

An Empirical Study of Public Defender Effectiveness: Self-Selection by the “Marginally Indigent”*

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An econometric study of all felony cases filed in Denver, Colorado, in 2002, shows that public defenders achieved poorer outcomes than their privately retained counterparts, measured by the actual sentences defendants received. But this study suggests that the traditional explanation for this difference—underfunding resulting in overburdened public defenders—may not tell the whole story. The authors discovered a large segment of what they call “marginally indigent” defendants, who appear capable of hiring private counsel if the charges against them are sufficiently serious. These results suggest that at least one explanation for poor public defender outcomes may be that public defender clients, by self-selection, tend to have less defensible cases. If marginally indigent defendants can find the money to hire private counsel when the charges are sufficiently serious, perhaps they can also find the money when they are innocent, or think they have a strong case.

I. INTRODUCTION

In 1963 the Supreme Court held that the Sixth Amendment guarantees indigent state court criminal defendants the right to court-appointed trial counsel at state expense.¹ That right became institutionalized in many states by the creation

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¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963). Several states, by constitution, statute or case law, recognized the right of indigent criminal defendants to court-appointed trial counsel at state expense long before *Gideon*. *Betts v. Brady*, 316 U.S. 455, 469–70 (1942). *Gideon* nationalized these views by holding that the Sixth Amendment right to counsel applied to the states by incorporation through the Fourteenth Amendment.

of public defender systems,² and the effectiveness of those systems has been the object of great debate. Much of that debate has taken the form of empirical studies comparing in some fashion the “effectiveness” of public defenders and private criminal defense lawyers, with wildly mixed results. Most, but not all, early studies showed that public defenders were just as effective as their private counterparts, despite the obvious disadvantages of under-funding and economic disincentives.³ But after 1980 many, but not all, studies began to demonstrate just the opposite: that private counsel were substantially more effective than public defenders.⁴

The most startling thing about these studies is not that they reached different results, but rather that almost none of them measured actual sentence outcomes. Instead, they compared things like how soon the defense lawyer first met the client,⁵ the time from filing to disposition,⁶ the number of defense motions filed,⁷

² Public defender systems also pre-dated *Gideon*. The nation’s first appears to have been created in Los Angeles in 1913, followed by New York City in 1917. Ellery E. Cuff, *Public Defender System: The Los Angeles Story*, 45 MINN. L. REV. 715, 721, 727–28 (1961); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986–87). Today, roughly one-third of the states have statewide public defender systems, although there are many others within which regional or local public defender systems operate. Even in those states that are “pure” appointment states, many have statewide standards that govern the appointment and payment of private counsel. Robert L. Spangenberg & Marea L. Beeman, *Toward a More Effective Right to Assistance of Counsel: Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 37 (1995).

³ For a comprehensive review of the early studies, see Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 365–78 (1991). Interestingly, one of those early studies was of felony cases filed in Denver, though, as discussed in the text accompanying notes 5–11 *infra*, this study, like most studies, did not look at actual sentence outcomes. See Jean G. Taylor et al., *An Analysis of Defense Counsel for the Processing of Felony Defendants in Denver, Colorado*, 50 DENV. L.J. 9, 35 tbl.15 (1973) (measuring types of sentences, not lengths of sentences).

⁴ See, e.g., Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in THE DEFENSE COUNSEL 151, 160–62 (William McDonald ed., 1983) (finding that private counsel are more likely to obtain deferred dispositions and charge reductions than public defenders); Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records and Leniency in Bargaining*, 17 J. CRIM. JUST. 253 (1989) (finding that private counsel enjoy a higher trial rate and a lower conviction rate than public defenders).

⁵ See, e.g., STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP’T OF JUSTICE, NCJ-158909, INDIGENT DEFENSE 4 tbl.7 (1996) (reporting that 69% of private-pay clients saw their lawyer within a week after arrest, compared to 47% of indigent clients).

⁶ See, e.g., ROGER A. HANSON ET AL., INDIGENT DEFENDERS: GET THE JOB DONE AND DONE WELL (Nat’l Center for State Courts 1992) (reporting a 160-day delay for private-pay clients and a 103-day delay for indigent clients).

⁷ See, e.g., McConville & Mirsky, *supra* note 2, at 766–70 (summarizing data showing New York City public defenders and court appointed counsel engaged in substantially less motions practice than private counsel).

plea bargaining rates⁸ and conviction rates.⁹ A few studies looked at dismissal rates and/or the number of times defense counsel achieved a sentence reduction, but without quantifying that reduction.¹⁰ But of course what criminal defendants care most about, and therefore what effectiveness researchers should measure, is not how long a case takes to get resolved (though defendants who cannot make bail care about that), or whether the case is plea bargained or goes to trial (though private-pay clients care about that), or even what the dismissal rate is (since, as we show below, very few cases are dismissed). What criminal defendants care most about, and therefore what researchers looking into whether public defenders are as effective as private lawyers should care most about, is the actual outcome of the case—for how long, if at all, was the defendant sentenced to incarceration?

Yet there have been only a handful of studies that looked at actual sentence outcomes, and none of them, to our knowledge, used the regression techniques we use to control for things like the seriousness of the charges.¹¹ Moreover, several of them claim to be sentence outcome studies, but look only at types of sentences and not length,¹² or only at defendants who actually received prison sentences (thus ignoring effectiveness differences in other kinds of sentences, such as jail time given with probation).¹³ In this study, we examine actual sentence outcomes for all charged defendants, regardless of the type of sentence imposed.

Some of the observed differences in previous studies can be explained by spending patterns. In general, public defender spending, on a per client basis, shrank rather dramatically after 1980. For the nine years between 1970 and 1978,

⁸ See, e.g., HANSON ET AL., *supra* note 6, at 45 tbl.11 (finding that public defenders plea bargain 95% of their cases, court-appointed counsel plea bargain 94% of theirs and private counsel plea bargain 91% of theirs).

⁹ See, e.g., *id.* at 45 tbl.12 (finding that defendants with public defenders suffer an 88% conviction rate, court-appointed counsel 83% and private counsel 88%).

¹⁰ See, e.g., *id.* at 41 tbl.8, 43 tbl.10 (finding that public defenders won dismissal in 9% of their cases, court-appointed counsel 9% and private counsel 13%, and that public defenders achieved some charge reduction in 86% of their cases, court-appointed counsel in 87% and private counsel in 84%).

¹¹ See the studies comprehensively discussed in Feeney & Jackson, *supra* note 3. It is not clear why there have been so few studies of actual sentence outcomes. One explanation may be that outcome data was not available in electronic form until relatively recently, and even then researchers face confidentiality barriers that prevent unrestricted access to all the data. See *infra* text accompanying note 44. Another explanation may be that the econometric techniques we use in this study are relatively new, and even when they became standard methods in economics, they were not accessible to most legally trained academics.

¹² See Taylor et al., *supra* note 3, at 19–21.

¹³ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE STATISTICS (1999). This study found that publicly financed defense lawyers (combining public defenders and appointed counsel) were slightly more effective than privately retained counsel, but its outcome results were limited to cases in which the defendant received some incarceration. Because it also found that indigent defendants suffered a substantially higher rate of incarceration, one cannot tell from the reported data whether, if one includes all cases, publicly financed lawyers obtained better or worse outcomes than private lawyers.

total state and local spending on indigent defendants increased almost seven-fold (though admittedly from a low baseline), from \$46 million to \$315 million (in constant dollars).¹⁴ For the twelve years from 1979 through 1990 spending merely doubled.¹⁵

In the meantime, at the very point in 1980 when spending was decelerating, the number of indigent defendants exploded. Until the 1980s, the percentage of indigent defendants nationwide had always hovered under 50%. For example, in 1962, one year before *Gideon*, the indigency rate was 43%.¹⁶ In 1980, seventeen years after *Gideon*, it was still only 48%.¹⁷ But by 1992 it was 80%.¹⁸ In addition, of course, the total number of criminal case filings increased dramatically, more than doubling between 1978 and 1991.¹⁹

The net effect of these patterns is that spending in constant dollars per indigent defendant began to decrease rapidly in the early 1980s. But these spending realities do not completely solve the effectiveness puzzle. In the first place, these are total spending figures, and do not control for variations across jurisdictions. The spending variance between particular jurisdictions is substantial. For example, in fiscal year 2002, Colorado and Kentucky, which had roughly equal populations, spent \$40 million and \$28 million, respectively, on their public defender programs.²⁰

Moreover, as late as 2001, in a study covering eleven different U.S. cities in eight different states, researchers claimed results that showed public defenders were performing just as effectively as private lawyers.²¹ Thus, even after the budget crises of the 1980s, and quite apart from cross-jurisdictional budgetary

¹⁴ Compare BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK ON CRIMINAL JUSTICE tbl.1.2 (1973) with BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK ON CRIMINAL JUSTICE tbl.1.4 (1980).

¹⁵ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK ON CRIMINAL JUSTICE tbl.1.3 (1994).

¹⁶ LEE SILVERSTEIN, THE DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 7-8 (1965).

¹⁷ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 33 (1986).

¹⁸ SMITH & DEFRANCES, *supra* note 5, at 4.

¹⁹ Compare NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984 tbl.35 (1986) (showing a 36% increase in state criminal filings between 1978 and 1984) with NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991 tbl.1.25 (1993) (showing a 51% increase between 1985 and 1991).

²⁰ The Spangenberg Group, State and County Expenditures for Indigent Defense Services in Fiscal Year 2002 (Sept. 2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf> (prepared for the American Bar Association Bar Information Program).

²¹ Roger A. Hanson et al., *Effective Adversaries for the Poor*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT (Malcolm Feeley & Setsuo Miyazawa eds., 2002).

differences, the overall results of public defender effectiveness studies remain mixed and quite unenlightening.²²

It is important to recognize that all measures of effectiveness—even sentence outcomes—may have built-in biases that cut against public defenders, including the possibility that public defender clients may tend to be in custody rather than on bond (putting substantially more pressure on them to plea bargain) and that public defender clients may tend to have more prior felonies (subjecting them to greater penalties if convicted). Although our statistical techniques could in theory control for these variables, the data available to us did not allow us to do so.²³ These potential biases require us to be cautious in the conclusions we draw from any study of public defender effectiveness. Nevertheless, observers continue to examine public defender effectiveness, researchers continue to find contradictory results (though only a few look at actual sentence outcomes), and policy makers want to know what it all means.

