

Pay to Play?

Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel

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(joint with Jay Jenkins, Texas Criminal Justice Coalition)

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The Right to Counsel

2

- *Gideon v. Wainwright* (U.S. 1963)
 - Right to counsel under U.S. Constitution for state felony criminal defendants
- Disappointed expectations
 - Unfunded (and highly unspecified) mandate for states
 - Difficult to show ineffective assistance of counsel
 - Increase in prosecutorial power
 - Lack of political will
 - Systemic/societal critiques: E.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2012)



Another reason: Incentive gap

3

- Defense attorney incentives not aligned with defendants'
- Assigned counsel
 - ▣ Paid by case, by day, by hour (with caps)
 - ▣ Maximize caseload, minimize effort
 - ▣ Lack of market discipline – contrast with private attorneys
- Contract attorneys – often similar incentives
- Public defenders
 - ▣ Overwhelmed by caseload – incentive to shirk, plea mills?
 - ▣ Implicit bias? L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 100 (2013)

This paper: Does campaign finance worsen the incentive gap?

4

- First research on how campaign finance might affect trial court decision-making
 - ▣ Previous research: focus on state supreme courts
 - E.g., Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623 (2009)
 - ▣ Side contribution: clear “quid pro quo” – rare to find
- Focus on Texas – but anecdotes from Oklahoma, Michigan
- Other states with elected judges + ability to donate to trial judges + at least some assigned counsel systems
 - ▣ Alabama, California, Georgia, Kansas, Kentucky, Maryland, Missouri, Montana, Nevada, North Carolina, and Ohio
 - ▣ Based on state ethics rules + info on elections – dig further

