

Pay to Play? Campaign Finance and the Incentive Gap in the Right to Counsel

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Abstract

For nearly 60 years, felony defendants in state trial courts have been guaranteed the right to counsel regardless of their ability to pay, thanks to the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*. Yet, most criminal procedure scholars agree that indigent defense as practiced today falls far short of its initial promise. Most commonly, these scholars claim that inadequate public funding, a lack of political will, and the near impossibility of succeeding on ineffective assistance of counsel claims render indigents' right to counsel more illusory than real.

These standard critiques, we argue, are incomplete. Indigent defense systems also fail due to poor design: they do not align publicly-funded defense attorneys with the best interests of their clients. Instead, attorneys have strong incentives to quickly dispose of their clients' cases, with no real investigation. Often this is because the system overburdens these attorneys; sometimes, as we show, it is because defense attorneys *choose* to overburden themselves to maximize profit.

We illustrate this "incentive gap" through an empirical study that raises a fresh concern: whether defense attorneys and elected trial judges engage in "pay to play," where attorneys donate to judges, and judges appoint these attorneys as counsel in indigent defense cases. We find trial judges routinely accept such donations, often as an apparent "entrance fee" from attorneys who have just become eligible for appointments. Judges also appoint their donors to over twice as many cases as non-donors, even though the two groups are similar in terms of their education and experience. Such appointments can be surprisingly lucrative, with many donors earning tens or even hundreds of thousands of dollars across hundreds of cases assigned to them in a single year.

Worse, defense attorneys who donate to a judge are, if anything, less successful overall than non-donor attorneys in attaining charge reductions, dismissals, and acquittals, or avoiding prison sentences. These differences are not driven by observable differences in assigned cases or defendant characteristics, or by unobservable time-invariant differences. We contend donor attorneys might underperform simply because they take on so many more cases from their donee judges, and hence have less time to spend on each matter.

While our data are from Harris County, Texas (the nation's third most populous county), we provide qualitative evidence that these problems are endemic across Texas. Indeed, we suggest similar problems might affect millions of Americans elsewhere, as trial judges who control indigent defense assignments in many other states (including California, Georgia, Maryland, Missouri, North

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Carolina, and Ohio, among others) are permitted to accept attorney donations to fund their election campaigns.

The apparent prevalence of pay to play, while troubling, is merely a symptom of a deeper pathology: the incentive gap in the right to counsel. We examine how this gap might be reduced by relaxing the long-standing ban on contingency arrangements in criminal law and providing performance-based payments to assigned counsel. We argue that more limited reforms that focus solely on eliminating pay to play are unlikely to substantially improve the lot of poor defendants unless accompanied by structural changes that address the incentive gap.

Introduction	4
The Promise and Failure of <i>Gideon</i>: A Brief History of the Right to Counsel	8
The Incentive Gap in the Right to Counsel	14
Background on Indigent Defense Systems	14
Assigned Counsel	15
Contract Attorneys	16
Public Defenders	16
Different Systems, Different Incentives	17
Caseloads for Assigned Counsel and Contract Attorneys	18
Caseloads for Public Defenders	20
Private Attorneys	21
The Incentive Gap Magnified: The Role of Campaign Finance	22
Attorney Donations and Indigent Defense in Texas	23
Attorney Donations in Trial Courts Elsewhere	25
The Incentive Gap in Action: An Empirical Analysis of Campaign Finance and Indigent Defense in Harris County, Texas	29
Background on Harris County	29
Courts and Judicial Elections	29
Indigent Defense	30
Construction of the Data	32
Summary Statistics	35
Cases and Contributions	35
Attorney Donations and Appointments	38
Regressions and Graphical Analysis	40
Attorney Donations and Appointments	40
Comparisons Within the Donor Class	43
Donation Timing and “Entrance Fees”	44
Election Cycles	46
Case Outcomes	47
Closing the Incentive Gap in the Right to Counsel	50
Attacking Pay to Play	50
Beyond Pay to Play: Shifting Attorney Incentives	54
Public Defenders for All?	54
Contingent Criminal Defense: A “Value-Based” Approach	55
Conclusion: Achieving the Ideals of <i>Gideon</i>	61
Appendix	62

I. Introduction

Were they alive today, Johnny Ray Johnson and Keith Steven Thurmond would be experts on what happens when indigent defendants are not assigned competent counsel. Both were inmates on death row in Harris County, Texas. In 2004, Mr. Johnson's appointed attorney, Jerome Godinich, missed the deadline to file a petition for federal habeas corpus relief. Mr. Godinich claimed a malfunctioning filing machine failed to date-stamp the petition, which he filed after the court had closed on the deadline date. His client eventually lost on appeal and was executed.¹

Months after the first missed deadline, Mr. Godinich missed the same deadline in Mr. Thurmond's case. His excuse? The same malfunctioning filing machine. The delay foreclosed a petition from Mr. Thurmond, who was also eventually put to death.²

Sadly, cases like these are not so rare. Although many indigent defense counsel perform admirably for their clients, some fall asleep during a client's capital murder trial,³ neglect to make an opening statement after an inflammatory opening by a prosecutor,⁴ or allow their client to remain locked up in pre-trial detention for 17 months before investigating facts in a drug possession case in which no drugs were ever found.⁵ There is, unfortunately, no shortage of defendant horror stories.

More prosaically, public defenders and assigned defense counsel often fail their clients simply because they are spread too thin across too many cases. Because these attorneys regularly handle hundreds of cases at the same time,⁶ they cannot conduct a focused investigation on any one matter or provide truly individualized counsel to any one defendant. So it is no surprise that the vast majority of indigent defendants simply do the most expeditious thing and quickly plead guilty to whatever deal they are offered -- often after being encouraged to do so by their own lawyer.

Such practices have led most criminal procedure scholars and many practitioners to assail the state of indigent defense in America. To illustrate, the *Yale Law Journal* held a symposium in 2013 to commemorate the 50th anniversary of *Gideon v. Wainwright*,⁷ the landmark decision that

¹ See Lise Olsen, *Slow Paperwork in Death Row Cases Ends Final Appeals for 9*, HOUS. CHRON. (Mar. 21, 2009).

² See *Thurmond v. Thaler*, 2011 U.S. App. LEXIS 1608 (2011).

³ See Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694 (2012) (citing Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, <http://articles.latimes.com/2000/jul/15/news/mn-53250>).

⁴ See *id.* (describing how an indigent defense attorney said nothing in response to a prosecutor claiming the defendant had bitten a child in a rape and murder case and could be identified through bite marks; the defendant was exonerated 17 years later).

⁵ See Lise Olsen, *Hundreds of Indigent Inmates Jailed for Months Pretrial*, HOUS. CHRON. (Oct. 3, 2009), at <https://www.chron.com/news/houston-texas/article/Hundreds-of-indigent-inmates-jailed-for-months-1566415.php> (noting failure of assigned counsel to investigate on behalf of defendant charged with possession of cocaine even though no drugs were found on him).

⁶ See, e.g., Steiker, *supra* note __, at 2696 (noting "[i]n Miami-Dade County, Florida, the average felony caseload per lawyer has reached five hundred in recent years due to budget cuts.").

⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963). Indigent capital defendants have had the right to counsel since the Supreme Court's decision in *Powell v. Alabama*, 287 U.S. 68, 68-69.

established a right to counsel for all state felony defendants. The occasion, however, turned out to be more lamentation than celebration, as scholars and practitioners pointed out again⁸ and again⁹ and again¹⁰ the persistent failures of indigent defense systems across the country.

Most of these critiques rely in some part on a standard narrative that centers on money and power.¹¹ Critics recognize that while *Gideon* required states to provide counsel for indigent defendants, this mandate was unfunded.¹² Political actors, in turn, lacked the will to provide the resources necessary to make a poor defendant's right to counsel more than a symbolic gesture.¹³ Combined with a substantial increase in prosecutorial power, as well as the Supreme Court's reticence to put substantial teeth into the requirement that appointed counsel actually be effective,¹⁴ the manifest failures of indigent defense in America are hardly surprising.

Certainly this standard narrative contains a good bit of truth. But, as we show here, it is incomplete, particularly in the context of assigned counsel systems, in which courts assign private attorneys to represent defendants for a fee. Such systems, which are used in hundreds of jurisdictions across the country, are undoubtedly underfunded on the whole. But that does not mean they are not highly profitable for some. As we show, many defense attorneys make tens or even hundreds of thousands of dollars in a given year across assignments from a single judge.

⁸ See, e.g., Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 *YALE L.J.* 2150 (2012) (“[F]ifty years after *Gideon* was decided, there is near-universal acceptance of the notion that our system of indigent defense is broken.”); Pamela R. Metzger, *Fear of Adversariness: Using Gideon To Restrict Defendants’ Invocation of Adversary Procedures*, 122 *YALE L.J.* 2550 (2012) (arguing “the Supreme Court has used *Gideon* to decrease the protection of Sixth Amendment rights that constitute the core structures of the American adjudicatory process.”)

⁹ See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 *YALE L.J.* 2150 (2012); see also Victoria Nourse, *Gideon’s Muted Trumpet*, 58 *Md. L. Rev.* 1417 (“Once the darling of the legal academy, criminal procedure has fallen into disrepute.”); see also *id.* At 1431 (“The importance of the lawyer . . . is not someone to try a case (most cases are never tried), but someone to stand with the individual citizen unaligned to the forces that laid him low and resist claims of the natural and inevitable superiority of government.”).

¹⁰ See Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 *YALE L.J.* 2236 (2012).

¹¹ By contrast, a few trenchant critiques have cut much deeper. In particular, Paul Butler argues *Gideon* itself was misguided and has led to more harm than good. He contends that by coating the trial process with a false veneer of objectivity and fairness, the right to counsel might actually obfuscate the system’s true goal of subjugating poor and black people. See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176 (2012). As Professor Butler notes, similar arguments have also been made in other areas of criminal procedure. See, e.g., Louis Michael Seidman, *Brown and Miranda*, 80 *Calif. L. Rev.* 673, 719 (1992) (arguing that *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Miranda v. Arizona*, 384 U.S. 436 (1966) “served to stabilize and legitimate the status quo by creating the illusion of closure and cohesion”); see also William J. Stuntz, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 3 (2011) (noting that accused persons have fared worse as rights have expanded).

¹² See, e.g., Erwin Chemerinsky, *Lessons from Gideon*, 122 *YALE L.J.* 2676, 2680 (2012) (“The Court imposed an unfunded mandate on state governments without any enforcement mechanism, and the Court then undermined the one remedy available to the judiciary, the ability to find ineffective assistance of counsel.”); M. Clara Garcia Hernandez & Carole J. Powell, *Valuing Gideon’s Gold: How Much Justice Can We Afford?*, 122 *YALE L.J.* 2358 (2012).

¹³ See Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 *YALE L.J.* 2694 (2012).

¹⁴ See *infra* notes ___ and accompanying text (discussing *Strickland v. Washington*, 466 U.S. 668 (1984) and succeeding cases).

Moreover, these attorneys often continue to receive such assignments even after they have been revealed to be woefully incompetent. For example, in the years after Mr. Johnson and Mr. Thurmond were executed, Mr. Godinich was appointed as counsel in state court for hundreds of other felony defendants. And he has continued to amass a record of inadequate representation during this time.¹⁵ Judges could appoint other lawyers to these cases. Why do they continue to appoint the same underperforming attorneys?

The proximate cause,¹⁶ we argue, may lie in campaign finance. Mr. Godinich was assigned the majority of his felony cases from one trial court judge, Jim Wallace. Mr. Godinich was also a significant donor to Judge Wallace. Between 2005 and 2014, Mr. Godinich donated on seven occasions a total of \$9,000 to Judge Wallace's electoral campaigns. Between 2004 and 2018, Judge Wallace appointed Mr. Godinich to 2,306 cases, including 9 capital cases. And since 2014, Mr. Godinich has earned at least \$872,642.50 from cases before Judge Wallace. Clearly, some indigent defense attorneys are not just scraping by.

While Mr. Godinich is an outlier, the link between campaign finance and indigent defense extends far beyond him. In this Article, we expose this hidden connection. In particular, we present empirical evidence of "pay to play," where defense attorneys donate to judges to obtain or maintain access to indigent defense cases.

We accomplish this by creating the first large-scale database that links trial court campaign donations with multiple criminal court datasets. Specifically, our data comprise the universe of 329,638 felony cases from January 2005 through May 2018 where defense counsel were assigned in Harris County, the nation's third most populous county and the home of the City of Houston. While a few recent research papers have looked at how campaign donations might influence elected state Supreme Court justices,¹⁷ ours is the first to explore how campaign finance might affect trial court decision-making.

What we find is shocking. Trial judges routinely accept donations from defense attorneys who practice before them. Worse, judges often accept these donations as an apparent "entrance fee" from counsel soon after they become eligible for indigent defense appointments. And while donor and non-donor attorneys appear similar in terms of their education and experience, on average, judges assign their donors more than double the number of cases they assign to non-donors. These preferential assignments often occur in the term following an election in which

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¹⁶ We say proximate cause because we acknowledge, as critical legal studies scholars have argued, that deeper societal problems might be common drivers of all of these phenomena. If indeed "prison is for the poor, and not the rich," see Butler, *supra* note ___, at 2178, then the whole system of campaign finance might be yet another system that was created to be indifferent or even hostile to the interests of the poor.

¹⁷ See Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decision*, 86 N.Y.U L. Rev. 69 (2011) (finding elected state supreme court justices more likely to rule in favor of business interests as donations from those interests increase); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L.J. 623 (2009); Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 St. Pol. & Pol. Q. 281 (2007).

an attorney made a donation to the appointing judge. Such assignments are flatly inconsistent with the prescribed rotation or “wheel” assignment system mandated by Texas law.¹⁸

In addition, we find these preferential assignment patterns enable donors to earn on average more than double the total attorneys fees of non-donors. And the total amount of these fees can be quite significant: the average donor earns \$31,174 in attorney fees from her donee judge.¹⁹ Put another way, if pay to play exists, then our regression analysis suggests the average defense attorney receives a nearly 28-fold “return” on her donations.²⁰

More troubling, the patterns we observe might directly harm indigent defendants. We find that if anything, defense attorneys who donate to judges are less successful than those who don't in terms of attaining charge reductions, dismissals, and acquittals, or avoiding prison sentences for their clients. These differences are not driven by observable differences in assigned cases or defendant characteristics, or unobservable differences that remain fixed over time. We suggest that donor attorneys might underperform simply because they take on so many more cases from their donee judges, and hence have less time to spend on each matter.²¹

We also produce qualitative evidence from interviews with practicing attorneys across Texas that the phenomena described here are endemic across the state. Furthermore, we explain why these problems might exist throughout the country, as trial judges in many other states (including California, Georgia, Maryland, Missouri, North Carolina, and Ohio, among others) can receive donations from attorneys and control assignments of indigent defense counsel.²²

Some might view our results as yet another nail in the coffin of *Gideon* -- as further proof that America's grand experiment with indigent defense is a failure, and that societal forces will ensure that it continues to be a failure absent sweeping social and political change. Perhaps this is true. But we argue, more modestly, that our research reveals the more immediate problem is one of misaligned incentives: as practiced today, no one's interests are truly aligned with those of indigent defendants. Instead, assigned counsel are often financially incentivized to dispose of indigent defense cases as quickly as possible, with as little effort as possible -- motives that line up better with zealous prosecutors and docket-conscious judges than with the best interests of poor defendants.

We argue that this “incentive gap” is an underappreciated fault at the heart of the right to counsel. We also explain that while modest reforms to attorney assignment rules and campaign finance regulations might reduce or eliminate pay to play, they are unlikely on their own to

¹⁸ See *infra* notes ___ and accompanying text.

¹⁹ See *infra* notes ___ and accompanying text.

²⁰ To give some perspective on how extraordinary this return is: if you had invested \$10,000 in a portfolio that replicated the S&P 500 in March 2009, at the market low during the Great Recession, and sold in July 2019, when the market recently peaked, your portfolio would have increased to \$48,708.38 -- just less than 5-fold increase. See S&P 500 Periodic Reinvestment Calculator (With Dividends), at <https://dqydj.com/sp-500-periodic-reinvestment-calculator-dividends/> (last visited Sept. 3, 2019). Moreover, as we explain later, our return estimates are likely significantly underestimated, as we have reliable attorney revenue data only from 2014-2018 and not from previous years.

²¹ See *infra* notes ___ and accompanying text.

²² See *infra* notes ___ and accompanying text.

substantially improve the lot of poor defendants absent deeper structural changes that alter attorney incentives.

We then sketch out one possible approach to closing the incentive gap: relaxing the long-standing ban on contingency arrangements in criminal law, thereby allowing assigned criminal defense counsel to be paid based on how well they perform for their clients. We argue this performance-based approach would better align attorney incentives with those of their clients, thereby reducing the gap. We counter standard arguments against allowing such contingency arrangements, showing why they are largely outmoded and unsupported by the data. We also describe how emerging performance-based metrics used in other areas of regulation, such as payment for medical services, could be usefully adapted to the context of criminal legal defense.

Of course, this approach has some shortcomings. But at least it addresses the core incentive gap that has plagued the right to counsel for decades, and thus has the potential to move indigent defense beyond its current disappointing state. If we truly want to achieve the promise of *Gideon*, we must close the incentive gap.

The next section provides a brief history of indigent defense in the United States, starting before *Gideon* and moving to present-day. Section III then overviews the three main models of indigent defense in America: assigned counsel, contract, and public defender systems. It further explains how each of these systems creates attorney incentives at odds with those of indigent defendants. This section also provides qualitative evidence on how campaign finance interacts with these assignment systems to further distort attorney incentives and widen the incentive gap.

Section IV turns toward empirics. After describing how the dataset was constructed, the section provides summary statistics, regression specifications, and graphical evidence that show how pay-to-play might be driving indigent defense appointments in Harris County. Section V sketches out proposals to deal with both pay to play and the underlying incentive gap, providing details on how a contingent fee system for criminal defense would better align attorney and client incentives. A brief conclusion then follows.

II. The Promise and Failure of *Gideon*: A Brief History of the Right to Counsel

The origins of the right to counsel in the United States begin far before *Gideon* in 1963. Twelve of the original thirteen colonies declared some form of this right in early versions of their state Constitutions, despite English Common law denying such a right existed.²³ The Supreme Court described this split from the common law in *Holden v. Hardy*, decided at the turn of the 20th century:

The earlier practice of the common law . . . so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.²⁴

²³ See *Powell v. Alabama*, 287 U.S. 45, 61-62 (1932).

²⁴ *Holden v. Hardy*, 169 U.S. 366, 386 (1898).

By the early 20th century, every state “had established the right to have the assistance of counsel similar to that found in the Sixth Amendment,”²⁵ and required the appointment of counsel in capital cases.²⁶ Nonetheless, the scope of the right was inconsistent across states, with one scholar estimating that by the early 1930’s approximately half of all states had not yet extended the right to counsel to non-capital cases.²⁷

The calculus on the right to counsel began to change in 1932 with the U.S. Supreme Court’s decision in *Powell v. Alabama*.²⁸ In *Powell*, the Court overturned the conviction of six young men charged with rape on the grounds that they had been denied access to counsel.²⁹ The *Powell* Court found that in capital cases, the Sixth Amendment right to counsel was a fundamental right encompassed by the Due Process Clause of the 14th Amendment.³⁰

This “fundamental fairness” test soon became a part of Sixth Amendment jurisprudence. The Court would next apply it in the context of a federal criminal trial in 1938’s *Johnson v. Zerbst*.³¹ In *Johnson*, two men facing federal counterfeiting charges were denied access to counsel, ultimately being convicted and sentenced.³² In overturning the convictions, the *Johnson* Court definitively established a right to counsel in all federal criminal proceedings.³³

Still, the Court was not yet ready to extend the right to counsel further to encompass state proceedings. In *Betts v. Brady*,³⁴ a defendant charged with a non-capital crime in Maryland state court challenged the court’s refusal to appoint him counsel.³⁵ Rather than require counsel to be available for indigent defendants in all state criminal proceedings, the *Betts* Court pointed to the diversity of access to counsel constitutional provisions and statutes as proof that “in the great majority of states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial.”³⁶ The

²⁵ SIXTH AM. CTR., *The Story of the Scottsboro Boys in Powell v. Alabama*, at <https://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/the-story-of-the-scottsboro-boys/> (citing William Beaney, THE RIGHT TO COUNSEL IN AMERICAN COURTS 19 (U of Mich, 1955)).

²⁶ *Id.*

²⁷ SIXTH AM. CTR., *The Story of the Scottsboro Boys in Powell v. Alabama*, at <https://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/the-story-of-the-scottsboro-boys/> (citing Hugh Richard Williams, THE HISTORY OF THE RIGHT TO FREE COUNSEL IN AMERICA 29 (Ill. Univ. Sch. of Law: Fall 2001)).

