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Investigating *Gideon*'s Legacy in the U.S. Courts of Appeals

ABSTRACT. This Essay investigates the legacy of *Gideon* by examining the de facto courts of last resort for convicted offenders: the federal courts of appeals. Part I focuses on the U.S. courts of appeals' judges and caseloads, revealing that very few federal appellate judges have prior criminal defense experience, despite the fact that half of their caseload consists of criminal and quasicriminal appeals. Part II posits that in an era of mass incarceration, the perspective of judges who have had criminal defense experience may be especially vital because judges' lack of criminal defense experience may affect their ultimate assessment of the merits of criminal and quasicriminal appeals. The Essay calls for further research to investigate whether federal appellate judges' prior experience in criminal defense or prosecution may affect their determination of the merits of a criminal conviction.

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ESSAY CONTENTS

INTRODUCTION	2378
I. JUDGES' PRIOR LEGAL EXPERIENCE AND CURRENT CASELOADS	2379
A. Prior Legal Experience of Federal Appellate Judges	2380
B. Federal Appellate Caseloads	2383
II. WHY IT MATTERS	2385
A. Procedural Justice in an Era of Mass Incarceration	2385
B. Hypothesizing the Import of Prior Criminal Defense Experience on Judging	2387
CONCLUSION	2393

INTRODUCTION

Scholars have discussed the dearth of resources for public defenders and court-appointed attorneys representing indigent criminal defendants,¹ as well as the surprisingly low level of lawyering that has passed muster under the two-pronged analysis for ineffective assistance of counsel set forth in *Strickland v. Washington*.² Indeed, David Cole has written that “the real story of the right to counsel is not Gideon’s, but that of David Leroy Washington,”³ because “Washington’s case, *Strickland v. Washington* . . . determined the actual content of the right to counsel for the poor.”⁴ Even as *Strickland* establishes that “the right to counsel means the right to *effective assistance* of counsel,”⁵ *Strickland*’s standard of effectiveness, as Cole observes, is one that “virtually assures that the poor are not in fact guaranteed competent representation.”⁶ Due to state and federal rules regarding when to raise ineffective assistance of counsel claims on appeal, convicted offenders usually raise ineffective assistance of counsel claims in postconviction petitions for relief under state and/or federal habeas corpus statutes (“quasicriminal” cases) rather than in direct criminal appeals.⁷ While *Strickland*’s ineffective assistance of counsel test remains *the* test to assess whether a convicted offender received competent counsel, the Supreme Court grants certiorari in very few ineffective assistance of counsel

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1. See, e.g., DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).
 2. As explained *infra* Part I, the two prongs of *Strickland*’s ineffective assistance of counsel test are: (1) whether counsel’s performance fell below an objective standard of reasonableness; and (2) whether counsel’s performance gives rise to a reasonable probability that, if counsel had performed adequately, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984); see also, e.g., Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J.L. & POL’Y 205 (2011) (collecting cases and examples).
 3. David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in CRIMINAL PROCEDURE STORIES 101, 102 (Carol S. Steiker ed., 2006).
 4. Cole, *supra* note 3, at 102.
 5. *Id.* at 104.
 6. *Id.* at 102.
 7. Most offenders convicted in state court must wait to raise their ineffective assistance of counsel claim in their state postconviction petition rather than in their direct appeal. If they are not successful during state postconviction proceedings and continue to federal court, their federal habeas corpus petition will also contain their claim of ineffective assistance of counsel. If convicted in federal court, they will first raise their ineffective assistance of counsel claim during their federal habeas corpus petition. See, e.g., Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST. 6 (2009).

cases. Over the years, scholars have analyzed the Supreme Court's ineffective assistance of counsel cases and have continued to critique the *Strickland* regime's ability to uphold the promise of *Gideon*.⁸

This Essay takes a different path. It investigates the legacy of *Gideon* by examining the de facto courts of last resort for litigants claiming ineffective assistance of counsel: the federal courts of appeals. Through a review of published biographical information for all federal judges currently serving in active or senior status on the U.S. courts of appeals, Part I reveals that (1) very few federal appellate judges worked in criminal defense before they became judges despite the fact that (2) half of the caseload of the federal appellate courts consists of criminal or quasicriminal (e.g., ineffective assistance of counsel) cases. Part II employs two lenses to examine the critical role that federal appellate judges serve in reviewing a convicted offender's appeal. First, the lens of mass incarceration highlights the procedural justice role of federal appellate judges and suggests such a role is especially vital when criminal convictions and the laws affecting convicted offenders are severely stratifying U.S. citizens.⁹ Next, the Essay uses the lens of social science literature to posit that the experience a person had working in criminal defense or criminal prosecution before becoming a federal appellate judge may affect that person's ultimate assessment of the merits of a convicted offender's appeal. The Essay calls for further research to investigate whether federal appellate judges' prior experience in criminal defense or prosecution may affect their determination of the merits of a criminal conviction.

