

***Testing the Supreme Court's
Experience Gap in
Criminal Rights Cases***

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In the May-June 1999 issue of *Judicature*, Judge Stephen Fortunato addresses the issue of Supreme Court justices' criminal defense experience prior to their tenure on the Court.¹ He makes three main points. First, Judge Fortunato argues that none of the current justices have had any experience as defense counsel prior to joining the Court. Second, he contends that this is a problem because about 25% of the Court's docket involve questions about defendant's rights.²

¹ Fortunato, *The Supreme Court's Experience Gap*, 82 JUDICATURE 251 (1999).

² This figure holds for the Warren and Burger Court's as well. Indeed, from 1953-1996 about 23.5% of the Court's docket was comprised of criminal rights cases. See Spaeth, Harold J. *United States Supreme Court Judicial Database 1953-1996*. Terms [Computer File]. 8th ICPSR version. East Lansing, MI: Michigan State University, Department of Political Science [producer], 1997. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1998.

Finally, Judge Fortunato suggests that the large percentage of criminal cases on the docket, combined with the justices' overall lack of experience in this issue area, has led to "bad, bizarre, or confusing decisions..."³ He argues that the Rehnquist Court's criminal rights opinions have been "so devoid of compassion, and so hostile to the fundamental values that have traditionally infused our criminal justice processes, that it is fair to question whether the justices' absence of familiarity with a criminal defense perspective and the economic and social underclass in this country has affected some decisions."⁴

Clearly the Rehnquist Court has been more conservative than the Burger Court, and much more conservative than the Warren Court, when dealing with the rights of the accused. Indeed, while the Warren Court ruled in favor of defendants about 60% of the time, the Burger Court did so only 25% of the time, and the Rehnquist Court does so only about 23% of the time.⁵ Judge Fortunato corroborates this finding by invoking four specific cases where the Rehnquist Court ruled against the defendant's claims. These cases include *Whren v. United States* (1996), *Penry v. Lynaugh* (1989), *United States v. Watts* (1997), and *Victor v. Nebraska* (1994). However, while he raises both an interesting and important question about how justices' pre-Court experience affects their decisions, further analysis is needed to determine whether the findings based on these four cases are generalizable. As such, I seek to determine whether the presence of justices with any experience within the criminal justice system makes the Court more sympathetic to the claims of the accused.⁶

³ Fortunato, 252.

⁴ Fortunato, 253.

⁵ Spaeth, 1998.

⁶ Others have studied the extent to which experience plays a role in how the Court makes decisions. See Tate, *Personal Attribute Models of the Voting Behavior of Supreme Court Justices: Liberalism in Civil Liberties and Economics Cases, 1946-1978*, 75 AMERICAN POLITICAL SCIENCE REVIEW 355 (1981). See also Tate and

I begin where Judge Fortunato begins – with an analysis of justices' pre-Court activities. Fortunato argues that "no member of the present Court ever defended a person accused of a felony..."⁷ This is accurate, but it is also true that that since 1953 only Justices Black and Frankfurter had this type of experience. Indeed, Frankfurter is famous for his defense in the trial of Sacco and Vanzetti, and Black is famous for his cross-examination skills.⁸ Even those justices who were considered to be the friendliest to criminal defendants (Brennan, Douglas, Fortas, Marshall, and Warren) had no trial experience in this realm of law. This is seen in Table 1.

[Table 1 about here]

Table 1 also explicates which justices were involved in criminal law as prosecutors or judges before their tenure on the Court. I code a justice as having prosecutorial experience if she was a city or county prosecutor, was either an attorney general or an assistant attorney general at the state or federal level, or was a state attorney or United States attorney.⁹ Of the 29 justices in the sample, almost half held such a position prior to joining the Court. Note that this does not necessarily imply that they prosecuted criminal cases. However, I assume that at least some of the justices handled these types of cases as prosecutors. As Fortunato points out, at least Justice Souter prosecuted felonies when he was an assistant attorney general in New Hampshire.¹⁰ I also determine the extent to which the justices sat as trial judges prior to their Supreme Court tenure. Only five of the 29 justices fall into this category. Overall, 16 of the 29 justices in the sample

Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior*, 1916-88, AMERICAN JOURNAL OF POLITICAL SCIENCE 460 (1991).