²⁸ 287 U.S. 45 (1932).

²⁹ *Id.* at 65. After an out-of-state lawyer who had offered to help local counsel refused an appointment to act as counsel for the defendants, the trial judge then appointed all the members of the local bar as counsel but neglected to name an individual lawyer to act in that capacity.

³⁰ *Id.*

³¹ 304 U.S. 458 (1938).

³² *Id.* at 459-60. The District Attorney in the case denied the men’s request for counsel on the grounds that the courts in South Carolina (where the trial occurred) did not appoint counsel unless the defendant was charged with a capital crime.

³³ *Id.* at 467 (“Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty.”).

³⁴ 316 U.S. 455 (1942).

³⁵ *Id.* at 456-58.

³⁶ *Id.* at 467.

Betts Court then enumerated a “special circumstances” test as to whether a state had violated a defendant’s due process rights by denying them access to counsel.³⁷

Many state supreme courts and legislatures responded to *Betts* by affirming their support for the right to counsel, and by the late 1950’s, thirty-five states had required counsel be appointed in non-capital cases, at least to some degree.³⁸ This affirmation of the right to counsel belied the *Betts* Court’s holding that the right was not considered fundamental. And indeed, the Court would revisit that issue just over 20 years later in *Gideon v. Wainwright*.³⁹

In *Gideon*, just as in *Betts*, the defendant faced felony charges in state court, this time in Florida.⁴⁰ As in *Betts*, the trial court denied the defendant’s request to provide an attorney when the defendant was unable to hire his own.⁴¹ Reversing their decision in *Betts*, the *Gideon* Court unanimously found that the right to counsel was essential to a fair trial in state criminal proceedings, noting: “[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁴²

Writing for the Court, Justice Black framed the issue in terms of resources and incentives for all parties involved, noting that government behavior and the behavior of wealthy defendants rendered access to counsel essential for a fair trial:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.⁴³

Justice Black concluded by noting that the ideals of American government necessitated the appointment of counsel to indigent defendants in state courts:

³⁷ *Id.* at 463-64.

³⁸ See Sixth Amendment Center, *The Post-Betts Era in the States’ Courts*, at <https://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/the-post-betts-era/> (citing WILLIAM BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (U. Mich. 1955)). See also Stacey L. Reed, *A Look Back at Gideon v. Wainwright after Forty Years: An Examination of the Illusory Sixth Amendment Right to Assistance of Counsel*, 52 *DRAKE L. REV.* 47, 51 (2003) (citing Wayne R. LaFave et al., *Criminal Procedure* § 11.1 (3d ed.2000)).

³⁹ 372 U.S. 335 (1963).

⁴⁰ *Id.* at 336-37.

⁴¹ *Id.* at 337.

⁴² *Id.* at 344.

⁴³ *Id.*

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁴⁴

Gideon was warmly received by the public,⁴⁵ inspiring the award-winning book *Gideon's Trumpet*.⁴⁶ And in subsequent years, the Court continued to expand the situations in which the right to counsel was deemed necessary, holding that it attaches from the time of indictment⁴⁷ to the time of a defendant's first appeal.⁴⁸ The Court subsequently extended the right to probation revocation hearings⁴⁹ and juvenile delinquency proceedings.⁵⁰ Within a decade after *Gideon* the Court would rule that the right to counsel attaches in any criminal case resulting in actual imprisonment,⁵¹ putting to rest many questions about *Gideon's* applicability in the states.

Still, even the most ardent supporters of *Gideon* acknowledged that significant resources would need to be marshaled to ensure the right to counsel was actually robust in practice. In a famous 1965 law review article, Henry Monaghan forewarned the coming tension between the promise of *Gideon* and the practical and logistical problems that might arise: "Gideon's little regiment had no real difficulty in running up its colors, but it is quite apparent that an army -- a very large one -- must be raised if the victory is to be a lasting one."⁵²

By the time *Gideon's Trumpet* was turned into a popular television movie starring Henry Fonda in 1980,⁵³ the shortcomings of that decision had become painfully apparent. Many states had failed to take the steps needed to effectively comply with the ruling. These failures continue today, with many scholars attributing the continued crisis in access to counsel to weaknesses and oversights in *Gideon* itself.

In particular, many scholars argue that a key failure of *Gideon* was that it did not define, let alone mandate, what kind of counsel defendants are entitled to. Neither did it define what states

⁴⁴ *Id.*

⁴⁵ See Reed, *supra* note ____.

⁴⁶ Anthony Lewis, *GIDEON'S TRUMPET*. New York: Vintage Books/Random House, 1964.

⁴⁷ See *Massiah v. United States*, 377 U.S. 201 (1964).

⁴⁸ See *Douglas v. California*, 372 U.S. 353 (1963) (a companion case to *Gideon*); see also *Halbert v. Michigan*, 545 U.S. 605 (2005) (state may not deny attorney for defendant who seeks to appeal after entering a guilty plea); *Griffin v. Illinois*, 351 U.S. 12 (1956) (due process and equal protection require state to pay for trial transcript for indigent defendant if necessary for defendant's appeal to be heard).

⁴⁹ See *Mempa v. Rhay*, 389 U.S. 128 (1967). More recently, the Court expanded the right to counsel to pretrial

⁵⁰ *In re Gault*, 387 U.S. 1 (1967).

⁵¹ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); see also *Scott v. Illinois*, 440 U.S. 367 (1979) (clarifying that the right to counsel is required whenever a defendant was actually sentenced to prison, but not if a prison sentence was merely authorized under the charging statute); *Alabama v. Shelton*, 535 U.S. 654 (2002) (suspended prison sentence may not be imposed if defendant lacked an attorney at trial).

⁵² Henry P. Monaghan, *Gideon's Army: Student Soldiers*, 45 B. U. L. Rev. 445, 446 (1965).

⁵³ *Gideon's Trumpet*. Directed by Robert L. Collins, performances by Henry Fonda, Jose Ferrer, John Houseman, and Fay Wray, Worldvision Enterprises (1980).

must do to ensure this type of counsel is available for indigent defendants. Put differently, *Gideon* gave states considerable freedom to shirk the large unfunded mandate that the case had created.

These issues were exacerbated by subsequent Court decisions, perhaps most notably *Strickland v. Washington*.⁵⁴ There, the Court determined that claims of ineffective assistance of defense counsel can succeed only if there were an initial determination that a defense attorney's performance was so lacking "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."⁵⁵ Moreover, the defendant must show the ineffectiveness prejudiced him severely enough such that there is a reasonable possibility that the outcome of the defendant's case would have been different without the deficient performance of counsel.⁵⁶

Justice Thurgood Marshall noted in his *Strickland* dissent that this exacting standard would be hard to meet, since "it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent."⁵⁷ And he was right: while ineffective assistance of counsel claims are regularly made, they are rarely successful.⁵⁸ The end result is that indigent defendants might get stuck with counsel who are not "ineffective," but whom paying clients would never select.⁵⁹

With ineffective assistance claims largely rendered futile, some sought to remedy the dramatic underfunding of indigent defense through systemic, structural litigation. But the potential for such federal litigation was limited, as federal courts relied on the abstention doctrine to avoid intervening in ongoing state cases.⁶⁰ Structural litigation in state courts has been similarly unsuccessful, with courts again demanding a showing of prejudice or the existence of a conflict on

⁵⁴ 466 U.S. 668 (1984).

⁵⁵ *Id.* at 687.

⁵⁶ *Id.*

⁵⁷ *Id.* at 710 (Marshall, J. dissenting).

⁵⁸ A 2013 analysis found that Supreme Court findings of ineffective assistance of counsel have been virtually non-existent since *Strickland*. Erwin Chemerinsky, Lessons from *Gideon*, 122 *YALE L.J.* 2676, 2689 (2013). Prof. Chemerinsky was able to identify just two Supreme Court findings of ineffective assistance of counsel in the 25 years following *Gideon* – *Wiggins v. Smith* and *Rompilla v. Beard*, both capital cases. The author then notes that the findings in *Wiggins* and *Rompilla* were called into question by the Court's ruling in *Cullen v. Pinholster*, 563 U.S. 170 (2011), which held that evidence of ineffective assistance of counsel could not be presented at federal habeas proceedings. See also *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that criminal defense attorneys must inform non-citizen defendants of deportation consequences of guilty pleas).

⁵⁹ As one private criminal defense firm in Texas colorfully (and perhaps self-servingly) noted on its website, "If you're appointed a lawyer in a criminal case in Texas, your court-appointed lawyer may be an incompetent hack, or he may be a truly outstanding attorney. Some of the best criminal-defense lawyers in Houston represent indigent defendants . . . By the same token, if you hire a lawyer for a criminal case in Texas, your retained lawyer might be either a fine attorney or a bungler." See Bennett & Bennett, Court Appointed Lawyers, at <https://bennettandbennett.com/about/court-appointed-lawyers/> (last visited Sept. 28, 2019).

⁶⁰ Chemerinsky at 2687; see also *Younger v. Harris*, 401 U.S. 37, 43–54 (1971) (federal courts to abstain from issuing rulings that interfere with ongoing state criminal prosecutions); Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 *IOWA L. REV.* 1951, 1962 (2014); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 *N.Y.U. REV. L. & SOC. CHANGE* 427, 438-43 (2009).

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an individual case-by/case basis from public defenders seeking to remedy funding disparities.⁶¹ The heightened evidentiary requirements have limited the number of structural indigent defense litigation suits in state courts, with one scholar stating “it is estimated that no more than ten of these suits were filed between 1980 and 2000.”⁶²

Gideon's failures have also been pinned on its inability to change underlying power dynamics and political considerations that adversely affect indigent defendants. In particular, scholars point to asymmetries in monetary support and available resources for prosecutors and indigent defense counsel. Prosecutors work closely with law enforcement agencies, whose job is to investigate in support of prosecution; defense counsel are often left to fend for themselves should they desire to investigate on behalf of their clients.⁶³ Prosecutors are afforded large budgets dedicated to investigation; indigent defense attorneys are rarely (if ever) afforded such a luxury.⁶⁴ And some judges rely heavily -- perhaps inappropriately -- on prosecutors, following their recommendations and even asking prosecutors to write orders for them,⁶⁵ a benefit that is rarely afforded to counsel advocating on behalf of indigent defendants.

The politics of mass incarceration in the decades following *Gideon* have further entrenched the built-in advantages that prosecutors enjoy over defense counsel. While the 1960's and 1970's brought only moderate increases in the size of America's criminal justice system, the “tough-on-crime” 1980's and 1990's created a system with an incarceration rate higher than any other industrialized nation.⁶⁶ The demand for indigent defense exploded with the system, financially straining a system that was already starved for resources.

The political battle for indigent defense resources that pitted popular tough-on-crime policies versus poor people accused of crimes was decidedly and expectedly one-sided. As one scholar put it, “The individuals adversely affected by this crisis—those accused of aggravated murder—are the most hated and the least politically powerful in the country, and political actors, including judges, are not highly motivated to make unpopular decisions that would benefit them.”⁶⁷ With political considerations -- including the desire for speed and efficiency over fact finding, the desire for retribution, and the over-emphasis on “winning” cases --- weighing heaviest on publicly elected prosecutors and judges, there was little to gain professionally from insisting on a level playing field.⁶⁸

⁶¹ See Chemerinsky, *supra* note __ at 2687 (citing *Florida v. Public Defender* 12 So. 3d 798 (Fla. Dist. Ct. App. 2009)).

⁶² See Drinan, *supra* note __, at 468.

⁶³ *Id.* at 2156. Moreover, discovery is limited in criminal cases, so defendants are also limited in terms of what information they can obtain from prosecutors and what prosecutors are obligated to disclose to defendants. See *Brady v. Maryland*, 373 U.S. 83 (1963).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Chemerinsky at 2686 (citing Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012)).

⁶⁷ *Id.* (citing Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFF. L. REV.* 329, 459 (1995)).

⁶⁸ *Id.* at 2157-58. Some scholarly critiques of *Gideon* also focus on its impact on other criminal procedural rights. See Justin F. Marceau, *Gideon's Shadow*, 122 *YALE L.J.* 2482 (2013) (arguing *Gideon* has been used

III. The Incentive Gap in the Right to Counsel

As we have seen, the long history of the right to counsel is largely defined by false hopes and unmet expectations. And as is commonly argued, inadequate funding, tepid political support, and the practical inability of defendants to succeed on most ineffective assistance of counsel claims are important reasons why indigent defense has not evolved in the way that many advocates hoped it would after *Gideon*.

But indigent defense in America doesn't just suffer from a lack of money or a lack of political support; it suffers from poor design.⁶⁹ Indeed, most indigent defense systems are built on a shaky foundation that puts publicly-funded defense attorneys at odds with those they are supposed to represent. This incentive gap, in turn, adversely affects the legal representation these defendants receive.⁷⁰

We begin this section by summarizing the different models of indigent defense adopted by various jurisdictions, and then discuss how they distort attorney incentives in different ways. We then explain how the relationship between judges and defense attorneys, mediated through the mechanism of campaign finance, exacerbates the incentive gap, thereby further adversely impacting the provision of indigent defense. Specifically, we provide qualitative evidence that indigent defense attorneys and trial judges might participate in pay to play in a number of jurisdictions.

A. Background on Indigent Defense Systems

Gideon and its progeny famously failed to direct states on how to provide counsel to indigent defendants, thereby giving them substantial latitude in crafting indigent defense systems.

as a cudgel to curb other procedural rights); Pamela Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants' Invocation of Adversary Procedures*, 122 *YALE L.J.* 2550 (demonstrating how *Gideon* and *Strickland* have weakened the adversarial process). Others have focused on its failure to adequately protect black defendants. See, e.g., Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 *YALE L.J.* 2126, 2236 (2013) (arguing the *Gideon* court failed to directly address racial discrimination and this failure portended larger failures to protect the rights of African Americans subject to the Jim Crow system of criminal justice). Still others suggest *Gideon* might actually be counterproductive to the plight of the poor in the justice system. See Butler, *supra* note __, at __ (“Poor people lose, most of the time, because in American criminal justice, poor people are losers. Prison is designed for them. This is the real crisis of indigent defense. *Gideon* obscures this reality, and in this sense stands in the way of the political mobilization that will be required to transform criminal justice.”); see also John H. Blume & Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 *YALE L.J.* 2126 (2013) (attempting to reconcile the state of indigent defense in America with the general reverence for *Gideon* by declaring it to be both a “shining city on a hill” . . . and a sham.”).

⁶⁹ Of course, these phenomena might be interrelated -- for example, some poor design choices in indigent defense systems might be deliberately made by those looking to render the system impotent. And a lack of funding is one way to make sure that poor design leads to worse outcomes.

⁷⁰ A rare paper that does look at how assigned counsel incentives are affected by payment systems is Benjamin Schwall, *More Bang for Your Buck: How to Improve the Incentive Structure for Indigent Defense Counsel*, 14 *OHIO ST. J. CRIM. L.* 553 (2017).

States are fairly evenly split in terms of whether indigent defense is administered at the local (usually county) level, or at the state level.⁷¹

Jurisdictions also are split among three different models of representation: assigned counsel, contract, and public defender.⁷² Each of these models is commonly used in the United States. Public defender systems are used most often in larger cities,⁷³ whereas assigned counsel systems are used in the most jurisdictions overall, particularly in rural parts of the country.⁷⁴ We summarize each of these systems below.

1. Assigned Counsel

Assigned counsel systems rely on private attorneys to represent indigent defendants.⁷⁵ The oldest model is the “Ad Hoc Assigned Counsel” system,⁷⁶ where “appointment of counsel is generally made by the court, without benefit of a formal list or rotation method and without specific qualification criteria for attorneys.”⁷⁷ Popular in smaller, more rural jurisdictions, ad hoc assigned counsel systems are frequently criticized “for fostering patronage and lacking control over the experience level of qualified attorneys.”⁷⁸

Other iterations of assigned counsel systems address some, but not all, of the ad hoc model’s shortcomings. One such system is sometimes referred to as the “wheel” system, in which “private attorneys, acting as independent contractors and compensated with public funds, are individually appointed from a list of qualified attorneys using a system of rotation to provide legal representation and service to a particular indigent defendant accused of a crime or juvenile offense.”⁷⁹ Wheel and ad hoc assigned counsel systems generally require attorneys to petition the court for any case-related expenses, including funds for investigation, expert witnesses, and other litigation costs -- often requiring prior approval from the court and limited by a maximum, court-determined payout.⁸⁰

The last distinct form of assigned counsel system is known as a managed or coordinated assigned counsel program. Rather than let the judge select an indigent defense attorney, this

⁷¹ See Suzanne M. Strong, *State-Administered Indigent Defense Systems, 2013*, Bureau of Justice Statistics (Nov. 2016) (“In 2013, 28 states and the District of Columbia had state-administered indigent defense programs for the delivery of criminal defense services.”).

⁷² *Id.* at 32.

⁷³ CITATION.

⁷⁴ CITATION.

⁷⁵ *Id.*

⁷⁶ *Id.* at 33.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ TX INDIGENT DEF. COMM., *Primer on Managed Assigned Counsel Programs* (Sept. 2017), at http://www.tidc.texas.gov/media/57815/tidc_primer2017.pdf, p.3; see also Scott Ehlers, Texas Indigent Defense Commission: “Challenges of Implementing Fair Defense Act Requirements & Indigent Defense Grant Opportunities” (Aug. 10, 2018). As discussed in more detail below, Harris County, Texas, where we conduct our empirical analysis, is supposed to be a “wheel” jurisdiction. See *infra* notes ___ and accompanying text.

⁸⁰ Spangenberg, *supra* note ___ at 33.

decision is left to an independent body, such as “a governmental entity, nonprofit corporation, or bar association operating under a written agreement with a county for the purpose of appointing counsel to indigent defendants.”⁸¹ Such systems are the rarest of assigned counsel systems, largely due to the additional administrative burdens that accompany them.⁸²

2. Contract Attorneys

Contract programs differ from assigned counsel systems in that the jurisdiction “enters into contracts with private attorneys, law firms, bar associations, or non-profit organizations to provide representation to indigent defendants.”⁸³ Still, in practice, many modern contract systems operate like assigned counsel systems, with the most significant difference being that there is no rotation requirement among attorneys in a contract system.⁸⁴

An early model of contract attorney systems was the fixed price contract model, where “the contracting lawyer, law firm, or bar association agrees to accept an undetermined number of cases within an agreed upon contract period . . . for a single flat fee.”⁸⁵ In a fixed-price contract model, the contracting entities are responsible for the cost of investigation and expert witnesses in all the cases, even if the caseload in the jurisdiction was higher than expected for the term of the contract.⁸⁶ Fixed-price contract models are frequently faulted for their failure to take into account the time that the attorney is expected to spend representing indigent clients, the competency of the attorney, the complexity of the case, or the lack of support costs provided to the attorney.⁸⁷

Another older model of contract attorney program is known as the fixed-fee-per-case contract model. The fixed-fee-per-case model is similar to the fixed price model, with the lawyers being paid by the case rather than contracting to provide an unlimited number of cases for a flat fee.⁸⁸ In the fixed-fee-per-case model, funds for investigation, expert witnesses, and support services are all included in the contract.⁸⁹ Just as with the fixed price model, the fixed-fee-per-case model has been criticized for its lack of quality control.⁹⁰ Nonetheless, jurisdictions are often willing to overlook the shaky legal and ethical footing of a contract attorney system to reap the benefit of being able to project costs by limiting the amount of money apportioned in each contract.⁹¹

3. Public Defenders

Finally, public defender systems are probably the most well-known model of indigent defense provision. Such systems employ staff attorneys who are paid a fixed salary to provide

⁸¹ TX INDIGENT DEF. COMM., *Primer on Managed Assigned Counsel Programs*, *supra*.

⁸² See Spangenberg, *supra* note __ at 33.

⁸³ *Id.* at 34.