I. JUDGES' PRIOR LEGAL EXPERIENCE AND CURRENT CASELOADS

This Part examines the published biographical information for all federal appellate judges currently serving in active or senior status and statistics on the kinds of cases they routinely hear. Section I.A begins with the federal courts of appeals, examining the professional experiences that federal appellate judges brought with them to the bench. It then compares the prior professional

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8. *Gideon v. Wainwright*, 372 U.S. 335 (1963); see Cole, *supra* note 3, at 126. For an analysis of the Supreme Court's ineffective assistance of counsel cases from the 2010-2011 Term, see Richard Klein, *New Paths for the Court: Protections Afforded Juveniles under Miranda; Effective Assistance of Counsel; and Habeas Corpus Decisions of the Supreme Court's 2010/2011 Term*, 28 *TOURO L. REV.* 353 (2012). See also Emily Hughes, *Mitigating Death*, 18 *CORNELL J.L. & PUB. POL'Y* 337, 352-57 (2009) (describing a recent triad of cases in which the Supreme Court found ineffective assistance of counsel, beginning with *Williams v. Taylor*, 529 U.S. 362 (2000)).
 9. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 11 (2012).

experiences of current federal appellate judges to the prior professional experiences of current U.S. Supreme Court Justices. Section I.B discusses the number of cases for which the Supreme Court granted a writ of certiorari in 2011 and compares that number to the number of cases filed in the courts of appeals in 2011. Section I.B concludes by discussing the percentage of criminal and quasicriminal appeals within the federal courts of appeals' overall caseload.

A. Prior Legal Experience of Federal Appellate Judges

Congress has authorized a finite number of federal appellate appointments for judges in active service, as opposed to judges with senior status.¹⁰ Within the U.S. courts of appeals, both active and senior status judges sit on the eleven numbered circuits, the District of Columbia Circuit, and the Federal Circuit.¹¹ Because of vacancies in the courts of appeals,¹² this Essay researched a total of 227 federal appellate judges currently working in active or senior status.¹³

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10. Congress has authorized 179 appointments for “active” judges on the courts of appeals, which includes twelve appointments on the Federal Circuit. Once a federal appellate judge is at least sixty-five years old and has served for at least fifteen years, the judge is qualified to take “senior status,” which means the judge continues to work part-time, actively hearing cases and remaining entitled to a staffed office (and also receiving a full salary). See *Frequently Asked Questions*, U.S. CTS., <http://www.uscourts.gov/Common/FAQS.aspx> (last visited Apr. 1, 2013) (“What is a senior judge?”).
11. The thirteenth circuit is the Federal Circuit, which is not included in the data in this Essay. It is not included because it does not have jurisdiction over any criminal or quasicriminal cases. Instead, it has nationwide jurisdiction in a variety of subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the U.S. government, federal personnel, veterans’ benefits, and public safety officers’ benefits claims. . . . The court’s jurisdiction consists of administrative law cases (55%), intellectual property cases (31%), and cases involving money damages against the U.S. government (11%).
- See *Court Jurisdiction*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html> (last visited Apr. 1, 2013). Other federal appellate courts not examined in this Essay include the Court of Appeals for the Armed Forces and the Court of Appeals for Veterans Claims.
12. As of January 2013, eighteen vacancies exist in the courts of appeals, with eight nominees pending. For additional vacancies or appointments after this Essay went to press, see *Judicial Vacancies*, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx> (last visited Apr. 1, 2013).
13. Online searching mechanisms provided by the Federal Judicial Center and the U.S. Courts were the main sources of biographical information for this group of active and senior judges. *Biographical Directory of Federal Judges, 1789-Present*, FED. JUD. CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Apr. 1, 2013). These data also incorporate biographical information supplied directly by specific courts of

While federal appellate judges have diverse employment histories, including experience as judicial law clerks, private practitioners, and law professors, almost all federal appellate judges share one thing in common: before they became federal appellate judges, they were *not* public defenders. Of the 227 federal appellate judges currently serving in active or senior status in the eleven circuits and the District of Columbia, only four worked as public defenders before their current judicial appointments.¹⁴ Eight represented criminal defendants in some capacity while they were private practitioners.¹⁵ In contrast, eighty-six worked as prosecutors.¹⁶

