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An Empirical Study of Appointed Counsel Effectiveness in Jury Trials

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Anecdotal evidence supports the belief among indigent individuals who are assigned defense counsel that they would be better represented by privately retained counsel. This perspective jeopardizes attorney effectiveness by reducing communication and trust between the attorney and client. Research on the effectiveness of counsel is sparse. The purpose of this quantitative study was to bridge this gap in knowledge by comparing the effectiveness of privately retained and publicly appointed counsel between 2008 and 2013, both before and after the imposition of state-wide compensation limitations on publicly appointed defense counsel. The theoretical framework was Stuntz's theory, which stresses that one part of the criminal justice system will be compensated for elsewhere in the system. Research questions focused on the success rates of publicly funded and privately retained counsel in jury trials in a large state district court in New England. Data were collected from court records and analyzed using tests of proportions and a binary logistic regression to determine the success rates of the types of counsel and whether appointed counsels' relative effectiveness changed after the compensation limitations were imposed in 2011. The results indicated that there was no significant difference in acquittal rates between counsel groups or for either counsel group before and after the imposition of the statewide compensation limits. Implications for positive social change include educating defendants on the effectiveness of publicly appointed counsel to enhance the trust within these attorney-client relationships, and improving the quality of discourse in legislative deliberations focused on weighing budget cuts to appointed counsel compensation with the risk to the fair administration of justice.

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Dedication

Dedicated to the family members of those who have been wrongly convicted.

Acknowledgments

Thank you Kerry for all your support, love, and understanding during this journey. Thanks to Jake and Julie for refocusing my efforts and energy. Thanks to Donna and Raymond for your guidance. Thanks to Dad for providing the inspiration to become an attorney and to Mom for inspiring my interest in lifelong learning! Much thanks to the dissertation committee.

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Chapter 1: Introduction to the Study

Introduction

The purpose of this research was to contribute to Stuntz's (1997) theory that the criminal justice system operates in a rough equilibrium, in which increased demands at one point are compensated for at other points (p. 5). To accomplish the purpose, I calculated the differences between the jury verdicts of defendants represented by publicly appointed counsel versus defendants represented by private counsel. In addition, by comparing acquittal rates between the publicly appointed counsel over the last 6 years, I examined whether certain cost-cutting initiatives affected the success rates of appointed counsel as compared to the success rates of privately funded counsel in jury trials. This research provides data and results that can promote discourse and spur positive social change within the criminal justice system, particularly in regard to how counsel are provided to represent the indigent.

In Chapter 1, I provide an overview and background. Chapter 2 includes a review of the current literature on studies related to attorney performance. I review current case law focused on the adequacy of representation under the Sixth Amendment to the U.S. Constitution, which specifies the rights of criminal defendants and which applies to the states through the Fourteenth Amendment and the Due Process Clause. In Chapter 3, I describe the type of data, variables, and methodology. Chapter 4 contains my results and analysis. Chapter 5 includes an interpretation of the findings, a review and analysis of the limitations of the study, recommendations for further research, and a discussion of the public policy issues and areas for positive social change noted by the data.

Background

Past research has been mixed with respect to the effectiveness of defense attorneys (Baer, 2008; Hartley, 2004; Hoffman, Rubin, & Shepherd, 2005; Stuntz, 1997). Stuntz (1997) summarized the causes and effects of actions in the equilibrium of the criminal justice system. Hartley (2004) tested Stuntz's theory by reviewing data on the comparative effectiveness of types of counsel related to whether clients were released on personal recognizance, whether charges were reduced, whether the client was confined, and what sentence was received (p. i). Hoffman et al. (2005) attempted to empirically test Stuntz's theory in demonstrating that public defenders achieved poorer results in terms of actual sentences. Iyengar (2007) determined that defendants who were appointed private attorneys rather than public defenders were more likely to be found guilty and received a 7.76 month longer sentence, on average. Iyengar attributed the difference to attorney performance in plea bargaining and electing not to go to trial. Abrams and Yoon (2007) determined that experienced public defenders could reduce the likelihood of incarceration by 25% (p. 1176). Anderson and Heaton (2011) found that public defenders in Philadelphia reduce their clients' murder conviction rate by 19%, overall time served by 24%, and the probability of a life sentence by 62% as compared to appointed private counsel (p. 3). Roach (2010) determined in state courts, assigned counsel generate significantly less favorable defendant outcomes then defenders, and Baer (2008) examined mock juror reactions to attorney characteristics. Etienne (2008) analyzed the impact of the Federal Sentencing Guidelines on the criminal justice system and the alterations it created in the attorney/client relationship, and Hoeffel (2007)

studied the attorney/client relationship and advocated for more permanent relationships to create more effectiveness. Research is still needed on the types of counsel and effectiveness in jury trials in state courts where the great majority of those affected by the criminal justice system have their cases heard. Furthermore, there had been no research in regard to whether success rates of publicly appointed counsel, as compared to privately retained counsel, have been affected over the years due to the implementation of cost-saving initiatives or budget cuts.

This study is important because an effective publicly appointed counsel is critical for the administration of government and the criminal justice system. One of society's most important goals is to ensure that persons are not wrongly convicted or imprisoned because of the consequences to the inmates' families and on an individuals' life, right to vote, and ability to secure employment. In order to ensure that the innocent are not wrongly convicted, and to abide by the provisions of the Sixth Amendment, states are undertaking a heavy burden in funding the defense of the indigent.

Problem Statement

There is little research on the jury trial results of publicly appointed counsel, as compared to private counsel, in actual trials. There has been no research on whether attorney performance is compromised during years in which budget cuts are implemented. There has been limited research related to the performance of publicly appointed counsel as compared to the performance of private counsel in different areas of the criminal justice process, but no studies were found related to jury trial results.

In this study, I aimed to contribute to the theory first advanced by Stuntz (1997), who argued that stresses on one part of the criminal justice system will affect another part of the system, as the system is in an equilibrium, where increased demands at one point are compensated for at other points. The study contributes to the body of knowledge needed to address this problem by examining whether private attorneys were more successful in jury trials than publicly appointed counsel, and whether the success rates of publicly appointed counsel were significantly impacted by cost-costing initiatives by comparing success rates from 2008 to 2013. I studied and examined all cases that were empanelled for a jury trial in Lawrence District Court, in Essex County, Massachusetts, from 2008 to 2013, for the type of counsel and each jury's verdict. Through quantitative design and analysis, I aimed to establish the strength of relationships between the variables, which may have an influence on indigent defendants' perceptions about their publicly appointed counsel and the budget for the trial court system. I reviewed acquittal rates between publicly appointed counsel and privately retained attorneys as well as between publicly funded counsel and privately retained counsel in the years before and after the cost-cutting initiatives were implemented.

Purpose Statement

In this quantitative study, I compared the acquittal rates of publicly funded counsel appointed to represent the indigent to that of privately hired counsel by reviewing actual jury trial results from Lawrence District Court, MA, for all cases from 2008 to 2013. I also attempted to establish whether the success rate of publicly appointed counsel for the indigent is correlated to various cost-cutting initiatives launched on August 15,

2011. I ran a test of proportions to determine if statistically significant differences exist on the success rate of publicly appointed counsel before and after cost-cutting measures. I also used a binary logistic regression to determine if type of counsel effectively predicts the result of jury trials. The independent variable in this analysis was the type of counsel (public vs. private). The result of the jury trial (not guilty vs. guilty) was used as the dependent variable. The judge who presided over the trial was used as a nominal variable. The gender of judge, gender of counsel, gender of defendant, and whether an interpreter was used served as control variables.