⁸⁴ TX INDIGENT DEF. COMM., *Primer on Managed Assigned Counsel Programs*, *supra* at 3.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*, citing *State v. Smith*, 681 P.2d 1374 (Ariz. 1984), where the Arizona Supreme Court found that the fixed-price contract models used in several Arizona Counties were unconstitutional.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

representation to indigent defendants.⁹² More precisely, public defender systems are often defined as “a governmental entity or nonprofit corporation that: 1) operates under written agreement with a county rather than an individual judge or court; 2) uses public funds; and 3) provides legal representation and services to indigent defendants accused of a crime or juvenile offense.”⁹³

The first public defender program started in Los Angeles in 1913, but the model did not gain widespread popularity until after *Gideon* and after national studies were published that supported this approach in the 1970's.⁹⁴ Unfortunately, the increased demand for indigent defense services that began in the 1980's meant that many public defenders carry overwhelmingly large caseloads, often resulting in ineffective representation.⁹⁵

In addition, some jurisdictions use public defenders alongside assigned counsel or contract attorneys.⁹⁶ This might be, for example, because there are insufficient numbers of public defenders who are able to handle the flow of indigent defense cases. In some instances, public defenders take only a very small percentage of such cases; such systems might be referred to as “nominal” public defender systems.⁹⁷

B. Different Systems, Different Incentives

Apart from being poor and typically young and male, indigent defendants vary from one another in myriad ways, such as in terms of their backgrounds, criminal histories, employment and family status, risk preferences, and crimes with which they are charged. Still, most defendants, whether indigent or not, invariably share some predictable goals. Clearly most would like to avoid a criminal conviction and punishment; failing that, they would want to minimize any punishment they receive, whether in terms of prison, probation, or fines. And like most people, indigent defendants would like to avoid pre-trial detention regardless of outcome.

Defense attorneys who represent indigent defendants also share some predictable goals. Some of those goals might align with those of their clients -- for example, a desire to win a case or to vindicate the rights of the innocent who are wrongfully accused of a crime. Other goals, however, might not be so compatible. This in turn might open up an incentive gap that causes attorneys to behave in ways that are detrimental to their clients.

This incentive gap is shaped by the indigent defense system that attorneys operate in.⁹⁸ As such, how an indigent defense system is designed might affect, among other things: how many

⁹² Spangenberg at 36.

⁹³ Scott Ehlers, TEXAS INDIGENT DEFENSE COMMISSION: “Challenges of Implementing Fair Defense Act Requirements & Indigent Defense Grant Opportunities,” August 10, 2018.

⁹⁴ Spangenberg at 36.

⁹⁵ *Id.* at 36-37.

⁹⁶ See, e.g., James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect Of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012) (one in five murder defendants in Philadelphia were randomly assigned a public defender; the rest received assigned counsel).

⁹⁷ As discussed in more detail below, Harris County, Texas, is an example of a nominal public defender jurisdiction.

⁹⁸ See Schwall, *supra* note __, at 553 (recognizing that “[t]he payment system and related incentive structure can have a major effect on an attorney's behavior, and this impact is somewhat predictable.”).

cases attorneys choose to take on; how much time and resources attorneys spends on each case they are assigned; when and whether an attorney recommends settling a case to a client and on what terms; and the quality of attorney who chooses to participate in such a system in the first place. We explore these issues in more detail below.

1. Caseloads for Assigned Counsel and Contract Attorneys

First, and perhaps most importantly, the design of an indigent defense system can affect attorneys' incentives when it comes to the size of their caseloads. In assigned counsel systems and many contract attorney systems, payments to an attorney typically bear some relation to the number of cases that the attorney is assigned. The payment might be, for example, a flat-fee for each case that is assigned, a flat-fee for each court appearance or day worked on a case, or an hourly fee for time worked on a case. Such systems often include caps on the maximum amount an attorney can be paid on a particular case.

Consider first a jurisdiction in which an attorney is paid a flat fee for each case she is assigned, as is done in some assigned counsel and contract attorney systems⁹⁹ If the flat fee is too low to justify taking a case -- such as, for example, if the attorney has more profitable outside options for her time -- then the attorney will choose not to take the case. But if the flat fee is large enough, we can immediately see that the attorney will have an incentive to take on as many cases as possible, since each case adds to her revenue.¹⁰⁰ By contrast, working more intensely on any one particular case gives the attorney no additional revenue, since she is being compensated a fixed amount regardless of her effort or the case's outcome. So we might expect paying attorneys a flat fee per case would push them toward large caseloads for which they exert little effort on any one case. In addition, we might expect attorneys to settle cases quickly, since additional time spent on a case is just wasted from a financial perspective.

Note a paradox that emerges here: on the surface, it might seem that the large number of cases assigned to these attorneys is the primary reason why they are unable to spend much time or exert much effort on any one case. But the real reason these attorneys are overextended is that they have *chosen* to take on an overload of cases in the first place. In this setting, it is not a lack of funds but the poor design of the indigent defense system itself that is driving the dysfunction.

While the per-case payment scheme may be an obvious example of how a large incentive gap might open up between attorney and client, other payment schemes might introduce distortions in less obvious ways. For example, consider when attorneys are paid based on the number of days they spend on a case. This is, for example, how assigned counsel in Harris

⁹⁹ In this example, and the others that follow, assume that the underlying cases are otherwise identical and that an attorney is motivated largely, if not exclusively, by financial gain. That is, the attorney seeks to maximize the total revenue she earns across all indigent defense cases she takes on. Attorneys in the real world are of course not one-dimensional like this; nonetheless, our empirical analysis suggests attorneys do respond to financial incentives, indicating the profit motive is an important determinant of attorney behavior.

¹⁰⁰ This assumes the cost of working on a case goes up linearly as well; if costs increase in a non-linear manner, then the attorney will eventually reach a point where adding an additional case will be more costly than the revenue she earns from it. The general point still holds, however, that the attorney will have an incentive to take on more cases until she reaches that point.

County, Texas, are paid, as demonstrated in a fee table for an actual case, shown in Figure 1 below. We can see the attorney in this case was paid \$125/day for each court appearance, regardless of how long he actually spent in court on the case itself (or regardless of how many other cases he might have handled on those same days). Those five court appearances entitled the attorney to a total of \$625 in attorneys fees.

INDIVIDUAL CASE APPOINTMENT		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					

Figure 1

At first glance, a pay-per-day system might seem like it benefits clients, since an attorney has an incentive to spend many days on each case, thereby increasing total wages. Nonetheless, this incentive does not necessarily help a client for at least two reasons.

First, like the system where attorneys are paid by the case, attorneys under this system still earn more money if they maximize the number of cases they take on. This, once again, leads to concerns about indigent defense attorneys choosing to take on an excessive workload.

Second, a daily payment system encourages attorneys to “touch” as many case files as possible in a single day, to ensure they are eligible to be paid for that day. But the amount of work they spent on each case might be minimal. The optimal strategy is for an attorney seeking to maximize revenues and minimize effort is to barely do any work on a case on any given day, but spread out this minimal work out over many days. Again, this hardly works to the benefit of indigent defendants. In fact, it could even be detrimental to the indigent defendant who is incarcerated while

awaiting trial: not only does the attorney have little incentive to spend quality time on a defendant's case, but now she has an incentive to drag the case out while her client languishes in jail.

An hourly payment system would seem preferable to these two alternatives. Here, an attorney is paid based on the amount of time she spends on a case. There is, at first glance, no incentive to take on more cases -- you can spend more time on the same case and earn the same marginal revenue as you would by taking on a new one.¹⁰¹ It might even be better to work more on an existing case, since there are fixed costs in picking up a new case that might make it more onerous than working an additional hour on a case that you're already familiar with.

Again, in practice, this system does not work as well as one might hope. While in theory an hourly system would incentivize attorneys to put in more effort on a particular case, there are typically caps on what an attorney can charge for that case. Once an attorney reaches that cap, she has little incentive to put in more work on that case and instead gains more revenue by seeking out fresh cases.

2. Caseloads for Public Defenders

One might view these distortions as proof that the best way to provide indigent defense is through a pure public defender system, in which all indigent defendants who face potential imprisonment are assigned a public defender. Indeed, unlike assigned counsel systems, salaries for a public defender do not depend on the number of cases they are assigned; hence, from a financial perspective, there is no incentive to take on an excessive number of cases. And there is some empirical evidence that suggests public defenders do, in fact, outperform assigned counsel in terms of outcomes for criminal defendants.¹⁰²

Unfortunately, public defenders must deal with a different set of forces that push their incentives away from those of their clients. While public defenders have no financial incentive to take on additional cases, they have little control over the number of cases they receive. If a public defender's office is understaffed -- as it invariably is in jurisdictions across the United States -- then the supply of public defenders is insufficient to meet the influx of indigent criminal defendants who need representation. Faced with a flood of cases, public defenders are forced to apportion their

¹⁰¹ There is some empirical evidence to support this point. See Schwall, *supra* note __, at __ (showing that South Carolina attorneys put in less effort after a shift from hourly payments to a flat-fee system).

¹⁰² See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect Of Defense Counsel on Murder Case Outcomes*, 122 *YALE L.J.* 154 (2012) (exploiting random assignment of indigent murder defendants in Philadelphia to public defenders and court appointed private attorneys and finding public defenders "reduce their clients' murder conviction rate by 19% and lower the probability that their clients receive a life sentence by 62%," as well as "reducing overall expected time served in prison by 24%."); Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel*, NBER Working Paper No. 13187 (June 2007) (exploiting random case assignment to determine that salaried federal public defenders outperform appointed private who are compensated hourly in terms of conviction rates and sentence lengths); see also David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 *U. CHI. L. REV.* 1145 (2007) (exploiting random assignment in Las Vegas, NV, and find "veteran public defender with ten years of experience reduces the average length of incarceration by 17 percent relative to a public defender in her first year."); Fabelo, Harris County Public Defender Survey.

time among those cases.¹⁰³ And once again, that creates pressure to dispose of cases quickly--or at least quicker and with less substantive investigation than if time were not a worry.¹⁰⁴

That public defenders are not immune from such time pressures has not gone unnoticed by commentators and scholars.¹⁰⁵ Notably, the American Bar Association (ABA) has addressed the issue head on,¹⁰⁶ stating explicitly in a report on the matter that “defender organizations, individual defenders, assigned counsel or contractors for services . . . must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments.” when they find accepting new cases or continuing with old cases “will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.”¹⁰⁷

3. Private Attorneys

Contrast the incentives of publicly-funded attorneys with those of private attorneys -- lawyers who represent private-paying clients. The two primary models by which private attorneys are paid are through up front fees, in which the attorney asks a prospective client to pre-pay for criminal defense representation, and a retainer system in which the client pays money up front into escrow, with funds deducted from the account and transferred to the attorney as she racks up hours on the defendant’s case. The pre-payment model is commonly used for lower stakes or more routine cases; the retainer model is commonly used for more complex criminal cases.

The pre-payment model is like the per-case payment model described for assigned counsel; hence, private counsel have an incentive to take on a large number of cases just like assigned counsel do in that setting. The retainer model does not include this kind of distortion, since the attorney is paid for each hour worked regardless of which case she works on.¹⁰⁸

Private attorneys, like most assigned counsel, have significant control over the number of cases they take on. But unlike assigned counsel, private attorneys do not face the same financial

¹⁰³ For an eye-opening discussion on the problems facing public defender’s offices nationwide, watch *Last Week Tonight with John Oliver: Public Defenders* (Sept. 13, 2015), available at <https://youtu.be/USkEzLuzmZ4>.

¹⁰⁴ Worse, some have argued that given this excessive caseload, implicit bias may cause public defenders to “triage” their caseload in ways that hurt stigmatized groups such as black defendants. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *YALE L.J.* 2626 (2013).

¹⁰⁵ Professor David Luban vividly captures the setting in which most public defenders and panel attorneys operate: “a world of lawyers for whom no defense at all, rather than aggressive defense or even desultory defense, is the norm; a world of minuscule acquittal rates; a world where advocacy is rare and defense investigation virtually nonexistent; a world where lawyers spend minutes, rather than hours, with their clients; a world in which individualized scrutiny is replaced by the indifferent mass-processing of interchangeable defendants.” See David Luban, *Are Criminal Defendants Different?* 91 *MICH L. REV.* 1729 (1993).

¹⁰⁶ See, e.g., *Securing Reasonable Caseloads: Ethics and Law in Public Defense*. Norman Lefstein 2011.

¹⁰⁷ See, e.g., *id.* Standard 5-5. As noted in its report, the ABA intentionally used the word “must” in referring to the need to take appropriate action when caseloads become excessive, rather than the word “should,” which is used for all of the remaining standards from the same chapter. *Id.* at 38. ABA Standard 5-5 has largely remained unchanged since it was first issued in 1980, but future ABA releases would continue to define the issue. *Id.* at 37

¹⁰⁸ Of course, the attorney might have an incentive to overcharge in this setting -- work maximally on tasks that are “easiest” and minimize effort but that maximize revenue.

incentives to take on an overwhelming number of cases. This is because private attorneys typically operate in a market with other competing defense attorneys.

If a private attorney fleeces a client, or attains bad results for him, this might adversely affect his reputation and future clients might be less likely to hire that attorney.¹⁰⁹ To the extent the market serves as a disciplining force, it constrains private attorneys from acting too far out of line from their clients' interest. Since attorneys who are overloaded cannot represent their clients as effectively as those are not, this market force constrains the number of cases that private attorneys are likely to take on.¹¹⁰

By contrast, no such market force exists to discipline counsel in indigent defense cases, whether assigned, contract or public defender. Since indigent defendants are told who their lawyer is rather than given the ability to select who should represent them, they are typically at the whim or whomever is chosen by a court or independent body as their representative. And as we shall see below, that attorney might be far from randomly chosen and instead be determined based on financial forces that have little regard for a defendant's well-being or best interests.

C. The Incentive Gap Magnified: The Role of Campaign Finance

Assigned counsel and some contract attorneys have financial incentives to amass large numbers of indigent defense cases in order to maximize their revenues. But this can happen, of course, only if the indigent defense system assigns them those cases in the first place. In theory, we would expect a well-functioning system to limit the number of appointments that assigned counsel can take on. While attorneys would have incentives to "max out" this limit, if the ceiling is set low enough, then presumably the attorneys would have sufficient time to devote to each of their cases (assuming they were inclined to do this in the first place).

The assignment system fails, however, if counsel can exert control over how many cases they are assigned. And unfortunately, this might be happening with regularity in many assigned counsel systems. Specifically, anecdotal evidence suggests indigent defense counsel often "buy" case assignments by providing campaign donations to assigning judges. In this section, we highlight qualitative evidence from Texas and other states, based on news articles and interviews we have conducted, that suggest this phenomenon commonly occurs. Campaign finance appears to be a tool that magnifies the incentive gap in these jurisdictions.

¹⁰⁹ This dynamic might be even greater today than in year's past, since websites like avvo.com include detailed reviews of criminal defense attorneys by their clients. One can see numerous instances where a bad review by a client is swiftly met by an explanation or a mea culpa by the offending attorney. See www.avvo.com. Like Yelp reviews for restaurants, one credible bad review can be devastating for business.

¹¹⁰ Since private criminal defense attorneys typically earn higher wages than publicly-funded defense counsel, their leisure time is worth more than private attorneys, which might cause them to substitute leisure for more hours of work. On the other hand, if their demand for leisure increases as they get richer, which seems likely, then this off-setting "income effect" might lower the number of cases they choose to take on. Put in simple terms, if private attorneys are earning high enough wages, they might decide it's not worth it to take on an excessive number of cases even though they could earn more by doing so.

1. Attorney Donations and Indigent Defense in Texas

Harris County, Texas, has struggled with indigent defense case assignments for over two decades. Then-State Senator Rodney Ellis, now County Commissioner for Precinct 1 in Harris County, notes a common refrain among judges during this time: “Judges who will remain nameless still try and tell me that the judge picking the lawyer is better [than a statewide public defender system]. . . because they pick people who are capable. How do you say that with a straight face?”¹¹¹

Attorneys practicing in Harris County echo Ellis’ question about the efficacy and ethics that underlie indigent appointments there. In 2015, Houston criminal defense attorney, Robert Fickman, described one of the ways that attorneys seeking appointments curry favor with the judges who assign them cases:

There’s a certain number of court-appointed lawyers who appear to be appointed primarily for their ability to move the docket. The trade-off is that the judge is appointing Lawyer X to lots of cases, and in return for the appointments, Lawyer X is moving those cases, which meets the judge’s objective.¹¹²

Sometimes the quid pro quo is even more explicit. Drew Willey, a criminal defense attorney who practices in Houston and nearby Galveston County, told us how he witnessed pay to play first hand while working as a new lawyer under a retired judge who took many felony appointments in Harris County:

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. Me and one colleague were abhorred enough to speak up. We approached this attorney separately, strongly voicing our opposition to this systematized pay for play conflict. He told me and that one colleague that we were exempt from being charged his donation fee, but continued to make the donations, openly admitting it was so that he could continue to get more appointments in those courts. . . . [After I left his office,]

¹¹¹ See Neena Satija, *How Judicial Conflicts of Interest Are Denying Poor Texans Their Right to an Effective Lawyer*, TEXAS TRIB. (Aug. 19, 2019), at <https://www.texastribune.org/2019/08/19/unchecked-power-texas-judges-indigent-defense/>, (last visited Sep. 26, 2019). A recent time-use study showed that Texas indigent defense attorneys spend remarkably little time on cases they are assigned. Dottie Carmichael, Austin Clemens, Heather Caspers, Miner P. Marchbanks, III, & Steve Wood, *Guidelines for Indigent Defense Caseloads*, TEXAS A&M PUB. POL. RES. INST. (Jan. 2015) (conducting time-use study of Texas indigent defense attorneys and finding the following average disposal times for these classes of cases: Class B misdemeanor (4.7 hours); Class A misdemeanor (7.6 hours); state jail felonies (10.8 hours); third-degree felonies (12.9 hours); second-degree felonies (15.2 hours) and first-degree felonies (22.3 hours)). The report suggested that any of the following would comprise a full-time caseload that attorneys should not exceed: “236 Class B Misdemeanors, 216 Class A Misdemeanors, 174 State Jail Felonies, 144 Third Degree Felonies, 105 Second Degree Felonies, [or] 77 First Degree Felonies.” *Id.*

¹¹² Emily Deprang, *Poor Judgment*, TEXAS OBS. (Oct. 12, 2015) <https://www.texasobserver.org/poor-judgment/> (last visited Sept. 26, 2019).

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.¹¹³

Willey also reports that the prevalence of pay to play adversely affects the quality of representation that indigent defendants receive:

[T]he disparities [in caseloads among attorneys] are too obvious that pay to play is continuing in some very specific courts. This level of corruption leads to human lives being forgotten in jail without anyone to stand up for them. We've handled cases in which these overloaded attorneys have not even visited their clients for 6-10 months at a time - pretrial.¹¹⁴

These types of behavior are not limited to Harris County's felony courts. A 2008 *Houston Chronicle* analysis of the juvenile appointment system found, "A relatively small group of attorneys, some of them old friends and all financial backers of judges handing out work, regularly receives close to half of all the tax-funded appointments to represent the poor in the juvenile courts."¹¹⁵ These concerns continue today, as a recent report indicates that "a handful of private attorneys – some of whom happened to be generous contributors to judges' campaign coffers – got more than 300 [case assignments]" while "juvenile public defenders received fewer and fewer appointments over several years, so that in 2017 they each had an average load of 140 juvenile cases, which is below the office's imposed limit of 200 . . ."¹¹⁶

In addition, there have been reports of similar instances of apparent pay to play occurring in other counties across the state. For example, in Bexar County, the fourth most populous county in Texas and home to nearly 2 million people, a recent *San Antonio Express-News* editorial decried the phenomenon of attorneys contributing to judges handing out appointments, calling it "a dynamic that raises inherent questions of fairness in the justice system and undermines public trust."¹¹⁷

Judicial influence on campaign appointments was similarly linked to a dysfunctional indigent defense system in Travis County, home to the state capital of Austin.¹¹⁸ When a Travis County judge was asked how a lawyer she appointed to over 400 cases in a year could possibly give his

¹¹³ Statement of Drew Willey, (Sept. 26, 2019) (on file with authors).

¹¹⁴ *Id.*

¹¹⁵ Sarah Viren, "Lawyers Picked for Juveniles Give Campaigns Cash," *HOUSTON CHRON.*, (Apr. 20, 2008) <https://www.chron.com/news/houston-texas/article/Lawyers-picked-for-juveniles-give-campaigns-cash-1759443.php> (last visited Sept. 26, 2019). See also Neena Satija, *Harris County Juvenile Judges and Private Attorneys Accused of Cronyism: "Everybody Wins But the Kids"*, *TEXAS TRIB.* (Nov. 1, 2018) <https://www.texastribune.org/2018/11/01/harris-county-texas-juvenile-judges-private-attorneys/> (last visited Sept. 26, 2019).

¹¹⁶ Satija, *supra* note __.

¹¹⁷ *Attorney Contributions to Judges Taints the System*, *SAN ANTONIO EXPRESS-NEWS ED. BD.* (Nov. 10, 2018) at <https://www.mysanantonio.com/opinion/editorials/article/Attorney-contributions-to-judges-taints-the-system-13379208.php>, (last visited Sep. 26, 2019).