Judges who were former prosecutors bring critical experience that helps them assess the merits of a criminal appeal, including an evaluation of both prongs of *Strickland*'s ineffective assistance of counsel test: (1) whether counsel's performance fell below an objective standard of reasonableness, and (2) whether counsel's performance gave rise to a reasonable probability that, if counsel had performed adequately, the result of the proceeding would have been different.¹⁷ Because prosecutors have vast experience assessing the strength and weaknesses of criminal cases—including deciding what offenses to charge and how to exercise prosecutorial discretion, which cases to take to

appeals. For example, information about judges serving in the Second Circuit is available at *Biographical Information*, SECOND CIRCUIT CT. OF APPEALS, <http://www.ca2.uscourts.gov/judgesbio.htm> (last visited Feb. 7, 2013). To supplement information from these official federal court websites, I used Google and websites including Wikipedia and Judgepedia. To widen the search to catch as much additional online information as possible, a typical query entered into these online searching mechanisms was "judge + (full name)." This information is not exhaustive. An example of its inherent incompleteness is the difficulty of discerning whether a judge's prior professional experience included private or court-appointed criminal defense. While full-time positions as public defenders are included in biographical information, it is not easy to discern whether a person whose biographical information includes private law practice may have also accepted court-appointed, paid, or pro bono criminal cases.

14. Judge Wynn of the Fourth Circuit, Judge Prado of the Fifth Circuit, Judge Donald of the Sixth Circuit, and Judge Tinder of the Seventh Circuit. When this Essay went to press, the Senate Judiciary Committee had approved the pending nomination of former federal public defender Jane Kelly to the Eighth Circuit. *See* Press Release, Sen. Tom Harkin, Harkin Welcomes Judiciary Committee Approval of Jane Kelly Nomination (Mar. 22, 2013), <http://www.harkin.senate.gov/press/release.cfm?i=341152>.
15. Judge Hardiman of the Third Circuit, Judge Aldisert of the Third Circuit, Judge Diaz of the Fourth Circuit, Judge Merritt, Jr., of the Sixth Circuit (senior status), Judge Watford of the Ninth Circuit, Judge Tallman of the Ninth Circuit, Judge Kleinfeld of the Ninth Circuit (senior status), and Judge Holmes of the Tenth Circuit.
16. Of the twelve judges who had experience as public defenders or in private criminal defense, six also had experience as prosecutors (Judges Diaz, Merritt, Tinder, Watford, Tallman, and Holmes), so they are counted twice.
17. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

trial and which cases to plead, how to develop a theory of the case, how to examine witnesses, and how to attack defenses—former prosecutors bring a keen eye to evaluating criminal appeals and ineffective assistance of counsel claims.¹⁸ As useful as this prior prosecutorial experience may be, however, the perspective of a former prosecutor comes from only one side of the courtroom. When it comes to upholding the promise of *Gideon* by ensuring that criminal defendants receive competent counsel, today's courts of appeals have few judges who have represented criminal defendants.

Moreover, this lack of former criminal defense attorneys on the federal appellate bench does not improve as one proceeds to the Supreme Court, which also lacks Justices who have represented an individual criminal defendant at trial. None of the nine Justices serving on the Supreme Court, now or since the retirement of Justice Marshall, has stood in the well of a courtroom and represented an individual criminal defendant at trial.¹⁹ Justice Ginsburg represented individual civil clients on appeal (not at the trial level), and she did not represent criminal defendants.²⁰ Justice Sotomayor brought experience as a former prosecutor, but in that capacity she represented the government and not individual clients.²¹ Similarly, when Justice Thomas served as Assistant Attorney General of Missouri, he began in the criminal appeals division, so he brought prosecutorial appellate experience but no experience representing an individual criminal defendant at trial.²² Chief Justice Roberts's experience includes serving as Special Assistant to the Attorney General in the U.S. Department of Justice during the Reagan administration, and then as Principal Deputy Solicitor General during the George H. W. Bush administration.²³ Justice Breyer was also a prosecutor, including appointments as Special Assistant to the U.S. Assistant Attorney General for Antitrust and

18. See, e.g., *U.S. v. Brewer*, 899 F.2d 503, 514-15 (6th Cir. 1990) (Merritt, J., dissenting) (disagreeing with the court's decision because it created an "inflexible sentencing system which is not in anyone's interest except perhaps prosecutors, who by their charging decisions, will effectively establish the sentence," then adding that "[a]s a former federal prosecutor, I know that such a rigid system of sentencing can only end in failure because it gives one side in the competitive process too much power").