Research Questions and Hypotheses

Research Question 1: Is the success rate of publicly appointed counsel before cost-cutting measures significantly different after cost-cutting measures?

$H_0$1: The success rate of publicly appointed counsel is not significantly different before and after cost-cutting measures.

Ha1: The success rate of publicly appointed counsel is significantly different before and after cost-cutting measures.

Research Question 2: Is the success rate of privately retained counsel before cost-cutting measures significantly different after cost-cutting measures?

$H_0$2: The success rate of privately retained counsel is not significantly different before and after cost-cutting measures.

Ha2: The success rate of privately retained counsel is significantly different before and after cost-cutting measures.

Research Question 3: Does type of counsel predict the result of jury trials, after controlling for judge that presided over the trial, whether an interpreter was used, gender of judge, gender of counsel, and gender of defendant?

Theoretical and Conceptual Framework

Stuntz (1997)

Stuntz (1997) theorized that cuts in funding and reductions in compensation will result in poorer relative performance for attorneys who are appointed to represent indigent defendants as compared to private attorneys. Additionally, if the criminal justice system is a balanced system, as suggested by Stuntz, then the performance of publicly funded attorneys should decline as more and more cost-cutting initiatives are initiated. The issue is important for public administration because one of society's most important goals is to ensure that its criminal justice system is fair for all defendants and that the innocent are not wrongly convicted or wrongly imprisoned. In order to measure whether appointed defense counsel are performing as well as privately hired attorneys, all jury trials in Lawrence District Court from 2008 to 2013 in Essex County, MA, were harvested for data. I developed a data set from the case files, and through quantitative design and analysis, my goal was to establish the strength of relationships between the various variables.

Nature of Study

Data were drawn from the case files of all jury trials from 2008 to 2013 in Lawrence District Court, MA. The gender of the system actors and the presence of an interpreter were used as covariates because past research suggested that these influence

the result of the trials (e.g., Baer, 2008; Martin & Garces, 2008). I controlled for the effect of the gender of different system actors have on the dependent variables in my statistical analysis. Correlations were run between the variables to identify the strength of relationships. Acquittal rates between the years were compared for publicly appointed counsel to assess the correlation between budget cuts and acquittal rates upon those represented by publicly appointed counsel as budget cuts imposed additional burdens upon counsel, which, Stuntz (1997) theorized, would affect the system equilibrium. The dependent variable used was the verdict: guilty or not guilty. The type of counsel was used as the independent variable. From the case records, the control variables included whether an interpreter was used, the gender of the defense attorney, the gender of the prosecutor, the gender of the defendant, and the gender of the judge.

Operational Definitions

The dependent variable is the verdict, either guilty or not guilty, which results after jury deliberation. A jury of six individuals must all agree on the verdict beyond a reasonable doubt. A judge controls the introduction of evidence and the conduct of the trial. Deliberations are secret discussions that jurors have together in seclusion after all the evidence is presented. The type of counsel, privately retained or publicly appointed, was the independent variable. Control variables included whether an interpreter was used, the gender of the defense attorney, the gender of the prosecutor, the gender of the defendant, and the gender of the judge, as previous studies have shown that these covariates influence the result of trials (Baer, 2008; Martin & Garces, 2008).

Assumptions

No assumptions were made that were critical to the meaningfulness of the study.

Scope and Delimitations

There has been no research on effectiveness between types of counsel in criminal jury trials in state district courts, where the vast majority of criminal cases are handled. I examined all cases in one district between the years 2008 and 2013 that had a jury trial and recorded the verdict in order to determine whether there were significant differences between the type of counsel used or as a result of cost-cutting initiatives. The Lawrence District Court was selected because it is one of the largest and busiest district courts in the commonwealth and provided a large sample of cases.

While other researchers have focused on other parts of the criminal procedure process such as bail hearings, eventual reduction of charges, confinement, and sentences (e.g., Hartley, 2004; Hoffman et al., 2005); in no study had researchers compared success rates of types of counsel in jury trials in a state district court. I selected this aspect of the criminal process for this research because a finding of guilty or not guilty is the most important factor in the continued exposure of most defendants exposed to the criminal justice system. Furthermore, if Stuntz's (1999) theory held, decreases in compensation would cause publicly appointed counsel to devote less time toward investigation, which, as Stuntz theorized, can harm the truly innocent. Counsel with time and compensation conflicts spend more time on procedural motions instead of investigation (Stuntz, 1997, pp. 2, 14).

Limitations

The analysis was limited to only a few of the measurable independent variables that affect a verdict. Within the quantitative study, the independent variable was whether a defense attorney was appointed to the accused. The dependent variable was whether a verdict of guilty or not guilty resulted. Not all impacts on the results of a jury's verdict can be isolated or even determined. However, because of restrictions the verdict can place on one's liberty, it was important to study the differences of the type of counsel used by a defendant. Other researchers have reviewed the effects of when a person acknowledges guilt, particularly in regard to studies on sentences and whether charges were reduced. Researchers have not studied the jury's actual verdict in state courts.

Significance of the Study

The study is significant as the courts and United States Constitution mandate that a person cannot have a fair criminal trial without the opportunity to be represented by counsel at all hearings. In Chapter 2, I address the progression of the protections afforded to indigent defendants in the courts and Federal and state case law. Flowing from this case law, outcomes have been studied based on whether a defendant had private counsel or publicly appointed counsel. However, there was a gap in the research in regard to the acquittal rates of publicly appointed counsel at jury trials in state district courts; with this study, I add to the body of research.

Researchers have not adequately studied the correlation between cost-cutting initiatives and the success rate at trial for attorneys who are publicly appointed over a series of years. In this study, I provide data to determine whether the disturbances to the

Stuntz equilibrium were significant enough to result in more convictions. This research may affect the debate about how appointed counsel are provided to indigent defendants in Massachusetts. The governor and legislature have repeatedly presented different proposals to cut funding to the court system. Schworm (2009) noted that Margaret Marshall, then the Chief of the Massachusetts Supreme Judicial Court, stated that justice was in jeopardy in Massachusetts as financial shortages were clogging the courts and demolishing the ranks of court-appointed guardians. The yearly fight to trim the court system's budget has led to increased scrutiny in regard to how the courts and the public defender system are funded (Anderson, 2012, para. 1-4). Various cost-cutting initiatives have been introduced which would impact the system, according to Stuntz (1999), by disturbing the balance of power and equities within the system. If Stuntz was correct, when costs have been reduced or stabilized and additional burdens are placed upon defense counsel, the results will be a loss of attorneys' net earnings, decreased time available to apply to individual cases, and counsel will need to budget time to other activities or more profitable cases.