In 1997, Professor William Stuntz, then at Virginia and now at Harvard, added a new and important voice to the controversy. In an article in the *Yale Law Journal*, entitled “The Uneasy Relationship between Criminal Procedure and Criminal Justice,”²⁴ Professor Stuntz approached the question of public defender effectiveness not in isolation, but as one piece of the larger system of criminal justice. Stuntz suggested that, because of the interdependence of overburdened prosecutors and overburdened public defenders, the whole mechanism of criminal procedure—designed generally to protect criminal defendants—could be having the unintended consequence of disadvantaging indigent defendants, because their public defenders cannot afford to litigate time-consuming pre-trial motions as frequently as private counsel.

More broadly, Stuntz proposed that all the parts of the criminal justice system enjoy a rough kind of equilibrium, so that increased demands placed on the system at one point will be compensated for at other points. So, for example, as the Warren Court began to constitutionalize various aspects of criminal procedure, state legislatures responded by tightening the appropriations for court-appointed counsel.²⁵ Purse strings are not the only counterbalance to what legislatures may deem overly protective judicially-created criminal procedures. Stuntz also discussed other kinds of legislative reactions, including criminalizing more behaviors and increasing penalties. As he summarized his observations:

²² We recognize that each public defender system not only has its own funding levels, but its own organizational structure, caseloads and legal culture. It is therefore fair to ask what we really learn if public defenders in New York are less effective than private counsel in New York, but public defenders in Los Angeles are more effective than private counsel in Los Angeles.

²³ The electronic form of our data did not contain information about defendants’ bail status or their prior felony record. *See infra* text accompanying notes 44–45.

²⁴ 107 *YALE L.J.* 1 (1997).

²⁵ *Id.* at 54–65.

[G]iven the existing allocation of power between courts and legislatures, our system suffers from a natural tendency toward a series of pathologies—overregulation of the criminal process, proceduralization of criminal litigation at the expense of the merits, overcriminalization, and underfunding of criminal defense . . . these pathologies tend to reinforce one another.²⁶

If we return to the narrower problem of public defender effectiveness, the Stuntz syllogism on this point is rather simple: 1) overworked public defenders file fewer potentially time-consuming pre-trial motions than private counsel; 2) overworked prosecutors, faced with two otherwise identical cases—one with lots of potentially time-consuming motions and one with fewer such motions—and the time to try only one of them, will plea bargain the one with more motions; and 3) private counsel thus tend to enjoy more favorable plea bargains than their public defender counterparts. In a system that has a national plea-bargaining rate of 95%,²⁷ this difference in treatment could be devastating to indigent defendants.

Notice that this is not just a fancied-up version of the “public defenders are overburdened” explanations offered by earlier scholars, though it certainly depends on the assumption that public defenders (and prosecutors, for that matter) are overworked compared to private counsel. It is a profoundly disturbing commentary on the whole relationship between procedure and justice. Procedures designed expressly to protect the accused—often deemed so fundamental as to have become constitutionalized²⁸—may be having the effect of dividing defendants into the procedural haves and the procedural have-nots, with serious substantive consequences.²⁹

²⁶ *Id.* at 65.

²⁷ See MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, NCJ-190103, FELONY SENTENCES IN STATE COURTS 1998 tbl.9–10 (2001) (reporting that 94% of state felony cases are plea bargained); U.S. SENTENCING COMM’N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.C (2001) (reporting that 96.6% of federal felony cases are plea bargained).

²⁸ As Stuntz recognized, the judicial regulation of police, primarily under the Fourth, Fifth and Sixth Amendments, represents only a portion of the vast constitutionalization of criminal procedure. Serpentine constitutionally driven rules govern virtually every aspect of the criminal process, from the selection of grand and petit jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986), through application of the Confrontation Clause at trial under *Crawford v. Washington*, 541 U.S. 36 (2004), and even at sentencing under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and now *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 125 S. Ct. 738 (2005).

²⁹ Another disturbing observation that Stuntz makes is that because procedural litigation is less costly than merits litigation—or, more precisely, because preliminary investigation of a procedural defense (e.g., did the interrogating officer Mirandize the defendant) is typically much less costly than preliminary investigation of a substantive defense (e.g., did the defendant have an alibi)—defense counsel will have significant incentives to litigate often non-dispositive procedural issues to the exclusion of dispositive substantive ones. Stuntz, *supra* note 24, at 37–41. But of course because 95% of criminal cases are plea bargained, what drives most outcomes is not the actual results of procedural or merits litigation but rather counsel’s guesses about those outcomes. But the effect is the same: if counsel’s attention to difficult merit issues gets displaced in some cases by their attention

Notice also that Stuntz does not attribute this difference in outcomes to some qualitative and immeasurable difference in the two kinds of lawyers' skill at the motions, trial or sentencing stages. Instead, he suggests that the difference is expressed at the very heart of the system—at the plea bargaining stage—and that it is not necessarily the result of public defenders being less skilled bargainers than private lawyers. On the contrary, under Stuntz's hypothesis, overworked public defenders are being forced to accept less favorable bargains because those are the bargains overworked prosecutors are offering.

Stuntz argues, quite powerfully, that if his general hypothesis is true, indigent defendants—especially innocent indigent defendants cajoled into pleading guilty by the considerable weight of the plea bargaining machine—would be substantially better off in a system with no procedural protections at all.³⁰

Stuntz's article triggered a wave of commentary, both positive and negative.³¹ Surprisingly, the one thing it did not trigger was any kind of empirical effort to test its validity. We decided to undertake such an effort, and in the process to re-ask the basic effectiveness question, but this time by looking at actual sentence outcomes in a comprehensive econometric fashion.

We tested Stuntz's hypothesis by examining sentence outcomes in every felony case filed in Denver, Colorado, in calendar year 2002. There were 5,224 felony cases filed in Denver in 2002; we were able to examine outcome data for 3,777 cases.³² We used regression analyses to measure the effect that the type of defense lawyer has on sentence outcomes and on the number of procedural motions filed. Regression analysis enabled us to separate the effects of many

to less difficult procedural issues, that displacement will likewise be reflected in the plea bargain. That is, a defense lawyer with a good suppression issue will use the strength of that issue to bargain for a favorable offer, and at the margins the time and energy used in that bargaining may displace the time and energy that could have been used to establish the client's outright innocence. But see *infra* the text accompanying note 72 for criticisms of these arguments.

³⁰ Stuntz, *supra* note 24, at 47–48. This argument about unintended procedural consequences surfaces in many different criminal contexts. For example, there is a whole line of *Miranda* criticisms arguing that rather than protecting suspects from police overreaching, *Miranda* actually gives police the green light to overreach once they have gone through the arguably meaningless safe harbor of the warnings. See, e.g., Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996); William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001); George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091 (2003) (book review).

³¹ See, e.g., Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 790–91 (2003) (book review); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 327–28 (2004); Richard E. Frase, *Book Review: The Search for the Whole Truth About American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785, 792–93 (2000) (book review); Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2313 (1998) (book review); Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057 n.6 (2002). As of April 25, 2005, a Westlaw search disclosed that Stuntz's article had been cited 152 times.

³² We discuss why only 3,777 cases had measurable outcomes in the text accompanying notes 62–64 *infra*.

different factors on our measures of these two variables, and thus to measure the impact of the type of defense lawyer, while controlling for other factors that may affect case outcomes. Specifically, we controlled for the seriousness of the charges against the defendant, whether the case went to trial, and the number of counts filed against the defendant. We also performed regressions with different combinations of controls to ensure that our results were not sensitive to the variables included in the regressions.

What we found was quite surprising. Denver public defenders achieved worse sentence outcomes for their clients than private defense counsel, just as Stuntz predicted, but not for the reason Stuntz suggested—that is, not because private counsel file more procedural motions. On the contrary, we found that public defenders filed marginally more motions than private counsel.³³

We also discovered that there is a surprisingly large segment of defendants who tend to use the public defender when the charges against them are not serious, but manage to retain private counsel when they are faced with serious charges. We call these defendants “marginally indigent.” Their existence arguably skews the effectiveness results against public defenders, because, if private counsel on average handle more serious cases than public defenders, private counsel have more room to be “effective” in the sentences they achieve. So we re-calibrated the data controlling for the seriousness of the felony, but the results remained the same: public defenders still achieved worse outcomes than private counsel.³⁴

These results suggest a non-traditional explanation for reduced public defender effectiveness: perhaps some public defender clients have been self-selected for guilt. If you are a marginally-indigent defendant, and you know not only that you are guilty but also that there is a very high probability that you will be convicted (for example, your crime was captured on videotape), it is not unreasonable to imagine that you will be less inclined to scrape together the money for private counsel than if, for example, you know you are wrongly accused. Thus, public defenders’ lower effectiveness may simply reflect the fact that, on average, they represent defendants with worse cases.

³³ The first of these results was quite surprising to the judge-author of this article, who has presided over many cases with both public defenders and private defense lawyers, and, if forced to guess, would have predicted that public defenders are more effective than private lawyers. On reflection, this feeling may have been the product of experiencing public defenders *at trial*, and, as shown in Figure 2 and as discussed in the text accompanying notes 65–66 *infra*, our data shows public defenders are just as effective as private lawyers at trial. The judge-author was not surprised that public defenders file more motions than private lawyers, as discussed in the text accompanying note 72 *infra*.

³⁴ All of our raw data is on file with the author.

