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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 attempts to quantify the response of different types of appellate judges to a major shift in criminal jurisprudence on drug offenses in Brazil, which, in 2010, revoked the prohibition of conversion of prison sentences in drug offenses. Appellate judges may react to criminal reform by changing their rates of judgements that are favorable to defendants and, depending on the judge type, responses run in different directions and with variable intensity. This study offers detailed estimates of such responses and interprets them in the light of the literature on the determinants of judicial decision-making, which resorts not only on legal factors but also on the ideology, personal attributes and strategic behavior of judges. According to the Brazilian constitution, 10% of the seats in appellate courts must be filled by formerly practicing lawyers and 10% by former prosecutors, both by executive appointment. The remaining 80% are reserved for career judges. In addition to these appointments, appellate panels also rely heavily on judges sitting by designation, who acted as rapporteurs, between 2009 and 2013, in as many as 14% of all criminal appeals in the state court of São Paulo, which is the subject of the analysis. A large dataset of criminal appeals related to drug offenses and the exogenous assignment of cases allow identifying the causal effects of career backgrounds on the response of appellate judges to the shift in drug jurisprudence. Estimates of the effect of judge types on appellate case outcomes, conditional on case characteristics and judging panel-specific effects, confirm that career judges are more likely to rule in favor of defendants, in line with the shift in jurisprudence. Former prosecutors and sitting judges seem to react against the shift, by increasing their rate of rulings against defendants. Former lawyers tend to exhibit mixed behavior, possibly resulting from a combination of liberal attitudes and strategic behavior, in deference to policy preferences of the executive branch.

1. Introduction

This paper presents a quantitative assessment of the effect of a major shift in criminal jurisprudence on defendants' chances of winning appeals in drug offense cases, depending on the career path of appellate judges in the state court of São Paulo, Brazil. Different types of appellate judges are likely to respond in different directions and with variable intensity to changes in law and jurisprudence. This study attempts to quantify these responses in detail, and interpret them in the light of the literature on the determinants of judicial decision-making, which rely on a combination of legal factors, ideology, personal attributes and strategic behavior of judges.

In 2006, Brazil enacted a new drug law (Law 11343 of 2006) to increase the punishment for serious drug trafficking offenses. The new law established (a) an increase in prison sentencing, from 3 to 8 years to 5 to 15 years, along with a tenfold increase in minimum day-fines; (b) a reduction of incarceration by as much as 3 years and 4 months, in cases qualified as privileged trafficking, defined as offenses committed by first-time offenders with a clean criminal record who are not gang members (art. 33, § 4°); (c) the prohibition of conversion of incarceration under any circumstances (art. 44). The purpose of Law 11343 was to increase sentences for serious drug offenses on the one hand and, on the other, to provide shorter sentences for minor drug offenses to reduce pressure on the overcrowded prison system. Law 11343 lacked, however, objective parameters for the specification of the offense, i.e., drug use (art. 28) versus drug trafficking. As a result, studies show, based on the official data, that more individuals were sentenced to longer terms, thus contributing to the ballooning of the numbers incarcerated due to drug offenses (from 31,520 in 2005, to 174,216 in 2014,

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or 9% to 28%, respectively, of the prison population, in Brazil.[1]). On September 1, 2010, the Supreme Court ruled on the unconstitutionality of the prohibition of conversion of confinement (present both in art. 33, § 4° and art. 44 of the New Drug Law).[2] This ruling was a persuasive precedent, but later on, through Resolution No. 5 of February 16, 2012, the Federal Senate amended the code of criminal procedure, thus suppressing the unconstitutional provision.

A basic question that arises is how such a major change in the criminal jurisprudence regime affected defendants' prospects in criminal appeals. Intuitively, one would expect that defendants would be better off across the board because of the adherence to a new, more flexible precedent on criminal sentencing, which considers alternatives to incarceration. A more interesting question is whether the impact of the shift in jurisprudence depends on the type of judge assigned as the rapporteur. The institutional setting of Brazilian appellate courts offers an opportunity to tackle these questions because these courts exhibit a variety of appellate judge types.

According to the federal constitution, 80% of appellate court seats must be filled by career judges and 10% by former lawyers and former prosecutors, by means of executive appointments. In addition to these appointments, the numbers from 2009 to 2013 show that appellate panels also rely heavily on judges sitting by designation, who acted as rapporteurs in as many as 14% of all criminal appeals in São Paulo.

But why exactly would appointed or designated judges behave differently from career, appellate judges? Gubernatorial appointments are the result of a political process which involves the court, the executive branch, and the institutions with which candidates are affiliated. In order to secure a seat at the bench, prosecutors and lawyers must first be selected by their peer delegates within powerful committees, which define a list of six candidates. A board of appellate judges then votes for three names out of the six and submits them to the state governor for a final decision. Due to the workings of this political process, most accounts emphasize the risks it poses to judicial independence: a viable candidate for an appointment needs to balance the interests of their own institution, of the court and, of the executive branch.[3] Criminal policy is sensitive to the executive branch because security is a key issue for the average (conservative) voter, who supports a tough-on-crime stance vis-à -vis drug offenses.[4]

To the extent that gubernatorial appointments represent their parent institutions, former prosecutors are expected to rule more favorably for the prosecution, either out of respect, gratitude, or deference to their own institution. Their views of the criminal system are stricter, and, indeed, the *Ministério Público* regularly publishes their strict guidelines (called "theses") for interpreting changes to statutes or jurisprudence.[5] Similarly, former lawyers are likely to adopt a stance congruent with the institutional views of the Brazilian bar association (*Ordem dos Advogados do Brasil*) and its political agenda, which, in addition to civil, constitutional, and human rights, focuses on safeguarding due process of law[6] and protecting access to justice. Both careers have exhibited a strong *esprit de corps* in Brazil. However, the contrast among such backgrounds is recognized even within high members of the Court.[7]

District judges sitting by designation do not retain the prerogatives of appellate judges and may be removed at the discretion of the Special Council of the TJSP. Their behavior, both in terms of efficiency (i.e., their 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 on 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, formerly practicing lawyer, former prosecutor, or district judge sitting by designation. Besides providing descriptive statistics, the paper establishes a judicial decision making-model, in which the outcome of the appeal depends on the 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 case 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. This result is consistent with the "integrated approach" to judicial decision making [Coggins (2008)], which considers, in a single model, the roles of both ideology [the attitudinal model, by Segal and Spaeth (2002)] and case selection [the *fifty-fifty rule*, derived from a strategic model of litigation Priest and Klein (1984)] in determining observed case outcomes.[8]

[1] For data and analysis in the case of São Paulo, see Oliveira Carlos (2015).

[2] *Habeas Corpus* n° 97256/RS.

[3] Several papers have discussed the system of nomination and executive appointment of state judges in Brazil. Sobrinho and Albuquerque (2017) suggests that the *Quinto Constitucional* (henceforth *Constitutional Fifth*) 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 an instrument to preserving 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 allegedly determinant. In 2014 and 2016, two daughters of Supreme Court justices were appointed for appellate courts in the State of Rio de Janeiro.

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

[5] The *Ministério Público* is also very mindful of public opinion and of its independence: in 2013, it blocked, with massive support of the public opinion, a constitutional amendment that proposed constraining its investigative powers, in detriment of police forces. It became increasingly focused on the agenda on *rule of law*, particularly after many large-scale corruption scandals reached courts. In 2015, the *Ministério Público* pressed congress for the approval of a package of more punitive laws, containing ten propositions (they have created an website for that initiative: http://www.dezmedidas.mpf.mp.br/.

[6] 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).

[7] In a newspaper interview in 2015, 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.* The interview can be found at https://www1.folha.uol.com.br/cotidiano/2015/10/1698478-estudo-indica-que-camara-do-tribunal-de-justica-paulista-mais-nega-recurso.shtml.

[8] Under the canonical model of Priest and Klein (1984), the sample of appellate cases is not a random sample of all cases in the first degree, because of selection effects: rational litigants, vis-a-vis predictable appellate outcomes, will rationally prefer to settle. As a result, only a non-representative fraction of cases, comprising the most unpredictable ones would reach the appellate court. Assuming the outcome of the appeal is largely determined by judicial attitudes (the attitudinal model) and that the attitudes of appellate judges are common knowledge, if the assignment of the appeal is not random, then ideological effects tend to weaken, because defendants will refrain from appealing if the rapporteur is perceived as a tough one, in anticipation of an unfavorable ruling.

The institutional setup – a significant diversity in the backgrounds of appellate judges – coupled with a major, exogenous shift in jurisprudence on the highly salient issue of drug offenses, with a large dataset on criminal appeals, provides ideal conditions for an empirical study on the impact of exogenous legal changes and their 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 of the paper is that more liberal judges (formerly practicing lawyers) will exhibit a more pronounced response to the shift in jurisprudence because of the initial wedge between their most preferred policy and legal, binding provisions. In contrast, conservative judges (former prosecutors) would exhibit a weaker response, simply because, from their perspective, the initial, legal restriction was not binding.[9] Another part of this hypothesis concerns *compensating effects* [Freyens and Gong (2017)], defined as a judicial response that runs counter to the direction of the statutory or jurisprudential reform.[10]

The second hypothesis of interest is that selection effects tend to blur the effect of ideology on judicial outcomes. If a specific judge retains jurisdiction over the prospective 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 as to their chances of success. More specifically, the hypothesis is that the exclusion of appeals under retained jurisdiction from the sample weakens selection effects and strengthens the impact of ideology.

