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Pauline Houlden

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QUALITY AND COST COMPARISONS OF PRIVATE BAR INDIGENT DEFENSE SYSTEMS: CONTRACT VS. ORDERED ASSIGNED COUNSEL

PAULINE HOULDEN*
STEVEN BALKIN**

I. INTRODUCTION

The Supreme Court decisions of *Powell v. Alabama*,¹ *Gideon v. Wainwright*² and *Argersinger v. Hamlin*³ have had tremendous impact on the operation of the state criminal courts. These decisions have forced jurisdictions to broaden the right to counsel during adjudication and to establish some systematic organization for providing representation for indigent defendants. Other Supreme Court rulings have extended the right to counsel for indigents in arraignment⁴ and sentencing hearings.⁵

A number of studies have explored the quality of defense provided by various types of indigent defense systems. The majority of this research has compared the consequences of defense by a public defender with those of defense provided by privately retained counsel. Often research has concluded that private counsel obtain superior outcomes for the defendant.⁶ Joyce Sterling notes, however,

* Sr. Partner, Professional Surveys, Evanston, IL. Ph.D., M.A., University of North Carolina; B.A., University of Toronto.

** Associate Professor, Department of Economics, Roosevelt University, Chicago, IL. Ph.D., M.A., B.A., Wayne State University.

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¹ 287 U.S. 45 (1932).

² 372 U.S. 335 (1963).

³ 407 U.S. 25 (1972).

⁴ *Coleman v. Alabama*, 399 U.S. 1 (1970).

⁵ *Memph v. Ray*, 389 U.S. 128 (1968).

⁶ See, e.g., J. EISENSTEIN & H. JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1977); Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179 (1975); Casper, "Did You Have a Lawyer When You Went to Court? No, I Had

that studies finding differences between public and private counsel tend not to control for other factors (e.g., the type of offense involved, the prior record, or the bail status of the accused) which might be associated with differences in outcomes.⁷

Furthermore, these studies tend to rely on observations and interview data rather than case records. The research that has controlled for differences in clientele and/or relied upon case records generally has concluded that the type of attorney has little effect on outcomes. In an examination of plea negotiation by public defenders, assigned counsel and private counsel, Sterling found differences in the outcomes received by the clients of these different groups of attorneys.⁸ She therefore controlled for prior record, age, sex, race, education, employment, pretrial release status and release status at the time of the charged offense. Her results reveal few performance differences, *ceteris paribus*, between public defenders and retained counsel.⁹ Similarly, Stover and Eckart, and Thomssen and Falkowski conclude that the type of attorney has little effect on plea bargaining rates or severity of outcome.¹⁰

Yet, due to economies of scale, the public defender is by far the least common method of providing indigent defense.¹¹ Although the volume of crime in large cities justifies the creation of a public defender's office, in most communities the amount of crime is too small to make employment of a full-time public defender cost-effective. Instead, the private bar is expected to provide defense counsel. Attorneys are assigned to indigent defendants in a variety of ways.

A. ASSIGNED COUNSEL SYSTEMS

Commonly, attorneys are assigned to indigent defendants in what has been described as an "ad hoc" method.¹² The judge simply assigns the case to an attorney that he sees in the courtroom or

a Public Defender," 1 YALE REV. L. & SOC. ACTION 4 (1971); Phillips & Ekland-Olson, *Repeat Players in a Criminal Court: The Fate of Their Clients*, 19 CRIMINOLOGY 530 (1982).

⁷ Sterling, *Retained Counsel vs. the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in THE DEFENSE COUNSEL 151 (McDonald ed. 1983) [hereinafter cited as Sterling].

⁸ *Id.* at 161.

⁹ *Id.* at 164.

¹⁰ Stover & Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265 (1975); C.L. THOMSSON & P.J. FALKOWSKI, PLEA BARGAINING IN MINNESOTA (1979).

¹¹ L.A. BENNER & B.L. NEARY, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY (1973).

¹² NATIONAL STUDY COMMISSION FOR DEFENSE SERVICES, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *Guidelines for Legal Defense Systems in the United States*, in REPORT OF

one who comes to mind. In other locations, attorneys may be assigned by the judge from an available list. One might describe this as an "ordered" assigned counsel system.¹³ Many degrees of ordering are possible, and consequently there are a multitude of ordered assigned counsel systems. A simple model for ranking ordered assigned counsel systems may be derived by considering four central characteristics of all assigned counsel systems: 1) whether the individual who does the appointing of counsel follows a list; 2) whether more than one list of attorneys is available (that is, the lists stratify counsel by skill or knowledge); 3) whether a judge or county official does the appointment; and 4) whether a judge or county official oversees the operation of the system and payment of attorneys.

Figure 1, below, presents a model of ordered assigned counsel systems. According to this model, there are twelve basic ordered counsel systems. Generally, systems increase in their degree of organization and order as one moves from left to right in Figure 1. The least organized system would be one in which judges (J) not only appoint defense counsel without using any list, but also determine payment of attorneys and maintain the operation of the system. The most organized system would be one in which a county official (CO) appoints defense counsel on the basis of a list which is stratified according to attorney skill and knowledge. A county official would also be responsible for payment of attorneys and maintenance of the system.

FIGURE 1
A MODEL OF ORDERED PRIVATE BAR ASSIGNED COUNSEL SYSTEMS

THE SYSTEM

APPOINTS ACCORDING TO:

NO LIST

ONE LIST

MORE THAN ONE LIST

APPOINTMENT BY:

Judge

CO

Judge

CO

Judge

CO

OVERSEER:

J CO

J CO

J CO

J CO

J CO

J CO

CO=County Official

J=Judge

THE NATIONAL STUDY COMMISSION FOR DEFENSE SERVICES (1976) [hereinafter cited as NATIONAL STUDY COMMISSION FOR DEFENSE SERVICES].

¹³ The NATIONAL STUDY COMMISSION FOR DEFENSE SERVICES labels such systems a "coordinated assigned counsel system." *Id.* at 77.