⁷ Fortunato, 253.

⁸ Fortunato, 251.

⁹ To determine experience, I used Epstein et al., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS (Washington D.C.: Congressional Quarterly Press, 1998).

¹⁰ Fortunato, 251.

had some experience in the criminal justice system before matriculating to the high bench. So, while few have had criminal defense experience, more than half of the justices from the Warren, Burger, and Rehnquist Courts have been involved in this part of the judicial system in some capacity.

The next step is to determine whether or not having experience as a judge, prosecutor, or defense counsel affects the Court's criminal rights decisions. Initially, I turn to Figure 1, which shows the percentage of Supreme Court criminal rights cases decided in favor of the defendant between 1953 and 1994. It also shows the percentage of justices who had experience in the criminal justice system prior to joining the Court. Several findings are notable. First, there is great variation in the number of cases decided in favor of the defendant, and little variation in the number of justices who have had criminal defense or trial judge experience.

[Figure 1 about here]

Second, there is a clear relationship between the percentage of justices with prosecutorial experience and the percentage of liberal criminal rights decisions made by the Court. That is, as the Court is comprised of more justices with previous experience as prosecutors, its decisions are more likely to favor the rights of the accused. Third, there is also a relationship – although it is less clear – between the number of justices with trial judge experience and the Court's willingness to favor defendants.

Finally, there is little relationship between having justices with criminal defense experience and how often the Court favors the claims of the accused. Indeed, even when both Frankfurter and Black sat on the Court there were years where the Court was less than sympathetic to defendants. Additionally, even though no justice has had criminal defense experience since Hugo Black left the Court in 1971, the Court has still ruled in favor of

defendants more than 40% of the time during 6 terms, and close to that percentage in several other terms. In general, Figure 1 suggests that experience may be related to how the Court rules in criminal rights cases, but only prosecutorial and judicial experience seem to have an effect.

To test the tentative findings from Figure 1 I use a multivariate regression model to more fully account for those factors that may influence the Court's criminal rights decisions. The dependent variable is the percentage of cases decided in favor of the accused between 1953 and 1994. By decisions in favor of criminal defendants I am talking about decisions opposite of what Fortunato calls bad or bizarre decisions.¹¹ That is, Fortunato seems to operationalize bad decisions as those where the Court denies the claims of the accused. Thus, he seems to operationalize good decisions as those that favor the defendant. For my analysis I operationalize liberal decisions as those where the Court rules in favor of the defendant, and conservative decisions as those that favor the state. This is consistent with Fortunato's claim.

The model includes four explanatory variables. First, I include measures for the total number of justices per term who have criminal defense, prosecutorial, or trial judge experience prior to joining the Court. Additionally, I include a measure to control for the Court's ideology.¹² Table 2 presents the results of this analysis.

[Table 2 about here]

Several findings are notable in this model. First, there is little relationship between the number of justices with criminal defense experience, and the Court's decisions in this area of law. Indeed, this variable does not reach statistical significance, and is signed incorrectly. That

¹¹ Fortunato, 252.

¹² My measure of ideology is based on ideological scores created by Segal and Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AMERICAN POLITICAL SCIENCE REVIEW 557 (1989). , as adjusted by Epstein, and Mershon, *Measuring Political Preferences*, 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 261 (1996). Note that Epstein and Mershon warn against using these scores outside of civil liberties

is, a negative relationship exists between the number of justices who were defense counsel and the Court's support of the accused. This cannot be a definitive conclusion as only two justices in the sample have had such experience, but the result is suggestive.