II. METHODOLOGY

A. *General*

Any empirical study of criminal litigation must deal with the twin challenges that almost all criminal cases are plea bargained,³⁵ and that plea bargains are negotiated by the lawyers privately, with no participation by the trial court, and therefore no plea bargaining record (other than the ultimate outcome) from which data might be retrieved.³⁶ As a result, studies of plea bargaining generally fall into three categories: post-bargain interviews of counsel; mock plea bargaining sessions; and analyses of actual cases, with this latter category, as discussed above, using various ways of measuring effectiveness.³⁷

The two former methods have the advantage of being directed at the heart of the plea bargain exchange between the defense lawyer and the prosecutor, but of course they suffer from the disadvantages of being very expensive, artificial and somewhat subjective. The approach of examining actual case outcomes has the advantage of dealing with real cases in an objective manner, but must somehow be able to take into account the innumerable variables that go into the plea bargain, and must also be able to construct inferences from the outcomes back to the plea bargain. Outcome studies are also considerably cheaper, especially if the data is stored electronically, and manual examinations of individual case files can thus be avoided. Such studies can also examine much larger amounts of data than the other two methods.

Here, because we are not interested in lawyer “effectiveness” in any absolute sense, but instead only in the differences between groups of lawyers, many of the confounding variables that present themselves in outcome studies cancel out, or, more precisely, get shuffled into the overall effectiveness measure. For example, the differences within one group—say, the differences in experience between one public defender and another public defender—will get blended together in our measure of aggregate public defender effectiveness.³⁸ Some variables that would be complicating in any study of absolute effectiveness cancel out entirely in a

³⁵ See DUROSE ET AL., *supra* note 27.

³⁶ In fact, in federal court and most state courts, including Colorado, the rules of criminal procedure expressly forbid the trial court from participating in the plea negotiations. FED. R. CRIM. P. 11(c)(1); COLO. CRIM. P. 11(f)(4).

³⁷ See *supra* text accompanying notes 5–13.

³⁸ That is, among the traditional disadvantages from which public defenders may suffer, we might add a lack of experience, as compared to private lawyers. We did not measure experience, but we suspect that it does not play a significant role, at least in our study. Public defenders in Colorado must have a certain amount of misdemeanor and/or juvenile court experience, not to mention a significant amount of training, before they are permitted to handle felony cases. Private counsel, by contrast, are limited only by their ability to attract clients. It is true that many private criminal defense lawyers, especially at the felony level, are former prosecutors or public defenders, but it is also true that there are many public defenders in the Denver office with decades of felony-level experience.

study of relative effectiveness, because we can be confident they impact both groups equally. The problem of consecutive versus concurrent sentences is one example.³⁹

Of course, other variables clearly will have impact across the public defender/private lawyer boundary. For example, as we have mentioned, it appears that privately retained defense lawyers, on average, handle more serious cases than public defenders.⁴⁰ This variable, however, is easily controlled by econometric methods.⁴¹

Our econometric methods also allowed us to make proper inferences from outcome back to plea bargaining. For example, we know that the differences we observed in outcome between public defenders and private lawyers are all happening at the plea bargain point or earlier, because those differences are not seen at later stages of the process (trial or sentencing).⁴²

Finally, the availability of electronic data made the outcome approach especially attractive to us. In Colorado, the progress of every case at the district court (general jurisdiction) level, both civil and criminal, is logged into a state-wide computer system called the Integrated Computerized On-Line Network (“ICON”). ICON contains a wealth of information about each case, including, in criminal cases, the name of the defendant, the names of counsel, the charges, a log of every motion filed, and minute orders (meaning the clerk’s summary) of every ruling on every motion, the progress and outcome of the trial, and the sentence imposed.⁴³

The public does not have access to ICON, and because of privacy issues that include the statutory confidentiality of certain information in sex assault cases,⁴⁴ the economist-authors of this article (and their graduate assistants) were not allowed direct access to the ICON database. Instead, personnel at the state court administrator’s office developed programs to dump categories of non-confidential data into spreadsheets, and the econometrics were performed on those spreadsheets.

³⁹ See *infra* note 52.

⁴⁰ See *infra* fig.3 and text accompanying notes 67–68.

⁴¹ See *infra* figs.6 & 7 and text accompanying note 71.

⁴² See *infra* figs.1 & 2 and text accompanying notes 65–66.

⁴³ The inputs into ICON are not completely standardized, especially across judicial districts. Even within a single judicial district, there are some variations in the input practices of individual clerks. One example, quite pertinent to our study, is that clerks in Denver differ greatly in how they describe motions. Often, the entry will simply say “motion,” sometimes even without indicating whether it was a prosecution or defense motion. For a more detailed discussion of this difficulty see *infra* text accompanying notes 57–61.

⁴⁴ Colorado’s Open Records Act preserves, and preserved in 2002, the confidentiality of the names of victims of sex assault or alleged sex assault, and directs, and directed in 2002, that the custodian of records delete that information from the public record. COLO. REV. STAT. § 24-72-304(4) (2004). Nevertheless, the judge-author of this article, and his staff, had access not only to all the ICON data for every case but also to the individual case files themselves.

Unfortunately, ICON does not contain all the information that is contained in the case files themselves, including, for example, the type of procedural motions. Moreover, in the process of extracting the data from ICON, certain ICON information could not be preserved, including details about when one lawyer might have withdrawn and another entered, whether a particular motion was filed by the prosecution or the defense, and whether the sentences imposed in the case of multiple convictions were imposed concurrently or consecutively. All of this lost or otherwise unavailable information required us to make certain assumptions, and the nature and statistical impact of each of those assumptions is discussed below in the section addressed to the variable impacted by that assumption. When an assumption seemed particularly critical, we took the step of confirming the assumption by examining a sample number of actual case files.⁴⁵

B. *The Three Variables*

The extracted data represented every felony case filed in Denver, Colorado, in calendar year 2002.⁴⁶ Using that data, we measured and then analyzed the relationship between three variables: 1) whether defense counsel was a public defender, a privately retained lawyer, or a court-appointed private lawyer; 2) defense counsel's effectiveness, measured by the actual sentence outcome; and 3) the number of motions filed by defense counsel.

1. Type of Defense Lawyer

We sorted all defense lawyers into three categories: public defender, private lawyer or court-appointed lawyer. The last category consists of private lawyers appointed by the court to represent indigent felony defendants whom the public defender cannot represent because of a conflict. We decided to look at the court-appointed category, as other studies have, as a check on our effectiveness results from the other two categories, with the idea that court-appointed counsel are a kind of cross between public defenders and privately-retained defense counsel. They have private practices and are therefore subject to market forces similar to private counsel, but in their appointed cases they are paid substantially below market rates

⁴⁵ We made two primary assumptions in this study: 1) all sentences were consecutive; and 2) the total number of motions filed was a reasonable relative measure of the number of defense motions filed. We are confident the first assumption, which we know is incorrect, had no impact on relative effectiveness. See *infra* note 52. We tested the second assumption by sampling individual case files. See *infra* text accompanying note 61.

⁴⁶ Colorado is a so-called "information state," that is, felony charges may be brought either by the District Attorney filing a complaint and information or by grand jury indictment, issued by a local or the statewide grand jury. COLO. CRIM. P. 2-3 (felony complaints), 6-6.9 (grand juries). We did not distinguish between cases brought directly by the District Attorney and cases brought by grand jury indictment.

and thus face some of the same economic disincentives as public defenders.⁴⁷ Contrary to our guesses, and as depicted below,⁴⁸ court-appointed lawyers achieved results that were indistinguishable from private counsel, and thus substantially better than public defenders.⁴⁹

In cases where a public defender withdrew and was replaced by a private lawyer, or vice versa, we could not tell which lawyer was responsible for the outcome because the extracted data merely listed all defense counsel of record sequentially, without preserving the date when the first lawyer withdrew and another entered his or her appearance.⁵⁰ We therefore excluded from our analysis the 498 cases in which a different type of defense counsel substituted for original defense counsel.⁵¹

2. Effectiveness

We looked at two related measures of defense counsel “effectiveness,” both grounded on the actual sentence that a defendant received. For each case, we compared the actual sentence a defendant received (in years) to the maximum sentence he or she faced (in years), in both measurements presuming consecutive sentences for cases involving multiple counts and capping consecutive sentences at 110 years.⁵² In one measure, which we call “absolute sentence reduction,” we

⁴⁷ In 2002, court-appointed counsel, called “alternative defense counsel” in Colorado, were paid \$45/hr for out-of-court time and \$55/hr for in-court time, with certain presumptive caps depending on the seriousness of the charges. Chief Justice Directive 04-04, Attachment D-2 (on file with author) (rates effective from Jan. 1, 2001 through Feb. 1, 2003).

⁴⁸ See *infra* figs.6 & 7.

⁴⁹ Conclusions about the effectiveness of appointed counsel as compared to the effectiveness of public defenders might bear on the hotly debated question of privatizing public defender systems. See, e.g., Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993). But because of the relatively small number of court-appointed cases in our study, we are reluctant to put too much weight on these particular findings. See *infra* fig.1 (only 214 court-appointed lawyer cases out of a total of 3,777).

⁵⁰ See *supra* text accompanying notes 44–45.

⁵¹ This might explain why our appointed counsel numbers were so low. It is quite common for public defenders to be appointed early on in a case, before a conflict becomes apparent. By excluding multiple defense lawyer cases, we no doubt excluded a great number of court-appointed cases where the court-appointed lawyer was appointed after the public defender discovered a conflict.

