DISCUSSION PAPER

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JUDICIAL ATTITUDES UNDER SHIFTING JURISPRUDENCE: EVIDENCE FROM BRAZIL'S NEW DRUG LAW OF 2006

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ABSTRACT

This paper exploits the diversity of panels at the court of appeals in the state of São Paulo to address the role of career backgrounds and ideology in shaping the response of judicial decisions to a major shift in jurisprudence on drug offenses. The Brazilian constitution reserves 80% of the seats in appellate courts to career judges, 10% to lawyers and 10% to prosecutors. In practice however, vacancies in panels coupled with backlogs have significantly increased participation of judges sitting by designation in appellate panels - who acted as rapporteurs in as much as 14% of all criminal appeals in Sao´ Paulo, between 2009-2013. Former lawyers and prosecutors are appointed by the state governor after nomination processes at the bar association and at the ministerial office. Judges sitting by designation are chosen at the discretion of the court's highest council and do not retain prerogatives of tenured appellate judges and are typically hired with the purpose of reducing backlogs. Their performance affects their chances of being promoted to the court of appeals, relatively to similar judges that have not been designated. Based on a large dataset of criminal appeals related to drug offenses in the State São Paulo, Brazil, this study exploits the exogenous assignment of cases to rapporteurs, to identify the causal effects of career backgrounds on the response of appellate judges to a major shift in drug jurisprudence, which revoked the prohibition of conversion of confinement punishment in drug offenses introduced by the new drug law of 2006. Estimates of treatment-effects, conditional on case characteristics and panel-specific fixed-effects, confirm that career judges respond favorably to defendants, in line with the jurisprudence shift. Former prosecutors react against the shift, responding unfavorably to defendants. Former lawyers tend to exhibit a mixed behavior, weighing in their preferences as well as strategically favoring predominant "law and order" views. Finally sitting judges behave in a diffident fashion but also favoring prosecution.

Keywords: judicial desisions; judicial bias; judges sitting by designation; Drug offenses; jurisprudence regimes.

1 INTRODUCTION

This paper presents a quantitative assessment of the effect of a major shift in criminal jurisprudence on the chances of defendants, contingent on the career backgrounds of appellate judges in the state court of São Paulo, Brazil.

In 2006, Brazil enacted a new drug law – Law 11,343 of 2006, in order to strengthen punishment of severe drug trafficking offenses. The new law established: i) increasing in punishment from a 3 to 8-year range to a 5 to 15-year range, along with a tenfold increase in minimum day-fines; ii) allowed reduction of prison time by as much as 3 years and 4 months, in cases framed as privileged trafficking, defined as an offense committed by first-timers with a clean criminal record and not belonging to gangs (article 33, x 4o); iii) prohibited conversion of confinement punishment under any circumstances (article 44). The purpose of Law was strengthening the enforcement of severe drug offenses on the one hand and relieving imprisonment of minor drug offenses to reduce pressure on the overcrowded prison system on the other hand. It lacked however, objective parameters for the specification of the offense, i.e., drug use (article 28) versus drug trafficking. As a result, studies show, based on official data, more individuals were sent to jail for longer terms, contributing to a massive increase in incarceration due to drug offenses (31,520 in 2005 to 174,216 in 2014, or 9 to 28% of total prison population in Brazil). On September 1st, 2010 the Supreme Court ruled for the unconstitutionality of the prohibition of conversion of confinement (present both in article 33, x 4º and article 44 of the New Drug Law).[1] This ruling was persuasive rather than binding but, on February 16th, 2012, through the Resolução No. 5/2012, the Federal Senate abridged the criminal code of procedures, suppressing the unconstitutional provision.

A basic question that arises is how such a major change in the criminal jurisprudence regime affected the chances of defendants in criminal appeals? A natural prior is that defendants would have become better off, due to a more flexible stance on criminal executions (alternative to incarceration). A yet more interesting question is whether the impact of the shift in jurisprudence depends on the type of judge assigned as the rap-porteur. The institutional setting of Brazilian appellate courts offers an opportunity to tackle these questions, provided that these courts exhibit a variety of appellate judge as we discuss next.

1. This prohibition was ruled unconstitutional by the Supreme Court, with Habeas Corpus nº 97256/RS.

The Brazilian constitution reserves 80% of the seats in appellate courts to career judges, 10% to lawyers and 10% to prosecutors. In addition, vacancies in panels coupled with backlogs have significantly increased participation of district judges sitting by designation in appellate panels – assigned as rapporteurs in as much as 14% of all criminal appeals in São Paulo, between 2009-2013.

But why exactly would appointed or designated judges behave differently from ca-reer, appellate judges? Gubernatorial appointments convey a strong content of political ideology. In order to secure a seat at the bench, former prosecutors and lawyers must first be selected by its peer delegates within powerful committees, which define a list of six candidates. Then a coup of appellate judges sorts three names out of the six and submit them to the state governor for a final decision. Due to the workings of this political process, most accounts emphasize the risks that it brings to judicial independence: a viable candidate for an appointment should thus balance the interests of their own corpus, of the court and of the executive branch.[2] Criminal policy is highly regarded by the executive branch, because security is a key issue for the median (conservative) voter, which supports a tough stance on drug offenses.[3]

To the extent that gubernatorial appointments represent their parent institutions, for-mer prosecutors should rule more favorably to plaintiffs either due to respect, gratitude or deference to its own institution (Ministério Público). Their view of the criminal system is more stringent. In fact, the Ministério Público publishes periodically their strict guidelines (called "theses") for interpreting changes to statutes or jurisprudence.[4] Similarly, former lawyers are likely to adopt a stance that is congruent with

2. Several papers have discussed the system of nomination and appointment of state judges. Verde Sobrinho and Albuquerque (2017) suggests that the Quinto Constitucional compromises judicial independence. Bianeck (2017) argues that the system has never served its main goals, which is to oxygenate and democratize the judicial power; instead, it has become a means to perpetuate the power of political and economic elites. The author establishes this claim based on four appointment processes (two among lawyers and two among prosecutors), in all of which family relationships with judges at superior courts or powerful politicians were determinant. There are two other recent, high-profile cases in which daughters of Supreme Court justices have been appointed for the bench.

3. Interests of the executive branch on courts go beyond criminal policy. The public sector is by far the largest litigant in Brazil. State governments in Brazil hold significant judicial, contingent liabilities and assets (debt foreclosures), which will ultimately be resolved in court. Courts will also handle misconduct of office and corruption cases involving government officials and local powerful politicians.

4. The Ministério Público is very mindful of public opinion and of its independence: it has recently blocked a bill that would limit its investigative powers, in detriment of police bodies, with massive support of public opinion. It became increasingly focused on the agenda on rule of law, particularly after many large-scale corruption scandals reached courts. In 2015, they pressed congress for the approval of a package of more punitive laws, containing ten propositions (they have created an

institutional views of the bar association (OAB) and its political agenda, which focuses on safeguarding due process of law,[5] besides civil, constitutional and human rights. Both careers have exhibited a strong espirit de corps in Brazil. The contrast among such backgrounds is recognized even within high members of the Court.[6]

District judges sitting by designation do not retain the prerogatives of appellate judges and may be removed in an discretionary fashion. Their behavior, both in terms of efficiency, i.e. ability to dispose of cases and reduce backlogs, as well as in terms of agreeing with the court's most preferred policies, can be decisive in terms of their chances of earning a permanent seat in the appellate court.

The empirical strategy involves comparing – before and after the jurisprudence shift – the percentage of cases decided in favor of the defendant in criminal appeals, for each type of rapporteur: career judge, former lawyer, former prosecutor or district judge sitting by designation. Besides descriptive statistics, the paper establishes a judicial decision making-model, in which the outcome of the review depends on that career background as well as on a vector of case and court characteristics, including judging panel – specific effects. The exogenous rule for the assignment of cases among rapporteurs entails a clear identification strategy: within each judging panel, the treatment assignment (that is, the choice of career background of the rapporteur) is exogenous, implying that non-observed factors related to the case outcome are orthogonal to the treatment. Randomization tests demonstrate that the design is appropriate. In addition, the paper shows that when selection effects are weaker, career backgrounds and ideology exhibit stronger effects on case outcomes. I interpret these results as evidence of the "integrated approach" (Coggins, 2008), which reconciles the presence of ideological effects [the attitudinal model, by Segal and Spaeth (2002)] and selection effects in a judicial decision-making model [the fifty-fifty rule, by Priest and Klein (1984)].

website for that initiative: <https://bit.ly/3tsKVd2>.

5. Former lawyers tend to adopt a pro-defendant stance, with stricter observance of due process of law and procedural formalism (particularly in civil law systems such as the Brazilian).

6. In a recent newspaper interview, the president of the Section of criminal panels of the appellate court in São Paulo said: "A judge has whole autonomy and independence to examine his cases and there are no controls over his inclinations. He judges with the law, the facts and his consciousness (...). It is evident however, that the readings of the facts and their conformity to the law also depends on the professional background, whether he is a career judge, a prosecutor or a lawyer" (Turollo Junior, 2015).