Budget officers, legislators, and policy makers, among others, are all players in Stuntz's equilibrium. These actors have looked to the court-appointed system to determine if savings can be achieved, either by readjusting for the offenses counsel appointed to the indigent, or by adjusting the system in which counsel are provided ("Mass. Lawmakers," 2011, p. 1). In the current system, counsel is provided to an indigent defendant when there is a chance that a defendant could receive a sentence involving incarceration. Cuts in compensation to counsel provided to the indigent could

affect the success of counsel appointed to the indigent. If outcomes were shown to be impacted, the information would be of utmost importance to policy makers and legislators. For example, if publicly appointed counsel were not as successful as private attorneys, some policy analysts may look to gut the system and provide another mechanism for delivering counsel to individuals. Other analysts may prefer this inefficiency to continue. Conversely, if less successful outcomes were documented, policy makers might push back against further budget cuts, and public defenders could refuse to take additional cases. Additionally, if publicly appointed counsel were less successful after budget cuts, legislatures might decide to allocate more funding to reduce the negative impact.

Adachi (2009) argued financial constraints and increased caseloads resulting from cutbacks in staff are pushing public defender systems closer and closer to failure. However, even altering delivery mechanisms to save costs has not fixed the issue. Such efforts typically push more unpaid obligations and secretarial work upon counsel and result in less-effective representation (para. 11). Costs also can be driven up by increased claims of ineffective assistance of counsel in additional appellate cases. Furthermore, attorneys are obligated by rules of professional responsibility and ethical canons to report conditions that could result in ineffective representation (Adachi, 2009, para. 5). Adachi (2009) noted:

> In 2008, the Miami-Dade County public defender's office sued the state of Florida for the right to refuse cases after experiencing a $2.48 million budget cut

and a 29 percent caseload increase. In September, a Florida judge allowed the office to reduce its caseload by turning away non-capital felony cases. (para. 2) Adachi (2009) added that counsel in Arizona, Maryland, Kentucky, and Minnesota have also refused new cases and litigated to reduce work requirements (para. 3).

In the current study, I studied the results of all jury trials from 2008 to 2013 in Lawrence District Court, MA. The results were compared in regard to the type of counsel defendants relied upon and the resulting verdict. Additionally, the success rates of publicly appointed counsel in jury trials were compared in the years before and after August 15, 2011, to see if there was a correlation between the implementation of cost-cutting initiatives and jury trial outcomes. This study and its findings were intended to extend the work Stuntz (1999) began by examining whether the cost-cutting initiatives implemented on August 15, 2011, were significant enough to display an impact on the criminal justice equilibrium, for which Stuntz advocated.

The findings of this research can be used to support arguments affecting public policy. Policy makers can use the findings to argue to gut the public defender programs, to alter the system, or to argue that they cannot increase caseloads of public defenders while decreasing budgets. Accordingly, the study is valuable, given the economic climate and budgetary challenges in Massachusetts. Stuntz (1997) stressed that cuts to the system make investigation less likely and have a greater impact on defendants who are truly innocent (pp. 2, 24). While the law and evidence should control the outcome of a case, such does not always happen. Proponents of fairness and justice should always

work against the belief of Robert Frost (as quoted in Joy & McMunigal, 2012) that a jury is "twelve persons chosen to decide who has the better lawyer" (p. 46).

Summary of the Study

I designed this research to contribute to Stuntz's (1997) theory that the criminal justice system operates in a balanced system, or equilibrium, where increased demands at one point are compensated for at other points (p. 5). I examined the criminal jury verdicts in Lawrence District Court, MA, in 2008, 2009, 2010, 2011, 2012, and 2013, and analyzed the differences in jury verdicts between defendants represented by publicly appointed counsel versus defendants represented by private counsel throughout those years. I addressed some of the gaps discussed in the literature review, including the lack of research on acquittal rates in jury trials in state district courts. By also comparing acquittal rates between the publicly appointed counsel over the last 6 years, I sought to discover whether cost-cutting initiatives have affected appointed counsel's success rates as compared to the success rates of privately funded counsel in jury trials. In Chapter 2, I review literature on studies related to attorney performance and case law focused on the adequacy of representation under the Sixth Amendment to the U.S. Constitution. In Chapter 3, I describe the type of data, variables, and methodology. In Chapter 4, I present the results and my analysis. Chapter 5 includes an interpretation of the findings, a review and analysis of the limitations of the study, recommendations for further research, and a discussion of the public policy issues and areas for positive social change noted by the data.

Chapter 2: Literature Review

Introduction

Research is mixed in regard to whether public defenders are as effective as privately hired attorneys (e.g., Baer, 2008; Hartley, 2004; Hoffman et al., 2005; Stuntz, 1997), and there were no studies on the correlation between cost-cutting initiatives and the effectiveness of publicly appointed counsel in jury trials. The purpose of this descriptive study was to compare the success of publicly appointed counsel representing the indigent to that of privately retained counsel by reviewing jury trial results from Lawrence District Court, MA, for all cases from 2008 to 2013.

In this literature review, I will discuss the progression of the law related to the right to counsel. Also addressed is how, the Sixth Amendment has been implemented in light of the budgetary need to balance other societal interests against the need to provide counsel to indigent defendants. The history of cases addressing flat rate assignments of counsel is discussed, along with past studies related to the effectiveness of public defenders.

The Sixth Amendment affords the right to counsel for all aspect of the criminal justice process, which led Stuntz (1997) to observe the following:

> Criminal procedure is, basically, a subset of constitutional law. That is why the criminal procedure literature focuses so thoroughly on the latest Supreme Court cases in this area; the Supreme Court makes relevant policy judgments, albeit with some fleshing out by other federal and state appellate courts. (p. 3)

Additionally, Stuntz noted that actions within the criminal justice system impact each other and cause reactions within the system (p. 4).

I used the Academic Search Complete, Criminal Justice Periodicals, Business Source Complete, Soc INDEX, and ProQuest Central databases with search terms including but not limited to: *Stuntz/William/Attorney*, *trial/performance/attorney*, and *indigent/attorney/private*. Articles ranging back as far as 20 years were included. In light of the scarcity of studies, I reviewed the impetus for these studies, that is, the history of the Sixth Amendment in the U.S. Supreme Court, and recent cases in state courts as the theoretical foundation for these studies. The development of the case law encouraged studies and reviews of attorney performance, which cemented the notion that adequate counsel had to be afforded to those facing imprisonment.

Conceptual Framework: Sixth Amendment

In a 1963 case, *Gideon v. Wainwright*, state prosecutors charged C. E. Gideon in Florida state court with breaking and entering a poolroom with the intent to commit a misdemeanor, a felony under Florida state law. Gideon requested that the judge appoint him counsel, but the court refused as Florida law only afforded counsel to those who were indigent and charged with a capital offense (*Gideon v. Wainwright,* 1963, p. 335). After the conviction, the court sentenced Gideon to 5 years in prison. Gideon filed a habeas corpus petition asserting that the failure to appoint him counsel denied him rights guaranteed by the Constitution and the Bill of Rights of the United States Government (*Gideon v. Wainwright,* 1963, p. 335). The highest court in Florida denied his petition with no opinion. The U.S. Supreme Court accepted the case and appointed counsel for

the proceedings before it (*Gideon v. Wainwright,* 1963). The Supreme Court accepted this case because there had been continuing controversy and conflicting results throughout the country in all levels of state and federal courts since its decision in *Betts v. Brady* in 1942 (as cited in *Gideon v. Wainwright,* 1963, p. 335).