19. *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 1, 2013); *Harry A. Blackmun*, LEGAL INFO. INST., <http://www.law.cornell.edu/supct/justices/blackmun.bio.html> (last visited Apr. 1, 2013); *William Hubbs Rehnquist*, LEGAL INFO. INST., <http://www.law.cornell.edu/supct/justices/rehnquist.bio.html> (last visited Apr. 1, 2013).

20. *Biographies of Current Justices of the Supreme Court*, *supra* note 19.

21. *Id.*

22. *Id.*

23. *Id.*

Assistant Special Prosecutor on the Watergate Special Prosecution Force.²⁴ Justice Scalia's, Justice Kagan's, and Justice Alito's backgrounds also include working for the government: Justice Scalia as an Assistant Attorney General, Justice Kagan as Solicitor General, and Justice Alito as U.S. Attorney for the District of New Jersey.²⁵

B. Federal Appellate Caseloads

Although the Supreme Court is the court of last resort, it grants very few petitions for certiorari each year relative to the number of cases the courts of appeals review. For example, the Supreme Court granted certiorari in seventy-five cases during the 2011 term.²⁶ Of those seventy-five cases, none arose from the Eighth Circuit, and the remainder arose from the other federal appellate courts as follows: two each from the First, Second, and Fourth Circuits; three each from the Fifth and Seventh Circuits; four each from the Tenth and Eleventh Circuits; five from the Sixth Circuit; seven from the Third Circuit; and twenty-four from the Ninth Circuit.²⁷

The seventy-five cases that the Supreme Court reviewed from the courts of appeals in 2011 is striking when contrasted against the 42,931 total cases filed in the eleven numbered circuits and the D.C. Circuit in 2011.²⁸ Of those total cases, 12,198 were criminal (28%), and 30,733 were civil (72%).²⁹ Within the 30,733 civil cases, 7,488 were cases in which the federal government was a party. Of those, 4,717 were prisoner petitions, of which 2,842 were motions to vacate a sentence and 1,035 were habeas actions.³⁰ The other 23,245 cases were "private" cases, the largest portion of which (10,961) involved a private prisoner whose civil case contained a federal question, including 6,338 habeas corpus cases.³¹ Federal habeas and motions to vacate a sentence, both of which

24. *Id.*

25. *Id.*

26. *Circuit Scorecard*, SCOTUSBLOG (June 30, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_scorecard_OT11_final.pdf.

27. *Id.* The remaining cases arose from the D.C. Circuit (four), the Federal Circuit (three), a federal district court (one), and directly from the state courts (eleven). *Id.*

28. *See 2011 Annual Report of the Director: Judicial Business of the United States Courts*, ADMIN. OFFICE OF THE U.S. COURTS 104-06 tbl.B-7 (2012), <http://www.uscourts.gov/uscourts/statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf>.

29. *Id.*

30. *Id.*

31. *Id.* The other main categories within the 23,245 "private" civil cases involved diversity of citizenship unrelated to criminal issues (2,908) and other civil rights cases (4,794). *Id.*

are quasicriminal, thus account for 10,215 cases, or 33% of the total civil cases in these twelve circuits. This means that the quasicriminal caseload of the U.S. courts of appeals is about 24% of all cases (33% of 72% = approximately 24% of all cases).

These numbers show that the combination of criminal and quasicriminal cases arising from the district courts accounted for roughly half (28% + 24% = 52%) of the total caseload of the federal courts of appeals in 2011. It is within this context of criminal and quasicriminal cases that convicted litigants present their ineffective assistance of counsel claims – as well as other claims for relief – to the federal appellate courts. Therefore, the next statistic that would be helpful to discern is the percentage of these appeals that contain ineffective assistance of counsel claims. Unfortunately, that data is not readily available.

What is known are the kinds of claims arising in federal habeas petitions filed by state prisoners in certain years. Nancy J. King, Fred L. Cheesman, and Brian J. Ostrom published an empirical study in 2007 that documented the number of ineffective assistance of counsel claims in habeas corpus cases filed by state prisoners between 2000 and 2005.³² With limitations, such as the fact that the study excluded federal prisoners' habeas petitions, the study's findings provide a glimpse into the significant number of ineffective assistance of counsel claims contained in federal habeas corpus cases.