The institutional set up – a significant diversity of backgrounds of appellate judges – coupled with a major, exogenous shift in jurisprudence on the highly salient issue of drug offenses and with a large dataset on criminal appeals, provide ideal conditions for an empirical exploration of the impact of exogenous legal changes and its interplay with ideology and strategic behavior of judges.

The new drug jurisprudence eliminates restrictions on alternative sanctions to incarceration, prison sentences, but does not impose a more forgiving treatment. Therefore, the first hypothesis is that more liberal judges (former lawyers) will exhibit a more pronounced response to the shift in jurisprudence because their most preferred policy was subject to a binding legal restriction, whereas conservative judges (former prosecutors) would exhibit a weaker response, simply because from their perspective the initial restriction was not binding.[7] Another part of this hypothesis concerns compensating effects (Freyens and Gong, 2017), defined as a judicial response that is opposite to the direction of the statutory or jurisprudential reform.[8]

The second hypothesis is that selection effects tend to blur the effect of ideology on judicial outcomes. If a specific judge retains jurisdiction over the appeal, then litigants will gauge more precisely their chances of success prior to filing, whereas if the appeal is randomly assigned, then litigants will face greater uncertainty surrounding their chances of success. More specifically, the hypothesis is that when appeals under retained jurisdiction are excluded from the sample, selection effects diminish and then the impact of ideology increases.

The third hypothesis concerns district judges sitting by designation. These judges are not appointed by the governor, but are chosen by the coup of the court. For many decades, the Court of São Paulo has been a conservative stronghold, supportive of o tough criminal policy. Therefore I expect theses sitting judges to behave conservatively as well. But since they are not appellate judges, they should also factor in career concerns, which

7. In the limit, if most of the decisions by theses judges were initially subject to a non-binding legal constraint, then the effect of eliminating that constraint should be null.

8. The authors describe such effects as follows: "If we are able to establish the presence of appointment bias in judicial decisions, as many other studies have done before us in other contexts, then we want to know whether this bias is sensitive to changes in the strictness of the legal standard. For instance, if socially progressive judges are biased in favour of plaintiffs in certain areas of the law we ask whether this bias increases or decreases when conservative governments revise the legal standard upwards so as to lower the chances of plaintiff success in court. If the bias increases, this would hint at the presence of compensating effects, e.g. to perceived biases in statutory reforms" (Freyens and Gong, 2017, p. 2).

involve productivity (reducing backlogs) and sound legal standards. The hypothesis then, is that designated judges should mimic the behavior of more conserva-tive judges (former prosecutors) but not as intensively, pushing them closer to neutral, career judges.

The main contributions of this paper are: first, the unique institutional features of the selection of judges in Brazil entail a peculiar proxy for judicial ideology, which contains two entangled components, namely a strong espirit de corps and a judicial politics component, inherent to the nature of the appointment process; second, the empirical strategy relies on a clean identification strategy, in which cases are exogenously assigned distinct judge types. Third, a large and reliable dataset, along with a well-designed identification strategy, results in a substantive contribution to the general literature on appellate decision-making and to the "personal attributes" model in particular, as well as to the integrated approach. Fourth, there is well established literature on the political and ideological motives underlying jurisprudence by the Brazilian Supreme Court justices, but no empirical studies focusing on courts of appeals either at the state or the federal levels, despite the fact that these account for a much larger volume of cases.

The next section presents an institutional background on the rules for the appointment of appellate judges in the court of São Paulo. Section III reviews of the literature. Section IV establishes the model and testable hypotheses. Section V presents results and section VI, the conclusions.

2 INSTITUTIONAL BACKGROUND

Three types of judges coexist in state appellate courts in Brazil: career judges, gubernatorial appointments (Quinto Constitucional) and district judges sitting by designation. Regardless of the career path of the judge, article 95 establishes broad guarantees and independence for the brazilian judges.[9]

9. "Article 95. Judges enjoy the following guarantees: (CA No. 19, 1998; CA No. 45,2004) I – life tenure, which, at first instance, shall only be acquired after two years in office, loss of office being dependent, during this period, on deliberation of the court to which the judge is subject, and, in other cases, on a final and unappealable judicial decision; II – irremovability, save for reason of public interest, under the terms of article 93, VIII; III – irreducibility of compensation, except for the provisions of articles 37, X and XI, 39, paragraph 4, 150, II, 153, III, and 153, paragraph 2, I. Sole paragraph. Judges are forbidden to: I – hold, even when on paid availability, another office or position, except for a teaching position; II – receive, on any account or for any reason, court costs or participation in a lawsuit; III – engage in political or party activities; IV – receive, on any account or for any reason, financial aid or contribution from individuals, and from public or private

2.1 Career judges

Articles 93 of the Federal Constitution establish basic principles and general rules for admission and promotion rules for career judges,[10] to be regulated by the state and federal Statutes of the Judicature.

institutions, save for the exceptions set forth in law; V – practice law in the court or tribunal on which they served as judges, for a period of three years following their retirement or discharge" (Brazil, 2019, p. 88).

10. "Article 93. A supplementary law, proposed by the Supreme Federal Court, shall provide for the Statute of the Judicature, observing the following principles: (CA No. 19, 1998; CA No. 20, 1998; CA No. 45, 2004) I – admission into the career, with the initial post of substitute judge, by means of a civil service entrance examination of tests and presentation of academic and professional credentials, with the participation of the Brazilian Bar Association in all phases, at least three years of legal practice being required of holders of a B.A. in law, and obeying the order of classification for appointments; II – promotion from level to level, based on seniority and merit, alternately, observing the following rules: a) the promotion of a judge who has appeared in a merit list for three consecutive times or for five alternate times is mandatory; b) merit promotion requires two years in office in the respective level and that the judge should appear in the top fifth part of the seniority list of such level, unless no one satisfying such requirements is willing to accept the vacant post; c) appraisal of merit according to performance and to the objective criteria of productivity and promptness in the exercise of the jurisdictional function and according to attendance and achievement in official or recognized improvement courses; d) in determining seniority, the court may only reject the judge with the longest service by the justified vote of two-thirds of its members, according to a specific procedure, full defense being ensured, the voting being repeated until the selection is concluded; e) promotion shall not be granted to a judge who unjustifiably withholds case records beyond the legal deadline, and he may not return them to the court archives without providing the necessary disposition thereof or decision thereon; III – access to the courts of second instance shall obey seniority and merit, alternately, as determined at the last or single level; IV – provision of official courses for preparation, improvement, and promotion of judges, while the participation in an official course or in a course recognized by a national school for the education and further development of judges shall constitute a mandatory stage of the tenure acquisition process; V – the compensation of the Justices of the Superior Courts shall correspond to ninety-five percent of the monthly compensation stipulated for the Justices of the Supreme Federal Court, and the compensation of the other judges shall be stipulated by law and distributed, at the federal and state levels, according to the respective categories of the national judiciary structure, and the difference between categories may not be higher than ten per cent or lower than five per cent, nor higher than ninety-five per cent of the monthly compensation of the Justices of the Superior Courts, with due regard, in any of the cases, for the provisions of articles 37, XI, and 39, paragraph 4; VI – the retirement of judges as well as the granting of pensions for their dependents shall comply with the provisions of article 40; VII – a permanent judge shall reside in the respective judicial district, except when otherwise authorized by the court; VIII – the acts of removal, of placement on paid availability, and of retirement of a judge, for public interest, shall be based on a decision by the vote of the absolute majority of the respective court or of the National Council of Justice, full defense being ensured; VIII-A – the removal upon request or the exchange of judges of same-level judicial districts shall obey, insofar as pertinent, the provisions of subitems a, b, c, and e of item II; IX – all judgements of the bodies of the Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity, but the law may limit attendance, in given acts, to the interested parties and to their lawyers, or only to the latter, whenever preservation of the right to privacy of the party interested in confidentiality will not harm the right of the public interest to information; X – administrative decisions of courts shall be supported by a recital and shall be made in open session, and disciplinary decisions shall be taken by the vote of the absolute majority of their members; XI – in courts with more than twenty-five judges, a special body may be constituted, with a minimum of eleven and a maximum of twenty-five members, to exercise delegated administrative and jurisdictional duties which are under the powers of the full court, half of the positions being filled according to seniority and the other half through election by the full court; XII – courts will operate continuously, without interruption, collective vacation being forbidden for first instance judges and courts of second instance, and there must be judges on duty at all times on days in which courts are closed; XIII – the number of judges in each court shall be proportional to the effective judicial demand and to the respective population; XIV – court employees will receive delegation to carry out administrative acts and acts aimed at the mere disposition of matters, without a decisional nature; XV – proceedings will be assigned immediately upon filing, at all levels of jurisdiction" (Brazil, 2019, p. 86-88).

To become a career judge in Brazil, one must undertake public entrance examination, which includes written tests, evaluation of prior academic and professional qualifications, and eventually practical activities such as hearings. Before acquiring lifetime tenure, the judge must serve a two-year evaluation or probation period. As far as promotions are concerned, the totality of appellate judges will vote for the names on lists of district judges that are established based on seniority and merit, in an alternative fashion.

