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# Equality Before the Law? Evaluating Criminal Case Outcomes in Canada

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# Equality Before the Law? Evaluating Criminal Case Outcomes in Canada

## **Abstract**

One of our most strongly held ideals is that individuals receive equal treatment under the law. Incidents of wrongful conviction or wide disparities in sentencing, however, challenge this premise. While legal scholars have recently examined this premise, our understanding remains largely normative or anecdotal. Scholars have begun to identify factors that influence legal outcomes, yet this question has remained largely unexplored in Canada. This article seeks to advance this inquiry. Using unique data from both the Ontario courts and Legal Aid Ontario during 2007–2013, we find that outcomes in routine criminal cases vary in ways not summarily explained by differences in defendant or city characteristics. Cities differ in their use and expenditure of defendant legal representation in ways strongly correlated with outcomes, controlling for other factors. While only a first step, our article counsels strongly in favour of a systematic examination of case adjudication in Canada, and offers future avenues for research.

## **Keywords**

Criminal Law

## Equality Before the Law? Evaluating Criminal Case Outcomes in Canada

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One of our most strongly held ideals is that individuals receive equal treatment under the law. Incidents of wrongful conviction or wide disparities in sentencing, however, challenge this premise. While legal scholars have recently examined this premise, our understanding remains largely normative or anecdotal. Scholars have begun to identify factors that influence legal outcomes, yet this question has remained largely unexplored in Canada. This article seeks to advance this inquiry. Using unique data from both the Ontario courts and Legal Aid Ontario during 2007–2013, we find that outcomes in routine criminal cases vary in ways not summarily explained by differences in defendant or city characteristics. Cities differ in their use and expenditure of defendant legal representation in ways strongly correlated with outcomes, controlling for other factors. While only a first step, our article counsels strongly in favour of a systematic examination of case adjudication in Canada, and offers future avenues for research.

L'un des idéaux qui nous sont les plus chers veut que tous soient égaux devant la loi. Des condamnations injustifiées et la grande disparité des sentences remettent toutefois en question cette prémisse. Même si des juristes ont récemment étudié cette situation, notre perception demeure largement normative et anecdotique. Des spécialistes commencent à comprendre les facteurs qui influencent les jugements, mais cette question demeure le plus souvent ténébreuse au Canada. Cet article cherche à faire progresser cette enquête. À partir de données particulières émanant tant des cours ontariennes que de l'aidejuridique

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de cette province entre 2007 et 2013, nous découvrons que les résultats de causes criminelles routinières varient d'une manière que n'expliquent facilement ni les différences entre défendeurs, ni les caractéristiques des villes. Les villes diffèrent dans leur recours à l'aide juridique et le budget qui y est affecté d'une manière fortement liée aux résultats, compte tenu des autres facteurs. Même s'il ne constitue qu'un premier pas, notre article recommande fortement un examen systématique des sentences prononcées au Canada et ouvre la voie à de futures recherches.

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**IN ALMOST EVERY DEVELOPED COUNTRY**, Canada included,<sup>1</sup> society holds as an ideal that citizens receive equal treatment under the law. That is to say, the outcome of a given case may turn on the alleged wrongdoing, but not the parties' gender, ethnicity, or socioeconomic status. Even the casual observer of our legal system, however, can point to notable incidents—or even personal experience—where reality has fallen short of this ideal. Examples of criminal defendants

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1. See *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]. Section 15 of the *Charter* states that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

wrongly convicted for crimes they did not commit suggest that our laws in fact may not apply equally to everyone.<sup>2</sup>

There are many potential explanations for differential treatment when it occurs. The first is individual. Each case is unique, and its specific characteristics—such as the strength of the prima facie case or the personal circumstances of the parties—influence the claims alleged, the remedy or penalty sought, and the ultimate outcome. These individual differences are often nuanced and not easily captured in court records.

Another explanation is institutional: Jurisdictions may differ from one another in their approach to the law, manifesting itself in the way that police enforce existing laws in deciding whether to make an arrest, how the Crown determines which cases to pursue and the charges it brings forward, and how judges adjudicate cases. Even within the same province, individual police departments, Crown offices, and courts may differ in their exercise of discretion.

Legal representation also may affect outcomes. Litigants vary in their ability to afford legal representation.<sup>3</sup> Indigent criminal defendants are eligible for publicly funded representation, particularly when the criminal charges entail a likelihood of incarceration;<sup>4</sup> in the civil context, such rights are much more limited, and in many situations, individuals engage in litigation without representation.

While scholars in other countries have examined factors that influence case outcomes,<sup>5</sup> such research is less developed in Canada. The existing scholarship in this country focuses primarily on the macro level, examining segments of the population (*e.g.*, middle-income litigants) who often lack the resources to pay for

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2. Allan Maki describes a recent example in which Leighton Hay was wrongfully convicted for a nightclub murder in 2002, and freed only after his successful appeal to the Supreme Court of Canada. See Allan Maki, “Wrongfully convicted of murder, Leighton Hay free after 12 Years,” *The Globe and Mail* (28 November 2014), online: <[www.theglobeandmail.com/news/national/wrongly-convicted-of-murder-leighton-hay-free-after-12-years/article21825039](http://www.theglobeandmail.com/news/national/wrongly-convicted-of-murder-leighton-hay-free-after-12-years/article21825039)>.
  3. See *e.g.* Ab Currie, “A National Survey of the Civil Justice Problems of Low- and Moderate-Income Canadians: Incidence and Patterns” (2006) 13:3 *Int’l J Legal Prof* 217.
  4. Indigent criminal defendants charged with a criminal offence may qualify for duty or certificate counsel. For a description of eligibility for duty and certificate counsel, see “Am I eligible for a legal aid certificate?” (2015) *Legal Aid Ontario*, online: <[www.legalaid.on.ca/en/getting/eligibility.asp](http://www.legalaid.on.ca/en/getting/eligibility.asp)>.
  5. See *infra* notes 14, 22, 23, and accompanying text.

a lawyer.<sup>6</sup> Largely ignored is a microanalysis that examines the factors that lead to disparities in outcomes across individual, similarly situated, litigants.

This article seeks to advance our understanding of this question. We conduct a study drawing from two unique data sources. The first is the Ontario courts, which generously provided case outcomes for low-level offences—assault, theft/robbery, driving under the influence (DUI), and narcotics—for the entire province for the period 2007–2013. The second is Legal Aid Ontario (“LAO”), which kindly provided the number of lawyers and expenses for each type of lawyer that it funds—staff, *per diem*, and certificate counsel—for the same period.

Our goals are threefold: one, to analyze the available data and identify the differences in case outcomes in criminal cases in Ontario; two, to examine the factors that may contribute to these differences, sensitive to the limitations of our data; and three, to explore future research that might increase our understanding of case adjudication in Canada. To our knowledge, this article represents the first micro-level exploration of this question.

Our analysis generates two main findings. The first is that in Ontario, case outcomes vary widely across cities, and in ways that defendant characteristics (*e.g.*, age and gender) and city-level demographics cannot easily explain. This variation endures even when limiting our analysis to individual offences or cases where the defendant faces only a single charge, as opposed to multiple charges of the same offence or additional, more serious offences. The second is that case outcomes strongly correlate with the type of legal representation the defendant receives. Some of this correlation may reflect elements of the case (*e.g.*, strength of the Crown’s case or criminal record of the accused) that we cannot observe in the data. At the same time, this relationship emerges across cities and type of offence.

This article proceeds as follows. Part I provides a brief literature review on studies of case adjudication. Part II presents our empirical framework, describing our identification and empirical strategies. We briefly describe our data in Part III. Part IV provides our results, while Part V discusses implications of our findings and avenues for future research. Part VI concludes.

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6. See *e.g.* Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012). For a general discussion of access to justice challenges, see Pascoe Pleasence et al, *Causes of Action: Civil Law and Social Justice* (Norwich, UK: Legal Services Commission, 2004).

## I. RELEVANT LITERATURE ON CASE ADJUDICATION

In recent years, legal scholars have become interested in examining case adjudication and its institutional elements. Generally speaking, scholars have examined judges and individual litigants, both from an empirical and theoretical perspective. In the criminal context, scholarship has pursued separate inquiries of the prosecution, judges, and the defence.

The existing literature shows that prosecutors, like private lawyers in a firm, operate in a competitive market. Because prosecutors have wide discretion in choosing which cases to bring forth, conviction rates are uniformly high,<sup>7</sup> with prosecutors having “more control over life, liberty, and reputation than any other person ... .”<sup>8</sup> They differentiate themselves, however, by the length of sentence they secure in their conviction, which positively influences their chances for promotion.<sup>9</sup> This inherent discretion, however, poses the risk of prosecutorial overreach, which is difficult to monitor.<sup>10</sup>

Scholarship on judicial behaviour has primarily examined the extent to which judges are ideological in how they decide cases. The existing literature in the American context reveals that federal judges are ideologically consistent in how they decide cases, and their decision making is strongly correlated with the elected official who appointed them to the bench.<sup>11</sup> Where judges are elected rather than appointed, judges are particularly attentive to the political will of their constituents.<sup>12</sup>

The study of legal representation, broadly speaking, examines three related questions. The first looks at the returns to having legal representation. In a study examining low-income tenants facing eviction, scholars found that

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7. See Eric Rasmusen, Manu Raghav & Mark Ramseyer, “Convictions versus Conviction Rates: The Prosecutor’s Choice” (2009) 11:1 Am L & Econ Rev 47.
  8. Brian Forst & Kathleen B Brosi, “A Theoretical and Empirical Analysis of the Prosecutor” (1977) 6:1 J Leg Stud 177 at 177.
  9. See Richard T Boylan, “What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys” (2005) 7:2 Am L & Econ Rev 379.
  10. See Rachel E Barkow, “Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law” (2009) 61:4 Stan L Rev 869.
  11. See Cass R Sunstein et al, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington, DC: Brookings Institution Press, 2006); Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge: Cambridge University Press, 2002).
  12. See Paul Brace & Brent D Boyea, “State Public Opinion, the Death Penalty, and the Practice of Electing Judges” (2008) 52:2 Am J Pol Sci 360.

tenants fared much better with a lawyer than without,<sup>13</sup> a finding buttressed by random assignment of lawyers to tenants. For the class of litigants with legal representation, quality also matters. In a given office of public defenders where cases were randomly assigned, clear differences emerged between the highest decile and lowest decile performing lawyers. Defendants represented by the former were much less likely to be convicted and served considerably shorter sentences.<sup>14</sup>

The second question examines differences within classes of lawyers. A recent study of criminal trials found that judges and opposing attorneys' perception of attorney skill had no effect on trial outcome.<sup>15</sup> Jurors' perception of opposing counsel mattered for prosecutors, but not defendants, leading the author to conclude that "the skill level of the defense attorney plays *no role* in determining the outcome of a criminal trial in everyday cases ...".<sup>16</sup> In contrast, a broader study of state and federal judges that considered all litigation, not merely trials, found that judges perceived disparities in the quality of legal representation, both within and across areas of law. In criminal cases, judges perceived significant disparities in 20% to 40% of cases;<sup>17</sup> in civil cases, the disparities varied by area of law, with civil rights litigation providing the most frequent occurrences and intellectual property providing the least.<sup>18</sup> In light of these disparities, the majority of judges at the trial and appellate levels compensate for the perceived weaker attorney by engaging in additional legal research.<sup>19</sup>

The third question looks beyond the threshold questions of the returns to legal representation and attorney representation, examining different types of lawyers providing the same service. A recent study showed private attorneys and public defenders achieving similar conviction and sentencing outcomes for the defendant clients, but assigned counsel achieving less favourable outcomes

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13. See Carroll Seron et al, "The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Courts: Results of a Randomized Experiment" (2001) 35:2 Law & Soc'y Rev 419.
  14. See David S Abrams & Albert H Yoon, "The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability" (2007) 74:4 U Chicago L Rev 1145.
  15. See Jennifer Bennett Shinall, "Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes" (2010) 63:1 Va L Rev 267.
  16. *Ibid* at 291 [emphasis in original].
  17. See Richard A Posner & Albert H Yoon, "What Judges Think of the Quality of Legal Representation" (2011) 63:2 Stan L Rev 317 at 327.
  18. See *ibid* at 333.
  19. See *ibid* at 336.



than either.<sup>20</sup> Other studies found that public defenders fare worse than private counsel.<sup>21</sup> The limitation with direct comparisons between types of lawyers is selection effects, many of them unobservable, that affect not simply how cases resolve but the type of lawyer a litigant receives in the first place.