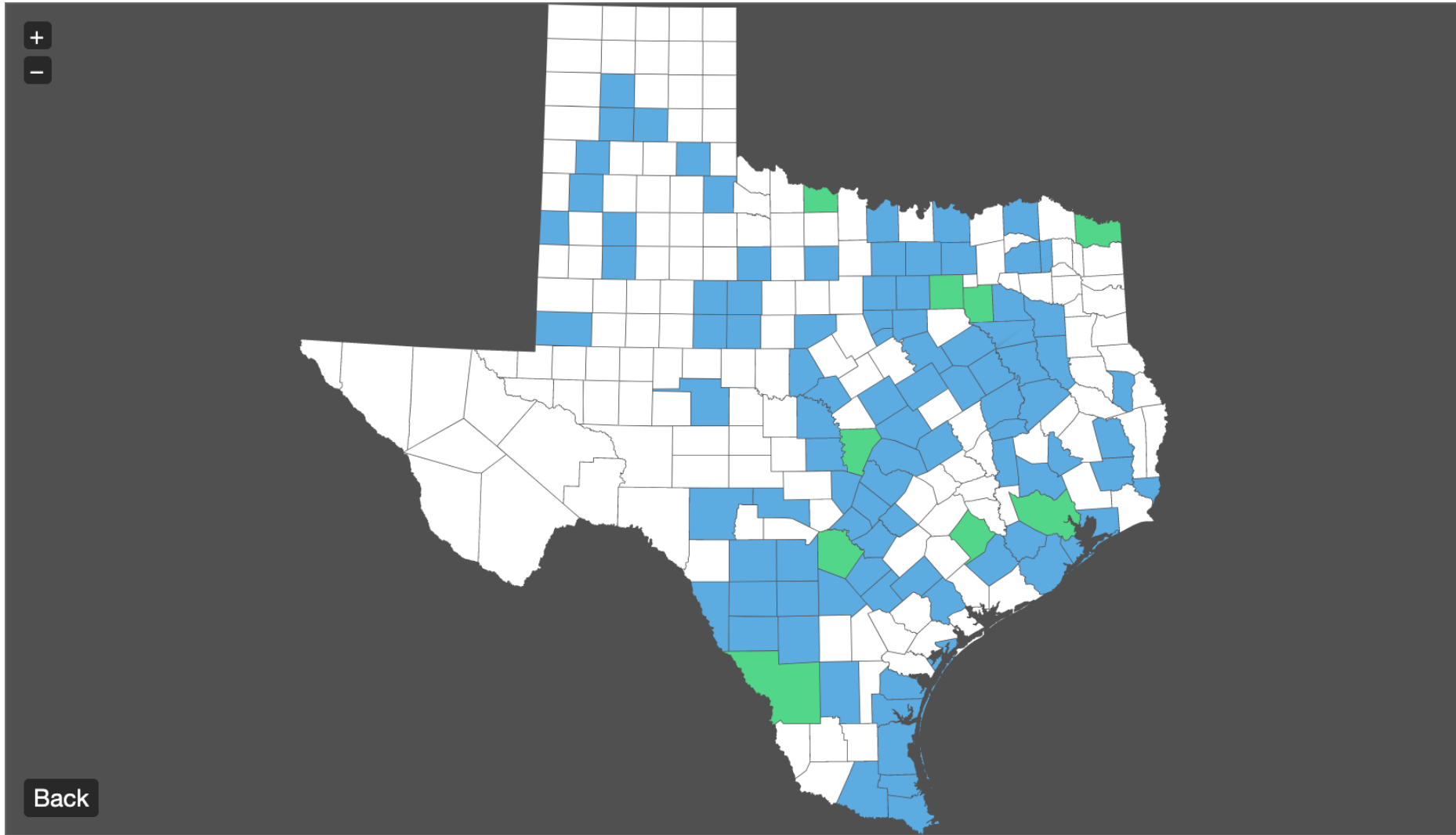
Research questions

5

- Do judges and attorneys engage in “pay to play” -- use campaign finance to decide who is assigned indigent defense cases?
- If so, does this adversely affect criminal defendants?
- Policy responses to address this conduct:
 - ▣ Just address pay to play
 - Won't help/might make things worse?
 - ▣ Broader response: address the incentive gap
 - Contingent fees for publicly-funded criminal defense attorneys



Mapping American Public Defense Project



Map Legend



Source: <https://safe-stream-85568.herokuapp.com/>

Our setting: Harris County, Texas

7

- Almost 4.7 million people (3rd most populous county in U.S.)
- Almost all assigned counsel for indigent defendants
 - ▣ Public Defender's Office only opened in 2012
- “Wheel” system of assignment
 - ▣ Public defenders are often not assigned even if on the wheel





Harris County District Courts

Appointed Attorney Candidates

Minimum Requirements

Master List...

You must meet these basic requirements before submitting an application to accept court appointments in Harris County.

- Be licensed and in good standing with the State Bar of Texas
- Have practiced in the area of criminal law for at least two (2) years
- Pass the certification test with a score of at least 75 except attorneys already board certified in criminal law by the Texas Board of Legal Specialization are exempt from the local certification test
- Exhibit proficiency and commitment to providing quality representation to criminal defendants
- Demonstrate professionalism and reliability when providing representation to criminal defendants
- Average ten (10) hours a year of continuing legal education courses or other training related to criminal law

Graduated List...

In addition to the basics, here are further requirements for specific appointment levels...

First Degree List:

Practiced criminal law for at least five (5) years, tried to verdict at least eight (8) felony jury trials as lead counsel and been accepted as competent to receive first-degree appointments by a majority of the district judges

Second-Degree List:

Practiced criminal law for at least four (4) years and tried to verdict at least four (4) felony jury trials as lead counsel

Third-Degree List:

Tried to verdict at least three (3) felony jury trials as lead counsel

<u>INDIVIDUAL CASE APPOINTMENT</u>		Number of Court Days/Hours	RATE	TOTAL (presumptive max.)	AMOUNT (Judge Completes)
NON-TRIAL	First Degree		\$225/day	*\$1125	
	Second Degree		\$175/day	*\$875	
	* Third Degree, SJF, MRP/MAJ	5	\$125/day	*\$625	625.00
TRIAL	First Degree		\$500/day		
	Second Degree		\$400/day		
	Third Degree, SJF, MRP/MAJ		\$300/day		
PRE-TRIAL HEARING WITH TESTIMONY & PSI HEARING			\$350/day		
OUT OF COURT HOURS (Must detail on Out-Of-Court Hours Log.)	First Degree		\$85/hour	\$1,700	
	Second Degree		\$60/hour	\$600	
	Third Degree, SJF, MRP/MAJ		\$40/hour	\$400	
INVESTIGATION	Bills submitted by investigators and experts must document the dates and hours spent on the case and must be sworn to or affirmed to as accurate. Expert expenses paid per county policy.			\$600/case	
EXPERT				\$650/case	
MENTAL HEALTH SUPPLEMENT (Must detail on Out-Of-Court Hours Log.)			\$50/hour	\$250	
BILINGUAL SUPPLEMENT			\$50/day	\$250	
AFTER HOURS SUPP. (Trial/Hearing after 6:00 pm)			\$50/hour		
OTHER					
				TOTAL	\$ 625.00

*The presumptive maximum number of non-trial settings beyond a term assignment is four.

List date(s) of all Court Appearances. Attach any Out-of-Court Hours Log.

10-20-14 , 11-20-14 , 12-19-14 , 2-3-15 , 2-17-15

PERSONAL INFORMATION

Drew Willey, Houston/Galveston defense attorney

11

- “A few months into working on his cases, [the attorney] told us that he'd be charging us a monthly fee out of our hourly pay to donate to judge's campaign funds. He said these donations were necessary to keep his lights on and keep allowing him to pay us.”
- “[After I left his office,] I know the pay for play continued, because that attorney later, in passing, told me that the elections of new judges meant that he ‘lost’ some courts and had to begin donating more to different judges in order to keep getting appointments.”
- Galveston judge story – unplugging the computer



Criminal Cases/Outcomes

Harris County Clerk: 2005 –

- Case (filing date, charge, etc.)
- Court → Judge
- Attorney name/SPN → Bar #
- Disposition and sentencing
- Type of atty (PD, hired, appointed)
- Defendant characteristics