Second, I find that as the number of justices with prosecutorial experience increases the Court is more likely to rule in favor of the accused. This is a counterintuitive finding, because one would expect past prosecutors to be more conservative when dealing with the criminally accused. Finally, note that the model is overwhelmed by the inclusion of the Court's ideology as an explanatory variable. Not only is this a statistically significant indicator of the justices' criminal rights decisions, but substantively it suggests that ideology plays a key role in how the Court decides its criminal rights cases. This is not to say that ideology is the definitive factor in determining whether the Court upholds the rights of the accused. Indeed, there is a burgeoning literature that suggests that scholars must understand the strategic behavior of the justices to fully understand how substantive decisions are made.¹³

Overall, this model performs quite well as it explains about 42 in the variance of the Court's decisions. Substantively, the model indicates that the Court's mean ideology, as well as justices' past prosecutorial experience, explains the Court's criminal rights decisions. However, having more justices with criminal defense experience has little impact on the Court's decisions.

Conclusion

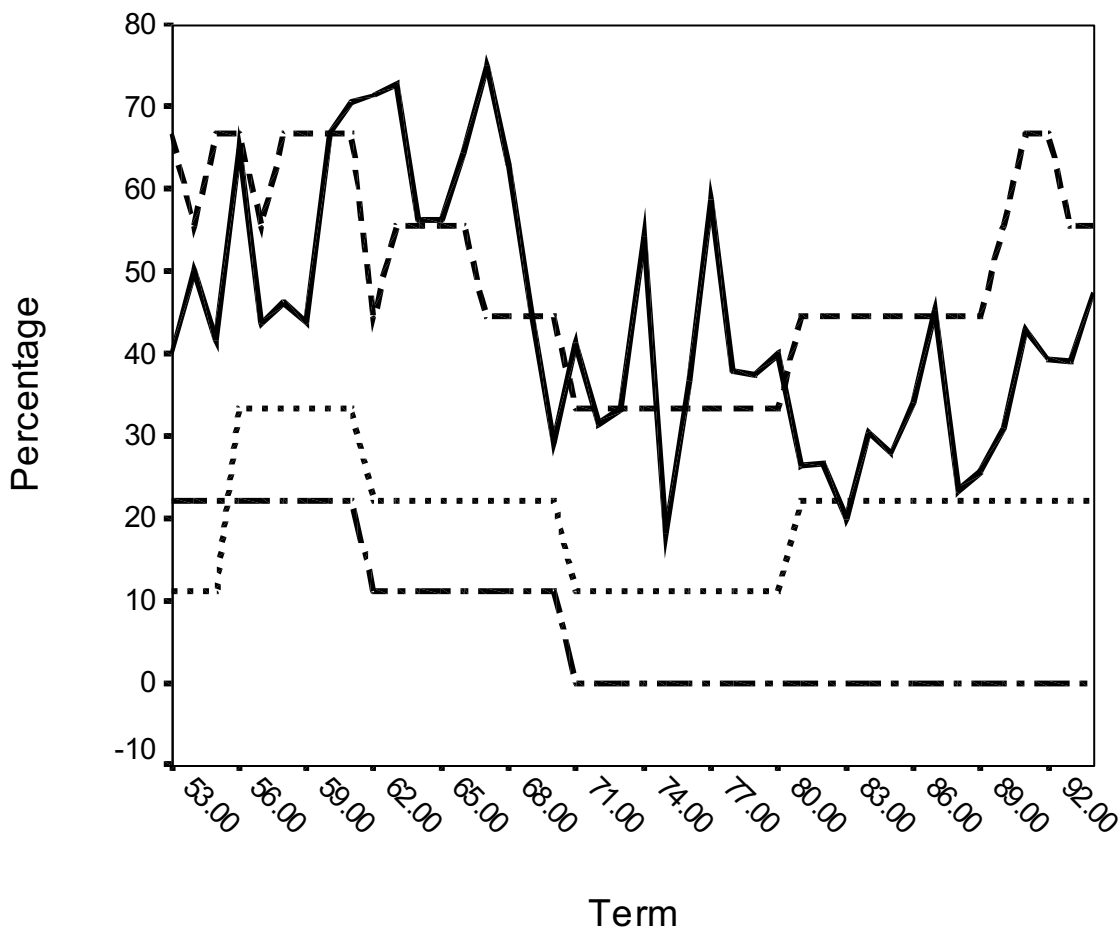
It is clear that the Rehnquist Court's criminal rights decisions are largely unfavorable to the accused, and that since the late 1970s there is a downward trend in the Court's support for criminal rights. This is seen in Figure 1 and in the statistical analysis in Table 2. Additionally, although there is little support for the notion that the presence of justices with criminal defense