Scholars examining this question more systematically, by exploiting random assignment in particular offices, similarly have found clear differences across types of attorneys. A study of American federal criminal cases found that federal public defenders achieved lower incarceration rates and sentences than the alternative court-appointed attorneys.<sup>22</sup> Another study looking at state criminal cases found that Philadelphia public defenders achieved more favourable outcomes than court-appointed counsel.<sup>23</sup>

Comparing case outcomes across different delivery models differs from measuring attorney quality, in part because while the assignment of a case across types of attorneys (*e.g.*, public defender versus court-appointed attorney) may be random, other aspects of these jobs are likely not. For example, significant structural differences exist between different types of criminal defence models. Public defender offices typically have more policies and procedures in place than court-appointed lawyers.<sup>24</sup> Also, public defenders are typically salaried, while appointed counsel are typically paid hourly, *per diem*, or a flat rate.<sup>25</sup> Criminal lawyers generally also face monetary constraints in which public funds are limited: The demands on one part of the system (*e.g.*, prosecutors) inevitably affect resources available to represent indigent defendants.

Equally important, legal systems vary across and even within jurisdictions. Correspondingly, courts differ along cultural dimensions of sociability and

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20. See Thomas H Cohen, "Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes" (Government of the United States of America - Administrative Office of the US Courts Working Paper, 2011), online: <ssrn.com/abstract=1876474>.
  21. See Morris B Hoffman, Paul H Rubin & Joanna M Shepherd, "An Empirical Study of Public Defender Effectiveness: Self-Selection by the 'Marginally Indigent'" (2005) 3:1 Ohio St J Crim L 223.
  22. See Radha Iyengar, "An Analysis of the Performance of Federal Indigent Defense Counsel" (2007) National Bureau of Economic Research Working Paper No 13187, online: <nber.org/papers/w13187.pdf>.
  23. See James M Anderson & Paul Heaton, "How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes" (2012) 122:1 Yale LJ 154.
  24. See Jessa DeSimone, "Bucking Conventional Wisdom: The Montana Public Defender Act," Legislative Comment, (2006) 96:4 J Crim L & Criminology 1479.
  25. See Robert L Spangenberg & Marea L Beeman, "Indigent Defense Systems in the United States" (1995) 58:1 Law & Contemp Probs 31 at 33-34.

solidarity.<sup>26</sup> Sociability refers to the affinity of individuals within an organization; solidarity refers to the ability of people to work together towards common goals. These differences, in turn, influence how courts handle cases; interact with administrators, prosecutors, and defence attorneys; and respond to change.<sup>27</sup> Scholars have found that timeliness and quality of case adjudication varies considerably across cities, in ways that trace back to differences in local legal culture,<sup>28</sup> specifically in court efficiency, both with respect to time and quality.<sup>29</sup> Changing this culture requires greater awareness among the relevant actors, and addressing their concerns about the tradeoff between greater efficiency and case outcomes.<sup>30</sup> While some scholars argue that different legal systems converge over time,<sup>31</sup> local differences persist.

Nearly all of the aforementioned studies have taken place in the United States. Canada shares many similarities with the United States with respect to its criminal justice system, but also some notable differences. For example, in the United States, most criminal cases are heard in state court, applying state law; federal criminal cases are limited to federal criminal offences. By contrast, criminal cases in Canada apply federal law, but are overwhelmingly heard in provincial court. In addition, Canada, like several commonwealth countries, consistently spends

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26. See Brian Ostrom et al, "Court Cultures and Their Consequences" (2005) 20:1 Ct Manager 14 at 15-16 (decomposing court cultures along the dimensions of sociability and solidarity).
  27. See *ibid* at 16 (describing how local legal cultures influence the processing and adjudication of cases).
  28. For seminal work on local legal culture and its effect on court performance, see Teresa A Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, "The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts" (1994) 17:3 Harv J L & Pub Pol'y 801; Thomas W Church Jr, "Examining Local Legal Culture" (1985) 10:3 Am B Found Res J 449; Raymond T Nimmer, *The Nature of System Change: Reform Impact in the Criminal Courts* (Chicago: American Bar Foundation, 1978); National Center for State Courts, *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, by Thomas Church Jr et al (Williamsburg, Va: National Center for State Courts, 1978). For an examination of local legal cultures in Europe, see James L Gibson & Gregory A Caldeira, "The Legal Cultures of Europe" (1996) 30:1 Law & Soc'y Rev 55.
  29. See United States, National Center for State Courts and the American Prosecutors Research Institute, *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts*, by Brian J Ostrom & Roger A Hanson (Williamsburg, Va: National Center for State Courts, 1999); Peter F Nardulli, James Eisenstein & Roy B Flemming, *The Tenor of Justice: Criminal Courts and the Guilty Plea Process* (Urbana, Ill: University of Illinois Press, 1988) (similarly finding that criminal case outcomes depend considerably on local legal culture).
  30. See James Peter Coolsen, "Case Management Innovation in a Large, Urban Trial Court: The Critical Importance of Legal Stakeholder Attitudes" (2009) 30:1 Just Sys J 70 at 83.
  31. See Lawrence M Friedman, "Is There a Modern Legal Culture?" (1994) 7:2 Ratio Juris 117.

more public money, per capita, on legal services than does the United States.<sup>32</sup> To the best of our knowledge, no study exists in Canada that systematically analyzes case outcomes and the institutional factors that influence them.

## II. EMPIRICAL STRATEGY: EXPLAINING UNEQUAL CASE OUTCOMES

In a first-best world, we could design an experiment to measure how different factors influence case outcomes. We could isolate factors one by one, holding other factors constant and randomizing the treatment of each factor. For example, we could randomize what type of legal representation (*e.g.*, duty versus retained) the defendant received, or randomize the court (and judge) with jurisdiction over the case. This approach would allow us to confidently attribute differences in case outcomes to the treatment variable of interest.

Unfortunately, we do not live in this first-best world. While the judicial system employs elements of randomization—such as the mailing of jury questionnaires<sup>33</sup>—most aspects are not random. Defendants are assigned to courts in the jurisdiction where they were arrested. In Ontario, no rule requires that criminal cases be randomly assigned to judges, or that the Crown or Legal Aid Ontario attorneys randomly assign cases to their lawyers. Ontario also allocates its legal representation funding in part based on the seriousness of the offence.

Given these constraints, we adopt a more modest and incremental approach. We begin with the null hypothesis that criminal case outcomes are constant across the province, on the premise that all defendants are subject to the same laws and judicial system. This hypothesis is almost certainly false. Several factors could explain how case outcomes are inconsistent with the null hypothesis: differences in the (1) composition of defendants across court locations; (2) usage of types of defendants' legal representation; (3) expenditures on defendants' legal representation; or (4) practice norms of the police, Crown, and the judiciary, to name a few.

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32. It is worth noting that Canada historically has spent over three times per capita on civil legal services than does the United States. See Justice Earl Johnson, Jr, "Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies" (2000) 24:6 *Fordham Int'l LJ* S83 at S93-S94, Tables 1 and 2.

33. See Ontario, Ministry of the Attorney General, "The Annual Jury Selection Process" (9 November 2015), online: <[www.attorneygeneral.jus.gov.on.ca/english/courts/jury/jury\\_selection\\_process.asp](http://www.attorneygeneral.jus.gov.on.ca/english/courts/jury/jury_selection_process.asp)>.

If we observe differences in case outcomes, we then sequentially examine potential explanatory factors. Given the absence of a clear identification strategy, we look more closely at correlation among the given factors. Specifically, we are interested in whether variation in these factors across offences and court locations correlate with case outcomes. For example, do jurisdictions with higher incarceration rates have systematically higher crime incident ratios? Are defendants systematically older or younger in some jurisdictions than others? Do jurisdictions with higher jail sentences rely more or less on duty counsel?

Finally, because cross tabulations make only pairwise comparisons—not controlling for other factors—we regress case outcomes on these factors collectively, examining probability of a jail sentence, duration of a sentence, and amount of criminal fine. We chose these outcome measures because they represent, from the perspective of the defendant, the practical implications of their arrest: impositions on their time and finances.<sup>34</sup>

We interpret these three outcome measures with caution, given likely selection on unobservables. The absence of random assignment means that factors unobservable in our empirical model—*e.g.*, individual circumstances of defendants, or differences across courts in how judges decide similarly situated cases—may be influencing case outcomes. Nevertheless, the regression-adjusted models can support or challenge the relationships that emerge from the pairwise comparisons.

### III. SOURCES OF DATA: THE ONTARIO COURTS AND LEGAL AID ONTARIO

Our data come primarily from two sources. The first is the Ontario courts. For the period 2007–2013, the Administration Division of the Ministry of the Attorney General provided us individual case level information on criminal cases for the following minor offences: theft or robbery (for amounts below \$5000); impaired

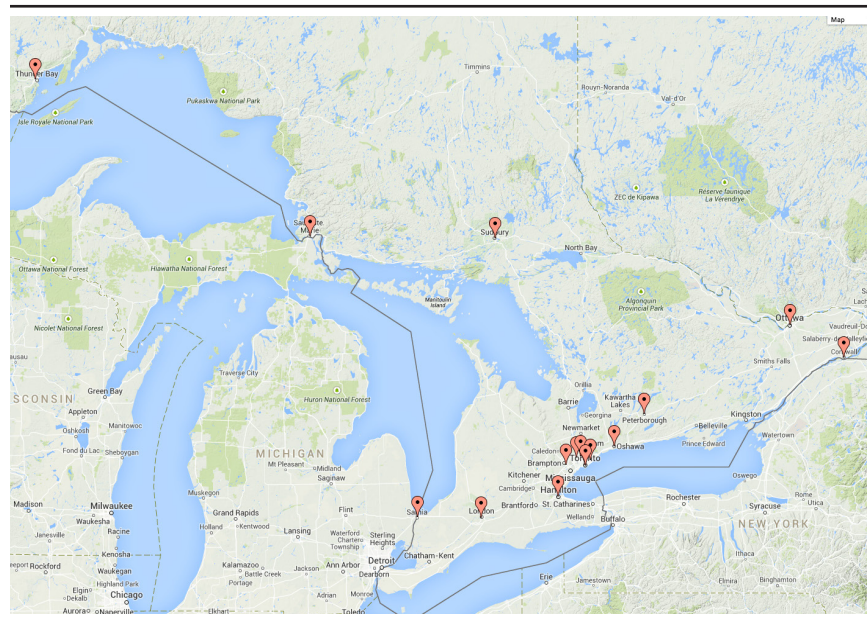
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34. Our analysis omits whether the defendant's charge resulted in a conviction. We would have liked to include this outcome, but our data do not allow us to know this with certainty. In our data, we do not directly observe whether the defendant was convicted, only whether they received any jail sentence or criminal fine. While a jail sentence or fine is a *sufficient* condition for a conviction, it is not a *necessary* one. A defendant could be convicted of an underlying offence but still avoid jail time (or a fine) at the discretion of the court.

driving (*i.e.*, DUI); common assault; and narcotics possession and trafficking.<sup>35</sup> These cases originate from the province's Integrated Courts Offences Network (ICON), which tracks criminal charges filed at the Ontario Court of Justice. Cases involving juvenile defendants are excluded. Accordingly, we have the universe of cases involving the aforementioned offences that appear in provincial court.<sup>36</sup>

Because police may arrest defendants for multiple offences stemming from the same arrest, a small subset of our data includes other offences (*e.g.*, illegal possession of a firearm, resisting arrest) for which the defendant was concurrently charged. For completeness, we include multiple-offence cases in our analysis.