¹¹⁸ See Satija, *supra* note __.

clients a full defense, the judge replied, “That’s a lot of cases . . . Lawyers have a personal responsibility. They know what they can handle. Do we really need to tell a lawyer, ‘Don’t do that?’”¹¹⁹

2. Attorney Donations in Trial Courts Elsewhere

In recent years, other states have become increasingly aware that campaign finance might affect their trial courts’ decision-making.¹²⁰ Just across the Red River from Texas in Oklahoma, a controversy has emerged over attorneys donating to civil trial court judges that they practice before, with one review showing that the majority of donations to district judge candidates in 2018 came from thousands of individual attorneys.¹²¹ Claiming the system puts judicial candidates in a “weird position,” Oklahoma defense attorney and 2018 district judicial candidate Misty Fields went so far as to send a letter to attorneys in the area “asking for their vote, but not for ‘for public support of any kind.’”¹²² Her letter notwithstanding, Fields ultimately ended up accepting donations from attorneys, claiming it was a necessary part of the campaign:

I would be remiss to say money doesn’t matter . . . You can only do so much with free social media and you can only knock on so many donors. It’s a sad part of it, but you need some money if you want to blanket an area with signs or newspaper ads.¹²³

A recent controversy between a prosecutor and a district court judge has exposed how Oklahoma’s criminal trial judges might be at risk as well. In September 2019, prosecutor David Prater publicly requested that District Judge Kendra Coleman recuse herself for failing to disclose her campaign donors, claiming that the judge repeatedly showed favoritism toward donor attorneys

¹¹⁹ *Id.* See also Andrew Weber, *Travis County’s Public Defender Office is Officially Funded*, AUSTIN MONITOR (Aug. 30, 2019), at <https://www.austinmonitor.com/stories/2019/08/travis-countys-public-defender-office-is-officially-funded/>, (last visited Sep. 26, 2019). In May 2019, Travis County applied for a grant to create a public defender office. That grant was approved on August 29, 2019.

¹²⁰ Prior scholarly analysis of the impact of campaign finance on judicial decision-making has focused almost exclusively on the state Supreme Court level. See *supra* note ___ and accompanying text. See also Sue Bell Cobb, *I Was Alabama’s Top Judge. I’m Ashamed by What I Had to Do to Get There*, POLITICO MAG., March/April 2015, <https://www.politico.com/magazine/story/2015/03/judicial-elections-fundraising-115503> (last visited Sept. 26, 2019) (lamenting the role campaign finance played in her election to the bench, and admitting, “[T]hose of us seeking judicial office sometimes find ourselves doing things that feel awfully unsavory.”); see also *id.* (“Donors want clarity, certainty even, that the judicial candidates they support view the world as they do and will rule accordingly. To them, the idea of impartial and fair judges is an abstraction. They want to know that the investments they make by donating money to a candidate will yield favorable results.”)

¹²¹ Trevor Brown, *Attorneys Help Bankroll Campaigns of Judges Who Hear Their Cases*, OKLA. WATCH (Oct. 8, 2018), at <https://oklahomawatch.org/2018/10/08/attorneys-help-bankroll-campaigns-of-judges-who-hear-their-cases/>, (last visited Sep. 26, 2019).

¹²² *Id.*

¹²³ *Id.* Misty Fields would ultimately lose her district court election to Shawn S. Taylor, who got 55.2% of the vote compared to her 44.8%.

and their clients in her court.¹²⁴ Highlighting the need for public trust in the courts, Mr. Prater condemned the judge's lack of transparency:

For each day this Court sits in judgment of parties appearing before it, no one — neither the parties, their counsel, nor the public — can be assured that the decisions being rendered have not been influenced by campaign contributions or other circumstances that this Court is actively endeavoring to conceal.¹²⁵

Despite such stories, many Oklahoman attorneys and the judges they donate to remain unconvinced that the system needs to change. For example, George Gibbs, an Oklahoma attorney who donated to a judge before whom he had an open civil case, notes, “Our state judges are more impartial, have better temperaments and are more fair than federal judges. No judge is going to risk their career, their standing and their reputation over a donation.”¹²⁶

Michigan, too, appears to be susceptible to links between campaign finance and trial court decision-making. A 2016 report on Michigan's indigent defense system found that court-appointed attorneys do very little work on their cases, with records indicating that in nearly a quarter of criminal cases in the same three-county area, an indigent criminal defendant met their attorney for the first time at their first court appearance.¹²⁷ The same report also found that court-appointed attorneys continued to donate thousands of dollars to the campaigns of circuit court judges.¹²⁸ David Carroll, executive director of the Sixth Amendment Center, described how Michigan's system impacts indigent criminal defendants: “[indigent defendants] may get a lawyer in name only, because that person has so many cases or has financial conflicts of interest. It's as if you're going into court with no lawyer at all.”¹²⁹

These states aren't the only ones struggling to manage the impact of campaign finance on their trial court systems. In 2004, the ABA Standing Committee on Legal Aid and Indigent

¹²⁴ Nolan Clay, *DA Says Judge Concealed Donors, Should Step Down from All Her Cases*, THE OKLAHOMAN, 5 (Sep. 2019), at <https://oklahoman.com/article/5640461/da-says-judge-concealed-donors-should-step-down-from-all-his-cases?>, (last visited Sep. 26, 2019).

¹²⁵ *Id.*

¹²⁶ See Brown, *supra* note ____.

¹²⁷ Justin A. Hinkley and Matt Mencarini, *Court-Appointed Attorneys Paid Little, Do Little, Records Show*, LANSING ST. J., 3 (Nov. 2016), at <https://www.lansingstatejournal.com/story/news/local/watchdog/2016/11/03/court-appointed-attorneys-paid-little-do-little-records-show/91846874/>, (last visited Sep. 26, 2019)

¹²⁸ *Id.*

¹²⁹ Max Johnston, *Trials and Tribulations of Court-Appointed Attorneys in Michigan*, INTERLOCHEN PUB. RADIO (Sep. 12, 2019), at <https://www.interlochenpublicradio.org/post/trials-and-tribulations-court-appointed-attorneys-michigan>, (last visited Sep. 26, 2019). Former public defender Eve Primus, who has studied Michigan's indigent defense issues, also emphasized how poor defendants bore the brunt of Michigan's dysfunctional system:

It isn't the rich white people who are being dragged through this system...If you cared about 'Brown v. Board of Education' and if you cared about the way we treated minorities in this society and you thought separate but equal was a bad thing, you should care about the criminal justice system because that's where separate and not equal seems to be the pervasive concept.

See Hinkley & Mencarini, *supra* note ____.

Defendants created a comprehensive report on the state of the right to counsel, to commemorate *Gideon's* 40th anniversary.¹³⁰ Relying on the public testimony of attorneys from around the country, the Committee found, "In many localities, the selection and payment of counsel is still under the control of judges or other elected officials instead of an independent authority as recommended by national standards."¹³¹ It continued:

Accordingly, lawyers must depend on judges to approve their compensation claims, as well as requests for expert or investigative services. Attorneys may be removed from court-appointed lists if they apply for fees considered by judges to be too high, creating a disincentive to spend adequate time on a case. *In some places, elected judges award court appointments as favors to attorneys who support their campaigns for re-election.*¹³²

There is no reason to believe the situation has improved since then. In late 2014, the ABA identified 39 states in which judges are elected, either in partisan, non-partisan or retention elections.¹³³ Thirty of those states ban judges from personally soliciting funds for campaigns, though many of them allow campaign committees to solicit on their behalf¹³⁴ and most allow judges to accept unsolicited funds.

Moreover, many other states that elect trial judges permit judicial candidates to solicit campaign funds, or have bans with significant loopholes that would allow candidates to indirectly receive (and know they have received) donations from attorneys who appear before them. These states include Alabama,¹³⁵ California,¹³⁶ Georgia,¹³⁷ Kansas,¹³⁸ Kentucky,¹³⁹ Maryland,¹⁴⁰ Missouri,

¹³⁰ Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lisclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

¹³¹ *Id.* at 39.

¹³² *Id.* (emphasis added)

¹³³ Brief of Amicus Curiae The American Bar Association in Support of Respondent, *Williams-Yulee v. Florida Bar*, No. 13-1499, U.S. Supreme Court (brief in support of the Florida Bar, whose ban on personal solicitation by judicial candidates had been challenged as violated the First Amendment) (hereinafter, "ABA Brief").

¹³⁴ For example, Alaska judges stand for retention election and are prohibited from personal solicitation, though candidates may create campaign contribution committees, which "are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers." See Ala. Canon 5(C)(3) (cited in ABA Brief, *supra* note __, at Appendix 2a-3a). Some states indicate that judges should not be informed who contributed to the campaign committee. See, e.g., Colorado Canon 4.3; Idaho Canon 5(C)(2); Minnesota Rule 4.4(B)(3); New Mexico Rule 21-402(E) (campaign committees, but not judges, may solicit lawyers with matters pending; committee must not disclose source of campaign funds to the candidate). Cf. Louisiana Canon 7(A)(6); *id.* Comment [2] to Canon 7 ("A judge or judicial candidate is prohibited from personally soliciting or personally accepting campaign contributions, but is not prohibited from knowing the identities of his or her campaign contributors.").

¹³⁵ Alabama judges are elected and "strongly discouraged [but not prohibited] from personally soliciting campaign contributions. It is highly recommended that a candidate establish committees of responsible persons to solicit and accept campaign contributions, to manage the expenditure of funds for the candidate's campaign, and to obtain public statements of support for his or her candidacy. Such committees may solicit and accept campaign contributions and public support from lawyers." See Ala. Canon 7(B)(4)(a) (cited in ABA Brief, Appendix 2a).

¹³⁶ Cal. Canon 5(b)(4) (emphasis added) provides:

¹⁴¹ Montana,¹⁴² Nevada,¹⁴³ North Carolina,¹⁴⁴ and Ohio.¹⁴⁵ Each of these states also relies, at least to some extent, on assigned counsel systems.¹⁴⁶ Hence, when considering this list of states in

In judicial elections, judges may solicit campaign contributions or endorsements for their own campaigns or for other judges and attorneys who are candidates for judicial office. *Judges are permitted to solicit such contributions and endorsements from anyone, including attorneys and other judges*, except that a judge shall not solicit campaign contributions or endorsements from California state court commissioners, referees, court-appointed arbitrators, hearing officers, and retired judges serving in the Assigned Judges Program, or from California state court personnel. In soliciting campaign contributions or endorsements, a judge shall not use the prestige of judicial office in a manner that would reasonably be perceived as coercive.

Id. See also ABA Brief, *supra* note __, at Appendix 4a.

¹³⁷ “Georgia judges are elected in non-partisan elections[and] may personally solicit campaign contributions and publicly stated support.” See ABA Brief, *supra* note __, at Appendix 6a. *But see* Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) (encouraging judges to establish campaign committees).

¹³⁸ A judicial district may choose to have elected trial judges, and judges may solicit campaign contributions. See ABA Brief, *supra* note __, at Appendix 8a (noting Kansas’s prohibition on personally soliciting campaign contributions was struck down in *Yost v. Stout*, No. 06-4122-JAR, 2008 WL 8906379 (D. Kan. Nov. 16, 2008)).

¹³⁹ Kentucky elects judges in non-partisan elections, and the Sixth Circuit previously found Kentucky’s solicitation clause unconstitutional. See ABA Brief, *supra* note __, at Appendix 8a (citing *In Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010)).

¹⁴⁰ “Trial court judges are elected in non-partisan elections. The Maryland Code of Judicial Conduct does not prohibit candidates from personally soliciting or accepting contributions.” See ABA Brief, *supra* note __, at Appendix 9a.

¹⁴¹ Missouri judges face retention elections. Missouri Rule 2-4.2(B) states: “[While] candidate[s] shall not solicit in person campaign funds from persons likely to appear before the judge[, they] may make a written campaign solicitation for campaign funds of any person or group, including any person or group likely to appear before the judge.” See also ABA Brief, *supra* note __, at Appendix 11a.

¹⁴² Montana judges are elected in non-partisan elections and not prohibited from personally soliciting campaign contributions. See ABA Brief, *supra* note __, at Appendix 12a.

¹⁴³ Nevada judges are elected in Nevada in nonpartisan elections. Nevada Rule 4.2(B)(4) permits judges who are opposed in an election to personally solicit and accept campaign contributions. See also ABA Brief, *supra* note __, at Appendix 12a.

¹⁴⁴ Judges are elected in publicly-funded, non-partisan elections in North Carolina. Canon 7(B)(4) states a judge or candidate may “personally solicit campaign funds and request public support from anyone for his own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds.” See also ABA Brief, *supra* note __, at Appendix 14a.

¹⁴⁵ Judicial candidates in general elections are placed on a non-partisan ballot in Ohio. The Ohio Code of Judicial Conduct prohibits candidates and judges from personally soliciting campaign contributions in Rule 4.4(A), but numerous exceptions to this rule would make it easy for attorneys who wish to donate to do so. For example, Ohio permits a judicial candidate to make “ a general request for campaign contributions when speaking to an audience of twenty or more individuals,” “sign letters soliciting campaign contributions if the letters are for distribution by the judicial candidate’s campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate,” and “make a general request for campaign contributions via an electronic communication that is in text format if contributions are directed to be sent to the campaign committee and not to the judicial candidate.” See also ABA Brief, *supra* note __, at Appendix 15a.

¹⁴⁶ For instance, consider California. See, e.g., [Gideonat50.org](http://gideonat50.org), California, at: <http://gideonat50.org/in-your-state/california/#state-independence> (“California provides very little funding and almost no oversight over right to counsel services at all levels: trial and appellate Most smaller, rural counties provide services through flat-fee contracts with private firms or with individual attorneys for primary

addition to Texas, Oklahoma, and Michigan,¹⁴⁷ we can see campaign finance might increase the incentive gap in judicial systems across multiple states that are collectively home to tens of millions of Americans.

IV. The Incentive Gap in Action: An Empirical Analysis of Campaign Finance and Indigent Defense in Harris County, Texas

In this section, we provide empirical support for the claim that campaign finance exacerbates the incentive gap in the right to counsel. Using detailed data from Harris County, Texas, we empirically analyze the relationship between attorney donations to elected judges and appointments to indigent defense cases. Our results are strongly consistent with the qualitative evidence we presented above: judges appoint their donors to a disproportionate number of cases, consistent with a system in which pay to play occurs with regularity. Moreover, if anything, donor attorneys appear to underperform for their clients relative to non-donors, even after controlling for case and defendant characteristics.

We begin by explaining in detail how judicial elections and court appointments work in Harris County. Next we describe how we constructed our linked dataset, which is the first large-scale dataset that connects criminal court data with donations to trial court judges. We then jump into the empirics.

A. Background on Harris County

1. Courts and Judicial Elections

The State of Texas has 254 counties, more than any other state. This translates into 252 County Courts of Law that primarily handle misdemeanor offenses in 92 counties¹⁴⁸ and 450 District Courts for felony offenses.¹⁴⁹ Texas's court system is said to be "designed to discourage the accumulation of power,"¹⁵⁰ resulting in a system with "numerous elected officials at every level, for every branch, [that has] shaped the state's unstructured approach to indigent defense."¹⁵¹

and for conflict services. There is no oversight board for any trial-level system in any California county. With a few notable exceptions, most right to counsel systems are overseen by the county's legislative board.").

¹⁴⁷ Interestingly, both Oklahoma and Michigan appear to have judicial ethics codes that prohibit judges from personally soliciting campaign contributions. See Oklahoma Rule 4.1(A)(8); Michigan Canon 7(B)(2)(a); *compare with* Texas Code of Judicial Conduct Canon 4(D)(1) (permits judges to solicit "funds for appropriate campaign or officeholder expenses as permitted by law."). That media reports suggest that judges, in fact, do receive campaign contributions from attorneys who practice in their court calls into question the efficacy of such bans in terms of preventing pay to play.

¹⁴⁸ Counties with County Courts at Law, TX OFFICE OF COURT ADMINISTRATION, *available at* http://www.txcourts.gov/media/1444575/countycourtsatlaw_september2019.pdf

¹⁴⁹ *Id.*

¹⁵⁰ Fabelo, Harris County Public Defender Survey, at 9.

¹⁵¹ Fabelo at 9.

Our data come from Harris County, home to over 4.65 million people and the third most populous county in the United States.¹⁵² The county comprises all of the City of Houston and a few major suburbs, most notably Pasadena, Texas. Here we focus on the 22 Harris County District Courts, which handle all state felony cases.

Like all judges in Texas,¹⁵³ Harris County district judges are elected. They serve four-year terms, with roughly half elected in November of off-presidential election years (e.g., 2002, 2006, etc.) and the other half elected in November of presidential election years (e.g., 2004, 2008, etc.). District judges take office on January 1 of the year following an election.

Typically, judicial elections in Harris County are not uncontested; rather, there is a partisan general election following a party primary, with one Democrat running against one Republican. In the early 2000s, Republicans controlled most of the judicial seats in Harris County. Beginning in 2008, however, Democrats found more electoral success in judicial elections as the county shifted politically toward the left. At any rate, there have been a fair number of close general elections in Harris County throughout the early part of this century.

Campaign finance has also been an integral part of the judicial landscape in Texas for decades. In 1980, Texas was the first state with a judicial race that cost over one million dollars, and the 12 candidates in the 1988 Supreme Court elections raised \$12 million total.¹⁵⁴ The seven winning candidates for the Texas Supreme Court from 1992-1997 each raised an average of \$1.3 million, with more than 40% of those funds “contributed by parties or lawyers with cases before the court or by contributors linked to those parties.”¹⁵⁵ As we show below, Harris County district judges also actively raise money for their campaigns, often from attorneys who practice before them.¹⁵⁶

2. Indigent Defense

Like most of Texas and many other states, Harris County relies primarily on assigned counsel to provide indigent defense, where judges are supposed to distribute cases to attorneys via a “wheel” that rotates through a list of eligible lawyers.¹⁵⁷ Figure 2 below¹⁵⁸ shows how prevalent

¹⁵² See UNITED STATES CENSUS BUREAU, American Fact Finder <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmm> (population estimate for Harris County as of July 1, 2018, is 4,698,619)

¹⁵³ Texas has had partisan election of judges at all levels of courts since 1876. See Judicial Selection in the States: Texas, NATIONAL CENTER FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/index.cfm?state=TX

¹⁵⁴ Judicial Selection in the States: Texas, NATIONAL CENTER FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/index.cfm?state=TX

¹⁵⁵ Judicial Selection in the States: Texas, NATIONAL CENTER FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/index.cfm?state=TX

¹⁵⁶ See *infra* notes __ and accompanying text.

¹⁵⁷ See *supra* notes __ and accompanying text. Currently, to be added to the master list of eligible attorneys, licensed Texas attorneys who are in good standing must have at least two years of criminal law practice experience, pass a certification test (or be board certified in criminal law), and satisfy certain continuing legal education requirements. To be assigned third-degree felonies the attorney must have “[t]ried to verdict at least three (3) felony jury trials as lead counsel.” To be assigned second-degree felonies, s/he must have “[p]racticed criminal law for at least four (4) years and tried to verdict at least four (4) felony jury trials as lead counsel.” And to be assigned first-degree felonies, the attorney must have “[p]racticed criminal law for at

such systems are in Texas, as counties that are colored blue rely solely on assigned counsel for indigent defense cases.

Ten counties are colored green, which means they also have public defender's offices. This is misleading, however, because public defenders might handle only a small fraction of indigent defense cases in a county. This is true, for example, in Harris County, which is the large green county in the southeast corner of the state. Although the county created a public defender's office in 2012, the Harris County Public Defender handles less than 3% of the cases in our sample. Moreover, these public defenders are simply treated as additional attorneys to be added to the "wheel."¹⁵⁹ Hence for all practical purposes, Harris County is a nominal public defender jurisdiction that relies almost exclusively on assigned private attorneys for indigent defense.¹⁶⁰

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." The attorney must also "[e]xhibit proficiency and commitment to providing quality representation to criminal defendants [and] [d]emonstrate professionalism and reliability when providing representation to criminal defendants." Finally, the attorney must be voted on to the master list in by a majority of district court judges. See Quick Guide, Minimum Requirements -- Harris County District Courts, at <https://www.justex.net/JustexDocuments/0/FDAMS/2017/quickGuide.pdf> (last visited Sept. 29, 2019).