⁵² We assumed consecutive sentences because the extracted data did not preserve whether the actual sentences imposed were consecutive or concurrent. Thus, for example, if a defendant received a six-year sentence on one count and a four-year sentence on another count, we counted that as a ten-year sentence. Because we are examining the *relative* effectiveness of public defenders and private counsel, we do not believe this assumption about consecutive sentences infects the integrity of our comparisons. In fact, if private counsel clients are more frequently given concurrent sentences than public defender clients (which may very well be the case because of prior record, see *supra* text accompanying note 23), our assumption that all sentences are consecutive is actually understating private counsel effectiveness. We capped consecutive sentences at 110 years, the same arbitrary number we used for life sentences. See *infra* text accompanying note 56.

simply subtracted the sentence received from the sentence faced. In the other measure, which we call “percentage sentence reduction,” we divided the absolute sentence reduction by the total sentence faced. We looked at percentage sentence reduction in order to test whether one type of lawyer or the other might tend to have more serious cases, and therefore have more room for absolute sentence reduction, although, as discussed below, we also examined effectiveness after controlling for the seriousness of the original charges.⁵³

Acquittals or dismissals were counted as zero. Probationary sentences not coupled to any jail time were also counted as zero. Probationary sentences coupled with jail time were counted as the jail time.⁵⁴ Half-way house sentences (in Colorado, called “community corrections” sentences) were counted as 120 days of incarceration, because in Colorado the typical protocol is that a community corrections defendant spends 120 days in residential custody, then moves to non-residential status.⁵⁵ Life sentences were counted as 110 years.⁵⁶

3. The Number of Motions Filed

As we have already discussed, the electronic form of the data we examined did not preserve the name of the motion, or even whether it was a defense motion or a prosecution motion.⁵⁷ Nor were we able to distinguish pre-trial motions from post-conviction motions, which explains why our motions data seems high.⁵⁸ Neither were we able to determine, in cases that actually went to motions hearings,

⁵³ See *infra* figs.6 & 7.

⁵⁴ We made no distinction between a jail sentence and a prison sentence, and in both cases measured the sentence exclusively by its length.

⁵⁵ As with jail versus prison, we made no distinction between the 120 days of assumed custody in community corrections and 120 days in jail or prison. We recognize that a large number of defendants who receive community corrections fail, often walking away from the programs during the non-residential phase, and therefore picking up new escape charges. We did not consider this reality in treating all community corrections sentences as 120 days of incarceration, for the same reason we did not consider the fact that many defendants fail on probation. Instead, our study focuses on defense lawyer effectiveness as measured by the *initial* sentence. For that same reason, we did not look at reconsidered sentences, outcomes on remand after a successful appeal, early release on parole or parole violations.

⁵⁶ In Colorado, first degree murder carries, and carried in 2002, a minimum sentence of life without the possibility of parole, and a maximum sentence of death. COLO. REV. STAT. § 18-1-105(1)(a)(I) (2002) (current version at COLO. REV. STAT. § 18-1.3-401(1)(a)(I) (2004)). There were no death penalty cases filed in Denver in 2002. *But see infra* note 60. Certain sex offenses carry, and carried as of October 1, 2002, indeterminate sentences, with the court imposing a sentence of a certain minimum length to life. COLO. REV. STAT. § 18-1.3-904 (2004). There were nineteen such sentences in our data, and we counted those sentences as an arbitrary 25% of the difference between the designated minimum and 110 years.

⁵⁷ See *supra* text accompanying notes 43–45.

⁵⁸ Compare *infra* fig.8 (showing an average of roughly twenty motions were filed per case, including all motions of any type, pre- and post-judgment), with *infra* note 61 (showing an average of roughly two motions per case, but which was limited to pre-judgment motions).

whether private lawyers spent more time litigating their motions than did public defenders, as Stuntz hypothesizes overworked prosecutors will assume.⁵⁹

Thus, to test Stuntz's assumption that public defenders file fewer potentially time-consuming motions than private counsel, we simply counted all the motions filed in each case. Although this is not the perfect measure of defense counsel's motions activity, we believe it is a reasonably good one, given that in the ordinary case the range of prosecution motions is rather limited, and there is no reason to suspect that prosecutors file more or less motions depending on whether the defense lawyer is a public defender or private.⁶⁰ Thus, the number of motions filed by the prosecution will tend to cancel out from case to case, leaving the total motions filed as a reasonably good relative indicator of the number of motions filed by the defense.⁶¹

III. RESULTS

A. General Results

Table 1, below, lists our general data: the number of cases filed, the number of cases with outcomes that could be examined, the overall plea bargaining rate, and the distribution of defense counsel.

Of the 5,224 felony cases filed in Denver in 2002, we examined outcome data on 3,777 cases. The difference represented the multiple defense lawyer cases we excluded,⁶² cases in which defendants had failed to appear at or before trial and

⁵⁹ With a 97.5% plea bargaining rate, such motions hearings are exceptional, though not quite as exceptional as trial, since some cases settle after the motions hearing.

⁶⁰ We can imagine that a prosecutor might respond to a glut of defense motions by tending to file more motions of his or her own, and so by counting the total number of motions we may, in effect, be exaggerating any difference between the number of private and public defender motions. But our sampling proved otherwise. *See infra* note 61. We should also note that in death penalty cases both sides typically file motions that often exceed, by an order of magnitude or two, the number filed in ordinary cases. As a result, any general study of the number of motions filed in criminal cases should probably deal with death penalty cases separately. There were no death penalty cases filed in Denver in 2002, but in Colorado the prosecution has sixty days after arraignment to declare for death. COLO. CRIM. P. 32.1(b). Thus, defense lawyers sometimes defend a first degree murder case as if it were going to be a death penalty case, until the sixty days passes and the prosecutor does not file for death. The cases we examined may very well have included some of these kinds of "presumptive" death penalty cases.

⁶¹ To give ourselves comfort about this assumption, we also sampled fifty individual case files. The prosecution filed pre-trial motions in only four of the fifty sample cases. In particular, there were a total of ninety-three pre-trial motions filed in our sample of fifty cases, eighty-nine of them by the defense. In addition to excluding post-conviction motions in our sample, we also excluded the motions to dismiss counts and motions to amend or add counts filed regularly by the prosecution when, as part of a plea bargain, some counts are dismissed and/or added. In any event, we can be confident that we are, in fact, getting an accurate measure of the relative number of defense motions by counting all motions.

⁶² *See supra* text accompanying notes 50–51.

were at large,⁶³ and cases that had not yet resolved by the time we examined the data in May 2004.⁶⁴

Table 1: General Data

Number of cases filed	5,224
Number cases with measurable outcomes	3,777
Plea bargaining rate (percent)	97.5
Percentage of public defenders	65%
Percentage of private counsel	29%
Percentage of court-appointed counsel	6%

The 97.5% plea bargaining rate is somewhat higher than both the federal and state national averages.⁶⁵ This high rate was most likely the result of the Denver Drug Court, which, like most drug courts, had a disposition rate that was close to 100%.

Tables 2 through 6, which appear in the appendix to this article, summarize the statistical detail from our various pair-wise regressions. All the regression detail is on file with the author.

B. Distribution by Type of Lawyer: Seriousness as Affecting Distribution; Marginally Indigent Defendants

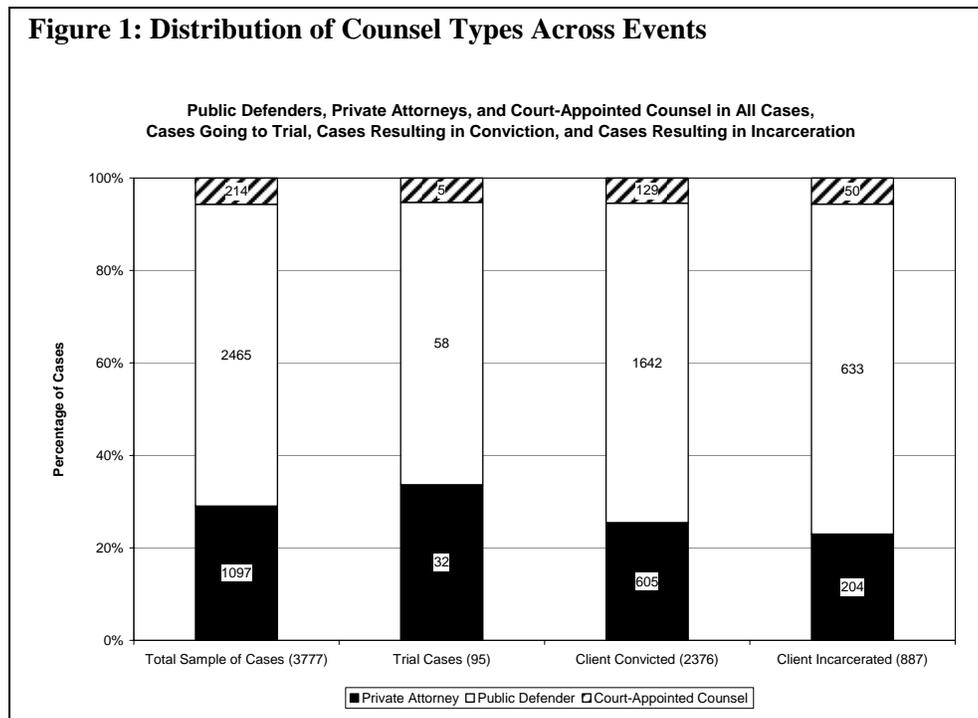
As shown in Table 1, roughly 65% of the cases were handled by public defenders, 29% by private counsel and 6% by court-appointed counsel. As shown in Figure 1, below, this general distribution persisted no matter where along the process we looked. That is, the same distribution appeared when we looked at tried cases instead of all cases (Column 2), meaning that public defenders, private counsel and court-appointed counsel go to trial roughly at the same frequency (with private counsel enjoying a somewhat higher trial rate).

⁶³ As of August 14, 2004, there were 364 cases from 2002 in which defendants were still at large. This number includes post-trial warrants (that is, defendants who absconded either between the verdict and the imposition of sentence or absconded post-sentence from probationary or other non-custodial sentences).

⁶⁴ There were 216 unresolved cases, but more than half of these had already been eliminated because they had multiple defense counsel. Cases that were consolidated into other cases would also not have their own outcomes. In addition, there are a few case numbers that are not assigned to individual cases, but instead are reserved to represent the statewide grand jury, the Denver grand jury and miscellaneous criminal proceedings, including things like extraditions and witness renditions. There was also one pro se case.