FIGURE 1: ONTARIO COURTS WITH JURISDICTION OVER CRIMINAL CASES<sup>37</sup>



35. Specifically, we know the particular statutory violation alleged in the charge. Each of these offences encompasses more than one statute, but the vast majority of the offences that appear in our data arise from a single statute. For theft/robbery, see *Criminal Code*, RSC 1985, c C-46, s 334. For driving under the influence, see *ibid*, s 253. For common assault, see *ibid*, s 266. For narcotics, see *Controlled Drugs and Substances Act*, SC 1996, c 19, s 4.

36. ICON records whether a case was committed to Superior Court. In our data, this occurred only twice.

37. Map Data: © 2015 Google.

TABLE 1: SUMMARY STATISTICS (2007–2013)

<b>Cases</b>		<b>Type of Offence (Fraction)</b>	
N	337035	Assault (CCC, s 266)	0.35
		Theft/Robbery (CCC, s 334)	0.30
		DUI (CCC, s 253)	0.15
<b>Defendant Demographics</b>		Narcotic Possession (CDSA, s 4)	0.20
Fraction Female	0.21	Narcotic Trafficking (CDSA, s 5)	0.05
Average Age	34.04		
SD	12.42		
Fraction Reporting Postal Code	0.25	<b>Cases by Year (Fraction of Total Cases)</b>	
		2007	0.14
		2008	0.14
		2009	0.14
		2010	0.15
		2011	0.15
		2012	0.15
		2013	0.14
<b>Number of Charges</b>		<b>Type of Legal Representation</b>	
Average	1.98	No Representation	0.09
SD	2.19	Duty Counsel	0.38
Median	1	Retained Counsel	0.53
<b>Number of Court Appearances</b>		<b>When Case Resolved</b>	
Average	4.30	Before Trial	0.83
SD	16.46	At Trial	0.17
Median	1		
<b>Sentencing</b>			
Fraction Serving Jail Sentence	0.20		
Average Jail Sentence (months)	10.98		
SD	59.81		
Median Jail Sentence (months)	0		

NOTES: The information was provided by Ontario courts for cases relating to assault, theft/robbery, narcotic possession, DUI, and narcotics trafficking. Cases involving multiple charges are categorized by the offence which receives the highest punishment, if any. The data excludes cases involving more serious offences that result in higher punishment than the aforementioned offences. Cases data refers to cases closed between the years 2007–2013. Retained Counsel under Type of Legal Representation refers both to certificate attorneys provided by LAO and private counsel.

CCC = *Criminal Code*, RSC 1985, c C-46

CDSA = *Controlled Drugs and Substances Act*, SC 1996, c 19

SD = Standard Deviation

The full data include cases from every court in the province with jurisdiction over these cases. This includes Brampton, Cornwall, Hamilton, Kenora, London, Oshawa, Ottawa, Peterborough, Sarnia, Sault Ste. Marie, Sudbury, Thunder Bay, and five Toronto courts (Old City Hall, 1911 Eglinton Avenue East, 1000 Finch Avenue West, 2201 Finch Avenue West, and College Park). Figure 1 shows the locations of these courts across the province. Most courts are situated around the Golden Horseshoe, where most of the province's population resides.

The Ontario Court of Justice gathers case data such that the unit of analysis is a defendant's appearance before the court. Because our focus is on case outcomes, we transpose the data into a flat file, where the unit of observation is now a single case that captures the different charges (if multiple), the number of appearances, and the resulting fine and jail sentences, if any.<sup>38</sup> Each observation includes the start and end date of the case; the alleged offence; the type of legal representation, if any, a defendant receives; and any jail sentence and/or fine.

Table 1 provides summary statistics of the Ontario court data, which represent all case filings, irrespective of outcome. We comment on a few notable numbers. The average age of defendants is 34 years, with males comprising the majority at nearly 80%. Most defendants face a single charge. One fifth of defendants receive a jail sentence, a perhaps unsurprising fraction given the relatively minor nature of these offences.<sup>39</sup> The average jail sentence across all cases was 10.98 months. Within this set of offences, the most common offence is assault (35%), followed closely by theft/robbery (30%). Narcotic possession (20%) and DUI (15%) appear roughly half as often as assault and theft/robbery, and narcotic trafficking is even less common (5%).

With respect to legal representation, most defendants (53%) receive representation by retained counsel, which may come in the form of private or certificate (LAO) counsel. Duty counsel represents another 38% of defendants, with 9% of defendants proceeding without legal representation. These figures, as we discuss in Table 5 in Part IV(D), below, obscure LAO's central role in representing indigent criminal defendants in Ontario, as LAO employs or finances all duty counsel and the vast majority of private counsel in these criminal matters.

Finally, the summary statistics confirm that most criminal cases in Ontario (83%) resolve through pre-trial plea-bargaining. The remaining fraction (17%)

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38. In a small number of cases, the defendant's type of legal representation may change during the course of his or her case. These changes, when they occur, typically occur early in the case. When creating the flat file, we record the final type of legal representation.

39. We do not directly observe whether the defendant's case resulted in a conviction, only whether a jail sentence or criminal fine was received. See *supra* note 34.



resolves at trial. This latter figure at first appears high, given that other countries report lower fractions of criminal cases adjudicated at trial.<sup>40</sup> The term *at trial* simply means that the case resolved after the trial began, whether by plea agreement or court verdict.

Our second source of data is LAO. Unlike the Ontario court data, which is individual case level information, LAO provided us aggregate case statistics for the set of offences listed in Table 1.<sup>41</sup> For cases involving duty counsel—staff and *per diem*—LAO provided total caseload and expenditures by year and court location. For cases involving lawyers retained through the certificate program, LAO provided total caseload and expenditures for year, court location, as well as type of offence. We calculated the average expenditure for year and court for duty counsel, and average expenditure for year, court, and offence for certificate lawyers.

TABLE 2: CASE OUTCOMES—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
N	337035	27094	12299	26585	23597	19918	133373
<b>Duration of Case</b>							
All Offences	198	214	212	145	184	174	206
SD	298	373	394	222	254	253	294
Assault	207	220	199	145	171	152	234
SD	239	305	300	175	199	185	240
Theft/Robbery	140	188	225	132	131	163	123
SD	327	464	447	258	268	338	308
DUI	289	259	184	169	283	194	366
SD	329	315	318	226	311	239	319
Narcotics Possession	189	185	242	152	159	193	198
SD	287	304	540	202	202	261	293

40. See Stephanos Bibas, “Regulating Local Variations in Federal Sentencing” (2005) 58:1 Stan L Rev 137 at 145 (stating that 95% of federal criminal cases resolve through plea-bargaining).

41. One key difference is that LAO was not able to provide separate statistics for narcotic possession and narcotic trafficking, but simply combined this category.



TABLE 2: CASE OUTCOMES—SELECT CITIES (2007–2013)

Narcotics Trafficking	275	301	252	233	244	276	287
SD	265	373	394	195	230	241	271
<b>Fraction Adjudicated by or during trial</b>							
All Offences	0.17	0.15	0.19	0.11	0.13	0.16	0.18
<b>Fraction Jailed</b>							
All Offences	0.20	0.27	0.20	0.28	0.14	0.28	0.19
Assault	0.21	0.25	0.23	0.25	0.20	0.30	0.20
Theft/Robbery	0.26	0.39	0.31	0.35	0.17	0.40	0.27
DUI	0.10	0.09	0.10	0.11	0.10	0.11	0.08
Narcotics Possession	0.16	0.29	0.08	0.28	0.11	0.29	0.14
Narcotics Trafficking	0.24	0.33	0.22	0.34	0.28	0.37	0.21
<b>Incarceration (days)</b>							
All Offences	11	15	12	17	10	18	9
SD	60	72	53	57	62	63	61
Assault	11	17	13	15	10	19	9
SD	51	64	39	53	52	52	54
Theft/Robbery	12	17	15	22	11	26	9
SD	53	62	62	58	71	74	47
DUI	7	7	6	7	9	8	4
SD	47	49	26	43	63	48	35
Narcotics Possession	13	21	11	17	10	20	12
SD	84	111	82	65	66	77	97
Narcotics Trafficking	40	76	43	44	45	57	33
SD	165	235	169	127	136	152	176

NOTES: The information was provided by Ontario courts for cases relating to assault, theft, narcotic possession, DUI, and narcotics trafficking. Cases involving multiple charges are categorized by the offence which receives the highest punishment, if any. The data excludes cases involving more serious offences that result in higher punishment than aforementioned offences. Cases data refers to cases closed between the years 2007–2013.

#### IV. FINDINGS: OUTCOMES VARY PRIMARILY WITH LEGAL REPRESENTATION

In the following tables, we present analysis for Ontario as a whole, as well as for a subset of its larger cities. We chose these cities for the simple reason that they represented the largest criminal case docket for our sample of cases.

##### A. CASE OUTCOMES

Case outcomes, as shown in Table 2, vary considerably by offence and city. For example, across the province, the judicial system processes theft/robbery cases on average 140 days faster

than other offences (*e.g.*, 289 days for DUI). Correspondingly, the fraction jailed is higher for theft/robbery (26%) than for DUI (10%), and the average jail sentence follows a similar ratio. Across the province, cases process in roughly 200 days on average across all offences, but process roughly 30% faster in London (145 days) than they do in Toronto (206 days). At the same time, defendants charged in London, Ottawa, and Hamilton are 40% more likely to receive a jail sentence than defendants in Toronto or Thunder Bay. Moreover, London defendants receive longer average jail sentences than Toronto defendants across every offence.

While some trends emerge across offences and cities, patterns do not necessarily correlate across measures of case outcomes. For example, across the province, defendants are more likely to receive a jail sentence for theft/robbery (26%) than other offences (10%), suggesting that defendants are more likely to accept a plea sentence when facing a theft/robbery charge. Given the relative alacrity with which the province adjudicates theft/robbery cases, this jail sentence (12 days) is nevertheless comparable to assault (11 days), while shorter than narcotic possession or trafficking (13 and 40 days, respectively).