2.2 Gubernatorial appointments (Quinto Constitucional)

In Brazilian courts of appeals twenty percent of seats in Brazil are assigned to non-judicial careers as follows: 10% to former lawyers and 10% to former public prosecutors.[11] Six-name lists of appointees from both the Brazilian Bar Association and the Prosecutor Office (Ministério Público) are separately chosen by universal suffrage within its members and sent to the State Court, which picks three names out of six and sends it to the state governor for a final choice.

2.3 Sitting judges

The designation of judges to sit in the appellate court was first established in São Paulo in 1990, by State Law 646, which defines the discretionary nature of such judgeships. Article 2 of that statute states: By designation of the President of the Court of Justice, the Second Degree Substitute Law judges will replace members of the Courts or assist them, when the accumulation of cases shows the need for their performance. Article 1 establishes that "In the Permanent Part of the Board of Justice, 60 (sixty) posts of Second Degree Substitute Judge are created, classified under special jurisdiction, reference V, for further filling, at the discretion of the Court of Justice, by means of a removal contest".

Therefore, the designation of sitting judges is decided in an en banc session, by means of a removal contest and thus abiding by its procedures. Prior to the session,

11. Constitution of the Federative Republic of Brazil, Article 94: "One-fifth of the seats of the Federal Regional Courts, of the Courts of the States, and of the Federal District and the Territories shall be occupied by members of the Public Prosecution, with over ten years of office, and by lawyers of notable juridical learning and spotless reputation, with over ten years of effective professional activity, nominated in a list of six names by the entities representing the respective classes. Sole paragraph. Upon receiving the nominations, the court shall organize a list of three names and shall send it to the Executive Power, which shall, within the subsequent twenty days, select one of the listed names for appointment. Other appellate courts also reserve a share of the bench to appointees among lawyers and prosecutors: Superior Tribunal de Justiça (Article 104), Tribunal Superior do Trabalho (Article 111-A) and Tribunais Regionais do Trabalho (Article 115)" (Brazil, 2019, p. 88).

the court publishes a call notice opening up a sit-in position and any senior judge is a potential candidate.[12]

In 2009, the National Justice Council established that the designation of sitting judges to appellate courts must follow objective criteria established by local law and subject to the LOMAN (National Judge Law). The consequence was that the selection of sitting judges must mimic the criteria for the promotion of judges from district to appellate courts, which rely on both seniority and productivity, in an alternate fashion (see article III). Sitting judges may not perform administrative duties.[13] Panels must be formed with a majority of career judges,[14] except for the extraordinary panels, where most of the sit-ting judges are. These extraordinary panels are presided by career, appellate judges by appointment of the president.[15]

Additional regulation suggests that the presidency of the Court retains highly discre-tionary powers over the assignments of the sitting judges.[16] Moreover, the sitting

12. 3rd. Second-degree substitute first-degree judges, where applicable, must be placed in a special class or class of the last degree and provided by objective criteria provided for in local law, and will be summoned for replacement or assistance in a second-degree judging body.

13. "Art. 4. The summons of first degree judges to substitute in the Courts may occur in cases of vacancy or removal for any reason of a member of the Court, within a period of more than 30 days, and only for the exercise of judicial activity" (Brazil, 1979).

14. "Art. 10. The Chambers or Classes of the Courts must be formed with a majority of regular judges and by one of them presided over, all acting as rapporteur, reviewer or member. Single paragraph. The first-degree judges summoned and the second-degree substitute judges appointed will be members of the chambers or classes to which they are assigned" (Brazil, 1979).

15. Extraordinary criminal panels 1 through 3 were established in 1998, by Resolution 106/1998: "Art. 1 - Three Extraordinary Criminal Chambers are instituted, with ordinal numbering, to assist the 1st, 2nd and 3rd Chambers, respectively.
Art. 2 - Each Extraordinary Chamber will be composed of four Second Degree Substitute Judges and an appellate Judge, who will preside over it, without prejudice to the functions of its Chamber.
Sole paragraph - The career, appellate Judge will be appointed, by rotation, for a period of three months, by the President of the Court, from among the members of the Criminal Chambers, observing the criterion of seniority among those enrolled.
Art. 3 - The Extraordinary Chambers will receive the entire collection of cases that, except for criminal reviews, await distribution, and should judge, with absolute preference, those of arrested defendants.
Art. 4 - The cases will be distributed to Substitute Judges in Second Degree, always participating in the judging group, as a member, the Judge.
Paragraph 1 - Infringing embargoes will be judged by the Judges of the embedded judgment and by the other two Substitute Second Degree Judges who are members of the Chamber.
x 2 - When necessary, a Second Degree Substitute Judge of the subsequent Extraordinary Criminal Chamber will be summoned to complete the judging class.
Art. 5 - For the preparation of votes and judgments, the term of fifteen months is fixed, extendable at the discretion of Chief Justice 2 Vice-President, not counting those of January and July 1999, during which there will be no sessions of the Extraordinary Chambers" (Estado de São Paulo, 1998).

16. Resolution nº 542/2011: "Considering the commitment made by the São Paulo Judiciary to judge all knowledge processes dis-tributed until December 31, 2006 and, as for those within the jurisdiction of the Jury Tribunal, until December

judges are subject to relatively elevated standards as far as their productivity is concerned, with direct implications in terms of their promotion prospects.[17]

Introduced in 2006 by regimental change 377, the Superior Council of the Judges has acquired significant discretionary powers in the selection of sitting judges.[18]

The Constitutional Amendment 45 of 2004 ("The reform of the judiciary") ordered the immediate assignment of all judicial cases already filed in Brazil. As a result, a restrained demand flooded court dockets. In addition, almost concomitantly, a major administrative court reform in São Paulo extinguished one of its appellate courts, the Tribunal de Alcada Criminal (it was a dual system), resulting in a major reassignment of cases to a new, unified appellate court. In practice, these institutional changes resulted in large backlogs in the criminal, appellate court dockets. In response, the Court established several criminal, extraordinary panels composed of sitting judges (SP state constitution, article 73). A significant number of decisions issued by these extraordinary panels were challenged at superior courts (STF and STJ), on the grounds of a violation of the principles of the natural judge and double degree of jurisdiction (see the leading case Habeas corpus HC 96821/SP, at the STF).[19]

31, 2007; WHEREAS, on February 22, 2011, 47,782 cases that fall under CNJ's Goal 2 remain in the Ipiranga's caseload; RESOLVE: Art. 8 - The presidents of the Sections may, upon indication to the President of the Court, move the Substitute Judges assigned to the respective Sections, or from one to another Subsection, in order to quantitatively balance, among the members of each Section or Subsection, the redistribution processes covered by this Resolution. Paragraph 1 - They may also carry out a differentiated distri-bution of one-third greater than normal for all Substitute Judges who are not members of Chambers, under the terms of art. 281 of RI, the final part of art. 178, x 3, of the Internal Regulation, in the part that mentions distribution under equal conditions. Paragraph 2 - They may also, regardless of the date of removal of the Substitute Judges, change the Chamber in the Sections or between the Sub-sections, upon indication to the President of the Court, provided that they have not received a collection upon arrival at the Court, including for partial redistribution. or total holdings left by Substitute Judges already promoted to Judge" (Estado de São Paulo, 2011).

17. Resolution 106/1998, Article 8, Paragraph 3: "The Substitute Judges will have their productivity checked monthly by the Internal Affairs Division of Justice, which must be assessed by the Superior Council of the Judges for the purpose of promotion, applying the provisions of art. 5 of this Resolution" (Estado de São Paulo, 1998).

18. Article 216: It is incumbent upon the Superior Council of the Judges, in addition to other attributions mentioned in these Regulations: "(...) item VI - prepare the list of nominations for filling vacancies at the Court of Justice, in the context of second-degree substitutes and at the first instance, for appointment, promotion, removal and exchange, issuing an opinion or justifying the vetoes, if applicable, taking into account the provisions of article 43, sole paragraph, of State Law No. 6,142, 6/27/1961" (Estado de São Paulo, 2006).