Elections/Candidates

Texas Sec'y of State

- Candidate name
- Court and election year
- Party
- Electoral outcome

Court, Year

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Campaign Contributions

Texas Ethics Commission: 2002 –

- Donor name
- Donee (candidate) name
- Amount contributed
- Contribution date
- Occupation/Employer
- Address

Donor, Donee (judge)

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Appointed Attorney Revenues

Texas Indigent Def. Comm'n: 2014 –

- Attorney name
- Revenue (per fiscal year per court)
- # cases assigned
- Bar #

Bar #, Court, Year

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Bar Data

Texas State Bar

- Bar #
- Law school
- Admission date
- Disciplinary info

Bar #

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“Wheel” Data

Harris County Clerk

- Court
- “Wheel” applicants
- Approved attys

Atty name

Criminal Cases/Outcomes

Harris County Clerk: 2005 –

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- Attorney name/SPN → Bar #
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- Type of atty (PD, hired, appointed)
- Defendant characteristics

Donor, Donee (judge)

Bar #, Court, Year

Bar #

Court, Year

Atty name

TABLE 1: SUMMARY STATISTICS ON CASES AND CONTRIBUTIONS

Felony Cases with Appointments: 2005–2018	
Total number of cases and attorneys:	290,633 cases, 772 attorneys
Appointed private attorneys	282,780 cases, 747 attorneys
Appointed public defenders	7,853 cases, 66 attorneys
Number of courts	22
Number of judges	45
Number of general elections	8
Campaign Contributions: 2004–2018	
Total number of donations: all appointed attorneys to all judges	1,841
Total donation amount: all appointed attorneys to all judges	\$622,917
Contribution Amounts for Appointed Attorneys	
Mean (SD)	\$338.36 (329.12)
1%	\$50
10%	\$100
25%	\$150
50%	\$250
75%	\$500
95%	\$1,000
99%	\$1,500

TABLE 2: DONORS VS. NON-DONORS—CASE CHARACTERISTICS FOR APPOINTED ATTORNEYS (2005–2018)

	All	Donor	Non-Donor
Number of Attorneys ^a	772	198 (25.65%)	574 (74.35%)
Felony Type ^b			
1 st Degree Felony	6.28%	6.88%	6.13%
2 nd Degree Felony	16.07%	16.67%	15.92%
3 rd Degree Felony	22.28%	22.01%	22.35%
State Jail Felony	53.41%	52.35%	53.67%
Capital Felony	0.17%	0.27%	0.14%
Defendant ^b			
% White	45.81%	43.72%	46.33%
% Female	20.30%	20.38%	20.28%
Mean Age (years)	33.42	33.35	33.44
Attorney Characteristics ^b			
Average rank of law school attended	116.35	107.43	118.60
Years since admission	22.95	25.36	21.09

^a “Donor” = 1 if attorney donated at least once to some judge during sample period

^b “Donor” = 1 if attorney donated at least once to the assigning judge during sample period

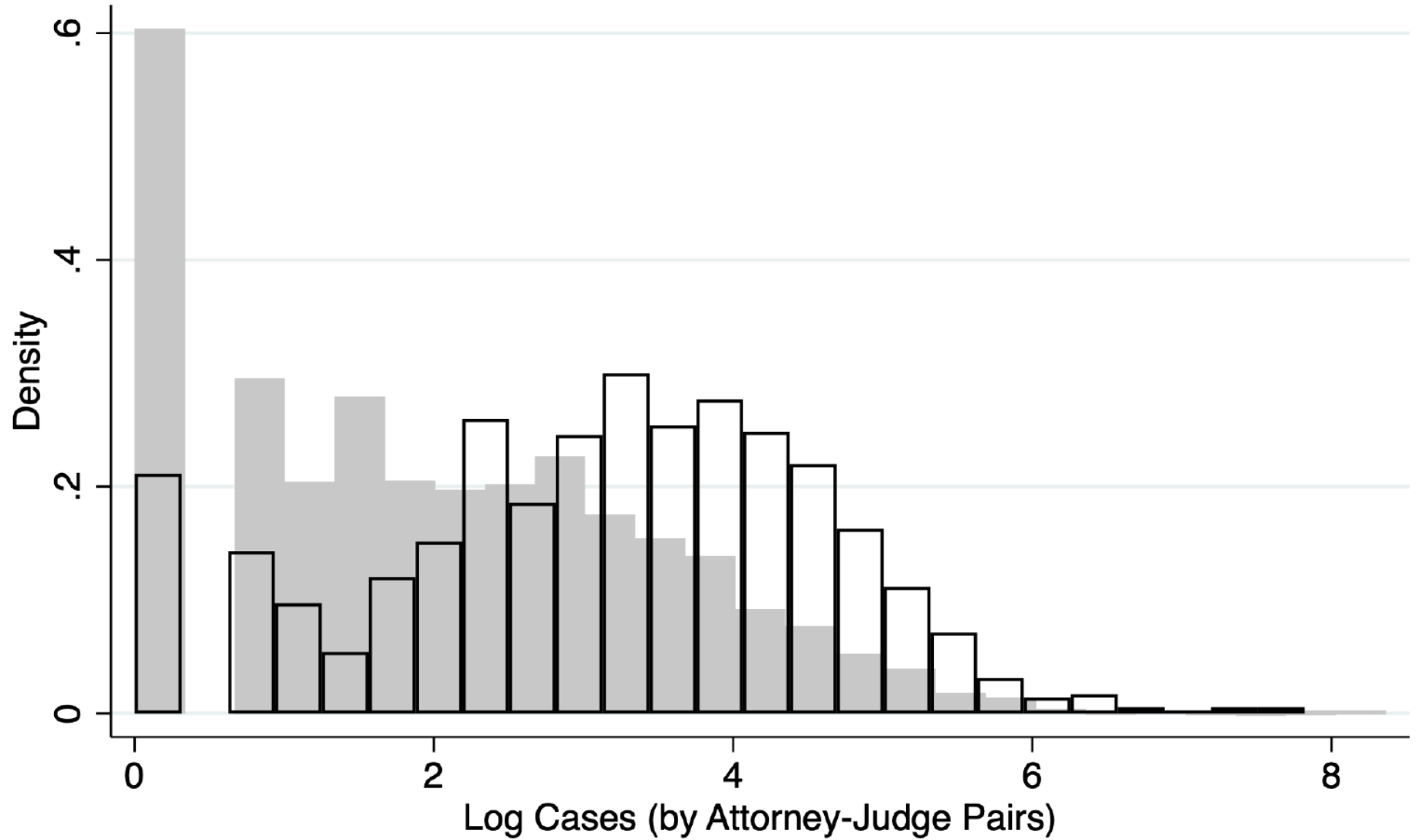
TABLE 3: DONORS VS. NON-DONORS—CASES APPOINTED AND REVENUES
(2005–2018)

