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How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes

ABSTRACT. One in five indigent murder defendants in Philadelphia is randomly assigned representation by public defenders while the remainder receive court-appointed private attorneys. We exploit this random assignment to measure how defense counsel affect murder case outcomes. Compared to appointed counsel, public defenders in Philadelphia reduce their clients' murder conviction rate by 19% and lower the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%. We find no difference in the overall number of charges of which defendants are found guilty. When we apply methods used in past studies of the effect of counsel that did not use random assignment, we obtain far more modest estimated impacts, which suggests defendant sorting is an important confounder affecting past research. To understand possible explanations for the disparity in outcomes, we interviewed judges, public defenders, and attorneys who took appointments. Interviewees identified a variety of institutional factors in Philadelphia that decreased the likelihood that appointed counsel would prepare cases as well as the public defenders. The vast difference in outcomes for defendants assigned different counsel types raises important questions about the adequacy and fairness of the criminal justice system.

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*The mills of justice grind slowly, but they grind exceedingly fine.*¹

INTRODUCTION

The idea that the inefficiency and slow speed of the justice system may somehow be justified by the system's ultimate precision is a reassuring one. It suggests that the justice system's vast creaky apparatus, for all its inefficiencies, will ultimately mete out the precise punishment that is necessary. It is also consistent with our goals of equal justice under the law² and the idea that we are ruled by law rather than men.³

In this Essay, we examine one measure of the criminal justice system's "finesness" – its sensitivity to the defense counsel function.⁴ Under nearly every normative theory of punishment or criminal responsibility, the characteristics of the offender's defense counsel should make no difference in the outcome of the process. Whether or not a defendant is found guilty and the extent to which the offender is sentenced to be punished should only depend upon facts about the offender and perhaps the possibility of and need to deter a particular crime.⁵ The effect of the individual lawyer (and of the system for providing that

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1. *Vineberg v. Bissonnette*, 548 F.3d 50, 59 (1st Cir. 2008) (Selya, J.).
 2. The idea of equal justice under the law can be traced at least as far back as Thucydides's account of the funeral oration of Pericles in 431 B.C. THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 117 (Rex Warner trans., 1954).
 3. See, e.g., MASS. CONST. pt. 1, art. XXX (1780); see also BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 122 (2004) (explaining the concept of the rule of law rather than of individuals).
 4. In an earlier work, one of us looked at another measure of the "finesness" of the criminal justice process – the effect of the individual judge on the length of sentences. James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999). For an updated look at this form of disparity, see Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1 (2010). See also Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (finding vast disparities in outcomes among immigration judges and asylum officers); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) (discussing the change in control of sentencing discretion among judges, prosecutors, Department of Justice headquarters, and the Supreme Court).
 5. Attorney General Robert H. Jackson pithily expressed the intuitive unfairness of disparity: "It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should be dependent in large part on a purely fortuitous circumstance . . ." (1939-1940) ATT'Y GEN. ANN. REP. 5 (1941). He was referring to interjudge sentencing disparity,

lawyer) is pure “noise.”

Usually the effect of the lawyer is hard to measure because lawyers and clients select one another.⁶ It is difficult to determine whether the results

but a nearly identical argument could be made with respect to the “fortuity” of an indigent defendant’s assigned counsel.

6. There have been many attempts to measure the effect of lawyers by compensating for the selection problem. See, e.g., James C. Beck & Robert Shumsky, *A Comparison of Retained and Appointed Counsel in Cases of Capital Murder*, 21 LAW & HUM. BEHAV. 525 (1997) (finding a death sentence more likely to result when the defendant was represented by appointed counsel rather than privately retained counsel); Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253 (1989) (finding that defendants represented by privately retained counsel obtained better outcomes than defendants represented by public defenders); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361 (1991) (summarizing several prior empirical studies comparing the performance of public defenders and private appointed counsel); Morton Gitelman, *The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases—An Empirical Study*, 24 ARK. L. REV. 442, 450 (1971) (finding that while the performance of particular lawyers did not differ depending on whether they were appointed or retained, defendants with appointed counsel had worse outcomes overall than defendants with retained counsel); Roger A. Hanson & Brian J. Ostrom, *Indigent Defenders Get the Job Done and Done Well*, in THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 254 (George F. Cole, Marc G. Gertz & Amy Burger eds., 8th ed. 2002) (finding small differences in performance between public defenders and appointed private counsel); Talia Roitberg Harmon & William S. Lofquist, *Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent*, 51 CRIME & DELINQ. 498, 511-13 (2005) (finding evidence that attorney skill affected the outcome of capital cases); Richard D. Hartley, Holly Ventura Miller & Cassia Spohn, *Do You Get What You Pay For? Type of Counsel and Its Effect on Criminal Court Outcomes*, 38 J. CRIM. JUST. 1063 (2010) (finding generally that public defenders and private attorneys have no direct effect on incarceration or sentence length); Pauline Houlden & Steven Balkin, *Costs and Quality of Indigent Defense: Ad Hoc vs. Coordinated Assignment of the Private Bar Within a Mixed System*, 10 JUST. SYS. J. 159, 170 (1985) (finding that the method of assigning attorneys to cases did not affect outcomes); Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 199 (1985) (finding little difference in the performance of attorneys assigned by judicial order and attorneys from a firm that has contracted with a particular jurisdiction to provide defense services); Stuart S. Nagel, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L.J. 404, 424 (1973) (arguing that retained counsel provide some benefits in outcomes compared to public defenders, but also have disadvantages); Inga L. Parsons, *“Making It a Federal Case”: A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 839 n.7 (noting that the Committee to Review the Criminal Justice Act (CJA) found that “the overall level of representation provided by federal defender organizations—including federal public defenders and community defense organizations—was ‘excellent’” and that such organizations should be emulated by states and nations); Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in THE DEFENSE COUNSEL 151, 167 (William F. McDonald ed., 1983) (finding that defendants with

obtained by a particular lawyer are attributable to the lawyer or simply to the characteristics of cases that the lawyer takes. Of course, most lawyers and clients act as though lawyers affect outcomes—lawyers brag about their abilities,⁷ wealthy clients hire lawyers with the best reputations, and students compete to get into the best law school possible.⁸ But because of this selection effect, it is usually impossible to isolate and measure the magnitude of the effect of the lawyer and the system for providing that lawyer.⁹

retained attorneys did not consistently obtain better outcomes than defendants with state-appointed counsel); Robert V. Stover & Dennis R. Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265 (1975) (finding comparable performance between public defenders and private attorneys); Jennifer Bennett Shinall, Note, *Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 VAND. L. REV. 267 (2010) (finding that prosecutor skill made more difference in outcomes than defense skill); Thomas H. Cohen, *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes?* (July 1, 2011) (unpublished manuscript), <http://ssrn.com/abstract=1876474> (finding that defendants with assigned counsel receive less favorable outcomes than defendants with a public defender or private counsel). For anecdotal evidence of the disparity of outcomes across defendants assigned to different types of defense counsel, see Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 49-50 (2008), which discusses the gap in quality between federal public defenders and attorneys appointed under the CJA. See also Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 318 (2011) (“What is missing is a comprehensive evaluation of legal representation. . . . [W]e lack a good understanding of how lawyers influence case outcomes.”).

7. See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 17-18 (1999) (discussing surveys that show that most lawyers, like members of other professions, believe themselves to be above average).
8. See 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, 1148 (2007).
9. For important exceptions, see *id.*, which uses random case assignment within the public defender office to measure the effect of attorney representation. See also Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), <http://www.nber.org/papers/w13187> (using random case assignment between federal public defenders and CJA-appointed attorneys in federal court to measure differences in outcome attributable to attorney experience, wages, law school quality, and average caseload, and finding that federal public defenders provide better outcomes for clients); Michael Roach, *Explaining the Outcome Gap Between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects* (Apr. 2011) (unpublished manuscript), <http://ssrn.com/abstract=1839651> (using jurisdictions that appear to use random assignment to find that appointed counsel provide worse outcomes than public defenders due to adverse selection of attorneys willing to take appointments). Although these papers provide important evidence on the influence of attorneys on case outcomes, the studies do not focus on serious crimes due to sample size limitations. Given that much of the jurisprudence regarding the availability and adequacy of

For the sake of the accuracy and fidelity of the criminal justice system—the fineness of the millstones of justice—one might hope that the differences in outcomes between lawyers are minimal.¹⁰ This is particularly true in the most serious cases where the public interest in reliable adjudication is at its height. Perhaps the resources of the state are marshaled in such an effective way and the facts established so clearly by the government that what the defense lawyer does makes little difference. Perhaps, for example, those guilty of such a serious act as taking another’s life are reliably and accurately punished irrespective of their lawyer.¹¹ It would be reassuring if the criminal justice system were this reliable in practice.

In this Essay, we take advantage of a natural experiment that allows us to measure the difference that defense counsel makes in the most serious cases. In Philadelphia, since April 1993, every fifth murder defendant is sequentially assigned at the preliminary arraignment to attorneys from the public defender’s office. The other four defendants are assigned to appointed counsel. This sorting mechanism allows us to isolate the effect of the “treatment”—defendants represented by the public defenders—with the “control”—defendants represented by appointed counsel—by using an instrumental variables approach in cases from 1994 to 2005.

The differences in outcomes are striking. Compared to appointed counsel, public defenders in Philadelphia reduce their clients’ murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%.

These results suggest that defense counsel makes an enormous difference in the outcomes of cases, even in the most serious cases where one might hope that the particular type of defense lawyer would matter least.

Our findings, from the fifth-largest city in the United States, raise questions regarding the fundamental fairness of the criminal justice system and whether it provides equal justice under the law. The findings also raise

counsel has been driven by serious cases (for example, the right to counsel was first established for capital defendants in *Powell v. Alabama*, 287 U.S. 45 (1932), over thirty years before *Gideon v. Wainwright*, 372 U.S. 335 (1963)), it seems desirable to understand how attorneys affect outcomes in the most high-stakes cases.

10. On our desire to believe that the world is just, see MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980). See also DEBORAH L. RHODE, *ACCESS TO JUSTICE* 122 (2004) (“‘Getting what you pay for’ is an accepted fact of life, but justice, we hope, is different, particularly in criminal cases.”).
11. See Posner & Yoon, *supra* note 6, at 343 (reporting a federal district judge’s “observation over my many years . . . that the jurors get it right if the judge presides fairly and judiciously”).

questions as to whether current commonly used methods of providing indigent defense satisfy Sixth Amendment standards for effective assistance of counsel and Eighth Amendment prohibitions against arbitrariness in punishment. More generally, the strong impact of defense counsel suggests that the criminal justice system is, in practice, quite sensitive to the characteristics of the professionals involved. Policymakers may wish to consider efforts taken in other fields, like medicine, to increase reliability by reducing the system's dependence on the skill and performance of an individual professional.

We begin with an overview of indigent defense in Philadelphia. This is followed in Part II by a discussion of our methodology and our quantitative findings on the effect of counsel on the outcomes of murder prosecutions. In Part III, we discuss the qualitative interviews we conducted and previous research on indigent defense in Philadelphia. Finally, we discuss the constitutional and policy implications of these findings.

I. BACKGROUND ON INDIGENT DEFENSE IN PHILADELPHIA

In 2000, Philadelphia had a murder rate of 21 per 100,000 people, twelfth highest among large U.S. cities.¹² Most murder defendants, approximately 95%, cannot afford to hire private counsel and are therefore provided counsel by the county as required by the Sixth Amendment.

Pennsylvania is unique among the states in that the individual counties are solely responsible for the costs of indigent defense. In every other state, the state itself either funds a statewide public defender program or contributes to the costs of county public defender programs.¹³ However, even with state help, counties bear a significant portion of the overall burden. In the one hundred largest counties in the United States, county and city funding made up 68.8% of total expenditures on indigent defense, with the states providing 25.3%.¹⁴

In Philadelphia, a nonprofit public defender organization, the Defender Association of Philadelphia, has long represented nearly all indigent defendants

12. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 185 tbl.286 (2002), <http://www.census.gov/prod/2003/pubs/02statab/law.pdf>.

13. Holly R. Stevens et al., *State, County, and Local Expenditures for Indigent Defense Services Fiscal Year 2008*, AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS 2 (Nov. 2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fyo8.authcheckdam.pdf.

14. See Carol J. DeFrances & Marika F.X. Litras, *Indigent Defense Services in Large Counties, 1999*, BUREAU OF JUST. STAT. 3 (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/idslc99.pdf>.

charged with any offense—except for murder.¹⁵ Although its origin is somewhat murky, this exception apparently arose in the late 1960s or early 1970s as a way to maintain the private homicide defense bar and judges’ power to appoint lawyers in murder cases.¹⁶ In the mid-1980s, the Defender Association proposed representing some defendants accused of homicide, but the Philadelphia Bar Association opposed the measure and no change occurred.¹⁷ After a change in bar and court leadership, the existing system began, and on April 1, 1993, the Defender Association began to represent one out of every five murder defendants.¹⁸ The other four out of five defendants continued to be represented by counsel in private practice appointed by a judge (“appointed counsel”) and paid by the county.

While some features of Philadelphia’s indigent defense system are fairly unique, the basic approach of utilizing a mix of both public defenders and appointed counsel to represent indigent defendants is relatively common in the United States. In 2000, a survey of indigent defense systems conducted by the Bureau of Justice Statistics revealed that 80% of the one hundred largest U.S. counties employed both public defenders and appointed private attorneys as defense counsel in felony cases.¹⁹

The homicide unit of the Defender Association consists of a group of about ten experienced public defenders who have considerable experience practicing in the Philadelphia court system.²⁰ Every case is staffed with teams of two lawyers and one or more investigators and mitigation specialists (non-lawyer legal professionals, often social workers, trained to develop mitigation evidence usually introduced during the penalty phase of a capital trial) as needed. All members of the staff are salaried. The unit also has its own limited set of funds to hire expert witnesses directly without having to seek approval and funding

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15. Cases in which there are conflicts of interest are assigned to appointed counsel.
 16. Telephone Interview with Anonymous #7 (July 23, 2011) (notes on file with authors).
 17. Interview with Anonymous #1 (Mar. 3, 2011) (notes on file with authors).
 18. Telephone Interview with Anonymous #3 (Apr. 15, 2011) (notes on file with authors).
 19. See DeFrances & Litras, *supra* note 14, app. tbl.
 20. See *The Adequacy of Representation in Capital Cases: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 9 (2008) (statement of Carolyn Engel Temin, Senior Judge, Court of Common Pleas of the First Judicial District of Pennsylvania) (noting that the Defender Association only accepts 20% of all murder cases and stating her opinion that appointed counsel generally fall below the standards of the Defender Association).

from a judge, as appointed attorneys are required to do.²¹ Unfortunately, we do not have the data necessary to calculate the cost per case of representation by the Defender Association.

Defendants who are not represented by the Defender Association are assigned counsel by one of the judges from the Philadelphia Court of Common Pleas, who each take turns assigning counsel in murder cases.²² During the study period, the Court of Common Pleas of Philadelphia County required lawyers who wished to accept potential capital cases to have special qualifications based on the number of serious cases they had tried and the number of capital cases in which they had assisted.²³ In potential capital cases, two lawyers were often appointed, one to be responsible for the guilt phase of the case and the other to be responsible for the penalty phase of the case.²⁴

During our study period, counsel appointed in murder cases—both capital and noncapital—in Philadelphia received flat fees for pretrial preparation: \$1,333 if the case was resolved prior to trial and \$2,000 if the case proceeded to

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21. See also Hillary E. Freudenthal, *The Effect of Indigent Defense Systems on Administration of the Death Penalty: A Case Study of Philadelphia County* 84-85 (Apr. 20, 2001) (unpublished A.B. thesis, Princeton University) (on file with authors) (attributing the superior effectiveness of Defender Association attorneys compared to appointed private counsel to differences in resources).
 22. Historically, the ability to assign counsel was considered an attractive “plum” to distribute among friends and political supporters. See *infra* text accompanying notes 96-103.
 23. In 2004, the Pennsylvania Supreme Court instituted a *statewide* requirement that counsel in capital cases must have “served as lead or co-counsel in a minimum of 8 significant cases” and taken a certain number of special capital continuing legal education courses. PA. R. CRIM. P. 801.
 24. E-mail from Marc Bookman, Exec. Dir., Atlantic Ctr. for Capital Representation, to author (Sept. 24, 2012 03:37 PM) (on file with authors); First Judicial District of Pennsylvania Common Pleas Court Form 30-1084D, Trial Division Attorney Payment Voucher (Rev. Apr. 2009), <http://www.courts.phila.gov/pdf/forms/criminal/30-1084D-CP-Trial-Division-Attorney-Payment-Voucher-and-Instructions.pdf>. In 2011, after our study period, the Court of Common Pleas of Philadelphia County created a Homicide Appointment System Committee to approve lawyers who wish to represent defendants in homicide trials. As of February 21, 2012, the Committee had approved only twelve lawyers for appointment to capital trials. *Commonwealth v. McGarrell*, No. 51-CR-0014526, at 12 (Pa. Feb. 21, 2012), <http://www.atlanticcenter.org/images/LernerReport.pdf>. However, on February 27, 2012, Administrative Judge Herron suspended the activities of the screening committee for the remainder of the year. Jon Campisi, *Phila. Judge Orders Changes Relating to Court-Appointed Capital Case Defense Attorneys*, PHILA. REC., Mar. 2, 2012, <http://pennrecord.com/news/phila-judge-orders-changes-relating-to-court-appointed-capital-case-defense-attorneys>.

trial.²⁵ The \$2,000 trial fee also included the first half-day of trial. While on trial, lawyers received \$200 for three hours of court time or less, and \$400 per day for more than three hours in a given day.²⁶ Court appearances for continuances are not reimbursable.