19. Available at: <https://jurisprudencia.stf.jus.br/pages/search/sjur179858/false>.

3 LITERATURE REVIEW

3.1 Career backgrounds and decision standards

An extensive literature has analyzed the role of career backgrounds in influencing decision patterns of judges, evaluated at various metrics. Reinhardt (1999) and Wald (1984) make the general point that judges acknowledge that their personal backgrounds and experiences affect the outcomes of their decisions. The approach that is most similar to this paper was offered by Nagel (1962), who concluded that judges with previous experience as prosecutors are significantly more likely to vote against defendants, compared to those without. Tate (1981) analyses the role of personal attributes on voting patterns of US supreme court justices between 1946 and 1978. He finds that justices with prosecutorial experience were less favorable to claims on civil rights and liberties and less favorable to the underdogs (typically defendants) on economic issue-related claims. Ten years later Tate and Handberg (1991) revisited the issue using a broader time span (1916-1988), to confirm that former prosecutors were less likely to vote in a liberal fashion (i.e., favorably to claims on civil liberties), although the magnitude of the "effect" appeared to be smaller than previously found. Eisenberg and Johnson (1991) find that prosecutorial experience is positively related to a favorable response to racial equal protection claims. Steffensmeier and Hebert (1999) presented evidence that, in the United States, judges initiated their careers as district attorneys tend to punish defendants more severely. Also in the US, Sisk, Heise and Morris (1998) presented evidence that judges with a criminal defense background were much more likely to oppose the Sentencing Guidelines established in 1988. They also find that judges with an experience as a prosecutor were more likely to favor the Guidelines. In this case however, the effects were not as robust as in the case of judges that were former defense lawyers. A number of other studies have failed to establish significant relationships between prior experience and judging standards: Howard (1981) found that, among circuit judges, civil rights issues were the only among several classes of cases, in which judicial experience was a significant factor. Gryski, Main and Dikson (1986) established that prior experience was not important to explain high court judicial behavior in sex discrimination cases. Ashenfelter, Eisenberg and Schwab (1995) found that individual judge characteristics, including prior judgeship, were not significant in explaining district court judges decisions. More recently, Robinson (2011) failed to establish a significant relationship between prosecutorial background and prodefendant outcomes in criminal cases in the U.S. Courts of Appeals. Based on his findings, this author concludes

that mixed evidence from previous studies is attributable to the usual shortcomings of data and empirical models: measurement errors (poor proxies for ideology) and omitted-variable bias – due to non-observable case characteristics.

There are few studies in the Brazilian literature on judicial experience and judicial decision-making. Wowk (2009) analyzes decision standards in criminal reviews, based on the profile of the judges, including gender, race and academic background, besides litigants and lawyers' characteristics. Based on a small sample of cases, the author ex-amines the correlation between sentencing and rapporteurs type of access to courts (appointment versus career), but does not find any statistically significant relationship.[20] Another similar study in Brazil, by Paladino (2007), analyzes the relation between professional backgrounds and juridical orientation, relying on a survey among appellate judges in the state of Paraná. Without distinguishing former prosecutors from former lawyers, the study finds that, when deliberating a case, judges selected through the Quinto Constitucional are more reluctant than career judges to disregarding the legal paradigm in favor of a consequential interpretation of statutes based on the principle of social justice. The study also finds evidence that these judges are less sympathetic of judicial independence and are more inclined to judicial formalism, in comparison to career judges.

3.2 Judges sitting by designation

Designated judges are also appointed, but in a completely discretionary manner and to that extent, these sitting judges should reflect the political agenda of the court only.[21] A limited body of literature has investigated the behavior of judges sitting by designation in US courts. Scholars have shown that decisions written by designated judges are not as solid as those written by career judges (The second..., 1963) and thus, more likely to be reviewed en banc (Alexander Junior, 1965; Solimine, 1988). In addition, Green and Atkins (1977) and Saphire and Solimine (1994) find that designated judges dissent much less frequently than circuit judges.[22] This diffident behavior has recently been corroborated by Brudney and

20. However, the study finds a significant, strong relationship among sentencing and academic background. The shortcomings of the study are: i) small sample, with only 81 appeals; ii) lateral access alone does not specify which career the judge once belonged; iii) outcome variable is sentencing, not reversal of decision.

21. One may think of these sitting judges as stripped from ideology and fully response to career incentives, which must force them to judge in line with the predominant views within the appellate court.

22. This pattern is attributable to the decisive role of seniority, status and hierarchy in collegiate decision-making. This point is made by Ulmer (1971), Walker (1970) and Green and Atkins (1977), and corroborated in the interviews by Cohen (2002).

Distlear (2001) in the context of appeals involving unfair labor practices: "[sitting judges] seldom author panel opinions, they even more rarely dissent, and they do not vote in any distinctively pro-union or anti-union fashion" (Brudney and Distlear, 2001, p. 599). In a similar fashion, Benesh (2006) finds that sitting judges write few majority opinions compared to appellate judges and are averse to filing dis-senting or concurring opinions. More recently, Peppers et al. (2012) and Budziak (2015) offer empirical evidence that the choice of judges sitting by designation id driven mainly by ideological compatibility between the chief judge and the candidate. Moreover, designation serves the purpose of pushing the legal policy agenda of the court's leaders. Finally, Lemley and Miller (2014) examines how rulings on the construction of patent claims by district judges are treated in the Federal Circuit in the United States. They find that district judges are far less likely to be reversed after they have sat by designation. They argue that results are driven by personal connections that judges establish with the appellate court, rather than judge experience in patent cases.

3.3 Present contribution to the literature

This paper addresses the exact same issue as Robinson (2011) namely, the impact of prosecutorial background on judicial decision-making, but extending the analysis to advocacy background as well. The unique processes of nomination and appointment of the "special" judges makes career background a particularly strong proxy for ideology: potential, viable candidates to the bench are representatives of the political agenda of their corporations. In addition a gubernatorial appointment requires political commitments and patronage. As a result, the behavior of appointed judges should convey not only a strong ideological component but also the political agenda of the court.

Regarding the behavior of sitting judges, the present paper revisits many of the previous questions in the empirical literature, in particular whether sitting judges are indeed diffident.

Last but not least, the current empirical analysis is a test for the integrated approach on judicial decision-making (Coggins, 2008), which reconciles the attitudinal model and the selection of disputes or litigation (case sorting):

> Judicial ideology should matter least when litigants are successful in their case sorting and more when litigants do a poor job sorting. Therefore, the primary hypothesis is: The influence of judicial ideology on court outcomes should be greater when strategic case sorting is less effective.

The importance of this empirical analysis is that case sorting becomes less effective after the shift in jurisprudence without a binding effect. Moreover, by restricting estimation to a sample of appeals without retained jurisdiction, case sorting becomes even less effective.

Career backgrounds are not the only source of variation to explaining decision standards of appellate judges. Institutional factors may play a role as well (Gillman, 1999; Smith, 2008).

4 MODEL AND TESTABLE HYPOTHESIS

Appellate decisions can be best framed within a discrete choice, a standard judicial decision-making model. The latent dependent variable is the probability that the appellate panel decision[23] is pro-defendant and depends on the type of rapporteur (career judge, former lawyer, former prosecutor or sitting judge). The model includes a covariates describing case and court characteristics:

$$P(y = \text{outcome} \mid x_1; x_2; x_3; x) = F(b_1x_1 + b_2x_2 + b_3x_3 + b_{12}x_1x_2 + b_{13}x_1x_3 + b_{23}x_2x_3 \\ \acute{}+b_{123}x_1x_2x_3 + xb) = F(xb) \quad (1)$$

Where y is a binary variable, equal to one when decision outcome is pro-defendant; equal to 1 if the decision is pro-defendant or partially pro-defendant;[24] and equal to zero otherwise; x_1 is a dummy variable equal to 1 if the judgement date is after the change in jurisprudence (HC 96821/RS), x_2 is a categorical variable, which distinguishes whether the rapporteur is a career judge, a district judge sitting by designation, a former, appointed lawyer or a former, appointed prosecutor career; x_3 is a dummy variable equal to 1 if the defendant files and zero if prosecution files the appeal; and x is a vector of covariates that describe case and court characteristics.

23. The dataset does not contain information on each panel judge individual vote. It only contains the final result. Still, over 99.5% of panel decisions are unanimously.
24. Most results are unchanged if an ordered-probit model is adopted, instead of an ordinary probit model with a binary dependent variable.

The interaction of x_1, x_2 and x_3 allows estimating the effect of the new jurisprudence on case outcomes contingent on judge type (ideology) and whether the plaintiff or the prosecutor files the appeal (selection effect).

The fact that cases are randomly assigned is central to the identification strategy, because it rules out the possibility of reverse causality or omitted-variable bias, which would invalidate inference and testing on the parameters of interest. For instance, if case assignment was not random, then parties would pick panels or rapporteurs according to their interests: appealing defendants would pick pro-defendant judges and appealing plaintiffs, pro-plaintiff. As a result, the parameters would be overestimated in magnitude. The way the model is established implies a key, implicit hypothesis underlying panel decision making process: the opinion of the rapporteur prevails. As descriptive statistics show, 98% of the cases are unanimously decided, following the rapporteur, suggesting a lack of dissent.

Quantitative and qualitative empirical studies in Brazil corroborate the assumption that the rapporteur prevails, but only in the context of the Supreme Court. Oliveira (2012) shows that in 98% of the non-unanimous decisions in declarations of unconstitutionality the vote of the rapporteur prevails. In interviews with Supreme Court Justices, Silva (2015) finds that only when the issue is highly controversial and sensitive to the public opinion the vote of the rapporteur is treated as anybody else's vote. Otherwise, in low-profile, repetitive cases, the vote of the rapporteur will indeed prevail. These findings may apply to state appellate courts as well, since the caseload is almost completely made of repetitive cases (particularly in criminal cases) not deemed as high profile. Moreover, career interests and efficiency considerations – both nonexistent at the Supreme Court – should ceteris paribus further strengthen the role of the rapporteur.