In *Gideon v. Wainwright* (1963), Justice Black noted that the facts in Gideon's case were similar to those the Court faced in *Betts v. Brady* (1963): An indigent defendant asked that an attorney be appointed, and the court denied an appointment of counsel because attorneys were purportedly only appointed at the time in murder and rape cases. After Gideon's conviction, Betts also filed a petition for habeas corpus, which the state court rejected and the Supreme Court affirmed "holding that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment" (*Gideon v. Wainwright,* 1963, p. 339). Justice Black noted that the rationale in the *Betts v. Brady* decision was that:

> asserted denied [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such a denial. (*Gideon v. Wainwright,* 1963, p. 339)

However, Justice Black noted that if the decision in *Betts v. Brady* (1963) was "left standing, [it] would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration, we conclude that

Betts v. Brady should be overruled" (*Gideon v. Wainwright,* 1963). Justice Black, in the Court's opinion, noted that the Sixth Amendment provides:

> "in all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." We have construed this to mean that, in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. (as quoted in *Gideon v. Wainwright,* 1963, pp. 339-340)

While the *Betts* Court did not hold that this right to counsel applied to the states, the *Gideon* Court held that:

> the provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. (*Gideon v. Wainwright,* 1963, p. 342)

It is important to note that the Justice Black emphasized that the government is able to spend monies to hire lawyers to represent it to prosecute defendants and to "establish machinery to try defendants accused of crime" (*Gideon v. Wainwright,* 1963, p. 344). The Supreme Court in overturning *Betts* noted that 22 states had supported the *Betts* decision being overturned and only two asked that it be left intact (*Gideon v. Wainwright,* 1963, p. 345).

Cases Before *Gideon v. Wainwright*

Given the passage of time, some of the results prior to *Gideon* seem shockingly unfair. They are important to show how the law has developed and to show that change in both directions could be possible particularly in light of budgetary pressures. Additionally, all these changes in the law impacted the equilibrium that Stuntz (1997) theorized exists in the criminal justice system (p. 2). The *Gideon* court noted that the *Betts* Court made an "abrupt break with its own well considered precedents" (*Gideon v. Wainwright,* 1963, p. 344). Justice Black (1963), in rendering the *Gideon* opinion, noted Justice Sutherland in rendering the *Powell v. Alabama* (1932) opinion best stated why a defendant needs a lawyer after highlighting the complexities of the law and criminal defense in noting that without counsel "though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence" (*Powell v. Alabama,* as cited in *Gideon v. Wainwright,* 1963, pp. 344-345).

The *Powell* Court reviewed whether black defendants received due process of law and were properly afforded the right to counsel in being convicted of the rape of white women and sentenced to death by a jury *Powell v. Alabama* (1932). The judgments were affirmed by the Alabama State Supreme Court (*Powell v. State*, 224 Ala. 540, as cited in *Powell v. Alabama,* 1932, p. 50. Justice Sutherland (1932) noted that the defendants challenged their convictions as they:

> were denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment, specifically as follows: (1) they were not given a fair, impartial, and deliberate trial; (2) they were denied the right

> of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; and (3) they were tried before juries from which qualified members of their own race were systematically excluded. (*Powell v. Alabama,* 1932, p. 50)

In rendering its decision, the Court noted that "it is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile, and excited public sentiment" (*Powell v. Alabama*, 1932). As a federal court of review, only the Supreme Court could decide "whether the federal Constitution was contravened" (*Herbert v. State of Louisiana*, 1926; *Rogers v. Peck*, 1905, as cited in *Powell v. Alabama,* 1932, p. 52). To do so, the Court had to assess whether the defendants were denied the right to counsel (*Powell v. Alabama,* 1932).

In summing up the facts, Justice Sutherland noted upon the return of the indictments the defendants were arraigned and pled not guilty. But they were not asked if they hired counsel or planned to hire counsel, nor were they asked if they had friends or relatives who could assist them, nor were they given an opportunity to communicate with their families who resided out of state (*Powell v. Alabama,* 1932, p. 52). The court noted that the defendants had counsel appear for them shortly after their convictions, which the Court suggested provided evidence that they were not given a proper opportunity to obtain counsel prior to their trials as counsel may have appeared before the trial if allocated reasonable time to obtain counsel (*Powell v. Alabama,* 1932, p. 52).

In reviewing the record, the Court noted that the facts suggested that there was not a proper opportunity to obtain counsel of their own selection and such amounted to a

denial of their due process rights (*Powell v. Alabama,* 1932). The Court noted that the trial began 6 days after the indictments were handed down and that no counsel answered for any defendant when the case was called *(Powell v. Alabama,* 1932, p. 52). The Court also pointed out that while the trial court appointed members of the local bar for the arraignment, there was no evidence that counsel stayed on the case or that anyone did any investigation or legal work for the defendants or even just reviewed the evidence prior to the trial (*Powell v. Alabama,* 1932, p. 56). The Court noted that:

> until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants. Whether they would represent the defendants thereafter, if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court." (*Powell v. Alabama,* 1932, p. 56)

In coming to this decision, the Court stressed that it did not appear that the trial court imposed any substantial obligation upon any counsel to do any work in order to properly prepare to defend the defendants (*Powell v. Alabama,* 1932). Furthermore, the Court indicated that the defendants "were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them" (*Powell v. Alabama,* 1932, p. 58). The Court in coming to its decision also weighed important factors such as the need to reduce inexcusable delays in the coming to trial, the desire to reduce continuances, and the need for the prompt resolution

of criminal cases; however, noted that the defendants could not be deprived of due process in order to satisfy those aims (*Powell v. Alabama,* 1932). The Court ruled that:

> the Constitution of Alabama provided that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel; and a state statute (Code 1923, 5567) requires the court in a capital case, where the defendant is unable to employ counsel, to appoint counsel for him. The state Supreme Court held that these provisions had not been infringed, and with that holding we are powerless to interfere. The question, however, which it is our duty, and within our power, to decide, is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution. (*Powell v. Alabama,* 1932, pp. 59-60)

The Court, also indicated that:

> at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes; and this court seems to have been of the opinion that this was true in all the colonies. (*Holden v. Hardy,* as cited in *Powell v. Alabama,* 1932, p. 64)

The Court also did an important balancing of whether or not analysis under the Fourteenth Amendment was essential when dealing with a right specifically listed in the Bill of Rights (*Powell v. Alabama,* 1932, p. 66). The Court noted there was precedence for such additional due process analysis as the Court had done so when it ruled that a

judgment of the state court, even when authorized by statute, when private property was taken, was in violation of the Fourteenth Amendment, where the Fifth Amendment explicitly barred such takings (*Powell v. Alabama,* 1932). Furthermore, the Court also barred infringements of freedom of speech and of the press through the due process clause even when they are protected by the First Amendment (*Powell v. Alabama,* 1932) citing *Gitlow v. People of State of New York*, 268 U.S. 666 (1925); *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931). The Court referenced that it could take such action because the rights enumerated within the Bill of Rights "are of such a nature that they are included in the conception of due process of law" (*Powell v. Alabama,* p. 68 1932). Under this analysis, the Court determined that one not only has to have counsel appointed, but counsel must be given an adequate time to prepare and the defendant must be given an opportunity to obtain counsel, as "the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment" (*Powell v. Alabama,* 1932, p. 71). In *Betts v. Brady* the defendant was indicted for robbery in Maryland and requested that counsel be appointed to him because he could not afford counsel which was denied by the trial court (*Betts v. Brady*, 1942). The Court assessed whether the conviction and sentence amounted to a deprivation of the defendant's due process rights under the Fourteenth Amendment (*Betts v. Brady*, 1942). The Court provided interesting dicta in that it stressed that:

> the Sixth Amendment of the national Constitution applies only to trial in federal courts. The due process clause of the Fourteenth Amendment does not incorporate

> as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth. (*Betts v. Brady*, 1942, pp. 461-462)

The court noted that the totality of the facts would be applied in each case to evaluate whether relief was appropriate (*Betts v. Brady*, 1942). However, the Court indicated that it was deciding whether due process demanded that counsel be appointed in every case to an indigent defendant (*Betts v. Brady*, 1942). The Court stressed that such is required for Federal defendants but that the Sixth Amendment does not apply directly to the states for their criminal prosecutions (*Betts v. Brady*, 1942).