Philadelphia's reimbursement rates for appointed attorneys during our study period were considered extremely low. Stephen Bright, president and senior counsel of the Southern Center for Human Rights, called Philadelphia's fee schedule "outrageous even by Southern standards."²⁷ Echoing the sentiment, a recent report issued by a homicide calendar judge in Philadelphia noted that "the compensation of court appointed capital defense lawyers in Philadelphia is grossly inadequate, both as to the dollar amount of the compensation and as to the compensation schedule provided by the present fee

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25. Trial Division Attorney Payment Voucher, *supra* note 24 (offering preparation fees of "Homicide: Disposition after Arraignment But Prior to Trial (\$1,333)" and "Homicide: Disposition at Trial (\$2,000)"). This fee schedule went into effect in March 1997. Directive Concerning Court Appointed Counsel Fees, 27 Pa. Bull. 926 (Jan. 15, 1997), <http://www.pabulletin.com/secure/data/vol27/27-8/251.html>. On February 22, 2012, the Administrative Governing Board of the Court of Common Pleas of Philadelphia County increased the fee schedule for capital cases substantially. The new schedule calls for a flat rate of \$10,000 for lead counsel in capital cases and \$7,500 for penalty phase counsel, "irrespective of whether the case is tried to verdict or otherwise disposed and resolved." Admin. Governing Bd., *Notice to All Capital Defense Counsel and Members of the Criminal Defense Bar*, THE PHILA. COURTS (Feb. 12, 2012), <http://www.courts.phila.gov/pdf/notices/2012/Notice-Capital-Defense-Counsel-Criminal-Defense-Bar.pdf>. Noncapital cases remain governed by the old fee schedule.
 26. Trial Division Attorney Payment Voucher, *supra* note 24; *see* Interview with Anonymous #1 (Mar. 3, 2011) (notes on file with authors); Telephone Interview with Anonymous #6 (May 5, 2011) (notes on file with authors) (describing private appointed attorneys' "low compensation rate"); Telephone Interview with Anonymous #10 (July 21, 2011) (notes on file with authors) (describing the "problematic" payment structure that effectively discourages guilty pleas).
 27. Joseph A. Slobodzian, *Pennsylvania Supreme Court Urged To Consider How Philadelphia Pays Death-Penalty Lawyers*, PHILA. INQUIRER (June 9, 2011), http://articles.philly.com/2011-06-09/news/29638728_1_death-penalty-lawyers-death-penalty-capital-cases; *see, e.g.*, Trial Division Attorney Payment Voucher, *supra* note 24. In *New York County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397 (N.Y. Sup. Ct. 2003), the court found fees of \$40 per hour in court and \$25 per hour out of court inadequate and ordered payment of \$90 per hour. *See generally* Rebecca A. Desilets, Robert L. Spangenberg & Jennifer W. Riggs, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-By-State Overview*, AM. BAR ASS'N (2007), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_2007felony_comp_rates_update_capital.pdf (listing court-appointed counsel compensation rates in death penalty cases by state).

system”²⁸

Both capital and noncapital murder cases require numerous hours of preparation.²⁹ One examination of death-eligible murder cases in federal court in which the Department of Justice had not authorized prosecutors to seek the death penalty found that the median number of hours of preparation was 436, and the attorney cost per case from 1998 to 2004 was \$42,148, which resulted in an hourly wage of approximately \$97.³⁰ In capital cases during the same period, the median attorney hours were 2,014, and the cost was \$273,901, which resulted in an hourly wage of approximately \$136.³¹

Philadelphia’s fee schedules have also been criticized for creating perverse incentives.³² Counsel has no financial incentive to prepare for trial because there is a flat rate for preparation time. In addition, counsel may have an incentive to take a case to trial so that she can make as much in five days of trial as for the entire preparation period. As the homicide calendar judge noted in his report, “[this arrangement] increases the risk of ineffective assistance of counsel by maintaining a compensation system which punishes counsel for handling these cases correctly and rewards them only if they take every case to trial without adequate preparation or the exploration of appropriate non-trial options.”³³ Numerous interviewees noted that because there is no cap on the number of cases that counsel can accept, the relatively small pool of attorneys who are willing to take appointed cases take on many more cases than they can adequately prepare.³⁴

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28. Report and Recommendations at 2, *Commonwealth v. McGarrell*, No. 51-CR-0014623 (Pa. Ct. Com. Pl. Feb. 21, 2012). The report noted that Philadelphia paid less to capital counsel than Mississippi, Montana, Arkansas, Tennessee, and South Carolina when compensation was adjusted for cost of living. *Id.* at 11 n.6.
29. See *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 *HOFSTRA L. REV.* 913 (2003) [hereinafter *Guidelines*].
30. Jon B. Gould & Lisa Greenman, *Report to the Committee on Defender Services Judicial Conference of the United States Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases*, JUDICIAL CONFERENCE OF THE UNITED STATES, at x (Sept. 2010), <http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/FDPC2010.pdf>.
31. *Id.*
32. See Motion To Require the Commonwealth To Provide Constitutionally Adequate Attorney Fees for the Defense of the Above-Captioned Capital Trials, or in the Alternative, To Preclude the Commonwealth from Seeking the Death Penalty, *Commonwealth v. McGarrell*, 51-CR-0014623 (Pa. Ct. Com. Pl. June 8, 2011).
33. Report and Recommendations at 17, *Commonwealth v. McGarrell*, No. 51-CR-0014623 (Pa. Ct. Com. Pl. Feb. 21, 2012).
34. See *infra* text accompanying notes 99-110.

In short, the conditions in Philadelphia are conducive to an excellent test of how much the defense counsel function matters to outcomes. For the reasons discussed in this Part, the appointed counsel system seems very likely to result in comparatively poor defense counsel function. Conditions in Philadelphia allow us to empirically test our hope that, as one federal judge put it, “the facts – not the lawyers . . . result in a substantially correct verdict.”³⁵

II. QUANTITATIVE ANALYSIS OF THE PERFORMANCE OF THE PUBLIC DEFENDER VERSUS APPOINTED COUNSEL

A. Data and Sample Construction

Murder defendants are initially charged in Municipal Court before being tried in the Court of Common Pleas. Our basic dataset includes a sample of 3,412 defendants charged with murder between 1994 and 2005 in Municipal Court. These data were provided to us by the Philadelphia Courts (First Judicial District of Pennsylvania). For each record, we observed the identity of the defendant, basic demographics (race, gender, and age), charges, attorney of record, and outcome. The Philadelphia Courts also provided us with a separate database with similar information tracking Court of Common Pleas cases that corresponded to these municipal cases and a database tracking changes in attorney assignments over time for a subset of defendants.³⁶ We supplemented these databases by collecting both the Municipal Court and Court of Common Pleas dockets for all of the cases in our sample from the Pennsylvania Judiciary’s online docket database³⁷ and, as necessary, using data from the dockets to supplement information missing from the Philadelphia Court database.³⁸

After eliminating forty-six defendants with missing data or ambiguous information on counsel assignment and 193 individuals (5.6%) in the sample who were ineligible for appointed counsel based on lack of indigency, we were left with 3,173 defendants. To identify individuals who were initially assigned

35. Posner & Yoon, *supra* note 6, at 343 (quoting a federal district judge’s response to a finding that lawyers do not significantly affect case outcomes).

36. Prior to 2003, the Philadelphia court records were maintained using a mainframe system that did not allow for the storage of complete attorney-history records, meaning that we cannot track the full attorney history for most of our sample.

37. PA’S UNIFIED JUD. SYS. WEBPORTAL, <http://ujportal.pacourts.us> (last visited Sept. 4, 2012).

38. For example, one key variable available in the dockets (but not in the files we received from the Philadelphia Courts) is the defendant’s ZIP code of residence, which we use below to consider neighborhood characteristics.

to the public defender based on the one-in-five rule, we relied on logs provided to us by the public defender tracking the defendants in their murder cases, including both defendants initially assigned to the public defender and replacement defendants.³⁹ Of the 1,043 individuals listed in the public defender logs, we were able to find matches for 1,027 (98.5%) in the murder case records provided by the Philadelphia courts.⁴⁰ We also eliminated sixteen records involving cases that had not yet been resolved, that were missing Court of Common Pleas records, or that contained other data anomalies, leaving us with a total of 3,157 defendants.

One conceptual issue that arises in measuring the effects of representation is how to determine who represented a defendant who might have had multiple attorneys over the course of a case. One approach would be to count anyone who was represented by the public defender at any point in the process as having had public defender representation. A drawback of that rule is that it would include as public defender clients a large number of defendants initially assigned to the public defenders who were quickly reassigned due to a conflict of interest, and who therefore had essentially no interaction with the public defender.

The best approach would be to assign representation based upon the identity of counsel at the time the murder charge was resolved. Unfortunately, because our attorney history data are incomplete for most of our defendants, our ability to identify who was representing a defendant at case resolution is limited.⁴¹ Moreover, if public defenders represent defendants at earlier stages of the case, such as at a preliminary hearing, they can arguably exert some influence over the outcome of the case even when defendants are ultimately represented by other counsel. As a compromise, we measure representation by the public defender based upon the identity of the attorney at the formal

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39. Replacement defendants were defendants who would have normally been assigned to appointed private counsel based on preliminary arraignment, but who were assigned to the public defender by court appointments staff. This process is described in further detail below.
 40. Because the public defender case logs did not contain any unique identifiers present in our other databases, we matched cases based on the name of the defendant and the timing of the case. The number of defendants (1,043) in the public defender logs is greater than the one in five from our sample because it includes (1) all those defendants initially assigned to the public defender who were subsequently lost due to conflict or hiring of private counsel and (2) the replacement defendants whom it subsequently represented.
 41. New counsel are almost always assigned to handle direct appeals and postconviction litigation. As a result, data on the most current attorney may not properly capture the attorney assignment at the time of adjudication.

arraignment.⁴² This approach has the advantage of measuring representation at the same point of case progression for all cases and at a point at which the attorney could have influenced case outcomes. An obvious drawback is that, to the extent that defendants change attorneys subsequent to the formal arraignment, our definition fails to account for such changes. This happens very infrequently, however, so representation at the formal arraignment makes an excellent proxy for representation at disposition.⁴³

We also constructed synthetic criminal histories for each defendant by extracting information from the Pennsylvania Court of Common Pleas docket sheets for each prior case involving that defendant.⁴⁴ Although these histories provide useful information regarding the prior criminal involvement of the defendants in our sample, they do not fully capture prior criminal activity because they only include offenses that occurred in Pennsylvania, generated a court record, and occurred after electronic recordkeeping was instituted in each county in the state.⁴⁵ Although it seems likely that our measures understate the amount of prior criminal activity because some activity is not captured in available court dockets, we have no reason to suspect that the pattern of missing information would correlate with attorney assignment.

Our sentencing data report a maximum and minimum sentence for each defendant, and also identify life and death sentences.⁴⁶ Because life and death sentences are qualitatively different from other sentences, we consider these outcomes individually. Ideally, we would also like to calculate an overall effect

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42. We can observe this information for all of our cases in the Municipal Court docket sheets.
 43. The Defender Association, by policy, refuses to accept cases in which appointed counsel handled the preliminary hearing, so there is almost no post-formal arraignment crossover from appointed counsel to the public defender. According to Paul Conway, the director of the Defender Association Homicide Unit, there were two cases since the Unit was founded in which the public defender took over a case that had been handled by appointed counsel at the preliminary hearing. Interview with Paul Conway, Dir., Homicide Unit, Defender Ass'n of Phila. (Aug. 26, 2011) (notes on file with authors). Slightly more common, but still rare, is the case in which a defendant represented by the public defender at the formal arraignment is represented at trial by either appointed counsel (if a conflict of interest is identified after the preliminary hearing) or privately retained counsel (if the defendant hires an attorney). *Id.*
 44. The Pennsylvania courts assign a unique identifier to each defendant, which allowed us to obtain prior case records for a given individual even when they involved an alias.
 45. For Philadelphia, case records are available going back to 1968, and for most counties, case records are available back to at least the early 1980s.
 46. For 172 individuals in the sample, information about the length of the sentence was missing. Incidence of missing sentencing information is uncorrelated with initial assignment to the public defender.

on length of incarceration. This metric is complicated by the fact that those sentenced to life and death do not receive numeric sentences. Because of this issue, we consider two alternative measures of incarceration length as outcomes. First, we consider average sentence, which we define as the midpoint of the reported maximum and minimum sentences for those given a numeric sentence. For those sentenced to life or death, we set the average sentence equal to forty years, an admittedly arbitrary choice but one that seems sensible given that the bulk of those sentenced to life are in their early twenties⁴⁷ and life sentences in Pennsylvania carried no possibility of parole.⁴⁸

Alternatively, to avoid the necessity of imputing an arbitrary sentence length for those sentenced to life or death, we also calculate the expected time served in prison and use this as an additional outcome measure for length of incarceration. To do this, we turn to data from the National Corrections Reporting Program (NCRP).⁴⁹ The NCRP contains individual-level information about state prison admissions and releases (including deaths) for participating states, and includes information about alleged offenses, sentencing, and time served. For the years between 1999 and 2003, the NCRP includes records for 15,721 defendants who were released from prison after serving a sentence for a murder conviction.⁵⁰ For each combination of age at prison admission and sentencing outcome, we compute the average time served across prisoners in our NCRP sample, which includes data from states other than Pennsylvania, and then apply that average to Philadelphia defendants who fall into that same age and sentence combination.⁵¹ For

47. Authors' calculations based on data from the National Corrections Reporting Program (NCRP) data. *See infra* note 49 and accompanying text.

48. *Commonwealth v. Yount*, 615 A.2d 1316, 1320 (Pa. Super. Ct. 1992) (stating that the Pennsylvania parole statute, now codified as amended at 42 PA. CONS. STAT. ANN. § 9756(c) (West 2012), "unequivocally bar[red] all parole for first degree murderers"); *Castle v. Pa. Bd. of Prob. & Parole*, 554 A.2d 625 (Pa. Commw. Ct. 1989) (defendant convicted of second-degree murder not eligible for parole since defendant must serve minimum of life sentence before becoming parole eligible).

49. Annual NCRP data can be accessed through the Inter-University Consortium for Political and Social Research's (ICPSR) National Archive of Criminal Justice Data (NACJD) at <http://www.icpsr.umich.edu/icpsrweb/content/NACJD/guides/ncrp.html>. However, in order to gain access to the data, researchers are required to execute a Restricted Data Use agreement with the NACJD.

50. Authors' calculations based on NCRP data.

51. Sentencing outcomes are acquittal, life, death, or a maximum sentence of 0, 1, 2, . . . 25 years, 26-29 years, 30 years, 31-34 years, 35 years, 36-39 years, 40 years, 41-49 years, 50 years,

example, among those in the NCRP with 30-year sentences imposed at age twenty-two to twenty-four who were released or died in prison between 1999 and 2003, the average actual time served was 16.1 years,⁵² suggesting a newly convicted twenty-three-year-old murder defendant with a 30-year sentence might expect to spend around 16 years behind bars. For life sentences we only use NCRP data for prisoners who died in prison because life sentences in Pennsylvania do not carry the possibility of parole.⁵³ This approach offers a data-driven method for deciding how much incarceration to assign to those with life and death sentences. Conceptually, the expected time served in prison can be thought of as the response of a well-informed attorney if the defendant asked, immediately after receiving a particular sentence, how long he could actually expect to spend behind bars.

A drawback of using NCRP data to project actual time served is that because these projections require data on complete sentences, they require us to use individuals who were mostly sentenced during the 1980s and early 1990s. Because of the growth of truth-in-sentencing laws⁵⁴ and declines in mortality among prison inmates, the actual time served for individuals in our sample from Philadelphia will be greater than time served in the NCRP, meaning that our projections likely represent lower bounds on future time served.⁵⁵

51-59 years, 60 years, or 61 or more years. Age cells are defined by defendants aged 18 and under, 19-21, 22-24, 25-27, 28-30, 31-35, 36-40, 41-45, 46-50, and 51 and older.