Another concern is that the lawyers and prosecutors that are selected for the bench are not randomly selected from their respective populations and thus, are not represen-tative of their types. It turns out however, the choice set of the state governor is based on a list of six names that are chosen by restricted suffrage, i.e., within boards of dele-gates, both at the bar association and at the Ministerial office.[25] Therefore, the

25. At the OAB, the Conselhos Seccionais and at the Ministério Público, the Conselho Superior do Ministério Público. These are statewide-representative councils. Voting system requires that each board member casts six votes among candidates in the list.

selection process suggests that these corporations carefully pick "representatives" that will be have a mandate and will be accountable to their constituents once they are appointed to the bench. Put another way, they must be bound by a strong espirit de corps. Moreover, anecdotal evidence suggests that viable candidates for the Quinto Constitucional must hand-kiss with political leaders of all branches of power: judiciary, executive and legislative.

Career background as a proxy for the ideology of appellate judges, is questionable in the sense that career judges may have previously been attorneys or even prosecutors. Whereas the latter is a quite unusual career path, the former is almost an universal norm: most Brazilian judges have worked as attorneys, simply because selection rules requires litigation experience, which in its turn requires affiliation to a bar association. However, this feature does not undermine our results, because the vast majority of appellate judges ascending from the judicial career served at first instance courts for at least a couple decades[26] and importantly, they were not selected by the mechanism of the Quinto Constitucional. These are, thus, significantly distinct types of judges.

5 DATA AND RESULTS

5.1 A Descriptive statistics

The Tribunal de Justiça do Estado de São Paulo (TJSP) is a very large court by any standards. In 2015, it had 2,607 judges and 43,033 employees, handling 4.76 million new cases (including 847 thousand cases in the second degree) and over 20 million pending cases.

Data on criminal appeals were provided by the TJSP.[27] The data comprises 122,807 criminal reviews on drug offense cases, assigned between 2009 and 2013,

26. The key point is that they are arguably different from former lawyers or former prosecutors, either because they opted for a judicial career to begin with or because, say they were initially randomly selected for the bench, many years of judgeship ended up shaping their views in particular ways that are distinct from that of those who spent their almost entire careers serving as prosecutors or lawyers.

27. The TJSP did not provide, however, a complete classification of their appellate judges according to career backgrounds. The data was collected from seniority lists, news clippings at the court's website, short judge biographies found on the internet and court gazettes, downloaded from the official press of São Paulo, available at: <https://bit.ly/3uUekNi>.

within sixteen appellate panels among seven classes of appeals: review of interlocutory decision, criminal review, motions to clarify decision, Habeas Corpus, writ of mandamus, review of sentence execution and annulment of judgment.

The sample is restricted to appeals that involve a prosecutor (Ministério Público), either as a plaintiff or as a defendant. A decision is classified as pro-defendant decision in the following situations: i) plaintiff is not the MP and the appeal is granted or partially granted; ii) the plaintiff is the MP and the appeal is not granted or partially granted. Otherwise, the decision is classified as pro-plaintiff (dependent variable equal to zero).

Table 1 presents aggregate statistics on appellate cases. Only 25% of the appeals are decided in favor of the defendant. More than 90% of the appeals were filed by the defendant. In 38% of the appeals, a given judge retains jurisdiction over the case. The majority of the appellate cases (86%) pertains to the classes of criminal review and Habeas corpus.

Table 2 presents descriptive statistics conditional on the type of litigant that files the appeal. Prosecution is on average less successful than defendants. Prosecutors concentrate claims on criminal reviews and reviews of sentence executions, while defendants concentrate their appellate claims on criminal reviews and Habeas corpus.

Table 3 below presents summary statistics by type of judge, before and after the shift in jurisprudence. The density of cases is not balanced pre and post-treatment, since the shift in jurisprudence occurs early in the sample window. Therefore, only three classes exhibit significant samples pre-treatment: criminal reviews, review of sentence executions and habeas corpus. The statistics suggest that, within these three classes, career and sitting judges have not exhibited significant changes in the rates of pro-defendant decisions; most of the "action" will come from the gubernatorial appointments. Former lawyers exhibit positive, sizeable changes in pro-defendant wins for all the three classes. Former prosecutors exhibit a large decrease in pro-defendant wins in reviews of sentence executions, a modest decrease in Habeas corpus and no decrease in criminal reviews.

TABLE 1
Summary statistics: criminal reviews in drug offense cases – Tribunal de Justiça de São Paulo (2009-2013)

	Mean	Standard deviation	N
Pro-defendant	0.245	0.370	122,807
Defendant files	0.917	0.275	122,807
Retained jurisdiction	0.377	0.485	122,807
Monocratic	0.001	0.028	122,807
Incident	0.024	0.154	122,807
Review of interlocutory decision	0.006	0.076	122,807
Motion to clarify judgement	0.021	0.145	122,807
Criminal review	0.486	0.500	122,807
Annulment of judgement	0.016	0.126	122,807
Review of sentence execution	0.095	0.294	122,807
Writ of mandamus	0.004	0.065	122,807
Habeas corpus	0.367	0.482	122,807

Source: Data from the Tribunal de Justiça do Estado de São Paulo.
Author's elaboration, with support of the Ipeajus system.

TABLE 2
Summary statistics by type of filing party: criminal reviews in drug offense cases – Tribunal de Justiça de São Paulo (2009-2013)

	Prosecution files	Defendant files
Pro-defendant	0.5999	0.2136
Retained jurisdiction	0.4529	0.3698
Monocratic	0.0007	0.0008
Incident	0.0123	0.0253
Review of interlocutory decision	0.0491	0.0019
Motion to clarify judgement	0.0122	0.0223
Criminal review	0.5181	0.4831
Annulment of judgement	0.0000	0.0174
Review of sentence execution	0.3840	0.0693
Writ of mandamus	0.0323	0.0017
Habeas corpus	0.0001	0.4005

Source: Data from the Tribunal de Justiça do Estado de São Paulo.
Author's elaboration, with support of the Ipeajus system.

Besides changes pre/post shift in jurisprudence, the data also reveals that sitting judges tend to be stricter that career judges, specially in Habeas corpus and annulment of judgments, with much lower pro-defendant win rates. Post-treatment, relatively to career judges, former lawyers tend to be more inclined to the annulment of judgement

and former prosecutors more inclined to uphold the judgements. Finally, data clearly shows that overall, former lawyers are (post-treatment) much more likely to favor defendants than former prosecutors.

TABLE 3
Percentage of pro-defendant decisions, before and after shift in jurisprudence, by class of appeal and type of rapporteur – São Paulo (2009-2013)

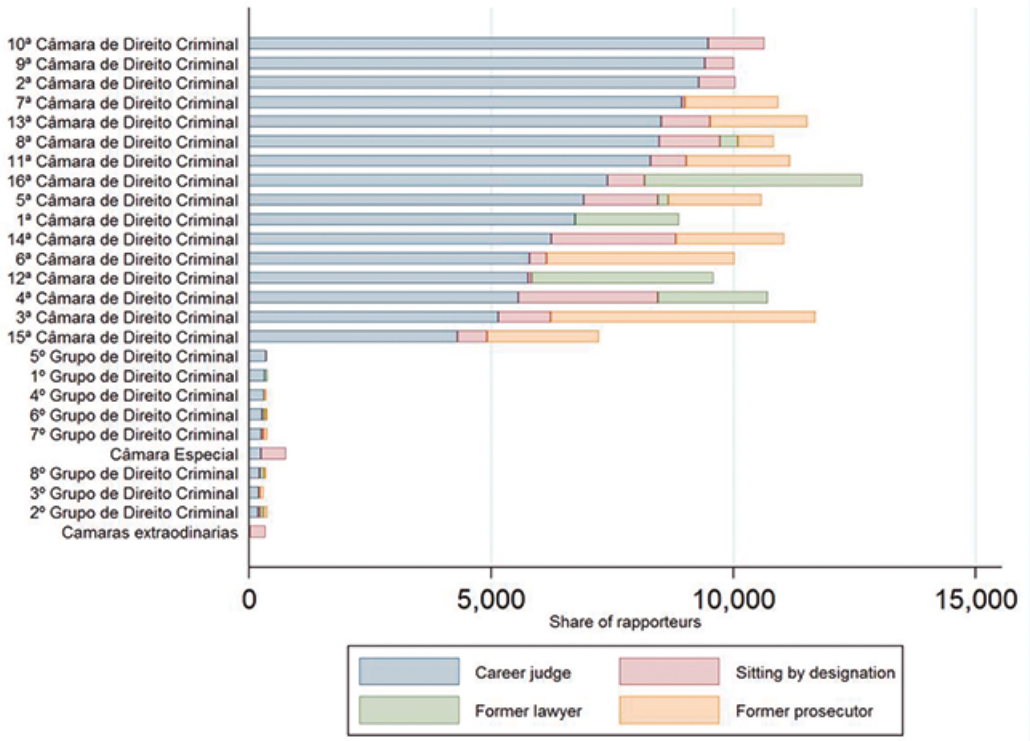
	Career judge		Designated judge		Former lawyer		Former prosecutor		**Total**	
Class	0	1	0	1	0	1	0	1	**0**	**1**
Review of sentence execution	0.427	0.395	0.364	0.356	0.466	0.554	0.490	0.393	**0.425**	**0.402**
	1,223	6,678	364	1,100	175	682	192	1,289	**1,954**	**9,749**
Criminal review	0.291	0.313	0.247	0.253	0.298	0.375	0.266	0.254	**0.281**	**0.303**
	4,607	37,057	1,141	4,480	181	3,845	537	7,829	**6,466**	**53,211**
Motion to clarify	0.185	0.191	0.107	0.158	0.278	0.274	0.080	0.172	**0.160**	**0.189**
	184	1,501	70	366	9	157	25	323	**288**	**2,347**
Habeas corpus	0.132	0.131	0.049	0.059	0.168	0.260	0.133	0.108	**0.120**	**0.133**
	5,262	25,363	1,500	2,954	723	3,234	916	5,151	**8,401**	**36,702**
Writ of mandamus	0.639	0.567	0.575	0.466	0.700	0.789	0.583	0.348	**0.630**	**0.556**
	72	298	20	29	10	38	6	46	**108**	**411**
Review of interlocutory decision	0.528	0.448	0.367	0.244	0.750	0.580	0.500	0.346	**0.506**	**0.431**
	53	456	15	41	4	50	6	91	**78**	**638**
Annulment of judgment	0.071	0.166	0.214	0.040	0.000	0.200	0.250	0.104	**0.102**	**0.154**
	35	1,403	7	100	3	155	4	259	**49**	**1,917**