In analyzing the case, the Court found it important to review common law and the laws of the colonies. It noted that:

> the Constitutions of the 13 original states, as they were at the time of federal union, exhibit great diversity in respect to the right to have counsel in criminal cases. Rhode Island had no constitutional provision on the subject until 1843, North Carolina and South Carolina had none until 1868. Virginia has never had any. Maryland, in 1776, and New York, in 1777, adopted provisions to the effect that a defendant accused of crime show be "allowed" counsel. A constitutional mandate that the accused should have a right to be heard by himself and by his counsel was adopted by Pennsylvania in 1776, New Hampshire in 1774, by Delaware in 1782, and by Connecticut in 1818. In 1790 Massachusetts ordained

> that the defendant should have the right to be heard by himself or his counsel at his election. In 1798 Georgia provided that the accused might be heard by himself or counsel or both. 1776 New Jersey guaranteed the accused the same privileges of witnesses and counsel as their prosecutors "are or shall be entitled to." (*Betts v. Brady*, 1942, p. 465)

The Court reasoned that in the majority of states:

> it has been considered the judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the state, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness. (*Betts v. Brady*, 1942, pp. 471-472)

This reasoning indicates that the trial courts can determine in advance whether or not fairness mandates counsel. Such is typically impracticable because the court may not know what the defense is, or what the witnesses will testify to in advance. However, the Court, in affirming the state court's judgment, noted that:

> to deduce from the due process clause a rule binding upon the states in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. . . . The Fourteenth Amendment prohibits the conviction

> and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel. (*Betts v. Brady*, 1942, p. 473)

This seems to be a matter of how one values a conviction. In the 1940s there was no Internet or electronic records, so a conviction likely did not prejudice one as much. Nowadays, the courts typically do not appoint counsel unless it determines there is a risk of incarceration with a conviction; however, most cases could result in jail time due to the prevalence of probationary terms, which in case of a violation, could result in confinement.

In *Johnson v. Zerbst* (1938) the Court decided that an individual charged with a crime had a right to counsel under the Sixth Amendment. The Court also held that without counsel or a valid waiver of counsel the Sixth Amendment bars a valid conviction and sentence. Justice Black (1938) noted that the defendant was convicted of uttering counterfeit money and filed a habeas corpus motion which the court denied because the lower court judge did not believe the lack of counsel was sufficient enough to void the trial but thought such issues should be addressed on appeal (*Johnson v. Zerbst*, 1938, p. 459). Zerbst, an enlisted U.S. Marine, was on leave and arrested on November 21, 1934. He did not make bail, and then on January 21, 1935, he was arraigned, convicted, and sentenced to 4½ years all on the same day without the assistance of

counsel and subsequently failed to appeal the convictions in a timely fashion (*Johnson v. Zerbst*, 1938, p. 460). Justice Black noted:

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting form his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. . . . A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine "the facts for himself when, if true as alleged, they make the trial absolutely void." (*Johnson v. Zerbst*, 1938, p. 468)

Smith v. O'Grady (1941) further advanced due process and fairness it was adjudicated that when an uneducated person without counsel is tricked by a state officer into pleading guilty, such is grounds for review under the due process clause of the Fourteenth Amendment. Justice Black reported that the lower court in Nebraska denied the defendant's writ of habeas corpus due to its opinion that the writ failed to state a proper cause of action for relief and because Nebraska law should control whether the confinement was lawful even though the petitioner also asserted his confinement was wrongful under the Federal Constitution (*Smith v. O'Grady*, 1941). Justice Black indicated that

> it is our duty to examine petitioner's allegations in order to determine whether they show that his imprisonment is the result of a deprivation of rights guaranteed him by the federal constitution. [The petitioner was] arrested without being

> informed of the charges against him, and then moved to another county and told he was wanted for burglary in a third county, but would be dealt with leniently if he would plead guilty. (*Smith v. O'Grady*, 1941, p. 334)

Then, over the telephone, Smith agreed to a 3-year sentence without ever seeing a charge sheet (*Smith v. O'Grady*, 1941). Smith was brought to court and "summarily arraigned, and, upon his prearranged plea of guilty, sentenced, to his surprise and consternation, to a term of twenty years' imprisonment in the Nebraska State Penitentiary" (*Smith v. O'Grady*, 1941, p. 332). Upon hearing the sentence Smith protested and asked for a copy of the charge sheet and for permission to withdraw his plea which was denied and he also asked for the assistance of counsel (*Smith v. O'Grady*, 1941). Smith later learned he had been tricked into pleading guilty to burglary with explosives which was punishable with a minimum sentence of 20 years (*Smith v. O'Grady*, 1941). Justice Black wrote that if petitioner's accounts were true:

> petitioner was imprisoned under a judgment invalid because [it was] obtained in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment. The state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations, the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand. (*Smith v. O'Grady*, 1941, p. 445)

In *Avery v. Alabama* (1940) advocates unsuccessfully attempted to advance the right to counsel even further suggesting that there must be an opportunity for meaningful

consultation between client and attorney to prepare for the defense. Avery was convicted of murder in Alabama and sentenced to death. Justice Black wrote:

> the sole question presented is whether, in violation of the Fourteenth Amendment, petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation of trial, because, after competent counsel were duly appointed, their motion for continuance was denied. . . The denial of opportunity for appointed counsel to confer, to consult with the accused, and to prepare his defense could convert the appointment of counsel into a sham, and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. (*Avery v. Alabama*, 1940, p. 446)

Justice Black indicated that in a murder case that occurred in 1932 in Alabama, authorities arrested Petitioner in Pennsylvania in 1938 and arraigned him that same day with the trial set for 2 days later (*Avery v. Alabama*, 1940). The attorneys indicated that they had no time to prepare, conflicts in their schedules, and concerns about the competency of the defendant and needed further time to investigate (*Avery v. Alabama*, 1940). There was no ruling in the record on the continuance motion, and the trial proceeded 3 days after the arraignment (*Avery v. Alabama*, 1940). The jury convicted defendant, and he was sentenced to the death penalty. The Alabama Supreme Court considered the case and ruled that the "trial court had not abused its discretion in failing to continue the case" (*Avery v. Alabama*, 1940, p. 450). The U.S. Supreme Court noted there was no evidence that the attorneys "could have done more had [they] had additional

time" (*Avery v. Alabama*, 1940, p. 452). The U.S. Supreme Court, in affirming the judgment of the Alabama Supreme Court, noted:

> Under the circumstances of this case, we cannot say that the trial judge, who concluded a fairly conducted trial by carefully safeguarding petitioner's rights in a clear and fair charge, deprived petitioner of his constitutional right to assistance of counsel. (*Avery v. Alabama*, 1940, p. 453)

In hindsight, this reasoning would seem to be clear to all to be unacceptable in light of constitutional requirements.