52. Statistic based on authors' calculations using NCRP data.
53. We treat death verdicts as equivalent to life sentences for the purposes of these calculations. We recognize, of course, that death sentences are very different, but we made this adjustment for ease of modeling. Since only three death row prisoners have been executed in Pennsylvania since 1976, and all three voluntarily waived their appeals, this treatment has some descriptive accuracy as well. See *Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers,"* DEATH PENALTY INFO. CENTER (Nov. 11, 2011), <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers> (noting only three executions in Pennsylvania since 1976 and that each defendant dropped his appeals).
54. Truth-in-sentencing laws were state laws widely passed in the 1990s that required violent felons to serve at least 85% of their sentences. Whereas only four states had such laws on the books in 1990, twenty-eight states had enacted these laws by 1998. See Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 81 tbl.2 (2000). Because many of the defendants with sentences ending between 1999 and 2003 would have been sentenced prior to the onset of truth-in-sentencing, the fraction of the sentence actually served among this NCRP population is likely to be below that of our sample population of Philadelphia defendants, who were subject to truth-in-sentencing.
55. This drawback can potentially be overcome using a "life table" approach, but that approach requires more complicated assumptions, and we declined to apply it here. For a more

However, there is no reason to suspect that the bias towards underprojection of time served inherent in our approach will differentially affect defendants represented by appointed counsel as compared to public defenders. As a result, we can use these projections to correctly measure the percentage difference in expected time served for defendants represented by the public defender.

B. Methods: Counsel Assignment and the Preliminary Arraignment Process

Appendix Figure 1 presents a flow chart illustrating the processing of murder cases in the Philadelphia courts. Shortly after arrest, defendants accused of murder receive a preliminary arraignment. This usually occurs by video conference before a court magistrate. The magistrate reviews the information about the defendant compiled by the court's pretrial unit to determine if the defendant can afford counsel.⁵⁶ If, in the magistrate's judgment, the defendant is unlikely to be able to afford counsel in a case with a murder charge, the magistrate appoints either the Defender Association of Philadelphia or to-be-determined appointed counsel to represent the defendant. In the vast majority of cases, it is clear that the defendant cannot afford private counsel.⁵⁷ The default is to assign counsel. Hearings in which counsel are assigned typically take approximately two to three minutes.

The Criminal Law Clerk maintains a log book of all cases of this type, and every fifth defendant with a murder charge is assigned to the public defender.⁵⁸ The other four defendants are not immediately assigned counsel, but their names are sent to court appointments for assignment to a court-appointed counsel.⁵⁹

detailed description of the life table approach, see Evelyn J. Patterson & Samuel H. Preston, *Estimating Mean Length of Stay in Prison: Methods and Applications*, 24 J. QUANTITATIVE CRIMINOLOGY 33 (2008); and James P. Lynch & William J. Sabol, *Did Getting Tough on Crime Pay?: Crime Policy Report No. 1*, URB. INST., (Aug. 1, 1997), <http://www.urban.org/publications/307337.html>.

56. Telephone Interview with and e-mail from Richard McSorley, Supervisory Trial Comm'r, Phila. Court of Common Pleas (Apr. 7, 2011, 9:11 AM) (notes on file with authors).

57. *Id.*

58. *Id.*

59. *Id.* There are two important exceptions to this procedure. The public defender cannot represent multiple codefendants in the same case or defendants with whom the public defender has had certain prior interactions (such as defending a victim or witness) because of conflict-of-interest rules. If one defendant is processed through the preliminary arraignment court and assigned to the public defender, and a codefendant on the same charge later comes through and would be assigned to the public defender, that assignment is skipped. Similarly, if at the time of preliminary arraignment the public defender identifies

After assignment, there is some crossover between “treatment” (Defender Association defense counsel) and “control” (appointed counsel) groups. Some defendants hire private defense counsel who replace either appointed counsel or the public defender. In some cases assigned to the public defender, it is determined subsequent to the initial assignment that there is a conflict of interest and that the public defender cannot represent the defendant. When that occurs, the case is assigned to appointed counsel and the public defender receives another “replacement” case that had been assigned to appointed counsel at the preliminary arraignment. The goal is to ensure that the public defender ends up with 20% of cases, per its contract, in spite of the fact that some defendants change counsel subsequent to initial assignment. Although these replacement cases are nominally random, there is no mechanism comparable to the rotation at preliminary arraignment to ensure that they are, in fact, randomly selected. However, because these diversions occur after the initial one-in-five randomization, they are not problematic for our analysis, and we need not assume that replacement cases are randomly selected.

If compliance with random assignment were perfect, so that every defendant initially assigned appointed counsel were ultimately represented by appointed counsel, and the same were true for the public defender, the causal impact of public defender representation could be computed simply as the difference in mean outcomes between those represented by the public defender and those represented by appointed counsel. However, in actual practice, later representation varies from the assignment for numerous reasons. In some situations, such as cases involving multiple defendants, individuals initially assigned to the public defender must be appointed counsel to avoid conflicts of interest. When defendants are able to hire a private lawyer, they often progress partway through the adjudication process with appointed counsel before being able to assemble the financial means to pay for a private attorney.

It is possible that this crossover (or imperfect compliance, as it would be called in a clinical trial) is correlated with the identity of counsel and characteristics of the case. Suppose, for example, that defendants with very serious cases assigned to the public defenders are more likely to hire private counsel than defendants with equally serious cases assigned to appointed

another conflict of interest, the case is reassigned. The public defender is also sometimes assigned appeals cases from the Capital Habeas Unit; when one of these cases is assigned, the public defender’s next turn in the assignment rotation for new cases is sometimes skipped. These quirks explain why the data show less than 20% of murder cases as being assigned to the public defender at the preliminary arraignment.

counsel. Simply comparing the mean outcomes between defender-assigned defendants and appointed-counsel-assigned defendants in that instance would then be misleading because the case mix would not be comparable—the public defenders would be left with a less serious set of cases.

Similarly, the operation of conflict-of-interest rules might also change the mix of cases. In general, a defense lawyer will not represent a defendant if an important witness in the case was previously represented by that lawyer because the duty to zealously represent the defendant's interest might conflict with an ongoing duty of loyalty to a former client, because of the need, for example, to attack the credibility of the former client. Because a conflict of interest is imputed to other attorneys in the organization, and because public defenders represent nearly all other criminal defendants, public defenders are much more likely to be conflicted out of a case than appointed counsel for any given set of witnesses in a case. Suppose that cases with numerous witnesses (in which the Defender Association attorney is more likely to be conflicted out) are more serious than cases with fewer witnesses. Once again, the case mixtures are no longer equivalent and the results of a simple comparison in outcomes are not valid.

To deal with this problem of crossover we employ an instrumental variables (IV) analysis. We use the initial random assignment as an instrumental variable for the later representation. The IV method permits us to exploit the randomness of initial assignment to estimate the causal impact of public defender representation.⁶⁰ This method essentially isolates the portion of variability in outcomes that is attributable to the initial random assignment. In estimation, this result is reached by regressing the case outcomes of interest on the predicted legal representation at arraignment, where the predicted value is determined by a first-stage regression of representation at arraignment on the legal representation at the point of random assignment (plus all other controls in the model). Because we use only the variation in legal representation status attributable to random assignment and not the actual representation, we can estimate the impact of public defender representation even when there is nonrandom sorting of defendants across different types of attorneys subsequent to the initial assignment. In light of the systematized assignment of counsel, even if a nonrepresentative subset of defendants switch counsel after the initial step in the process, we can still identify two groups of

60. See Guido W. Imbens & Joshua D. Angrist, *Identification and Estimation of Local Average Treatment Effects*, 62 *ECONOMETRICA* 467 (1994). For a technically rigorous yet accessible primer on the use of instrumental variables, see JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS* 113-218 (2009).

defendants – namely, those who were and those who were not initially assigned to the public defender – for whom the expected average sentence is the same except for the fact that they end up with different types of counsel. The IV approach compares the average outcomes across these groups (rather than groups based upon actual realized representation) and then scales this difference by the groups' difference in representation. This comparison allows us to control for the fact that there may be nonrandom sorting (e.g., by seriousness of case) between the time of initial assignment counsel at the preliminary arraignment and the time that the cases are ultimately resolved.

The key requirement for the IV analysis to deliver valid causal estimates is that the instrumental variable – in this case, initial counsel assignment – affects eventual representation but is otherwise uncorrelated with case outcomes. If the initial assignment of counsel is truly random, as we assume, this requirement will be satisfied. Fortunately, it is possible to examine the validity of this assumption directly using the available data. In particular, if counsel is assigned randomly, we would expect those assigned to appointed counsel and those assigned to the public defender to appear similar on observable characteristics determined prior to counsel assignment.

In Table 1, we summarize the characteristics of our sample, reporting average characteristics of defendants initially assigned to appointed counsel (Column I) and the public defender (Column II). We also report the t-statistic and associated p-value for a test of the null hypothesis of equal means across the two groups. The first row of the table indicates that of those who were initially assigned appointed counsel, 15.5% were ultimately represented by the public defender at their municipal court arraignment. Many of these cases represent individuals who normally would have been given court-appointed counsel based on the one-in-five assignment rule, but who were instead diverted to the public defender in order to provide replacement cases for clients initially assigned to the public defender who had subsequently found other representation. Only 59.2% of those initially assigned public defenders retained their public defenders through the municipal court arraignment. In other words, almost half of those assigned public defenders ultimately were represented by other attorneys, due to either conflicts or voluntary hiring of an outside attorney. Although substitutions away from the initial assignment were fairly commonplace, the t-test indicates that the initial assignment satisfies the first requirement of an instrument, namely, that it affects eventual representation.

The next rows of Table 1 report average demographics by initial assignment. Age, race, and gender are comparable across the two groups of defendants. Although available case records contain no additional direct demographic information, another way to assess the comparability of the

background characteristics of defendants is to examine the population characteristics of the ZIP codes in which they reside.

Table 1.

CHARACTERISTICS OF INDIGENT PHILADELPHIA HOMICIDE DEFENDANTS BY INITIAL REPRESENTATION ASSIGNMENT

CHARACTERISTIC	AVERAGE FOR INDIVIDUALS ASSIGNED APPOINTED COUNSEL (N=2,677) (I)	AVERAGE FOR INDIVIDUALS ASSIGNED DEFENDER ASSOCIATION COUNSEL (N=480) (II)	T-STAT (I)-(II)	P-VALUE
REPRESENTATION				
Defended By Public Defender	15.5% (0.362)	59.2% (0.492)	-18.58	0.000
DEFENDANT DEMOGRAPHICS				
Male	92.9% (0.257)	94.8% (0.222)	-1.70	0.089
Black	73.2% (0.443)	74.4% (0.437)	-0.53	0.594
Age (years)	25.7 (9.6)	26.3 (10.3)	-1.10	0.271
ZIP CODE CHARACTERISTICS (N=1,764)				
Living in Philadelphia	95.3% (0.2)	94.1% (0.2)	0.86	0.389
Female-headed households	55.7% (0.1)	54.9% (0.1)	0.91	0.363
Adults with less than HS education	35.3% (0.1)	34.6% (0.1)	0.91	0.363
Median household income	\$25,918 (8,796)	\$26,631 (9,342)	-1.15	0.252
Missing ZIP code data	32.3% (0.5)	29.8% (0.5)	1.09	0.276
PRIOR CRIMINAL HISTORY				
<i>Number of prior counts for:</i>				
Any offense	9.98 (13.65)	10.57 (12.86)	-0.92	0.358
Aggravated assault	0.52 (1.04)	0.47 (0.87)	1.16	0.247
Robbery	0.38 (0.90)	0.44 (0.95)	-1.28	0.200
Simple assault	0.85 (1.51)	0.89 (1.37)	-0.68	0.500
Weapons offenses	1.81 (3.13)	1.82 (3.01)	-0.05	0.961
Burglary	0.20 (0.66)	0.21 (0.61)	-0.33	0.744
Theft	1.54 (3.33)	1.87 (3.54)	-1.90	0.058
Drug offenses	1.43 (2.60)	1.45 (2.82)	-0.15	0.878

HOW MUCH DIFFERENCE DOES THE LAWYER MAKE?

PRIOR CRIMINAL HISTORY				
<i>Number of prior counts for:</i>				
Any offense	9.98 (13.65)	10.57 (12.86)	-0.92	0.358
Aggravated assault	0.52 (1.04)	0.47 (0.87)	1.16	0.247
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Burglary	0.20 (0.66)	0.21 (0.61)	-0.33	0.744
Theft	1.54 (3.33)	1.87 (3.54)	-1.90	0.058
Drug offenses	1.43 (2.60)	1.45 (2.82)	-0.15	0.878
<i>Ever charged with:</i>				
Any offense	64.8% (0.478)	67.9% (0.467)	-1.32	0.188
Aggravated assault	30.9% (0.462)	31.4% (0.465)	-0.25	0.801
Robbery	23.8% (0.426)	25.2% (0.434)	-0.65	0.516
Simple assault	41.8% (0.493)	44.4% (0.497)	-1.08	0.279
Weapons offenses	43.2% (0.495)	44.7% (0.498)	-0.61	0.545
Burglary	13.0% (0.336)	14.9% (0.356)	-1.07	0.286
Theft	38.5% (0.487)	44.0% (0.497)	-2.23	0.026
Drug offenses	37.9% (0.485)	37.1% (0.484)	0.34	0.732
CURRENT CASE CHARACTERISTICS				
Number of charges filed	5.13 (2.16)	4.94 (2.13)	1.75	0.080
Number of murder counts	1.07 (0.30)	1.05 (0.24)	1.34	0.181
Any weapons charge	83.3% (0.373)	77.3% (0.419)	2.94	0.003
Any conspiracy charge	46.8% (0.499)	42.1% (0.494)	1.91	0.057
Number of defendants in case	1.69 (1.33)	1.70 (1.46)	-0.15	0.880

Note: Standard errors are in parentheses.

The next rows of Table 1 compare economic and social characteristics of the residential ZIPs of indigent defendants using data drawn from the 2000 Census.⁶¹ If the randomization is compromised so that certain types of defendants are more likely to receive Defender Association attorneys, we might expect to observe different neighborhood backgrounds for these defendants. A drawback of examining ZIP code characteristics is that ZIP information is missing for almost a third of the sample, although, as indicated in Table 1, rates of data availability are similar across the two groups.

Indigent homicide defendants are drawn disproportionately from disadvantaged areas. For example, 56% of households in the ZIP code of a typical defendant were female headed, versus 22% for the city as a whole and 12% nationally.⁶² Unemployment rates in the defendants' ZIPs were more than 2.5 times the city average.⁶³ Although homicide defendants are clearly drawn from an unrepresentative sample of the city's neighborhoods, differences in the neighborhood characteristics of those assigned appointed versus public attorneys are negligible.⁶⁴

Our criminal history data provide another way to assess the comparability of the two groups of defendants. As indicated in Table 1, average criminal involvement appears slightly higher among those assigned to the public defender, although none of the differences is statistically significant except for prior theft charges. Given that prior criminal history is one of the strongest predictors of case outcomes,⁶⁵ the fact that the two groups of defendants appear largely balanced in their prior criminal involvement is reassuring.

The next rows of Table 1 summarize the characteristics of these defendants' cases, including number and nature of charges and number of defendants involved in the case. Because attorney assignments are made prior to the formal

61. ZIP code-level Census tabulations for the 2000 Census are downloadable from the Census Bureau's American FactFinder website at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

62. Authors' calculations from 2000 Census ZIP code files. *See id.*

63. *Id.*

64. One way to more formally assess whether attorney assignment is correlated with ZIP code of residence is to regress an indicator for whether an individual was initially assigned to the public defender on a full set of indicator variables for individual ZIP codes, and then test for the joint significance of the indicators. With such a test we fail to reject the hypothesis that ZIP code is unrelated to attorney assignment (p-value=0.59).

65. Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 *CRIMINOLOGY* 259, 279 (2006); John Kramer & Darrell Steffensmeir, *Race and Imprisonment Decisions*, 34 *SOC. Q.* 357 (1993).

arraignment, in theory the charge composition could adjust based on attorney characteristics. For example, if prosecutors believe that public defenders are likely to beat weapons or conspiracy charges, they may drop or decline to file such charges once they see that a particular defendant is represented by a public defender. As a practical matter we see little evidence of important differences in case characteristics by initial assignment, although there appears to be a slightly lower rate of weapons charges for defendants initially assigned public defenders.

There are statistically significant differences between the two populations across a handful of characteristics, such as prior theft, but even in the absence of true differences, we would expect to observe some statistically significant differences when examining this many characteristics due to sampling variation alone. One way to assess whether the overall pattern of group differences shown in Table 1 provides evidence of nonrandom assignment is to examine the distribution of p-values in the table. Under the null hypothesis of random assignment, we would expect these p-values to be uniformly distributed between 0 and 1. A Kolmogorov-Smirnov test⁶⁶ applied to the twenty-nine defendant characteristics listed in Table 1 that were determined prior to assignment of counsel yields a p-value of 0.17, indicating that we cannot reject the null hypothesis of random assignment.⁶⁷

Of course, data-based tests of the independence of an instrument are limited to the available data. It is always possible that the proposed instrument is actually related to the outcome in other ways that are unobservable in our data. It is therefore important to examine the actual mechanism of the instrument.

Here, interviews with the Philadelphia court staff indicate that the assignment process is almost completely mechanical and ministerial—little human judgment (and possible conscious or unconscious bias) is involved.⁶⁸ A log book is kept by the clerk of the arraignment court and every fifth defendant with a murder charge

66. The Kolmogorov-Smirnov test is a nonparametric statistical test designed to test whether the observed cumulative distribution of a random variable corresponds to a hypothesized reference distribution.