The third hypothesis concerns district judges sitting by designation. These judges are not appointed by the governor but are chosen by the Special Council of judges of the court. For many decades, the Court of São Paulo has been a conservative stronghold, supportive of a tough criminal policy; therefore, I expect these sitting judges to behave conservatively as well. But because they are not appellate judges, one would expect them to also factor in career concerns, which involve productivity (reducing backlogs) and performing according to sound legal standards. The hypothesis then, is that designated judges will mimic the behavior of more conservative judges (former prosecutors), albeit perhaps not as intensively and thus pushing them closer to neutral, career judges.

The main contributions of this paper are that (a) 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 *esprit de corps* and a component of judicial politics, inherent to the nature of the appointment process; (b) this is one of the very few studies in the literature to evaluate the role of attitudes and strategic behavior in shaping ruling standards of appellate judges, based on an empirical framework that explores *changes* in legal standards, rather than just comparing *levels* of say, pro-defendant rulings, between different judge types[11] ; (c) there is a well-established literature on the political and ideological motives underlying the behavior of Brazilian Supreme Court justices, but no empirical studies focusing on appellate courts, either at state or federal levels, even though they are responsible for a much larger caseload.

The next section presents an institutional background on the rules for the appointment of appellate judges in the court of São Paulo. Section 3 reviews the literature. Section 4 establishes the econometric model and testable hypotheses. Section 5 presents the results and Section 6, the conclusions.

2. Institutional background

Three types of judges coexist in state appellate courts in Brazil: career judges, gubernatorial appointments (pursuant to the Constitutional Fifth) and district judges sitting by designation. Regardless of the career path of the judge, art. 95 establishes broad guarantees and independence for the Brazilian judges.[12]

2.1. Career judges

Article 93 of the Federal Constitution establishes basic principles and general rules for admission and promotion for career judges,[13] to be regulated by the state and federal Statutes of the Judicature. Becoming a career judge in Brazil requires passing a public entrance examination, which includes multiple-choice, written, and oral tests, as well as an assessment of academic and professional achievements (typically accounting for ten percent of the final score). Before acquiring lifetime tenure, the judge must serve a two-year evaluation or probation period. As far as promotions are concerned, the Special Council, a restricted group of appellate judges votes for the names on lists of district judges, established by alternating criteria of seniority and merit.

2.2. Gubernatorial appointments (Constitutional Fifth)

In Brazilian courts of appeals, one fifth of seats are assigned to candidates with nonjudicial career paths. Of these, 10% are allo-

[9] 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 would be null.

[10] 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".

[11] In fact, the paper by Freyens and Gong (2017) is the only other paper to explore a similar empirical strategy.

[12] Article 95. Judges enjoy the following guarantees: (CA n° 19, 1998; CA n° 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. (...)

[13] Article 93. A supplementary law, proposed by the Supreme Federal Court, shall provide for the Statute of the Judicature, observing the following principles: (CA n° 19, 1998; CA n° 20, 1998; CA n° 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; (...)

cated to former lawyers and 10% to former public prosecutors.[14] . Six-name lists of appointees from both the Brazilian Bar Association and the Prosecutor's Office (*Ministério Publico*) are separately chosen by restricted suffrage within their members and sent to the State Court, which picks three names out of the six and sends them to the state governor for a final choice.

2.3. Sitting judges

In Brazilian courts, there are three ways through which district judges may end up sitting at appellate panels: (a) by means of a career promotion (Second Degree Substitute)[15] ; (b) by appointment of the presidency of the court, to fulfil temporary absences of at least 30 days (temporary substitutes); (c) by appointment of the presidency of the court, to provide assistance under exceptional necessity (assistant judges).

In 2009, the National Justice Council established, through the enactment of resolution 72, the following rules: (a) the selection of Second Degree Substitutes obeys the criteria for the promotion of judges from district to appellate courts, which rely alternately on seniority and productivity criteria, in full conformity with the National Judge Law; (b) temporary substitutes may not perform administrative duties[16] ; (c) panels must be formed with a majority of appellate judges.[17]

Additional regulation suggests that the presidency of the Court retains highly discretionary powers over the appointing of sitting judges.[18] Moreover, the sitting judges are subject to close monitoring of their productivity, with direct implications in terms of their prospects for promotion.[19]

Introduced in 2006 with regimental change No. 377, the Superior Council of the Judges acquired significant discretionary powers in the selection of sitting judges.[20]

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 large volume of previously filed cases flooded the court dockets. In addition, almost simultaneously, a major administrative court reform in São Paulo extinguished one of its appellate courts, the *Tribunal de Alçada Criminal*, which was responsible for processing appeals of less serious criminal offenses and small civil claims. These institutional changes resulted in large backlogs in the criminal, appellate court dockets in São Paulo. In response, the court established several criminal extraordinary panels composed of sitting judges. A significant number of rulings issued by these extraordinary panels were challenged at superior courts (STF and STJ), on the grounds that they violate the principles of the right to a fair trial and of the right to appeal the judgment to a higher court.[21] Due to these challenges, by 2009, when the data begins, these panels where almost completely phased out.

For the purposes of the empirical strategy, sitting judges in the sample have been identified be exclusion, i.e., if the rapporteur is not an appellate judge, then he must be sitting by designation. The data does not allow distinguishing the legal basis for the appointment: Second Degree Substitute, temporary substitute or assistant judge. Nevertheless, the data contains all three types of sitting judges. Moreover, some of the judges transition through different types of designations.

Overall, the institutional context of judicial designations in the state court of São Paulo suggest that, apart from the selection of sitting judges, which combines rule-based and discretionary policies, incentives may also play an important role in influencing the behavior of these special judges, since both the Presidency and the Special Council of the court oversee the performance of judges and concentrate administrative powers that are influential in career paths.

3. Literature review

3.1. Career backgrounds and decision standards

An extensive literature has analyzed the role of career backgrounds in influencing the ruling patterns of judges, based on various definitions of outcomes. Wald (1984) and Reinhardt (1999) make the general point that judges acknowledge that their personal backgrounds and experiences affect the outcomes of their rulings. The approach that is most similar to this paper is offered by Nagel (1962), who concluded that judges with previous experience as

[14] 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).

[15] The designation of sitting judges at 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 reads as follows: "By designation of the President of the Court of Justice, the Second Degree Substitute judges will replace members of the Courts or assist them, when the accumulation of cases requires their performance." Article 1 establishes that "In the Permanent Part of the Board of Justice, 60 (sixty) posts of Second Instance Substitute Judge are created, classified under special jurisdiction, reference V, for further filling, at the discretion of the Court of Justice, by means of an internal competition to fill judicial vacancies".

[16] Resolution n° 72 of the National Justice Council, Article 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**.

[17] Resolution n° 72 of the National Justice Council, Article 10: The Chambers or Panels 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 panels to which they are assigned.

[18] Resolution n° 542/2011: "Considering the commitment made by the São Paulo Judiciary to judge all cognitive cases assigned until December 31, 2006 and, as for those within the jurisdiction of the Jury Tribunal, until December 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 distribution of one-third greater than normal for all Substitute Judges who are not members of Chambers, under the terms of art. 281 and the final part of art. 178, § 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 caseload upon arrival at the Court, including for partial or total redistribution of caseloads left by Substitute Judges already promoted to the appellate court.

[19] 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."

[20] Internal Rules of the State Court of São Paulo, 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 n° 6,142, enacted on 6/27/1961.

[21] Given that these extraordinary panels had a majority of sitting judges, who, strictly speaking, are not appellate judges. See the leading case habeas corpus HC 96821/SP, at the STF: https://jurisprudencia.stf.jus.br/pages/search/sjur179858/false

prosecutors are significantly more likely to vote against defendants, compared to those without such experience. Tate (1981) analyzes 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 lawsuits on civil rights and liberties and to the underdogs (typically defendants) in lawsuits related to economic issues. Ten years later, Tate and Handberg (1991), using a broader time span (1916–1988), revisited the issue to confirm that former prosecutors were less likely to vote in a liberal fashion (i.e., favorably to civil liberties lawsuits), although the magnitude of the "effect" appeared to be smaller than previously found. Eisenberg and Johnson (1991) found that prosecutorial experience is positively related to a favorable response to equal protection actions related to race. Steffensmeier and Hebert (1999) present evidence that, in the United States, judges who began their careers as public prosecutors tend to punish defendants more severely. Also in the US, Sisk et al. (1998) present evidence that judges with a criminal defense background were much more likely to oppose the Sentencing Guidelines established in 1988, whereas judges with experience as a prosecutor were more likely to favor the Guidelines. (The latter finding was not as statistically robust as the former.) Several other studies have failed to establish significant relationships between prior experience and judging standards. For example, Howard (1981) finds that, among circuit judges, only in relation to civil rights issues, among several types of cases, was experience a significant factor. Gryski et al. (1986) establish that prior experience was not important to explain high court judicial behavior in sex discrimination cases. Ashenfelter et al. (1995) find that individual judge characteristics, including prior judgeship, were not significant in explaining the rulings of district court judges. More recently, Robinson (2011) failed to establish a significant relationship between prosecutorial background and pro-defendant outcomes in criminal cases in the U.S. Courts of Appeals. The author concluded that mixed evidence from previous studies is attributable to the usual shortcomings of data and empirical models, that is, measurement errors (poor proxies for ideology) and omitted-variable bias due to non-observable case characteristics.