As one would expect, research has tested the relative performance of assigned counsel vs. retained counsel and assigned counsel vs. public defenders. Wheeler and Wheeler compared the conviction rates of, and sentences received by, the clients of ad hoc assigned and retained counsel in Houston, Texas.¹⁴ The data gathered from the court dockets revealed that clients of assigned counsel were less likely to be convicted of murder, drug-related charges and forgery, while the clients of retained counsel were less likely to be convicted of burglary, arson and theft.¹⁵ The study also found that clients of assigned counsel were less likely to go to prison for drug-related charges, while for all other offenses the clients of retained counsel were less likely to receive prison sentences.¹⁶ When the authors controlled for prior record and initial bond status of the defendant, however, none of these relationships between type of crime and defense attorney were statistically significant.¹⁷

A study by Sterling compared assigned counsel and public defenders on the basis of plea bargaining outcomes.¹⁸ No major differences in obtained outcomes were observed in this study.¹⁹ Similarly, two studies reviewed by Cohen, Semple and Crew apparently found no differences in the performance of public defenders and assigned counsel.²⁰ They found only a few differences in the outcomes of clients of public defenders and ordered assigned counsel in four pairs of matched jurisdictions in Virginia.²¹ Clients of public defenders were more likely to have their cases dismissed, more likely to enter pleas of guilty, and less likely to be adjudicated guilty.²² If adjudicated guilty, however, clients of public defenders were less likely to be placed on probation and more likely to receive a longer sentence.²³ In addition, cases handled by public defenders proceeded to sentencing more slowly than cases represented by assigned counsel.²⁴ Finally, Cohen, Semple and Crew, as did previous

¹⁴ Wheeler & Wheeler, *Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly-Line Justice*, 26 CRIME & DELINQ. 319 (1980).

¹⁵ *Id.* at 325.

¹⁶ *Id.* at 325-26.

¹⁷ *Id.* at 328-29.

¹⁸ Sterling, *supra* note 7.

¹⁹ *Id.* at 167.

²⁰ Cohen, Semple & Crew, *Assigned Counsel vs. Public Defender Systems in Virginia: A Comparison of Relative Benefits*, in THE DEFENSE COUNSEL 127 (McDonald ed. 1983) [hereinafter referred to as Cohen, Semple & Crew]; see also M. COHAN, WOODBURY COUNTY PUBLIC DEFENDER PROGRAM: PRELIMINARY EVALUATION (1977); Vining, *The Need for a Public Defender in Ontario*, 20 CRIM. L.Q. 468 (1978).

²¹ Cohen, Semple & Crew, *supra* note 20.

²² *Id.* at 141-43.

²³ *Id.* at 141-44.

²⁴ *Id.* at 143.

researchers, found that the public defender system costs less per case.²⁵ Others have suggested that it is more cost-effective.²⁶

Only one study has revealed differences in the quality of representation provided by assigned counsel vs. public defenders.²⁷ This research determined that public defenders obtained better outcomes for their clients than did assigned counsel.²⁸ However, the analysis of this data did not control for defendant characteristics.

B. CONTRACTED COUNSEL SYSTEMS

Recently, indigent defense services also have been provided by "contract" systems. In jurisdictions employing this method of appointing counsel, law firms bid for the job of providing the majority of criminal defense in the county for a period of time. The job is generally awarded to the lowest bidding firm. When an indigent defendant requests an attorney, a judge in such a jurisdiction will inform the individual of the law office responsible for handling such cases. This is an example of the current trend to contract with the private sector for the provision of public services.

Some research has explored the quality of counsel provided by contract assigned attorneys and public defenders and/or privately retained counsel. One assessment of defense services in a county utilizing contract counsel suggested that the two law firms which had contracted to provide criminal defense were deficient in their attorney-client relationships, pre-trial motions, case investigations, scientific investigations, supervision of attorneys' rate of trials, and their advice to clients about the right to appeal.²⁹ The investigators felt that the system suffered from an excessive caseload and inadequate funding. The study evaluated the contracted counsel system against ideal defense counsel. Since it did not compare the behavior of contract defense attorneys with that of other assigned counsel systems in the state or privately retained counsel in the jurisdiction, it is impossible to determine the relative performance of these contract systems.

²⁵ *Id.* at 146; see also M. COHAN, CLINTON COUNTY PUBLIC DEFENDER PROGRAM: AN EVALUATION (1977); Steggerda & McCutcheon, *Legal Defense for the Indigent Defendant: A Comparison of the Effectiveness of the Offender Advocate and Court Appointed Counsel*, in THE DEFENSE OF INDIGENTS: POLK COUNTY, IOWA (1974).

²⁶ S. SINGER, B. LYNCH & K. SMITH, FINAL REPORT OF THE INDIGENT DEFENSE SYSTEMS ANALYSIS PROJECT (1976).

²⁷ Nagel, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L. J. 404 (1973).

²⁸ *Id.* at 420.

²⁹ NATIONAL CENTER FOR DEFENSE MANAGEMENT, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, ASSESSMENT OF DEFENSE SERVICES, ADA COUNTY, IDAHO (1978).

Lefstein examined the quality of representation provided by a contract defender system in Clark County, Washington.³⁰ Because he gathered data about the public defender system which had preceded the contract system in this county, he was able to draw conclusions about the relative performance of the two methods of representation. According to this study, the contract system had not reduced the cost of indigent defense, but had reduced the number of trials, *de novo* appeals, pre-trial motions, and requests for investigative services.³¹ It also had increased defendant complaints about lack of attorney responsiveness and guilty pleas at the first court proceedings.³² Additionally, misdemeanor caseloads exceeded national standards, no funds existed for attorney training and no access was available to library resources.

No previous study has attempted a comparison of contract assigned counsel and an ad hoc or ordered assigned counsel system. Most jurisdictions currently are employing some form of private bar assigned counsel system. If they are dissatisfied with the quality of representation provided or the cost of their system, they are likely to consider a contract system as an alternative. The contract system may seem advantageous to a county in that it is easier to predict and plan for the indigent defense budget. Once the annual fee is set, the contract firm bears the consequences of variation in the caseload. Yet, if the contract office finds itself confronted with an unexpectedly heavy caseload, it may not accept the costs and pass them on to defendants by skimping on provided services. The relative quality and cost of these two systems therefore is of much interest.