67. The ZIP code measures may be correlated with one another, as might the measures capturing prior criminal history. However, we also fail to reject the null hypothesis of randomization if we conduct Kolmogorov-Smirnov tests excluding the ZIP code characteristics or the prior case history variables. The listed variables along with a full set of ZIP code fixed effects are also jointly insignificant (p-value=0.37) in a regression where the dependent variable measures the initial attorney assignment.

68. E-mail from Richard McSorley, Supervisory Trial Comm'r, Phila. Court of Common Pleas (Apr. 7, 2011, 9:11 AM) (notes on file with authors).

who comes through is assigned to the public defender. This sorting mechanism is additional evidence of the independence of our instrument.

C. Results

We find significant differences in the outcomes of the defendants represented by the Defender Association and appointed counsel. Table 2 reports defendant outcomes by initial attorney assignment.

Table 2.

CASE OUTCOMES BY INITIAL REPRESENTATION ASSIGNMENT

CHARACTERISTIC	AVERAGE FOR INDIVIDUALS ASSIGNED APPOINTED COUNSEL (N=2,677) (i)	AVERAGE FOR INDIVIDUALS ASSIGNED DEFENDER ASSOCIATION COUNSEL (N=480) (ii)	T-STAT (i)-(ii)	P- VALUE
CASE OUTCOMES				
Guilty of any charge	80.1% (0.399)	79.2% (0.406)	0.43	0.664
Number of guilty charges	2.36 (1.83)	2.24 (1.80)	1.31	0.189
Guilty of murder	56.5% (0.496)	54.3% (0.499)	0.89	0.371
Average sentence length (years)	20.9 (17.9)	18.1 (17.0)	3.28	0.001
Minimum sentence, conditional (years)	8.45 (10.00)	7.67 (8.99)	1.46	0.145
Maximum sentence, conditional (years)	18.6 (21.4)	17.0 (19.7)	1.37	0.172
Life sentence	26.2% (0.440)	19.5% (0.397)	3.32	0.001
Death sentence	1.3% (0.112)	1.3% (0.112)	0.04	0.968
Expected time served (years)	10.97 (7.67)	9.81 (7.43)	3.05	0.002
CASE HANDLING (N=3,133)				
Waiver trial	26.3% (0.000)	27.0% (0.000)	-0.33	0.742
Plead guilty	28.1% (0.000)	38.4% (0.000)	-4.28	0.000

Note: Conditional minimum and maximum sentences do not include individuals sentenced to life imprisonment or death. Sample size is 3,133.

Given that the two groups of defendants appear largely similar in terms of demographics, prior criminal involvement, and observable case characteristics, absent any effects of counsel, it seems reasonable to expect similar outcomes across the two groups. In the first row, for example, of the 2,677 defendants who were originally assigned appointed counsel, 80.1% were found guilty of any charge; the comparable number for defendants originally assigned to the public defender was 79.2%. The low t-statistic and p-value that is greater than 0.05 for this characteristic indicate that there is not a statistically significant difference in overall conviction rates across the two groups at a 95% confidence level.

However, we observe statistically significant and practically large disparities in some outcomes across the two groups. For all of the sentencing measures except for death verdicts—which, even among this population, are quite rare—those assigned to the public defender achieved better outcomes than those assigned to court-appointed defense counsel. The seven-percentage-point difference in the likelihood of receiving a life sentence and the difference in expected time served are particularly notable. The greater-than-one-year difference in expected time served is large relative to the overall expected time served of around eleven years.

One potential explanation for these differences in outcomes is that public defenders might use different strategies for determining whether to take cases to trial than appointed attorneys, particularly given that these two sets of attorneys have different financial incentives for trial. The bottom row of Table 2 indicates that defendants assigned to the public defender are appreciably more likely to plead guilty in their cases than those initially assigned appointed attorneys.

1. Effects on Guilt

The simple comparisons in Table 2 strongly suggest that public defender representation is associated with improved case outcomes. To estimate the causal impact of representation by the public defender, we turn to the instrumental variable (IV) analysis.

Table 3.

ESTIMATED IMPACT OF DEFENDER ASSOCIATION REPRESENTATION ON CASE OUTCOMES

OUTCOME	AVERAGE FOR THOSE ASSIGNED APPOINTED COUNSEL	ESTIMATED EFFECT OF PUBLIC DEFENDER REPRESENTATION ON OUTCOME			
		(IV ₁)	(IV ₂)	(IV ₃)	(OLS)
Guilty of any charge	80.1%	-0.020 (0.046)	-0.037 (0.046)	-0.070 (0.073)	-0.030 (0.018)
Number of guilty charges	2.36	-0.271 (0.206)	-0.243 (0.200)	-0.436 (0.301)	-0.202** (0.079)
Guilty of murder	56.5%	-0.051 (0.057)	-0.110* (0.056)	-0.111 (0.071)	0.011 (0.021)
Life sentence	26.2%	-0.153** (0.046)	-0.161** (0.046)	-0.209** (0.062)	-0.046* (0.018)
Death sentence	1.3%	-0.001 (0.013)	-0.001 (0.013)	-0.005 (0.019)	-0.009 (0.005)
Average sentence length (years)	20.9	-6.53** (1.99)	-6.42** (1.92)	-3.10 (2.70)	-1.93** (0.73)
Minimum sentence, conditional (years)	8.45	-1.72 (1.18)	-1.55 (1.17)	-1.49 (1.92)	-0.13 (0.47)
Maximum sentence, conditional (years)	18.6	-3.52 (2.56)	-3.03 (2.57)	-5.35 (4.59)	-0.32 (1.01)
Expected time served (years)	11.0	-2.63** (0.86)	-2.61** (0.85)	-0.75 (1.35)	-0.68* (0.33)
Include controls?		N	Y	Y	Y
Include case fixed effects?		N	N	Y	N

Note: The IV coefficients estimated in the first three columns are estimated by using legal representation at the preliminary arraignment as an instrument for later representation. Conditional minimum and maximum sentences do not include individuals sentenced to life imprisonment or death. An asterisk (*) denotes an estimate that is statistically significant at the two-tailed 5% level, and two asterisks (**) at the 1% level. Heteroskedasticity-robust standard errors are reported in parentheses. All of the estimates noted as statistically significant except the "Guilty of murder"—IV₂ and "Expected time served"—OLS would remain significant after applying the Benjamini and Hochberg correction for multiple comparisons with a false discovery rate of 0.05. See Yoav Benjamini & Yosef Hochberg, *Controlling the False Discovery Rate: A Practical and Powerful Approach to Multiple Testing*, 57 J. R. STAT. SOC. B. 289 (1995).

In Table 3 we report IV regression estimates of the impact of public defender representation on whether an individual was found guilty of various types of offenses (either at trial or because of a plea arrangement), with a

murder defendant as the unit of observation.⁶⁹ The first column of the table reports the average outcome among those initially assigned private counsel, which offers a basis for judging the magnitude of the impact estimates. Each subsequent row entry reports an impact estimate obtained from estimating a particular regression model. The first row in the table, for example, indicates that defendants initially have a 0.801 average probability (or 80% chance) of pleading or being found guilty of some charge. Using the IV₁ model, representation by the public defender is estimated to reduce the probability a defendant is found guilty of any charge by 0.02, but this difference is not statistically significant.

Column IV₁ estimates a simple linear IV model with no controls; this setup is equivalent to dividing the mean difference in outcomes reported in Table 2 by the mean difference in representation (0.44).

Column IV₂ adds to the IV regressions controls for defendant race, gender, age and age squared, and year of case; and indicators for the number of defendants, total number of charges, presence of a weapons or conspiracy charge, and total prior charges and prior arrest for assault, aggravated assault, weapons offenses, drug offenses, burglary, robbery, and theft. If randomization was successful, as is suggested by Table 1, the inclusion of additional controls in the regression model is not strictly required to obtain an unbiased estimate of the impact of public defender representation. However, controlling for additional covariates may yield more precise estimates of attorney effects, and the controls may also be helpful for addressing any unrecognized departures from randomization. Because the IV₂ model includes a comprehensive set of controls and identifies the effect of public defender representation using the broadest set of cases, it is our preferred specification, although in general we obtain similar effects estimates whether or not we control for other factors.

Column IV₃ limits the analysis to cases involving multiple defendants and adds a set of indicator variables, one for each case, as additional controls.⁷⁰ This IV analysis essentially identifies the impact of public defender representation by comparing the outcomes for codefendants who were involved in the same case, where one defendant was assigned to a public

69. We also estimated nonlinear versions of these specifications (IV Poisson models for count outcomes and bivariate probit models for binary outcomes) and obtained similar results. For simplicity, we report results from the linear models.

70. Including these 447 indicator variables as additional regressors allows each case to have its own separate effect on the outcome across all defendants in the case, which effectively controls for factors that are unique to a case but shared across defendants in that case.

defender and other defendants were assigned appointed counsel. The main advantage of such a within-case analysis is that it holds constant factors that are determined at the case level—such as the quality of witnesses, investigative effort by the police, etc.—across those with different types of representation, even when such factors may be unobservable. The primary drawback of the models with case-level indicators is that these models appreciably reduce our sample size, excluding the 2,061 cases involving a single defendant from the analysis and focusing only on those cases with several defendants who differ in their initial assignment. Because of the smaller sample, these estimates are less precise than those using the full sample.

Although estimates of the impact of public defender representation on guilt for any charge are negative, these estimates are modest relative to the overall guilt rate of 80%, and none is statistically significant. More striking are disparities in murder conviction rates. The IV2 model, our preferred specification, demonstrates that those represented by public defenders are 0.11 points less likely to be convicted of murder, a 19% decline relative to the conviction probability among those with appointed counsel of 0.565. This difference is statistically significant.

2. *Effects on Sentencing*

We next turn to sentencing outcomes. The two most severe penalties for murder are life in prison, which in Pennsylvania carries no possibility of parole, and death. As shown in the next rows of Table 3, representation by the public defender reduces the probability of receiving a life sentence by 0.16 (Column IV2), or a remarkable 62%. This reduction in life sentences can be observed both in the full sample and when limiting the analysis to trials with multiple defendants.⁷¹

While no defendant represented by the public defender at trial has ever received a death sentence, our estimates of the effect of being represented by the public defender on receiving a death sentence are small. However, because fewer than 2% of defendants receive a death sentence, our estimates are highly

71. One illustration of the effectiveness of the Defender Association attorneys is the fact that, in eighty-nine cases involving two defendants, one of whom was represented by the public defenders and one of whom had appointed counsel, sixteen defendants represented by the appointed attorneys were acquitted of all charges, versus twenty-five among those represented by the public defenders.

imprecise.⁷² The 95% confidence interval for these estimates encompasses values that would imply either a substantial reduction or a substantial increase in the probability of receiving a death sentence due to public defender representation. Thus, these data preclude drawing conclusions about the efficacy of public defenders in avoiding death sentences.⁷³

We next turn to an analysis of sentence length and expected time served. We find substantial and highly statistically significant impacts of public defender representation on average sentence length. The causal impact of public defender representation on sentence length is a 6.4-year reduction (IV₂), which represents a 31% decline relative to the mean sentence length for those assigned appointed counsel of 20.9 years.⁷⁴

For those who are not sentenced to life imprisonment or death, we also examine minimum and maximum sentences. The IV point estimates for these outcomes are negative and sizable, but only marginally statistically significant. The magnitudes of the estimated impacts, however, are large, implying a greater than one year reduction in minimum sentences and a more than three year reduction in maximum sentences. It appears that public defenders are successful at both reducing the likelihood of the most extreme sanctions and reducing the severity of less extreme sentences.

The final row of Table 3 uses expected time served as the outcome, where expected time served is calculated using the NCRP as described in Section II.A. Our analysis reveals statistically significant and practically large impacts of public defender representation on expected time served. The IV₂ estimate of -2.6 implies that individuals represented by public defenders are expected to

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72. This is not simply a result of using a linear model; similar results are obtained with a bivariate probit analysis.
73. Because no client represented by the public defender at trial has ever been sentenced to death and because more than seventy-four defendants represented by private or appointed counsel have been sentenced to death since 1994, most interviewees with whom we discussed this were surprised by this finding. Because death sentences are comparatively very rare events, occurring in only 1.3% of cases, our analysis is unable to detect a difference. A disadvantage of the IV approach is that because it isolates the variation attributable to the initial assignment, the model has less explanatory power than it would in a situation in which the IV approach was not necessary—if, for example, there was no postassignment crossover and we could simply compare the average sentences that resulted from each group.
74. As might be expected, when we assign a sentence length of thirty years rather than forty years to those sentenced to life or death, the point estimates are a bit smaller, but remain highly statistically significant. Since this alternative approach also lowers overall average sentence lengths, the implied percentage impact of the public defender on sentence length remains at -31%.

spend more than two-and-a-half fewer years in prison than otherwise similar defendants represented by appointed counsel.⁷⁵ This measure represents a 24% reduction in expected sentence. The magnitude of this effect in percentage terms is roughly comparable to our estimated impacts using average sentence length as an incarceration measure.

It is instructive to compare our findings with those of two other recent studies that use randomization to understand the influence of defense lawyers on case outcomes.⁷⁶ Rather than comparing appointed attorneys and public defenders as we do, Abrams and Yoon exploit the random assignment of defense attorneys within the public defender office in Clark County, Nevada to examine whether experience and other attorney characteristics affect outcomes. They find that an additional year of experience is associated with a 1.7% reduction in the sentence.⁷⁷ Thus, moving from a private appointed attorney to a public defender in Philadelphia, which we estimate reduces sentences by about 31%, is similar in effect to shifting from an attorney with no experience to one with over 18 years of experience in their study.

Iyengar compares public defenders and appointed counsel in the federal system and finds that public defenders reduce expected sentences by 16% relative to private assigned counsel.⁷⁸ Her estimates are sufficiently precise so as to statistically reject the 31% decrease in sentences we find in Philadelphia. The fact that public defenders in Philadelphia appear to have a larger impact on sentences than federal defenders may reflect the fact that attorneys play a larger role in murder cases than in other, less serious cases, or this difference

75. Although the specification including case fixed effects is not statistically significant, it is also somewhat imprecise, and indeed we cannot statistically reject equivalence between this estimate and the estimates in columns IV1 and IV2.

76. Beyond examining different contexts, one of the key differences between this study and the prior work by Abrams, Yoon, and Iyengar pertains to the severity of the offenses considered. The average unconditional sentence for the Abrams and Yoon sample is seven months, Abrams & Yoon, *supra* note 8, at 1162, and in Iyengar it is thirty months, Iyengar, *supra* note 9, at 35, versus 250 months in our sample. Thus, the consequences of disparity for defendants are arguably much greater in our setting than in those examined by prior research.

77. Abrams & Yoon, *supra* note 8, at 1169. The 1.7% reduction can be calculated by dividing the estimated impact of an additional year of experience of -0.122 reported in Column 2 of Table 7 of their article by the average sentence length of 7.2 months.

78. Iyengar, *supra* note 9, at 35. The 16% reduction can be calculated by dividing the estimated impact of having CJA-appointed counsel (4.75) reported in column 6 of Panel A of Table 2 of the Iyengar paper by the average sentence length of 30.26 months.

may result from the compensation system and other factors more specific to Philadelphia.⁷⁹

By way of contrast, the column of Table 3 labeled OLS presents estimates of the impact of public defender representation on outcomes that use ordinary least-squares (OLS) regression analysis that adjusts for observable differences in characteristics between those with private appointed counsel versus those with public defenders. The OLS method is the primary approach used in past studies of the impacts of public versus appointed counsel.⁸⁰ Its primary flaw is that it ignores the effect of postassignment, nonrandom sorting: the fact that defendants who start out with the public defender and move to appointed counsel (and vice-versa) may have particular nonrandom characteristics.

The OLS approach does provide some evidence that public defenders attain better outcomes than their appointed counterparts—for example, public defenders are estimated to reduce the number of guilty charges by an average of 0.2 charges across defendants and reduce the probability of receiving a life sentence by 0.05. However, differences between the OLS and IV estimates are noticeable for many outcomes. For example, properly accounting for nonrandom sorting to attorneys triples the estimated impacts of public defender representation on life sentences and increases the reduction in expected time served by two years. OLS estimates suggest public defenders do not affect murder convictions, whereas the more credible IV results show a strong effect.

To provide further insight into why OLS and IV estimates differ, in Appendix Table 1 we report coefficient estimates from a regression model where the dependent variable is an indicator for whether a defendant was represented by a public defender at the formal arraignment and the explanatory variables capture defendant demographics and prior criminal history.⁸¹ These regressions provide insight into which types of defendants are ultimately most likely to keep their public defenders through the resolution of their cases. Appendix Table 1 demonstrates that those ultimately represented by public defenders are indeed a nonrandom subset of the total population—for example, older defendants are slightly more likely to remain represented by the public defenders. Defendants with current weapons charges are less likely to be

79. For example, private appointed attorneys in the federal system are paid an hourly wage, whereas Philadelphia attorneys receive flat fees.