	All	Donor	Non-Donor
Number of Attorneys ^a	772	198 (25.65%)	574 (74.35%)
Cases Appointed: Any Donation ^a	—	152,200 (52.37%)	138,433 (47.63%)
Cases Appointed: Donate to Appointing Judge ^b	—	58,588 (20.16%)	232,045 (79.84%)
Average Case Pendency (days) ^b	105.77	108.77	105.02
Attorney–Judge Pairs ^b			
Number of Observed Pairs	10,723	1,107 (10.32%)	9,616 (89.68%)
Average Revenue by Pair	\$16,300	\$31,081	\$13,992
Average Number of Cases Assigned Per Pair	27.10	52.93	24.13

^a “Donor” = 1 if attorney donated at least once to some judge during sample period

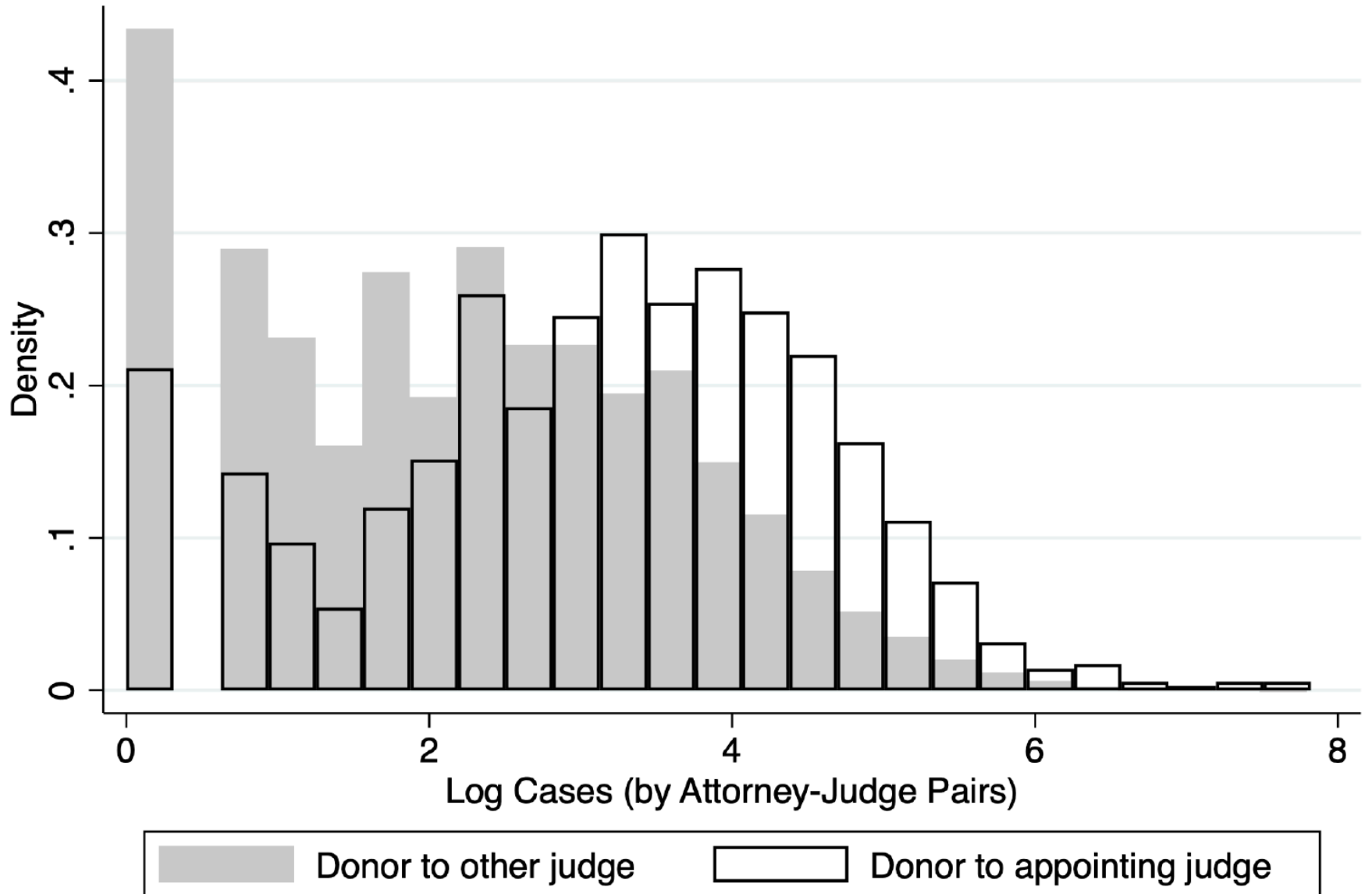
^b “Donor” = 1 if attorney donated at least once to assigning judge during sample period