Through sophisticated computations, King, Cheesman, and Ostrom found that “ineffective assistance of counsel was far and away the most frequently raised claim in federal habeas corpus litigation.”³³ More specifically, they found that between 2000 and 2005, “litigants asserted ineffective assistance in 81% of all habeas petitions in capital cases, raising it in thirty of thirty-three successful petitions, and in 50% of all habeas petitions in noncapital cases, raising it in only two of seven successful petitions.”³⁴ Litigants also “challenged evidentiary rulings, including *Kimmelman* claims of ineffective assistance, in 46% of all capital petitions and 20% of all noncapital petitions.”³⁵ A *Kimmelman* ineffective assistance of counsel claim refers to *Kimmelman v. Morrison*,³⁶ which held that a Sixth Amendment ineffective assistance of counsel claim based on

32. NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>.

33. Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 438 (2011) (discussing the King, Cheesman, and Ostrom study).

34. *Id.*

35. *Id.*

36. 477 U.S. 365 (1986).

counsel's failure to effectively litigate a Fourth Amendment issue is cognizable in federal habeas, even though Fourth Amendment claims do not usually provide the basis for federal habeas relief.³⁷ Thus, a *Kimmelman* claim is infused with both evidentiary and ineffective assistance of counsel issues.

In sum, criminal and quasicriminal cases comprise half of the docket of federal judges sitting on the courts of appeals. Criminal appeals account for about 28% of the total caseload of the circuit courts. In addition, about 24% of all cases in the courts of appeals consist of quasicriminal appeals, which include motions to vacate sentences and federal habeas petitions. Within the federal habeas corpus claims raised by state prisoners, the most frequently raised claim is ineffective assistance of counsel.

Given the fact that half of the docket of the courts of appeals consists of criminal and quasicriminal cases, and given the large portion of ineffective assistance of counsel claims within those cases, the small number of judges in the courts of appeals who have public defense backgrounds is pronounced. The significant number of criminal and quasicriminal appeals to the courts of appeals is one argument for increasing the number of federal appellate judges who bring criminal defense experience to the bench. A panel comprised of a former prosecutor and a former criminal defense attorney would bring well-rounded, real-life experience—from both sides of the courtroom—to inform the overall assessment of the prejudice and performance prongs of *Strickland*, as well as the viability of criminal appeals.

The next Part situates this argument in the context of what is happening not just within the courts of appeals, but within society more broadly. It examines the role that federal appellate judges serve in ensuring procedural justice and posits that this role is especially critical given the current effects of mass incarceration on American society. It then examines how social science research may help to understand the degree to which prior criminal defense experience informs judging.

II. WHY IT MATTERS

A. Procedural Justice in an Era of Mass Incarceration

The background and professional experience of the people reviewing prisoner petitions and ineffective assistance of counsel claims is particularly

37. See *Stone v. Powell*, 428 U.S. 465 (1976) (holding that, where a state prisoner has been provided a full and fair opportunity to litigate a Fourth Amendment claim, a federal court may not grant that state prisoner federal habeas relief on the ground that evidence obtained through an unconstitutional search or seizure was improperly introduced at trial).

important given the reality of mass incarceration in the United States. Indeed, while mass incarceration impacts people who are incarcerated and the families of people who are incarcerated, the collateral consequences of convictions reach far beyond the prison walls and are arguably as devastating as the convictions themselves.³⁸

In her book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander documents how laws targeted toward convicted offenders often have “a greater impact on one’s life course than the months or years one actually spends behind bars.”³⁹ Alexander notes that laws deny convicted offenders “employment, housing, education, and public benefits,” thereby creating insurmountable obstacles ensuring that “the vast majority of convicted offenders will never integrate into mainstream . . . society.”⁴⁰ As a result, Alexander argues that the current system of mass incarceration in the United States is a “set of structural arrangements that locks a racially distinct group into a subordinate political, social, and economic position.”⁴¹ She examines the war on drugs as a mechanism through which a large number of people, especially African-American men, become “perpetually trapped” in systems of visible and invisible punishment.⁴²

This Essay accepts as true the basic formulation of Alexander’s argument,⁴³ thereby conceptualizing mass incarceration as a social justice or civil rights issue and not simply a criminal justice issue.⁴⁴ Understanding the effects of mass incarceration sheds light on the importance of competent counsel and the role that de facto judges of last resort serve in deciding whether a convicted offender received the effective assistance of counsel. The system of invisible punishment continues throughout the lives of many convicted offenders, and the insurmountable obstacles that result from invisible punishment often lead to repeat cycles of incarceration throughout an offender’s life.⁴⁵ In this context,

38. ALEXANDER, *supra* note 9, at 185 (citing *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005)).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Alexander’s full argument, which takes 261 pages to unfold, is more nuanced than the bare-bones version described above. See, e.g., *id.* at 200-17 (critiquing the limits of her own argument).

