument that gender has little systematic effect on outcomes as well as the more nuanced information theory, which argues that gender will only factor into cases where divergent life experiences lead men and women to view legal problems differently. Arguably, criminal law is not such an area. Finally, both Tate (1981) and Tate and Handberg (1991) found evidence that former prosecutorial career experience interacted with prior judicial experience, weakening the liberalizing effect of the latter. In the courts of appeals model, at least, these interactions do not approach statistical significance, nor do a number of other tested interactions between relevant model variables.<sup>19</sup>

As for the case-specific variables, defendant resources, while correctly signed, does not reach statistical significance, nor do the jurisdiction variables that stand in for government resources. As expected, appellate judges were likely to support the lower court’s decision regardless of whom it had favored. The influence of Supreme Court reversals also impacts these decisions, at least those which reverse on behalf of the liberal position, but while the correlation is highly significant, the estimate is signed in the opposite of the hypothesized direction. In other words, U.S. Court of Appeals judges were more likely to decide criminal cases in the conservative direction in the wake of recent liberal reversals by the Supreme Court. This result is somewhat difficult to explain. On one hand, it may support, as some scholars have argued, that while U.S. Court of Appeals judges certainly care about making good legal decisions and fol-

<sup>17</sup> This program allows the user to simulate predicted probabilities for a model, and then tinker with the values of variables of interest to examine the impact of these changes on the predicted outcome. For a fuller explanation, see King, Tomz, and Wittenburg, 2000.

<sup>18</sup> For the most liberal judge, there was a 67.7 percent predicted probability of supporting the government, an 8.52 percent chance for a mixed result, and a 23.72 percent chance of supporting the defendant. For the most conservative judge, the probabilities include a 77.67 percent chance of supporting the government, a 6.51 percent chance of a mixed result, and a 15.82 percent probability of supporting the defendant. This simulation was run in the first model specification using dummy variables for prosecutorial and judicial experience; the other specifications presented similar predicted probabilities.

<sup>19</sup> The tested interactions include prosecutorial experience \* prior judicial experience, prosecutorial experience \* ideology, prosecutorial experience \* gender, prosecutorial experience \* freshman, and ideology \* gender. All of these interactions were statistically insignificant at the  $p < .05$  level.

**Table 3**  
**Binomial Logit Estimates on the Probability of a Pro-Defendant Outcome**  
**in U.S. Supreme Court Criminal Cases, 1946-1995**

	(1) Dummy Variable for Career	(2) Square Root of Career Years	(3) Career Years
Prosecutorial experience	0.111 (0.080)	0.061** (0.019)	0.016*** (0.003)
Prior judicial experience	-0.051 (0.053)	-0.028 (0.015)	-0.009* (0.004)
Ideology (liberal)	0.227* (0.103)	0.225* (0.099)	0.212* (0.101)
State jurisdiction	-0.252*** (0.076)	-0.253*** (0.076)	-0.253*** (0.076)
Federal jurisdiction	-0.822*** (0.088)	-0.823*** (0.088)	-0.822*** (0.088)
Defendant resources	-0.004 (0.012)	-0.003 (0.012)	-0.003 (0.012)
Ideology of lower court (liberal)	-1.241*** (0.025)	-1.236*** (0.026)	-1.238*** (0.026)
Salient case	-0.069 (0.050)	-0.071 (0.050)	-0.071 (0.050)
SG Brief for defendant	1.488*** (0.172)	1.489*** (0.171)	1.489*** (0.171)
SG Brief for government	-0.910*** (0.031)	-0.910*** (0.031)	-0.908*** (0.031)
<i>N</i>	11,030	11,030	11,030

Robust standard errors in parentheses \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$

**Note:** The data for each model come from criminal cases in the Spaeth Supreme Court Database (VALUE=1), specifically the “flipped” judge-vote version compiled by Paul Collins (2008), as well as from the Supreme Court Justices Database (Epstein et al., 2010). Segal-Cover scores, for which higher numbers indicate increased liberalism, are available at <http://www.sunysb.edu/polsci/jsegal/qualtable.pdf>. SG refers to the solicitor general. The category of “local jurisdiction” was omitted from the model as the reference category. The coefficients for court term and the constant were also omitted to conserve space.

lowing precedent, they do not worry overly much about being overturned by the Supreme Court. Indeed, given the difficulty knowing which cases the Court will review, how they will decide those reviewed cases, and whether or not court of appeals judges feel reversals are truly costly, the strategic model may not well apply to the fed-

eral appellate tier (Barnes and Songer, 2008; Klein and Hume, 2003). On the other hand, these results may be explained by problems of incomparability, in which the criminal cases where the Court has recently reversed the circuit's decisions raise different legal issues than those which the Court of Appeals faced in the data. In fact, one can easily imagine a situation where the Warren Court (the period during which most of the liberal reversals take place) overturns key precedent and reverses a circuit's decisions in a liberal direction. Its actions spur legal actors to bring additional challenges in other areas of criminal law in hopes of further liberal decisions, at which point the court of appeals judges faithfully follow existing precedent (making conservative decisions) and are again overturned by the Supreme Court.

Table 3 shows a somewhat different tale than Table 2, although the result similarly shows no sign of any relationship between prosecutorial experience and conservative outcomes.