##### B. DEFENDANT DEMOGRAPHICS

The composition of defendants also varies by type of offence and city, although their demographic differences appear to be smaller than the differences in case outcomes. Table 3 suggests that the observed differences in defendants' age and gender do not strongly correlate with the general patterns we observe in case outcomes (Table 2). The variation in age across offences, using median or mean, is relatively narrow. London, in particular, routinely falls close to the provincial average with respect to defendant characteristics. Nevertheless, jail sentences in London (Table 2) are higher than the provincial average in most instances. This

lack of a clear relationship between defendant characteristics and case outcomes leaves open the possibility that other characteristics more strongly influence case outcomes.

TABLE 3: DEFENDANT DEMOGRAPHICS—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
N	337035	27094	12299	26585	23597	19918	133373
<b>Age</b>							
All offences							
Median	32	33	30	30	31	32	33
Mean	34.0	34.6	33.1	33.1	33.4	34.3	34.7
SD	12.4	12.2	12.3	12.1	12.6	12.2	12.4
Assault							
Median	32	32	31	31	33	33	33
Mean	34.2	33.8	33.1	33.0	34.5	34.3	34.9
SD	12.0	11.7	11.8	11.9	11.9	11.7	12.2
Theft/Robbery							
Median	33	36	29	30	32	34	35
Mean	34.9	36.0	31.6	33.0	33.9	35.2	36.1
SD	12.8	12.2	11.4	12.1	13.1	12.4	12.8
DUI							
Median	35	33	34	35	36	38	34
Mean	37.0	36.0	36.8	36.8	37.3	38.3	36.7
SD	13.0	13.2	14.1	13.4	13.1	13.3	12.4
Narcotics Possession							
Median	26	27	28	28	24	28	27
Mean	29.7	30.6	31.5	30.9	28.1	31.2	30.0
SD	10.8	10.9	11.8	10.8	10.3	10.9	10.7
Narcotics Trafficking							
Median	27	26	32	28	27	28	27
Mean	30.5	30.4	34.5	31.9	30.4	30.5	30.0
SD	11.0	10.9	12.2	11.8	10.9	10.2	10.7

TABLE 3: DEFENDANT DEMOGRAPHICS—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Gender</b> (fraction female)							
All offences	0.21	0.19	0.26	0.25	0.23	0.20	0.21
Assault	0.17	0.16	0.23	0.19	0.20	0.16	0.16
Theft/Robbery	0.35	0.26	0.41	0.35	0.41	0.29	0.34
DUI	0.14	0.17	0.18	0.15	0.16	0.16	0.13
Narcotics Possession	0.14	0.13	0.19	0.19	0.15	0.19	0.11
Narcotics Trafficking	0.16	0.15	0.26	0.22	0.18	0.19	0.13

NOTES: The information was provided by Ontario courts for cases relating to assault, theft, narcotic possession, DUI, and narcotics trafficking. Cases involving multiple charges are categorized by the offence which receives the highest punishment, if any. The data excludes cases involving more serious offences that result in higher punishment than the aforementioned offences. Cases data refers to cases closed between the years 2007–2013.

Comment

1. Not that much variation within courts for the same offense
2. Some variation across offenses for the same court.

### C. POPULATION DEMOGRAPHICS

As with the defendant demographics (Table 3), population demographics (Table 4) do not correlate closely with the case outcomes (Table 2). For example, London—which in Table 2 reports higher incarceration rates and sentencing than other cities—has the lowest median income among the cities listed, while having one of the highest unemployment rates. Its overall crime severity index, while close to the provincial average, is higher than the other cities. At the same time, London's crime severity indices, including separate measures for violent and non-violent offences, is lower than Thunder Bay's indices. But Thunder Bay reports lower incarceration and sentence length than London (Table 2).

TABLE 4: CENSUS DATA—SELECT CITIES

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
N	337035	27094	12299	26585	23597	19918	133373
<b>Age</b>							
All offences							
Median	32	33	30	30	31	32	33
Mean	34.0	34.6	33.1	33.1	33.4	34.3	34.7
2011 Population	12,851,821	1,236,324	108,359	366,151	149,607	721,053	5,583,064
<b>Population Demographics (2011)</b>							
Median Age	40	39	43	39	41	41	39
Median Income	\$30,526	\$38,543	\$31,182	\$29,478	\$34,816	\$32,008	\$29,593
Unemployment Rate	8.30	6.60	8.00	9.00	8.90	10.10	8.60
<b>Crime Severity Index (2012)</b>							
All Offences	77.6	57.0	88.0	74.5	47.5	60.1	52.1
Violent Offences	85.7	58.2	118.8	64.1	54.3	62.5	78.4
Non-Violent Offences	74.5	56.5	76.5	78.1	44.9	59.1	42.5

SOURCES: Data on population comes from Statistics Canada, *2011 National Household Survey* (Ottawa: Statistics Canada, 2013). Data on the Crime Severity Index comes from Statistics Canada, "Police-reported crime statistics in Canada, 2012" by Samuel Perreault, in *Juristat*, Catalogue NO 85-002-X (Ottawa: Statistics Canada, 2013) at 32 (Table 4), with the exception of Oshawa, which comes from Statistics Canada, "Crime Severity Index values for 239 police services policing communities over 10,000 population, 2011" (Ottawa: Statistics Canada, 2012).

#### D. LEGAL REPRESENTATION

Our data allow us to examine the type of legal representation, which varies considerably across the province. Table 5 reports that in the aggregate, over 90% of defendants receive legal representation, either in the form of duty counsel or retained counsel. These categories are more nuanced than they first appear, as both types of representation capture multiple subcategories of counsel. Within duty counsel, that representation can take the form of salaried or *per diem*, both of which the LAO funds. Both types provide legal advice to defendants, and can

appear in court with the defendant on matters of bail, pleas, and sentencing—but typically not trials.<sup>42</sup>

TABLE 5: DEFENDANT'S LEGAL REPRESENTATION—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
N	337035	27094	12299	26585	23597	19918	133373
<b>Chosen Representation</b>							
All Offences							
No Legal Representation	0.09	0.08	0.24	0.10	0.17	0.10	0.04
Duty Counsel	0.38	0.20	0.19	0.23	0.26	0.22	0.57
Retained Counsel	0.53	0.72	0.56	0.67	0.56	0.67	0.40
Assault							
No Legal Representation	0.07	0.07	0.19	0.09	0.11	0.07	0.05
Duty Counsel	0.33	0.18	0.15	0.17	0.25	0.20	0.47
Retained Counsel	0.60	0.76	0.66	0.73	0.64	0.73	0.48
Theft/Robbery							
No Legal Representation	0.11	0.11	0.29	0.12	0.24	0.13	0.04
Duty Counsel	0.50	0.28	0.22	0.30	0.36	0.28	0.70
Retained Counsel	0.38	0.61	0.50	0.58	0.40	0.58	0.25
DUI							
No Legal Representation	0.08	0.07	0.18	0.08	0.12	0.07	0.03
Duty Counsel	0.24	0.10	0.25	0.22	0.11	0.23	0.39
Retained Counsel	0.69	0.84	0.57	0.70	0.77	0.70	0.58
Narcotics Possession							
No Legal Representation	0.11	0.09	0.39	0.09	0.22	0.15	0.02
Duty Counsel	0.39	0.21	0.20	0.19	0.30	0.20	0.61
Retained Counsel	0.50	0.70	0.41	0.72	0.48	0.65	0.38

42. See Legal Aid Ontario, “Criminal duty counsel” (2015), online: <[www.legalaid.on.ca/en/getting/dutycounsel\\_criminal.asp](http://www.legalaid.on.ca/en/getting/dutycounsel_criminal.asp)>.

TABLE 5: DEFENDANT'S LEGAL REPRESENTATION—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
Narcotics Trafficking							
No Legal Representation	0.03	0.05	0.13	0.04	0.07	0.02	0.01
Duty Counsel	0.21	0.07	0.07	0.06	0.07	0.03	0.38
Retained Counsel	0.75	0.88	0.80	0.90	0.86	0.95	0.60

NOTES: The information was provided by Ontario courts for cases relating to assault, theft, narcotic possession, DUI, and narcotics trafficking. Cases involving multiple charges are categorized by the offence which receives the highest punishment, if any. The data excludes cases involving more serious offences that result in higher punishment than aforementioned offences. The data refers to cases closed between the years 2007–2013. Retained Counsel under Chosen Representation refers both to certificate attorneys provided by LAO and private counsel.

Comment

1. Variation across courts for same offense
2. Variation across courts for different offenses

Table 4 suggests that some of the observed differences in case outcomes may be attributable to differences in socioeconomic factors across the cities. Drawing from information from Statistics Canada, Table 4 reports demographic and socioeconomic data from 2011 and crime data for 2012. The cities' variation in age is relatively narrow. The cities' statistics for income and unemployment show greater variation. For example, Ottawa has the highest median income and lowest unemployment, while London has the lowest median income and Hamilton the highest unemployment. With respect to the crime indices, the correlation between median income and unemployment rate appears attenuated. As mentioned, Ottawa has the highest median income and the lowest unemployment rate, but cities such as Oshawa and Hamilton have both a higher median income and unemployment rate than the provincial average.

TABLE 6: LAO LEGAL REPRESENTATION—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
N	337035	27094	12299	26585	23597	19918	133373
<b>Chosen Representation</b>							
All Offences							
No Legal Representation	0.09	0.08	0.24	0.10	0.17	0.10	0.04
Duty Counsel	0.38	0.20	0.19	0.23	0.26	0.22	0.57
<b>Duty Counsel</b>							
<i>Per Diem</i>							
Expenditure per Case	\$63	\$120	\$94	\$65	\$74	\$52	\$56
N	550,599	6,203	19,436	52,332	27,326	76,410	171,606
Staff							
Expenditure per Case	\$71	\$58	\$72	\$86	\$52	\$90	\$83
N	876,639	73,280	9,628	20,896	66,415	8,443	504,618
<b>Certificate</b>							
All Cases	\$1,562	\$1,624	\$970	\$1,196	\$1,509	\$1,459	\$1,850
N	115,062	13,892	3,807	11,885	4,162	15,594	41,959
Assault	\$1,277	\$1,503	\$908	\$1,124	\$1,321	\$1,211	\$1,354
N	43,305	4,483	1,961	3,870	1,381	5,683	16,318
Theft/Robbery	\$1,512	\$1,503	\$927	\$1,110	\$1,412	\$1,499	\$1,805
N	36,649	5,126	1,126	4,590	1,274	5,008	13,074
DUI	\$1,169	\$1,163	\$845	\$1,183	\$1,040	\$1,147	\$1,366
N	3,218	473	139	256	168	365	686
Narcotics	\$2,048	\$1,985	\$1,294	\$1,410	\$1,854	\$1,749	\$2,609
N	31,890	3,810	581	3,169	1,339	4,538	11,881

NOTES: The data was provided by LAO for cases covering the period 2007–2013. Dollar amounts are reported in constant 2013 dollars. Figures for the province (Column 1) include cities beyond those listed in Columns 2–6, and accordingly is greater than the sum for these columns. Data for Duty Counsel—*per diem* and staff—are not broken down by type of case. Data for Certificate cases are broken down by case; if cases involve multiple different offences, the offence of record is determined by the most serious charged offence.



Retained counsel includes both certificate and privately retained counsel. In either instance, private lawyers represent defendants. The difference within retained counsel is the source of funding: LAO pays for certificate counsel, while the defendants pay out of pocket for non-certificate private retained counsel. In determining whether a legal matter qualifies for a certificate, LAO considers the defendant's financial eligibility, as well as whether the defendant faces likely imprisonment if convicted.<sup>43</sup> As a general matter, LAO certificate representation are reserved for more serious and complex criminal matters.