There is little theory to guide our expectations about the relative performance of these two systems. Micro-economic theory and psychological equity theory would seem to predict differences in performance as a function of the manner in which the two systems are paid.³³ Micro-economic theory suggests that where prices are quoted on a fixed fee basis, an organization or individual is more likely to economize on the use of their own time resources than when prices are quoted on an hourly basis. According to psychological equity theory, people strive to make relative inputs equivalent to relative outputs and vice versa. It would suggest that if a system

³⁰ H. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING (1982).

³¹ *Id.* at 51.

³² *Id.* at 52.

³³ G.C. HOMANS, SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS (1974); Adams, *Inequity in Social Exchange*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY (L. Berkowitz ed. 1965); Adams, *Towards an Understanding of Inequity*, 67 J. ABNORMAL & SOC. PSYCHOLOGY 422 (1963).

endorses fixed fee payments, then attorneys will perform less work on a difficult case than if the system reimbursed as a function of work done. According to equity theory, attorneys could be expected to adjust their hours of work to conform to their perceptions of a fair hourly rate. In sum, both theories would suggest that attorneys would devote fewer hours to cases under the contract system.

The current study, conducted as part of a larger investigation of various systems of assigned counsel, is intended to compare the cost and quality of the ordered assigned counsel system in one jurisdiction with a contract assigned counsel in a "matched" jurisdiction.

II. THE STUDY

A. THE RESEARCH DESIGN

The typical research paradigm for studies investigating indigent defense systems has compared only one example of each form of legal representation in one or two sites. While it is recognized that the results of these studies may be site-specific, it is not always noted that the internal validity of the results of such studies is questionable. Because the compared systems are in different jurisdictions (or one jurisdiction at two different times), the observed differences may be due to variations in "legal culture" rather than to differences in the assigned counsel systems. An example of this would occur if one jurisdiction is slower than another in bringing cases to disposition, although the assigned counsel systems in each jurisdiction are equally timely. If a study simply compares the performance of assigned counsel systems, it would conclude that one assigned counsel system was slower than the other when in fact one jurisdiction was slower than another. This problem in interpretation is a limitation of all previous investigations of assigned counsel systems.

The current study utilizes a research design that strives to overcome this limitation. It uses data about the performance of retained counsel in each investigated jurisdiction as a control for differences between jurisdictions. The study does not simply compare two systems of assigned counsel; nor does it simply compare assigned and retained counsel within a site. It examines the differences between assigned and retained counsel in two sites. This additional control for jurisdictional differences is a methodological advance in this area of research.

In the section which follows, we describe the two private bar indigent defense systems which we studied. The purpose of this study is to compare the quality of representation provided by an ordered assigned and contract defense counsel system. Therefore,

we needed to locate two similar jurisdictions in one state (to control for variations in procedure and outcome due to state law): one which used an ordered assigned system, and the other which used a contract system. The study used twelve social-demographic measures to make certain that the jurisdictions were as similar as possible.³⁴

B. DESCRIPTION OF THE ORDERED ASSIGNED COUNSEL SYSTEM

Prior to 1979, this jurisdiction used an ad hoc method of appointment. In response to charges that judges favored attorneys of the same political background and complaints about excessive expenditures, the jurisdiction implemented the current ordered assigned counsel system. The system uses two lists to assign counsel: one of attorneys who will accept felony cases and one of attorneys who will accept misdemeanors. Attorneys are appointed in rotation except when a case requires special skills in which case the official skips over names to locate an experienced attorney. A part-time attorney-administrator and full-time eligibility screener/clerk/secretary run the system. The administrator is under contract to supervise the eligibility screener, make recommendations to judges about the appointment of counsel,³⁵ recoup money from defendants if possible, provide attorney services at line-ups, probation violation hearings and in extradition cases, and file monthly reports with a "monitoring committee."³⁶

Counsel are appointed according to the following process.

³⁴ The following data indicate the degree of similarity between the two jurisdictions:

	Ordered Assigned Counsel	Contract Counsel
Population (1980)	228,059	171,276
Population Density/sq. mile (1975)	278	294
% Black (1980)	15.7	14.5
% Labor Force in Manufacturing (1970)	43.2	38.8
% Growth in Population 1970-1980	3.8	4.5
Per Capita Income (1974)	\$4,506	\$4,313
% Population Below Poverty Level (1970)	7.7	9.6
Crime Rate (1975)	7,767	6,905
County Expenditures (1981)	\$19,793,760	\$14,260,200
Indigent Defense Expenditures (1981)	\$496,051	\$162,800
% of County Funds Spent on Indigent Defense (1981)	2.5	1.1
Cases Filed (1981)	4,974	7,025*

*For reasons of time and money, we decided to gather data only from the main courthouse of this jurisdiction. Of the 7,025 cases filed in this jurisdiction, 5,894 were filed in this courthouse.

³⁵ Judges make the final decision on all appointments, but almost uniformly approve the recommendation of the Administrator.

³⁶ The monitoring committee consists of one lower and one upper court judge, the two court administrators, and a county commissioner.

Once it is determined that a defendant may be eligible for court-appointed counsel, the defendant goes to the Office of Assigned Counsel for an eligibility interview. The Office identifies an attorney who is available to take the case. The Office sends a draft Order of Appointment to the judge. If the appointment is approved, the Office informs the attorney of the appointment. Thus, several days are likely to pass before a defendant could hope to have any contact with his or her attorney.

Some attorneys interview clients in the county jail shortly after appointment; others meet their clients immediately prior to the preliminary hearing. Though a single attorney is appointed to represent a defendant, it is fairly common for another member of the assigned attorney's law firm to make court appearances and otherwise participate in the defendant's representation.

The jurisdiction pays attorneys based on the attorney's fee request. The fee request lists tasks done and hours worked, along with a dollar amount requested for these services. This dollar amount is based on the type of case handled and the number of hours worked. The administrator and the judge both must approve the fee request. At times, they adjust these requests downward.