80. See *supra* note 6 and accompanying text.

81. We employ a probit regression model and report average marginal effects in the table. Estimation using a linear model provides very similar results.

ultimately represented by public defenders. Given this clear evidence of sorting based on observable characteristics, it seems reasonable to expect that sorting may also occur along dimensions that are unobservable to us but may affect how cases are ultimately decided.⁸² These patterns demonstrate the difficulty of cleanly measuring attorney effects using traditional regression methods that cannot readily account for defendant sorting behavior.

One question raised by the large disparity in outcomes shown in Table 3 is the extent to which these differences reflect superior performance by public defenders in plea negotiations versus trials. Although the data clearly indicate public defenders must perform better at something, ideally one might wish to isolate whether the difference results from better handling of plea negotiations, better handling of trials, or both. Unfortunately, the usual notion of whether a public defender is “better” – (i.e., for a given defendant and fact pattern, does the public defender achieve a lower sentence in a trial or plea negotiation?) – cannot be measured using the available data. Whether a person pleads guilty or goes to trial is not randomly determined, but rather reflects a selection process involving the attorney, the client, and the prosecutor; we cannot simply reanalyze the subset of cases that involves guilty pleas or trials to measure the effect of attorney type on that particular class of case.⁸³ Put differently, even if, for any given defendant, public defenders are worse at both plea negotiations and trial representation, it would still be possible for public defenders to get shorter than average sentences for their clients if there is heterogeneity across defendants in the expected benefit of going to trial and public defenders are simply better at sorting appropriate defendants to pleas versus trials.

We can, however, examine whether there appear to be systematic differences in how different types of attorneys handle cases. Table 4 presents estimates of the impact of public defender representation on two measures of case handling: whether the defendant waives a jury trial – a strategy typically used to reduce the likelihood of a death sentence – and whether the defendant pleads guilty to at least some charges.⁸⁴ While use of waiver trials does not vary across the two types of attorneys, clients of public defenders are 21 percentage points (or 76%) more likely to plead guilty than clients of appointed private attorneys. These differences in willingness to plea bargain may at least partly

82. For example, defendant aptitude may affect both his choice of attorney and the quality of his case.

83. This would re-introduce the selection bias that we seek to eliminate by exploiting the random assignment of attorneys.

84. These estimates have been obtained using the same methods and control variables as those in Table 2.

explain the shorter sentences obtained by Defender Association attorneys for their clients.

Table 4.
ESTIMATED IMPACT OF DEFENDER ASSOCIATION REPRESENTATION ON CASE HANDLING

OUTCOME	AVERAGE FOR THOSE ASSIGNED APPOINTED COUNSEL	ESTIMATED EFFECT OF PUBLIC DEFENDER REPRESENTATION ON OUTCOME			
		(IV ₁)	(IV ₂)	(IV ₃)	(OLS)
Waived jury trial	26.3%	0.017 (0.051)	-0.018 (0.049)	-0.038 (0.057)	-0.017 (0.020)
Pled guilty	28.1%	0.236** (0.055)	0.213** (0.053)	0.176* (0.073)	0.135** (0.021)
Include controls?		N	Y	Y	Y
Include case fixed effects?		N	N	Y	N

Note: An asterisk (*) denotes an estimate that is statistically significant at the two-tailed 5% level, and two asterisks (**) denote significance at the 1% level. Heteroskedasticity-robust standard errors are reported in parentheses.

Because public defender representation does not affect overall guilt rates, as shown in Table 3, but does appreciably increase the share of cases resolved by plea bargain, we know that the conviction rate must be lower among cases taken to trial by Defender Association attorneys than among cases taken to trial by private appointed counsel. This pattern might occur because public defenders are better at ensuring that cases with superior prospects for acquittal proceed to trial, or it may be that public defenders are better at arguing cases.

The following provides one interpretation of the combined evidence from Tables 3 and 4: public defenders are more successful at convincing their clients to plead guilty to lesser charges, and as a result, these clients are able to avoid being found guilty of murder and do not receive the most severe sanctions, such as life imprisonment. Clients of appointed counsel are more likely to go to trial, but overall guilt rates for this group end up being the same, meaning that these individuals lose the benefit of lessened sentences from plea bargaining without gaining much in terms of increased likelihood of acquittal.

III. EXPLANATIONS FOR THE DIFFERENCE IN OUTCOMES

Why the stark difference in outcomes? In order to better understand the reasons for the difference in outcomes, we undertook qualitative interviews, a review of past research on this issue, and a review of relevant cases.

It is theoretically possible that the difference in quantitative outcomes that we observe is the result of differences in the way that the prosecutor or judge treats a defendant with an attorney of a particular type, not a result of differences in the actions or inactions of the attorney. However, we found no evidence of this in the interviews we conducted and think it is unlikely.

Instead, our interviews suggest that the causes of the difference in outcomes are attributable to defense counsel. These, in turn, can be understood as ranging from longer-term systemic and institutional causes to more immediate differences in the treatment of individual cases.

We find that, in general, appointed counsel have comparatively few resources, face more difficult incentives, and are more isolated than public defenders. The extremely low compensation for appointed counsel reduces the pool of attorneys willing to take the appointments and makes extensive preparation economically undesirable. Moreover, the judges selecting counsel may be doing so for reasons partly unrelated to counsel's efficacy. In contrast, the public defenders' steady salaries, financial and institutional independence from judges, and team approach to indigent defense avoid many of these problems. These longer-term institutional differences lead to the more immediate cause of the difference in outcomes: less preparation by appointed counsel.

These problems are not new. For almost twenty years, commentators have noted many of the same problems with the representation provided by appointed counsel in Philadelphia. In a series of ten newspaper articles in 1992 and 1993, journalist Fredric Tulsky documented an indigent defense system in Philadelphia murder cases that was marred by conflicts of interest, lack of compensation, poor training, and few standards.⁸⁵ In 2001, Hillary

85. Fredric N. Tulsky, *Big-Time Trials, Small-Time Defenses*, PHILA. INQUIRER, Sept. 14, 1992, http://articles.philly.com/1992-09-14/news/26023186_1_poor-defendants-new-trial-trial-attorney [hereinafter Tulsky, *Big-Time Trials*]; Fredric N. Tulsky, *Lawyers Back Plan for Defense of the Poor*, PHILA. INQUIRER, Dec. 18, 1992, http://articles.philly.com/1992-12-18/news/25992759_1_homicide-case-defense-lawyer-capital-cases; Fredric N. Tulsky, *Lawyers Balk at Plan for Flat Fees*, PHILA. INQUIRER, Sept. 25, 1992, http://articles.philly.com/1992-09-25/news/26021391_1_public-defender-flat-fees-court-appointments; Fredric N. Tulsky, *Lawyers' Fees Get New Look*, PHILA. INQUIRER, Dec. 9, 1992,

Freudenthal conducted a series of quantitative analyses and qualitative interviews and chronicled a similarly dysfunctional system in an unpublished undergraduate paper.⁸⁶

To understand whether the situation has meaningfully changed since this previous research, we conducted structured qualitative interviews with twenty appointed counsel, judges, and current and former public defenders⁸⁷ and reviewed cases in which Philadelphia counsel were found ineffective in capital murder cases. We found that while the situation has improved recently in some respects, many of the same underlying problems remained and are the most probable explanation for our finding a sharp difference in the outcomes of cases during our study period (1994-2005).

We emphasize that the problems identified with appointed counsel do not reflect every appointed counsel in every case. Most respondents noted that some appointed counsel could perform well in many cases. Similarly, our data analysis only reflects the outcomes of defendants represented by appointed counsel and public defenders *on average*. Appointed counsel might produce better outcomes than the public defender for any particular defendant.

http://articles.philly.com/1992-12-09/news/25992641_1_poor-defendants-private-lawyers-court-appointed-attorneys; Fredric N. Tulsky, *Legal Panel Endorses New Rules*, PHILA. INQUIRER, Apr. 21, 1993, http://articles.philly.com/1993-04-21/news/25983103_1_court-appointments-criminal-justice-system-defender-association [hereinafter Tulsky, *Legal Panel Endorses New Rules*]; Fredric N. Tulsky, *Proposal Aimed at Lawyers of Indigent Criticized*, PHILA. INQUIRER, June 16, 1993, http://articles.philly.com/1993-06-16/news/25974621_1_lawyers-philadelphia-bar-association-defendants; Fredric N. Tulsky, *Report: Money Woes Affect Trials' Fairness*, PHILA. INQUIRER, June 9, 1992, http://articles.philly.com/1992-06-09/news/26029522_1_death-penalty-death-row-defender-association [hereinafter Tulsky, *Report: Money Woes Affect Trials' Fairness*]; Fredric N. Tulsky, *A Step for Indigent Defense*, PHILA. INQUIRER, Apr. 12, 1993, http://articles.philly.com/1993-04-12/news/25979556_1_homicide-defendant-private-lawyers-defender-association [hereinafter Tulsky, *A Step for Indigent Defense*]; Fredric N. Tulsky, *What Price Justice? Poor Defendants Pay Cost as Courts Save on Murder Trials*, PHILA. INQUIRER, Sept. 13, 1992, http://articles.philly.com/1992-09-13/news/26024272_1_blount-murder-trials-social-worker [hereinafter Tulsky, *What Price Justice?*]; Fredric N. Tulsky, *Working for Better Legal Help for Poor*, PHILA. INQUIRER, Dec. 27, 1992, http://articles.philly.com/1992-12-27/news/25995259_1_court-appointed-lawyers-defender-association-court-appointments.

86. Freudenthal, *supra* note 21.

87. We identified subjects by the snowball method: we asked respondents for the names of other knowledgeable respondents. Overall, we interviewed three judges, four current or recent Defender Association lawyers, and thirteen counsel who took appointments during the study period. On many topics, there was broad consensus on the reasons that public defender-represented defendants were generally likely to fare better than those represented by appointed counsel, and we are confident that we achieved saturation within the population of respondents.

A. Conflicts of Interest

An adversarial system of criminal justice relies upon zealous representation of the parties in order to reach a reliable outcome. Hence the traditional ethical obligations of counsel to avoid any direct conflict of interest or anything that might impair her independence or ability to zealously advocate for her client's interests.⁸⁸ Similarly, the American Bar Association recommends that appointed counsel systems be independent of judges in order to protect counsel's ability to provide zealous advocacy.⁸⁹ Unfortunately, both judges and defense counsel in Philadelphia face potential conflicts of interest in the appointment, payment, and representation process that may help explain why the defender-represented defendants fared better.⁹⁰

Appointments in Philadelphia have long been controlled by the judges of the Philadelphia Court of Common Pleas. When a lawyer is needed, court administrators determine whose turn it is to appoint the attorney, and they contact that judge's chambers. That judge provides the name of the attorney to be appointed.⁹¹ The set of appointing judges includes those assigned to the civil division, who do not try criminal cases.

Interviewees indicated that judges face several potential conflicts of

88. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."). For example, the prohibition on outside investment in law firms in Rule 5.4 is justified on the grounds that it might impair the independent decisionmaking of attorneys. See *id.* R. 5.4.

89. AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002) ("The public defense function, including the selection, funding, and payment of defense counsel, is independent. . . . Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense." (footnote omitted)).

90. Stephen Bright noted the endemic conflicts of interest in appointed counsel systems:

This is a system riddled with conflicts. A judge's desire for efficiency conflicts with the duty to appoint indigent defense counsel who can provide adequate representation; a lawyer's need for business . . . taints the constitutional and ethical requirements of zealous advocacy. And later, if there is a claim of ineffective assistance, the judge who appointed the lawyer is the one to decide the claim.

Protecting the Innocent, Ensuring Competent Counsel in Death Penalty Cases: Hearing on S.486 Before the S. Comm. on the Judiciary, 107th Cong. (2001) (statement of Stephen B. Bright, Director, Southern Center for Human Rights).

91. This appointment "wheel" is unrelated to the system by which a case is assigned to a judge for trial.

interest. The first is fiscal. Because Pennsylvania is the only state in which each county is solely responsible for funding indigent defense without any assistance from the state,⁹² every dollar that is spent on indigent defense by the county comes directly from the court's overall budget. Judges must therefore weigh indigent defense costs against many needs, including those of probation officers and treatment courts.⁹³

Apart from the direct pecuniary costs of paying for defense counsel, judges may also have conflicts of interest in appointing counsel who will require too much judicial time and energy. Judges who worry about overcrowded dockets may have incentives to appoint counsel who file fewer pretrial motions, ask fewer questions during voir dire, raise fewer objections, and present fewer witnesses.⁹⁴ Quite apart from reducing the expenditures paid to counsel, less active defense attorneys also effectively allow judges to process more cases in less time.⁹⁵

Historically, judges have apparently assigned cases to lawyers with whom they had political connections.⁹⁶ A former chairman of the Philadelphia Bar

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92. Holly R. Stevens & Colleen E. Sheppard, *State and County Expenditures for Indigent Defense Services: Fiscal Year 2008*, AM. BAR. ASS'N 4-5, 53 (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fyo8.authcheckdam.pdf.
93. See Telephone Interview with Anonymous #17 (July 26, 2011) (notes on file with authors). According to some lawyers, judges would use unspent funds for indigent defense on other judicial branch needs. See Telephone Interview with Anonymous #9 (July 21, 2011) (notes on file with authors) (stating that surplus funds went into general operating costs of the court system); see also Freudenthal, *supra* note 21, at 65 (according to defense counsel, indigent defense funds were used for other court expenditures, including hiring politically appointed courtroom staff).
94. See Freudenthal, *supra* note 21, at 67 (noting the "broad perception that judges prefer lawyers who move cases along without spending 'excessive' time on motions and requests" and quoting a lawyer who explained, "we've got a huge backlog problem here, and many of the judges just want you moving cases"); Telephone Interview with Anonymous #16 (July 25, 2011) (notes on file with authors); Telephone Interview with Anonymous #15 (July 29, 2011) (notes on file with authors) ("[The] last thing judges want is a good lawyer winning a homicide case. Trial used to be an art form. They just want to move cases.").
95. Telephone Interview with Anonymous #16 (July 25, 2011) (notes on file with authors) (stating that judges are under tremendous pressure to process cases quickly and that "[n]obody wants to rock the boat" by appointing lawyers who are too aggressive); Telephone Interview with Anonymous #15 (July 29, 2011) (notes on file with authors).
96. See Tulsky, *Legal Panel Endorses New Rules*, *supra* note 85 ("[Judges] view appointments as a prerogative they wanted to keep." (quoting Samuel C. Stretton, a Pennsylvania lawyer)); Tulsky, *What Price Justice?*, *supra* note 85 ("Judges have traditionally kept hold of the power

Association's criminal justice section explained that the system of appointments had developed because "judges wanted to pay back supporters for their political help."⁹⁷ Another lawyer explained, "[t]he homicide appointment system is largely a patronage system."⁹⁸ In 2001, Freudenthal made similar findings, noting that judges distributed these appointments as political favors.⁹⁹

Today, opinion is mixed with respect to whether political considerations continue to play a role in the appointments, with most respondents indicating that this consideration plays much less of a role than it did in the past. One interviewee disagreed, explaining that "[t]he appointment process is still political. If the judge is Republican, they appoint the next guy on the list they get from the party. Democratic judges aren't any better."¹⁰⁰ According to this respondent, this practice occurs even for lawyers that other judges identify as clearly incompetent: "In one case, the homicide calendar judge saw that the lawyer was hopeless and contacted the judge who appointed the guy and told him not to appoint him again. It did not do any good. The [judge] appointed the same guy again."¹⁰¹

However, most interviewees thought that blatant political considerations

to appoint attorneys and have often assigned lawyers with connections. Big criminal cases have been handed out to relatives and friends of judges.").