The largest source of variation is the relative balance between duty and retained counsel. Defendants are more likely to be represented by duty counsel when charged with theft/robbery, and less likely when charged with narcotics trafficking. The severity of punishment cannot readily explain this trend. For example, defendants charged with narcotics trafficking—statistically regarded as more serious than narcotics possession based on sentencing (Table 2)—are more likely to choose retained counsel. At the same time, the majority of defendants charged with DUI—which, as a stand-alone offence not involving homicide or other bodily injury, has the lowest probability of incarceration and jail sentence (Table 2)—opt for retained counsel.

Cities also vary in their use of different legal representation. For example, defendants in Toronto are least likely to proceed without legal representation, and most likely to rely on duty counsel. By contrast, defendants in Ottawa rely on retained counsel more than defendants in the other listed cities, save for narcotics offences.

Decomposing legal representation into its elemental types, by itself, tells an incomplete story, failing to account for potential differences in expenditures across these types. Table 6 shows that LAO spends much more on average for cases represented by certificate counsel than for duty counsel: The average expenditure for the former exceeds \$1000 for every type of offence, while averaging less than \$100 for both staff and *per diem*.<sup>44</sup> This difference in expenditure between the two types of counsel is consistent with the view that certificate counsel works on more complex cases, thereby generating higher legal costs. Over 90% of cases involving LAO are funded through duty counsel, although LAO allocates over

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43. For a discussion of certificate eligibility, see Legal Aid Ontario, "I've been charged with a crime... do I qualify for legal aid services?" (2015), online: <[www.legalaid.on.ca/en/getting/eligibility\\_charges.asp](http://www.legalaid.on.ca/en/getting/eligibility_charges.asp)>. On its website, LAO provides a "Criminal Code charge search" that describes general guidelines for whether LAO provides a certificate for a given offence [LAO Eligibility].

44. LAO maintains expenditures by offence for certificate, but not duty, counsel.

two-thirds of its lawyer expenditures through certificate counsel. With respect to certificate counsel, cities vary in their expenditures. Toronto spends the most per case among the selected cities for most offences (save assault), while Thunder Bay spends the least in every offence category.

While the criteria by which LAO decides whether to provide certificate counsel depends on the specifics of each case,<sup>45</sup> LAO's use of certificate counsel appears to comprise the majority of retained counsel. Back-of-the-envelope calculations comparing the number of cases of retained counsel in Table 5 (roughly 180,000) with the number of certificate cases provided by LAO in Table 6 (roughly 115,000) suggest that LAO finances well over three-fifths (64%) of defendants using retaining counsel.<sup>46</sup>

TABLE 7: WHETHER DEFENDANT RECEIVES JAIL SENTENCE—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	-0.109*** (0.00129)	-0.134*** (0.00678)	-0.0831*** (0.00567)	-0.132*** (0.00413)	-0.0754*** (0.00717)	-0.105*** (0.00202)	-0.119***
Age							
21-25	0.0586*** (0.00291)	0.0933*** (0.0125)	0.0566*** (0.0140)	0.0972*** (0.0109)	0.0428*** (0.00882)	0.0519*** (0.0134)	0.0548*** (0.00495)
26-30	0.110*** (0.00329)	0.196*** (0.0136)	0.111*** (0.0155)	0.134*** (0.0117)	0.0805*** (0.0107)	0.108*** (0.0146)	0.108*** (0.00553)
31-40	0.126*** (0.00297)	0.232*** (0.0124)	0.0708*** (0.0136)	0.119*** (0.0108)	0.0862*** (0.00945)	0.129*** (0.0134)	0.141*** (0.00504)
41-50	0.133*** (0.00317)	0.239*** (0.0127)	0.0868*** (0.0156)	0.0764*** (0.0113)	0.0954*** (0.0101)	0.142*** (0.0140)	0.155*** (0.00534)
50+	0.0587*** (0.00346)	0.123*** (0.0148)	0.0132 (0.0164)	-0.0384*** (0.0125)	0.0549*** (0.0112)	0.0888*** (0.0164)	0.0784*** (0.00575)

45. See LAO Eligibility, *supra* note 43.

46. The case numbers do not track identically between the LAO and the Ontario court data. LAO reports expenditures on a yearly basis, while the Ontario courts report representation based on filing or closing dates.

TABLE 7: WHETHER DEFENDANT RECEIVES JAIL SENTENCE—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Legal Representation</b>							
No Legal Representation	-0.123*** (0.00236)	-0.0125 (0.0236)	-0.0229 (0.0191)	-0.256*** (0.0116)	-0.0782*** (0.00943)	-0.211*** (0.0155)	-0.0358*** (0.00730)
Duty Counsel	-0.0781*** (0.00368)	0.0874*** (0.0248)	-0.0922*** (0.0141)	-0.218*** (0.0219)	-0.0376*** (0.0119)	-0.0836*** (0.0251)	-0.0119* (0.00666)
Legal Expenditures (in \$10s)	-0.000355*** (2.58e-05)	0.000245* (0.000143)	0.000575*** (0.000186)	-0.000748** (0.000293)	0.000110 (8.90e-05)	0.000727*** (0.000196)	-0.000122*** (3.85e-05)
Observations	337,035	27,095	12,299	26,585	23,597	19,917	133,378

NOTES: The dependent variable is whether the defendant received a jail sentence. Coefficients are reported as marginal effects, and standard errors are indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which the case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.

## E. LIKELIHOOD OF SENTENCE

The examination of individual factors, while informative, ignores their interaction with other factors. For example, any correlation of age with case outcomes may change if these factors are correlated with other demographic factors or the form of legal representation. Accordingly, we regress case outcomes on the aforementioned defendant and case characteristics, as well as other observable

case and defendant characteristics.<sup>47</sup> In the Tables that follow, we report on the entire set of cases, not merely the cases in which the defendant was convicted or received a jail sentence. Our rationale is to capture the full set of outcomes, which implicitly reflect actions of the Crown, judges, and lawyers.

Table 7 reports whether a defendant received a jail sentence, controlling for year, type of offence, number of charges, and number of court appearances. The dependent variable is the dichotomous outcome whether the defendant received a jail sentence, and the coefficients are reported as probit marginal effects. A defendant's demographic characteristics correlate strongly with the outcome: Women across the province are 10% less likely to receive a jail sentence than men (Column 1), with the greatest disparity in Ottawa and the smallest in Oshawa. Similarly, across all jurisdictions, older defendants are more likely to receive a jail sentence than the baseline (omitted) group of defendants 20 years and younger. In most cities, the probability of a sentence monotonically increases by age cohort until the defendant reaches 50 years. The exceptions are Thunder Bay and London, where defendants aged 26 to 30 are most likely to receive a jail sentence.

Similarly, the type of legal representation a defendant receives correlates strongly with the likelihood of receiving a jail sentence. Compared with the baseline (omitted) category of defendants with retained counsel, defendants without legal representation are less likely to receive a jail sentence. This disparity reflects the fact that the Crown drops all charges for a significant fraction of unrepresented defendants: The underlying data reveal that only 9% of unrepresented defendants receive a jail sentence, compared with 21% of represented defendants.

As between duty and retained counsel, cities vary considerably in the probabilities of the defendant receiving a jail sentence. Overall, and in most cities, defendants represented by retained counsel are more likely to receive a jail sentence than those represented by duty counsel. This difference comports with certificate counsel typically dealing with more serious or complex cases. Yet, in Ottawa and Thunder Bay, the pattern is reversed: Defendants with retained counsel are *less* likely to receive a jail sentence.

The empirical specifications in Table 7 controls for expenditures at the city-year-lawyer level, which has a statistically significant effect on the defendant's probability of receiving a jail sentence. The point estimates for duty and retained counsel are sensitive to the inclusion of legal expenditures. Overall, their effect

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47. For defendant characteristics, we include a series of dummies for the cohort age of the defendant. This approach allows for a flexible, non-linear relationship between age and case outcome. With respect to legal expenditures, we elect a linear relationship because we know only city-year averages for LAO expenditures for duty counsel and certificate counsel.

on the point estimates for duty counsel is small, but greater for retained counsel. In a separate regression excluding lawyer expenditures (not reported), defendants with retained counsel have a 13% higher probability of receiving a jail sentence than defendants without representation. Controlling for lawyer expenditures, Table 7 (Column 1) shows that defendants with duty counsel have an 8% lower probability of a jail sentence than defendants represented by retained counsel. This difference in point estimates reinforces a likely selection effect, where retained counsel disproportionately handles cases where the defendant faces a likelihood of a jail sentence. This effect, however, varies by city. Controlling for expenditure reveals that retained counsel correspond with a greater probability of a jail sentence in each of the listed cities.

It is worth noting that in presenting separate specifications for the individual cities, we are not claiming that case outcomes are statistically different across each of these cities (although they are in many instances). Rather, we emphasize that differences emerge across cities along specific factors, such as gender.

**TABLE 8: LENGTH OF DEFENDANT'S JAIL SENTENCE—SELECT CITIES (2007–2013)**

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	0.289*** (-41.56)	0.323*** (-14.83)	0.333*** (-12.13)	0.386*** (-14.96)	0.327*** (-9.96)	0.429*** (-10.23)	0.272*** (-24.13)
Age							
21-25	1.693*** (10.45)	2.222*** (6.93)	2.436*** (6.13)	1.694*** (6.40)	1.428* (2.19)	1.304 (1.80)	1.630*** (4.71)
26-30	2.359*** (18.06)	2.991*** (10.74)	3.472*** (9.28)	2.025*** (8.59)	2.041*** (4.20)	1.494** (3.09)	2.411*** (9.35)
31-40	2.586*** (21.24)	3.817*** (13.99)	3.132*** (8.47)	1.662*** (6.74)	2.557*** (5.85)	1.784*** (4.51)	2.721*** (11.40)
41-50	2.854*** (21.42)	4.155*** (14.39)	3.838*** (9.15)	1.716*** (5.50)	3.380*** (7.26)	1.991*** (5.24)	2.813*** (11.52)
50+	2.012*** (11.62)	3.010*** (7.79)	2.588*** (4.44)	0.941 (-0.53)	1.975*** (3.74)	1.789*** (3.84)	2.136*** (6.83)

**TABLE 8: LENGTH OF DEFENDANT'S JAIL SENTENCE—SELECT CITIES (2007–2013)**

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Legal Representation</b>							
No Legal Representation	0.344*** (-14.20)	1.112 (0.48)	1.070 (0.31)	0.230*** (-4.39)	0.525** (-2.58)	0.302*** (-3.92)	0.723* (-2.20)
Duty Counsel	0.649*** (-6.11)	1.988*** (3.38)	0.484** (-2.99)	0.411** (-2.83)	0.924 (-0.34)	0.779 (-0.96)	0.981 (-0.15)
Legal Expenditures (in \$10s)	1.000 (0.54)	1.004** (3.23)	1.010*** (4.44)	1.001 (0.21)	1.007*** (4.35)	1.007*** (4.14)	1.001 (1.54)
Observations	337035	27095	12299	26585	23597	19917	133378

NOTES: The dependent variable is the length of the defendant's jail sentence, reported as incident rate ratios (IRR). Z test statistic is indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.