Log Cases: Non-Donor v. Appointing Judge Donation

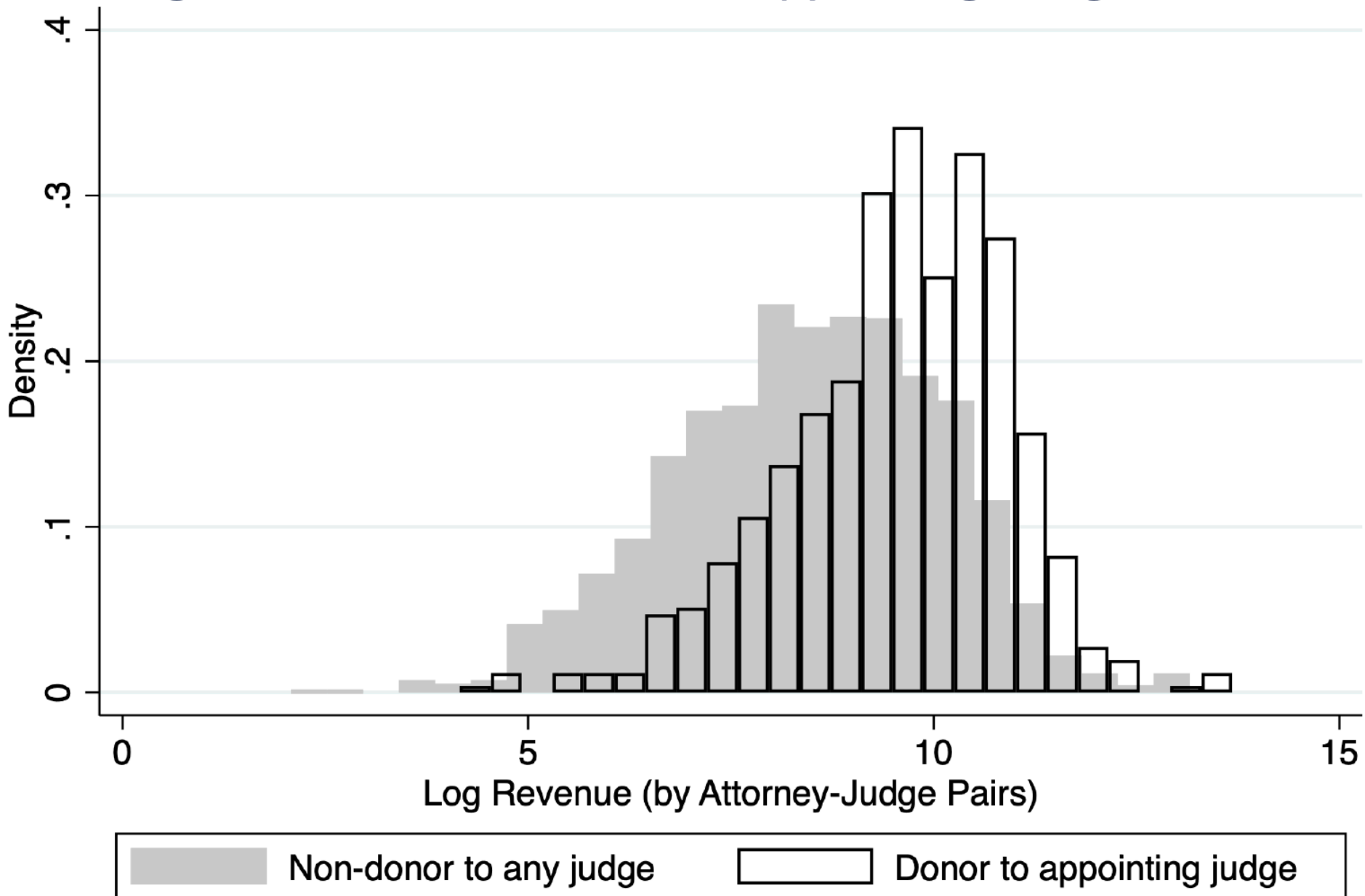


■ Non-donor to any judge □ Donor to appointing judge

Log Cases: Other Judge v. Appointing Judge Donation