97. Tulsky, *Big-Time Trials*, *supra* note 85 (quoting Steven A. Morley, former chairman of the criminal justice section of the Philadelphia Bar Association). Tulsky noted that "Philadelphia's poor defendants often find themselves being represented by ward leaders, ward committeemen, failed politicians, the sons of judges and party leaders, and contributors to the judges' election campaigns." *Id.* He also quoted Stuart H. Shuman, the head of the Municipal Court program for the Defender Association, who noted that the "Philadelphia homicide appointment system is . . . a political device enabling individual judges with the opportunity to appoint favored lawyers to cases in which a decent appointment fee can be earned." *Id.* (alteration in original).
98. *Id.* (quoting Robert E. Welsh, Jr., former head of the major-crimes division of the U.S. Attorney's Office for the Eastern District of Pennsylvania). The lawyer who received the most homicide appointments in the period Tulsky examined was a former judge who had been removed from the bench for taking money from the Roofers Union and then misleading the FBI. He represented defendants in an extraordinary sixty-two homicide cases, including capital cases, over a two-year period. *Id.*; see also Tulsky, *A Step for Indigent Defense*, *supra* note 85 (noting that an appointed counsel was charged with overbilling the city for indigent defense work).
99. See Freudenthal, *supra* note 21, at 67. Appointments were more desirable in the past because inflation has eroded the real value of the fees, which were not proportionally adjusted over the years.
100. Telephone Interview with Anonymous #8 (July 23, 2011) (notes on file with authors).
101. *Id.*

in the appointment of counsel are much less common today, in part because fewer attorneys want the appointments.¹⁰² At least one interviewee who was generally positive about appointed counsel admitted that not every appointed lawyer did a good job.¹⁰³

This system of appointment may also create perverse incentives for lawyers who wish to continue to receive appointments. Aware of the caseload and fiscal pressures faced by judges, appointed lawyers may be more hesitant to request numerous experts or to employ time-consuming strategies in the course of representing a defendant.¹⁰⁴ At least one of the appointed lawyers whom we interviewed, however, denied that appointed counsel's actions were influenced by these considerations and emphasized their professional obligations to zealously represent their clients.¹⁰⁵

In contrast, public defenders, who are paid a fixed salary and who are not beholden to judges for future appointments, are not subject to these perverse incentives and are thus able to act more independently.¹⁰⁶

B. Compensation for Lawyers, Investigators, and Experts

Another ongoing problem, documented by both Tulsy¹⁰⁷ and Freudenthal,¹⁰⁸ is the compensation paid to appointed attorneys for representation, investigators, and experts in murder cases. Counsel appointed

102. See, e.g., Telephone Interview with Anonymous #14 (July 25, 2011) (notes on file with authors). Many of the attorneys who continue to accept appointments are sole practitioners who value the steady income despite the small compensation. Telephone Interview with Anonymous #12 (July 25, 2011) (notes on file with authors). Another attorney suggested that being appointed in a high profile case may provide free publicity for the attorney. Telephone Interview with Anonymous # 8 (July 23, 2011) (notes on file with authors).

103. See, e.g., Telephone Interview with Anonymous #17 (July 26, 2011) (notes on file with authors).

104. Telephone Interview with Anonymous #16 (July 25, 2011) (notes on file with authors). Another lawyer has speculated that counsel "are routinely appointed because they don't make trouble, they try the cases quickly, the[y] don't do a huge amount of prep, they don't bill huge. They've figured out what's acceptable to the court." Freudenthal, *supra* note 21, at 67.

105. See, e.g., Telephone Interview with Anonymous #10 (July 21, 2011) (notes on file with authors).

106. Telephone Interview with Anonymous #8 (July 23, 2011) (notes on file with authors) (noting that fixed salaries permit aggressive representation by Defender Association attorneys).

107. *Supra* note 85 and accompanying text.

108. Freudenthal, *supra* note 21, at 45-47, 69-72.

in murder cases—both capital and noncapital—receive flat fees for pretrial preparation: \$1,333 if the case is resolved prior to trial and \$2,000 if the case goes to trial. The preparation fee also includes the first three hours of trial time. While on trial, lawyers receive \$200 for three hours of court time or less, and \$400 per day for more than three hours.¹⁰⁹

This compensation structure creates several problems. First, the overall amounts of compensation are very low compared to other jurisdictions and compared to what most attorneys could earn in the private sector. By contrast, attorneys appointed to criminal cases in federal court earn \$125 per hour in noncapital cases and \$185 per hour in capital cases. As a result of the below-market rate for appointed attorneys, many respected criminal defense attorneys refuse to be on the list to accept indigent defense assignments. Interviewees, including appointed counsel, note that while some of the lawyers who are willing to take appointments are good, some are not.¹¹⁰

Consistent with microeconomic theory, defense counsel who take appointed cases do it either because it makes up for the lack of other, better-paying work¹¹¹ or because they receive other benefits from it. For many appointed counsel, this other benefit is an enjoyment of murder trials and being involved in what one lawyer called “significant” cases.¹¹² One explained:

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- ¹⁰⁹. Interview with Anonymous #1 (Mar. 3, 2011) (notes on file with authors); Telephone Interview with Anonymous #10 (July 21, 2011) (notes on file with authors); Trial Division Attorney Payment Voucher, *supra* note 24.
- ¹¹⁰. Telephone Interview with Anonymous #4 (Dec. 15, 2010) (notes on file with authors) (noting that “mostly political hacks” get appointments and further noting despite required training, many of these lawyers “make the same mistakes, again and again”); Telephone Interview with Anonymous #19 (July 28, 2011) (notes on file with authors) (describing “an ever-diminishing pool of hacks who were willing to take these cases”); *see* Freudenthal, *supra* note 21, at 70 (quoting a private lawyer claiming that “[t]here are a lot of lawyers I know who would be good advocates in these cases who won’t take it because it’s too much time and almost no money, in terms of the time you have to spend”); *id.* (“[L]awyers must consider the possibility that their bills will be cut.”); *see also* Roach, *supra* note 9, at 46 (finding that as outside options for higher quality attorneys improve, the quality of attorneys willing to take appointments declines).
- ¹¹¹. Telephone Interview with Anonymous #12 (July 25, 2011) (notes on file with authors) (noting that while private clients are more lucrative, appointed work provides a steady income).
- ¹¹². Telephone Interview with Anonymous #11 (July 22, 2011) (notes on file with authors) (noting that a love of “doing cases” is a significant motivation, and that the court administration “has [the] private bar over a barrel” because a sufficient number of lawyers are willing to accept appointments despite low compensation).

“I’d do it for next to nothing, and the judges know this.”¹¹³

Second, as a result of the low rate of compensation for each individual case, attorneys who do take homicide appointments generally take on many more of them than it would be possible to handle well. One interviewee explained: “The way the system is built, it is very difficult for someone who wants to do a good job to get the money and time to be able to use best practices. It’s very hard for them to bill all that and get paid for it.”¹¹⁴

Another respondent who chose to stop taking appointments explained, “I think of [appointed counsel] as dray horses. You crack the whip, they pull the wagon. Some better than others, but none at the level I think is required.”¹¹⁵

The American Bar Association Guidelines for Counsel in Capital Cases note that a study of federal capital trials found that “total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889.”¹¹⁶ If two appointed lawyers in Philadelphia worked similar hours, they would be compensated at a rate of just over \$2 an hour.¹¹⁷

Third, the fee structure, with its flat rate for preparation with additional payments for trial, creates an incentive to take cases to trial, but does not create any marginal incentive to prepare for trial. As a result, interviewees noted that appointed counsel do relatively little preparation and are more

113. Telephone Interview with Anonymous #15 (July 29, 2011) (notes on file with authors).

114. Telephone Interview with Anonymous #8 (July 23, 2011) (notes on file with authors); see also Freudenthal, *supra* note 21, at 71 (quoting one lawyer as saying, “[a]nyone who takes a capital case under the Philadelphia system of paying lawyers basically has to commit ethical violations and go into court basically unprepared in many areas”).

115. E-mail from Anonymous #16 to author (July 29, 2011, 11:34 AM) (on file with authors).

116. See *Guidelines*, *supra* note 29, at 40.

117. In 1992, Tulsy reviewed twenty capital cases and found that the lawyers were paid, on average, \$6,399 per case. See Tulsy, *What Price Justice?*, *supra* note 85. In only one of the cases were two lawyers involved. Lawyers also often complained that their bills, submitted after the trial was finished, were substantially cut. See Tulsy, *Report: Money Woes Affect Trials’ Fairness*, *supra* note 85.

likely to take cases to trial.¹¹⁸

In particular, interviewees note that Defender Association counsel spend much more time in preparation with defendants, building trust. This trust is important for developing an effective defense, particularly in the penalty phase of a capital case, which often requires the defendant to candidly discuss personal family background, including sensitive incidents of neglect and abuse.¹¹⁹ This level of trust between counsel and defendant also increases the ability of defense counsel to convince a young defendant that the best course of action might be to agree to a plea bargain or to waive a jury.¹²⁰

Some appointed counsel were critical of the Defender Association for meeting with the client repeatedly in an effort to persuade defendants to plead guilty rather than take the case to trial.¹²¹ One lawyer who took appointments candidly admitted that he thought “time with the client was highly overrated.”¹²² He contrasted the Defender Association counsel’s time-intensive efforts to persuade clients to plead with his general willingness to accept at face value a client’s desire to go to trial.¹²³

Fourth and finally, compared to the public defender, appointed lawyers are limited in their ability to hire expert witnesses, investigators, and mitigation specialists. The American Bar Association recommends that in a capital case, a defense team should include lawyers, investigators, mitigation

118. Telephone Interview with Anonymous #19 (July 28, 2011) (notes on file with authors); Telephone Interview with Anonymous #11 (July 22, 2011) (notes on file with authors); Telephone Interview with Anonymous #4 (Dec. 15, 2010) (notes on file with authors). Ten years ago, Freudenthal noted the same dynamic and quoted one lawyer explaining why he does not spend time convincing defendants to accept a plea: “It could be hours and hours and hours with them, with the family, because you have to get the family involved. I mean, talk about preparation time—that could eat up your \$1700 right there.” Freudenthal, *supra* note 21, at 76; see also Roach, *supra* note 9, at 50 (finding that moral hazard related to compensation structure may affect appointed counsel behavior).

119. Telephone Interview with Anonymous #4 (Dec. 15, 2010) (notes on file with authors).

120. See Freudenthal, *supra* note 21, at 75 (noting that public defenders, in contrast to appointed counsel, invest time in convincing defendants to plead guilty when they think it best).

121. Telephone Interview with Anonymous #11 (July 22, 2011) (notes on file with authors).

122. *Id.* (“I’m not their friend or father or brother. I’m their lawyer.”).

123. *Id.* In this respect, appointed counsel could be viewed as more traditionally adversarial than the public defenders. To the extent we value the public jury trial for its public expressive functions, the fact that defendants represented by appointed counsel are more likely to go to trial may provide some third-party benefits. But as our quantitative results show, whatever theoretical benefits this might provide come at substantial cost to the client in terms of the likelihood of the client’s conviction of murder and the length of sentence.

specialists, and expert witnesses.¹²⁴ Expert testimony is critical, particularly in the penalty phase of a capital trial, to present and explain the lifelong mental health significance of trauma that is often part of capital defendants' histories. Mitigation specialists, often trained social workers, are also an important part of a capital team and are specialists at identifying and documenting mitigating evidence about the defendant's life.

When a case is assigned to the public defender's office, mitigation specialists are part of the defense team from the start, meeting with the client and the client's family. Similarly, the public defender does not require court approval in order to hire an expert. Every homicide client is routinely examined by a defense mental health expert to develop mitigating evidence and help the lawyers understand whether an affirmative defense might be available to the defendant.

In contrast, appointed counsel have to seek judicial permission and funding to hire experts or investigators. While interviewees indicate that these approvals are now much more freely granted, in the past, during our study period, judges sometimes denied these requests.¹²⁵

C. Relative Isolation

Another factor that distinguishes the public defenders from appointed counsel is the degree of isolation of the appointed counsel. Most are sole practitioners, operating out of single-person law offices.¹²⁶ In noncapital cases, they represent the defendant alone. In potentially capital cases, two

124. See *Guidelines*, *supra* note 29, at 28 (“The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.”).

125. Freudenthal, *supra* note 21, at 77, quotes an appointed lawyer as noting that

[t]he courts are often willing to give you an expert for \$500. You can get two experts total for various things, so you sort of have to pick and choose. You might get an investigator for \$500—and you might be able to get a little more money, but they'll give a fight—it's not guaranteed. And maybe, let's say you need a pathologist. Maybe they'll give you a pathologist for another nickel. I don't know which doctor—we're talking a pathologist—is going to do any significant amount of work for \$500 or even \$1000. I mean, any good medical expert is a minimum of \$2500 per day, and the court will never give that to you—ever. It's just not going to happen. But let's say you've got a case in which you need a pathologist, you need an investigator, you need a ballistics expert, you need a fingerprint expert—I've had cases like that. They're just not going to do it.

126. *Id.* at 70.

lawyers are appointed: one to be primarily responsible for the guilt phase of the case and the other the penalty phase of the case. Coordination between the pair of appointed lawyers varies.

In contrast, the public defender's homicide unit is about ten attorneys, three investigators, and three mitigation specialists, housed in a much larger office.¹²⁷ In every murder case, capital and noncapital, two public defenders work the case together from the start. This organizational structure reduces the risk that inevitable human error on the part of one attorney will affect the overall representation in a way that is detrimental to the client.

One appointed attorney described one way the disadvantage of relative isolation could manifest itself in cases handled by appointed counsel: "you get defense lawyer syndrome—you think your defense theory of the case is much stronger than it actually is."¹²⁸ If this overestimation effect holds, appointed counsel could be more eager to take a case to trial than justified by the actual strength of that defense case.¹²⁹ The public defender's team approach to representation reduces the risk of these errors because multiple professionals vet a particular theory of the case as it develops.

Some interviewees also suggest that appointed counsel are slow to adopt new strategies or keep up with relevant case law developments, patterns that might also arise from isolation.¹³⁰ One interviewee reports that a U.S. Department of Justice-funded national capital case seminar in Philadelphia attracted lawyers from all over the country, but none of the lawyers who accepted homicide appointments in Philadelphia attended.¹³¹ Even on the

127. During the study period, the size of the office ranged from approximately 160 to 210 attorneys. E-mail from Paul G. Conway, Chief of Homicide Unit, Defender Ass'n of Phila. (Sept. 27, 2012, 3:15 PM) (on file with authors).

128. Telephone Interview with Anonymous #14 (July 25, 2011) (notes on file with authors); see also Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133 (2010) (presenting an empirical examination of lawyers' ability to predict the outcome of their own cases).

129. See Zev J. Eigen & Yair Listokin, *Do Lawyers Really Believe Their Own Hype and Should They?: A Natural Experiment*, 41 J. LEGAL STUD. (forthcoming 2012), <http://ssrn.com/abstract=1640062> (reviewing studies demonstrating optimism bias among attorneys, and showing that law students are more likely to believe in the merits of their side's position in moot court cases even when positions are randomly assigned).

130. Telephone Interview with Anonymous #4 (Dec. 15, 2010) (notes on file with authors) (describing an attempt to train appointed counsel on new jury voir dire techniques in capital cases—which were based on new case law developments—and noting that appointed counsel were repeatedly making the same errors).

131. *Id.*

same case, the two lawyers who are now appointed to potentially capital cases do not always communicate with one another to develop a central consistent theme.¹³² Ten years ago, Freudenthal noted a similar isolation among appointed counsel.¹³³ Some appointed counsel, however, disputed the suggestion that they were isolated and suggested that they maintained networks of colleagues at the criminal courthouse with whom they discussed cases.¹³⁴

Some interviewees believed that appointed lawyers' skill as trial lawyers was equal to or greater than that of the public defenders, who were criticized as elitist.¹³⁵ Yet even these interviewees admitted that not every lawyer taking appointments was as qualified or able as they were and that the payment scale made spending much time preparing cases economically irrational. On this view, appointed counsel's pride as professionals and skill as lawyers made up for the failure of the courts to pay them to adequately prepare.¹³⁶

We also found failure to prepare in our review of forty capital cases in which appointed lawyers in Philadelphia have been found ineffective over the last sixteen years.¹³⁷ While some of these cases were tried prior to our study

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132. One interviewee explained this breakdown in communication: "Organizationally, private lawyers have no sense [of] what other lawyers are doing. No team meetings; no sense there is [a] thematic approach to cases." *Id.*
133. See Freudenthal, *supra* note 21, at 63 (quoting an appointed lawyer: "I think one of the problems of the quality of justice is that we're not talking to each other—that we're not sharing information"); *id.* (noting several lawyers echoing the assertion, "William Penn tried a case in 1600 and lawyers have been trying cases the same way ever since").
134. Telephone Interview with Anonymous #10 (July 21, 2011) (notes on file with authors); Telephone Interview with Anonymous #16 (July 25, 2011) (notes on file with authors).
135. See, e.g., Telephone Interview with Anonymous #10 (July 21, 2011) (notes on file with authors); Telephone Interview with Anonymous #11 (July 22, 2011) (notes on file with authors).
136. Telephone Interview with Anonymous #10 (July 21, 2011) (notes on file with authors); Telephone Interview with Anonymous #14 (July 25, 2011) (notes on file with authors).
137. See, e.g., *Kindler v. Horn*, 542 F.3d 70, 87 (3d Cir. 2008) (alternative holding granting habeas relief for ineffective assistance of counsel for counsel's failure to investigate and present mitigating evidence); *Bond v. Beard*, 539 F.3d 256, 289 (3d Cir. 2008) (affirming finding of ineffective assistance of counsel for failing to investigate and present substantial mitigating evidence and stating that "[w]e do not question [defense counsel's] dedication or zeal in representing Bond, but here no amount of good intentions makes up for his lack of experience and preparation"); *Holland v. Horn*, 519 F.3d 107, 119-20 (3d Cir. 2008) (granting a new sentencing hearing as a result of counsel's ineffectiveness in failing to obtain the appointment of a mental health expert and present available mitigating mental health evidence); *Commonwealth v. Brooks*, 839 A.2d 245, 248-50 (Pa. 2003) (granting a new trial for ineffectiveness of counsel in failing to prepare for trial when appointed counsel

period, they serve as additional evidence of a longstanding pattern of appointed counsels' failure to prepare.