The effect of defendant characteristics and legal representation holds when examining individual offences. Tables A1 and A2, reported in the Appendix, look at the individual offences of theft/robbery and DUI, respectively. For theft/robbery, the results were similar to Table 7: Women are less likely to receive a jail sentence, as are defendants under age 21; defendants represented by duty counsel are less likely to receive a jail sentence than defendants represented by retained counsel (again reflecting likely selection effects).

For DUI offences, the effect of gender was smaller across the province and each city, although still statistically significant. With respect to age, some cities—specifically London and Toronto—did not meaningfully differentiate between the under-21 and the 21–25 cohorts, although older cohorts were more likely to

receive a jail sentence. The type of legal representation mattered less than for theft/robbery, and in many instances was not statistically significant.<sup>48</sup> Taken together, Tables A1 and A2 reflect the fact that a defendant's form of legal representation correlates more closely for theft/robbery than for DUI.

## F. DURATION OF SENTENCE

Table 8 examines the length of the sentence itself, based on the same factors in Table 7, using a negative binomial model. We chose this model for two reasons. First, sentence length is a form of count data, truncated at zero, for which ordinary least squares is inappropriate. Second, sentence length follows a non-normal distribution, where the variance is greater than the mean. We report the variable coefficients in Table 7 as incident rate ratios, the log of the ratio of expected counts. More simply stated, the coefficients report the variables' one-unit effect on the sentence rate.<sup>49</sup>

As with the probability of receiving a jail sentence, women fared better than men, as did defendants in the under-21 cohort. Across the province, the sentence length for female defendants was 29% that of male defendants, while defendants under age 21 served the shortest sentences of all age cohorts. The differences in sentence length, however, vary considerably by city. Toronto has the largest disparity in sentence length based on gender, while Thunder Bay imposes higher sentence lengths for older defendant cohorts.

The effect of legal representation on sentence length suggests a more nuanced story. Across the province, defendants represented by duty counsel received shorter sentences than defendants represented by retained counsel. But in individual cities, such as Ottawa, the reverse pattern emerged. Oshawa, Hamilton, and Toronto are notable because the differences in outcomes between

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48. Defendants represented by duty counsel and retained counsel were more likely on average to receive a jail sentence than defendants representing themselves, but the disparity was smaller, and in Thunder Bay, defendants represented by duty counsel were 3% less likely to receive a jail sentence than defendants representing themselves.

49. Notwithstanding the high fraction of zero-value observations, we decided against using a zero-inflated regression model (*e.g.*, either Poisson or negative binomial) because it assumes that the zeros are composed of true (counts generated by the standard Poisson regression model) and excess (counts with a zero probability of a count greater than zero). Our data do not support this assumption for either sentence length or fine amount. For a discussion on zero-inflated regression models, see William Greene, *Functional Form and Heterogeneity in Models for Count Data* (New York: Now, 2007) at 31-36.

defendants represented by duty counsel and retained counsel were small and statistically non-significant.

Examining sentence length for individual offences—theft/robbery and DUI (Table A3 and Table A4, respectively, in the Appendix, below)—tells a similar story to the full sample of offences in Table 8. The disparities by gender and legal representation are larger for theft/robbery than for DUI. Across the province, female defendants serve 20% of the sentence length of male defendants across the province, but 27% of the comparable sentence length for DUI. Compared to defendants represented by retained counsel, defendants represented by duty counsel serve only 21% of the sentence length for theft-robbery, and 66% of the sentence length for DUI. It is worth noting that for most cities, the differences in outcomes comparing duty and retained counsel were not statistically significant.

For completeness, we also examine criminal fines. For the same reasons as with sentence length (Table 8), we use a negative binomial regression. As a formal matter, fines can be imposed irrespective of whether the defendant receives a jail sentence. As a practical matter, however, fines and jail sentences rarely overlapped. Most defendants (67%) received neither a jail sentence nor a fine. Roughly one fifth (19%) received only a jail sentence, and 13% received only a fine. In only 0.3% of the cases did a defendant receive both a sentence and a fine. To frame it slightly differently, conditioned on receiving a jail sentence, a defendant also received a fine in only 2% of cases.

TABLE 9: CRIMINAL FINES—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	0.332*** (-21.38)	0.411*** (-7.63)	0.303*** (-7.82)	0.387*** (-9.80)	0.339*** (-9.03)	0.260*** (-10.31)	0.233*** (-12.58)
Age							
21-25	1.653*** (6.35)	1.152 (0.61)	1.598* (2.34)	1.569** (3.07)	1.343 (1.61)	2.727*** (4.88)	1.552 (1.74)
26-30	1.977*** (6.82)	1.175 (0.68)	2.699*** (4.68)	1.697*** (3.77)	1.203 (1.04)	2.803*** (4.80)	2.131** (2.76)
31-40	1.984*** (8.98)	1.169 (0.66)	2.712*** (5.29)	1.941*** (4.86)	1.308 (1.53)	2.831*** (5.11)	1.956** (2.96)
41-50	2.471***	1.173	3.903***	2.420***	1.375	3.151***	2.676***



TABLE 9: CRIMINAL FINES—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
	(11.25)	(0.68)	(6.97)	(5.92)	(1.86)	(5.46)	(4.01)
50+	2.646***	1.263	3.893***	2.448***	1.465	3.552***	2.995***
	(6.98)	(0.96)	(6.42)	(5.40)	(1.93)	(5.91)	(3.50)
<b>Legal Representation</b>							
No Legal Representation	1.262*	1.947*	0.771	0.631	1.683	1.299	1.591
	(2.19)	(1.99)	(-1.08)	(-1.66)	(1.88)	(0.57)	(1.29)
Duty Counsel	1.301**	0.841	1.019	1.013	1.410	2.927**	0.980
	(2.81)	(-0.62)	(0.08)	(0.05)	(1.33)	(2.64)	(-0.07)
Legal Expenditures	1.004***	1.005**	1.006**	0.999	1.007***	1.005*	1.003
(in \$10s)	(8.26)	(2.87)	(2.95)	(-0.39)	(4.17)	(2.09)	(1.81)
Observations	337035	27095	12299	26585	23597	19917	133378

NOTES: The dependent variable is the amount of the defendant's criminal fine, reported as incident rate ratios (IRR). Z test statistic is indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.

## G. CRIMINAL FINES

As with sentence length, defendant demographics have a similar effect on amount of criminal fines. As shown in Table 9, female defendants paid smaller fines, on average, as did defendants below the age of 21. Across the province, compared with defendants represented by retained counsel, defendants represented by duty counsel paid higher fines on average, as did defendants representing themselves. Within cities, these differences were often small and not statistically significant,

although individual cities (*e.g.*, Hamilton) showed significant differences between duty and retained counsel.

The relative success of retained counsel in Table 9 suggests that they provide greater returns when the likely sanction is fines as opposed to incarceration. Looking at fines for the particular offences of theft/robbery and DUI (Table A5 and Table A6, respectively, in the Appendix) bear this out. For theft/robbery, the more likely sanction is a jail sentence; accordingly, the effect of type of lawyer on fines is smaller and—in most instances—not statistically significant. Conversely, the point estimates for duty counsel are larger and statistically significant for DUI offences across the province, reflecting the fact that fines are a more common form of sanction for DUI offences than jail sentences.

## V. DISCUSSION

Our analysis shows that case outcomes for minor criminal offences vary widely across the province, and that geographic and legal factors strongly correlate with these outcomes. Defendants in certain cities (*e.g.*, Toronto) receive systematically lower punishment than others. Women receive systematically lighter punishment than men across offences, including the probability of jail, length of sentence, and imposition of fines. Similarly, defendants younger than 21 are more likely to avoid jail time, serve shorter jail sentences than older defendants, and pay smaller fines. A defendant's punishment is also closely correlated with the type of legal representation received. Self-represented defendants typically receive lighter sentences than represented defendants; within the class of represented defendants, duty counsel, on average, correspond with lighter sentences than retained counsel.

It is important to fully acknowledge the limitations of our data. Case outcomes depend on factors beyond those included in our model. Most notably, we do not observe the facts of each case. The stronger the Crown's case against a defendant, the greater the likelihood of conviction and, in many instances, the longer the length of sentence. The strength of the Crown's case in turn likely influences the defendant's form of representation.

More systematically, heterogeneity in the defendant population by city may account for differences in sentence length. For example, it may be the case that the defendant population varies across cities. The census population demographics reported in Table 4 reveal that cities differ from one another with respect to income, unemployment, and crime severity index. That said, these aggregated differences do not map neatly onto differences we observe in case outcomes.

We also do not observe institutional actors. As noted by criminologists,<sup>50</sup> local legal culture is important. Judges may vary, either individually or by city, in how they adjudicate these offences. Even though only a small fraction of cases end at trial, these judicial differences, if they exist, influence the plea-bargaining process. They may also influence the actual length of jail sentence. For example, a judge has discretion to take into account the length of time a defendant may have spent in remand, effectively offsetting some of the defendant's net sentence.<sup>51</sup>

The police may also provide another explanation for differences in case outcomes. While the Royal Canadian Mounted Police ("RCMP") provide policing in most provinces, Ontario is an exception in that it maintains its own provincial police services.<sup>52</sup> Within Ontario, police departments may vary in their enforcement of specific offences. Differences in police behaviour may operate through more nuanced channels, with significant effects. For example, assume each city experiences the same distribution of criminal conduct (a strong assumption) and that police are either selective (meaning they exercise discretion whether to arrest for each offence) or categorical (meaning they arrest for all known offences) in their enforcement. This difference in police strategy will inevitably influence the distribution of cases that actually appear in court and the subsequent case outcomes.

Furthermore, Crown attorneys, or even an entire Crown office, may have different norms of charging defendants. For example, they may vary in their use of the Direct Accountability program, a non-court resolution to criminal charges in which the Crown exercises discretion in whether to refer defendants to this program.<sup>53</sup> Such differences may explain why a higher fraction of defendants are jailed in London relative to Hamilton or Toronto. Similarly, LAO may differ in how it allocates defence counsel resources across the province. For example, its decision to routinely staff duty counsel in some court jurisdictions but not others will likely influence defendants' choice of legal representation.

Equally important to note from our results is that the relationships we observe may be merely correlational and not causal. For example, our results consistently show that unrepresented defendants fare better than represented clients. This phenomenon is, in all likelihood, an artifact of case selection. Defendants often

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50. See *supra* notes 26-30 and accompanying text.

51. See Statistics Canada, *Trends in the Use of Remand in Canada*, by Lindsay Porter & Donna Calverley (Ottawa: Statistics Canada, 2011) at 17.

52. See Julian V Roberts & Michelle G Grossman, *Criminal Justice in Canada: A Reader*, 4th ed (Toronto: Nelson Education, 2012) at 29. Quebec also has its own provincial police force.

53. See Ontario, Ministry of the Attorney General, "JOT Initiatives" (13 November 2015), online: <[www.attorneygeneral.jus.gov.on.ca/english/jot/jot\\_in\\_action.asp](http://www.attorneygeneral.jus.gov.on.ca/english/jot/jot_in_action.asp)>.

eschew representation because they perceive the weakness of the Crown's case against them, a belief substantiated by the relatively high percentage of cases resulting in their receiving an acquittal or the Crown dropping the case entirely.

Even other factors where we observe consistent effects on case outcomes are open to competing interpretations. For example, women systematically receive lower punishment than men: This finding may reflect that women are less culpable than men, or have committed fewer total offences (relevant to sentence length); alternatively, it may reflect the fact that the Crown, judges, or juries systematically exercise more leniency towards women than men.