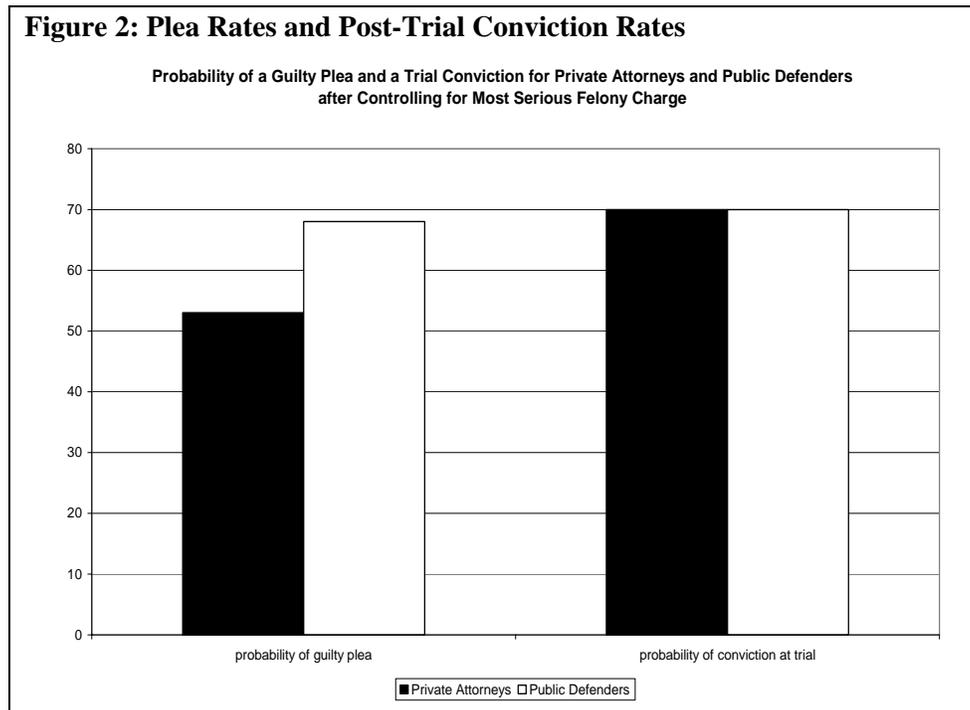
⁶⁵ See *supra* note 27.

The same pattern appeared when we looked at convictions (Column 3), meaning that public defenders, private counsel and court-appointed counsel enjoy the same relative success arguing against convictions (with private lawyers enjoying a slightly lower conviction rate). Because this data does not exactly tell us that this same rough equivalence was enjoyed *at trial* (since “convictions” include guilty pleas), we ran regressions on conviction rates only for cases that went to trial, and in fact public defenders and private lawyers perform identically in terms of their conviction rates at trial (Figure 2, below).



And, finally, the same pattern appeared when we looked only at cases in which convicted defendants (whether by plea or verdict) were sentenced to some incarceration (Figure 1, Column 4), meaning that public defenders, private counsel and court-appointed counsel enjoy the same success in arguing against incarceration at sentencing (with private counsel enjoying a slightly lower incarceration rate).⁶⁶

⁶⁶ Of course this is true only with respect to *whether* the defendant was incarcerated. It does not necessarily answer the much more refined question of the *amount* of incarceration. We do not actually know whether the difference in the amount of sentence we observed between the two groups is entirely attributable to differences at the moment of the plea bargain; in theory, the difference could be attributable to differences in how effective each group was at the sentencing hearing. But the practice of sentence bargaining greatly reduces the impact defense lawyers can have at the sentencing hearing. In 2002, Judge Hoffman was the only judge, of the seven judges on the Denver District

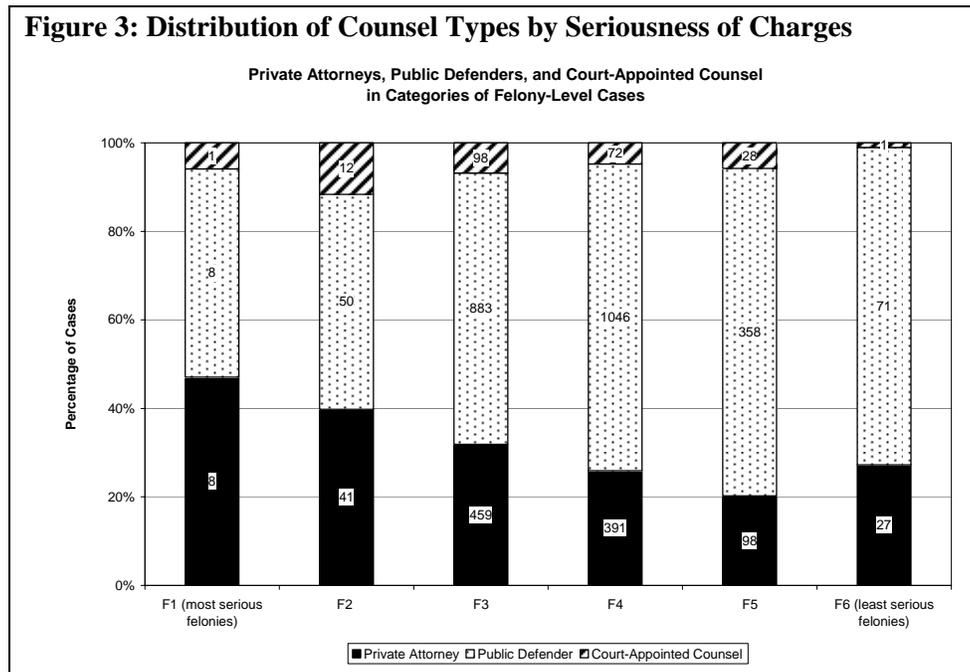


But when we divided the cases based on the seriousness of the charges, a surprisingly different pattern of lawyer distribution emerged. As shown in Figure 3, below, private counsel's representation shot up from 29% overall to 42% of defendants charged with class one felonies.⁶⁷ That share of representation continued to be above the case-wide average until class four felonies, decreasing rather linearly as the seriousness of the crime decreased.⁶⁸

Court criminal bench, who did not allow sentence bargaining. Thus, in roughly 6/7 of the plea bargained cases in 2002, the outcome, or some range of permissible outcomes, was regularly subsumed in the bargain itself.

⁶⁷ Felonies in Colorado are, and were in 2002, divided into six classes, with the most serious being class one (first degree murder and some kinds of kidnapping, all with a sentence of either death or mandatory life in prison without parole) and the least serious being class six (e.g., criminal trespass, with a presumptive prison sentence of six months to eighteen months). COLO. REV. STAT. § 18-1-105 (2002) (current version at COLO. REV. STAT. § 18-1.3-401(1)(a)(V) (2004)). The bulk of drug convictions, which represent the bulk of all convictions, are at the class four and five levels (presumptive prison sentences of two to eight years and one to three years, respectively).

⁶⁸ See *infra* fig.3. At the class six felony level there was a small reversal in this trend that the less serious the charged offense, the more likely the public defender will be involved. One explanation of that reversal might be that with these lowest-level felonies, misdemeanor offers are fairly routine, are often made at the first or second appearance in county court, and private lawyers can be engaged for minimal amounts to shepherd those misdemeanor pleas.



Thus, it appears that being “indigent” or “non-indigent” is not nearly as binary an inquiry as one might imagine. Significant numbers of criminal defendants (significant enough to account for the distribution patterns noted in Figure 3) claim indigency when faced with less serious felony charges, but seem to manage to scrape together enough money to hire private counsel when the charge is more serious. This notion of “marginally indigent” defendants makes some sense, both as a matter of procedure and as a matter of economic theory.

In Colorado, the chief justice of the state supreme court issues directives establishing presumptive levels of indigency for various purposes, including representation in criminal cases by the state public defender.⁶⁹ Public defenders are required to obtain financial affidavits from prospective clients, but generally take their client’s word and do not attempt to verify the financial information on the affidavit, unless certain red flags appear, such as a supposedly indigent defendant being able to post a significant bond. If the financial affidavit shows that a defendant meets the presumptive indigency guidelines, the public defender is routinely appointed without further inquiry by the judge, either into the accuracy of the financial affidavit or into extra-affidavit aspects of a defendant’s finances that might rebut the presumption of indigency. In other words, whether the presumption of indigency will apply is largely in the defendant’s hands, and once it

⁶⁹ Those indigency standards are contained in Chief Justice Directive 04-04, *supra* note 47.

attaches it is, for all practical purposes, irrefutable.⁷⁰ Thus, to a great extent, defendants, who may not really be indigent under these standards, control whether they will be treated as indigent.

The notion that there are criminal defendants who actually make choices about whether to rely on the public defender or pay a private lawyer seems perfectly obvious to the economist-authors of this article. Economics is the study of human choice, and all of us are constantly barraged with a continuing stream of choices, and therefore tradeoffs. Those of us trained in the law might think of indigency as a binary inquiry simply because a binary decision must be made about whether to appoint the public defender in a given case. But, of course with some reflection, even the least economically inclined of us should be able to appreciate that there is a wide range of financial conditions within the category of “indigent.” Some indigent people, and, indeed from our data, a significant number, will resort to their own resources (or their friends’ and family’s resources) to hire a private lawyer if the charges are serious enough, and if they believe a private lawyer will keep them from the penitentiary. To an economist, it is no news that, to the extent they are able, marginally indigent defendants, just like all people, act in their perceived self-interest.⁷¹

C. Effectiveness

Without controlling for the seriousness of the crime, our study found that public defenders are substantially less effective than private lawyers, as detailed in Figures 4 and 5, below. An average public defender client was sentenced to almost five more years of imprisonment than the average private lawyer client.

But because private lawyers also tend to handle more serious cases, this gross measure of effectiveness may overstate private counsel’s effectiveness, since, as mentioned above, serious cases leave more room to be “effective” by our measure. So we re-examined the data, this time controlling for seriousness. The results, shown in Figures 6 and 7, below, were that public defenders still performed

⁷⁰ We do not by these observations necessarily mean to criticize these procedures. Every public defender system faces the difficult challenge of balancing the cost of creating more refined eligibility sieves—both in dollars spent and in the risk of violating *Gideon*—with the benefits of culling non-indigents from the system.