The States

The Sixth Amendment, as applied to the states, has had a huge impact upon state budgets. The extent of the impact might not have been anticipated at the time of the Supreme Court's strict application of the right to counsel in all cases in which jail time is contemplated in *Argersinger v. Hamlin* (1972). In *Argersinger,* Justice Douglas wrote that:

> an indigent was charged in Florida with carrying a concealed weapon, an offense punishable by imprisonment up to six months, a $1,000 fine, or both. The trial was to a judge, and petitioner was unrepresented by counsel. He was sentenced to serve 90 days in jail, and brought this habeas corpus action in the Florida Supreme Court, alleging that, being deprived of his right to counsel, he was unable as an indigent layman properly to raise and present to the trial court good and sufficient defenses to the charge for which he stands convicted. The Florida Supreme Court by a four-to-three decision, in ruling on the right to counsel,

> followed the line we marked out in *Duncan v. Louisiana*, 391 U.S. 145, 159, as respects the right to trial by jury and held that the right to court-appointed counsel extends only to trials "for non-petty offenses punishable by more than six months imprisonment." (*Argersinger v. Hamlin*, 1972, p. 25)

The Court ruled that an indigent defendant may not be imprisoned for a misdemeanor unless afforded the right to counsel:

> under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts. The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy. (*Argersinger v. Hamlin*, 1972, p. 40)

However, in making its ruling, the Court did not seem to understand the impact that its ruling eventually would have upon budgets. In fact, at the time, the *Argersinger* court noted that "it is similarly unrealistic to suggest that implementation of the Court's new rule will require no more than a few thousand full-time lawyers" (*Argersinger v. Hamlin*, 1972, p. 58). The Court did not seem to foresee that its ruling would have different impacts on different communities, or that it would affect defendants in rural settings different from those cities (*Argersinger v. Hamlin*, 1972). Instead, the Court

focused on the impact on the courts, as it believed that counsel would be available, and then they would have the tendency to stretch out cases due to their zeal to obtain the best possible result and/or to avoid an ineffective assistance of counsel claim. Perhaps the most serious potential impact of today's holding will be on our already overburdened local courts with "added delay and congestion in the courts" (*Argersinger v. Hamlin*, 1972, p. 58). The Court's lack of vision has set the stage for recent developments in state courts and legislatures as the courts are understaffed and congested, while being under continual budgetary attack.

In Pennsylvania, Slobodzian (2011) noted that pressing budgetary issues have sparked much recent discourse in Pennsylvania and recently public defenders appointed to death penalty cases have filed suit for more pay and/or to stop the state from seeking the death penalty as they allege that they cannot be effective if paid so little. Slobodzian noted that the pay is so low for death penalty defense that it is unconstitutional, as counsel cannot adequately represent a defendant which such little financial incentive. Such seems to refashion arguments made in *Powell* above that there really is not counsel appointed, if counsel cannot adequately prepare. The author noted that the attorneys asked the judge to order the Commonwealth to pay them adequately or bar the government from seeking the death penalty. They noted that the system was ineffectiveness per se as Philadelphia, by far, pays its appointed counsel less for capital case preparation than similar large cities. Slobodzian noted that opponents of the system argued Philadelphia death-penalty defense lawyers get a flat fee of $1,333 to defend a murder case prior to trial and another $667 if the case goes to trial. The author noted that

the second attorney appointed to the case also receives $1,700 for his or her role as sentencing counsel; if the case goes to trial, after the first day the lawyer is compensated another $200 for the first 3 hours or $400 if more than 3 hours are needed in a trial day after the first day. He also noted that that private lawyers charge $35,000 to $50,000 to handle a capital case. It seems logical that a public defender could not do even close to an adequate job with relatively little compensation.

By comparison, in North Carolina, budgetary pressures have caused numerous public defenders to refuse to take indigent cases. In North Carolina, budgetary disputes caused numerous attorneys, who previously accepted court appointments, to refuse to take public appointments because it was not economically worth it to do so (Carroll, 2011h, para. 4). Carroll (2011h) argued the fiscal restraints of running a law practice while representing the indigent creates constitutional issues and shows the potential for conflict between counsel and his or her clients:

> Indigent Defense Services staff estimate that it will have to reduce assigned counsel rates to $50 per hour to come within the projected budget. If assigned counsel attorneys actually pocketed $50 per hour, this might be a significant amount of money, but they do not. Assigned counsel attorneys must first pay all of the overhead expenses of operating a law office out of this hourly rate, and they receive as income only the amount that is left over. These overhead expenses would have to be incurred by the state if services were delivered through staffed public defender offices. (Carroll, 2011h, para. 3)

Pridgen and Brinkley (2011), as officers of the North Carolina Bar Association, wrote to the governor and legislature to object to the plan to reduce compensation to appointed counsel to $50 an hour as it costs approximately $58 an hour to operate a typical small North Carolina law office, while federal indigent defenders are paid $90 per hour. Carroll (2011h) noted that due to the lack of available counsel, some judges are considering appointing counsel who typically do not practice criminal law to cases in order to handle the flow of cases (Carroll, 2011h, para. 5). Carroll stressed that such may violate Principle 6 of the American Bar Association's Ten Principles of a Public Defense Delivery System, which requires counsel only be appointed to matters for which they are qualified (para. 6).

In Maryland, litigation was pursued related to when an indigent defendant has to be appointed counsel, which has many constitutional and budgetary implications as it will expand the need for counsel. In *Rothgery v. Gillespie County* (2008), the Supreme Court decided an initial bail hearing was an event where counsel had to be present (p. 191). However, in *Richmond v. District Court of Maryland* (2010, p. 549), the Maryland court applied such standard creating a vast expansion in the need for public defenders as they presently do not appear at such stage in the proceedings (Carroll, 2010f, para. 6).

In New York, budgetary constraints have caused legislators to sacrifice improvements to indigent services that they just implemented. The cuts follow a 2010 decision by the state's highest court that found instances where "counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed waived

important rights without authorization from their clients," which, at heart, was "nonrepresentation" (*Kimberely Hurrell-Harring et al., v. The State of New York et al.*, 2010, as cited in Carroll, 2011a). As Carroll (2011a) noted:

> a little more than a month since New York's Chief Justice expressed optimism that his state's 'severely dysfunctional' right to counsel system would one day meet Gideon's promise, a deal is struck to slash the budget for the new, legislatively-created Indigent Legal Services Office.