Log Revenue: Non-Donor v. Appointing Judge Donation



Log Revenue: Other Judge v. Appointing Judge Donation

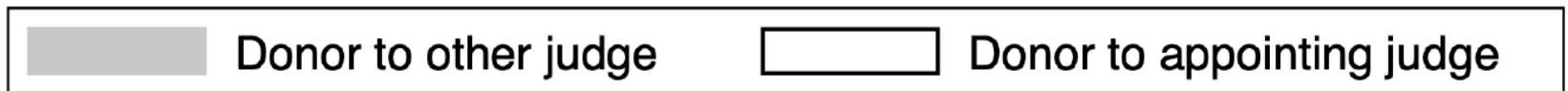
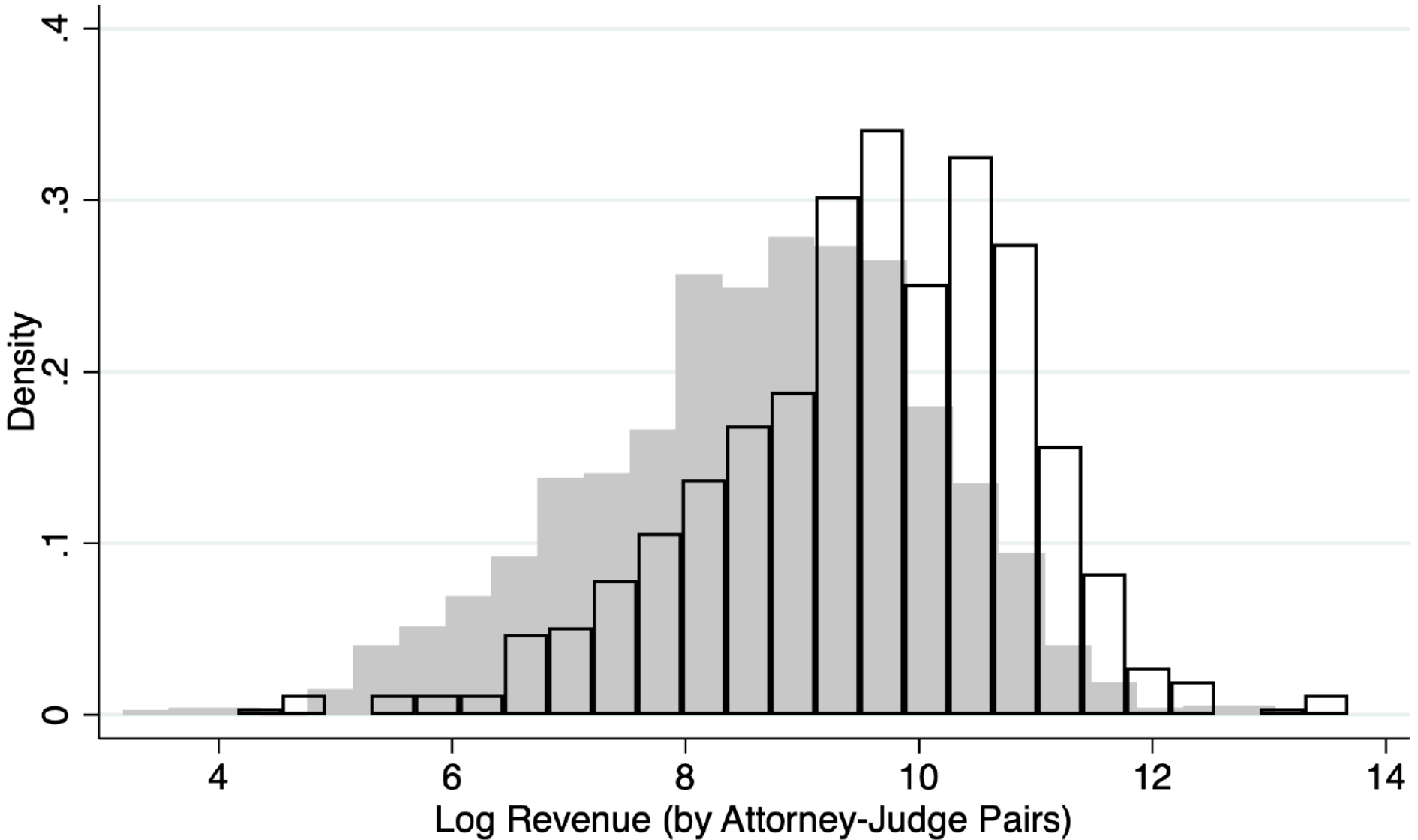