⁷¹ We recognize there is a tautological aspect to our findings that marginally indigent defendants facing serious charges self-select away from the public defender. They must do so because they believe private lawyers are more effective. Other factors that go into the decision of whether to retain private counsel, however, are whether the marginally indigent defendant is guilty and whether he or she believes the case is winnable. *See infra* text accompanying notes 74–75. We might disagree about whether a general preference by felony defendants for private lawyers reflects an accurate assessment of reality or simply the recidivist complaints of the two-thirds of criminal defendants who had been represented by the public defender previously. But we should all be able to agree that, to the extent a marginally indigent defendant’s guilt is a factor in his or her decision about whether to hire a private lawyer, that is one factor about which the defendant has special expertise. *See infra* note 75 and accompanying text.

substantially below the levels achieved by private counsel. The average public defender client was sentenced to almost three more years of incarceration than the average private lawyer client facing an equally serious charge.

Figure 4: Absolute Effectiveness

Average Reduction in Sentence for Private Attorneys, Public Defenders, and Court-Appointed Counsel

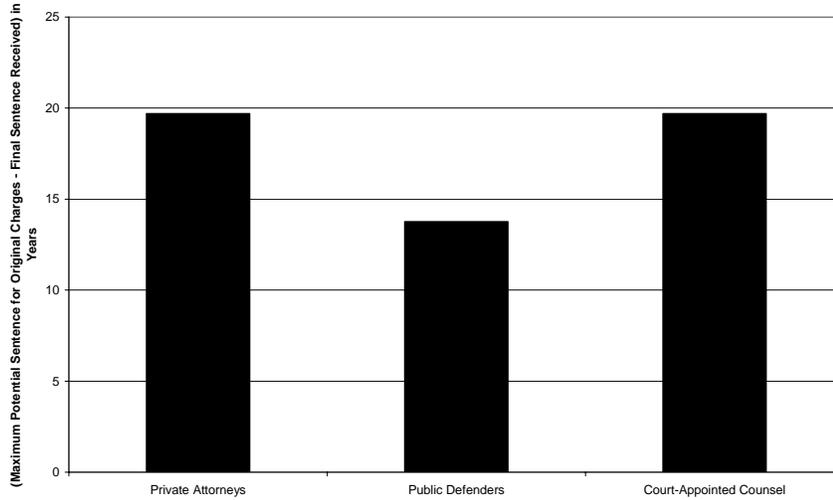


Figure 5: Percentage Effectiveness

Percentage Reduction in Sentence for Private Attorneys, Public Defenders, and Court-Appointed Counsel

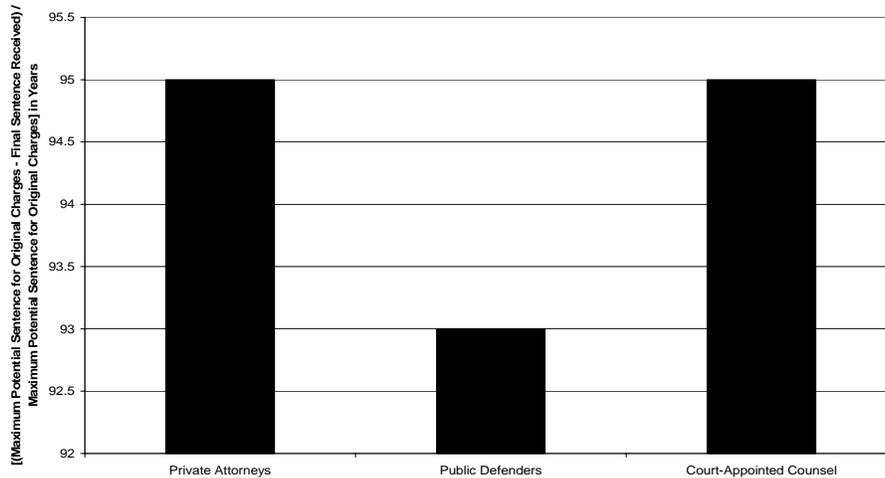


Figure 6: Absolute Effectiveness after Controlling for Most Serious Felony Charge

Average Reduction in Sentence for Private Attorneys, Public Defenders, and Court-Appointed Counsel after Controlling for Most Serious Felony Charge

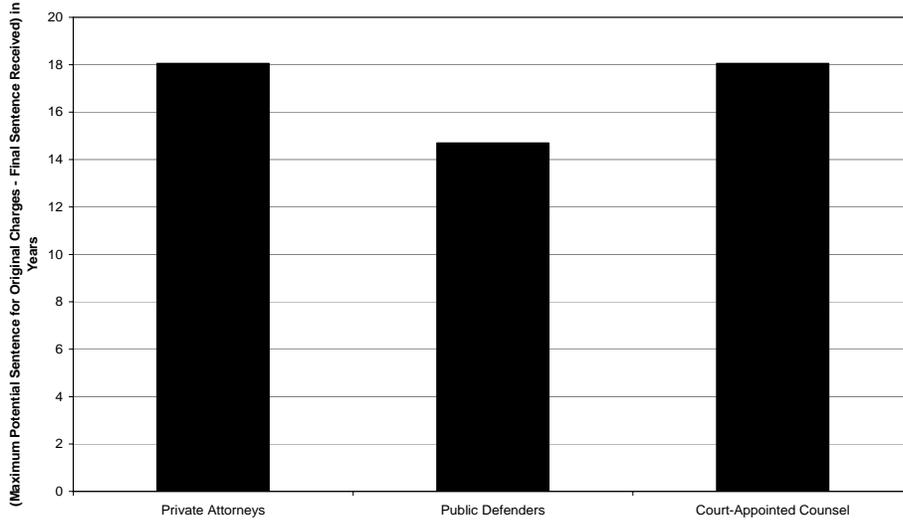
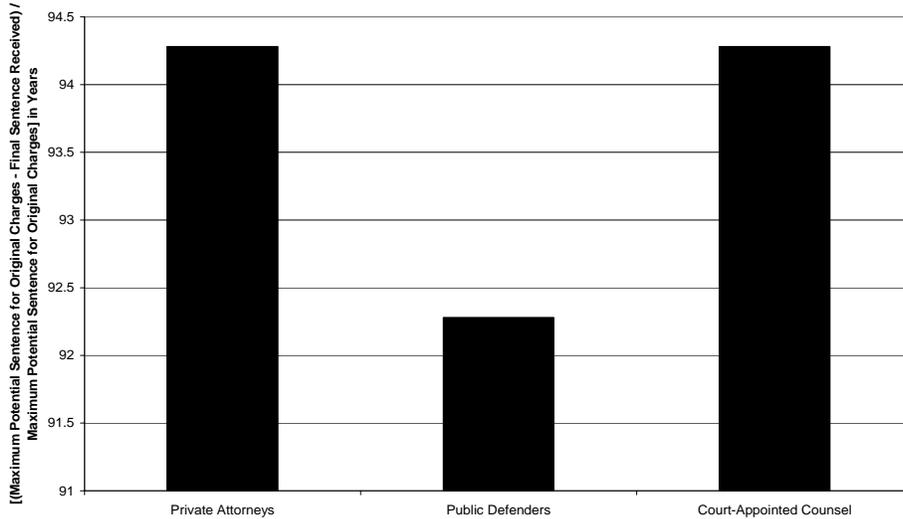


Figure 7: Percentage Effectiveness after Controlling for Most Serious Felony Charge

Percentage Reduction in Sentence for Private Attorneys, Public Defenders, and Court-Appointed Counsel after Controlling for Most Serious Felony Charge

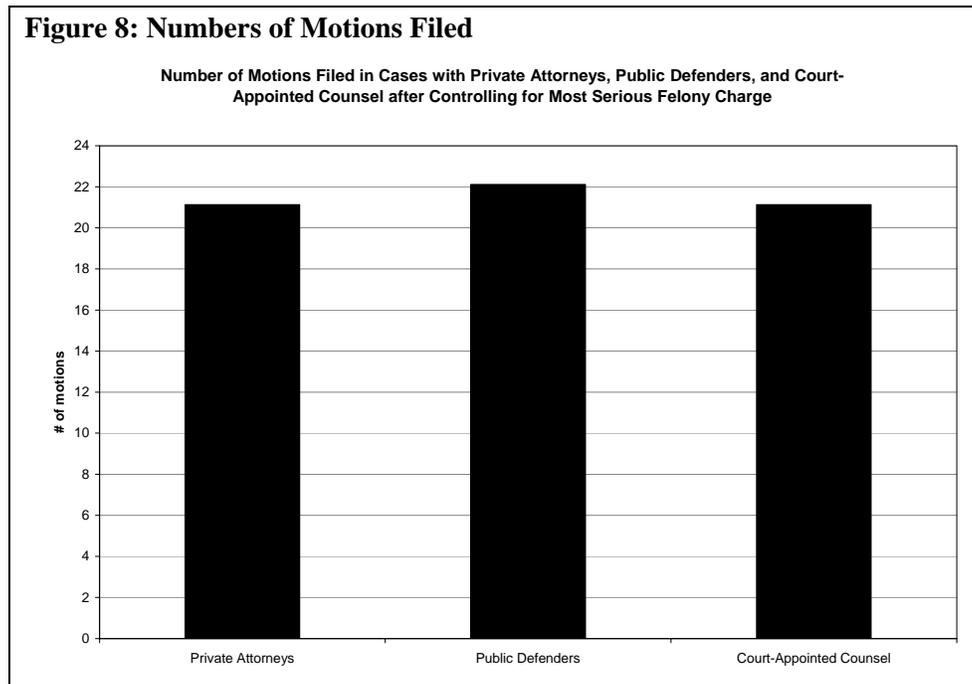


Thus, our results have confirmed Stuntz's assumption: public defenders are less effective than private lawyers. But why? Is it because, as Stuntz hypothesized, that private lawyers file more procedural motions than public defenders?

D. The Number of Motions Filed

As shown in Figure 8, below, our study revealed that, after controlling for seriousness, public defenders filed marginally *more* motions than private counsel. Although the aggregate difference was not great—only about one motion per case—the causal difference was statistically significant. That is, we can be confident that in Denver, a public defender, just by being a public defender, is very likely (to a confidence level of 95%) to file one or two motions more than his or her private counterpart.