Source: Data from the Tribunal de Justiça do Estado de São Paulo.
Author's elaboration, with support of the Ipeajus system.

Graph 1 shows that composition of criminal panels, by type of appellate judge, varies significantly.[28] A number of "residual" panels contribute to a small fraction of all judgements – the groups, the Special Chamber (Camara Especial) and the extraordinary panels.

28. Composition is measured by the shares of rapporteurs by type of judge sitting in each panel, in the sample period (2009-2013).

GRAPH 1
Composition of criminal panels in São Paulo (2009-2013)



Source: Data from the Tribunal de Justiça do Estado de São Paulo.
Author's elaboration, with support of the Ipeajus system.
Obs.: 1. The share of a particular type of rapporteur in panel cases is the sum of cases assigned to that type divided by the total number of cases assigned to any panel member.
2. Publisher's note: Graph whose layout and texts could not be formatted and proofread due to the technical characteristics of the original files.

5.2 Balancing tests

The identification strategy requires that, within each judging panel, the selection of the type of rapporteur be orthogonal to case characteristics. This means that, in any given panel (i.e., the randomization stratum), case assignment rules cannot discriminate among judge types.[29] Put another way, in any given panel, treatment (non-career judges) and control groups (career judges) should not exhibit significant pre-treatment differences in the case attributes that matter for outcomes. This is true by design, but since the appellate court of São Paulo has a large number criminal panels, with re-

29. Strictly speaking, case assignment needs not be random. It needs to obey a rule that is exogenous with respect to relevant case characteristics, for instance, sequential alternate assignment among panel members. The fact that panels are not balanced in terms of judge types is not a problem, as long as we condition outcomes on these strata.

served, cumulative or residual jurisdiction powers, assignment procedures can be quite intricate, particularly in the context of an overburdened case docket,[30] which at times, becomes a justification for shuffling cases around, by shifting jurisdiction powers or relocating judges. This institutional setting casts legitimate doubts over the randomness of case assignments[31] and therefore, empirical tests are needed.

Graph 2 presents results of balancing tests, which consist of t-tests of differences in means of observables between treatment (non-career judges) and control group (career judges), for each stratum (i.e., each criminal panel).[32] Except for the incidence of criminal reviews and Habeas corpus, most of the tests fail to reject equality in means between between treatment and control prior to treatment. That difference is explained by the fact that sitting judges are predominant in duty courts that handle urgent matters on weekends or holidays, which include Habeas corpus, but not reviews. Also, when sitting judges fill for the absence of appellate judges, their competence is restricted to urgent matters too. These differences do not compromise the research design, since the estimates of treatment effects are conditional on case class as well.

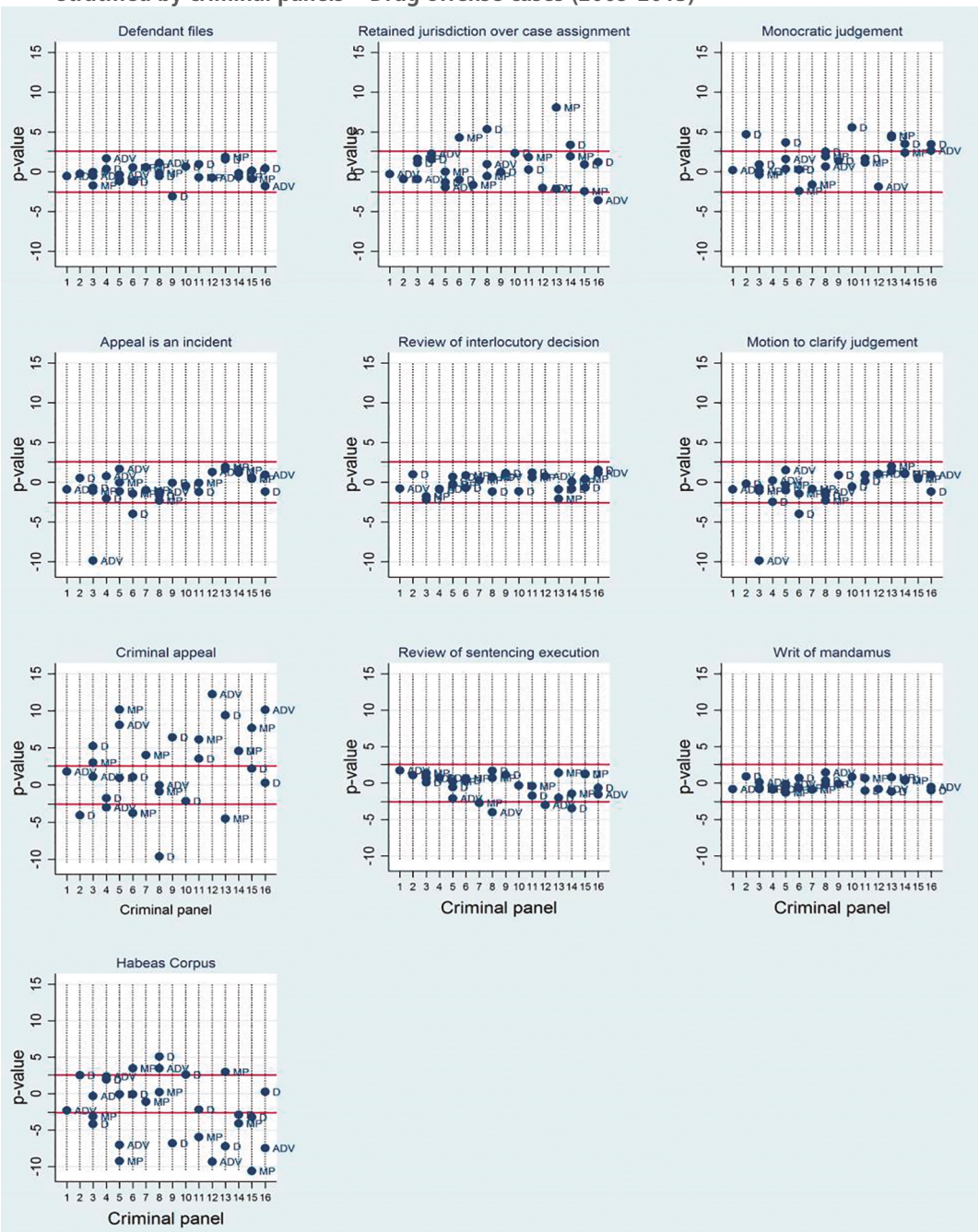
30. Some panels have reserved jurisdiction: the 15th criminal panel detains jurisdiction over claims against mayors and former mayors, crimes against public administration, abuse of authority and frauds in public procurement (jurisdiction established by resolution 393/2007 by the Órgão Especial). In February 2013, four criminal, extraordinary panels were established (resolution 590/2013), with jurisdiction over cases pending the longest. Curiously, it requires rapporteurs be district judges sitting by designation. The Câmara Especial holds jurisdiction over child and juvenile-related cases, besides cases on conflict of venue and motions for bias. Effective in 2008 (changes in resolutions 194/2004 and 274/2006), members of the Órgão Especial were granted discretion over being rapporteurs. This panel has jurisdiction over cases against state authorities (the governor, representatives, judges and prosecutors) as well as declarations of unconstitutionality.

31. Jurisdiction powers have been a contentious matter in Brazilian justice and São Paulo is no exception. A wide range of claims filed at the Supreme Court and the National Justice Council have questioned the validity of case assignment rules, predominantly on the grounds that they undermine the principle of the natural judge.

32. The tables of results is not included in the paper for the sake of brevity, since there are sixteen strata and twelve observables.