TABLE 5: CASES ASSIGNED / REVENUE EARNED FOR EACH DOLLAR DONATED TO ASSIGNING JUDGE

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Total Donated	0.064*** (0.019)	0.065*** (0.020)	0.073*** (0.021)	27.95*** (9.08)	28.08*** (7.33)	28.25*** (6.20)
Observations	10,723	10,723	10,723	4,939	4,939	4,939
Adj. R-squared	0.04	0.07	0.32	0.09	0.13	0.45
Judge, Atty Ctrl	NO	YES	NO	NO	YES	NO
Judge, Atty FEs	NO	NO	YES	NO	NO	YES

Notes: This table presents OLS regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2018, at the attorney-judge pair level. The outcome variable in cols. (1)-(3) is total cases assigned by a judge to an attorney; in cols. (4)-(6), it is total revenue earned by an attorney across all cases assigned by a judge. "Total Donated" is the total dollar amount ever donated from an attorney to the judge in the pairing. Cols. (2) and (5) include controls for attorney and judge characteristics as specified in the text. Cols. (3) and (6) include both attorney and judge fixed effects. All specifications include a constant variable control. Standard errors are heteroskedastic robust in cols. (1) and (4) and clustered at the judge-level elsewhere. *** = significant at 1% level.

First Donation Relative to Case Assignment Eligibility

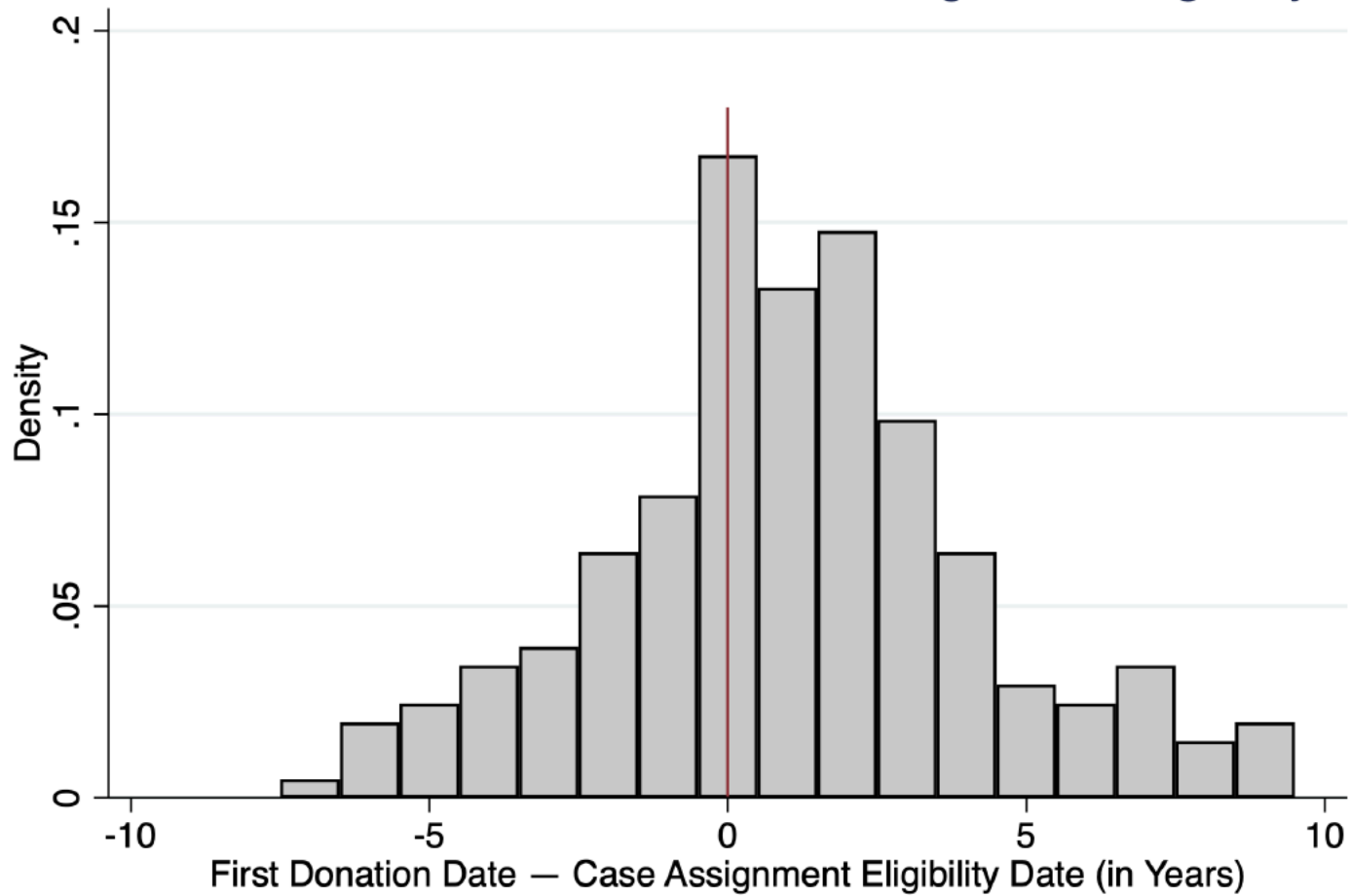


Figure 6

TABLE 7: CASE OUTCOMES FOR DONOR VS. NON-DONOR ATTORNEYS

	Good Outcome		Sentenced TDC		Jail/Prison Term	
	(1)	(2)	(3)	(4)	(5)	(6)
Donor Somewhere	-0.44*** (0.15)	-0.05 (0.41)	0.75*** (0.11)	0.57** (0.25)	33.71*** (4.55)	18.32** (7.74)
Public Defender	8.91*** (0.50)	6.31*** (0.65)	-2.12*** (0.37)	-1.25* (0.64)	40.16** (18.16)	8.94 (24.94)
Def. Female	-	1.79*** (0.24)	-	-5.70*** (0.20)	-	-110.67*** (4.45)
Def. White	-	-0.21 (0.16)	-	0.39*** (0.13)	-	-34.95*** (6.08)
Def. Age	-	-0.00 (0.01)	-	0.19*** (0.01)	-	6.56*** (0.29)
Constant	117.07*** (2.26)	119.14*** (2.48)	-4.97*** (0.46)	-13.95*** (0.96)	-14.47 (14.76)	-424.38*** (41.31)
Observations	325,791	325,712	325,871	325,792	211,112	211,056
Adj. R-squared	0.22	0.23	0.24	0.25	0.44	0.45
Charge FE	YES	YES	YES	YES	YES	YES
Judge FEs	NO	YES	NO	YES	NO	YES

Notes: This table presents OLS regressions of case outcomes on attorney, defendant, and case characteristics. "Donor Somewhere" is a dummy variable for whether an attorney ever donated to some judge in the sample. "Good Outcome" = 1 if case is dismissed, defendant is acquitted, or charges are reduced; = 0 if defendant is convicted or pleads guilty or no contest. "Sentenced TDC" = 1 if defendant received a prison sentence in the Texas Department of Corrections, = 0 otherwise. Coefficients for "Good Outcome" and "Sentenced TDC" are inflated by 100 to put in percentage point terms. "Any Jail/Prison Term" = max sentence across TDC, Harris County Jail or state jail. Standard errors are heteroskedastic robust in odd-numbered columns and clustered at the judge-level in even-numbered columns. *** = significant at 1% level, ** = significant at 5% level, * = significant at 10% level.