This result was not at all surprising to our judge-author. As Stuntz himself recognized, many procedural motions are easy to file, relatively easy to investigate and relatively easy to litigate.⁷² In the real world, a whole host of stock motions are filed by public defenders in virtually every case as a matter of routine. Often, these motions take very little time to prepare or to litigate.



⁷² See *supra* note 29.

These realities are reflected in judges' setting practices. Most of the judges in the Denver district court give counsel on both sides only 20 days after the arraignment to file motions, and set most motions to be heard in a single afternoon. Although there are of course exceptions, and even predictable exceptions (e.g., sex assault cases with Rule 404(b), rape shield and/or child hearsay motions), it is the judge-author's experience that the vast majority of all felony motions are in fact litigated in a single afternoon.

Moreover, contrary to Stuntz's assumption, "procedural" motions are not always non-dispositive. For example, motions to suppress evidence in drug cases are, by their very nature, almost always potential case-winners. If the drug evidence gets suppressed, few cases can proceed. Experienced public defenders don't need much time to assess whether they have an arguable motion to suppress. It is difficult to imagine that any overworked prosecutor would really believe that he or she should offer a better deal to a private lawyer than a public defender simply because the public defender is less likely than the private lawyer to invest the relatively small amount of time needed to file a stock suppression motion, then review the discovery to see if the case has a winnable suppression issue. If the relative willingness to file then litigate procedural motions cannot explain the substantial difference we have detected between public defender and private counsel outcomes, what can? Our discovery of "marginally indigent" defendants suggests an answer.

IV. BAD FACTS, NOT JUST OVERWORKED LAWYERS

In seeking to discover hidden forces that drive case outcomes—that is, in 95% of the cases, the forces that drive plea bargains—it is sometimes easy to overlook the obvious. Trials are about truth-finding, and plea bargaining is about lawyers, defendants and victims making predictions about truth-finding. Bad facts will tend to get defendants convicted quite apart from the skill of their lawyers, or the lack of skill of the prosecutors (assuming a minimum level of prosecutorial competence). Conversely, weak facts, coupled with the high burden of proof, will tend to result in acquittals, again quite apart from the skill of the lawyers (assuming a minimum level of defense competence). Thus, in a system that tries only 5% of all criminal cases, the most important skill for a lawyer on either side is the ability to evaluate a case before entering into plea negotiations, not the ability to shine at trial.⁷³

We concede that overworked public defenders may have less time and less economic incentive to evaluate cases accurately. But our results suggest that even if we posit equal skill in case evaluation, public defenders will still be less

⁷³ We recognize that trial skills—both yours and the other side's—are themselves factors that go into the plea bargaining decision. But the point here is that trial skills, like motions skills, are important only at the margins. The best lawyer in the world can only work with the facts as they are.

effective—not because they are bad or overworked lawyers, but simply because they attract less winnable cases.

If it is true, as our results suggest, that a large number of criminal defendants are “marginally indigent” (that is, that they have some choice about whether to claim indigency or hire a private lawyer), then that decision will not only depend on the seriousness of the offense but also on the defendant’s perceived risk of conviction. Let’s consider the two extremes. If a marginally indigent defendant is charged with first degree murder and is innocent, and assuming he believes (rightly or wrongly) that private lawyers are more effective than public defenders,⁷⁴ he will have the maximum incentive to try to raise funds to hire a private lawyer. But if that same marginally indigent defendant is charged with a misdemeanor offense witnessed by Mother Theresa, he will have no incentive to waste his and his friends’ and family’s resources on a private lawyer. Thus, assuming a sufficient number of marginally indigent defendants, public defenders will tend, on average, to get less serious and less winnable cases, which is exactly what our data shows.

Granted, the seriousness of the crime could have more impact on a marginally indigent defendant’s decision about hiring counsel than the strength of the case. For example, one could imagine that a defendant whose crime was caught on videotape, and/or to which he confessed, might still want to hire private counsel if he believed private counsel could achieve a better sentence. But as discussed above, our data show there is only a small difference between private counsel and public defenders at arguing sentences,⁷⁵ a fact about which we may assume criminal defendants, as the consumers of these services, are generally aware. In the end, a marginally indigent defendant must consider the trade-offs between any small increase in the chances for a more favorable result and the costs of hiring private counsel.

Of course, there are many truly indigent defendants, and therefore some innocent indigent defendants, who could not hire private counsel no matter how much they believe it might be in their best interest. Also, defendants are not perfect predictors of the strength of the prosecution’s case. However, if we assume the system is reasonably reliable, and therefore that case outcomes have something to do with factual guilt, defendants are usually in the best position of anyone to assess their case since they usually know whether or not they are guilty.⁷⁶

⁷⁴ See *supra* note 71.

⁷⁵ See *supra* text accompanying note 66.

⁷⁶ We recognize, of course, not only that various procedural and evidentiary rules can affect the outcome of a case quite apart from the factual guilt of a defendant, but also that “factual guilt” is not the entire inquiry in a system in which the defendant’s state of mind is half of the definition of the crime. Significant differences in outcome can happen, and happen regularly, depending on the jury’s view (or, more often, counsel’s predictions of the jury’s view) of the defendant’s state of mind. Whether a defendant acted intentionally, knowingly, recklessly or negligently is very difficult to determine, and therefore a jury finding on that issue is very difficult to predict, even for the defendant.

If the status of “indigent” is really as ambiguous as our data suggests, the choices available to defendants could have a lot to do with the measured outcome differences between public defenders and private lawyers. Public defenders are not just overworked and underpaid, they may represent clients who, by self-selection, tend to have worse cases.

V. OTHER EXPLANATIONS

There may well be other explanations for our results, besides the proposition that public defender clients self-select for guilt. For example, because our methodology (and any methodology short of interviewing the bargaining lawyers⁷⁷) was unable to measure the inherent strength of a case, other than to see what comes out of the plea-bargain machine, we cannot actually tell whether the outcome difference is due to differences in the strengths of the cases, or because public defenders are less effective plea bargainers. That is, it may be that, despite our discovery of marginally indigent defendants, these outcome differences can be explained by the traditional disadvantages of public defenders—being overworked and underpaid—disadvantages expressed directly in the plea negotiations. Although this alternative explanation is possible, it seems unlikely, given our effectiveness results across events (Figure 1). There is no apparent reason, other than the Stuntz effect, why public defenders would be just as effective as private lawyers at every phase of the process except the plea-bargaining phase.

That brings us to another explanation: perhaps the Stuntz effect is operating despite our data on the number of motions filed. After all, the critical difference posited by Stuntz is not that prosecutors predict private counsel will file more motions, it is that prosecutors predict private lawyers will file more *time-consuming* motions. Of course, our data was unable to measure whether this prediction is accurate. Our use of the sheer numbers of motions as a measure of the amount of time those motions consume is, as we have already discussed, problematic.⁷⁸ If we were able to discard the motions that really pose no threat of consuming significant litigation time, including the boiler-plate motions that come from public defender brief banks, perhaps private lawyers really do file more potentially time-consuming motions than public defenders. More investigation is needed to ferret out not only the number of filed motions, but the number of potentially time-consuming motions and, perhaps most importantly, whether private lawyers actually spend more time litigating motions than public defenders.

Even if we can correctly conclude from our data that the Stuntz effect is not happening—that is, that overworked prosecutors do not anticipate private lawyers will file more time-consuming motions than public defenders—a kind of Stuntz effect might still be happening from the prosecutorial side. Think of two virtually identical cases, in which the *prosecutor* has filed virtually identical motions, one in

⁷⁷ See *supra* text accompanying note 64.

⁷⁸ See *supra* text accompanying note 60–61.

which the defendant is represented by a public defender and the other in which the defendant is represented by private counsel. If the overworked prosecutor believes the private lawyer is more likely than the public defender to resist the prosecutor's motions at a time-consuming hearing, he or she will tend to offer the private lawyer a better disposition. That is, anytime there are filed motions, regardless of the source of those motions, and a difference in the capacity of defense counsel to take those motions to hearing, that difference could drive a difference in plea-bargained outcomes.

As discussed above, however, this syllogism posits assumptions about the real world of motions litigation that simply are not accurate, at least not in Denver. Motions typically do not take days to litigate. Regardless of who files them, many procedural motions are in fact case-ending if won by the defense, and public defenders seem just as willing to file and litigate those case-ending motions as private lawyers.⁷⁹ Perhaps most importantly, even if the Stuntz effect is operating, there is no way to tell whether the overworked prosecutor offered the private lawyer the better deal because of fear of extended motions litigation, or because the private lawyer simply had a better case on the merits. Thus, it is possible that all three effects operate in tandem to drive the outcome difference: the Stuntz effect, the traditional disadvantages faced by public defenders, and the self-selection-for-guilt phenomenon we posit in this article. The mechanics of our study do not allow us to distinguish completely between these three potential causes.

There is another explanation for the outcome difference, one that ends up being a traditional kind of criticism of Stuntz's procedural/substantive approach. In a system where public defenders and prosecutors have 20 times more cases than they can possibly try, it is the threat of a time-consuming *trial*, not the threat of a relatively less time-consuming motions hearing, that drives plea bargains. Assuming private lawyers are in a position to try more of their cases than public defenders—indeed, private lawyers may have an economic incentive to try cases—this ability would give private lawyers a tremendous advantage in the plea bargaining process. And, in fact, most studies have found that private lawyers are more likely to take cases to trial than public defenders,⁸⁰ including ours.⁸¹

We also cannot ignore what may be the biggest disadvantage facing public defenders, and one we've mentioned only in passing: their clients tend to be in custody awaiting trial, rather than on bond. In the end, it is the defendant's decision whether to accept a plea offer, and the prospect of having to spend months in custody awaiting trial must have a significant impact on the plea decision, and perhaps even on the plea offers made by prosecutors. The impact on public defenders of having more than their share of in-custody defendants is magnified by their tendency to have less serious cases: a defendant facing a 90-day sentence if

⁷⁹ See *supra* text accompanying note 72.