C. DESCRIPTION OF THE CONTRACT DEFENSE SYSTEM

Prior to the establishment of the contract system, lawyers in this jurisdiction were appointed to provide legal representation for indigents accused on an ad hoc basis. Neither the courts, county board nor local attorneys, however, were happy with this system. In these circumstances, three lawyers offered the County Board to contract for all indigent criminal defense work for one year at a fixed price. The county awarded a contract to these attorneys in November, 1971. The county did not use any competitive bidding in awarding the contract, nor did it make any effort to solicit other bids. The first contract firm continued to represent indigents through 1979. In that year another firm approached the county board and proposed to handle all indigent criminal cases for 1980 for a sum that was approximately \$45,000 less than the first firm. The Board accepted this offer and changed the contract firm.

In cases of a conflict of interest (usually because one or more co-defendants have conflicting defenses), the contract firm appoints another attorney to handle the case. The appointed attorney submits a fee petition directly to the court and receives a county check. This amount is deducted by the county from the monthly payment made to the contract firm.

One of the partners in the contract firm administers the contract. He keeps track of the number of files opened and the number of hours spent by each attorney on the contract. Younger attorneys handle the cases in the lower court while the more experienced attorneys handle the felony work in the upper court. The firm allocates part of the time of eight attorneys to the contract work. Five attorneys devote a substantial percentage of their time to work under the contract while three devote 5-10% of their time. The former are the younger, less experienced attorneys. Three of them work on a straight salaried basis. The other two, like the more experienced attorneys, are paid on a percentage basis determined by the money that they produce for the law firm. They receive credit for work performed on the contract based upon their established hourly rates.

The assignment of counsel is easily accomplished. When a judge determines that a defendant is eligible for assigned counsel, he or she simply tells the client to contact the contract law office. As in the other jurisdiction, in some cases attorneys contact clients in the county jail, while in others they meet and interview them only prior to the preliminary hearing.

III. METHOD

A. SAMPLE

Our resources allowed for the collection of a sample of 400 cases. In each jurisdiction we attempted to obtain 100 cases represented by assigned counsel and 100 cases represented by retained counsel. Ideally, the study would have gathered sufficient information about each of the major categories of felonies so that it could compare assigned attorney system behaviors for each major category of crime. This, however, was not possible with a sample of cases from only one year. The population of our matched jurisdictions was insufficient to generate enough murders, rapes, arsons, or armed robberies represented by both assigned and retained counsel in a single year. On the one hand, it seemed best to gather data for all types of felonies. Although there would be insufficient data to draw conclusions about attorney behavior for many particular felonies, it would allow conclusions about attorney behavior in general.³⁷ On the other hand, it seemed best to gather data for only a

³⁷ The idea of attorney behavior-in-general may not make sense. Averaging together, for example, the number of motions filed for murder cases and the number of motions filed for all the lesser felonies seems likely to yield an absolutely meaningless number.

limited set of felonies. This approach would reduce error variance, increase degrees of freedom and better detect actual differences. We decided that the better approach was to examine a subset of felonies.

The types of felonies chosen had to be selected so that there would be enough charged and prosecuted in a year to allow statistical analyses. In addition, since we intended to gather data about the performance of retained as well as assigned counsel, the chosen felonies had to be ones that frequently would be represented by both assigned and retained counsel. Thus, burglary, although a frequent felony, was eliminated from consideration because accused burglars rarely can afford to retain counsel. In addition, our questioning of the participants in the court systems of the two jurisdictions revealed that there would be greater differences in performance between assigned and retained counsel for crimes against persons than for crimes against property. Considering these three constraints, we decided to gather data for only two types of felonies—assault and drug cases. The design of data collection and analysis of this study was to sample randomly 50 felony assault and 50 felony drug cases represented by assigned counsel and a similar number of assault and drug cases represented by retained counsel in each site.³⁸

B. DATA COLLECTION INSTRUMENTS

We employed three instruments at each site: the docket instrument, the prior record instrument and the cost instrument. The

³⁸ At each site, selection of a random sample of felony cases was not easy because of the decision to examine only felony assault and felony drug cases. In order to select a random sample of these cases, we required a list of all the felony assault and felony drug cases in the jurisdiction. Simply knowing the frequencies of these cases would not have been much help. We would have known how often cases of this type occurred, but not where to find these cases in the court files. In order to compile the sampling frame, we made a pre-site visit to each jurisdiction. During this visit we examined the docket books maintained by the courts. These books listed the defendant's name, charges against him or her, code number of the offense(s), type of defense counsel, date of defendant's first appearance, date of case disposition and method of case disposition. We transcribed this information for all felony assault and drug cases and drew from it a random sample of felony assault and drug cases represented by retained and assigned counsel.

Before making this final selection, we deleted certain cases from the population such as cases that were not yet "closed," cases which had no counsel and cases involving co-defendants. In addition, we attempted to eliminate the possibility of companion cases. If there were other charges filed against a defendant within six months before or after he or she was charged with the offense of interest, we excluded the defendant from the study. Since the final resolution of the felony drug or assault case under consideration might have been combined with the resolution of those other charges, we felt that avoiding such cases would obtain a purer evaluation of attorney performance.

docket instrument was used to code information in the court files regarding the processing and outcome of the sampled cases. It gathered such information as the defendant bond status at the time of first appearance and time of case disposition, the method of case disposition (e.g., dismissal, trial, plea), the nature of the case disposition (e.g., innocent, guilty), the sentence received, the number of motions filed, the number of attorney appearances in court, and the number of days from first appearance to disposition and sentencing.

The prior record instrument was used to record information about the defendant's prior convictions, race, sex, and age. We often obtained this information from sources such as the local sheriff's office or prosecutor's card files.

The cost instrument was used to code information taken from the bills submitted by attorneys appointed to handle indigent cases in the jurisdiction that employed ordered assignment. It gathered information about the number of in-court and out-of-court hours claimed, the number of court appearances claimed, the amount of payment requested by the attorney and the amount eventually paid. The cost instrument was not used in the contract site because attorneys do not submit bills in that system. We obtained cost data in this jurisdiction by integrating data from county budgets, the contract firm's records and interviews with contract attorneys.

IV. RESULTS

A. OVERVIEW

The overall approach to our empirical inquiry is within the framework of the analysis of covariance.³⁹ Although the concern of this study is to assess differences between assigned counsel systems,⁴⁰ it is necessary to compare assigned and retained counsel systems in each site in order to do this. The study analyzes each dependent variable within the framework of a 4 (type of attorney) x 2 (type of felony—assault/drug) factorial design. We establish contrasts to test the effects in which we are interested. Thus, the results first present the differences between assigned and retained counsel at each site, and then present the significant differences between the two types of assigned counsel systems.⁴¹

³⁹ Because of the amount of missing data, we computed a univariate analysis of covariance for each dependent measure.