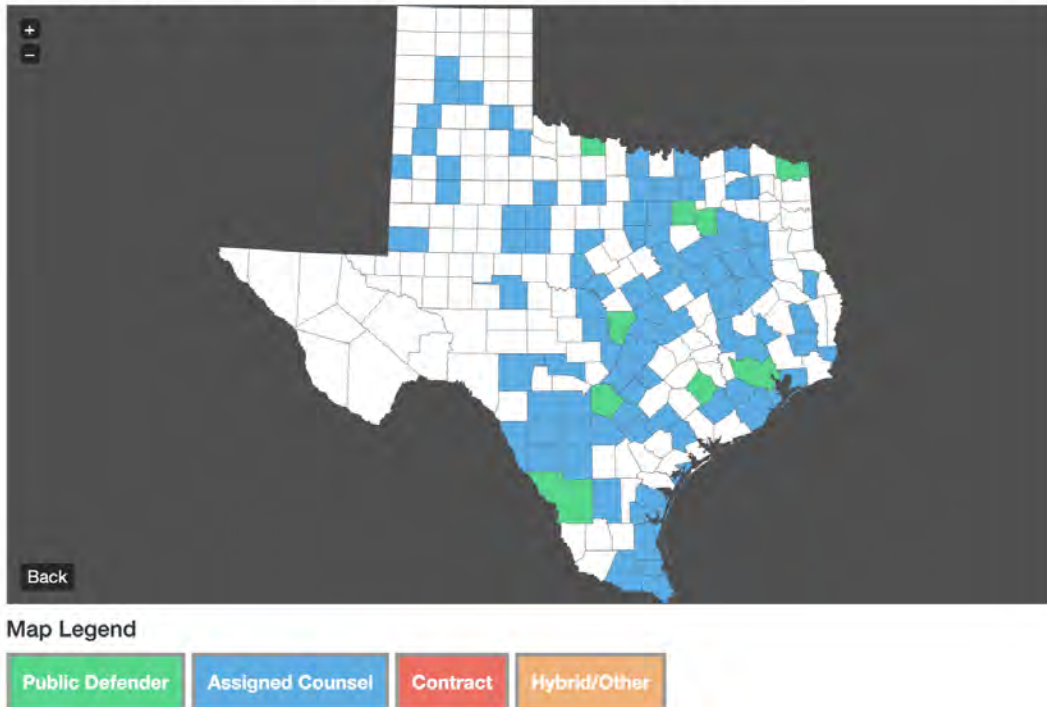
According to a local defense attorney, testing requirements were not always present and were added after counsel assignments in Harris County came under increased scrutiny. See Murray Newman, *Too Much for Too Few*, Life at the Harris County Criminal Justice Center (Jan. 26, 2013), at <http://harriscountycriminaljustice.blogspot.com/2013/01/too-much-for-too-few.html> (last visited Sept. 27, 2019).

¹⁵⁸ Source: Mapping American Public Defense Project, at: <https://safe-stream-85568.herokuapp.com/> (last visited Sept. 1, 2019)

¹⁵⁹ See *supra* notes ___ and accompanying text.

¹⁶⁰ See, e.g., Gidenonat50.org, Texas, at: <http://gideonat50.org/in-your-state/texas/#state-independence> ("The vast majority of Texas indigent defense representation, even in those jurisdictions that have a public defender office, is provided by appointed attorneys.").

Mapping American Public Defense Project



161

Source: Mapping American Public Defense Project, at: <https://safe-stream-85568.herokuapp.com/>

Figure 2

B. Construction of the Data

To analyze how campaign contributions might relate to indigent defense case assignments, we connect a number of different datasets. Specifically, we combine six types of data from Harris County: (1) criminal cases and their outcomes; (2) judicial elections; (3) campaign contributions to judicial candidates; (4) annual revenue earned by attorneys for indigent defense appointments; (5) attorney eligibility for indigent defense appointments; and (6) attorney bar information. Figure 3 below summarizes the relevant information in these datasets and how we link them together.

¹⁶¹ Harris County District Clerk, at <https://www.hcdistrictclerk.com/Common/default.aspx> (last visited Sept. 1, 2019).

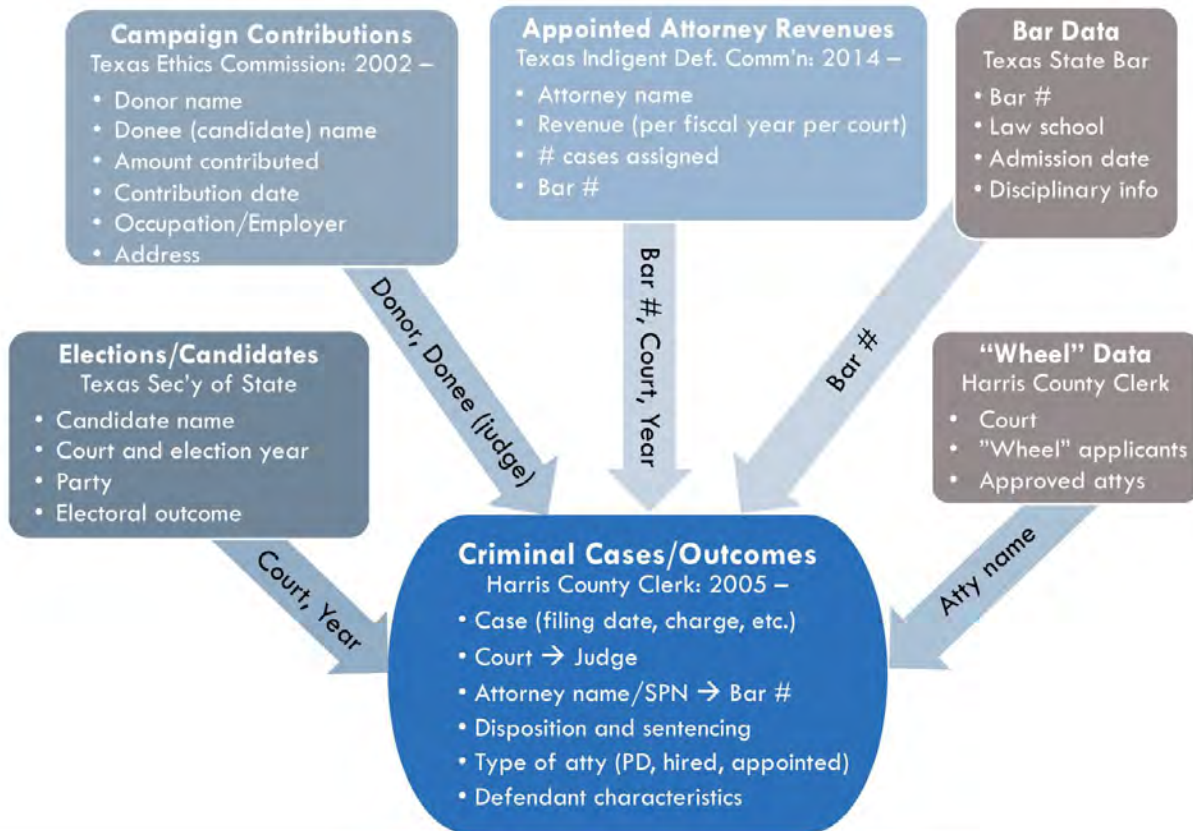


Figure 3

Our central dataset is our criminal cases/outcomes dataset, obtained from the Harris County Clerk (HCC). We focus on felony cases in the dataset, which comprise the universe of all such cases disposed in Harris County District Court from January 2005 through May 2018. The dataset includes information on all indigent defense counsel appointments made by district judges during that time period, as well as the characteristics of the cases to which they were assigned. In particular, the HCC dataset includes the full name and an identifier for the appointed attorney¹⁶² as well as the appointment type (Public Defender, Appointed Attorney, Hired Attorney); the defendant's full name, sex, age, race, and address; and case characteristics like the offense level and degree, sentence type and sentence duration, and filing and disposition dates.

We combine these data with a dataset on Harris County judicial elections, provided by the Texas Secretary of State. While the HCC case data do not include the name of the presiding district judge, we can identify this information by looking at electoral outcomes for district court races and identifying each judge's electoral history. Hence, by merging these data, we can precisely identify which judge appointed counsel in an indigent defense case.¹⁶³

¹⁶² The identifier is a System Person Number (SPN), used to identify the individual throughout the dataset. We were able to convert the SPN number into the corresponding attorney bar number, which allowed us to merge with attorney-related data in other datasets.

¹⁶³ We also know which judicial candidates received donations from eligible attorneys but failed to be elected. In related work, we are conducting a regression discontinuity design to measure the effect of donations on

Next, we connect the data to campaign contributions data, provided by the Texas Ethics Commission (TEC). This dataset encompasses all political contributions to district court candidates in Texas from 2004 to 2016.¹⁶⁴ The TEC dataset includes information on contribution dates and amounts, along with self-reported identifying information from contributors such as occupation, employer, and zip code.¹⁶⁵ This information lets us supplement the cases database with identifiers for attorneys who have contributed to the appointing judge, which might happen before, during, or after the judge's tenure.¹⁶⁶

The fourth dataset we connect are payments made by the State of Texas to appointed attorneys. This information is tracked by the Texas Indigent Defense Commission (TIDC), and is comprehensive and accurate for 2014 to 2018.¹⁶⁷ The TIDC data include information on how much each attorney earned in total from each court (i.e., each judge) during each fiscal year 2014-2018.

The TIDC data do not provide granular detail as to specific attorney payments (e.g., payments made based on the number of days an attorney appeared in court or worked on a case outside of court). The data do, however, include attorney bar numbers, which allows us to accurately merge the revenue data with our cases database. Hence, the HCC case data can be connected with both attorney contributions data and attorney revenue data. This allows us to

appointments. See David S. Lee and Thomas Lemieux, *Regression Discontinuity Designs in Economics*, 48 J. ECON LIT. 281 (2010). In particular, we can causally estimate the impact of donation by comparing case appointments for attorneys who donated to judicial candidates who barely won an election versus attorneys who donated to candidates who barely lost.

¹⁶⁴ Contributions data prior to 2004 are not particularly accurate. As such, we cannot track contributions prior to that date. As a consequence, we might under-estimate the number of contributions received by judges who held office prior to 2005.

¹⁶⁵ Some attorney contributors list themselves using the name of their private practice (e.g., John Doe might donate as "Law Offices of John Doe"). If a law firm just has one named partner, we assign that contribution to the named partner. When a law firm has more than one named partner, or it is unclear who the main partner is, we do not assign such contribution to any attorney (i.e. contributions under the name of "The Law Firm of John Doe" were attributed to John Doe, while contributions from "Do, Re, Mi and Associates" are not attributable to anyone). Since we cannot capture these donations, if anything, we likely underestimate the number of donations from attorneys to judges in our sample.

In addition, in 81 instances, matched attorneys contributed jointly with their spouses or someone else. In all of these cases, only one of the names in the pair matched to someone in the list of appointed attorneys. We drop the unmatched contributor name off our list of contributors and attribute the whole donation amount to the appointed attorney.

¹⁶⁶ Matching the contributors in the TEC dataset to the attorneys in the HCC dataset is not easy. This is in part because the TEC lacks any unique identifier for political contributors, and does provide other identifying data like mailing address and employer. We take advantage of the name variation in the HCC dataset to identify different ways that attorneys might list their names for contribution purposes. We use these names to look for political contributions made by attorneys who have been appointed at least once in any district court in Harris County. For attorneys unmatched by their exact listed name, we do a second round of matching using fuzzy matches between unmatched attorney names and contributor names using the Stata function *matchit* to compare each name with the neighborhood of the subsequent 5 unmatched names in alphabetical order. After that we look at the matches suggested and keep the suggestion only if the similarity is above a certain threshold (.85). Finally, we manually audit the data to confirm the matches we have made are not false positives and to search for matches we may have missed.

¹⁶⁷ Note we could obtain reliably accurate revenue only for fiscal years 2014-2018, but our donation data stretch from 2004-2018. Hence, the actual return on investment might be significantly higher than what we estimate here; our estimate is likely only a floor on the real return rate.

estimate a “return on investment” for donors. That is, if pay to play exists, we can estimate the revenue that donor attorneys received for each dollar they contributed.

Fifth, we connect our data to information on attorneys who are appointed to cases in the district court, as compiled by the State Bar of Texas.¹⁶⁸ This dataset includes demographic information on attorneys, including when the attorney obtained their legal license in Texas and what law school they attended.¹⁶⁹ We also obtain this information for all judges in our dataset, allowing us to test whether informal or social networks (e.g., an attorney or judge attended the same law school or are approximately the same age) might be driving results.

Finally, we combine all these data with information on when attorneys applied for approval as indigent defense counsel, obtained from the Harris County District Courts. As discussed in more detail below, we can see whether attorney donations were correlated with their addition to the list of eligible indigent defense counsel. For example, if pay to play exists, we might expect to see an attorney would donate to a judge when she applies for or is approved on the list of attorneys eligible to receive indigent defense appointments.

C. Summary Statistics

1. Cases and Contributions

Together, these datasets enable us to shed light on the relationships between Harris County district court judges and indigent defense counsel. Table 1 provides some summary statistics on our final data.¹⁷⁰ We cover the universe of 329,638 felony cases in which indigent defense counsel were assigned in Harris County between January 2005 and May 2018, spread over all 22 district courts. There were 45 different judges who assigned counsel in these cases. The vast majority of the cases (97.13%) were assigned to private attorneys; the remainder were assigned to a public defender.¹⁷¹

Attorneys who practiced before these judges also donated money to those judges. In particular, we see that from 2004-2018,¹⁷² Harris County district court judges received a total of \$629,217 over 1,857 donations from attorneys who practiced at some point before those judges.

¹⁶⁸ We thank Kyle Rozema for providing us with the Texas bar data. See Kyle Rozema, *Lawyer Misconduct in America* (working paper, 2019).

¹⁶⁹ We also merge this dataset with data from *U.S. News and World Report*, which provides an annually-updated, widely-followed list of law school rankings. This allows us to compare the law schools attended by donor and non-donor attorneys.

¹⁷⁰ Our final dataset does not include information on 90 cases for which we were unable to match the attorney to a lawyer listed in state bar attorney rolls. It also does not include 35 cases in which the listed defense attorney was identical to the judge in the case. These discrepancies are likely due to minor clerical errors in the cases dataset.

¹⁷¹ Because public defenders are also assigned to the “wheel” system and are treated as attorneys to be appointed in cases, we include them in our analysis below. However, our results are substantially the same if we exclude them instead.

¹⁷² While our case data begin in 2005, we include donations data from 2004 onward since judges who began their terms in 2005 ran for election in 2004.

These donations were relatively modest in size: the average donation was \$338.84, with donations rarely exceeding \$2,000.¹⁷³

Table 1: Summary Statistics on Cases and Contributions

Felony cases with appointments: 2005 – 2018	
Total number cases/attys:	329,638 cases, 770 attys
Appt. private attorneys	320,168 cases, 745 attys
Appt. public defenders	9,470 cases, 69 attys
Number of courts	22
Number of judges	45
Number of gen. elections	8
Campaign contributions: 2002 – 2018	
Total # donations: all appt. attys to all judges	1,857
Total donation amt: all appt. attys to all judges	\$629,217
Contribution amounts for appointed attys	
Mean (SD)	\$338.84 (332.23)
1%	\$50
10%	\$100
25%	\$150
50%	\$250
75%	\$500
95%	\$1,000
99%	\$2,000

Next, we examine case and attorney characteristics, both in the aggregate as well as split out by donor and non-donor attorneys. Table 2 summarizes these data below. Of the 770 attorneys who were assigned at least one indigent defense case between 2004-2018, 25.84% (199) donated to at least one Harris County district court judge during our sample time frame.

¹⁷³ The smallest donation in the sample was \$25; the largest was \$5,000.

Table 2: Donors v. Non-Donors – Case Characteristics for Appointed Attorneys (2004-2018)

	All	Donor	Non-Donor
Number of attorneys ^a	770	199 (25.84%)	571 (74.16%)
Felony Type ^b			
1 st Degree Felony	7.16%	7.78%	6.99%
2 nd Degree Felony	16.31%	16.72%	16.20%
3 rd Degree Felony	23.29%	22.97%	23.38%
State Jail Felony	52.69%	51.85%	52.91%
Capital Felony	0.17%	0.28%	0.14%
Defendant ^b			
% White	45.47%	43.23%	46.06%
% Female	19.36%	19.39%	19.35%
Mean age (years)	33.19	33.12	33.21
Attorney Characteristics ^b			
Average rank of law school attended	116.14	108.01	118.26
Years since admission	22.08	25.63	21.15

^a "Donor" = 1 if attorney contributed at least once to some judge during the sample period

^b "Donor" = 1 if attorney contributed at least once to the assigning judge during the sample period

Donors and non-donors were assigned similar types of cases, though donors on average handled slightly more serious felonies.¹⁷⁴ For example, first-degree felonies make up a slightly higher share of donor cases (7.78%) as compared to non-donor cases (6.99%). And state jail felonies -- which are the least severe class of felony in Texas -- make up 51.85% and 52.91% of all cases for donors and non-donors, respectively.¹⁷⁵

The demographic characteristics of defendants assigned to donors and non-donors are also quite similar. Donors were slightly less likely to represent white defendants relative to non-donors (43.23% versus 46.06%), and both groups were very similar in terms of their clients' gender (just over 80% male for both) and age (average age of about 33 for both).

Finally, donor and non-donor attorneys are relatively similar in terms of their educational and experiential background. The average law school ranking of an assigned attorney in our sample is 116.14; donor attorneys attended slightly better-ranked law schools (average of 108.01) relative to non-donors (average of 118.26). They also have more experience, as measured by years between the attorney's admission to the Texas bar and the filing date of a case (25.63 versus 21.15 years).

¹⁷⁴ Even though the magnitude of most differences between donor and non-donor groups in Table 2 is small, they are statistically significant at the 5% level, with the exception of defendant age and gender. This is due to the large sample size we have here, which lets us detect even small differences across groups.

¹⁷⁵ Offense level was missing in 6,249 cases (1.90% of the total sample). Those cases have been excluded from the data when tabulating the percentages in Table 2.

2. Attorney Donations and Appointments

As described above, there are only slight measurable differences in the types of cases and types of defendants assigned to donor and non-donor indigent defense counsel. Donor and non-donor defense counsel also appear largely similar in terms of their educational and experiential background.

By contrast, there are stark differences between donor and non-donor attorneys in terms of the number of cases assigned to them by donee judges, as well as the fees they earned from such cases. This is clear from Table 3 below, which shows summary statistics on appointed cases and received revenues across all attorneys, as well as split between donors and non donors.

Table 3: Donors v. Non-Donors – Cases Appointed and Revenues (2004-2018)

	All	Donor	Non-Donor
Number of attorneys^a	770	199 (25.84%)	571 (74.16%)
Cases Appointed: Any Donation^a	--	175,252 (53.16%)	154,386 (46.84%)
Cases Appointed: Donate Appt. Judge^b	--	68,578 (20.80%)	261,060 (79.20%)
Avg. case pendency (days)^b	112.29	115.99	111.32
Attorney – Judge Pairs^b			
Number of Observed Pairs	10,739	1,119 (10.42%)	9,620 (89.58%)
Avg. Revenue by Pair	\$16,276	\$31,174	\$13,937
Avg. # Cases Assigned Per Pair	30.70	61.29	27.14

^a "Donor" = 1 if attorney contributed at least once to some judge during the sample period

^b "Donor" = 1 if attorney contributed at least once to the assigning judge during the sample period

As noted previously, over one-quarter of assigned attorneys contributed to at least one judge within our sample period. But these donor attorneys were assigned over half (53.16%) of the cases in our sample. Moreover, 20.80% of all cases in which a judge assigned indigent defense counsel involved an attorney who donated at some point to that specific judge.

The disparity in case assignment between donor and non-donor attorneys becomes clearer when we look at attorney-judge pairings -- that is, unique pairings between judges and attorneys who were assigned at least one indigent defense case in our sample period. Out of 10,739 attorney-judge pairings in our sample, 1,119 (10.42%) involved an attorney who at some point donated to that judge.

On average, an attorney in an attorney-judge pairing was assigned 30.70 indigent defense cases from that judge and earned \$16,276 in indigent defense fees for those cases, which yields an average of \$530 per case. This shows us how indigent defense cases can be surprisingly lucrative if, as often occurs, an attorney spends just one or two days in total on each case she is assigned.¹⁷⁶

¹⁷⁶ To illustrate, an attorney who handles one such case each day and works 200 days a year would earn \$106,000.

We can also see that an average non-donor attorney was assigned slightly fewer cases -- 27.14 cases, with earnings of \$13,937 (an average per case of \$514). By contrast, the average donor was assigned more than twice the number of cases by that judge, and earned more than twice the revenue on those cases than a non-donor -- 61.29 cases and \$31,174 in revenues. Donors earn slightly less per case (\$509), which suggests their additional revenue comes from the additional cases they are assigned, not from additional revenue per case assigned.