In fact, the highest court in New York held in *Kimberely Hurrell-Harring et al., v. The State of New York et al.* (2010) that New York publicly appointed attorneys were not always meeting their obligations as it stated that:

> also critical to Sixth Amendment purposes is the period between arraignment and trial when a case must be factually developed and researched, decisions respecting Grand Jury testimony made, plea negotiations conducted, and pre-trial motions filed. Indeed, it is clear that 'to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. (*Maine v. Moulton*, 1985, as cited in *Kimberely Hurrell-Harring et al. v. The State of New York et al.,* 2010, p. 12)

In some parts of Pennsylvania, in an effort to preserve funds, counsel have been delivered to the indigent in a matter that appears to actually drive up costs while not protecting the rights of the indigent as courts have sanctioned a system of allowing different counsel to represent defendants at the arraignment, pre-trial conferences, and trial (Carroll, 2011i, para. 4). Carroll (2011i) noted this:

> horizontal representation inhibits the establishment of an attorney-client relationship, fosters in attorneys a lack of accountability and responsibility for the outcome of a case, increases the likelihood of omissions of necessary work as the case passes between attorneys, is not cost-effective.... and is demoralizing to clients as they are re-interviewed by a parade of staff starting from scratch. (para. 3)

Such representation drives up costs as it delays cases, creates the need for more preparation time for each counsel, and increases exposure to malpractice or wrongful incarceration claims (Carroll, 2011i, para. 3). Carroll (2011) suggested there are consequential damages as well since the increased amount of continuances results in more money being spent for police, witnesses, court reporters, bailiffs, clerks, and others (para. 4). Staging counsel in this manner results in an inefficient process, which should be considered when one is attempting to find money-saving alternative delivery mechanisms. Perhaps, this thinking will lead to legislation aiming to repackage flat rate appointments with exit options for unusual events.

Flat Fee Cases

The lack of vision of the *Argersinger* Court, in believing that a sufficient pool of counsel would always be present to take on indigent cases, has placed states in a difficult position. Not only did the Court fail to consider that different locales have different systems and capabilities, but it also assumed that counsel would volunteer to accept cases at a financial loss. Much has changed in the law and in society since the *Argersinger* decision. The specialization and increasing complexity of the law have caused many

attorneys to stay away from courtroom work which is often expensive, time consuming, and a profit-losing venture. Thus, in order to reconcile budgetary constraints and a lack of a supply of cheap, but competent, counsel, the states have looked to other ways to cut or control costs and have begun to explore "bidding" or "flat fee systems" for the delivery of counsel services in light of Sixth Amendment requirements. While some state courts have ruled that the practice in the past was impermissible due to the conflicts of interest it creates, some states have looked at tweaking such a system in order to balance budgets or control costs while transferring the "ethical" burden to others.

In Iowa, the state's highest court handed down a unanimous decision in 2010 finding that a fee cap of $1,500 per appellate case would result in ineffective assistance of counsel (*Simmons v. State Public Defender*, 2010). The court explained that "inadequate compensation will restrict the pool of attorneys willing to represent indigent defendants" (Carroll, 2010e, para. 1) and introduces "perverse economic incentives" (Carroll, 2010e, para. 4) in which the attorneys' ability to make a living are pitted against their clients' interests and constitutional rights. Some argue that flat fee contracts should not be impermissible as a lawyer must always put the client first and that such is the lawyer's obligation to uphold. A flat rate contract provides a lawyer a single lump sum to handle an unlimited number of cases or a single case for a certain sum. Others argue that these contracts create unworkable scenarios that counsel cannot handle as counsel has to sacrifice his livelihood or family time or financial status to adequately live up to unreasonable promises of adequate representation under the Constitution. An unethical attorney may play the odds that a case will settle or gamble that witnesses will not show

up and not do much work. The motivation for doing little work or cutting corners also increases when the contracts call for attorneys to pay witness fees, copying, or for exhibits costs (Carroll, 2010e, para. 4):

> In reaching their decision, the Court examined the real-life results of fee caps on attorneys' ability to earn a living. Citing national workload standards [for defense counsel] supported by the National Legal Aid & Defender Association ("NLADA") and the American Bar Association ("ABA") that under no circumstances should a lawyer who exclusively handles appeals carry more than twenty-five appeals in a given year, the Court determined that a full-time lawyer would earn a gross income of $40,000 in Iowa. . . . "From this figure, the attorney must pay for overhead which, according to the Iowa State Bar Association survey offered into evidence in this case, was, for the average Iowa lawyer, in excess of $70,000. Even assuming that a criminal defense lawyer working on appeals would have less overhead than the average Iowa lawyer, it seems clear that it would be very difficult for a lawyer working under the state public defender's rule to earn a living." (Carroll, 2010e, para. 3)

Alternatively, Mosher (2010) noted that some jurisdictions consider hiring one person or law firm to handle all defenses of indigents throughout the whole jurisdiction for a certain time period for a lump-sum payment which could result in an unlimited number of cases. This type of arrangement is said to result in a financial conflict of interest between the attorney and the client (Mosher, 2010). Critics have noted that the attorney will be compensated no matter how much efforts is put into a case and without

consideration in regard to what is spent on experts or assistants and receives no financial penalty for losing while deliberate cost saving measures could result in an increased chance of conviction or jail time (Mosher, 2010). Despite ethical and constitutional questions due to these arrangements, they are attractive to legislators as they allow states, counties, or cities to budget costs with certainty related to the Sixth Amendment and force the ethical burdens and costs onto an unpopular segment of society, criminal defense counsel. However, public officials have a responsibility to only approve systems which are ethical and respectful of constitutional obligations, particularly when they could result in the conviction of the innocent. Furthermore, Mosher (2010) noted that the eighth of the ABA Ten Principles states that contracts should have clear workload expectations and should never be based on a flat fee with no exceptions for unusual cases or with mechanisms to fund expert fees or other costs as such would improperly place such a burden on the counsel and pit the interests of counsel against their clients' interests.

Conversely, in Washington State, Mosher (2010) reported that Grant County officials had no problem in transferring the ethical burdens of upholding constitutional rights to another in 2001 when it hired one lawyer for the entire indigent defense workload for a set dollar amount regardless of the number of cases. One year this defender made $225,000 himself and in the following year he handled, by himself, 413 felony cases, which is 275% higher than the recommended load and which averaged out to 4 hours a felony case (Mosher, 2010). One defendant who served 7 months in jail was

awarded a $3 million judgment against the public defender, who was eventually disbarred and the county settled for $250,000 itself (Mosher, 2010).

Some states have recently attempted to control or mitigate ethical dilemmas that its systems purportedly create. Mosher (2010) noted that Oregon attempted to access the workload values of certain types of cases, based on the amount of time *likely* to be needed for each type of case on average. This type of case forecasting shows that the legislature is assessing what is appropriate rather than looking to short change constitutional rights for budgetary considerations or money. There are additional safeguards: Each contractor has to do an audit with the state every 6 months to ensure that their case loads are not overwhelming via acceptable time standards, and an exceptions provision allows that more monies can be requested for unusual cases (Mosher, 2010).

In Tennessee, feeling pressure to control costs, its highest court in 2011 proposed changes which authorized flat-fee contracts for defense counsel without instituting checks and balances which other states have used to attempt to ensure constitutional rights are protected (Carroll, 2011j, para. 1). At that time, Iowa and Washington had "banned these types of low-bid contracts because they create a direct financial conflict of interest between the attorney and each client" (Carroll, 2011j, para. 1). Carroll (2011) noted that administrators will still rely on attorneys' assertions that they have the ability to handle certain workloads offered (Carroll, 2011j, para. 9). Carroll (2011j) noted that it has been clearly determined in the past that self-regulation is inadequate to protect constitutional rights due to the inherent conflicts of interest involved (Carroll, 2011j, para. 9). Carroll

(2011j) noted this is the very reason why the American Bar Association called for an independent board to monitor the indigent defense function (Carroll, 2011j, para. 10). The president of the Tennessee Bar Association (TBA), D. Van Horn, also objected and sent a letter to the court recommending that before launching the changes, there should be a "pilot, guided by an advisory group of lawyers with experience in indigent representation, to examine the workability of contract representation in mental health committal and child support contempt matters only" (as quoted in Carroll, 2011j, para. 11).