At this point, we are agnostic whether judges, police, the Crown, or LAO systematically affect case outcomes. But because we do not observe individual-level variation on these dimensions, we cannot rule out the possibility that they do. If so, these actors collectively raise concern regarding litigants' equality before the law. Our inability to determine their true effect warrants closer examination of the potential influence of institutional factors.

Our analysis generates some stark findings that cannot be readily dismissed as spurious or inconsequential. A defendant's sentence correlates in large part with the type of legal representation received. Defendants represented by retained counsel are more likely to receive a jail sentence and serve longer sentences than defendants represented by duty counsel or without representation. The import of this result is not primarily the disparity itself, which may largely reflect selection on case severity, but rather the variation across cities. In London, the probability of receiving a jail sentence is 22% lower for duty counsel than for retained counsel (Table 7) but only 1% in Toronto for the same comparison. As it turns out, Toronto spends 54% (\$654) more per certificate case than does London. Toronto's additional expenditures on certificate cases may partially explain a narrower gap in outcomes between retained and duty counsel.

Variation across cities relating to defendants' demographic characteristics similarly invites closer scrutiny. Female defendants fare better than male defendants across the province (Table 7, showing women 11% less likely to receive a prison sentence; and Table 8, showing sentence length only 29% compared to male defendants), but the gender disparity is even higher in Toronto (12% less likely and 27% sentence length compared to male defendants). When looking at theft/robbery (Ottawa) or DUI (London), differences across cities are even greater.

Unobservable case characteristics, while almost certainly important, are unlikely to fully explain our results. While it may be the case that female defendants have fewer aggravating factors than male defendants on average, it is difficult to believe that Ottawa and Oshawa are so different on this dimension to

account for the markedly lower incarceration rates for females in Ottawa. Our data militate against this conclusion. We examine garden variety and generally low level offences, which invites more systematic adjudication and sentencing. Furthermore, we are skeptical whether aggravating factors—such as culpability of concurrent offences—drive our results. In a separate specification (not reported), we look only at cases where the defendant is charged with a single offence. The point estimates are comparable to the full data and are statistically significant.

Accordingly, we exercise caution in interpreting what the data can and cannot tell us. Our results are limited in what they can say definitively, to be sure, but expose differences in case outcomes that warrant more systematic and rigorous analysis. In a province where all defendants are subject to the same set of laws, why do outcomes vary significantly by city? For example, why are defendants in London two times more likely to serve a jail sentence than defendants in Oshawa, even though cases process faster in London than in Oshawa (Table 2)? Similarly, why do defendants represented by retained counsel fare so much better in Ottawa relative to duty counsel in other cities (Table 7)?

Our results, while preliminary, do not implicate intentional bias or discrimination at the institutional level. Nevertheless, they reveal that defendants of a certain gender or age cohort experience different outcomes depending on the city that adjudicates their case. Two possible explanations for these disparities are that Crown offices and the police (or even individual Crown attorneys or police officers) may differ from one another in their charging practices; and similarly, that courts in a given city (or individual judges) may differ in their view towards criminal defendants.

Our results are consistent with the view that the quality of legal representation may vary considerably within and across cities. Cities differ in their spending across all forms of publicly funded defence counsel, and these differences have a statistically significant effect on case outcomes. Lawyer representation cannot be easily captured by expenditures, but our results show that expenditures matter, and invite closer examination. To further complicate matters, these disparities may exist not only across cities, but they also may be relative to the quality of Crown prosecutors in each city.

If designated the social planner, our policy objective would be to construct a criminal justice system where similarly situated defendants receive the same outcome. Toward that end, we would attempt to eliminate institutional and structural factors that bias certain classes of defendants over others. We would identify existing policies that improve the efficiency of case adjudication, from both a time and quality perspective.

The challenge is in knowing where to begin. Our results show that defendants charged with the same statutory offence receive different sentences, depending on both the city where they allegedly committed the offence and what type of representation they received. Based on the available data, we cannot isolate the effect of each factor.

Our results, however, also suggest that legal representation is a promising place to start. In particular, there are two questions we would ask: What type(s) of legal representation achieve the best outcomes for defendants, and what are their costs? The optimal delivery model for legal services depends on both dimensions. Neither Ontario, nor other provinces to the best of our knowledge, has systematically examined this question. For example, the same rigour examining local legal culture in other countries<sup>54</sup> could be replicated in Canada.

The stakes for addressing this question are undeniably high. LAO spent over \$315 million for legal representation in 2011,<sup>55</sup> with \$187 million dedicated to legal aid certificates alone.<sup>56</sup> The private bar has a stake in the status quo, under which it which receives most of LAO's expenditures on legal representation. Other actors, however, have reason to explore potentially more efficient delivery models of legal services. The Government of Ontario funds over 90% of LAO's operating budget, including expenditures for legal representation.<sup>57</sup> Given the seemingly abundant demand for LAO's services but finite resources, both LAO and the government could benefit from maximizing its return on legal expenditures. Whether these existing differences raise challenges under the *Charter* is beyond the scope of this article, but understanding these differences—and addressing them when warranted—is compelling as a matter of policy.

A modest place to begin would be to closely examine case files for a random subset of cases across the province. While qualitative in nature, this approach could provide some insight into how different types of lawyers operate—within and across cities. In addition, these files would shed light on the behaviour of Crown prosecutors and judges.

The most rigorous approach to evaluating the efficacy of different forms of legal representation is through random assignment. Within the category of duty counsel, defendants could be randomly assigned to *per diem* and staff counsel, and within the pool of lawyers for each type, defendants would be randomly assigned. Randomization provides a clean and straightforward evaluation:

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54. See *e.g.* Ostrom et al, *supra* note 26.

55. See Legal Aid Ontario, *2011/12 Annual Report* (Toronto: Legal Aid Ontario, 2012) at 27.

56. See *ibid* at 16.

57. See *ibid* at 26.

Differences in case outcomes can be attributable to the attorneys themselves. Any observed differences could then be viewed in relation to the costs of providing these services.

Retained counsel presents a greater challenge because randomization is more difficult to achieve. Defendants in this category have wide latitude in choosing their lawyer, and lawyers in this category have latitude in choosing whether to take on a case. This inquiry is further challenged by the presence of full-time LAO staff lawyers who represent defendants at some stage of criminal proceedings. Duty counsel fulfill some of the duties of public defenders, but only some of their activities. LAO could, however, implement a pilot program where defendants eligible for certificate legal representation are randomly assigned to one of its certificate lawyers or full-time staff lawyers. Any approach involving randomization, however, requires program design—and some up-front costs—not merely *ex post* evaluation. To the extent that organized interests militate against such an experiment, the challenges are considerable, but not insurmountable.

## VI. CONCLUSION

This article provides strong evidence that for criminal cases involving common, relatively low-level offences, outcomes vary widely across the province. These variations cannot be easily explained by defendant characteristics or population demographics, but appear to correlate strongly with the city in which the defendant commits the alleged offence and the type of legal representation received. Our results are consistent with the claim that the quality of legal representation varies considerably across cities, in ways that lead to real differences in a defendant's probability of jail and the duration of sentence.

People can disagree over the appropriate amount of punishment in criminal cases, but within a given jurisdiction, this amount should not turn on where the defendant happens to have committed the offence. Given existing discrepancies, the challenging next step is to more precisely identify the contributing factors and to develop policies to reduce them. While individual defendants may benefit from any reforms, so too does the public through greater confidence in the fairness of the criminal justice system.

## VII. APPENDIX

TABLE A1: WHETHER DEFENDANT RECEIVES JAIL SENTENCE FOR THEFT/  
ROBBERY—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	-0.181*** (0.00256)	-0.257*** (0.0105)	-0.133*** (0.0174)	-0.197*** (0.00964)	-0.123*** (0.00852)	-0.280*** (0.0163)	-0.195*** (0.00389)
Age							
21-25	0.139*** (0.00718)	0.236*** (0.0266)	0.122*** (0.0342)	0.174*** (0.0199)	0.117*** (0.0233)	0.167*** (0.0405)	0.140*** (0.0123)
26-30	0.218*** (0.00765)	0.380*** (0.0236)	0.196*** (0.0345)	0.218*** (0.0206)	0.116*** (0.0245)	0.314*** (0.0383)	0.243*** (0.0131)
31-40	0.236*** (0.00663)	0.379*** (0.0220)	0.167*** (0.0338)	0.172*** (0.0193)	0.176*** (0.0219)	0.323*** (0.0346)	0.292*** (0.0112)
41-50	0.234*** (0.00684)	0.388*** (0.0219)	0.168*** (0.0386)	0.0824*** (0.0201)	0.135*** (0.0225)	0.307*** (0.0352)	0.309*** (0.0111)
50+	0.104*** (0.00751)	0.214*** (0.0273)	-0.00232 (0.0471)	-0.107*** (0.0213)	0.0617** (0.0241)	0.175*** (0.0419)	0.192*** (0.0125)
<b>Legal Representation</b>							
No Legal Representation	-0.223*** (0.00362)	-0.165*** (0.0557)	-0.0844 (0.107)	-0.182 (0.131)	-0.182*** (0.0181)	-0.345*** (0.0558)	-0.216*** (0.00472)
Duty Counsel	-0.271*** (0.0105)	-0.100 (0.0620)	-0.158* (0.0831)	-0.0867 (0.161)	-0.154*** (0.0289)	-0.189* (0.101)	-0.410*** (0.0278)
Legal Expenditures (in \$10s)	-0.00129*** (6.94e-05)	-0.000603 (0.000443)	0.000870 (0.00121)	0.00212 (0.00163)	-0.000503** (0.000255)	0.000712 (0.000760)	-0.00195*** (0.000129)
Observations	95,510	9,050	2,944	9,740	5,347	3,652	41,898



**TABLE A1: WHETHER DEFENDANT RECEIVES JAIL SENTENCE FOR THEFT/  
ROBBERY—SELECT CITIES (2007–2013)**

NOTES: The dependent variable is the amount of the defendant's criminal fine, reported as incident rate ratios (IRR). Z test statistic is indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.