44. *Id.* at 9.

45. *Id.*

federal appellate judges play an unusually critical role in reviewing the validity of criminal convictions.

Procedural justice is especially vital for a convicted offender in the context of federal habeas corpus litigation because habeas is the end of the line for these litigants. Following the enactment of the Antiterrorism and Effective Death Penalty Act of 1996,⁴⁶ once a litigant's federal habeas petition terminates, almost insurmountably high hurdles face a litigant who wishes to obtain a merits review of a second or successive petition. In addition, the skill of the litigant's trial attorney directly affects the kinds of claims that the litigant can later raise in a federal habeas corpus petition. For example, if an attorney does not preserve a claim in trial, that claim may be defaulted by the time the convicted offender files her habeas corpus petition in federal court.⁴⁷

The ever-narrowing opportunities for individuals to have their rights heard through ever-expanding notions of waiver necessitate extraordinary vigilance on the part of trial attorneys to properly preserve errors for appeal. A federal appellate bench that includes some individuals who have preserved (or failed to preserve) errors themselves would be one small step toward ensuring procedural justice during the critical review of a convicted offender's case.

B. Hypothesizing the Import of Prior Criminal Defense Experience on Judging

In light of the intersection of procedural justice and mass incarceration, it matters that so few federal appellate judges have criminal defense backgrounds because their prior experience may affect the outcomes of the cases before them. The logical starting point for this analysis is to examine the assumption that a person's prior experience may inform the way she judges, including when she is sitting on a three-person appellate panel.

Scholars have produced a "voluminous body of literature" exploring the

46. Pub. L. No. 104-132, 110 Stat. 1214.

47. See, e.g., Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 610-14 (2011). Primus analyzes how criminal defendants "routinely face the threat of incarceration (or continued incarceration)" through every stage of the criminal process, from trial through federal habeas corpus proceedings, and explains how mechanisms such as exhaustion and procedural default are "serious obstacles to obtaining federal habeas relief for any petitioner." *Id.* at 598, 611. See also Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIM. JUST., Fall 2009, at 6 (2009).

effects of certain personal characteristics on judging.⁴⁸ Within this body of literature, Christina L. Boyd, Lee Epstein, and Andrew D. Martin examined whether certain combinations of three-person panels affect a panel's ultimate vote.⁴⁹ While their results did not resonate across all cases and all panels, they found that, in certain kinds of cases, certain combinations of three-person panels do affect the outcome. Regarding the role that male or female judges play on three-person panels in the courts of appeals, they found that although "the presence of women in the federal appellate judiciary *rarely* has an appreciable empirical effect on judicial outcomes . . . [r]arely . . . is not never."⁵⁰ The "rare" category in which the presence of a woman on an appellate panel makes a significant difference is sex discrimination disputes, where empirical evidence indicated that "the presence of a female on a panel actually *causes* male judges to vote in a way they otherwise would not—in favor of plaintiffs."⁵¹

No perfect analogy exists between the role of gender in three-person panels deciding sex discrimination disputes and the role that criminal defense experience may play in three-person panels deciding criminal or quasicriminal cases. At the same time, however, Boyd, Epstein, and Martin observed that their results

may provide empirical fodder for a class of normative claims supportive of diversity on the bench; namely, 'the greater the diversity of participation by [judges] of different backgrounds and experiences, the greater the range of ideas and information contributed to the institutional process,' and the higher the likelihood of altered deliberations in response.⁵²

While the application of such research to criminal cases in the courts of appeals is somewhat speculative, the research helps to hypothesize how federal appellate judges' criminal defense experience (or lack thereof) may affect their ultimate assessment of criminal appeals or ineffective assistance of counsel claims. Just as the presence of a woman on a panel can actually cause male

48. See, e.g., Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010). Boyd, Epstein, and Martin cite an appendix on their website describing the results of over thirty studies on this topic. *Id.* at 389 n.1.

49. *Id.* at 393-99 (explaining the methodology).

50. *Id.* at 406.