Career backgrounds are not the only source of variation to explaining ruling standards of appellate judges. Institutional factors may play a role as well (Gillman (1999); Smith (2008)). Indeed, authors in this branch of the literature have discussed how institutional contexts contribute to judicial rulings, possibly overriding individual attitudes.

Studies in the Brazilian literature on judicial experience and judicial ruling are rare. Wowk (2009) analyzes ruling standards in criminal appeals, based on judge profiles, including gender, race, and academic background, in addition to the characteristics of litigants and lawyers. Based on a small sample of cases, the author examines the correlation between, on the one hand, sentencing, and on the other, the rapporteur's background as it relates to judgeship (i.e., appointment versus career), but fails to establish any statistically significant relationship.[22] Another similar study in Brazil, by Paladino (2007), analyzes the relationship 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, appellate judges selected through the *Constitutional Fifth* are more reluctant than career judges to disregard 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 to judicial independence and more inclined to judicial formalism compared to career judges.

3.2. Judges sitting by designation

Designated judges are also appointed, albeit in a discretionary manner. As such, in response to career incentives, these sitting judges tend to rule according to the predominant views within the appellate court.

A limited body of literature has investigated the behavior of judges sitting by designation in US courts. Scholars have shown that rulings handed down by designated judges are not as solid as those of career judges [Note (1963)] and thus, are more likely to be reviewed *en banc* [Alexander (Jr. 1965) and Solimine (1988)]. In addition, Green and Atkins (1977) and Saphire and Solimine (1994) find that designated judges dissent much less frequently than circuit judges.[23] This diffident behavior has recently been corroborated by Brudney and 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]. Similarly, Benesh (2006) finds that sitting judges write few majority opinions compared to appellate judges and are averse to filing dissenting or concurring opinions. More recently, Peppers et al. (2012) and Budziak (2015) offer empirical evidence that the choice of judges sitting by designation is 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) examine how rulings on the construction of patent claims by district judges are treated in the Federal Circuit in the United States. They find that the decisions of 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 the experience of the judge in patent cases.

3.3. Present contribution to the literature

This paper addresses the same issue as Robinson (2011), namely, the impact of prosecutorial background on judicial ruling, but extending the analysis to the former-lawyer background as well. The unique processes of nomination and appointment of the "special" judges make career path a particularly strong proxy for ideology: viable candidates to the bench are representatives of the political agenda of their parent institutions. 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 one particular issue previously raised in recent empirical contributions namely, whether there designated judges contribute to pushing the policy agenda of the court.[24]

[22] Nevertheless, the study finds a significant, strong relationship among sentencing and academic background. The main limitations of the study were: (a) small sample, with only 81 appeals; (b) lack of distinction between the source of gubernatorial appointments: former attorney versus former prosecutor; (c) the outcome variable is sentencing, not reversal of decision.

[23] 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)

[24] Testing whether sitting judges are diffident is not possible with the present dataset because it does not contain information on individual votes of appellate judges.

Last but not least, the current empirical analysis is a test for the integrated approach on judicial decision-making [Coggins (2008), p. 34], which reconciles the attitudinal model and the selection of cases for formal dispute (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 (because of greater uncertainty). Moreover, by restricting the samples to appeals without retained jurisdiction, case sorting becomes even less effective.

4. Model and testable hypotheses

Appellate ruling can be best framed within a standard discrete choice model. The latent dependent variable is the probability that the appellate panel ruling.[25] is favorable to the defendant and depends on the type of rapporteur (career judge, formerly practicing lawyer, former prosecutor, or sitting judge). The model includes covariates describing case and court characteristics:

$$P(y = outcome|x_1, x_2, x_3, x) = F(\beta_1 x_1 + \beta_2 x_2 + \beta_3 x_3 + \beta_{12} x_1 x_2 + \beta_{13} x_1 x_3 + \beta_{23} x_2 x_3 + \beta_{123} x_1 x_2 x_3 + x\tilde{\beta}) = F(x\beta) \quad (1)$$

where y is a binary variable, equal to one if the ruling is favorable or partially favorable to the defendant[26] and equal to zero otherwise; x_1 is a dummy variable equal to one if the ruling date is posterior or equal to September 1st 2010, the date the of the jurisprudence change (HC 97256/RS); x_2 is a categorical variable, which distinguishes whether the rapporteur is a career judge, a district judge sitting by designation, an appointee from the bar association (formerly practicing lawyer), or an appointee from the *Ministério Público* (former prosecutor)[27] ; x_3 is a dummy variable equal to one if the defendant files the appeal and zero if the prosecution does so; and x is a vector of covariates that describe case and court characteristics.

The interaction of x_1, x_2 and x_3 allows one to estimate the effect of the new jurisprudence on case outcomes contingent on the type of the rapporteur and on whether the defendant or the prosecutor files the appeal.[28]

The fact that cases are exogenously 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. If case assignment was not random, then litigants would strategically decide whether to file or not to file the appeal. For instance, a criminal defendant could refrain from filing in anticipation of the assignment to a rapporteur perceived as biased against defendants. As a result of this selection mechanism, the true (anti-defendant) bias would be underestimated.

The specification of the model implicitly establishes a key assumption underlying the panel decision-making process: the vote of the rapporteur prevails. As the descriptive statistics show, 98% of the cases are unanimously decided, suggesting that appellate panels rarely 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 rulings in declarations of unconstitutionality, the vote of the rapporteur prevails. In a previous study, Oliveira (2008) concludes that "the vote of the rapporteur is by far the most influential variable in the result of the ruling" at the Supreme Court. Based on interviews with Supreme Court Justices, da Silva (2015) finds that the vote of the rapporteur tends to prevail in low-profile, repetitive cases, but not in highly salient cases, which are controversial and sensitive to the public opinion. Two reasons explain why rapporteurs may prevail: (a) rapporteurs are responsible for ruling on motions *in limine* and overseeing all case proceedings, including adding the case to trial docket; (b) the well-documented, inconsequential role of oral arguments in Brazilian appellate courts,[29] which raises the prominence of case briefing, the purview of the rapporteur. Although the three studies mentioned above refer to the Brazilian supreme court, contextual and institutional similarities – particularly those related to procedural rules – between the Supreme Court and state appellate courts[30] suggest that the conditions that tend to empower rapporteurs in the former would also apply in the context of the latter.

Another concern is that the lawyers and prosecutors selected for the bench are not randomly selected from their respective populations and thus, are not representative of their types. In fact, the appointment process is subject to significant levels of political influence of the court and the governor: the boards of delegates, which are statewide-representative councils, both at the bar association and the Ministerial office,[31] choose six names[32] ; these six names are then sent to the court, which selects three candidates[33] for a final choice by the governor. Therefore, the selection process suggests that, although these bodies endorse "representatives" that will be accountable to their constituents and will be bound by a strong *esprit de corps*, they must also bow to political interests, especially those of the executive power.

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. In practice though,

[25] The dataset does not contain information on the individual vote of each panel judge, only the final ruling of the panel.

[26] Most results are unchanged if an ordered-probit model is adopted, instead of an ordinary probit model with a binary dependent variable.

[27] As far as state-appointed judges are concerned, a natural question that arises is whether the identity or political party of the appointing governor captures ideological preferences and as a result, shapes the patterns of judicial rulings (as in Cross and Tiller (1997), for example). In the context of the present study, the relevance of this type of proxy variable is questionable for two reasons: first, there is very little variance in the ideology and political party of appointing governors in the sample; second, appointments based on lists with three names cause power to partially shift away from the governor. Moreover, non-reported results, based on sub-samples (with appointed judges only), with and without fixed-effect for appointing governor, confirm that the identity of the governor does not change the results.

[28] The type of appellant is relevant because there are reasons to believe the selection of cases in the context of the criminal jurisprudence shift is different for the two groups: while defendants file appeals based on the prospects of improving individual outcomes, the public prosecutor's decision to appeal will rely on policy preferences and institutional positioning vis-à -vis the new jurisprudence.

[29] de Paula and Melo (2020) corroborate the claim based on a small sample of criminal appeals in the court of Rio de Janeiro. See also Cruz (2002). Horbach (2014) compares the functioning of oral arguments in Brazil and the United States, arguing that in the former the proceeding is actually a mere formality resembling a monologue, rarely giving way to a debate or further inquiries by judges.

[30] Dissimilarities such as caseload profile also strengthen the present extrapolation: the caseload of appellate courts comprises mostly repetitive cases (particularly in criminal cases) not deemed as high profile, in which, according to the arguments by da Silva (2015), the rapporteur is more likely to prevail.

[31] At the Brazilian Bar Association, the *Conselhos Seccionais* and at the *Ministério Público*, the *Conselho Superior do Ministério Público*

[32] The voting system requires that each board member casts six votes among candidates in the list.