cases, but I have also tested the model using justices' past votes in criminal rights cases, and the results do not change.

¹³ See Epstein and Knight, *THE CHOICES JUSTICES MAKE* (Washington D.C.: Congressional Quarterly Press, 1998). Additionally, the law and the facts of cases clearly affect how justices make decisions. See Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases 1962-81*, 78 *AMERICAN POLITICAL SCIENCE REVIEW* 891 (1984).

experience makes the Court more liberal in criminal rights case, there is support for the idea that experience does matter. This corroborates past findings in this area of research, as well as Fortunato's intuition about experience. However, to make definitive claims about the findings here the model should be more fully specified to account for other relevant factors (e.g., legal, political, and strategic) that may also affect the Court's decisions. Second, it would be interesting to test whether experience in specific areas of the law affects individual justice's decisions in those areas. For instance, Justice Stevens is well known as an expert on antitrust issues, while Justices Scalia and Ginsburg are experts in administrative law. Deriving and testing hypotheses about these relationships may shed more light on whether experience matters for how justices make decisions. In the end, while experience may not be the overarching factor in determining how the Court decides cases, the analysis here, combined with past research suggests that it is something that should not be ignored.

Figure 1:
Percentage of Supreme Court Criminal Rights Cases Decided in Favor of the Accused, and Criminal Trial Experience of Supreme Court Justices (1953-1994)



Percent of Liberal Decisions ———

Justices with Defense Experience - · - · - ·

Justices with Trial Judge Experience ·····

Justices with Prosecution Experience - - - - -

Table 1:
Supreme Court Justices' Pre Court Experience in the
Criminal Justice System (1953-1996)

Justice	Defense Counsel	Prosecutor	Judge
Black	Yes	Yes	Yes
Blackmun	No	No	No
Brennan	No	No	Yes
Breyer	No	No	No
Burger	No	Yes	No
Burton	No	No	No
Clark	No	Yes	No
Douglas	No	No	No
Frankfurter	Yes	Yes	No
Fortas	No	No	No
Ginsburg	No	No	No
Goldberg	No	No	No
Harlan	No	Yes	No
Jackson	No	Yes	No
Kennedy	No	No	No
Marshall	No	No	No
Minton	No	No	No
O'Connor	No	Yes	Yes
Powell	No	No	No
Reed	No	Yes	No
Rehnquist	No	Yes	No
Scalia	No	Yes	No
Souter	No	Yes	Yes
Stevens	No	No	No
Stewart	No	No	No
Thomas	No	Yes	No
Warren	No	Yes	No
White	No	Yes	No
Whittaker	No	Yes	Yes

Source: Epstein, Lee, Jeffrey Segal, Harold Spaeth, and Thomas Walker. 1996. *The Supreme Court Compendium: Data, Decisions, and Developments*. Washington D.C.: Congressional Quarterly Press.

Table 2:
Regression Estimates of the
Supreme Court's Criminal Rights Decisions
(1953-1994)

Variable	Coefficient	Standard Error	Significance
Constant	-7.48	16.01	.64
Total Justices with Defense Experience	-3.77	5.04	.46
Total Justices with Prosecutorial Experience	6.27	3.44	.08
Total Justices with Trial Judge Experience	-4.90	4.13	.24
Court Ideology	66.75	18.56	.001
N	42		
Adjusted R ²	.42		
F	8.56		.000