⁸⁰ See *supra* note 8.

⁸¹ See *supra* fig.2.

he takes a plea is unlikely to be willing to spend six months in custody awaiting trial, especially if he faces only 18 months if convicted.⁸²

Finally, there is one obvious institutional difference between public defenders and private lawyers that, to our knowledge, has not been examined by any researchers: public defenders typically have an ongoing relationship with the same set of prosecutors, litigating case after case, while the exchange between the private lawyer and the prosecutor may be much closer to a one-time encounter. What outcome effect, if any, might this difference in familiarity breed? We originally planned to develop a “familiarity index” between every prosecutor and every defense lawyer, based on the number of case encounters between them weighted by recency; then we would measure the relatedness of outcome to familiarity. Unfortunately, in the transfer of data from ICON to spreadsheet, some of the information necessary to develop such an index was lost.⁸³

Experimental economists have discovered many situations in which strategies developed in the course of a two person game vary significantly depending on whether the same players play each other repeatedly, or whether the games are so-called “one-shot” games. When the players know each other, or when strangers get to know each other by playing each other over and over, trust between the players can have important consequences to their observed behaviors.⁸⁴ The effects, if any, of lawyer familiarity on case outcome could be a significant piece of the effectiveness puzzle.

VI. CONCLUSION

The general problem of public defender ineffectiveness vis-à-vis private counsel is a problem that should concern us all. Our data show that private defense lawyers achieve better sentence outcomes than public defenders, and that the difference is statistically significant, both in causation and magnitude. On average, public defender clients suffer in excess of three years more incarceration than private defense clients, even controlling for the seriousness of the charges.

Whether this difference is the product of sheer under-funding or of inefficiencies of the kind embedded in government-run systems, or a combination of both, it should be deeply troubling to us all. To the extent it is the product of the

⁸² As we have previously discussed, our data did not preserve the defendants’ bond status, so we were unable to measure the impact that being in custody might have on sentence outcomes. *See supra* note 23 and accompanying text.

⁸³ Although the names of counsel appear in ICON, they do not appear in the extracted data. We are exploring the feasibility of extracting the identity of counsel (by bar registration number), and, short of that, manually examining ICON and/or the actual case file in order to be able to measure counsel familiarity.

⁸⁴ Biologists and economists have developed so-called “trust games” to investigate this central aspect of human exchanges. *See, e.g.*, R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* (1959); ERIC RASMUSSEN, *GAMES AND INFORMATION* (3d ed. 2001); Margaret E. Slade, *Interfirm Rivalry in a Repeated Game: An Empirical Test of Tacit Collusion*, 35 *J. INDUS. ORG.* 499 (1987).

interplay between criminal procedure, the plea bargaining system and underfunding, as Stuntz suggests, it should be even more troubling. Procedures designed to protect all defendants should not have the effect of hurting indigent defendants.

But our study suggests a more benign explanation. If we assume criminal defendants are at least as knowledgeable as academics about the differences between public defenders and private defense lawyers, marginally indigent defendants, with a choice of spending resources on private counsel or claiming indigency and using the services of the public defender, are likely to make that choice depending on the interplay of two factors: the seriousness of the charges and the strength of the prosecution's case. Marginally indigent defendants are most likely to spend resources for private lawyers if the charges are serious and if they are innocent. Conversely, they are least likely to spend resources on a private defense lawyer to defend minor charges for which they are guilty, or, more precisely, for which they know the risk of conviction is high.

Thus, the difference in outcome effectiveness we measured between public defenders and private lawyers may reflect, at least in part, that public defenders have less defensible cases. Before we rush to consider remedies for the difference between public defender and private lawyer effectiveness—by increasing public defender budgets, by privatizing public defender systems, or by attempting, in some other fashion, to disentangle the disparate substantive effects the rules of criminal procedure may be having—we should attempt to quantify the extent to which this difference might be the result of defendants self-selecting for guilt.

If this phenomenon is a significant part of the reason public defender clients enjoy less favorable outcomes than private lawyer clients, the appropriate remedy, if any is needed at all, may simply be to tighten the mechanisms by which we determine indigency.

APPENDIX: REGRESSION TABLES

Table 2: Estimates of the Relationship between the Number of Motions Filed and the Types of Defense Attorneys

Dependent Variable is the Number of Motions Filed				
Public Defender Indicator	0.29 (0.58)	0.85 (1.73)+	0.91 (1.87)+	0.91 (1.85)+
Court-Appointed Counsel Indicator	1.34 (1.31)	1.20 (1.19)	1.30 (1.31)	1.30 (1.31)
Most Serious Felony Charge		-2.87 (10.99)*	-2.70 (10.46)*	-2.70 (10.04)*
Trial Case Indicator			15.65 (11.31)*	15.65 (11.31)*
Number of Charges Filed Against Defendant				-0.02 (0.15)
Constant	21.76 (52.53)*	32.07 (31.36)*	30.97 (30.65)*	31.07 (26.69)*
Adjusted R-squared	.0001	.0307	.0622	.0620
F-statistic	0.87	40.83	63.62	50.89

Notes: The dependent variable is the total number of motions filed in each case. Absolute values of t-statistics are in parentheses. “*” and “+” represent significance at the 5% and 10% levels, respectively.

Table 3: Estimates of the Relationship between Conviction and the Types of Defense Attorneys

Dependent Variable is a Conviction Indicator Variable				
Public Defender Indicator	0.30 (6.49)*	0.38 (8.06)*	0.38 (8.05)*	0.45 (9.27)*
Court-Appointed Counsel Indicator	0.13 (1.37)	0.11 (1.19)	0.11 (1.18)	0.08 (0.79)
Most Serious Felony Charge		-0.36 (14.06)*	-0.36 (14.10)*	-0.22 (7.86)*
Trial Case Indicator			-0.15 (1.10)	-0.18 (1.28)
Number of Charges Filed Against Defendant				0.26 (14.05)*
Constant	0.13 (3.44)*	1.44 (14.27)*	1.45 (14.31)*	0.26 (1.96)*
Pseudo R-squared	.0086	.0497	.0500	.0971
Chi-squared statistic	42.71	247.56	248.77	483.60

Notes: The dependent variable is an indicator variable for conviction (1=conviction, 0=no conviction). Absolute values of t-statistics are in parentheses. “*” and “+” represent significance at the 5% and 10% levels, respectively.

Table 4: Estimates of the Relationship between Incarceration and the Types of Defense Attorneys

Dependent Variable is an Incarceration Indicator Variable				
Public Defender Indicator	0.24 (4.65)*	0.30 (5.71)*	0.30 (5.73)*	0.33 (6.10)*
Court-Appointed Counsel Indicator	0.16 (1.60)	0.17 (1.63)	0.17 (1.65)+	0.17 (1.62)
Most Serious Felony Charge		-0.25 (9.21)*	-0.25 (9.05)*	-0.21 (7.34)*
Trial Case Indicator			0.27 (1.97)*	0.27 (1.93)+
Number of Charges Filed Against Defendant				0.05 (4.97)*
Constant	-0.89 (20.37)*	-0.005 (0.05)	-0.027 (0.25)	-0.32 (2.63)*
Pseudo R-squared	.0053	.0266	.0275	.0335
Chi-squared statistic	21.98	109.38	113.20	137.91

Notes: The dependent variable is an indicator variable for incarceration (1=incarceration, 0=no incarceration). Absolute values of t-statistics are in parentheses. “*” and “+” represent significance at the 5% and 10% levels, respectively.

Table 5: Estimates of the Relationship between the Percentage Reduction in Sentence and the Types of Defense Attorneys

Dependent Variable is the Percentage Reduction of the Final Sentence from the Maximum Potential Sentence for the Original Charges				
Public Defender Indicator	-2.60 (2.07)*	-2.56 (2.02)*	-2.63 (2.09)*	-2.44 (1.94)+
Court-Appointed Counsel Indicator	0.66 (0.25)	0.65 (0.25)	0.51 (0.20)	0.42 (0.16)
Most Serious Felony Charge		-0.25 (0.37)	-0.49 (0.73)	-0.04 (0.05)
Trial Case Indicator			-21.37 (5.96)*	-21.44 (5.98)*
Number of Charges Filed Against Defendant				0.63 (2.19)*
Constant	94.99 (90.95)*	95.88 (36.61)*	97.37 (37.18)*	94.09 (31.21)*
Adjusted R-squared	.0009	.0006	.0097	.0107
F-statistic	2.66	1.82	10.24	9.16

Notes: The dependent variable is the percentage reduction in the sentence ([maximum potential sentence for original charges—final sentence received] / maximum potential sentence for original charges)*100. Absolute values of t-statistics are in parentheses. “*” and “+” represent significance at the 5% and 10% levels, respectively.

Table 6: Estimates of the Relationship between the Reduction in Sentence and the Types of Defense Attorneys

Dependent Variable is the Difference between the Final Sentence and the Maximum Potential Sentence for Original Charges				
Public Defender Indicator	-4.67 (8.20)*	-2.40 (5.35)*	-2.41 (5.36)*	-1.13 (3.45)*
Court-Appointed Counsel Indicator	2.00 (1.61)	1.43 (1.55)	1.42 (1.54)	0.82 (1.22)
Most Serious Felony Charge		-11.57 (48.69)*	-11.59 (48.68)*	-8.51 (46.70)*
Trial Case Indicator			-1.69 (1.32)	-2.18 (2.32)*
Number of Charges Filed Against Defendant				4.30 (57.19)*
Constant	18.30 (38.65)*	59.85 (64.32)*	59.97 (64.16)*	37.61 (47.73)*
Adjusted R-squared	.0227	.3997	.3998	.6785
F-statistic	44.89	838.94	629.77	1594.49

Notes: The dependent variable is the reduction in the sentence (maximum potential sentence for original charges—final sentence received). Absolute values of t-statistics are in parentheses. “*” and “+” represent significance at the 5% and 10% levels, respectively.