We can more easily show these differences between donors and non-donors graphically, as depicted in Figure 4 below. As before, this figure looks at unique attorney-judge pairs. The left panel of Figure 4 shows the natural log of cases¹⁷⁷ assigned to attorneys who donated to the appointing judge. The gray bars show the distribution of cases assigned to non-donor attorneys; the white bars show the distribution of cases assigned to donors. As is apparent, the white distribution is shifted to the right relative to the gray distribution. This means that donor attorneys were assigned more cases than non-donor attorneys.¹⁷⁸

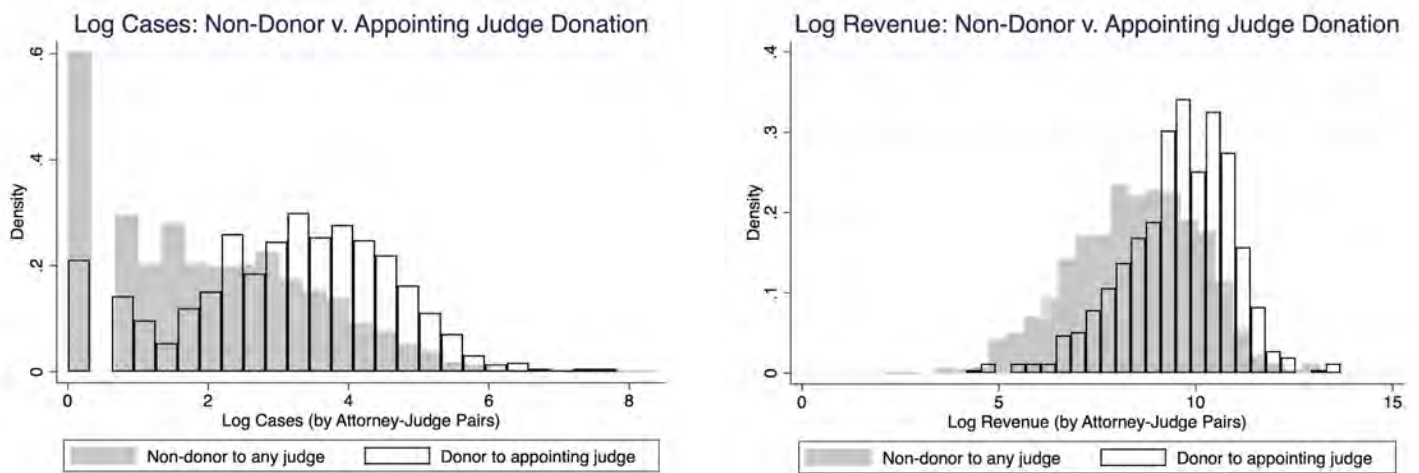


Figure 4

This relationship is even more apparent when you look at revenue. The right panel of Figure 4 below shows log revenue for donor attorneys (in white) versus log revenue for non-donors (in gray). Once again, we can see the distribution for donor attorneys is clearly shifted to the right -- that is, attorneys who donated to a judge received more revenue than attorneys who did not donate to any judge.

¹⁷⁷ It is common to take the natural log of variables that are positive and highly skewed (i.e., have a few entries that are very large relative to others). Often this includes revenue or income, or count variables such as number of cases. For display purposes, logging variables also compress a graph into a more reasonable range. At any rate, the results are very similar in graphs in which the standard count rather than the natural log is used.

¹⁷⁸ We can also see that about 60% of non-donors were assigned just one case (corresponding to the spike in histogram at 0, which = log 1). By contrast, only ~20% of donors were assigned just one case.

D. Regressions and Graphical Analysis

1. Attorney Donations and Appointments

The summary data show clear differences in assignment patterns to donors and non-donors: in particular, donee judges assign twice the number of cases to their donors relative to non-donors. Still, we might believe such results are explained by differences, either observable or unobservable, across attorneys or judges.

To illustrate how this might happen, suppose that donors are just *better* attorneys. Then maybe it makes sense for judges to award them more cases, not because they are donors but because they are simply higher quality lawyers. Indeed, perhaps attorneys who can afford to give donations are implicitly demonstrating, through their wealth, their legal prowess. If this were true, we might expect the donor group to comprise more successful attorneys who “deserve” more appointments.

We can show this is an unlikely explanation in a few different ways. First, we can use ordinary least squares (OLS) regression analysis,¹⁷⁹ which allows us to control for attorney- or judge-specific factors.¹⁸⁰ Tables 4 and 5 present these results below, which show observations for all attorney-judge pairs in which a judge assigned at least one case to an attorney during our sample period.

Table 4: Cases Assigned / Revenue Earned for Donors to Assigning Judge v. Non-Donors

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Donor	34.15*** (4.57)	33.94*** (7.95)	37.68*** (8.00)	17,237*** (2,416)	14,789*** (3,393)	13,653*** (2,791)
Observations	10,739	9,743	10,739	4,968	4,736	4,968
Adj. R-squared	0.01	0.07	0.29	0.02	0.07	0.39
Judge, Atty Ctrls	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. “Donor” is a dummy variable for whether an attorney ever donated to the judge in the pairing. Cols. (2) and (5) include controls for observable 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.

¹⁷⁹ We obtain similar results if instead we use logistic regressions for specifications with binary outcome variables.

¹⁸⁰ We cannot rule out that time-varying, unobservable differences across donor and non donor cases are driving the differences in case assignment or revenues that we see here. But we doubt this is the case, given the size of these differences and how closely they hew to donation practices, as we discuss in more detail below.

In Table 4, the key regressor of interest in all columns is “Donor”, a dummy variable (i.e., 0/1 variable) that =1 when the attorney was a contributor to the judge and =0 when the attorney was never a contributor. The outcome variable in columns (1)-(3) is the total number of indigent defense cases assigned by a particular judge to a particular attorney. In columns (4)-(6), the outcome variable is total fees earned by an attorney across all indigent defense cases assigned by a particular judge.¹⁸¹

Column (1) presents the most parsimonious specification, with no controls. The coefficient for “Donor” is 34.15, and it is statistically significant at the 1% level. This means that donors on average were assigned over 34 more cases by their donee judges relative to non-donors. Column (4) translates this into dollars, as it presents the same specification but with total revenues as the outcome variable. Here, we can see donors to an assigning judge earn on average about \$17,237 more than non-donor attorneys.

The remaining columns introduce a variety of controls for attorney or judge characteristics. Columns (2) and (5) capture *observable* differences across attorneys and judges, as they include separate controls for years of admission to the Texas bar for the attorney and the judge;¹⁸² controls for law schools attended by the attorney and the judge;¹⁸³ a dummy variable for whether the attorney ever served as a public defender; a control for the year when the attorney became eligible to be assigned indigent defense cases; a control for the year the judge was first elected to the district court; and a dummy variable for whether the attorney and the judge attended the same law school.¹⁸⁴

Columns (3) and (6) capture *unobservable* differences across attorneys and judges. They accomplish this by including fixed effects for attorneys (i.e., controls that should capture unobservable attorney-specific behavior) and fixed effects for judges (i.e., controls that should capture unobservable judge-specific behavior).

Notably, controlling for these differences does not change the results in any substantial way. Whether we add controls for observable differences in attorneys and judges (as in columns

¹⁸¹ Note that we have fewer judge-attorney pairs in these columns because we only have revenue data from TIDC for 2014 to 2018. See *supra* note ___ and accompanying text. If anything, that suggests our estimates of revenues earned are underestimated, since we only have an estimate of the fees earned by attorneys during those years and cannot measure fees earned prior to 2014. So indigent defense work is likely significantly more profitable than we show here.

¹⁸² In addition to proxying for a judge’s legal experience, this variable indirectly captures whether the judge is of a similar age as an attorney. This might matter, for example, if we think that judges and attorneys who are similar in age are more likely to be friends, and that it is this friendship rather than campaign donations that are driving the results here.

¹⁸³ These are “fixed effects” for law school (i.e., separate dummy variables added for each separate law school attended by an attorney in our sample). We obtain similar results if we instead include law school ranking as a control.

¹⁸⁴ Along with the experience variable, the “same law school” dummy might capture a social “network effect” -- for example, if a judge who went to The University of Texas at Austin is biased toward UT graduates, then this dummy variable would capture that effect.

(2) and (5)), or we add in judge- and attorney-fixed effects (as in columns (3) and (6)), the coefficient remains roughly similar in magnitude and maintains its statistical significance.

We now turn to Table 5, which is identical to Table 4 except now the regressor of interest is “Total Donated,” which is the total dollar amount that an attorney has ever donated to a judge over time. Column (1) again presents the most parsimonious specification, with no controls. The coefficient in column (1) is 0.074, which is statistically significant at the 1% level. This means that every dollar donated by an attorney to a judge is associated with 0.074 additional cases assigned to that attorney. If we interpret this within a “pay-to-play” context, then $\$1/0.074 = \13.51 is the price for an attorney to “buy” a single case from a judge.

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	0.074*** (0.022)	0.076*** (0.024)	0.085*** (0.024)	27.96*** (8.94)	28.18*** (7.15)	28.13*** (6.17)
Observations	10,739	9,743	10,739	4,968	4,736	4,968
Adj. R-squared	0.04	0.10	0.32	0.09	0.13	0.45
Judge, Atty Ctrls	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 observable 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.

Similarly, column (4) presents the same specification but with total revenues as the outcome variable. Here, we can see that each dollar contributed from an attorney to a judge on average results in \$27.96 in fees from that judge. Within a pay-to-play context, this can be interpreted as a “return on investment” -- a \$1 donation yields by an attorney yields \$27.96 in revenues.

Like Table 4, the addition of attorney- or judge-level controls in columns (2) and (5) or fixed effects in columns (3) and (6) do not substantially impact the results. They remain approximately the same magnitude and are highly statistically significant. Once again, this suggests that systematic differences between donor and non-donor attorneys, such as differences in their experience or education, are not driving our results here.

2. Comparisons Within the Donor Class

Still, one might wonder whether our results can be explained by some difference between donors and non-donors that cannot be easily captured by regression controls. One way to address this claim is to focus only on the sample of donors and see whether our results remain.

Specifically, we can exploit the fact that a donor typically only contributes to some, but not all, of the judges she appears before. Therefore, if we limit our sample only to attorneys who donated to at least one judge, a natural comparison is to see whether donors received more case assignments from their donee judges relative to judges to whom they did not donate. If so, that would suggest there is something specific in the judge-donor relationship, rather than something special about the donor herself, that is causing the judge to assign more cases to that attorney.

Once again, graphs can dramatically illustrate our results. Figure 5 below limits our sample only to attorneys who donated to at least one judge during our sample period of 2004-2018. The white bars again represent attorney-judge pairs in which the attorney donated to that judge. The gray bars show attorney-judge pairs in which the attorney did not donate to that judge, but s/he did donate to some other judge.

As is plain, the white distribution is once again shifted to the right for both the cases and revenue graphs. In other words, attorneys in the “donor class” received significantly more cases (and earned significantly more revenue) from their donee judges relative to other judges to whom they did not donate. There implies there is nothing “special” about donor attorneys themselves that earned them additional case assignments. Rather, there is something specific to the donor-judge relationship that is driving that result, since only judges to whom attorneys donated seem to assign them a disproportionate number of cases.¹⁸⁵

¹⁸⁵ We can also run the same regression analysis as we did earlier, but this time limited to attorneys who donated to at least one judge. Appendix Tables A.1 and A.2 present this analysis, with Table A.1 presenting the same specifications as Table 4, and Table A.2 presenting the same specifications as Table 5. We can see that all of the regression coefficients remain highly significant and are similar in magnitude as in the previous tables. This once again shows that attorney- or judge-level differences do not seem to be driving our results.

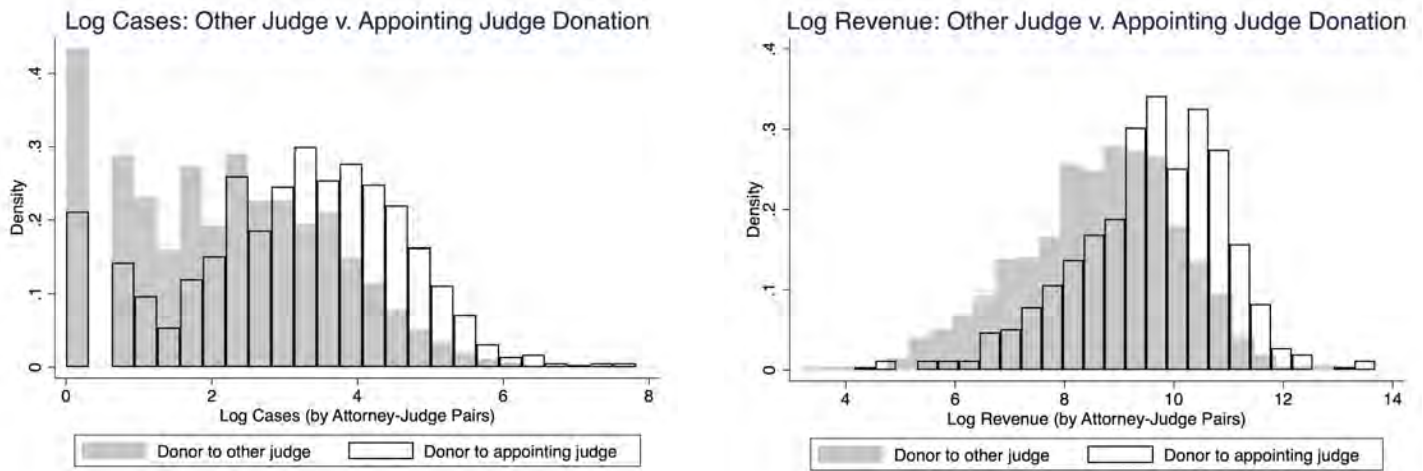


Figure 5

3. Donation Timing and “Entrance Fees”

So far we have shown that attorneys who donate receive more cases from their donee judges, but not from other judges to whom they did not donate. Such donation patterns cannot be explained by observable differences between attorneys or judges, such as where they attended law school, the ranking of the law school, or the years of practice experience they might have. It also cannot be easily explained by some “social network” arguments, such as an alumni connection to a particular school that both judges and attorneys attended, or similarity in age or years of experience. Moreover, it cannot be explained by unobservable differences in attorneys and judges that remain fixed over time. All of these results are consistent with a system in which pay to play is rampant, as our anecdotal evidence suggested.

Still, we can go further. Another approach we can use to get more evidence of pay to play is by exploiting the timing of donations relative to appointments. As noted above, a prerequisite for appointment as indigent defense counsel is getting added to a list of eligible attorneys. If pay to play is occurring, one might expect donors to give their donations either just before or soon after they become eligible to receive cases. One could view this type of donation as an “entrance fee” that attorneys must pay judges in order to receive appointments.

Since we know when counsel became eligible to be assigned cases, and we know when they gave their first donation to a judge, we can test whether in fact this is true. Figure 6 below graphically displays our results as a histogram. It tracks the difference in years between when an attorney first donated to a judge, and when she first became eligible to be appointed as indigent defense counsel.¹⁸⁶ A negative value means that the attorney donated prior to becoming eligible to

¹⁸⁶ For this graph, we limit our sample of attorney-judge pairs to judges who were elected in 2008 or later and attorneys who became eligible for appointment in 2008 or later. This prevents data censoring issues that

receive cases; a positive value means that she donated after gaining eligibility. A zero value means the attorney donated in precisely the same year she became eligible to receive cases. If an attorney donated in an election year, then a value of 0, 1, 2, or 3 means that the attorney received her first appointment from that judge in the four-year term following that donation.

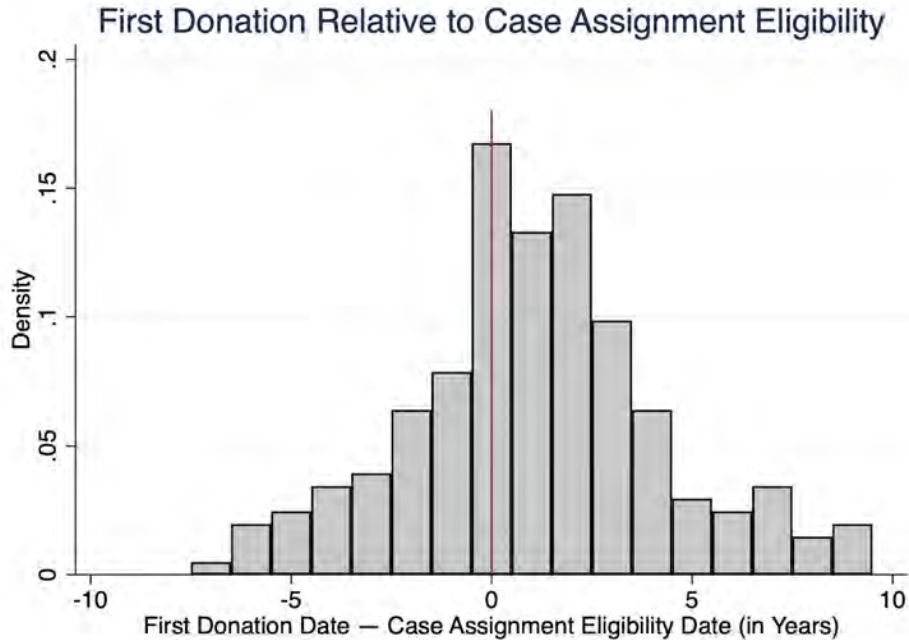


Figure 6

If donations and appointments were completely unrelated, we might expect to see a uniform distribution -- that is, a relatively flat graph from left to right. But that is clearly not what we see here. This graph is peaked at 0, and the majority of the distribution is just to the right. This means most attorneys who donated to a judge first donated soon after they became eligible to receive appointments from that judge. In fact, in over half (54.7%) of all attorney-judge pairs in which the attorney donated to the judge, the first donation to the judge occurred between 0 and 3 years following the year the attorney became eligible to be assigned indigent defense counsel cases.

If we also include donations that occurred in the year prior to eligibility -- which would be a plausible time to donate if one wants to pay to play, since an attorney must be voted in by a majority of judges before she is placed on the eligible list¹⁸⁷ -- then the percentage of relevant attorney-judge pairs jumps to 62.6%. These facts are again consistent with pay-to-play: newly-eligible or soon-to-be-eligible attorneys might be paying their “entrance fee” to start receiving cases from that judge.

might skew the graph, since we do not have donation data prior to 2004 or we do not know the exact year when attorneys who were eligible in 2005 actually became eligible in the first place. The same general trends typically hold, however, even if we limit our sample in other ways.

¹⁸⁷ See *supra* note __.

4. Election Cycles

Another way to use timing to show pay to play is to look at when an attorney makes donations to a judge and when he is actually assigned cases by that judge. To do this, we can compare the number of cases that judges assigned to attorneys who donated to them in their last election campaign versus attorneys who didn't donate then.

To illustrate, suppose a judge is running for election in 2004 and wins; hence, her term runs from January 1, 2005, to December 31, 2008. We can determine: (1) which attorneys donated to the judge in 2004; and (2) whether those attorneys received more cases relative to other non-donating attorneys during the 2005-2008 term.

Table 6: Cases Assigned by Donee Judge in a Term

	(1)	(2)	(3)
Donated Last Election	21.56*** (5.86)	20.80*** (6.00)	19.55*** (6.09)
Constant	21.72*** (0.53)	1,332.72*** (277.65)	23.93*** (1.04)
Observations	14,391	14,391	14,391
Adj. R-squared	0.003	0.04	0.25
Judge, Atty Ctrls	NO	YES	NO
Judge, Atty FEs	NO	NO	YES

Notes: This table presents OLS regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2015, at the attorney-judge pair level. The outcome variable in all regressions is total cases assigned by a judge to an attorney in a term following an election. "Donated Last Election" is a dummy variable for whether an attorney donated to the judge in the pairing in the previous election. Col. (2) includes controls for observable attorney and judge characteristics as specified in the text. Col. (3) includes both attorney and judge fixed effects. Standard errors are heteroskedastic robust in cols. (1)-(2) and clustered at the judge-level in col. (3). *** = significant at 1% level.

Table 6 above presents regression results that test this theory. The outcome variable is the number of cases assigned to an attorney in the term following an election in which she donated to the judge. We can see that attorneys who donated to a judge during an election year were assigned about 20 more cases by that judge during the subsequent term relative to attorneys who did not.