In short, longitudinal qualitative evidence over the last twenty years identifies systemic and institutional reasons for the difference in outcomes observed in Part II. Compared to public defenders, appointed counsel may be impeded by conflicts of interest on the part of both the appointing judges and the appointed counsel, extremely limited compensation, incentives created by that compensation, and relative isolation. Based on our qualitative interviews, we believe that these systemic factors cause appointed counsel generally to spend less time with defendants and investigate and prepare cases less thoroughly. Moreover, inevitable human errors in judgment are less likely to be caught by another member of the defense team because appointed counsel are primarily operating individually, in contrast to the Defender Association's more team-based approach.

IV. PRELIMINARY IMPLICATIONS OF THE PERFORMANCE DISPARITY BETWEEN THE PUBLIC DEFENDER AND APPOINTED COUNSEL

While a comprehensive discussion of the implications of our findings of disparity must await another day, in this Part we offer preliminary thoughts on the constitutional and policy implications of our findings.

never met with defendant prior to trial and specifically remembered only a single pretrial telephone conversation of less than a half hour; and court finding trial counsel per se ineffective for failing to meet with a capital client before trial); *Commonwealth v. O'Donnell*, 740 A.2d 198, 214 n.13 (Pa. 1999) (expressing "serious doubts regarding counsel's effectiveness during the penalty phase of Appellant's trial" when "entire defense presentation during the penalty phase took only four pages to transcribe," and stating that "it is difficult to disagree with Appellant that a defense which amasses only four pages of transcript simply does not reflect adequate preparation or development of mitigating evidence by counsel representing a capital defendant in a penalty phase hearing"); Docket Sheet at 19, *Commonwealth v. Ramos*, No. 51-CR-0100891 (Phila. Ct. Com. Pl. filed Jan. 11, 1999) (finding ineffective assistance of counsel for failing to investigate and present mitigating evidence); Docket Sheet at 8, *Commonwealth v. Carson*, No. 51-CR-0228371 (Phila. Ct. Com. Pl. filed Mar. 3, 1994) (ordering penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

A. Constitutional Implications

1. Sixth Amendment

The Sixth Amendment theoretically guarantees the effective assistance of counsel.¹³⁸ In *Strickland v. Washington*,¹³⁹ the Supreme Court held that in order to show a violation of this right, a defendant must show that (1) counsel's performance was deficient—that it fell below an objective standard of reasonableness; and (2) there was a reasonable likelihood that the defense was prejudiced by the attorney's deficient performance. Whatever the merits of this oft-criticized doctrinal framework,¹⁴⁰ our findings suggest that *Strickland* (and its application by the lower courts) permits an enormous and troubling chasm between different types of counsel.¹⁴¹

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138. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court held that this right applies to states through the Fourteenth Amendment.
139. 466 U.S. 668, 687 (1984). In *United States v. Cronin*, 466 U.S. 648 (1984), the Court held that in cases in which “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing,” ineffectiveness will be presumed without a petitioner having to show prejudice. *Id.* at 659.
140. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1858-64 (1994); Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986); William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995) (“Directly contrary to its rhetoric in *Strickland*, the Court has effectively ensured that *Gideon* guarantees little more than the presence of a person with a law license alongside the accused during trial.” (footnote omitted)); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 500-07 (1993); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999) (“[T]he *Strickland* Court interpreted the requirements of the Sixth Amendment’s right to effective assistance of counsel in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant.” (footnotes omitted)).
141. Justice Marshall anticipated disparity as a result of *Strickland* in his dissent: “My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts.” *Strickland*, 466 U.S. at 707 (Marshall, J., dissenting). Justice Blackmun made a similar point in his dissent from the denial of certiorari in *McFarland v. Scott*, 512 U.S. 1256 (1994) (Blackmun, J., dissenting from denial of certiorari), by providing dramatic examples of executed prisoners who had been poorly represented at trial but who were unable to meet the *Strickland* standard. *Id.* at

At least as a matter of logic, our findings could be used by a petitioner to support both prongs of a *Strickland* challenge. Given the systemic problems with the appointed counsel system that we document, the fact that a defendant was represented by an appointed lawyer makes it more likely that the performance of that lawyer fell below an objective standard of reasonableness and was “outside the wide range of professionally competent assistance.”¹⁴² As we observe above, however, not all appointed counsel perform poorly in every case, so while our findings may be relevant to the case-by-case determination a reviewing court must make, it is unlikely they will be determinative.¹⁴³

While *Strickland* is not ordinarily thought to be designed to reduce disparity across defendants, it does contain a seed of relativity. *Strickland*’s definition of deficient performance is based on the performance of *reasonable* counsel—an inquiry that necessarily requires a reviewing court to consider the performance of other counsel. In this respect, disparity in outcomes could be used to show the deficient performance prong of *Strickland*.

Our findings are also relevant to the prejudice inquiry. The difference in outcomes we measure provides a stark quantitative measure of the prejudice (in terms of additional prison time) that defendants may bear from the effects of counsel.¹⁴⁴ The difference in expected outcomes that we measure, about two-

1259-61.

142. *Strickland*, 466 U.S. at 690.

143. Interestingly, the Pennsylvania Supreme Court recently suggested the possibility that the failures of Philadelphia’s counsel system might be considered outside of the *Strickland* framework. In litigation considering the adequacy of the counsel system in Philadelphia, the Pennsylvania Supreme Court directed the Court of Common Pleas of Philadelphia County to consider “if the issue of whether the Philadelphia capital defense fee schedule is so inadequate that it can be presumed that counsel is constitutionally ineffective may indeed be properly considered in a general, global sense, or whether such a claim is more properly resolved on a case-by-case basis.” Order, *Commonwealth v. McGarrell*, No. 77 EM 2011 (Pa. Sept. 28, 2011).

144. The dissent in *Strickland* argued that a defendant represented by an ineffective lawyer should not have to prove exactly how he was prejudiced and noted how difficult it would be for a reviewing court to assess prejudice on a case-by-case basis:

First, 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. . . . On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government’s evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may

and-a-half years of prison time, has been found to be constitutionally significant. In *Glover v. United States*,¹⁴⁵ the Supreme Court reversed a lower court's application of *Strickland* that had found that an increase in sentence from six to twenty-one months did not violate the Sixth Amendment because it did not render the defendant's trial fundamentally unfair. The Court explained that "[a]uthority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."¹⁴⁶ Our results suggest that, in general, being represented by appointed counsel has an even larger effect than that found constitutionally significant in *Glover*.

Our findings that counsel during plea negotiations affects outcomes lend support to the Supreme Court's reasoning in its recent rulings on the right to effective assistance during plea negotiations. In two cases last Term, the Court held that the Sixth Amendment right to counsel extends to plea negotiations and that a subsequent fair trial cannot cure ineffectiveness during the plea negotiation phase.

In *Missouri v. Frye*,¹⁴⁷ defense counsel received a letter offering a ninety-day sentence which he (ineffectively) never conveyed to his client, who ultimately received a three-year prison sentence. The Court held that while no defendant has the right to any particular plea bargain, the general Sixth Amendment right to effective assistance of counsel extends to the plea bargaining process.¹⁴⁸

Similarly, in *Lafler v. Cooper*,¹⁴⁹ a habeas petitioner alleged that defense counsel advised him to reject an offered plea deal based on a misunderstanding of the relevant law. The defendant was then convicted at trial and given a much lengthier sentence than he would have received from the deal. The Court squarely rejected the State and the Solicitor General's argument that a fair trial renders any counsel ineffectiveness during plea negotiations irrelevant.¹⁵⁰

be missing from the record precisely because of the incompetence of defense counsel.

466 U.S. at 710 (Marshall, J., dissenting).

¹⁴⁵. 531 U.S. 198 (2001).

¹⁴⁶. *Id.* at 203.

¹⁴⁷. 132 S. Ct. 1399 (2012).

¹⁴⁸. *Id.* at 1408.

¹⁴⁹. 132 S. Ct. 1376 (2012).

¹⁵⁰. *Id.* at 1385. Since *Lafler*, unlike *Frye*, was heard as an appeal of a petition for habeas corpus, the Court necessarily found that the Michigan Supreme Court's earlier decision was contrary to then-existing law. This is because the standard of review under the

In both cases, the Court based its decision in part upon the centrality of plea negotiations to the criminal process. In *Lafler*, the Court explained that the argument that “[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining . . . ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials.”¹⁵¹ Similarly, in *Frye*, the Court noted that “[t]o a large extent horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.”¹⁵² The Court concluded by observing, “In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”¹⁵³

Our quantitative and qualitative findings are consistent with those observations. One of the key causes of the net disparity in outcomes between the defendants represented by the public defenders and appointed counsel appears to be the selection of cases for trial. Defendants represented by appointed counsel are substantially more likely to go to trial, and thus more likely to lose the potential advantage to be gained from a plea bargain.¹⁵⁴

Similarly, one of the issues that emerged during the qualitative interviews was the risk of “defense lawyer syndrome” among appointed counsel in which the defense lawyer believes that the defense case for acquittal is stronger than it really is. Defense counsel can persuade both himself and the client that the case is winnable at trial, and such a mindset may lead defense counsel to be less willing to try to convince the client to accept a plea deal. The more collaborative, team-based approach used by the public defenders might lessen the risks arising from relative isolation in defense practice.¹⁵⁵

Antiterrorism and Effective Death Penalty Act of 1996 precludes granting habeas relief to any petitioner on any new theory of constitutional law. 28 U.S.C. § 2254(e) (2006).

151. *Lafler*, 132 S. Ct. at 1381; see also *id.*, at 1387 (“The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel.” (citing Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) (“The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain.”))).
152. *Frye*, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).
153. *Id.*
154. See *supra* Subsection II.C.2.
155. See Freudenthal, *supra* note 21, at 61 (noting the advantages to collaboration at the Defender

Our interviews suggested that public defenders are thought to be more effective at persuading defendants to accept plea deals, at least in part because they spend more time meeting and developing a trusting relationship with their clients. Interviewees noted that the pay structure of appointed counsel both discouraged the frequent client visits that prove helpful in persuading defendants to accept pleas and made taking cases to trial more lucrative.

All of these findings suggest that, as the Supreme Court noted, the negotiation of a plea bargain is central to the defense function and that any efforts to improve the efficacy of defense services to the indigent must take account of the centrality of the plea bargaining process.

Considerable uncertainty remains as to how *Strickland*'s framework might be applied in these circumstances. Consider an apparently recurring pattern in Philadelphia: poorly prepared appointed counsel fails to persuade a client to explore a beneficial plea.¹⁵⁶ Our qualitative interviews suggested that this behavior is likely influenced by the payment structure and the lawyers' comparative isolation. Should it matter for the purposes of the Sixth Amendment if the attorney's failure to persuade the client to accept a favorable plea was a function of his failure to meet with the client, his financial interest in seeing the case go to trial, or his erroneous but genuine belief that the case was winnable at trial? From the perspective of the unnecessarily imprisoned defendant, of course, it makes little difference.

Unfortunately, our findings also suggest that any factfinding aimed at resolving claims of ineffectiveness during plea negotiations may also be quite difficult. Conventional ineffectiveness claims usually focus on what did or did not occur in the courtroom, where proceedings are almost always transcribed.¹⁵⁷ Ineffectiveness on account of actions or inactions during plea negotiations will be harder to prove, in part because the process is far less formal during this phase.¹⁵⁸ And to return to our recurring pattern, let us

Association).

156. Other commentators have noted a tendency in other jurisdictions for underresourced defense counsel to plead too many cases—a phenomenon deemed “meet ‘em, greet ‘em and plead ‘em.” Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1793 (2001) (noting that some criminal defense lawyers dispose of felony cases in under two hours with no investigation).
157. While counsel's pretrial preparation is sometimes litigated, it is usually directly related to actions or inactions that occurred during trial.
158. In *Martínez v. Ryan*, 132 S. Ct. 1309 (2012), the Court held that in cases where an ineffective assistance of trial counsel claim can be raised for the first time only on collateral review, a claim of ineffective assistance of postconviction counsel “may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.” *Id.* at 1315. This holding will

suppose that counsel fails to persuade or advise a client to accept an advantageous plea bargain because of the combination of financial interest, lack of time to meet with the client, and erroneous but genuine belief that the case was winnable at trial. While our results suggest that these factors are important in the aggregate, meeting *Strickland's* standards (at least as they are currently enforced) by proving the effect of any of those factors in an individual case would be very difficult.

2. Eighth Amendment

The Eighth Amendment, unlike the Sixth Amendment, has been interpreted to prohibit arbitrariness in the criminal process.¹⁵⁹ Perhaps the most disturbing aspect of our analysis is the fact that we identify a factor—whether or not a defendant is initially assigned to the public defender—that has an important impact on case outcomes but that is completely unrelated to the culpability or conduct of the defendant. The fact that a defendant's time in prison may dramatically change as a function of the ordering in which cases are entered into a log book raises troubling questions about the fairness and arbitrariness of the current system for assigning representation in Philadelphia.

However, the courts have been reluctant to consider statistical claims of this kind in this context. In *McCleskey v. Kemp*,¹⁶⁰ the Supreme Court rejected petitioner's Eighth and Fourteenth Amendment claims that were primarily based on statistical evidence of race-of-victim sentencing discrimination in the application of the death penalty. The Court stated that “[a]pparent disparities in

somewhat expand the circumstances under which a federal habeas petitioner can bring a claim that trial counsel was ineffective. Prior to *Martinez*, a prisoner's potentially meritorious claim of trial counsel ineffectiveness could be procedurally defaulted because his state postconviction counsel failed to bring it properly. Since the default constituted an independent and adequate state procedural bar, the prisoner would have no remedy for having been represented ineffectively at trial.

159. For example, in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the Supreme Court held that the way the death penalty was imposed constituted cruel and unusual punishment in violation of the Eighth Amendment. The concurring opinions in the case emphasized that the arbitrariness of the use of a death penalty was a key concern. See, e.g., *id.* at 295 (Brennan, J., concurring) (“The probability of arbitrariness [in the use of capital punishment] is sufficiently substantial that it can be relied upon, in combination with other principles, in reaching a judgment on the constitutionality of this punishment.”). Much subsequent capital punishment jurisprudence was predicated on the goal of reducing the risk of arbitrariness identified in *Furman*.

160. 481 U.S. 279 (1987).

sentencing are an inevitable part of our criminal justice system”¹⁶¹ and noted that “[s]tatistics at most may show only a likelihood that a particular factor entered into some decisions.”¹⁶² The Court also held that “[t]he Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.”¹⁶³ While *McCleskey* has also been criticized by many,¹⁶⁴ including its author,¹⁶⁵ it would be a significant obstacle in litigating Eighth or Fourteenth Amendment claims based on our findings.

3. Prospective Remedies

While *McCleskey*’s skepticism about the relevance of statistical evidence to case-by-case retroactive litigation may serve as an obstacle to retroactive litigation, it does not necessarily apply to litigation seeking prospective remedies. A claimant might use our findings or those of a similar study to bring a structural suit seeking to improve the system of providing indigent defense counsel. Indeed, some such suits have occurred.¹⁶⁶

However, as this discussion illustrates, the constitutional significance of the gap in outcomes we identify remains unclear. We show that defense counsel matters and that one group of attorneys consistently provides better outcomes, but that showing is likely insufficient to convince the courts to intervene, at least under *Strickland* as it is currently interpreted.

161. *Id.* at 312.

162. *Id.* at 308.

163. *Id.* at 319.

164. See, e.g., SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 159-211 (1989); Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34 (2007); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 473-80 (1995); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1413-18 (1988).

165. JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR. 451 (2001) (recounting that Justice Powell named *McCleskey* as a case in which he would change his vote if given the opportunity).

166. See, e.g., *State v. Peart*, 621 So. 2d 780 (La. 1993); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010). The Missouri Public Defender Commission’s practice of refusing to take cases once it has determined that the public defender system is at capacity is currently being reviewed in the Missouri Supreme Court. See *State ex rel. Mo. Pub. Defender Comm’n v. Waters*, No. SC91150 (Mo. 2012) (en banc), <http://www.courts.mo.gov/file.jsp?id=55767>.

B. Method of Providing Counsel to Indigent Defendants

Relatedly, our findings bear on the question of the best way to provide indigent defense. While our results might seem to imply that public defenders are superior to appointed counsel, it is important to recognize that public defender representation is confounded with a number of additional factors, such as differences in attorney compensation, which may themselves independently affect the quality of counsel and therefore the disparity in outcomes. We cannot completely disentangle the effects of public defenders versus appointed counsel from the other differences in characteristics across these two types of attorneys.

For example, two factors that interviewees cited as important differences between public defenders and appointed counsel in Philadelphia were the use of integrated teams by the public defender and the larger amount of case preparation by public defenders, which is in part related to their financial incentives. In theory, one could organize an indigent defense system that relies solely on private appointed attorneys but that requires coordinated teams in more serious cases and offers incentives for careful case preparation. This structural change might allow appointed counsel to achieve results comparable to those of public defenders. Similarly, the appointed versus public defender distinction itself is not necessarily relevant for the purpose of providing access to dedicated funds for investigators, psychologists, and other case support personnel. An indigent defense system could allocate such funds and place them beyond the discretion of the judge regardless of which “type” of attorney is active in the case.