Noticeably, in the two specifications where prosecutorial experience is measured using interval variables, the model estimate presents statistically significant coefficients. However, and surprisingly, the coefficient is *positive*; in other words, increased prosecutorial experience correlates with a *greater* likelihood of making liberal or pro-defendant decisions. The effect size here is small; for example, using CLARIFY for the linear specification (with other variables at their mean) shows that each additional year of prosecutorial experience increases the chance of a liberal vote by roughly 0.4 percent. Explaining this counterintuitive finding is difficult; part of this effect may be attributed to Justice Warren, who with nineteen years of prior prosecutorial experience under his belt is a strong outlier in the data (the next highest justice had seven years of experience). Removing Warren's votes from the data voids the significance of such experience in the square-root specification, but not in the linear one. Fortunately, it is not necessary to explain these correlations or agree on their validity here. It is enough that they show no evidence of the expected finding, in which prosecutorial experience correlates with a greater propensity for conservative outcomes.

As for the rest of the model, the remaining variables largely present statistically significant coefficients, signed in the hypothesized manner. Liberal justices are more likely to support defendants than conservative ones, though the effect is modest.<sup>20</sup> State jurisdictions are more successful than local jurisdictions in their appeals, and the federal government is more successful still. Liberal lower-court decisions are more likely to be overturned, and the solicitor's general's support seems to increase the chances that a particular party will succeed. Finally, as with the appellate model, and contrary to previous studies examining prosecutorial experience, judicial experience

<sup>20</sup> The Supreme Court model was also run using Martin-Quinn scores, an alternative ideological measure. Martin-Quinn scores are created through a dynamic-item-response model of Supreme Court decisions (Martin and Quinn, 2002). As such, it is generally inappropriate to use these scores to predict those same decisions. Nevertheless, Appendix D (available via e-mail from the author) shows these alternative estimates. Notably, the ideology estimates themselves are correctly signed but no longer significant. The other model variables, however, are substantively unchanged in sign, significance, and relative impact.

does not interact with prosecutorial experience to ameliorate the purported pro-government tendencies of the latter.<sup>21</sup>

## DISCUSSION

Ultimately, these results cannot directly speak to whether prosecutorial background will influence the way Justice Sotomayor or any particular jurist will decide future criminal cases. However, they do cast considerable doubt on the notion that such experience affects case outcomes in the aggregate. As a relatively strong subset of a fractured literature, the purported “law-and-order” effect of prosecutorial experience has long been cited as one of the social background model’s few successes (Heise, 2002). Moreover, as the Sotomayor nomination made clear, the notion that former prosecutors favor conservative legal positions in criminal cases is a common talking point. Finally, politicians may use prosecutorial background as a hedge against charges that a particular nominee is too liberal. The preceding analysis calls these assumptions into question. Either the socialization effects of a prosecutorial background are too weak or too varied to lead to particular patterns of decision outcomes, prosecutorial jobs do not recruit individuals who are particularly inclined toward a more conservative stance on criminal justice issues, or both. Regardless, prosecutorial background is a poor predictor of outcomes.

Naturally, these results do not foreclose the possibility that prosecutorial background affects the judicial process in areas outside the study’s scope. Future research on prosecutorial experience might examine whether different results arise for federal district or state court judges. Other areas of case law might also be examined; perhaps, as Epstein et al. (2005) found in their analysis of Supreme Court rulings issued during time of war, the treatment variable affects a different set of cases than one would expect. It may also be that prosecutorial experience does affect outcomes in some narrower subset of criminal cases. Furthermore, while models that predict decision outcomes remain understandably important within the empirical legal literature, there is obviously more to the judicial process than just outcomes. Former prosecutors might view crucial case facts or write opinions differently than judges who lack such experience. Or, perhaps, opinion writers with such experience are extended additional deference in criminal cases as a result of their experience.

That said, the relevant literature and the assumptions of pundits, politicians, and legal commentators have been based primarily on the purported relationship between

<sup>21</sup> The tested interactions include prosecutorial experience \* prior judicial experience, prosecutorial experience \* ideology, and prosecutorial experience \* case salience. Only the last of these three was significant. In the main model, a justice was less likely (3 percent) to vote for the defendant if the case was highly salient, although the relationship was not statistically significant. The interaction effect (calculated here using the method from Norton, Wang, and Ai, 2004) shows that justices with prosecutorial experience are slightly more likely, in salient cases, to side with the defendant than judges without such experience (mean effect coefficient = .066, mean standard error = .02). While interesting, this effect does not change the overall finding in this study. Indeed, rather than finding that prosecutorial experience correlates with a higher likelihood of siding with the government in criminal cases, it suggests the opposite.

background and decision outcomes. The preceding analysis suggests that they are mistaken. Carefully drawn studies within narrow areas of law have found, and will likely continue to find, predictive relationships between social background variables and specific decision outcomes. Prosecutorial experience, however, is not such an area. It would undoubtedly make for poor copy if the *New York Times* and other media outlets simply quoted Judicial Common Space scores when discussing Supreme Court nominees and predicting their future decisions. But insofar as scholars can forecast the decisions of appellate judges in criminal cases, ideological measures remain the better predictor. **jsj**

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