GRAPH 2

Balancing tests for the assignment of rapporteurs in the appellate court of São Paulo, stratified by criminal panels – Drug offense cases (2009-2013)



Source: Data from the Tribunal de Justiça do Estado de São Paulo.
Author's elaboration, with support of the Ipeajus system.
Obs.: 1. Red lines are the limits for the 99% confidence interval of the tests of the equality of means. Drug offense cases.
2. Publisher's note: Graph whose layout and texts could not be formatted and proofread due to the technical characteristics of the original files.

5.3 Results

In theory, the first prior is that, with the new jurisprudence, the odds of defendants would, on average, improve to some extent across the board. Secondly, one should expect that the lack of a restrain on a conversion of imprisonment to a lighter punishment should have an asymmetric effect: prior to the shift, tougher judges were less constrained whereas softer judges were relatively more constrained by the New Drug Law of 2006. Therefore, once the supreme court eliminates that constraint, one should expect a larger effect in magnitude for softer judges, i.e., former lawyers, and a smaller effect for the tougher judges, i.e., former prosecutors (due to a non-binding legal restraint). This rationale is based on a ceteris paribus assumption, meaning that all other factors affecting judicial decisions are unchanged. But, as it seems from the following results, this will not be the case: judges may respond to jurisprudence or statutory changes by changing reasoning.

Table 4 below presents estimates of the marginal effect of the shift in jurisprudence, contingent on the type of rapporteur.

TABLE 4
Marginal effect of a jurisprudence shift contingent on appellate judge type – Tribunal de Justiça do Estado de São Paulo (2009-2013)[1]

	Criminal reviews	Review of interlocutory	Review of execution	Annulment	Habeas corpus	Writ of mandamus	Motion to clarify
Career X defendant files	0.043***	0.297***	-0.028	0.156***	-0.002	0.223***	-0.010
	(0.014)	(0.082)	(0.032)	(0.040)	(0.007)	(0.085)	(0.055)
Designated X defendant files	0.031	-0.178	0.031	-0.077	0.017***	0.544***	0.014
	(0.021)	(0.260)	(0.046)	(0.090)	(0.007)	(0.197)	(0.018)
Former lawyer X defendant files	-0.019	0.226	-0.008	0.168***	0.048***	0.276***	-0.209
	(0.051)	(0.170)	(0.065)	(0.030)	(0.019)	(0.136)	(0.252)
Former prosecutor X defendant files	0.014	-0.072	-0.105***	-0.079	-0.028***	0.287	0.107***
	(0.025)	(0.369)	(0.060)	(0.213)	(0.012)	(0.410)	(0.016)
Career X prosecutor files	-0.035	0.009	-0.026			0.033	-0.000
	(0.026)	(0.127)	(0.033)			(0.113)	(0.149)
Designated X prosecutor files	-0.178***	0.019	-0.046			-0.144	-0.250
	(0.061)	(0.171)	(0.056)			(0.247)	(0.261)
Former lawyer X prosecutor files	-0.102***	-0.335***	0.088***			0.218	-
	(0.043)	(0.074)	(0.052)			(0.190)	-
Former prosecutor X prosecutor files	-0.154***	-0.099	0.048			-0.354	-0.214***
	(0.074)	(0.222)	(0.062)			(0.289)	(0.007)

Source: Data from the Tribunal de Justiça do Estado de São Paulo.
Author's elaboration, with support of the Ipeajus system.
Note: [1] Shift in jurisprudence: Habeas Corpus No. 97,256/RS of February 16th, 2012.

Baseline results regarding the shift in jurisprudence suggest:

- statistically significant responses by career judges are limited to appeals filed by defendants, being always favorable to them. A particularly strong effect, close to 30 p.p., is observed in reviews of interlocutory decisions filed by defendants.[33] Sizeable effects also appear in annulments of judgements (15 p.p.)[34] and writ of mandamus (+22 p.p.);
- the response of former prosecutors is always against defendants, except for motions to clarify (filed by defendants). Sizeable effects appear in criminal reviews (-15 p.p.) and motions to clarify filed by prosecution (-21 p.p.);
- the response of former lawyers is mixed: when defendants file, the response is favorable to defendants – particularly strong in annulments (+17 p.p.) and in writ of mandamus (+28 p.p.); when prosecution files, the response is (mostly) against defendants, notably strong in reviews of interlocutory decisions (-34 p.p.);
- designated judges are mostly unresponsive, except for favorable decisions to prosecution in criminal reviews (-17 p.p.) and favorable decisions to defendants in writ of mandamus (+54 p.p.).

Interestingly, in writ of mandamus only former prosecutors fail to show a strong, statistically significant and favorable response to defendants. Likewise, only career judges fail to show a negative response when prosecution files criminal reviews.

Considering the behavior of career judges as a benchmark, the fact that these judges are unresponsive to the jurisprudence shift when prosecution files the appeal, is consistent with the following selection mechanism: in face of pro-defendant shifts in jurisprudence and statutes, the ministerial office should anticipate to the consequences of the jurisprudence shift and rationally choose to file "strong cases", hence the lack of statistically significant effects.

Table 5 presents estimates of the marginal effects of the jurisprudence shift controlling for selection effects. As discussed above, when a particular judge retains jurisdiction over the case, the identity of the rapporteur will be know ex-ante, directly

33. Reviews of interlocutory decisions discusses finding of facts; judicial inquiries; jurisdiction powers; framing, i.e., whether the defendant is charged with drug use or drug trafficking, etc., typically in early stages of the case.
34. The effect comes mostly from variation between judge types, given that there are very few cases decided prior to the shift in jurisprudence. There were only 76 Annulments of judgment (Revisão Criminal) filed prior the Supreme Court ruling and 2,047 after, suggesting that this remedy was widely pursued after the change in jurisprudence.

affecting the decision of filing the appeal. As a result, the average outcome of the appeals within that panel will be significantly influenced by selection effects, masking the true effect of judge attitudes. Thus, aiming at mitigating selection effects, table 5 presents estimates of the parameters of the same models, excluding cases with retained jurisdictions, i.e., including only appeals that are randomly assigned.

Due to a reduced sample size, the model is not estimable for some of less numerous case classes: writ of mandamus and motion to clarify judgement. Results are consistent with the full-sample results but the magnitude of the effects are greater, confirming that selection effects tend to overshadow the effect of judicial attitudes on case outcomes.

TABLE 5
Marginal effect of a jurisprudence shift contingent on appellate judge type[1] – Tribunal de Justiça do Estado de São Paulo (2009-2013)[2]

		Review of interlocutory	Review of execution	Annulment	Habeas corpus
Career X defendant files	0.033***	0.390***	-0.013	0.156***	0.003
	(0.016)	(0.088)	(0.060)	(0.040)	(0.007)
Designated X defendant files	0.016	-0.502	0.022	-0.069	0.019***
	(0.024)	(0.311)	(0.085)	(0.088)	(0.006)
Former lawyer X defendant files	-0.029	-	-0.010	0.167***	0.075***
	(0.059)	-	(0.110)	(0.031)	(0.022)
Former prosecutor X defendant files	-0.008	-0.218***	-0.133	-0.081	-0.033***
	(0.029)	(0.111)	(0.120)	(0.200)	(0.013)
Career X prosecutor files	-0.039	0.095	-0.021		
	(0.031)	(0.143)	(0.054)		
Designated X prosecutor files	-0.256***	0.027	0.091		
	(0.069)	(0.208)	(0.097)		
Former lawyer X prosecutor files	-0.084	-0.398***	-0.015		
	(0.063)	(0.110)	(0.050)		
Former prosecutor X prosecutor files	-0.092	0.181	-0.011		
	(0.085)	(0.186)	(0.090)		

Source: Data from the Tribunal de Justiça do Estado de São Paulo.
Author's elaboration, with support of the Ipeajus system.
Notes: [1] Excludes cases with retained jurisdiction.
[2] Shift in jurisprudence: Habeas Corpus No. 97,256/RS of February 16th, 2012.

6 DISCUSSION

The pro-defendant response of career judges suggests that when jurisprudence and statutes prevail over attitudes, pro-defendant changes in these should mechanically lead to pro-defendant changes in case outcomes.

The anti-defendant response of former prosecutors corroborates the notion that ideology and espirit de corps may play a role in shaping judicial decisions. In theory, a less restrictive jurisprudence should, at best, result in no-effects, but evidence suggests that former prosecutors respond against defendants. Results also shed light on the balance between legal and extralegal factors: former prosecutors also exhibit a pro-defendant response in writ of mandamus and motions to clarify, which are procedural remedies that tend to rely upon objective legal aspects, allowing a narrower margin for extralegal considerations.

The mixed response of former lawyers is also evidence of the interplay between legal factors and attitudes. The very strong and negative response in reviews of interlocutory decisions suggests some degree of deference to the prosecution's pursue of alternative strategies while building the case, in face of new jurisprudence. However, in later stages or beyond the end of the case, such judges become more sensitive to legal standards, thus the positive response (i.e., favorable to defendants) in writ of mandamus and annulments.