**TABLE A2: WHETHER DEFENDANT RECEIVES JAIL SENTENCE FOR DUI—SELECT  
CITIES (2007–2013)**

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	-0.0473*** (0.00234)	-0.0575*** (0.00575)	-0.0399*** (0.0103)	-0.0758*** (0.00908)	-0.0521*** (0.00726)	-0.0506*** (0.00959)	-0.0312*** (0.00416)
Age							
21-25	0.0606*** (0.00982)	0.0787*** (0.0270)	0.0948* (0.0506)	0.00299 (0.0247)	0.0712** (0.0336)	0.0737* (0.0448)	0.0143 (0.0147)
26-30	0.118*** (0.0120)	0.128*** (0.0340)	0.169*** (0.0615)	0.0820** (0.0338)	0.129*** (0.0417)	0.104** (0.0513)	0.0531*** (0.0183)
31-40	0.147*** (0.0114)	0.182*** (0.0342)	0.176*** (0.0544)	0.0967*** (0.0323)	0.172*** (0.0388)	0.141*** (0.0517)	0.0666*** (0.0179)
41-50	0.185*** (0.0124)	0.226*** (0.0370)	0.219*** (0.0583)	0.143*** (0.0348)	0.219*** (0.0414)	0.163*** (0.0507)	0.0920*** (0.0209)
50+	0.162*** (0.0129)	0.205*** (0.0387)	0.209*** (0.0602)	0.0730** (0.0316)	0.206*** (0.0447)	0.155*** (0.0527)	0.0856*** (0.0220)
<b>Legal Representation</b>							
No Legal Representation	-0.0301*** (0.00548)	0.00508 (0.0764)	0.100 (0.161)	-0.0587** (0.0269)	-0.0835*** (0.0252)	-0.0472 (0.0429)	0.0110 (0.0156)
Duty Counsel	-0.0151**	0.0453	0.0450	-0.0555*	-0.0655*	-0.0351	-0.00214

TABLE A2: WHETHER DEFENDANT RECEIVES JAIL SENTENCE FOR DUI—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
	(0.00609)	(0.0935)	(0.106)	(0.0316)	(0.0341)	(0.0537)	(0.00984)
Legal Expenditures	-4.51e-05	0.000128	0.00136	-9.41e-05	-0.000938	0.000173	-2.91e-05
(in \$10s)	(5.45e-05)	(0.000597)	(0.00108)	(0.000395)	(0.000790)	(0.000598)	(7.43e-05)
Observations	54,917	5,970	2,195	3,282	5,204	3,497	14,823

NOTES: The dependent variable is the amount of the defendant's criminal fine, reported as incident rate ratios (IRR). Z test statistic is indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.

TABLE A3: LENGTH OF DEFENDANT'S JAIL SENTENCE FOR THEFT/ROBBERY—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	0.196***	0.252***	0.394***	0.324***	0.128***	0.179***	0.209***
	(-34.17)	(-13.83)	(-8.00)	(-16.26)	(-14.76)	(-12.96)	(-23.41)
Age							
21-25	1.931***	2.903***	2.248***	2.184***	2.580***	0.933	2.030***
	(6.09)	(5.19)	(3.89)	(6.67)	(3.54)	(-0.25)	(3.88)
26-30	3.212***	4.509***	3.409***	3.188***	2.502***	2.027*	4.384***
	(10.32)	(8.04)	(6.09)	(8.48)	(3.47)	(2.38)	(7.96)
31-40	3.644***	5.061***	2.833***	2.257***	4.175***	2.052**	5.363***

TABLE A3: LENGTH OF DEFENDANT'S JAIL SENTENCE FOR THEFT/ROBBERY—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
	(12.03)	(8.62)	(5.20)	(6.90)	(5.45)	(2.61)	(9.48)
41-50	3.776***	4.607***	2.571***	1.665***	4.162***	1.976*	5.035***
	(11.97)	(8.53)	(4.33)	(4.10)	(5.38)	(2.49)	(9.27)
50+	1.872***	2.098***	1.077	0.839	2.430**	1.336	3.038***
	(5.54)	(3.62)	(0.24)	(-1.02)	(2.78)	(0.90)	(6.11)
<b>Legal Representation</b>							
No Legal Representation	0.108***	0.422*	1.497	3.538	0.0544***	0.0774**	0.0642***
	(-13.37)	(-2.03)	(0.61)	(1.09)	(-4.44)	(-2.89)	(-9.74)
Duty Counsel	0.205***	0.611	0.748	4.938	0.181**	0.288	0.0875***
	(-9.67)	(-1.21)	(-0.46)	(1.45)	(-2.76)	(-1.56)	(-9.62)
Legal Expenditures	0.995***	0.999	1.017*	1.029**	0.998	1.003	0.989***
(in \$10s)	(-5.10)	(-0.42)	(2.26)	(2.72)	(-0.46)	(0.48)	(-7.92)
Observations	95510	9050	2944	9740	5347	3652	41898

NOTES: The dependent variable is the amount of the defendant's criminal fine, reported as incident rate ratios (IRR). Z test statistic is indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.

TABLE A4: LENGTH OF DEFENDANT'S JAIL SENTENCE FOR DUI—SELECT CITIES [2007–2013]

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	0.270*** (-12.82)	0.173*** (-6.93)	0.237*** (-4.32)	0.141*** (-6.41)	0.180*** (-7.32)	0.319*** (-4.01)	0.228*** (-5.75)
Age							
21-25	2.864*** (4.65)	16.57*** (6.26)	6.012** (3.04)	0.851 (-0.30)	3.834* (2.46)	4.909** (3.09)	1.839 (1.10)
26-30	4.005*** (6.65)	17.79*** (6.85)	16.41*** (4.33)	1.350 (0.61)	4.820** (2.94)	3.442** (2.61)	2.906* (2.17)
31-40	5.692*** (8.88)	45.77*** (9.41)	28.19*** (5.51)	2.195 (1.64)	8.474*** (4.33)	4.905*** (3.63)	2.984* (2.31)
41-50	9.311*** (11.49)	90.45*** (10.99)	49.74*** (6.81)	4.421** (2.92)	20.76*** (6.12)	6.542*** (4.39)	5.003*** (3.39)
50+	8.532*** (10.83)	71.92*** (10.43)	31.61*** (5.91)	2.573 (1.91)	13.55*** (5.24)	8.944*** (5.03)	6.682*** (3.99)
<b>Legal Representation</b>							
No Legal Representation	0.448*** (-4.25)	0.103 (-1.13)	0.731 (-0.15)	0.181 (-1.79)	3.437 (0.70)	0.259 (-0.90)	1.259 (0.53)
Duty Counsel	0.660* (-2.49)	0.260 (-0.74)	0.304 (-0.61)	0.187 (-1.86)	3.768 (0.80)	0.165 (-1.26)	1.113 (0.35)
Legal Expenditures (in \$10s)	0.999 (-0.85)	0.985 (-0.89)	1.004 (0.17)	0.998 (-0.30)	1.018 (1.08)	0.994 (-0.48)	1.000 (0.19)
Observations	54917	5970	2195	3282	5204	3497	14823

**TABLE A4: LENGTH OF DEFENDANT'S JAIL SENTENCE FOR DUI—SELECT CITIES (2007–2013)**

NOTES: The dependent variable is the amount of the defendant's criminal fine, reported as incident rate ratios (IRR). Z test statistic is indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.

**TABLE A5: DEFENDANT'S FINES FOR THEFT/ROBBERY—SELECT CITIES (2007–2013)**

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	0.297*** (-16.62)	0.405*** (-4.75)	0.229*** (-5.88)	0.382*** (-9.51)	0.208*** (-6.94)	0.389*** (-4.03)	0.259*** (-10.16)
Age							
21-25	2.918*** (7.10)	0.690 (-0.88)	1.098 (0.22)	1.353 (1.57)	6.388*** (4.28)	5.814*** (3.93)	4.154*** (4.00)
26-30	3.631*** (8.51)	0.897 (-0.25)	2.263 (1.95)	2.516*** (4.29)	5.669*** (3.79)	5.853*** (3.74)	5.453*** (4.78)
31-40	4.650*** (10.78)	0.971 (-0.07)	2.624* (2.46)	2.430*** (4.83)	6.526*** (4.46)	5.593*** (4.20)	7.394*** (6.14)
41-50	5.291*** (11.81)	1.148 (0.33)	7.891*** (4.74)	3.081*** (5.84)	9.446*** (5.10)	4.965*** (3.94)	9.160*** (6.82)
50+	6.190*** (9.75)	0.880 (-0.29)	6.595*** (4.12)	3.026*** (4.78)	3.829** (2.72)	11.73*** (5.26)	12.17*** (6.82)
<b>Legal Representation</b>							
No Legal Representation	0.997 (-0.01)	0.614 (-0.48)	0.785 (-0.20)	1.061 (0.04)	5.057 (1.76)	12.02 (1.91)	0.990 (-0.02)
Duty Counsel	1.193	0.307	1.556	1.723	4.149	27.70**	0.655

**TABLE A5: DEFENDANT'S FINES FOR THEFT/ROBBERY—SELECT CITIES (2007–2013)**

	(0.81)	(-1.25)	(0.38)	(0.35)	(1.66)	(2.80)	(-0.67)
Legal Expenditures	1.004*	0.999	1.009	1.003	1.017**	1.016*	1.000
(in \$10s)	(2.57)	(-0.23)	(0.63)	(0.19)	(2.88)	(2.10)	(0.08)
Observations	95510	9050	2944	9740	5347	3652	41898

NOTES: The dependent variable is the amount of the defendant's criminal fine, reported as incident rate ratios (IRR). Z test statistic is indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.

**TABLE A6: DEFENDANT'S FINES FOR DUI—SELECT CITIES (2007–2013)**

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
<b>Demographic Characteristics</b>							
Female	1.006	1.014	1.015	1.009	1.007	0.961	0.962
	(0.57)	(0.52)	(0.36)	(0.25)	(0.19)	(-1.27)	(-1.45)
Age							
21-25	0.993	1.006	0.963	1.013	1.006	1.051	1.022
	(-0.41)	(0.16)	(-0.63)	(0.27)	(0.10)	(0.80)	(0.47)
26-30	0.993	1.010	0.984	0.947	1.073	1.077	1.011
	(-0.43)	(0.24)	(-0.25)	(-1.06)	(1.19)	(1.14)	(0.23)
31-40	1.021	0.952	1.002	1.079	1.086	1.151*	1.071
	(1.26)	(-1.21)	(0.03)	(1.55)	(1.49)	(2.23)	(1.48)
41-50	1.056**	0.972	1.040	1.073	1.130*	1.160*	1.141**
	(3.28)	(-0.68)	(0.66)	(1.37)	(2.20)	(2.37)	(2.81)
50+	1.057**	1.053	0.981	1.108*	1.101	1.101	1.087

TABLE A6: DEFENDANT'S FINES FOR DUI—SELECT CITIES (2007–2013)

	1	2	3	4	5	6	7
	Ontario	Ottawa	Thunder Bay	London	Oshawa	Hamilton	Toronto
	(3.22)	(1.25)	(-0.32)	(2.01)	(1.66)	(1.52)	(1.71)
	<b>Legal Representation</b>						
No Legal Representation	1.185***	0.569*	0.668	1.121	1.215	0.836	1.480***
	(5.85)	(-2.06)	(-1.44)	(1.12)	(0.80)	(-1.16)	(5.77)
Duty Counsel	1.313***	0.631	0.923	1.189*	1.214	0.963	1.375***
	(10.35)	(-1.80)	(-0.32)	(1.97)	(0.85)	(-0.27)	(5.90)
Legal Expenditures (in \$10s)	1.001***	0.996	0.997	1.000	1.000	0.998	1.001***
	(4.50)	(-1.79)	(-1.05)	(0.40)	(-0.12)	(-1.60)	(3.55)
Observations	54917	5970	2195	3282	5204	3497	14823

NOTES: The dependent variable is the amount of the defendant's criminal fine, reported as incident rate ratios (IRR). Z test statistic is indicated in parentheses. For Age, the omitted baseline is a defendant at or below 20 years of age. For Legal Representation, the omitted baseline is the defendant represented by retained counsel. Duty Counsel includes both salaried and *per diem* attorneys. Retained counsel includes both certificate and private counsel. Legal expenditures are averages (in constant 2013 dollars) for given city and year based on LAO expenditures for its duty counsel and certificate counsel. All models include controls for year, type of offence, number of charges, and number of appearances. Column 1 includes controls for the court in which case originated. Single, double, and triple asterisks indicate statistical significance at the 0.05, 0.01, and 0.001 levels, respectively.