Since the average non-donor received about 20 cases in a term, the average donor was assigned over double the number of cases relative to the non-donor. This is consistent with our

other results: donors receive about twice as many case assignments from their donee judge as compared to non-donors.¹⁸⁸

5. Case Outcomes

We might be less troubled by the differences in revenue and case assignment that we observe if donors consistently achieve better outcomes for their clients relative to non-donors. Indeed, this story is not completely implausible -- if “pay to play” is occurring, then perhaps the attorneys who pay are buying better results for their clients.¹⁸⁹

The data, however, provide no evidence to suggest this is true. Table 7 below shows summary statistics that compare whether donors and non-donors achieve various positive outcomes for their clients. We define an outcome as “good” (Good outcome = 1) if a case is dismissed, charges are reduced,¹⁹⁰ or the defendant is acquitted, and an outcome as “not good” (Good outcome = 0) if the defendant is convicted or pleads guilty or no contest.¹⁹¹ By this metric, non-donor attorneys do slightly better than donors (33.63% v. 32.32%, respectively). Defendants represented by non-donors are also less likely to end up in the Texas Department of Corrections (16.56% and 17.87% for non-donors and donors, respectively) and receive shorter prison or jail sentences on average (664.67 and 761.70 days for non-donors and donors, respectively).

¹⁸⁸ See *supra* note ___ and accompanying text. Another test for pay to play is to compare attorneys who donated multiple times to a judge versus those who never contributed or just contributed one time. If we think pay to play is occurring, we might think donors who contributed multiple times would be assigned more cases by donee judges than non-donors or single-time donors. And in fact, this is what we see. Appendix Tables A.3 and A.4 present this analysis, with Table A.3 presenting the same specifications as Table 4, and Table A.4 presenting the same specifications as Table 5.

¹⁸⁹ See *supra* note ___ (noting accusation from Oklahoma district attorney that a judge was partial toward defense attorneys who donated to her campaign).

¹⁹⁰ We can determine whether charges are reduced by comparing the offense level in the complaint (e.g., 1st degree felony, 2nd degree felony, etc.) and the offense level when the case was disposed.

¹⁹¹ Some outcomes are ambiguous whether they are good or bad; we exclude those cases when defining this variable. For example, it is ambiguous whether an outcome is good when the case is dismissed because the defendant died or when the defendant was convicted on another charge.

Table 7: Donors v. Non-Donors – Case Outcomes (2004-2018)

	All	Donor	Non-Donor
Number of attorneys^a	770	199 (25.84%)	571 (74.16%)
Cases Appointed: Any Donation^a	--	175,252 (53.16%)	154,386 (46.84%)
Cases Appointed: Donate Appt. Judge^b	--	68,578 (20.80%)	261,060 (79.20%)
Avg. case pendency (days)^b	112.29	115.99	111.32
Outcomes^b			
Good outcome ^c	33.36%	32.32%	33.63%
Texas Dept. of Corrections	16.83%	17.87%	16.56%
Harris County Jail	28.02%	25.66%	28.63%
State Jail	19.61%	19.81%	19.56%
Mean prison/jail time (days)	684.51	761.70	664.67

^a "Donor" = 1 if attorney contributed at least once to some judge during the sample period

^b "Donor" = 1 if attorney contributed at least once to the assigning judge during the sample period

^c "Good" = 1 if charges dismissed or reduced, or defendant acquitted or found not guilty;
= 0 if defendant found or pled guilty or no contest

A reasonable concern is that these slight differences in outcomes might be driven by differences in case or defendant characteristics. Based on what we can observe, however, this does not seem to be true. We can control for various case and defendant characteristics through an ordinary least squares regression analysis, as we present in Table 8 below.

Table 8: Outcomes for Donor v. Non-Donor Attorneys

	Good Outcome		Sentenced TDC		Jail/Prison Term	
	(1)	(2)	(3)	(4)	(5)	(6)
Donor Somewhere	-1.01*** (0.15)	-0.61* (0.33)	0.73*** (0.11)	0.55** (0.25)	33.27*** (4.58)	17.60** (7.87)
Public Defender	7.29*** (0.52)	5.18*** (0.79)	-2.10*** (0.37)	-1.24* (0.65)	40.55** (18.18)	10.03 (24.84)
Female		2.76*** (0.25)		-5.70*** (0.20)		-110.79*** (4.52)
White		0.20 (0.16)		0.41*** (0.13)		-34.84*** (6.14)
Age		0.04*** (0.01)		0.19*** (0.01)		6.55*** (0.29)
Constant	117.72*** (2.28)	120.31*** (2.61)	-4.98*** (0.47)	-14.00*** (0.95)	-22.85 (14.11)	-432.97*** (41.63)
Observations	305,106	305,032	323,389	323,310	209,375	209,319
Adj. R-squared	0.23	0.24	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.

The outcome variable in columns (1)-(2) is a dummy variable whether the attorney achieves a "good" outcome as defined earlier. In columns (3)-(4), the outcome is a dummy variable for whether the defendant receives a term of imprisonment in the Texas Department of Corrections, which is typically where most substantial prison sentences are served. And in columns (5)-(6), the outcome variable is the maximum sentence of jail or imprisonment received. Odd-numbered columns include controls for whether a defense attorney is a public defender and for the type of crime charged;¹⁹² even-numbered columns also include dummy variables for whether a defendant was white or female; a control for the defendant's age; and fixed effects for the judge in the case.

We can see that generally speaking, attorneys who have donated to some judge perform worse than those who are non-donors. If anything, donor attorneys appear between 0.61 and 1.01

¹⁹² Because outcomes depend so heavily on the type of crime that is charged, we include as a control the type of offense charged even in our base specification. We can distinguish between 631 different charged crimes, often split quite finely. For example, within the narrow category of "trademark counterfeiting", we can distinguish between 5 different classes based on the amount of the offense.

percentage points less likely to obtain a good outcome.¹⁹³ They are between 0.55 and 0.73 percentage points more likely to have a client who is sentenced to a term in the Texas Department of Corrections. And defendants represented by donors receive jail sentences that are between 17.60 and 33.27 days longer than non-donor defendants.

Of course these results should be taken with a grain of salt. It is possible that unobservable differences across cases are driving the slightly worse outcomes we see for donor attorneys. Nonetheless, it would be hard to conclude, based on this evidence, that the opposite holds true -- that donor attorneys are in fact doing significantly better than their non-donor counterparts. If anything, donors appear to be underachieving for their clients relative to non-donors. This is what we might expect, given the additional caseload that donors choose to take on.

V. Closing the Incentive Gap in the Right to Counsel

The apparent prevalence of pay to play, as revealed by our quantitative and qualitative analysis, is troubling. In part this is because a system in which attorneys buy cases from judges runs counter to common notions of ethics and justice. And in part it is because, as we have shown, donor attorneys might underperform for their clients relative to non-donors.

But perhaps most discomfoting is that pay to play lays bare the core dysfunction in the right to counsel: that many of those who are assigned to represent indigent defendants really do not share their clients' interests. More concisely, pay to play is just a symptom of the incentive gap.

In this section, we explore how we might close the incentive gap. We start with some modest proposals to reform attorney appointment rules and campaign finance regulations. While such reforms might eliminate pay to play, we argue they would be insufficient to meaningfully change attorney incentives.

We then discuss a more ambitious proposal: removing the ban on contingent arrangements in criminal cases and giving assigned counsel a financial stake in the outcome of these cases. We contend that deeper changes like this are needed to close the incentive gap and make lasting progress on behalf of indigent defendants.

A. Attacking Pay to Play

Pay to play is a confluence of two separate phenomena: judges who are popularly elected and can solicit campaign donations, and assigned counsel whose appointments are controlled by those judges. If the goal is simply to eliminate pay to play -- which, as we discuss in more detail below, would not cure the deeper structural deficiencies in indigent defense -- then plausible reforms should tackle one or both of these elements.

¹⁹³ Since about 1/3 of all defendants receive a good outcome, this translates into between about a 1.8% to 3% difference between donors and non-donors.

To begin, one approach would be to simply prohibit donee judges from appointing their donors as counsel.¹⁹⁴ A slightly softer approach might be to limit this ban to some time period following a contribution -- for example, the attorney might be barred from being appointed by that judge until an intervening election cycle has passed. Apart from its direct impact, such a rule would have the salutary secondary effect of disincentivizing attorneys from donating to a judge before whom they might want to practice in the future. Put differently, a donation to a judge becomes costly for those attorneys in terms of potential foregone revenue in future indigent defense cases.

An obvious limitation of this approach is that it would not address situations in which attorney appointments precede donations, which we sometimes observe in our data. This would be a problem if, for example, an attorney has a tacit agreement with a judge that she will delay donating to the judge until after she has been assigned cases by that judge.

A second set of reforms to minimize pay to play could reduce judges' discretion to assign cases to indigent defense counsel. As noted earlier, one popular method to reduce judicial discretion is to introduce mandatory rotation policies, in which judges are supposed to select the next attorney on a rotating "wheel" when assigning a case.¹⁹⁵ Putting aside whether such a system is optimal or in the best interests of a defendant -- there is no reason to believe, for example, that a perfectly even split of cases across all eligible attorneys is necessarily ideal -- our empirical results suggest such systems are honored more in the breach than in the observance. Harris County supposedly follows a wheel assignment system, but as we have seen, its criminal court judges generally do not distribute cases anywhere close to evenly across attorneys.

A better way to reduce pay to play would be to remove the appointment power from judges altogether and placing it instead with an independent commission or entity. Some jurisdictions already have such managed assigned counsel systems.¹⁹⁶ Indeed, the Texas Legislature passed a bill to accomplish this in 1999, but the bill was subsequently vetoed by then-Governor George W. Bush, who stated:

Senate Bill No. 247 proposes a drastic change in the way indigent criminal defendants are assigned counsel. While well-intentioned, the effect of the bill is likely to be neither better representation for indigents nor a more efficient administration of justice. The bill inappropriately takes appointment authority away from judges, who are better able to assess the quality of legal representation, and gives it to county officials. The bill creates the potential for counties to set up a new layer of bureaucracy that could result in increased backlogs and decreased court efficiency.¹⁹⁷

¹⁹⁴ Alternatively, this same rule could be configured from the perspective of the assigned attorney: ethics rules could prohibit her from seeking or accepting a case assignment from a judge to whom she has donated.

¹⁹⁵ See *supra* notes ___ and accompanying text.

¹⁹⁶ See *supra* notes ___ and accompanying text.

¹⁹⁷ Gov. George W. Bush Veto of SB 247, June 20, 1999.

Bush's statement points out some of the political challenges of taking away the appointment power from state judges.¹⁹⁸ Moreover, even if trial judges are divested of their appointment power, one still might be concerned they would find other ways to reward their donors. For example, if attorney requests for out-of-court case preparation expenses and expert opinions must be ultimately approved by the judge -- as is often the case -- then a judge would still have the opportunity to be more generous with her donors than with non-donors in granting such requests.

Instead of focusing on attorney appointments, another approach to limit pay to play could be to regulate campaign donations to judges directly. For example, one reform would be to prohibit judges from personally soliciting donations from practicing attorneys. This would both reduce any improper influence that these attorneys might have over the judges, as well as minimizing the appearance of such influence.

While the constitutionality of such a restriction might seem questionable at first glance, it would likely pass muster following the Supreme Court's recent 5-4 decision in *Williams-Yulee v. Florida Bar*,¹⁹⁹ in which the Court upheld a Florida ethics rule that banned judicial candidates from personally soliciting any campaign funds. While the majority was divided on whether such a regulation should be subject to strict scrutiny,²⁰⁰ the Court held the law passed even this highest level of review. The Court found that the state had a compelling governmental interest "in preserving public confidence in the integrity of the judiciary."²⁰¹ The Court also found that the solicitation ban was narrowly tailored, relying in part on the fact that the Florida law allowed candidates to set up campaign committees to solicit donations.²⁰²

¹⁹⁸ Following Governor Bush's veto of SB247, the nonprofit Texas Appleseed undertook a statewide survey on indigent defense practices that would spur the legislature to return to indigent defense in 2001. Texas Appleseed's report, released in December 2000, contained 27 findings about Texas' indigent defense system at the time, including: a "complete absence of uniformity in standards and quality of representation among the indigent defense systems" in the Texas counties surveyed by Appleseed; the "unfettered discretion given to judges over attorney selection and compensation creates the potential and appearance of a conflict of interest"; and "costs per capita for indigent defense were approximately \$4.65, making Texas near the bottom of all 50 states for indigent defense funding." See TX APPLESEED REPORT, December 2000 at p. 7-13.

Following the issuance of Appleseed's report on indigent defense, released in December 2000 on the eve of the legislative session, the Texas Legislature passed the Fair Defense Act in 2001, this time avoiding a veto from Governor Rick Perry. The Texas Fair Defense Act went into effect on January 1, 2002 and required officials in all Texas counties to adopt written procedures for delivery of indigent defense services in a timely and fair manner. The legislation created a state body to administer policies and funding across the state, the Texas Task Force on Indigent Defense. In 2011, the Task Force on Indigent Defense was renamed the Texas Indigent Defense Commission, which continues to develop and promote improved funding and practices for the benefit of counties across the state of Texas. See TX APPLESEED REPORT, December 2000 at p.1; Fabelo at 10.

¹⁹⁹ 135 S. Ct. 1656 (2015).

²⁰⁰ Justices Ginsburg and Breyer argued that a less exacting standard should apply for judicial elections. 135 S. Ct. ___ (2015) (Ginsburg, J., concurring) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 803 (2002) (Ginsburg, J., dissenting) (dissent from majority opinion holding that Minnesota's "announce clauses" that prohibit judicial candidates from stating their views on issues was unconstitutional)).

²⁰¹ 135 S. Ct. 1656 (2015).

²⁰² See *id.*

A restriction that merely prohibited judicial candidates from soliciting funds from practicing attorneys would be narrower in scope than the Florida ban,²⁰³ as such it would be presumptively constitutional. Yet, such a ban would not necessarily eliminate pay to play. Unless the ban also applied to campaign committees associated with the judge, attorneys could still funnel money indirectly into the judge's coffers. And the judge would still know which attorneys supported his candidacy by seeing who donated to the committee -- hence the judge could still reward those attorneys with case assignments.²⁰⁴ This dynamic might lead one to wonder to what extent a Florida-style ban is really more about form rather than substance.²⁰⁵

Of course, one might extend the solicitation ban beyond what was considered in *Williams-Yulee*, and instead prohibit judges from soliciting from practicing attorneys either personally or via their campaign committees. But given that the Roberts' Court's other decisions in this arena have consistently tilted against restrictions on campaign finance,²⁰⁶ as well as the strict scrutiny that any such regulation is likely to face, it is not clear whether this additional limitation would be found to be constitutional.

Moreover, a ban on solicitations from a campaign committee would not touch unsolicited contributions from attorneys. The identity of judicial candidates is common knowledge; hence, an attorney could simply send an unsolicited check directly to a candidate as a campaign donation. Such a donation would comply with state campaign laws so long as it did not exceed rules regulating contribution limits.²⁰⁷ This end run around a solicitation ban might vitiate the benefits of such a law.

²⁰³ Note that Texas does not appear to have any such ban. See Texas Code of Judicial Conduct Canon 6D(1) (emphasis added):

A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. *This limitation does not prohibit either a judge or candidate from soliciting funds for appropriate campaign or officeholder expenses as permitted by state law.*

²⁰⁴ As noted earlier, some states allow campaign committees to solicit donations but prohibit the committees from divulging the names of donors to candidates. See *supra* note ___. Of course, a donor attorney could still presumably announce to the judge that she in fact did make such a donation, thereby side-stepping such a rule.

²⁰⁵ See, e.g., Eugene Volokh, *Supreme Court upholds ban on judicial candidates soliciting campaign contributions — even via mass mailings*, The Volokh Conspiracy, WASH. POST (Apr. 29, 2015) (concluding ban might have an impact in limiting context of face-to-face personal solicitations, which might be different if conducted by a judicial candidate vis a vis a representative of her campaign committee).

²⁰⁶ Richard L. Hasen, *Election Law's Path in the Roberts Court's First Decade: A Sharp Right Turn but with Speed Bumps and Surprising Twists*, 68 STAN. L. REV. 1597 (2016); John O. McGinnis, *Neutral Principles and Some Campaign Finance Problems*, 57 WM & MARY L. REV. 841 (2016); see also Noah B. Lindell, *Williams-Yulee and the Anomaly of Campaign Finance Law*, 126 YALE L.J. 1577 (2017).

²⁰⁷ Another more radical approach would be to eliminate popular election of judges altogether. As of 2015, 39 out of 50 states had some form of judicial election (either partisan, non-partisan or retention elections). See ABA Brief, *supra* note ___. Eliminating popularly elected judges would eliminate the need for campaign funds and the possibility of pay to play. Still, such an approach would still not eliminate the incentive gap.

B. Beyond Pay to Play: Shifting Attorney Incentives

The reforms discussed above would, to varying degrees, prevent attorneys from donating to judges so that those judges assign them more cases. Unfortunately, these reforms on their own are unlikely to substantially improve the lot of indigent defendants.

This is because these reforms do not substantially impact the incentive gap. They do not reduce assigned counsel's incentives to seek out as many cases as possible. And depending on how fees are structured, attorneys would still have incentives to work minimally on each case they are assigned. This is especially true if the attorneys maintain outside dockets, with paying clients. Given what we now know about the financial motivations of many assigned counsel, it is unrealistic to assume these attorneys would devote as much time and effort to their indigent clients as they would to their paying ones if there are no reputational or financial gains from doing so.

If we are serious about helping indigent defendants, we have to probe deeper and try to shift attorney incentives so they line up with those of their clients. We first explore the possibility of expanding public defender networks. We then discuss how changing the fee structure in assigned counsel and contract attorney cases might eliminate the incentive gap.

1. Public Defenders for All?

To begin, one approach to addressing the incentive gap might seem particularly straightforward: moving fully to a system of public defenders, and away from assigned counsel and contract attorney systems.²⁰⁸ Not only would this eliminate pay to play, but it would remove financial incentives for attorneys to amass an excess of indigent defense cases.

Unfortunately, expanding the network of public defenders by itself might actually prove counterproductive. As explained earlier, public defenders might perform better than assigned counsel,²⁰⁹ but they still have goals that differ from their clients.²¹⁰ In a system in which public defenders are often saddled with hundreds of cases, attorneys are faced to triage amongst them. Because they cannot control how many cases they are assigned, they cannot give the same time or effort to each case that they would give if they could control their docket.²¹¹ Indeed, expanding public defender systems without the necessary allocation of financial resources would only exacerbate existing caseload issues, driving down the overall quality of defense.

The key, then, would be not only to expand public defender networks but also to increase the funding for those networks. This would be a significant challenge. First, in comparison to

²⁰⁸ A small subcategory of cases would likely still need to be assigned to private attorneys because of conflicts of interest, but the vast majority of cases could be assigned to the public defender.

²⁰⁹ See *supra* note ___ and accompanying text.

²¹⁰ Public defenders are also drawn from the pool of assigned counsel. As such, they might share some of the same incentives as that group. For example, we found that out of 69 public defenders listed in our dataset, 14 of them had donated to at least one judge during our sample period. And seven donated to a judge before whom they practiced.

²¹¹ Moreover, as noted earlier, implicit bias may play a role in how public defenders choose to terminate these cases. See *supra* note ___.

prosecutors, public defenders receive much less funding, make lower salaries,²¹² and have significantly smaller departmental budgets.²¹³ Making up for this massive disparity would require a dramatic reallocation of institutional resources.

Second, it's no accident that public defender networks are poorly funded to begin with. Political fights that involve funding for public defenders typically do not go well for them. Historically these discussions have been one-sided, with many officials shying away from allocating more money to public defenders offices out of fear of looking weak on crime.²¹⁴ Though the public's attitudes around this issue are starting to change,²¹⁵ there is little evidence that this shift has had any impact on the overall political calculus. In order to truly address this issue, the system would need to create the necessary political pressure on those with power to make changes.

2. Contingent Criminal Defense: A "Value-Based" Approach

Successfully expanding public defender networks while ensuring they are fully funded is likely to pose significant political challenges. As such, a better approach might be to correct the incentive gap within the contract attorney and assigned counsel systems, where the problem is most acute.

Changing attorney incentives requires changing how attorneys are paid. For assigned counsel, an obvious place to start are the fee tables that determine compensation rates.²¹⁶ One simple approach would be to reduce fees across the board. We have seen that some indigent defense attorneys respond to financial incentives; hence, lowering fees for indigent defense work should disincentivize these attorneys from taking on excessive numbers of cases in the first place.