Even with some of these structural changes, some factors that appear to contribute to disparity in case outcomes are likely to be directly affected by the choice to organize indigent defense through a public defender’s office. For example, the relative isolation experienced by appointed counsel noted by interviewees seems less likely to occur in public defender offices, where opportunities to share information with colleagues and engage in collective training activities are likely to be greater. Thus, it seems likely that even with changes in funding mechanisms, the choice of whether to organize an indigent defense system using appointed counsel as opposed to public defenders will continue to impact the defense counsel function.

C. Improving the Process of Defense

Even completely apart from abstract concerns about justice, the rule of law, and the Constitution, the level of disparity in our findings shows a system in which the outcomes are highly dependent upon the individual

lawyer. Any such system is highly sensitive to inevitable human error.¹⁶⁷

Other professions and industries—from engineering to aviation, medicine, and car manufacturing—appear to be far ahead of the legal profession in trying to design systems that do not depend upon the characteristics of the individual professional to reach a reliable outcome.¹⁶⁸ The legal profession’s heroizing of the fiercely independent solo practitioner may exacerbate this danger and serve as an obstacle to a more systems-based approach.¹⁶⁹ The Defender Association, perhaps inadvertently, has adopted some of the risk reduction methods employed in these other fields: standardized preparation and a team approach to accomplishing the task and minimizing the effect of an individual human error.¹⁷⁰

Other professions have adopted quality assurance methods in an effort to minimize error and increase efficiency rather than to advance any commitment to justice or the rule of law. Ironically, the legal profession’s lofty commitments to these abstractions may have obscured its concrete failures to implement more reliable practices—practices that would help

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167. Authors have made similar arguments in the context of another complex system for delivering services: healthcare. See, e.g., *ERROR REDUCTION IN HEALTH CARE: A SYSTEMS APPROACH TO IMPROVING PATIENT SAFETY* (Patrice L. Spath ed., 2000) (urging a focus on systems rather than individual actors to reduce errors); INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 49 (Linda T. Kohn, Janet M. Corrigan & Molla S. Donaldson eds., 2000) (same); Donald M. Berwick, *Sounding Board: Continuous Improvement as an Ideal in Health Care*, 320 *NEW ENG. J. MED.* 53 (1989) (calling for the application of industrial techniques of quality improvement to healthcare); Lucian L. Leape, *Error in Medicine*, 272 *JAMA* 1851, 1854 (1994); cf. CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES* (1984) (noting the inevitability of human error in complex systems).
168. See, e.g., ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009) (calling for the use of checklists to minimize human error in medicine and chronicling other attempts to do the same); James M. Doyle, *Learning from Error in American Criminal Justice*, 100 *J. CRIM. L. & CRIMINOLOGY* 109 (2010) (calling for criminal law to view wrongful convictions as organizational accidents and to create, like the fields of medicine and aviation, a culture of safety). One partial explanation for the disparity is the Defender Association’s practice of assigning two lawyers to a case, which has the effect of reducing the consequences of an individual’s inevitable error.
169. Atticus Finch, the heroic sole practitioner of Harper Lee’s *To Kill A Mockingbird*, is so revered by lawyers that the American Bar Association created its own category for him in its contest of most influential fictional attorneys. *Farewell, Atticus*, A.B.A. J. (Aug. 1, 2010, 4:50AM), http://www.abajournal.com/magazine/article/farewell_atticus.
170. It is telling that one of appointed counsel’s criticisms of the public defender is that they are too reluctant to take cases to trial. Interview with Anonymous #10 (July 21, 2011) (notes on file with authors). From a risk management perspective, trials are often unpredictable and risky.

achieve the more abstract goals. Despite lawyers' belief that they are achieving justice and not making widgets, breaking down the pursuit of justice into concrete steps would be useful. In this respect, the legal profession may have much to learn from efforts in other fields to develop reliable processes.

For example, *Strickland* focuses on the "ineffectiveness" of a particular individual lawyer—blaming an individual for an error. In contrast, the Institute of Medicine has long urged that in order to reduce medical errors, "[t]he focus must shift from blaming individuals for past errors to a focus on preventing future errors by designing safety into the system."¹⁷¹

The comprehensive development of such a system is beyond the scope of this Essay, but we offer a few preliminary, admittedly speculative thoughts. Our objective is a criminal justice system in which the outcomes are reliable and robust to individual human error. In such a system, the traditional heroic individual lawyer necessarily plays a smaller role.

A concrete first step might be the further development and use of detailed guidelines and checklists.¹⁷² In capital cases, the Supreme Court has cited the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as evidence bearing on whether counsel met the deficient performance prong of *Strickland*.¹⁷³ However, such guidelines are rarely used outside capital cases, and the more general ABA Guidelines for the "Defense Function" were last updated more than twenty years ago, in 1991.¹⁷⁴ Guidelines and checklists have played a role in reducing error in medicine, a context which has similar traditions of professional

171. INST. OF MED., *supra* note 167, at 5.

172. See Martin C. Calhoun, *How To Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L. J. 413, 437-42 (1988) (outlining a proposal to create a hybrid categorical/judgmental standard for ineffectiveness that incorporated limited concrete requirements for action by defense counsel that would shift the burden to government).

173. *E.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

174. See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, at xi-xiv (3d ed. 1993) (noting that the most recent revision to the Guidelines for the Defense Function occurred in 1991, and that the Third Edition includes subsequent revisions to and commentary on the Guidelines for the Prosecution Function). The utilization of guidelines by defense counsel might create a safe harbor or a rebuttable presumption against ineffectiveness.

autonomy.¹⁷⁵

Second, increasing discovery in criminal cases is likely to make outcomes less dependent upon the individual defense lawyer. Currently, in almost every jurisdiction, discovery in criminal cases is far less extensive than discovery in civil cases.¹⁷⁶ The first time the defense sees most of the government's witnesses is often at trial. Similarly, in many jurisdictions witness statements are not required to be provided to the defense until after the witness has testified on direct examination. These practices put a premium on trial skills and cross-examination on the fly. This greatly increases the importance of the individual lawyer to the outcome of the process. Pretrial depositions of witnesses and more extensive discovery might result in fewer surprises and result in a more reliable process. These reforms might also reduce the risk of "defense lawyer syndrome" – the overvaluing of a case – and lead to more plea agreements.

Third, increasing the use of nonlawyer legal professionals might permit the more team-based approach to the defense function that is likely to reduce the sensitivity of the system to individual human errors. Many of the discrete tasks necessary for a reliable defense (investigation, witness and client interviews) do not require a law degree. More radically, it is not clear why a criminal defense lawyer necessarily needs mandatory training in torts, property, and the required curriculum of an ABA-accredited three-year law school.¹⁷⁷ Rethinking these requirements might permit a shift away from reliance on fewer lawyers with expensive three-year generalist training toward larger teams of specialists.

These suggestions are preliminary, and we recognize that creating a more reliable criminal justice system that is robust to human error is more easily

175. See, e.g., GAWANDE, *supra* note 168. Indeed, some state bar associations are moving in this direction. See, e.g., *Performance Guidelines for Criminal Defense Representation*, WASH. ST. BAR ASS'N (June 3, 2011), http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/~media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Performance%20Guidelines%20for%20Criminal%20Defense%20Representation%20060311.ashx.

176. See Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 581; cf. John H. Langbein, *The Disappearance of the Civil Trial in the United States*, 122 YALE L.J. (forthcoming 2012), <http://ssrn.com/abstract=2123386> (arguing that the expansion of discovery made civil trials less necessary).

177. See Neil Rickman & James M. Anderson, *Innovations in the Provision of Legal Services in the United States*, KAUFMAN-RAND INST. FOR ENTREPRENEURSHIP AND PUB. POL'Y 29-34 (2011), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2011/RAND_OP354.pdf (discussing disadvantages of the restrictions on the practice of law in the United States).

urged than accomplished. But our findings suggest that a thorough rethinking and reengineering of the process of providing defense is overdue. There is surely room for improvement.

CONCLUSION

Consider the following thought experiment. Suppose the 2,459 defendants in our sample represented by appointed counsel had been represented instead by Defender Association counsel. Based on the results in Table 2, we would expect 270 defendants who were convicted of murder to have been acquitted of this charge with Defender Association representation. Three hundred ninety-six individuals who received life sentences without the possibility of parole would have been received shorter sentences with an expectation of eventual release. In the aggregate, we would expect the time served by the 2,459 defendants for the crimes observed in our data to decrease by 6,400 years.¹⁷⁸

Prison costs for these crimes would also be affected. Recent estimates place the cost of incarcerating a prisoner for one year in Pennsylvania at roughly \$32,000,¹⁷⁹ so a decrease of 6,400 years would reduce prison costs for these crimes by over \$200 million.

In short, we find that the defense lawyer (and the system for providing him or her) makes a vast difference in the outcome of murder cases in Philadelphia.¹⁸⁰

178. Such calculations require us to assume that the size of the public defender pool does not have a direct effect on outcomes. This assumption might be violated under some models of court behavior. For example, if judges or prosecutors wish to ensure that the overall average sentence across murder defendants remains at some fixed number of years, increasing the number of people represented by Defender Association attorneys would lead to changes in the sentences received by Defender Association clients.

179. See Jack Wagner, *Fiscal and Structural Reform—Solutions to Pennsylvania’s Growing Inmate Population*, AUDITOR GENERAL’S SPECIAL REPORT 3 (Jan. 2011), <http://www.auditorgen.state.pa.us/Reports/performance/special/specorrections012611.pdf>. However, it is unclear whether Defender Association representation reduces or increases overall prison costs, because incarceration may itself affect future crime (and future incarceration) through deterrence or incapacitation.

180. A priori, we might have expected defense counsel to make the *least* difference in murder cases because the state expends the most resources and has the highest stakes in a reliable outcome. As a result of local institutional history, there may be reasons to think that the gap in outcomes between defendants represented by public defenders and appointed counsel may be smaller in other cities where appointed counsel have more resources or are better funded. Though it is ultimately an empirical question, there is no reason to think that the criminal justice system in Philadelphia is any more sensitive to counsel than other jurisdictions.

Our qualitative interviews suggest that the causes of this disparity are incentive structures created by the appointment system and a resulting failure of appointed counsel to prepare cases as thoroughly as the public defender.

Perhaps the stark difference in outcomes attributable to counsel should come as no surprise. Effective counsel is a prerequisite to the assertion of nearly every other right in the criminal justice system. As the Supreme Court observed, “[I]t is through counsel that all other rights of the accused are protected: ‘Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.’”¹⁸¹ Representation by counsel is the right to all (or most, anyway) other rights.¹⁸²

As such, legislatures (or here, local government, including the courts), can effectively undermine court-mandated procedural rights by failing to provide resources to enforce them. In this way, as the late William J. Stuntz has noted, the legislature can profoundly shape the actual practice of constitutional criminal procedure despite its nominally being the province of the courts.¹⁸³ Our findings can be understood as a rough measure of the results of this strategy in one jurisdiction.

We often claim, in the words of John Adams, to be “a government of laws, not of men.”¹⁸⁴ To further this end, *Gideon* extended the right of counsel so that “every defendant stands equal before the law.”¹⁸⁵ Ideally, the vagaries of counsel should make no difference in the outcome of a proceeding in our justice system. Our findings suggest how far from this goal we are.

In the short run, relying more on public defenders and less on appointed

181. *Penon v. Ohio*, 488 U.S. 75, 84 (1988) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)); see also *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980) (“Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself.”).

182. To provide a concrete example of this: the Supreme Court has provided the capital defendant the theoretical right to “life qualify” the jury to ensure that every juror is able to consider and give effect to mitigating evidence in the penalty phase of a capital trial. *Morgan v. Illinois*, 504 U.S. 719 (1992). Yet one interviewee noted that in Philadelphia many appointed counsel did not regularly do so. Interview with Anonymous #4 (July 21, 2011) (notes on file with authors).

183. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 12 (1997).

184. John Adams, *Novanglus Letter No. 7 (1775)*, reprinted in THE POLITICAL WRITINGS OF JOHN ADAMS: REPRESENTATIVE SELECTIONS 38, 44 (George A. Peek, Jr. ed., 2003); see MASS. CONST., art. XXX (1780).

185. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

counsel may be a sensible way of increasing the reliability of the criminal justice system. But in the long run, our goal should be a criminal justice system that is robust to inevitable human error. This may require more fundamental, systematic change.

APPENDIX

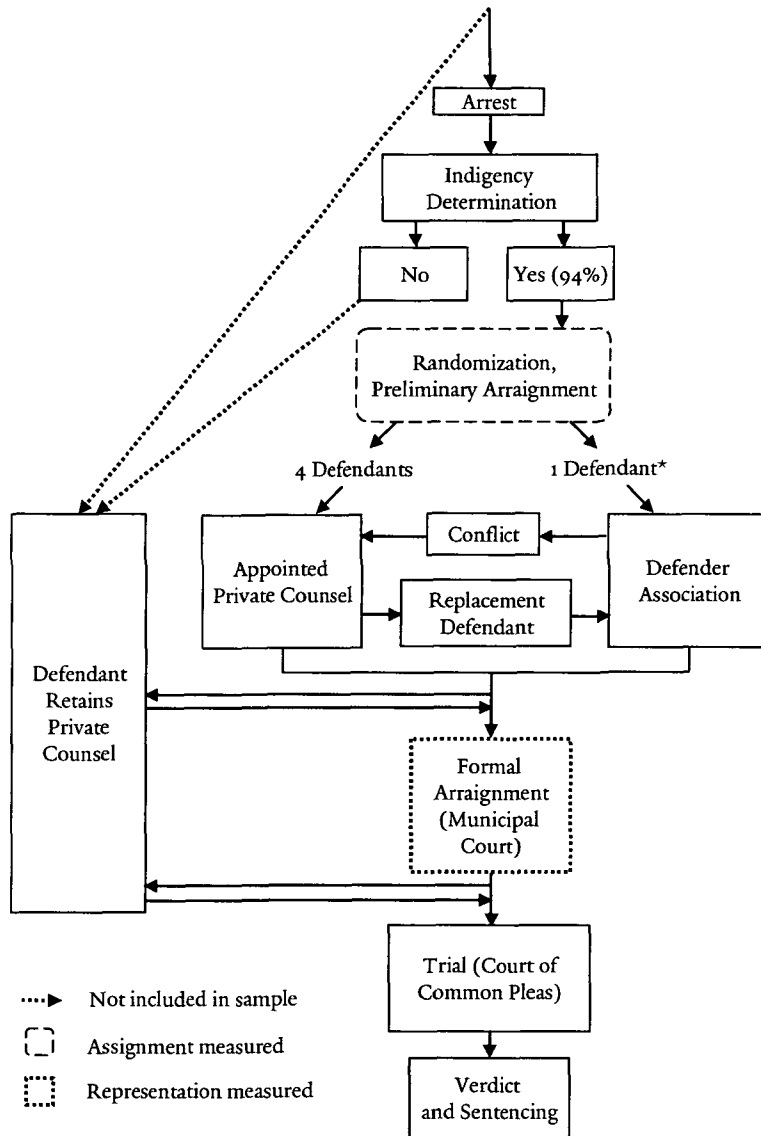
Appendix Table 1.

PREDICTORS OF EVENTUAL DEFENDER ASSOCIATION REPRESENTATION AT FORMAL ARRAIGNMENT

EXPLANATORY VARIABLE	COEFFICIENT ESTIMATE
Male	-0.018 (0.032)
Black	-0.014 (0.017)
Age	0.002* (0.001)
Number of charges in current case	0.007 (0.004)
Current case includes weapons charge	-0.086** (0.023)
Current case includes conspiracy charge	-0.154** (0.018)
Number of defendants in current case	-0.009 (0.008)
Number of prior criminal charges for defendant	-0.001 (0.001)
Defendant had prior assault charge	0.060* (0.028)
Defendant had prior aggravated assault charge	-0.023 (0.024)
Defendant had prior weapons charge	-0.058** (0.020)
Defendant had prior drug charge	-0.006 (0.017)
Defendant had prior robbery charge	0.027 (0.027)
Defendant had prior theft charge	0.031 (0.022)
Defendant had prior burglary charge	0.043 (0.026)

Note: Appendix Table 1 reports marginal effect coefficient estimates from a probit regression where the outcome variable is a 0-1 indicator for a defendant who was ultimately represented by a Defender Association attorney (mean=0.221) and the explanatory variables are defendant demographics, prior criminal history, and current case characteristics. The regression also includes year-fixed effects as additional unreported controls. The sample size is 3,157.

Appendix Figure 1.
CASE PROCESSING IN PHILADELPHIA COURTS



*Occasionally the homicide unit of the Defender Association is assigned cases outside of this process, such as new trials or penalty phases remanded after successful appeals. When such an outside case is assigned, the next normally scheduled defendant who would go to the Defender Association based on the one-in-five assignment is sometimes skipped and assigned to appointed counsel.

HOW MUCH DIFFERENCE DOES THE LAWYER MAKE?

Appendix Figure 2.

DISTRIBUTION OF EXPECTED TIME SERVED BASED ON SENTENCING OUTCOME BY TYPE OF REPRESENTATION