⁴⁰ The main purpose of this study is to judge the comparative performance of assigned counsel systems, not the absolute performance of them. We note, however, that we did conduct interviews in both jurisdictions with various court-related personnel that revealed serious shortcomings in both indigent defense systems.

⁴¹ Although statistically one should begin by looking for interactions and then dis-

Overall, we find few significant differences between the ordered assigned counsel and contract assigned counsel system on our set of performance indicators. The differences, if any, concern the length of time for the processing of the case and number of attorney appearances. The contract system generally disposes of cases more quickly and involves fewer attorney appearances than does the ordered assigned system.

B. ORDERED ASSIGNED COUNSEL SYSTEM

1. *Description of the Sample*

We were able to locate court files for 159 felonies. Table 1 presents a breakdown of the felony offenses by type of counsel.⁴² Table 2 presents frequencies and means for the performance indicator variables (dichotomous and interval level) utilized in the analyses of covariance.

TABLE 1
DESCRIPTION OF THE SAMPLE IN ORDERED ASSIGNED
INDIGENT DEFENSE COUNSEL JURISDICTION
(TOTAL CASES=159)

	CASE FREQUENCY		
	<u>Assigned Counsel</u>	<u>Retained Counsel</u>	<u>Total</u>
Assault	42	31	73
Drug	<u>47</u>	<u>39</u>	<u>86</u>
Total	89	70	159

cussing main effects (in this case, differences between assigned and retained counsel) only in the absence of interactions, differences between assigned and retained counsel in a single jurisdiction in themselves may be of interest to some readers. Moving from main effects to interactions, rather than vice versa, may be more understandable to most readers.

⁴² A change in type of representation was relatively rare. Four defendants changed from assigned to retained counsel and three from retained to assigned counsel. In the analyses reported, the type of counsel to which a defendant changed (if there was a change in representation) is used as an independent variable.

TABLE 2
INDICATORS OF PERFORMANCE FOR DEFENSE COUNSEL IN
ORDERED ASSIGNED COUNSEL JURISDICTION
FREQUENCIES OF DICHOTOMOUS
PERFORMANCE MEASURES

VARIABLE	ASSIGNED COUNSEL		RETAINED COUNSEL	
	<u>%</u>	<u>N</u>	<u>%</u>	<u>N</u>
Bond Status at Time of Case Disposition:				
-in jail* (2)	22.4%	(19)	5.8%	(4)
-out of jail (1)	77.6	(66)	94.2	(65)
Change in Bond Status:				
-change—was in jail, now out (1)	64.0	(32)	88.0	(22)
-no change—was in jail, still in (2)	36.0	(18)	12.0	(3)
Case Disposition:				
(a) dismissal				
-dismissed (1)	28.4	(25)	17.1	(12)
-not dismissed (2)	71.6	(63)	82.9	(58)
(b) trial				
-case tried (1)	3.4	(3)	0.0	(0)
-case not tried (2)	96.6	(85)	100.0	(70)
(c) trial vs. plea				
-plea entered (1)	95.2	(60)	100.0	(58)
-case tried (2)	4.8	(3)	0.0	(0)
(d) type of plea				
-original charge (1)	1.7	(1)	5.2	(3)
-lesser charge (2)	98.3	(59)	94.8	(55)
(e) trial outcome				
-guilty (1)	33.3	(1)	0.0	(0)
-not guilty (2)	66.7	(2)	0.0	(0)
(f) trial outcome				
-guilty of original charge (1)	100.0	(1)	0.0	(0)
-guilty of lesser charge (2)	0.0	(0)	0.0	(0)
(g) motions filed				
-any filed (1)	15.7	(14)	24.3	(17)
-none filed (2)	84.3	(75)	75.7	(53)
(h) overall disposition				
-not guilty (1)	30.7	(27)	17.1	(12)
-guilty (2)	69.3	(61)	82.9	(58)
Sentence:				
(a) incarceration				
-yes (1)	45.0	(27)	19.6	(11)
-no (2)	55.0	(33)	80.4	(45)

(b) type				
-incarceration (3)	45.0	(27)	19.6	(11)
-probation (2)	25.0	(15)	37.5	(21)
-other (1)	30.0	(18)	42.9	(24)

* Numbers in parentheses indicate how the variable was coded for the analyses of covariance.

MEANS FOR INTERVAL LEVEL PERFORMANCE MEASURES

VARIABLE	MEAN OF ASSIGNED COUNSEL	MEAN OF RETAINED COUNSEL
Length of Incarceration (range)	13.3 months (1-120)	7.1 months (9-24)
Number of Motions Filed (range)	.17 motions (0-2)	.34 motions (0-3)
Number of Attorney Appearances (range)	2.4 apps. (1-6)	2.7 apps. (1-6)
Days from First Appearance to Disposition (range)	68.8 days (1-307)	88.7 days (0-334)
Days from First Appearance to Sentencing (range)	142.1 days (0-318)	147.4 days (15-402)

2. *Analyses of Covariance of Differences in the Performance of Assigned and Retained Counsel in the Ordered Assigned Counsel System*

We next conducted analyses of covariance in order to assess whether the differences between the above percentages and means reflect significant differences in the quality of representation provided by ordered assigned and retained counsel. Covariates are defendant's sex, race, and age; whether or not the defendant had prior convictions and whether or not other offenses were charged at the time of this arrest and initial bond status.⁴³

For two variables: the number of motions filed and whether or not any motions were filed, the type of attorney exerts a statistically significant effect ($p < .05$) and the coefficient of regression is significant. Retained counsel are likely to file more motions than assigned counsel. The second effect is that retained counsel appear more likely to file motions than assigned counsel.