[33] under various circumstances – including situations in which at least one of the three chosen names does not attain the minimum vote requirements – the court may return the list to the delegates.

it is quite unusual for prosecutors to switch careers and become a district judge. On the other hand, it is true that all district judges are formerly practicing lawyers, for the simple fact that selection rules require litigation experience and membership with the bar association. However, this aspect does not undermine the empirical strategy, because the majority of appellate judges which pursued a judicial career path served in first instance courts for at least a couple decades[34] and were not selected by the mechanism of the *Constitutional Fifth*.

The empirical framework yields a set of testable hypotheses which rely on the statistical significance of the marginal effects of the interaction of the jurisprudence shift, the appellate judge type and the type of appellant. The four testable hypotheses concerning heterogeneous responses to changing legal standards are: (a) career judges respond favorably to defendants due to legal changes that are favorable to criminal defendants; (b) asymmetry in responses to changing legal standards: liberal judges respond by increasing pro-defendant appellate rulings, whereas conservative (former prosecutors and judges sitting by designation) do not respond. The explanation, for former prosecutors, rests on attitudes, whereas for sitting judges, it may be related to strategic reasons; (c) Presence of "compensating effects", which occur if the response of conservative judges is contrary to defendants; (d) the magnitudes of the responses of different appellate judge types to changing jurisprudence become larger once selection effects are properly accounted for. This hypothesis is related to the "integrated approach" to judicial decision-making models [Coggins (2008)].

5. Data and results

5.1. Descriptive statistics

The *Tribunal de Justiça do Estado de São Paulo* (TJSP) is a large court by any standards. In 2015, it had 2,607 judges and a staff of 43,033, handling 4.76 million new cases (including 847,000 cases in the second instance) and over 20 million pending cases.

Data on criminal appeals was provided by the TJSP.[35] The data comprises 122,112 criminal appeals on drug offense cases, assigned between 2009 and 2013 to 16 appellate panels among 7 types of appeals: appeals of interlocutory rulings; criminal appeals; motion for clarification; habeas corpus; writ of mandamus; sentencing appeal; and annulment of judgment. Due to concerns regarding potentially non-random assignment of cases, the sample excludes 317 judgments handed down in duty court (during weekends, holidays, or court recess).

The sample is restricted to appeals that involve a public prosecutor (*Ministério Público*), either as an appellant or as an appellee. A ruling is classified as pro-defendant when (a) the plaintiff is not the public prosecutor and the appeal is granted or partially granted, or (b) the plaintiff is the public prosecutor and the appeal is not granted or partially granted. Otherwise, the ruling 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, judges retain jurisdiction over the case. The majority of the appellate cases (86%) pertain to the types of criminal appeal and habeas corpus.

Table 2 presents descriptive statistics conditional on the type of litigant that files the appeal. On average, prosecutors are much less successful than defendants. Prosecutors concentrate their actions in criminal appeals and sentencing appeals, while defendants concentrate their appellate filings on criminal appeals and habeas corpus.

Table 1
Summary statistics. Criminal appeals in drug offense cases filed at the appellate court of the state of *São Paulo* between 2009 and 2013.

	Mean	Standard deviation
Pro-defendant	0.246	0.369
Defendant files	0.917	0.275
Retained jurisdiction	0.376	0.484
Monocratic	0.001	0.028
Incident	0.022	0.145
Appeals of interlocutory ruling	0.006	0.076
Motion for clarification	0.022	0.145
Criminal appeal	0.488	0.500
Annulment of judgement	0.016	0.126
Sentencing appeal	0.096	0.294
Writ of mandamus	0.004	0.065
Habeas Corpus	0.368	0.482

Notes: The number of observations is 122,128. Drug offenses include drug trafficking, drug possession, drug manufacturing and conspiracy. *Pro-defendant* is a dicothomous variable, equal to one if the judgement was favorable or partially favorable to the defendant and equal to zero if unfavorable to the defendant. *Defendant files* is a *dummy* variable equal to one if the defendant is the author of the appeal and zero otherwise. *Retained jurisdiction* is a *dummy* variable, equal to one if the assignment of the appeal is not random, but instead is assigned to a particular judge who has been responsible for previously filed cases (or procedures such a as police investigations) connected to case at hand. *Monocratic* is a *dummy* variable equal to one if judgement has been rendered by the *rapporteur* alone and zero if rendered though collegiate deliberation. *Incidental* is a *dummy* variable equal to one if the appeal is an incidental proceeding underlying a principal case, and zero otherwise. *Appeal of interlocutory ruling*, *Motion for clarification*, *Criminal appeal*, *Annulment of judgement*, *Sentencing appeal*, *Writ of mandamus* and *Habeas corpus* are *dummy* variables that define the type of appeal.

Table 2
Summary statistics. Criminal appeals in drug offense cases filed at the appellate court of the state of *São Paulo* between 2009 and 2013, by type of appellant.

	Prosecution files ($N = 10,088$)	Defendant files ($N = 112,040$)
Pro-defendant	0.600	0.214
Retained jurisdiction	0.454	0.369
Monocratic	0.001	0.001
Incident	0.012	0.022
Appeal of interlocutory ruling	0.049	0.002
Motion for clarification	0.012	0.022
Criminal appeal	0.520	0.485
Annullment of judgement	0.000	0.018
Sentencing appeal	0.386	0.070
Writ of mandamus	0.033	0.002
Habeas Corpus	0.000	0.401

Notes: Drug offenses include drug trafficking, drug possession, drug manufacturing and conspiracy. *Pro-defendant* is a dicothomous variable, equal to one if the judgement was favorable or partially favorable to the defendant and equal to zero if unfavorable to the defendant. *Defendant files* is a *dummy* variable equal to one if the defendant is the author of the appeal and zero otherwise. *Retained jurisdiction* is a *dummy* variable, equal to one if the assignment of the appeal is not random, but instead is assigned to a particular judge who has been responsible for previously filed cases (or procedures such a as police investigations) connected to case at hand. *Monocratic* is a *dummy* variable equal to one if judgement has been rendered by the *rapporteur* alone and zero if rendered though collegiate deliberation. *Incidental* is a *dummy* variable equal to one if the appeal is an incidental proceeding underlying a principal case, and zero otherwise. *Appeal of interlocutory ruling*, *Motion for clarification*, *Criminal appeal*, *Annulment of judgement*, *Sentencing appeal*, *Writ of mandamus* and *Habeas corpus* are *dummy* variables that define the type of appeal.

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

[35] The TJSP did not provide, however, a complete breakdown of their appellate judges according to backgrounds. The data was collected from seniority lists, news clippings on the court's website, short judge biographies found on the internet, and court gazettes, downloaded from the official press office of São Paulo, at https://tjsp.jus.br/Sistemas_DJE.

Table 3
Proportion of pro-defendant decisions, before and after shift in jurisprudence, by class of appeal and type of rapporteur. Appeals related to drug offenses, filed between 2009 and 2013. *Tribunal de Justiça do Estado de São Paulo*.

Class	Career judge		Designated judge		Former lawyer		Former prosecutor		Total		
	Pre	Post	Pre	Post	Pre	Post	Pre	Post	Pre	Post	*N*
Sentencing appeal	0.427	0.395	0.364	0.366	0.475	0.568	0.482	0.362	0.425	0.402	
	1,223	6,672	364	1,211	201	778	166	1,078	1,954	9,739	11,693
Criminal appeal	0.291	0.313	0.247	0.247	0.327	0.404	0.255	0.23	0.281	0.304	
	4,607	37,028	1,141	5,093	196	4,371	522	6,672	6,466	53,164	59,630
Motion for clarification	0.185	0.191	0.12	0.165	0.269	0.324	0	0.125	0.16	0.189	
	184	1,500	71	389	13	176	20	276	288	2,341	2,629
Habeas corpus	0.132	0.131	0.049	0.055	0.238	0.314	0.057	0.049	0.12	0.133	
	5,256	25,283	1,500	3,406	828	3,763	811	4,116	8,395	36,568	44,963
Writ of mandamus	0.639	0.569	0.575	0.466	0.727	0.789	0.5	0.348	0.63	0.557	
	72	297	20	29	11	38	5	46	108	410	518
Appeal of interlocutory ruling	0.528	0.448	0.367	0.283	0.8	0.6	0.4	0.287	0.506	0.432	
	53	456	15	46	5	60	5	75	78	637	715
Annulment of judgment	0.071	0.166	0.214	0.032	0	0.177	0.25	0.123	0.102	0.154	
	35	1,401	7	126	3	189	4	199	49	1,915	1,964
Observations	11,430	72,637	3,118	10,300	1,257	9,375	1,533	12,462	17,338	104,774	122,112

Note: Drug offenses include drug trafficking, drug possession, drug manufacturing and conspiracy. "Pre" and "post" refers to the periods before and after the shift in jurisprudence (HC 97256/RS). The number of observations is reported below statistics.

Table 3 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 types exhibit significant samples pre-treatment: criminal appeals, sentencing appeals, and habeas corpus. The statistics suggest that, within these three types, career and sitting judges have not exhibited significant changes in the rates of pro-defendant rulings; most of the "action" will come from the gubernatorial appointments. Former lawyers exhibit positive, sizeable changes in pro-defendant wins for all three types. Former prosecutors exhibit a large decrease in defendant wins in sentencing appeals, a modest decrease in habeas corpus and no decrease in criminal appeals.