Unfortunately, implemented on its own, this solution might actually exacerbate the incentive gap. A flat reduction of fees for indigent defense work, if severe enough, might deter most attorneys from taking these cases at all, and the ones who remain might be of lower quality.²¹⁷ This

²¹² See Bryan Furst, "A Fair Fight: Achieving Indigent Defense Resource Parity," at p.9-10, Brennan Center for Justice, 9 Sep. 2019, at https://www.brennancenter.org/sites/default/files/publications/2019_09_Defender%20Parity%20AnalysisV7.pdf, accessed 30 Sep. 2019. The author highlights the Fourth Judicial District in Florida, where public defenders with zero to three years of experience earn approximately \$10,000 less than their prosecutor counterparts (citations omitted).

²¹³ *Id.* at p.1-2, citing the disparity between Colorado's budget for prosecution (\$156,574,431) and Colorado's budget for defense (\$78,542,342) (citations omitted).

²¹⁴ *Id.* at p.1.

²¹⁵ *Id.* at p.1-2, citing a recent poll showing 66 percent in support of the use of government tax dollars to provide indigent defense. See Belden Russonello Strategists, *American's Views on Public Defenders and the Right to Counsel* (Washington, D.C.: American University School of Public Affairs, Justice Programs Office, 2017), 12, https://static1.squarespace.com/static/55f72cc9e4b0af7449da1543/t/5a0225139140b76ff9027de7/1510090007542/Americans%27+Views_11-7-17.pdf.

²¹⁶ See *supra* Figure ___ for an example of a fee table used in Harris County, Texas.

²¹⁷ This is a variant of the famed "market for lemons" problem. See George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). In essence, if you lower wages enough, the only people willing to take a job will be those for whom it is the best financial option (i.e., they can't get a better wage outside of the assigned counsel system).

would also increase the burden on the remaining counsel, forcing judges to apportion more cases among fewer attorneys. Moreover, a fee reduction would deter both good attorney work -- that is, legal representation that is in a client's best interests -- as well as bad attorney work -- where there is a large incentive gap between the attorney's financial interests and the client's best interests.²¹⁸

We argue that a more promising approach is to change fees so that attorney payment is tied to performance, contingent on how well attorneys represent their clients. While space limitations permit us only to sketch a rough outline here, contingency arrangements for assigned counsel have the potential to close the incentive gap and materially improve the legal representation that indigent defendants receive.²¹⁹

Currently, contingent arrangements are common in civil cases, and they often enable litigation that would otherwise be unaffordable for plaintiffs. While contingent fee litigation has some well-known drawbacks,²²⁰ it undoubtedly creates incentives for attorneys to "win" for their clients rather than merely collect fees. If criminal defense attorneys were compensated based on whether they successfully represented their clients, then presumably they would also be better incentivized to achieve successful outcomes.

Of course, this proposal raises a number of predicate technical and legal questions. First, how would a contingent fee system work in criminal cases? Put differently, what does "compensation" mean in the context of criminal law, where there ordinarily is no *res* or monetary return at the end of litigation? And relatedly, how can we measure "success" in a rigorous way that is neither highly malleable nor susceptible to substantial dispute? Finally, even if contingent fees in criminal cases are a good idea, what about current laws and ethical rules, which uniformly ban this form of representation?²²¹

²¹⁸ One of the authors made a similar point previously, albeit in a much different context. See Neel U. Sukhatme, "Loser Pays" in *Patent Examination*, 54 *Hous. L. Rev.* 165, 201-02 (2016) (arguing against raising patent fees across the board as it would deter both good and bad patent applications and instead suggesting that fees should be differentially priced based on applicant success). One mitigating factor might be that lower fees across the board might deter good attorney work less than bad attorney work, if good attorneys are motivated more by an intrinsic desire to help defendants and hence are less sensitive to fee changes. *Cf.* Jonathan S. Masur, *Costly Screens and Patent Examination*, 2 *J. Legal Anal.* 687, 687 (2010) (noting that high patent costs would "disproportionately select against patents that are harmful to overall social welfare, while leaving beneficial patents almost entirely untouched").

²¹⁹ Peter Lushing and Pamela Karlan analyzed the issue of contingent criminal fees in some detail in the early 1990s; the issue has received little scholarly attention since. Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 *Colum. L. Rev.* 595 (1993) (hereinafter "Karlan, *Contingent Fees*"); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 *J. Crim. L. & Criminology* 498 (1991). See also Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 *Am. Crim. L. Rev.* 25 (2015) (arguing that indigent defense law gives too little control to defendants (principals) to control actions of attorneys (agents)); Lindsey N. Godfrey, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 *Tex. L. Rev.* 1699 (2001); Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 *Chi.-Kent L. Rev.* 583 (1995) (discussing when fees should be shifted from non-indigent defendants to the government).

²²⁰ See *infra* notes ___ and accompanying text.

²²¹ See, e.g., Lushing, *supra* note ___, at 500 & n.1 ("Contingent fees for criminal defense attorneys-agreements under which the attorney's fee depends upon the result obtained in the case-are almost uniformly considered unethical and illegal."); see Karlan, *Contingent Fees*, *supra* note ___, at 1; see also Model Rules of Professional Conduct Rule 1.5(d)(2) (1983) ("A lawyer shall not enter into an

To begin, the lack of a financial prize at the end of criminal litigation²²² does not eliminate the possibility of a contingent fee system for indigent defendants. Contingency litigation does not require a pot of money to change hands from defendant to plaintiff; rather, there simply needs to be a fund of money somewhere from which an attorney can be paid. And that fund already exists: the money that is currently paid to assigned counsel by court systems.²²³

In a contingent fee system for indigent defense, payment to assigned counsel would come from the state, as before. The difference would be that now, payment would not be mechanically determined based on the number of cases assigned or the number of days worked on the case. Instead, payment would turn on performance: how well the attorney did for her client.

In addition, while we believe that funding for indigent defense should be increased, note that a contingent fee system need not require the state to commit more funds than the status quo. It only requires the state change how it distributes those funds in the end -- high-performing assigned counsel are paid more than low-performing ones. Payments could be adjusted so that on average, such a system remains revenue neutral relative to the status quo.

This brings us to the second question: how to measure attorney performance? To begin, we know the outcomes that are most attractive to criminal defendants -- an acquittal or perhaps a nominal penalty, which is adjudicated quickly by the court and which comes with little or no collateral consequences (e.g., no effect on family, employment or immigration status). These are observable outcomes in a case. Hence, one naive approach would be simply to: (1) define what constitutes a good outcome, given the crime charged and the average outcome that other defense attorneys achieve for clients charged with that crime; and (2) compare outcomes across attorneys, giving higher payments to those attorneys who achieve better outcomes.

The obvious problem here is that criminal cases vary in important ways apart from the charged crime, most notably the quality of the evidence, the quality of the prosecutor, and defendant-specific characteristics, among other things. If these differences in cases are not

arrangement for, charge, or Collect . . . a contingent fee for representing a defendant in a criminal case."); Model Code of Professional Responsibility DR 2-106(C) (1980); Standards Relating to the Prosecution Function and the Defense Function: The Defense Function § 3.3(e) (Am. Bar Ass'n 1971) [hereinafter ABA Standards: The Defense Function] (same). Professor Karlan notes that even under current law, if a criminal defense lawyer fails to get all his fees up front, the fee arrangement may turn out to be contingent, since a guilty defendant might be unlikely to pay his fees, especially if he is imprisoned. See Karlan, *Contingent Fees*, *supra* note __, at 599-600.

²²² Professor Karlan notes that in a number of instances, criminal proceedings will actually produce a *res*. See Karlan, *Contingent Fees*, at 602-03 (noting the *res* could be the defendant's ability to continue to work after an acquittal, or a retention of funds in white collar litigation); see also *id.* at 602 n.36 (noting that certain civil litigation also lacks a *res*, most notably civil rights litigation).

²²³ Another argument that has been raised against contingent criminal defense fees is that such claims are typically used by plaintiffs, not defendants, in the civil context. See Karlan, *Contingent Fees*, at 606-08. It is unclear why this should matter -- the logic of contingency and whether it is a good idea do not depend on whether a defendant or plaintiff is relying on this mechanism. See *id.*

accounted for, then attorneys' compensation might depend on case-specific attributes over which they exert little control.²²⁴

There are many reasons to believe that this problem, while legitimate, could be surmounted in practice. First, differences in cases can be controlled for, at least some extent. For example, the analysis we conducted earlier required us to control for case- and defendant-specific differences between donor and non-donor attorneys. Similar procedures could be used to control for differences in assigned cases to specific attorneys. Moreover, as the quantity and quality of electronic court data continues to grow -- and as machine learning algorithms continue to improve, allowing us to better convert that data into control variables²²⁵ -- we will be better able to account for differences across cases assigned to counsel.

Second, even if the value-added by an attorney in a particular case is measured with some noise, on average, we should expect this noise to cancel out if the attorney is assigned enough cases. For example, in any one given case, it is possible that a contingent fee system will overestimate the attorney's value (he gets lucky) or underestimate his value (he gets unlucky). But so long as cases are assigned in a random manner (as they are supposed to be in a wheel assignment system) and each attorney receives a sufficient number of cases, then we should expect that on average, these differences would wash out.²²⁶

Third, the underlying incentive gap here is not unique to the indigent defense context. Rather, closely-related problems have already been tackled in other disciplines. Understanding these approaches might provide insights how to structure contingent fee payments for criminal cases.

Consider, for example, the field of health care policy, where scholars are trying to come to terms with a system that often delivers marginal care at extraordinary cost.²²⁷ Like indigent defense attorneys, many doctors are paid by the government, in the form of Medicare or Medicaid. One feature of these programs that health policy scholars have consistently attacked is "fee-for-service"

²²⁴ One response to this might be -- so what? This is just risk, inherent in any job. That some criminal defense attorneys might get unlucky, and others might get lucky, should not deter us from pursuing a policy that otherwise would increase social welfare.

While this perspective has some appeal, one worry might be that if the risk of the job becomes too high -- if the swings between lucky and unlucky defense attorneys are too great -- then we might deter some risk-averse defense attorneys from entering the assigned counsel system in the first place. This could have a similar negative impact that lowering attorney fees across the board would have. See *supra* note ___ and accompanying text.

²²⁵ One of the authors recently wrote in detail about this in a different context, noting how the growth of electronic medical records and improvements in machine learning algorithms enable us to "approach the comparability between clinical alternatives achieved by well-designed clinical trials." See Neel U. Sukhatme & M. Gregg Bloche, *Health Care Costs and the Arc of Innovation*, 104 MINN. L. REV. ___ (2019) (forthcoming).

²²⁶ From a statistical analysis point of view, case assignment is an example of a repeated event. As the number of events increases, the average of this series of events should converge to the population average.

Of course, one might be concerned about those attorneys who are assigned very few cases (e.g., less than 20 cases) -- this might not be enough for the lucky and unlucky cases to average out. One solution could be to pay attorneys a fixed fee for this first set of cases, then switch to a contingency fee system for all cases above that limit.

²²⁷ (ADD CITES); see Sukhatme & Bloche, note ___, at ___.

-- paying doctors based on what they do, rather than the outcomes they achieve for patients.²²⁸ A common rallying cry is that medicine should instead be more “value-based” -- we should pay for services based on the value of outcomes that are delivered. The health policy literature is replete with analyses on how to design such value-based systems.²²⁹

Similar problems can be found in the field of education policy. Most teachers in the United States are paid by a local or state government, like indigent defense attorneys. The education policy literature is full of discussion of how to maximize our bang for our buck and increase the “value-added” provided by teachers. Approaches include measuring the impact of teachers on student test scores and assessing whether that impact matters in terms of students’ future earnings.²³⁰

While the context is completely different, the underlying incentive gap in indigent defense bears some important similarities to problems in the health care and education contexts. In all settings, the goal is to induce agents (whether doctors, teachers, and lawyers) to act in the best interests of principals (patients, students, and clients). More generally, an entire branch of economics known as contract theory has sprung up to deal with ways to incentivize an agent to act according to a principal’s best interests.²³¹ As such, when designing a contingent payment system for indigent defense, one need not start from scratch -- the copious work already done on solving related problems in these other fields might prove especially useful.

Which brings us to our final question: even if we can design an effective contingent fee system for criminal defense, are there strong normative arguments that justify why the law uniformly bans such payments?²³² The answer, it seems, is no.

One argument why contingent fees should not be imported to the criminal defense context is because they are not needed -- since we already have *Gideon*, indigent defendants are already entitled to paid counsel.²³³ Putting aside that this ignores the interests of non-indigent defendants, who might desire contingency arrangements for various financial reasons,²³⁴ this ignores the benefits that contingent arrangements might offer defendants in ensuring that their counsel are properly motivated to defend their interests. As we have seen, this is particularly important in the indigent defense context.

Another argument against contingent fees is that they will give attorneys “a greater incentive to win, and thus a greater incentive to engage in corrupt practices that enhance her

²²⁸ (ADD CITES).

²²⁹ The literature in this field is too voluminous to cite fully, but a few prominent examples include (ADD CITES). One of the authors has written about how value-based incentives should be imported into the context of patent protection as a way of reducing health care costs and encouraging more substantial innovation. See Sukhatme & Bloche, note __, at __.

²³⁰ See, e.g., Raj Chetty, John N. Friedman & Jonah E. Rockoff, *The Long-Term Impacts of Teachers: Teacher Value-Added and Student Outcomes in Adulthood*, NBER Working Paper No. 17699 (2012).

²³¹ See, e.g., Bernard Salanié, *THE ECONOMICS OF CONTRACTS: A PRIMER* (The MIT Press, 2nd. Ed. 2017); see also Schwall, *supra* note __, at 555-58.

²³² See *supra* note __.

²³³ See *id.* at 603-06.

²³⁴ *Id.*

prospects of winning.”²³⁵ While this argument might have some currency in other contexts, it seems particularly inapt in the indigent defense context. As we have shown, indigent defense counsel could use more incentives to push on behalf of their clients. And as Professor Pamela Karlan notes, “there is no hard empirical support for the proposition that criminal defense lawyers are less capable of resisting these incentives than are their civil counterparts,”²³⁶ who commonly use contingency arrangements.

Finally, a more reasonable fear of contingency fees is that they might induce indigent defense counsel to take bigger risks in order to get paid, perhaps at the expense of their clients.²³⁷ A simple example illustrates the concern. Suppose a criminal defendant is offered a plea deal in which he would serve 3 years in prison for a charged offense. The sentence he will face if convicted at trial is 30 years; he will walk free if he is found not guilty. Suppose the lawyer believes the defendant has a 10% chance of winning at trial -- the defendant’s expected sentence if he goes to trial is then $0 \cdot 0.10 + 30 \cdot 0.90 = 27$ years. Unless the defendant is highly risk-seeking, he will probably want to take the plea deal.

By contrast, now suppose the lawyer gets paid handsomely if the defendant walks free but gets almost nothing if the defendant takes the deal (perhaps because the average sentence for the crime is 2 years and so the defendant is already doing worse than average). If this difference in outcomes is large enough for the attorney, the lawyer will have an incentive to push the defendant to fight a case he should instead plead out.

While such a scenario is possible, there are reasons to believe it will not be a major concern in practice. First, the primary problem in this hypothetical is with the fee structure. In particular, the 3 year sentence and the 30 year sentence were treated as identical for the attorney, even though they were far from identical for the defendant. A better-designed fee structure would “zero-out” a defense attorney’s compensation only if the defendant receives a truly bad sentence (maybe the maximum sentence in the sentencing range).

In addition, it seems unlikely that fees would be changed so drastically as to make pleading disfavored by defense attorneys. Lawyers spend less effort on criminal cases that plead out than that go to trial. This is a significant benefit for indigent defense counsel, who have strong incentives to terminate cases quickly, particularly when they have a full docket. Hence, even if a contingent fee system pushes some criminal defense attorneys away from plea bargains and toward trial, this would likely only counteract the natural tendency that indigent defense counsel have to plead out cases in the first place.²³⁸

²³⁵ *Id.* at 610.

²³⁶ *Id.*

²³⁷ *See id.* at 611-13.

²³⁸ Professor Karlan suggests “a government-paid bonus in cases in which [indigent] defendants obtain favorable outcomes” might be beneficial. She argues, “The combination of caseload and cynicism about clients’ claims of non-culpability creates an incentive for lawyers to pressure their clients into early guilty pleas. Providing some bonus for favorable outcomes could offset this incentive to the extent that such a fee renders lawyers and their clients partial joint venturers” *See id.* 634-35.

VI. Conclusion: Achieving the Ideals of *Gideon*

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."²³⁹ Despite this pronouncement by the Supreme Court, made in the decade prior to *Gideon*, indigent defendants still face a system in which their interests are regularly brushed aside by those who are supposed to represent them. As we have shown, this phenomenon is caused at least in part by poor design: indigent defense systems often create financial incentives for counsel that are at odds with their client's best interests.

We show how this incentive gap is exacerbated by empirically exploring, for the first time, how campaign finance influences attorney appointments in indigent defense cases. We create the first dataset that links donations to trial court judges with criminal court data and show that donor attorneys are appointed to far more cases, and earn far more revenue than non-donors. The apparent prevalence of pay-to-play reveals the depth of the incentive gap and its pervasiveness within the criminal justice system.

We conclude, however, that even if we eliminate pay to play, the underlying problems in the right to counsel will still remain. Instead, we need to dig deeper and attack the incentive gap at its core. We sketch out one way this might be accomplished: by relaxing the long-standing ban on contingency arrangements in criminal law and providing performance-based payments to assigned counsel.

Such an approach better aligns attorney incentives with those of clients. It also stands a better chance of navigating the political headwaters that have stymied past attempts at indigent defense reform and stifled increases in indigent defense funding. Reforms like this are needed if we hope to close the incentive gap and move the right to counsel closer to the ideal that *Gideon* imagined.

²³⁹ See *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion).

Appendix

Table A.1: Cases Assigned / Revenue Earned for Donors to Assigning Judge v. Donors to Another Judge

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Donor	35.37*** (4.58)	36.34*** (8.22)	39.49*** (7.66)	17,329*** (2,450)	16,806*** (3,499)	14,238*** (2,647)
Observations	5,235	5,121	5,235	2,605	2,555	2,605
Adj. R-squared	0.02	0.05	0.10	0.03	0.06	0.23
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 sample is limited to attorneys who contributed to at least one judge during the sample period. 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. "Donor" is a dummy variable for whether an attorney ever donated to a judge. Cols. (2) and (5) include controls for observable 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.

Table A.2: Cases Assigned / Revenue Earned for Each Dollar Donated to Assigning Judge (Limited to Attys Who Donated to Some Judge)

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Total Donated	0.075*** (0.023)	0.078*** (0.023)	0.085*** (0.024)	28.03*** (9.23)	29.43*** (6.74)	28.18*** (5.82)
Observations	5,235	5,121	5,235	2,605	2,555	2,605
Adj. R-squared	0.12	0.15	0.20	0.15	0.17	0.32
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 sample is limited to attorneys who contributed to at least one judge during the sample period. 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 a judge. Cols. (2) and (5) include controls for observable 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.

Table A.3: Cases Assigned / Revenue Earned for Attys Who Donated Multiple Times to an Assigning Judge v. Non-Multiple Donors to that Judge

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Multiple Donor	44.90*** (9.17)	44.73*** (15.74)	47.00*** (15.47)	24,145*** (4,538)	21,042*** (5,198)	17,378*** (3,841)
Observations	10,739	9,743	10,739	4,968	4,736	4,968
Adj. R-squared	0.01	0.06	0.28	0.02	0.07	0.39
Judge, Atty Ctrls	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. "Multiple Donor" is a dummy variable that =1 if an attorney donated multiple times to a judge; =0 for 0 or 1 donations. Cols. (2) and (5) include controls for observable 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.

Table A.4: Cases Assigned / Revenue Earned for Attys Who Donated Multiple Times to an Assigning Judge v. Other Donors

	# Cases: Appointed by Donee Judge			Revenue: From Cases with Donee Judge		
	(1)	(2)	(3)	(4)	(5)	(6)
Multiple Donor	43.90*** (9.18)	45.11*** (16.28)	47.77*** (14.62)	23,325*** (4,558)	22,183*** (5,170)	17,561*** (3,652)
Observations	5,235	5,121	5,235	2,605	2,555	2,605
Adj. R-squared	0.02	0.04	0.09	0.03	0.06	0.23
Judge, Atty Ctrls	NO	YES	NO	NO	YES	NO
Judge, Atty FEs	NO	NO	YES	NO	NO	YES

Notes: This table presents ordinary least squares regressions for all felony cases with indigent defense appointments in Harris County, Texas, from 2004-2018, at the attorney-judge pair level. The sample is limited to attorneys who contributed to at least one judge during the sample period. 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. "Multiple Donor" is a dummy variable that =1 if an attorney donated multiple times to a judge; =0 for 0 or 1 donations. Cols. (2) and (5) include controls for observable 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.