Eliminate pay to play?

32

- Regulate appointments from donors
 - ▣ Appointments precede donations?
- Managed assigned counsel systems (independent committee) OR public defenders for all?
 - ▣ More costly
 - ▣ Politically unpopular (G.W. Bush veto example)
- Enforce workload limits for appointed counsel?
 - ▣ Hasn't really worked (National Advisory Commission on Criminal Justice Standards and Goals limits – often not followed)
 - ▣ Plus: assigned counsel still have incentives to increase caseload
- Biggest problem: none of these address the incentive gap

Contingent Criminal Defense

33

- Tie payment to performance
 - ▣ Same pot of money as before
- Measure “value-added” of attorney
 - ▣ Normalize based on types of cases received and observables in case
 - ▣ Opportunities from better case data/machine learning
 - Cf. Neel U. Sukhatme & M. Gregg Bloche, *Health Care Costs and the Arc of Innovation*, MINN L. REV. (forthcoming)
 - ▣ Unlikely to be “unfair” in aggregate

Contingent Criminal Defense (cont'd)

34

- Insights from other disciplines
 - ▣ Health-care: pay more for “value-based” medical services rather than fee for service
 - ▣ Education: extra pay for teachers who add value
 - ▣ Contract theory: deals with principal/agent problem
 - ▣ Unlikely to make trial too attractive for attorneys – strong incentives to plead out (minimize effort)

Additional research

35

- RDD on elections
 - ▣ Donate to candidate who barely wins election v. candidate who barely loses
- Diff-in-diff: donate to winner/loser before/after election; break into challenger v. incumbent
 - ▣ Punished for donating to challenger?

Conclusion

36

- The incentive gap is a pervasive problem in indigent defense.
- Campaign finance exacerbates the incentive gap – assigned counsel not aligned with defendants they represent. Evidence:
 - Donors > 2x cases of non-donors
 - Limit to donors: receive > 2x cases from donee judges but not others
 - Same when comparing donor v. non-donor in last election cycle
 - Holds when control for observable atty/judge differences such as where they attended law school/ranking, years of practice experience, and unobservable time-invariant effects
 - Not explained by alumni or age-correlated “social network”
 - Timing of payments consistent with “entrance fees”
- Problem in Harris County and across Texas but also likely across the United States
- Address the incentive gap: contingent fees to publicly-funded criminal defense attys to better align atty/client incentives