Comparing levels, rather than changes in pro-defendant rates, the data reveals that designated judges tend to be stricter than career judges, especially in cases of habeas corpus and annulment of judgment, with much lower pro-defendant win rates. Post-sentencing reform, relatively to career judges, formerly practicing lawyers tend to be more inclined to the annulment of judgment and former prosecutors more inclined to uphold a judgment. Finally, the data clearly shows that overall, former lawyers are (post-treatment) much more likely to find in favor of defendants than former prosecutors.

Fig. 1 shows the percentage of pro-defendant rulings before and after the jurisprudence shift (HC 97256/RS), by type of appellant, case type and appellate judge type. In the left panel, which shows judgments of appeals filed by defendants, it seems that overall, both career and former lawyers tend to respond by increasing rates of pro-defendant rulings. Apart from motions for clarification, judges sitting by designation and former prosecutors tend to decrease or maintain their pro-defendant rates. Unlike all other case types, motions for clarification tilted in favor of defendants regardless of the type of appellate judge. Formerly practicing lawyers exhibited the most consistent, positive response, increasing pro-defendant rulings for all case types. The right panel of Figure 1 shows the results of appeals filed by the criminal prosecutor. After the shift in jurisprudence, all judge types reduced their rates of pro-defendant rulings in criminal appeals and increased in sentencing appeals. In the latter, only former lawyers exhibited a large response. In all other case types, numbers could be deceiving due to a relatively reduced number of cases. Still, career judges seem to reduce pro-defendant rulings both in interlocutory appeals and writ of mandamus. In appeals filed by the prosecution, career judges responded either maintaining or reducing rates of pro-defendant ruling, but never significantly increasing.

Fig. 2 shows that the composition of criminal panels, by type of appellate judge, varies significantly.[36] Several "residual" panels contribute to a small fraction of all judgments – the *groups* of chambers, the *Special Chamber* (*Câmara Especial*), and the extraordinary panels.

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 according to judge type.[37] In other words, 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 of criminal panels, with reserved, cumulative, or residual jurisdiction powers, assignment procedures can be quite intricate, particularly in the context of an overburdened case docket,[38] which at times, becomes a justification for shuffling cases around,

[36] Composition is measured by the shares of *rapporteurs* by type of judge sitting in each panel, in the sample period (2009–2013).

[37] 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.

[38] 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 Special Council. 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.

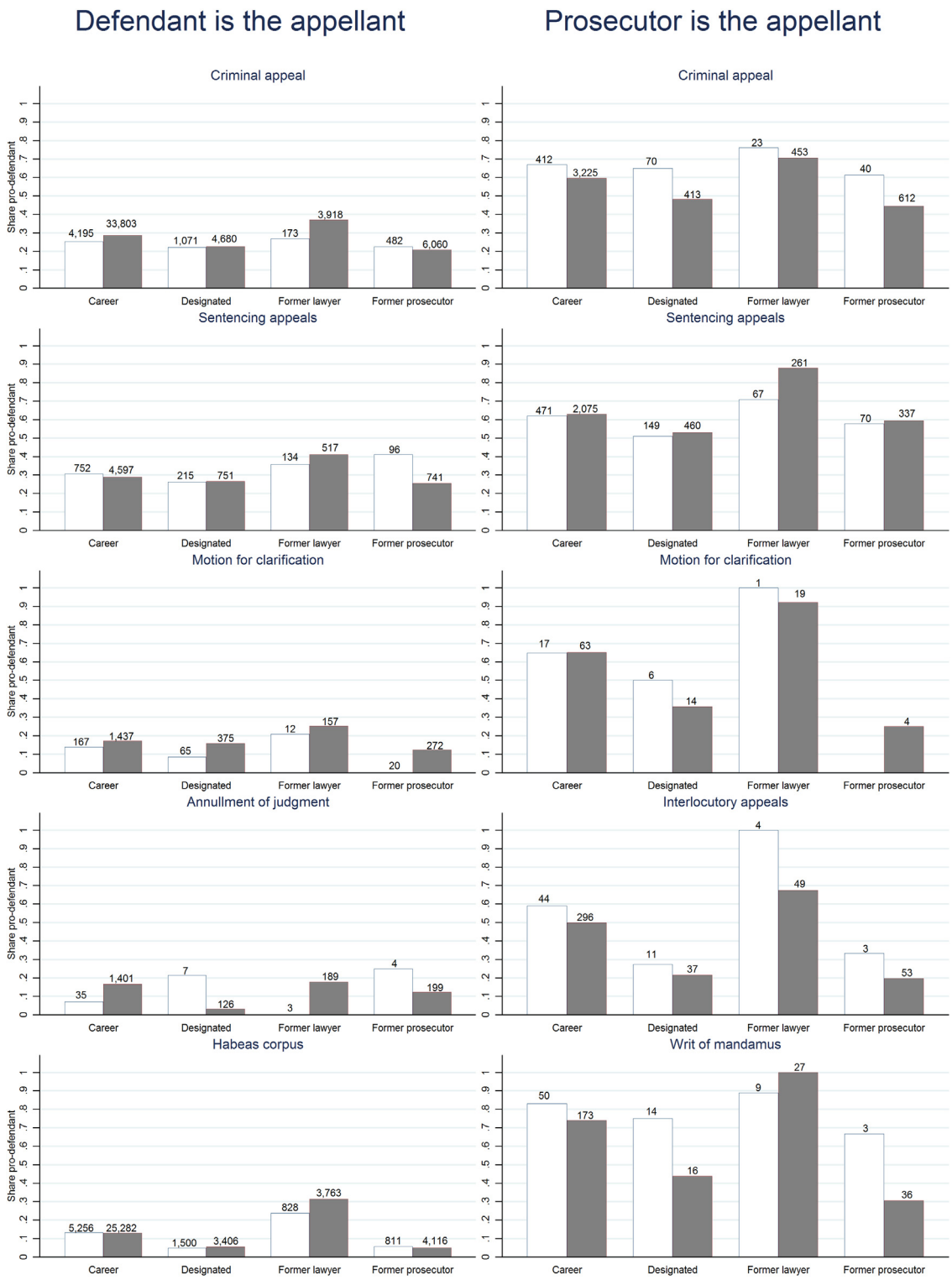

Fig. 1. Share of pro-defendant judgments, before and after a shift in jurisprudence (HC 97256/RS), by type of appellant, case type and appellate judge type. Drug offense-related, appellate cases, filed between 2009 and 2013 in the state court of *São Paulo*.

either by shifting jurisdiction powers or by relocating judges. This institutional setting casts legitimate doubts over the randomness of case assignments,[39] therefore, empirical tests are needed. Fig. 3 presents the 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

[39] Jurisdiction powers have been a contentious matter in Brazilian justice and São Paulo is no exception. A wide range of lawsuits 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 right to a fair trial.

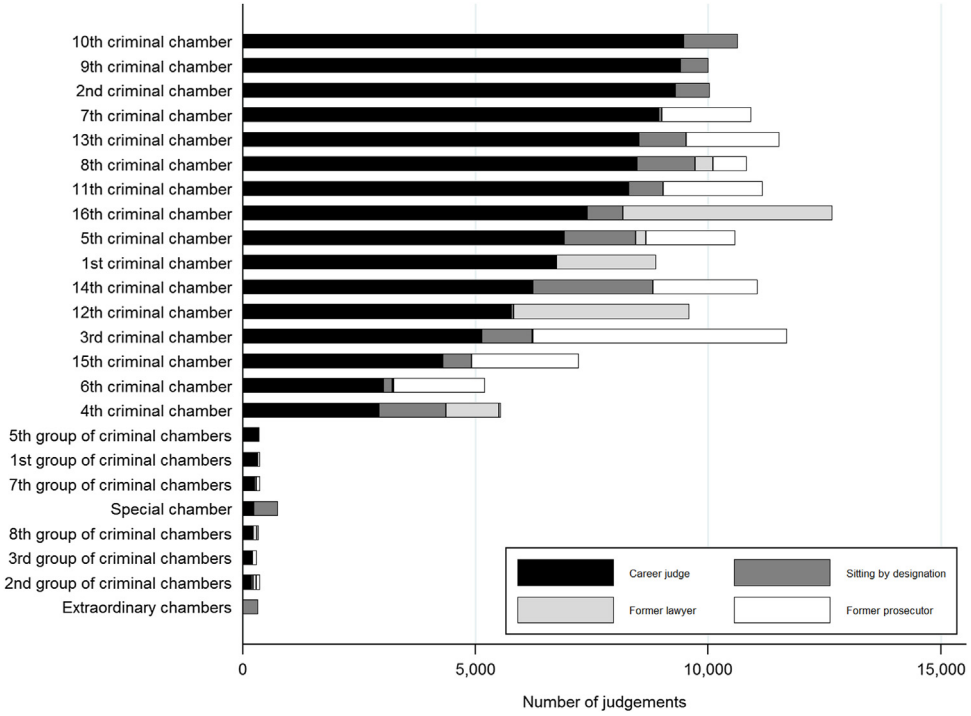

Fig. 2. Composition of criminal panels in the appellate state court of *São Paulo*. Drug offense-related appellate cases filed between 2009 and 2013.

stratum (i.e., each criminal panel).[40] Except for criminal appeals and habeas corpus, most of the tests fail to reject equality in means between treatment and control, prior to treatment. These differences do not compromise the research design because the estimates of treatment effects are conditional on appeal type as well.