The analyses reveal two other variables for which type of attor-

⁴³ The percentage and frequency distributions of the characteristics of defendants represented by assigned and retained counsel which are used as covariates are as follows:

ney exerts a significant effect. For both, however, the effect is qualified by the type of felony committed (drug vs. assault) ($p < .05$). Assigned counsel dispose of felony assault cases as quickly as retained counsel, yet dispose of felony drug cases more quickly than retained counsel. Assigned and retained counsel do not differ in their speed of processing felony assault cases regarding days to sentencing, yet assigned counsel bring felony drug cases more expeditiously than retained counsel. The coefficient of regression was non-significant for both effects.

C. CONTRACT ASSIGNED COUNSEL SYSTEM

1. Description of the Sample

We were able to locate court files for 138 felonies in this jurisdiction. Table 3 presents the frequencies of the felony offenses represented by contract assigned and retained counsel.⁴⁴ Table 4 presents frequencies and means for the performance indicator variables (dichotomous and interval level) utilized in the analyses of covariance for Jurisdiction C.

	Percentage and Frequency of each Category of Defendant			
	Assigned		Retained	
<i>Prior Convictions:</i>				
Yes	53.9%	(48)	31.4%	(22)
No	30.3	(27)	44.3	(31)
No Information	15.7	(14)	24.3	(17)
<i>Sex:</i>				
Female	11.2%	(10)	15.7%	(11)
Male	87.6	(78)	81.4	(57)
No Information	1.1	(1)	2.9	(2)
<i>Race:</i>				
White	42.7%	(38)	57.1%	(40)
Black	51.7	(46)	31.4	(22)
Hispanic	4.5	(4)	7.1	(5)
No Information	1.1	(1)	4.3	(3)
<i>Initial Bond Status:</i>				
Bond	31.0%	(27)	35.7%	(25)
Jail	58.6	(51)	37.1	(26)
ROR	9.2	(8)	25.7	(18)
<i>Other Offenses Charged at Time of this Arrest:</i>				
Yes	48.3%	(43)	54.3%	(38)
No	51.7	(46)	45.7	(32)
<i>Mean Year of Birth:</i>	1952		1951	

⁴⁴ Nine clients who originally accepted contract assigned counsel changed to privately retained counsel and four individuals who had initially expected to retain a lawyer eventually accepted the services of the contract defender's office. Table 3 indicates the type of counsel handling the case at time of case disposition.

TABLE 3
DESCRIPTION OF THE SAMPLE IN CONTRACT INDIGENT
DEFENSE COUNSEL JURISDICTION
(TOTAL CASES=137)

	CASE FREQUENCY		
	<u>Contract Counsel</u>	<u>Retained Counsel</u>	<u>Total</u>
Felony Assault	47	17	64
Felony Drug	<u>41</u>	<u>32</u>	<u>73</u>
Total	88	49	137

TABLE 4
INDICATORS OF PERFORMANCE FOR DEFENSE COUNSEL IN
JURISDICTION WITH CONTRACT INDIGENT DEFENSE COUNSEL
FREQUENCIES OF DICHOTOMOUS PERFORMANCE MEASURES

VARIABLE	CONTRACT COUNSEL		RETAINED COUNSEL	
	<u>%</u>	<u>N</u>	<u>%</u>	<u>N</u>
Bond Status at Time of Case Disposition:				
-in jail* (2)	41.4%	(36)	8.7%	(4)
-out of jail (1)	58.6	(51)	91.3	(42)
Change in Bond Status:				
-change—was in jail, now out (1)	31.4	(16)	71.4	(10)
-no change—was in jail, still in (2)	68.6	(35)	28.6	(4)
Case Disposition:				
(a) dismissal				
-dismissed (1)	17.0	(15)	16.3	(8)
-not dismissed (2)	57.8	(73)	83.7	(41)
(b) trial				
-tried (1)	3.4	(3)	6.1	(3)
-not tried (2)	96.6	(85)	93.9	(46)
(c) trial vs. plea				
-plea entered (1)	95.9	(70)	92.7	(38)
-case tried (2)	4.1	(3)	7.3	(3)
(d) type of plea				
-original charge (1)	5.7	(4)	7.9	(3)
-lesser charge (2)	94.3	(66)	92.1	(35)
(e) trial outcome				
-guilty (1)	66.7	(2)	100.0	(3)
-not guilty (2)	33.3	(1)	0.0	(0)

(f) trial outcome				
-guilty of original charge (1)	50.0	(1)	66.7	(2)
-guilty of lesser charge (2)	50.0	(6)	33.3	(1)
(g) motions filed				
-yes (1)	5.7	(5)	10.2	(5)
-no (2)	94.3	(83)	89.8	(44)
(h) overall disposition				
-not guilty (1)	18.2	(16)	16.3	(8)
-guilty (2)	81.8	(72)	83.7	(41)
Sentence:				
(a) incarceration				
-yes (1)	61.1	(44)	29.3	(12)
-no (2)	38.9	(28)	70.7	(29)
(b) type				
-incarceration (3)	61.1	(44)	29.3	(12)
-probation (2)	13.9	(10)	41.5	(17)
-other (1)	25.0	(18)	29.3	(12)

* Numbers in parentheses indicate how the variable was coded for the analyses of covariance.

MEANS OF INTERVAL LEVEL PERFORMANCE MEASURES

VARIABLE	MEAN OF CONTRACT COUNSEL	MEAN OF RETAINED COUNSEL
Length of Incarceration (range)	7.25 months (1-90)	7.8 months (1-24)
Number of Motions Filed (range)	.034 motions (0-1)	.18 motions (0-3)
Number of Attorney Appearances (range)	1.77 apps. (0-5)	2.08 apps. (1-6)
Days from First Appearance to Disposition (range)	31.5 days (12-329)	61.1 days (0-343)
Days from First Appearance to Sentencing (range)	34.7 days (3-329)	79.6 days (0-343)

2. *Analyses of Covariance of Differences in Performance of Contract and Retained Counsel in Contract Assigned Counsel System*

The analyses of covariance⁴⁵ reveal six measures of attorney performance which significantly differentiate ($p < .05$) between the performance of contract assigned and retained counsel.

⁴⁵ Percentage and frequency distributions of the six covariates, for contract and retained counsel are as follows:

They are as follows: bond status at time of case disposition,⁴⁶ likelihood of a change in bond status from the time of first appearance to case disposition, days from first appearance to case disposition, days from first appearance to sentencing, likelihood of incarceration, and number of motions filed. The coefficient of regression was significant for the first two of these variables.