Designated judges show no response the jurisprudence shift when defendants file, which is quite a contrast with career judges.[35] This insensitivity in face of a non-binding jurisprudence shift is consistent with the notion of diffidence of judges sitting by designation. On the other hand, these sitting judges exhibit large anti-defendant responses when prosecution files, particularly in criminal reviews. Therefore, designated judges show diffidence and also some evidence of attitudes contrary to the direction of the jurisprudence shift.

Results on the impact of jurisprudence/legal changes can be interpreted as evidence on the role of extra-legal considerations in opinions, relying on the qualitative analysis of Machado et al. (2018), who analyze reasoning underlying 266 opinions in

35. The non-binding nature of the shift gives room or appellate judges to ignore it.

the TJSP, before and after shift in jurisprudence. They show that, after the shift, arguments in favor of non-custodial punishments were predominantly based on the new precedent. On the other hand, arguments against conversions were varied, including the non-binding nature of the leading-case[36] and conflicting jurisprudence by the STJ (Superior Court of Justice). Once Senate enacted the statutory change, they argue, strictly legal, statutory interpretation shifted towards provisions of the sentencing guidelines of section 44 of the criminal code, which prohibits non-custodial sentencing regimes when punishment exceeds four years. In addition, legal reasoning tended to increasingly rely on critical, extra-legal judgments such as the "adequacy of punishment"[37] and moral assessments of the essential nature of drug use and drug trafficking activity.[38] In short, the authors describe a gradual transformation of legal reasoning following first the shift in jurisprudence and then the change in the statute: as jurisprudence and the statute no longer "functioned" favorably to tough judges, moral judgments and alternative statutes increasingly replaced he former as a source of law and a basis for judgements.

The magnitude of the effects of changes in jurisprudence suggests: i) an anti-defendant stance of former prosecutors – who, contrary to the prediction of a purely-legal model, became yet tougher after the enactment of more forgiving criminal jurisprudence/statutes; ii) a dubious stance of former lawyers – much more favorable to defendants in habeas corpus and annulment of judgments and much more unfavorable in case of reviews of interlocutory decisions filed by prosecution; iii) overall, designated judges do not exhibit an effective response to the jurisprudence shift (in fact many negative effects appear but with large variance). But when prosecution files appeals, designated judges exhibit a strong response against defendants.

Examining particular case classes brings additional insights, since litigation strategies and legal reasoning are expected to adapt or to respond to changes in jurisprudence, for instance by switching between alternative procedural instruments or remedies that may be substitutes in terms of their substantive effects.

36. And the fact that the decision was not unanimous, augmenting possibilities for challenging.
37. Alternative punishments were deemed "insufficient", incompatible with "reproving and prevention" of drug trafficking, generating a "feeling of impunity" and "incentives to recidivism".
38. Claims on the "gravity of losses" associated with these type of crime and on its "heinous nature".

Freyens and Gong (2017) test whether behavior of labor judges is sensitive to the in-teraction of judge-specific bias and statutory changes. They present empirical evidence of compensating effects that are similar in flavor to present the findings: after statute changes that adversely affected the chances of workers in labor disputes in Australia, judges with a progressive background increased their percentage of rulings favorable to dismissed employees.

7 CONCLUSION

This paper evaluates the effect of judicial ideology on the outcome of criminal appeals related to drug offenses. This evaluation exploits the heterogeneous response of different types of judges to a major shift in jurisprudence on drug offenses, in a setting where appeals are randomly assigned to panels.

The institutional structure of the state court in São Paulo encompasses three types of appellate judges, besides career judges: former lawyer and former prosecutors, selected by gubernatorial appointments, and judges sitting by designation, without tenure at the appellate court, that can be removed at the discretion of the coup of the court. The basic assumptions regarding the behavior of these different judge types are that, compared to career judges, former lawyers are more inclined towards defendants whereas former prosecutors are more inclined towards prosecution. These appointed judges have a duty to represent their constituents, from institutions that have well-defined political agendas, in terms of their support for "rule of law" and punishment, in the case of former members of the Ministério Público, and the right to a fair trail and due process of law, in the case of former members of the bar association (OAB). Both types are bound by a strong espirit de corps. Due to the political nature of their appointment, these judges are relatively more susceptible to contributing to the policies by the executive, in particular the criminal policy. Judges sitting by designation, on the other hand, do not enjoy the constitutional prerogatives of independent judges and thus are exposed to political pressure and career incentives, with potential impacts on their decision standards. Specifically, the following features may appear as disproportionately important for these judges: they value judicial efficiency, they adhere to the dominant ideology of the court and they might be diffident.

Results suggest that career judges indeed respond favorably to defendants, after a pro-defendant shit in jurisprudence. This evidence corroborates the role of legal factors underlying judgments. It turns out however, that this behavior is not quite the same for all judge types.

The response of former prosecutors to the jurisprudence shift is very significant, provided that, despite new, more lenient legal provisions towards drug offenders, former prosecutors responded to changes with significantly harsher decisions, in most case classes. This type of response resembles the phenomena of offsetting (Freyens and Gong, 2017). The fact that they are systematically much more pro-prosecution than other types of judges when the Ministério Público files the appeal is suggestive of a strong espirit de corps. It is also significant that former prosecutors are the only category of appellate judges in which none of the common constitutional remedies such as habeas corpus and writ of mandamus have not tilted towards defendants post-shift.

Former lawyers responded to the jurisprudence shift becoming much harsher in early stages of the cases – judging contrarily to defendants in the challenge of interlocutory decisions and in criminal reviews,[39] but they responded favorably to defendants either in later phases of the case (execution and annulments) or while facing constitutional remedies. These 'liberal' judges were – prior to the shift – the most constrained by a harsh criminal statute and thus, exhibited the most meaningful response ex-post.

The only significant and strong response of sitting judges is in criminal reviews, tilting against defendants after the jurisprudence shift. They do not favor defendants in early sages of the case, like career judges. Neither in post-judgement remedies like former lawyers, although they also seem to concede to defendants in constitutional issues. This type of response is consistent with a diffident posture.

Comparing the responses of different judge types, it seems that, regarding career judges as a baseline, former prosecutors will offset the shift because their preferences are in line with prevailing policy views. The preferences of former lawyers on the other hand, are not aligned with such views, resulting in mixed responses, which weigh in refractory behavior by prosecution (offsetting) but as cases evolve, fundamental rights

39. Possibly, evidence of a formalist view.

weigh in more heavily. Finally, the response of sitting judges is consistent with diffident behavior and offsetting.

The behavior of special judges seems to be consistent with policy orientation by executive state authorities, characterized by the literature as a now long-lasting crack-down on crime, which pursues the maximization of conviction chances and provided that conviction is achieved, that sentencing be as harsh as possible.[40] Overall, this evidence illustrates how political appointments in the judiciary could have substantive impacts on law enforcement.[41]

Overall, the response of special judges to changes in jurisprudence is subject to a constant interplay between different objectives in their utility functions: jurisprudence and statutes, public policy, career interests and special interests. The analysis of the change in jurisprudence suggests the system is far from the simple dynamics of a "mechanical jurisprudence" because the data corroborates the occurrence of intense and heterogeneous reactions, contingent on judge types and case types, which reflect changes in the selection of procedural instruments underlying a new jurisprudence regime alongside new prosecution strategies.

In that respect, since at least the beginning of the 2000's, the state of São Paulo has adopted a very tough stance on crime, which has effectively reduced homicide

40. In that respect, since at least the beginning of the 2000's, the state of São Paulo has adopted a very tough stance on crime, which has effectively reduced homicide rates, but at the same time with dramatic increase in incarceration and alleged human rights' violations by police forces, inside and outside the prison system. A few years earlier, a new federal Law No. 11343/2006 established a much harsher sentencing for drug offenses. The growth of organized crime legitimated a state policy that was very tough on crime and less concerned with human rights' violations, under a logic of a war on drugs. This appears to be a pervasive pattern throughout the estimation sample: cracking down on crime, even in the case of less violent crimes or juvenile offenses. Additional evidence on the ideological preferences of the court as a whole can be found on the case of two appellate judges who faced complaints filed by the Ministerial Office, allegedly because of being lenient with criminals. In the first case, judge Roberto Corcioli faced a complaint filed by 23 prosecutors. The coup of the TJSP (Órgão Especial) has just decided for punishment of censure by a large majority, 22 to 2. Another judge, Kenarik Boujikian was also punished for similar reasons.

41. Bezerra (2016) discusses the problem of designated judges in São Paulo courts, stressing that by the excessive use of designations, the coup of the state court is in practice able to choose arbitrarily the judge of the case, violating the principle of the natural judge. Cardoso (2017) provides an extensive discussion on the institutions of criminal policy in São Paulo, based on interviews with prosecutors judges and public defendants. She points to the dominant role of designated, first degree judges in panels that oversee police investigations and sentence executions. Since these judges are not immovable, the design implies that that the coup of the judiciary holds significant discretionary powers over the entrance and exit doors to the prison system in São Paulo. Moreover, the author suggests, prosecutors (Ministério Público) and public defendants (Defensoria Pública) played along, in exchange for corporatist favors.

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