5.3. Results

Two types of results are expected. First, considering the adherence to precedent in a legal decision model, one would expect that, with the new jurisprudence, the odds of defendants would, on average, improve. Second, one would expect that eliminating the prohibition on converting imprisonment to alternative punishments leads to asymmetric responses by appellate judges: prior to the shift, *tougher* judges were, relatively to their preferences, less constrained whereas *softer* judges were more constrained by the *New Drug Law* of 2006. Therefore, once the supreme court eliminates that constraint, one would expect a larger effect in magnitude for *softer* judges (former lawyers) and a smaller effect for the *tougher* judges (former prosecutors) due to a *non-binding* legal restraint.

Table 4 presents estimates of the marginal effect of the shift in jurisprudence, contingent on the type of *rapporteur*. Table 5 is a similar presentations, but excluding cases with retained jurisdiction, that is, including only appeals that have been randomly assigned. As discussed above, when a particular judge retains jurisdiction over the case, the identity of the *rapporteur* will be known ex-ante, directly 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.

Both baseline (Table 4) and "robust" results (controlling for selection, Table 5) suggest that, when defendants file the appeal, (a) career judges exhibit a positive, strong, statistically significant response in appeals of interlocutory rulings[41] (+30 and +39 p.p., if controlling for selection); and sizeable responses in annulments of judgments (+15 p.p.)[42] and writ of mandamus (+22 p.p.); (b) the response of former lawyers resembles that of career judges namely, a positive response in annulments (+16 p.p.) and in writ of mandamus (+28 p.p.), albeit a marginally significant, positive response in appeals of interlocutory rulings; (c) designated judges rule in favor of defendants only in extraordinary remedies such as habeas corpus (+1.5 p.p) and writ of mandamus (+54 p.p.), but exhibit a very strong response that is unfavorable to defendants in appeals of interlocutory rulings (−61 p.p.) after controlling for selection effects (Table 5)[43] ; (d) former prosecutors rule against defendants both in sentencing appeals (−24 p.p.) and habeas corpus (−2 p.p.), after controlling for selection effects (Table 5). It is significant that former prosecutor is the only judge type that does not uphold a favorable judgment in writ of mandamus (Table 4). Surprisingly, former prosecutors were the only type that responded favorably to defendants in motions for clarification (Table 5), but these motions will not necessarily ease the sentencing and, in fact, may even harshen it.

[40] When the test value falls outside the 99% confidence interval (dashed lines), it means that the case characteristic before treatment (i.e., the jurisprudence shift) is, on average, different between special judges (treatment groups) and career judges (control group). The complete test results, for 16 strata and 10 case characteristics, are not included in the text for the sake of brevity.

[41] Appeals of interlocutory rulings discuss remanding the prisoner in custody; finding of facts; judicial inquiries; jurisdiction powers; framing, that is, whether the defendant is charged with drug use or drug trafficking, etc. These issues are typically discussed at early stages of the case.

[42] 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 to the Supreme Court ruling and 2047 after, suggesting that this remedy was widely deployed after the change in jurisprudence.

[43] In fact, former prosecutors comprise the only group of judges that show statistically significant responses that are counter to the interests of defendants in sentencing appeals and habeas corpus.

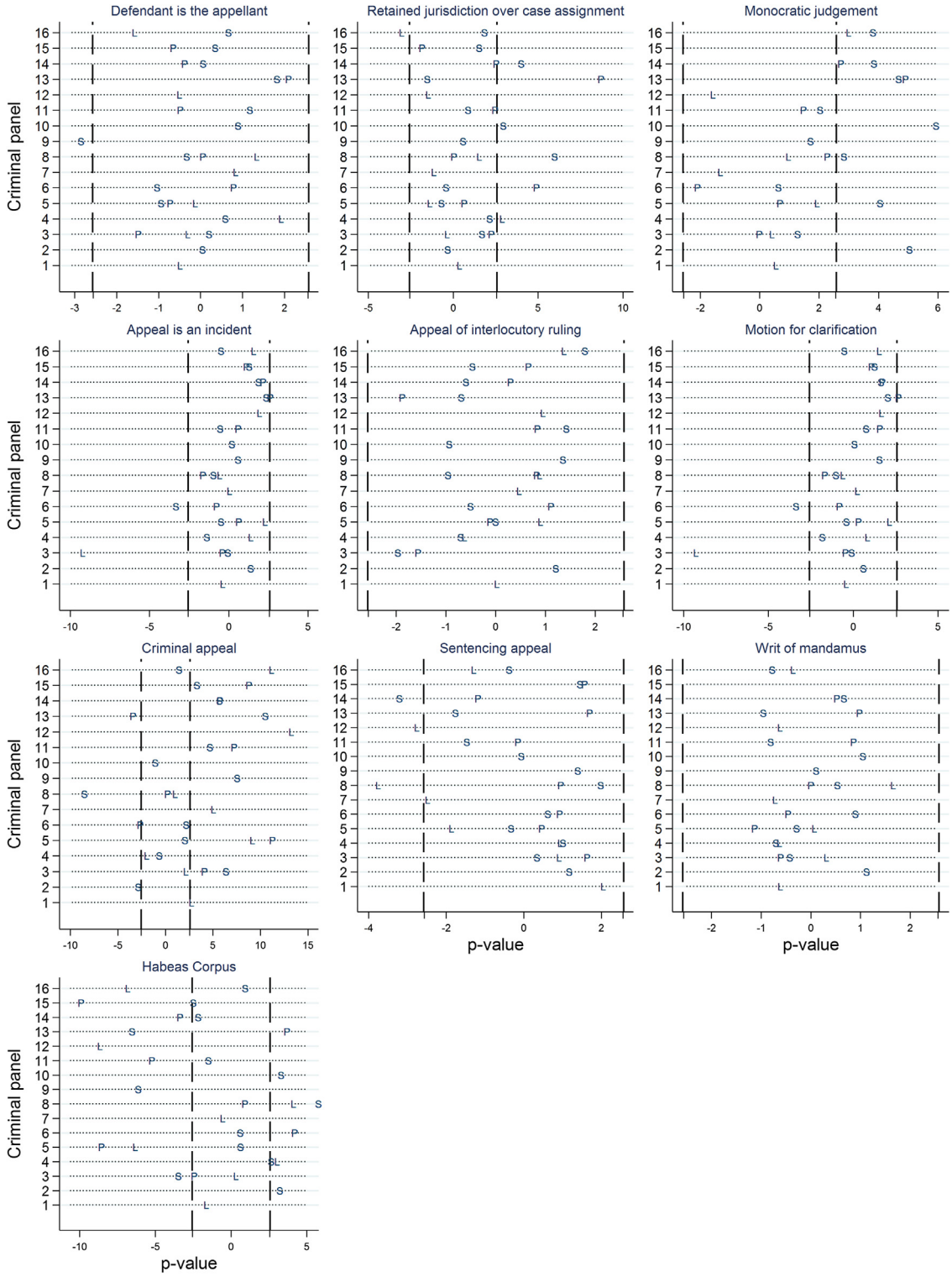

Fig. 3. Balancing tests for the assignment of *rapporteurs* in the appellate court of São Paulo, stratified by criminal panels. Drug offense, appellate cases. 2009–2013. *Notes:* The horizontal axis shows the *p*-values of standard *t*-test of the difference of **pre-treatment** means between the treatment group – judges sitting by designation (labelled as S), former lawyers (labelled as L) and former prosecutors (labelled as P) – and the control group, i.e., career judges. The vertical axis represents each criminal, appellate panel in the *Tribunal de Justiça do Estado de São Paulo*. Tests are run separately for each criminal panel. Dashed, vertical lines delimit the 99% confidence interval of the tests of the equality of means. Drug offense cases.

When the prosecution files the appeal, all three types of special judges rule unfavorably to defendants in criminal appeals with sizeable effects (between 12 and 16 p.p.), although the estimated coefficient is only marginally significant for rapporteurs that are former prosecutors. Former lawyers also tend to rule against defendants in appeals of interlocutory rulings (−31 p.p.) and to rule favorably (marginally significant), in the case of sentencing appeals (+8 p.p.).

Due to the small sample size, some combinations of appeal type and appellant type may rule out reliable estimates of the standard

Table 4
Marginal effect of a jurisprudence shift contingent on appellate judge type and appellant type. Outcome, latent variable is the probability of a decision being favorable to the defendant. Appeals related to drug offenses, filed between 2009 and 2013, in the state court of *São Paulo*.