Examination of adjusted means indicates that contract assigned counsel are more likely to have clients in jail at the time of case disposition, and less likely to get their clients out of jail between the first arraignment and case disposition. They also take fewer days to disposition, move their cases to sentencing more quickly, have more of their clients incarcerated, and file fewer motions than retained counsel.

Contract and retained counsel also differ with respect to number of attorney appearances in court, but this effect is qualified by an interaction with type of felony (assault/drug) ($p < .05$). Adjusted means suggest that retained counsel appear more often than contract assigned counsel for felony assault cases while there is no difference in the number of appearances for felony drug cases. For this effect, the coefficient of regression is non-significant.

Percentage and Frequency for each Category of Defendant:				
	Contract Counsel		Retained Counsel	
<i>Prior Convictions:</i>				
Yes	44.3%	(39)	34.7%	(17)
No	53.4	(47)	65.3	(32)
No Information	2.3	(2)	0.0	(0)
<i>Sex:</i>				
Female	19.3%	(17)	14.3%	(7)
Male	78.4	(69)	85.7	(42)
No Information	2.3	(2)	0.0	(0)
<i>Race:</i>				
White	45.5%	(40)	67.3%	(33)
Black	51.1	(45)	32.7	(16)
No Information	3.3	(3)	0.0	(0)
<i>Initial Bond Status:</i>				
Bond	16.1%	(14)	23.4%	(11)
Jail	58.6	(51)	29.8	(14)
ROR	25.3	(22)	42.6	(20)
<i>Other Offenses Charged at Time of this Arrest:</i>				
Yes	23.9%	(21)	18.4%	(9)
No	76.1	(67)	81.6	(40)
<i>Mean Year of Birth:</i>				
	1954		1950	

⁴⁶ When analyses were conducted in which bond status at time of case disposition was a dependent measure, bond status at time of first appearance was not included as a covariate.

D. COMPARISON OF AN ORDERED ASSIGNED COUNSEL AND CONTRACT ASSIGNED COUNSEL SYSTEM OF INDIGENT DEFENSE

While the previous analyses assess the relative effectiveness of a retained and assigned counsel system in each of two jurisdictions, the main focus of this research is to compare two private bar indigent defense systems. The preceding sections have presented the differences between assigned and retained counsel. This section reports the more important interaction effects of jurisdiction and type of counsel. It is these interaction tests that allow us to reach conclusions about the relative effectiveness of two assigned counsel systems of representation. The interaction tests indicate whether the performance of assigned compared to retained counsel in the site using the ordered assigned system is different from the performance of assigned compared to retained counsel in the site employing contract assigned counsel.

We find two statistically significant interactions between type of counsel and site. Both are qualified by an interaction with the type of felony (assault/drug) committed. The first is an interaction for the variable of days from first appearance to sentencing, and the second is for the variable of the number of attorney appearances in court. The coefficient of regression is non-significant for both. The first triple-order interaction occurs because in the ordered assigned counsel system there is a double-order interaction between type of counsel and type of felony, while in the contract system the double-order interaction is not significant. As can be seen in Table 5, felony drug cases in the ordered assigned counsel system are sentenced significantly more quickly when handled by assigned counsel. There is no difference in the speed of sentencing felony assault cases. Within the contract system, however, both felony assault and felony drug cases are sentenced more quickly when taken by assigned counsel. Thus, contract counsel always seem to finish cases more quickly than retained counsel. Whether ordered assigned or retained counsel complete cases more quickly depends on the type of case.

TABLE 5
ADJUSTED CELL MEANS FOR NUMBER OF DAYS TO
SENTENCING: INTERACTION OF JURISDICTION,
TYPE OF COUNSEL AND TYPE OF
FELONY

<u>Type of Felony</u>	JURISDICTION			
	<u>Ordered Assigned Counsel</u>		<u>Contract Counsel</u>	
	<u>Retained</u>	<u>Assigned</u>	<u>Retained</u>	<u>Assigned</u>
Assault	134.4	160.0	129.2	42.1
Drug	177.0	117.9	70.2	20.7

The second triple-order interaction (see Table 6), involving the number of attorney appearances, is significant because a double-order interaction occurs in the contract system jurisdiction but not in the ordered assignment jurisdiction. Contract and retained counsel do not differ significantly in the number of appearances they make for drug cases, but retained counsel appear significantly more often for assault cases. In the other jurisdiction, however, assigned and retained counsel do not differ significantly in the number of appearances they make for felony drug and assault cases.

Table 6 presents the adjusted cell means associated with these effects. Overall it appears that contract counsel make fewer appearances than ordered assigned counsel. Ordered assigned counsel appear as often as retained counsel regardless of case type. But contract counsel appear as often as retained counsel only for felony drug cases.

TABLE 6
ADJUSTED CELL MEANS FOR NUMBER OF COURT
APPEARANCES: INTERACTION OF JURISDICTION,
TYPE OF COUNSEL AND TYPE OF
FELONY

<u>Type of Felony</u>	JURISDICTION			
	<u>Ordered Assigned Counsel</u>		<u>Contract Counsel</u>	
	<u>Retained</u>	<u>Assigned</u>	<u>Retained</u>	<u>Assigned</u>
Assault	2.4	2.4	2.7	1.6
Drug	2.9	2.3	1.9	2.0

E. COMPARISON OF COSTS OF AN ORDERED ASSIGNED COUNSEL AND CONTRACT ASSIGNED COUNSEL SYSTEM OF INDIGENT DEFENSE

This study uses two different methods to measure direct cost per case between the different systems.⁴⁷ For the ordered assigned counsel system, costs are computed from the attorney fee requests and adjustments are made to include each case's proportionate share of the overhead of running the ordered assigned system.⁴⁸ Overhead costs per case are computed from budget information from the county and knowledge of the caseload. For the contract system, costs are calculated by a formula that computes aggregate cost per case as a weighted average of the cost per case of the different types of cases that were represented. Assuming that cost per hour is the same for all cases and knowing the aggregate cost per case (from budget information), we can determine the cost per case for the different types of cases by learning the relative hours of attorney time spent per case. We obtained this latter piece of information from interviews with contract attorneys. Almost all overhead costs are implicitly included in these cost-per-case estimates since the firm appoints its own attorneys and manages the system.⁴⁹

Table 7 presents the cost per case for the ordered assigned counsel system. Costs for a richer variety of cases were computed, but there are a sufficient number of cases in only the felony non-trial category to generate meaningful comparisons between the two jurisdictions. Cost per case is calculated as fee paid per case plus an amount for the overhead costs of running the ordered assigned counsel system. Overhead per case consists of two parts: the per

⁴⁷ We calculated only direct costs to the county for this study. Other costs that could be included are those resources expended in other county agencies because of the assigned counsel system (e.g., extra jail costs if the defendant did not obtain bond) and costs that are incurred by the defendants themselves (e.g., loss of work time due to court appearances). Evaluating indigent defense services in a rigorous cost-benefit framework would involve considering costs and benefits to society wherever they are incurred.