51. *Id.*

52. *Id.* at 406-07 (citing Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 944 (2003)).

judges to vote in a way they otherwise would not vote in sex discrimination cases,⁵³ so might the inclusion of a former criminal defense attorney on a panel cause the panel to vote in a way they otherwise would not vote in criminal appeals or ineffective assistance of counsel cases.

Further research is necessary to investigate the degree to which the criminal defense or prosecution backgrounds of federal appellate judges could play a role in changing the ultimate outcome of criminal and quasicriminal appeals. One difficulty in conducting this research is that the limited number of federal appellate judges who have criminal defense experience impedes the ability to conduct such research at present. Even some of the most relevant research conducted to date has not tracked the experiences of former public defenders. For example, Theresa M. Beiner has observed that “[w]hile it is difficult to know how many . . . ex-prosecutors [currently serving on the federal bench] did some defense work at some point in their careers, it is notable that the political scientists who track this information have no category for ex-public defenders.”⁵⁴

Compared to the small number of former public defenders working as federal appellate judges, a comparatively greater—and more easily countable—number of former prosecutors serve on the federal appellate bench. Even though information about the prosecutorial experience of federal judges is more readily available than is information about criminal defense backgrounds, researchers studying the impact of prior prosecutorial experience have not agreed how such experience impacts judging. A recent study examining forty years of criminal cases from the Supreme Court and the courts of appeals found “no relationship between prosecutorial background and a propensity for favoring conservative outcomes.”⁵⁵ In contrast, other researchers have observed that “prosecutorial experience has been associated with more conservative behavior in civil liberty cases . . . but with a more liberal or favorable response

53. See, e.g., Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (noting that, in an empirical analysis of sexual harassment or sex discrimination claims in 556 federal appellate cases decided in 1999, 2000, and 2001, “[t]hrough plaintiffs lost in the vast majority of cases, they were twice as likely to prevail when a female judge was on the bench”).

54. Theresa M. Beiner, *Diversity on the Bench and the Quest for Justice for All*, 33 OHIO N.U. L. REV. 481, 492 (2007).

55. Rob Robinson, *Does Prosecutorial Experience “Balance Out” a Judge’s Liberal Tendencies?*, 32 JUST. SYS. J. 143, 143 (2011). But see Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI., 333, 336 (1962) (finding in an early study that former prosecutors were significantly more likely to vote against the defense in criminal cases, based on comparing percentages of rulings for defendants above court average by each attribute group).

to racial protection claims.”⁵⁶ The limited research to date focused on prosecutors does not therefore suggest predictability in how prior defense experience may impact a federal appellate judge. Just as prior prosecutorial experience of judges has led researchers to observed mixed findings, so might a judge’s prior criminal defense experience.

Moreover, even if a judge’s prior criminal defense experience did result in a different view of a case than that of her colleagues, that different view may not result in a different overall assessment of the merits of the appeal. One reason for this result is that even if a judge with criminal defense experience takes a different position on a particular appeal, that judge may not persuade her colleagues to adopt her position and may dissent with or without writing a dissenting opinion.

Although dissenting opinions do not carry the same weight as the decision of the case, dissenting opinions are one possible way in which criminal defense experience on the bench may be important. Whether or not the dissenting judge chooses to write a dissenting opinion, the dissent could still signal the need for en banc review or for the Supreme Court to grant certiorari. The decision to dissent—even if it does not ultimately change the actual outcome of the case—serves an important procedural justice role because it indicates that at least one judge saw the case differently and tried to persuade her colleagues to join her side. Similarly, the inclusion of a person with criminal defense experience on a panel may also serve an important procedural justice role, even if the panel unanimously upholds the conviction.⁵⁷ Whether a person is serving life in prison or trying to extricate himself from the invisible prison that operates outside the prison walls, knowing that one’s voice was heard, even if

56. Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 835 n.78 (citing Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1190 (1991)).

57. See, e.g., Tom R. Tyler, *Does the American Public Accept The Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664 (2007). Tyler explains that “[f]our critical factors dominate evaluations of procedural justice.” *Id.* As Tyler observes,

First, people want to have an opportunity to state their case to legal authorities. . . . [T]hey want to have a ‘voice’ in the decisionmaking process. Second, people react to signs that the authorities with whom they are dealing are neutral. . . . Third, people are sensitive to whether they are treated with dignity and politeness and to whether their rights as citizens and as people are respected. Finally . . . [p]eople react favorably to the perception that the authorities are benevolent and caring and are sincerely trying to do what is best for the public—that is, when they trust that authority.