	Criminal appeal	Appeal of interlocutory ruling	Sentencing appeal	Annulment of judgement	*Habeas corpus*	Writ of mandamus
Career × Defendant files	0.042***	0.300***	−0.03	0.158***	−0.004	0.222***
	(−0.014)	(−0.082)	(−0.032)	(−0.04)	(−0.008)	(−0.085)
Designated × Defendant files	0.021	−0.264	0.024	−0.098	0.015**	0.543***
	(−0.021)	(−0.264)	(−0.046)	(−0.099)	(−0.007)	(−0.197)
Frm.lawyer × Defendant files	0.004	0.252*	0.022	0.157***	0.023	0.277**
	(−0.047)	(−0.145)	(−0.061)	(−0.026	(−0.022)	(−0.135)
Frm.prosecutor × Defendant files	0.01	0.022	−0.157**	−0.042	−0.017*	0.284
	(−0.025)	(−0.364)	(−0.061)	(−0.202)	(−0.01)	(−0.411)
Career × Prosecutor files	−0.036	0.012	−0.028			0.032
	(−0.026)	(−0.128)	(−0.033)			(−0.113)
Designated × Prosecutor files	−0.164***	0.088	−0.018			−0.145
	(−0.061)	(−0.173)	(−0.055)			(−0.246)
Frm.lawyer × Prosecutor files	−0.116***	−0.307***	0.078*			0.181
	(−0.039)	(−0.067)	(−0.047)			(−0.164)
Frm.prosecutor × Prosecutor files	−0.157*	0.016	0.03			−0.302
	(−0.081)	(−0.152)	(−0.067)			(−0.322)
Observations	59,362	715	11,693	1,964	44,962	516

Notes: The shift in jurisprudence was entailed by *Habeas Corpus* n° 97,256/RS of September 1st, 2010. Statistics shown are the marginal effect at means of the triple interaction among the jurisprudence shift step-*dummy* variable (equal to one after September 1st, 2010 and equal to zero otherwise), the appellate judge type (career designated, former lawyer or former prosecutor) and the type of appellant (defendant or prosecutor). The absolute values of *z* statistics associated with the null hypothesis of no-effect are reported below main coefficients, in parentheses. Each column reports a separate set of estimates of the parameters of a standard *logit* model, for each type of appeal type. Blank cells signify that the respective *cohort* does not retain the minimum number of observations required for feasible estimates. The specification of the *logit* models include, in addition to interaction terms, fixed-effects for judging panel and year of judgement and an indicator variable of whether the case is a main case or an incidental proceeding. Standard errors are based on a robust estimation procedure proposed by Huber et al. (1967) and White (1980, 1982). Motions for clarification ($N = 2{,}505$) excluded due to unfeasible computation of standard errors. Asterisks, ***p<0.01, **p<0.05, *p<0.1, denote the significance level of the coefficients. Drug offenses include drug trafficking, drug possession, drug manufacturing and conspiracy.

Table 5
Marginal effect of a jurisprudence shift contingent on appellate judge type and appellant type. Outcome, latent variable is the probability of a decision being favorable to the defendant. Appeals related to drug offenses, filed between 2009 and 2013, in the state court of *São Paulo*. Excludes cases with retained jurisdiction.

	Criminal appeal	Appeal of interlocutory ruling	Sentencing appeal	Annulment of judgement	*Habeas corpus*	Motion for clarificatio n
Career × Defendant files	0.033**	0.386***	−0.013	0.158***	0.001	−0.012
	(−0.016)	(−0.091)	(−0.061)	(−0,04)	(−0.008)	(−0.049)
Designated × Defendant files	0.007	−0.610**	−0.012	−0.093	0.014**	0.004
	(−0.024)	(−0.286)	(−0.081)	(−0.098)	(−0.006)	(−0.009)
Frm.lawyer × Defendant files	−0.014		0.079	0.157***	0.045	−0.059
	(−0.053)		(−0.105)	(−0.027)	(−0.027)	(−0.048)
Frm.prosecutor × Defendant files	−0,01	−0.073	−0.242**	−0.046	−0.021**	0.095***
	(−0.028)	(−0.107)	(−0.123)	(−0.185)	(−0.011)	(−0.019)
Career × Prosecutor files	−0.039	0.093	−0.024			0.251*
	(−0.031)	(−0.144)	(−0.054)			(−0.131)
Designated × Prosecutor files	−0.237***	0.101	0.138			0.991***
	(−0.068)	(−0.215)	(−0.095)			(−0.008)
Frm.lawyer × Prosecutor files	−0.096*	−0.325***	−0.043			
	(−0.057)	(−0.092)	(−0.045)			
Frm.prosecutor × Prosecutor files	−0,09	0.104	−0.067			
	(−0.091)	(−0.173)	(−0.109)			
Observations	40,921	468	2,411	1,921	29,763	402

Notes: The shift in jurisprudence was entailed by *Habeas Corpus* n° 97,256/RS of September 1st, 2010. Statistics shown are the marginal effect at means of the triple interaction among the jurisprudence shift step-*dummy* variable (equal to one after September 1st, 2010 and equal to zero otherwise), the appellate judge type (career designated, former lawyer or former prosecutor) and the type of appellant (defendant or prosecutor). The absolute values of *z* statistics associated with the null hypothesis of no-effect are reported below main coefficients, in parentheses. Each column reports a separate set of estimates of the parameters of the model, for each type of appeal type. Blank cells signify that the respective *cohort* does not retain the minimum number of observations required for feasible estimates. The specification of the *logit* models include, in addition to interaction terms, fixed-effects for judging panel and year of judgement and an indicator variable of whether the case is a main case or an incidental proceeding. Standard errors are based on a robust estimation procedure proposed by Huber et al. (1967) and White (1980, 1982). Asterisks, ***p<0.01, **p<0.05, *p<0.1, denote the significance level of the coefficients. Drug offenses include drug trafficking, drug possession, drug manufacturing and conspiracy.

errors of the parameters. Considering the marginal effects that were statistically significant in Table 4, for the most part, the magnitude of the effects increases with the exclusion of cases with retained jurisdiction. This is the case for appeals of interlocutory rulings and sentencing appeals. In annulments of judgment, marginal effects remain unchanged because estimation samples remain unchanged. In the case of motions for clarification and writ of mandamus, a comparison is not possible because of sample size issues. Finally, regarding criminal appeals, the evidence is mixed: some effects clearly increased (designated vs. prosecutor files) while others slightly decreased (career vs. defendant files and former lawyer vs. prosecutor files). The differences in the magnitude of marginal effects between Tables 4 and 5 suggest that selection effects inher-

ent in non-random case assignments tend to overshadow the effect of judicial attitudes and behavior on case outcomes.[44]

5.4. Discussion

The increase in the rate of pro-defendant rulings by career judges suggests that, for these arguably more neutral judges, legal changes (jurisprudence and statutes) prevail over behavior and attitudes. Strong responses in appeals of interlocutory rulings and annulments of judgements seem to reflect the adherence of career judges to the new precedent. When it is the prosecution that files the appeal, career judges are the only ones not to favor the accusers, at least in criminal appeals. The findings suggest that, in the case of career judges, adherence to precedent outweighs political and institutional factors in response to the legal changes.

The behavior of former lawyers is not much different from that of career judges when defendants file the appeal, although in appeals of interlocutory rulings the effect is only marginally significant. However, when it is the prosecution that files, former lawyers show a strong and negative response in appeals of interlocutory rulings and a sizeable negative response in criminal appeals, suggesting some degree of deference to the claims filed by the prosecution. This sort of mixed response on the part of former lawyers is also evidence of the interplay between legal attitudinal and institutional factors in shaping decisions. Pro-defendant responses, when defendants file, are attributable to both legal factors (as in the case of career judges) or personal preferences; however the current analysis is not able to separate these effects. The anti-defendant responses in rulings, when prosecution files, are consistent with judicial politics and policy views underlying the reaction of the *Ministério Público* to the jurisprudence shift.

The strong, anti-defendant bias of designated judges in both appeals of interlocutory rulings (when defendants file) and criminal appeals (when the prosecution files) – is suggestive of behavior that is counter to the jurisprudence shift. The lack of any pro-defendant effects – except for constitutional remedies – is suggestive of the prevalence of institutional factors underlying decisions. For this group of judges, it seems that judicial politics and career interests outweighed legal issues and possibly, personal attitudes, while shaping their response to the shift in jurisprudence. Bezerra (2016) and Cardoso (2017)[45] discuss the issue of designated judges in São Paulo district courts only, emphasizing that, by the excessive use of designations,[46] the presidency of the court is in practice able to choose arbitrarily the judge of the case, thus violating the principle of the right to a fair trail. The two authors highlight the prominent role of designated, first instance judges in the department of investigations of the court, which supervises the case during police investigations, prior to the filing of a criminal complaint. Since these judges are not immovable, institutional incentives imply that the presidency of the court might select judges based on their ideological profile.[47] Even though designations to the appellate court are not as discretionary, the behavior of the judges sitting in appellate panels will still be susceptible to career interests, since their chances of promotion depend on somewhat subjective criteria, examined by judges within the Special Council. Under this institutional setting, the empirical results show that judges sitting by designation tightened up appeals of interlocutory rulings, which are precisely the instrument available to challenging decisions in early stages of the case, including police investigations. The initial proceedings are key to increasing conviction possibilities and the severity of punishment, in case of a conviction.