⁴⁸ We conceive of overhead costs here as direct fixed costs for operating the assigned counsel system and the associated non-lawyer incremental costs borne by the county court and budget office for its part in operating the system. Overhead cost items will vary between systems.

⁴⁹ The only overhead cost items not included in the cost per case represented by contract attorneys are the costs for eligibility determination and the process of reimbursing non-contract firm attorneys for work in conflict cases. We consider eligibility determination an overhead item because this task is performed by the Coordinator's office in the ordered assigned counsel jurisdiction. The cost of the process of paying other attorneys for their work in conflict cases is included in the costs of the ordered assigned jurisdiction as part of the payment process cost for all cases. It is not included in the contract fee. A calculation of both these cost items results in an amount less than \$5.00 per case, so we have ignored these overhead items in calculating cost per case for the contract jurisdiction.

case share of the administrative budget of the administrator's office (such as his salary, secretary, office expenses), and the per case share of the manpower involved in the fee request approval process (such as judge time, clerk time, auditor time). The former cost is estimated at \$33 per case, while the latter is estimated at \$16 per case.⁵⁰

TABLE 7
COST PER CASE: NON-TRIAL FELONY CASES

<u>Jurisdiction</u>	<u>Fee per case</u>	<u>Overhead per case</u>	<u>Cost per case</u>
Ordered Assigned	\$243	\$49	\$292
Contract	—	—	\$91

Table 7 also presents cost per case for the contract system. The contrast of the two systems reveals that cost per case for non-trial felony cases is over three times greater in the ordered assigned counsel system than in the contract system. However, before concluding that the contract system is less expensive, we must consider the attorney time spent per case.

Table 8 presents attorney time per case and fee per hour for the two jurisdictions. Examination of the table reveals a large difference in the hours per case but little difference in the hourly cost of the two systems. Attorneys spend 150 percent more time on felony non-trial cases in the ordered assigned counsel system than in the contract system. That contract attorneys spend less time (on average) on their cases is consistent with our economic and psychological theoretical expectations concerning the contrast in payment methods.

⁵⁰ The ordered assigned counsel system includes efforts at recoupment of expenses from defendants. The county attempts recoupment not only to save county funds but also to allow greater liberality on qualifying for assigned counsel services. We do not reduce costs of the system by the amount of recoupment obtained since recoupment does not represent a service provided, but is merely a transfer payment from the client to the county. Of the total costs, 5.4% are recouped from clients.

TABLE 8
ATTORNEY HOURS PER CASE AND FEE PER HOUR FOR
NON-TRIAL FELONY CASES

<u>Jurisdiction</u>	<u>Average Number of Hours Per Case</u>	<u>Fee Per Hour⁵¹</u>
Ordered Assigned	7.18	\$33.43
Contract	2.80	\$32.56

V. CONCLUSION

There appears to be little difference in our set of measured performance indicators between the ordered assigned system attorneys and the contract assigned system attorneys. In this respect, the findings of our study are in accord with the those of the majority of research exploring performance differences among assigned defense counsel systems.

When we examine objective criteria and control defendant characteristics, few differences emerge as a function of type of indigent defense system. In this study, the differences that did appear concerned speed of disposition and number of attorney appearances in court. Contract counsel made fewer appearances and processed cases more quickly.

This relative streamlining in the disposition of cases represented by contract counsel seems to explain the cost differentials between the ordered assigned counsel system and the contract counsel system. The contract system costs less per case because contract attorneys are spending fewer hours per case and making fewer appearances compared with ordered assigned attorneys.

To the extent that our analysis measures all possible outcome possibilities, the contract system may be more cost-effective. There are no differences in dispositional performance between the contract and ordered assigned systems. Yet the contract system has lower direct costs to the county.⁵² On the other hand, the provision

⁵¹ Fee per hour for the ordered system was calculated by dividing amounts received for attorney fees by the hours spent per case. This information appeared on the attorney fee request forms. Fee per hour for the contract system was calculated by dividing an adjusted contract amount by the number of hours that the firm had spent on contract work. This latter piece of information was supplied by the contract firm from their internal records. For the jurisdiction employing ordered assignment, if overhead were included, the cost per hour would increase by \$6.82 for felony non-trial cases. No overhead adjustments are necessary for the contract system as there are no substantial expenses for appointment or payment after the contract has been awarded.

⁵² It has been observed that a firm will greatly underbid to obtain a contract to encourage the initiation of this type of system and to end the public defender or ordered

of indigent defense services is the provision of more than just outcomes; it is the provision of a process of justice.⁵³ From this perspective, the process by which indigent defense clients reach those outcomes should be considered in an analysis of cost-effectiveness. Indigent defendants deserve adequate attorney services such as attorney time spent on a case, client interviews and case investigation. The indigent client is entitled to the full services available to clients with retained counsel, even if case outcome is not affected. Within this conceptual framework, the contract system may not be more cost-effective. The contract system may be providing services at a lower cost, but it may be offering lower quality services.

assigned counsel system that has been in use. After a period of time, the bidding process results in bids that cost the county more than its previous system of representation. Therefore, one should look at costs over time to judge which system costs less.

⁵³ See J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); Houlden, LaTour, Walker & Thibaut, *Preferences for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPERIMENTAL SOC. PSYCHOLOGY 13 (1978).