Id.

the ultimate outcome remains the same, may make a difference in how the convicted offender experiences the consequences of his conviction.

The legacy of Justice Marshall, whose criminal defense experience informed his decision in *Strickland*, is one such example.⁵⁸ As the lone dissenter to both the opinion and the judgment in *Strickland*,⁵⁹ Justice Marshall critiqued the majority's two-pronged ineffective assistance of counsel test by analyzing how lawyers and judges would apply it in practice.⁶⁰ He objected to the performance prong by finding it "so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts."⁶¹ Similarly, he objected to the prejudice prong for two reasons, both of which resonated with his criminal defense experience.

First, Justice Marshall noted the difficulty of being able to discern, in hindsight, whether a convicted offender "would have fared better if his lawyer had been competent."⁶² He observed that a cold record would complicate such review, and that the difficulty could be "exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."⁶³

"Second, and more fundamentally," Justice Marshall critiqued the majority's assumption that "the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted."⁶⁴ He took issue with the contention that no Sixth Amendment violation exists if a "manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney."⁶⁵ For this reason, Justice Marshall would have held that "a showing that the performance

58. *Strickland v. Washington*, 466 U.S. 668, 706-19 (1984) (Marshall, J., dissenting).

59. Writing separately, Justice Brennan concurred in the opinion but dissented from the judgment because of his adherence to the "view that the death penalty is in all circumstances cruel and unusual punishment." *Id.* at 701 (Brennan, J., concurring in part and dissenting in part). While Justice Brennan believed the two-pronged ineffective assistance of counsel test would "provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law," *id.* at 702, Justice Brennan would have vacated Washington's death sentence, *id.* at 701.

60. *Id.* at 707-08 (Marshall, J., dissenting).

61. *Id.* at 707.

62. *Id.* at 710.

63. *Id.*

64. *Id.* at 711.

65. *Id.*

of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby."⁶⁶

While Justice Marshall's dissent in *Strickland* was informed by his experience as a criminal defense attorney, he—like all judges—brought more to the bench than one aspect of his professional experience. Of course, one dimension of a person's life does not necessarily outweigh the rest of his varied experiences. Rather, the argument for increasing the number of federal appellate judges with criminal defense experience reflects the need to increase the overall diversity of the federal bench. As others have observed,

Justice Marshall was not only the first minority justice, he was also a non-Establishment Justice. He was not an insider; his background was not one of advantage, privilege or wealth. What is fair and just in any given situation depends on one's perspective, and Justice Marshall's perspective was different from that of his colleagues.⁶⁷

Despite Justice Marshall's informed critique of the two-pronged ineffective assistance of counsel test, the analysis set forth in *Strickland* remains the means by which reviewing courts ensure *Gideon's* promise of competent counsel. Federal appellate judges must apply *Strickland* to the best of their ability to the unique facts of each case.⁶⁸ Multiple perspectives, especially perspectives that are currently lacking, may help judges assess ineffective assistance claims more thoroughly.

66. *Id.* at 712.

67. Theodore McMillian, *Reflections upon the Retirement of Justice Marshall*, 34 HOW. L.J. 3, 4 (1991); see also Sandra Day O'Connor, *Justice Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992) ("Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. . . . His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice."); Gerald F. Uelman, *Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court*, 26 ARIZ. ST. L.J. 403, 411 (1994) (noting that Marshall's "background as a criminal defense lawyer was only part of the personal experience Thurgood Marshall brought to his role as a judge").

68. *But see* Stephanos Bibas, *The Psychology of Hindsight and After-the Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 11 (asserting that *Strickland* "has no teeth" and observing that "[h]indsight biases and scanty records create grave problems for after-the-fact review, problems that are easy to lament but hard to fix").

CONCLUSION

For a backstop against a highly punitive criminal justice system, today's convicted offenders depend on the review of the U.S. courts of appeals, as the de facto courts of last resort, to review the merits of their appeals to ensure their convictions are sound, and especially to ensure they have received the effective assistance of counsel. The courts of appeals have a significant criminal and quasicriminal docket, and convicted offenders find themselves in dire circumstances once they enter the system of mass incarceration. Review of criminal convictions by more diverse panels of federal appellate judges—at least some of whom have had the “gut-wrenching experience of having the life or liberty of a fellow human being riding on [their] tactical choices”⁶⁹—is a more pressing need than ever.

69. Uelmen, *supra* note 67, at 403.