The most important result regarding the behavior of former prosecutors is that they respond strongly against defendants in sentencing appeals. The purpose of such type of appeal (by defendants) is to attenuate sentencing, which includes converting imprisonment sentences. From the standpoint of "tough" judges, a less stringent, criminal jurisprudence should, at best, result in no effects but, it seems that former prosecutors try to compensate for the effects of a liberalizing shift in jurisprudence. For these judges, attitudes or and institutional factors are aligned: ideology, *esprit de corps*, and criminal policy preferences.[48]

The responses of appellate judges to the jurisprudence shift are depicted in a reduced-form model, implying that the exact mechanisms underlying the outcomes have not been identified. This response reflects an interplay between different objectives in their utility functions: law (jurisprudence and statutes); attitudes (policy preferences); and institutional environment (career interests and lack of independence shaping judicial behavior). The reduced-form does not allow these effects to be teased apart. Overall though, it seems that the behavior of special judges is consistently influenced by institutional and political factors, in particular regarding policy preferences of the executive branch.[49] The influence of institutions and politics on the judicial response to the jurisprudence shift seems to be stronger for the special judges, in comparison to career judges.

In interpreting results, point-estimates of marginal effects are not sufficient to infer that the sentencing pattern of some judge types is stricter than others, given any appeal type. Considering the standard errors reported in Tables 4 and 5, it becomes clear that the confidence intervals do overlap, implying that one cannot reject the hypothesis that the magnitudes of the effects are equal.

Results on the impact of jurisprudence/legal changes can be interpreted as evidence on the role of extra-legal considerations in appellate judges' opinions. These results corroborate the qualitative analysis of Machado et al. (2018), who scrutinize the legal reasoning underlying 266 opinions in the TJSP, before and after the shift in jurisprudence. They show that, after the shift, arguments in favor of non-custodial punishments relied predominantly on the new precedent. On the other hand, arguments against conversions were more diverse, including the nonbinding nature of the leading-case[50] and conflicting jurisprudence by the *STJ* (Superior Court of Justice). Once the Senate enacted the statutory change, they argue, strictly legal, statutory interpretation shifted from the criminal code of procedures, towards provisions of the sentencing guidelines of section 44 of the criminal code, which prohibits non-custodial sentencing regimes when punishment exceeds four years. It also establishes, in vague terms, that the alternative sanc-

[44] These differences refer to point estimates. A formal test to assess whether the difference in marginal effects between the two samples is statistically significant would require comparing confidence intervals, in which case one would most likely be unable to reject the null hypothesis that marginal effects are different, that is, the hypothesis that selection effects diminish the strength of the effect of judge types on case outcomes.

[45] She analyzes the workings of institutions of criminal policy in the state of São Paulo, based on interviews with prosecutors, judges, and public defendants.

[46] Bezerra (2016) points that *all* judges in the unit the foresees police investigations were designated.

[47] Cardoso (2017) also describes how prosecutors (*Ministério Público*) and public defendants (*Defensoria Pública*) tend to take part in such institutional arrangements, in exchange for corporatist favors.

[48] A pro-defendant bias in motions to clarify filed by defendants, which are procedural remedies that tend to rely upon objective legal aspects, do not weaken results. Moreover, as previously noted, granting them does not necessarily leave the defendant better off.

[49] Tight criminal policies and institutional changes that were counter to the intent of legislators' reasoning underlying the new drug law and have resulted in significant increases in incarceration rates, particularly due to drug offenses, in the state of São Paulo.

[50] And the fact that the decision was not unanimous, augmenting possibilities for challenging it.

tion must be "sufficient".[51] In addition, legal reasoning tended to increasingly rely on critical, extra-legal judgments, such as the "adequacy of punishment"[52] and moral assessments of the essential nature of drug use and drug trafficking activity.[53] In short, the authors describe a gradual transformation of legal reasoning by conservative judges, following the shift in jurisprudence. Once the New Drug Law no longer supported judgements against non-custodial sentences, moral judgments and alternative statutes gained in prominence as basis for doctrine and law in the opinions of conservative appellate judges.

The results highlight the importance of considering heterogeneity in the analysis, both in terms of appeal types and appellant types. First, because appeal types represent different legal instruments that matter more or less depending on the substantive legal issue affected by the change in jurisprudence. Second, considering appeal and appellant types separately in the model allows capturing compensating effects, if any. Changes in jurisprudence may cause litigation strategies and legal reasoning to adapt and change for instance, by switching between alternative procedural instruments or remedies that may be interchangeable in terms of their substantive effects on sentencing outcomes. These composition effects may not be detectable in analyses that aggregate case types. Third, different appellant types, i.e., prosecution or defendants, are likely to have different mechanisms for the selection of appellate cases, particularly after big changes in jurisprudence, rendering a more accurate interpretation of the empirical results.

Freyens and Gong (2017) test whether behavior of labor judges is sensitive to the interaction of judge-specific bias and statutory changes. They present empirical evidence that is similar in flavor to the present 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. The current empirical results suggest the presence of compensating effects, in other words, judicial responses, by appellate judges, that run counter to the direction of the change in jurisprudence.

6. Conclusion

This paper evaluates the effect of judicial attitudes and behavior on the outcome of criminal appeals related to drug offenses. This evaluation explores the heterogeneous response of different types of judges – in terms of their attitudes and incentives – to a major shift in jurisprudence on drug offenses, in a setting where appeals are exogenously assigned to judging panels in the appellate court of the state of Sao Paulo, Brazil.

The institutional structure of the appellate state court in São Paulo encompasses three types of appellate judges, besides career judges: former practicing lawyers and former prosecutors, selected by gubernatorial appointments, and judges sitting by designation, without tenure at the appellate court, who can be removed at the discretion of a special council of powerful judges 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," punishment, and deterrence (in the case of former members of the *Ministério Público*) and the right to a fair trial and due process of law (in the case of former members of Brazil's bar association). Both types are bound by a strong *esprit de corps*. Due to the political nature of their appointment, these judges are relatively more inclined to contribute to executive policy, in particular 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 and institutional pressure and face career incentives, with substantive effects on the pattern of their rulings.

The results suggest that career, appellate judges tend to find in favor of appealing defendants, after the pro-defendant shift in jurisprudence. This pattern of response vanishes when appeals are filed by the prosecution. This evidence, which corroborates the importance of legal changes in determining changes in appellate judgments, does not seem to be valid when the behavior of "special" judges is concerned.

The response of former prosecutors in reaction to the shift in jurisprudence differs from that of career judges in that, despite the new legal provisions that were more lenient to drug offenders, former prosecutors became harsher towards defendants, in several appeal types.[54] At best, from a theoretical standpoint, one would expect the absence of effects. This type of bias resembles the phenomena of *compensating effects* [Freyens and Gong (2017)]. 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 failed to tilt towards defendants after the pro-defendant jurisprudence shift.

The response of former lawyers to the jurisprudence shift is most favorable to defendants in appeals of interlocutory rulings (marginally significant), annulments of judgments, and writs of mandamus. However, former lawyers seem to favor the prosecution as the appellant in the earlier stages of cases (appeals of interlocutory rulings and criminal appeals). The interpretation of this mixed response is that there is a tension between the attitudes (aligned with the jurisprudence shift) of former-lawyer judges and judicial politics. This mixed response is not observed in the case of career judges.

Judges sitting by designation responded strongly and unfavorably to defendants in appeals of interlocutory rulings and criminal appeals. Otherwise, they tended to favor defendants in constitutional remedies (habeas corpus and writ of mandamus). Sitting judges seem to play an important role in implementing the institutional agenda of conservative judicial and executive branches of power, which required, in the specific context, counteracting the effects of a new, liberalizing jurisprudence promoting non-custodial sentencing.

Overall, the behavior of *special judges* seems to be aligned with policy preferences of executive, state authorities in São Paulo, depicted in the literature as a now long-lasting crackdown on crime, aiming at maximizing the rates of convictions and, with a successful conviction, as harsh as possible sentencing.[55] The findings of

[51] Alternatives to incarceration will substitute incarceration when "the culpability, background, social conduct and personality of the convict, as well as the reasons and circumstances indicate that this replacement is sufficient." (Penal Code. Law n° 9.714, of 1998, section 44, paragraph 3).

[52] Alternative punishments were deemed "insufficient", incompatible with "reproving and prevention" of drug trafficking, generating a "feeling of impunity" and "incentives to recidivism".

[53] Claims on the "gravity of losses" associated with these type of crime and on its "heinous nature".

[54] Or did not respond at all, whereas other judge types significantly increased leniency to defendants (as in the case of a writ of mandamus filed by the defendant). Moreover, it is the only judge type with a strong, negative response to the jurisprudence shift when it comes to sentencing appeals.

[55] In that respect, since at least the beginning of the 2000s, the state of São Paulo has adopted a very tough stance on crime and effectively reduced homicide rates. But this has come with a dramatic increase in rates of incarceration and alleged human rights violations by police, inside and outside the prison system. A few years earlier, federal law 11.343/2006 became effective, which established much harsher sentencing for serious drug offenses. The growth of organized crime lent legitimacy

the paper illustrate how political appointments in the judiciary can have substantive impacts on criminal law enforcement.

Declaration of interests

None.

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to 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 in the case of two appellate judges who faced complaints filed by the Ministerial Office, allegedly for being lenient to criminals. In the first case, Judge Roberto Corcioli faced a complaint filed by twenty-three prosecutors. The Special Council of the TJSP (*Órgão Especial*) has recently decided for the punishment of censure by a large majority, 22 to 2 votes. Another judge, Kenarik Boujikian has also been punished for similar reasons.