At the time, there were also additional problems looming in Tennessee. Carroll (2011) noted that while:

> TCA § 16-2-518 mandates that any local funding for public defenders be at a rate of 75% of funding for the corresponding district attorney general's office, it generally being agreed that approximately 75% of those being prosecuted by the district attorney will be indigent. However, at the state level, 228 full time assistant public defenders are funded, and 379 assistant district attorneys are funded, a ratio closer to three to five. (Carroll, 2011j, para. 4)

Carroll (2011), while generally correct, failed to point out that the district attorneys' office budgets typically do not include the cost of the police departments' investigatory costs. For example, while defense attorneys may have to do their own investigations or hire experts, district attorneys have cases generally presented to them already investigated. Furthermore, they typically need not pay experts or pay to summon witnesses as the police are already being paid by the police department or the experts are

generally state employees. Moreover, when counting personnel, the police prosecutors and paralegals are not attributed to the government. For this reason, defense counsel should be hired or compensated at least at the budget level of the district attorneys' offices.

In Connecticut, there has been a recent reversal in the protection of rights of the indigent. At one point, the state had laid off 42 public defender employees, including 23 lawyers, and planned to eliminate 33 more positions (Collins, 2011) despite its rich history as being the first public defender system in the United States established in 1917 (Fusaris, 2010). Additionally, following the *Argersinger* ruling, in 1975 the state established the state-wide provider of indigent defense services, its Division of Public Defender Services (Carroll, 2011c, para. 2).

Legislators or executives in some states continue to look at derivations of low bid contract despite their courts' reluctance to approve them in light of Sixth Amendment challenges. Some have contemplated widespread change and turning to low-bid contractors but have ultimately decided against change. In Arizona, in the face of budgetary pressures, Cochise County officials looked at implementing a "proposal to switch from an assigned counsel system paying an hourly rate of $50 to a system paying a flat fee of $150 per misdemeanor case and $900 per felony case" (Carroll, 2011b, para. 1). County officials have considered this alternative despite a strong history of cases in Arizona which discourage such contracts (Carroll, 2011b, para. 1). Since the decision in *State v. Joe U. Smith*, Arizona authorities, like officials in other states, have struggled to budget and responsibly forecast public expenditures while ensuring that due process and

constitutional rights are protected (Carroll, 2011b, para. 1, citing *State v. Joe U. Smith*). Additionally, Arizona officials have refused to follow caseload standards (Arizona State Bar Ethics Opinion 90-10, 2010). This Ethics Opinion 90-10 rejected that formulas could be applied to all counsel without an independent assessment of abilities (Carroll, 2010b, para. 8).

While Cochise County proposed paying flat rates to counsel in each such cases, Sixth Amendment champions advocated against such a plan as lawyers would be paid the same no matter how much work was done and private attorneys potentially would work more on their better paying cases as a result (Carroll, August 16, 2011, para. 5). For example, even if a plea is entered on Day 1, the state pays counsel the same amount as a counsel going all the way through a jury trial. This system was championed despite the Arizona Supreme Court's ruling in *Zarabia v. Bradshaw*, 1995) which established presumptive caseload ceilings in *State v. Smith* (Carroll, 2011b, para. 7). In 1973, the National Advisory Commission (NAC) on Criminal Justice Standards and Goals developed limits on case acceptance loads by counsel (Carroll, 2011b, para. 7). These standards have been generally accepted in all states as they were developed with guidance from the U.S. Department of Justice (Carroll, 2011b, para. 7). NAC Standard 13.12 suggests that agencies should appropriate staff so that it has a counsel for every "150 felonies per year, for every 400 misdemeanors per year, for every 200 juvenile cases, and for every 200 mental health cases per attorney per year, or for every 25 appeals per year" (Carroll, 2011b, para. 7).

Utah has also faced many challenges in meeting the demands of the Sixth

Amendment and some believe that prosecutors are creating conflicts themselves by overstepping their bounds. Carroll (2011k) reported that the Utah ACLU exposed prosecutors for picking defense counsel and negotiating the rates of the defense in its flat fee contract indigent defense system. Carroll (2011k) noted that the defense must get expenses approved by the county attorney (para. 1). Carroll (2011k) suggested why this system is so wrong for the effective delivery of justice in a free society:

> American jurisprudence is based on an adversarial court process, competent defense lawyers are necessary to scrutinize and challenge the police investigation, the lawfulness of any searches and seizures, the arresting officers' tactics, the credibility of the evidence, and the district attorney's theory of the case. In this way, an effective defense serves to improve the overall quality and effectiveness of law enforcement itself. Arguably, it is because of a strong adversarial process when private criminal defense lawyers are employed that the United States is in the forefront of cutting edge public safety technologies – such as DNA evidence – that help to exonerate the innocent while convicting the guilty. That cannot occur in places like Utah, where the defense is beholden to the prosecution. (Carroll, 2011k. para. 9)

Similar to Arizona's proposal, the *Los Angeles Times* (as cited in Carroll, 2011d, para. 2) shined a light on the defense of juvenile in reports analyzing the effectiveness or effort of private conflict attorneys working under a flat rate contract of $345 a case. While Carroll (2011d) noted that some believe a flat-rate system is not detrimental to the

defendant as they believe defense attorneys are senior attorneys and more pay is not going to make them try harder, he noted:

> the federal courts pay an appointed attorney rate of $125 per hour for non-capital cases. Applying that rate shows that Los Angeles' attorneys working at the flat fee rate of $345 per case would only devote approximately two hours and forty-five minutes of paid work to a case; any time spent on a case beyond that would essentially be done for free. When compensation does not adequately approximate the workload, a significant number of qualified attorneys simply stop taking public cases. (Carroll, 2011d, para. 2)

Carroll (2011d) argued some attorneys may not be affected by low rates of compensation, but a larger supply of attorneys is needed than those who defend defendants just for the nobility of it and are independently wealthy. Carroll noted that:

> for a Los Angeles County assigned counsel attorney to make as much money as a private attorney being paid $125 per hour under federal rates, he would need to open and dispose of 670 juvenile delinquency cases in a year, or more than three times the workload allowable under national standards. Conversely, under national standards the average juvenile delinquency case requires eight hours of work. At $345 per case, this equates to about $43.13 an hour. For the person on the street, that may seem like a lot of money. But private attorneys must pay for all overhead (office space, insurance, utilities, secretarial assistance, paper, pens, etc.) out of that sum. To give some perspective, case law in Alabama –a state with a significantly lower cost of living rate than Los Angeles -- requires the state

> to pay a presumptive rate of $30 for overhead in addition to an hourly wage. (Carroll, 2011d, para. 4)

Despite several strong points, that argument fails to consider that not all attorneys have all the business that they need; that is, that they could regularly replace appointed work with work on better paid private work.

Joy and McMunigal (2012) observed technology advances have created great concerns, in particular DNA evidence, which expose weaknesses in the criminal justice system and lawyers' ability, but particularly with flat rate cases due to the inherent conflicts of interest (p. 46). Joy and McMunigal noted that appointed counsel in Philadelphia receive a:

> flat fee for pretrial preparation of $1,333 if the case is resolved without a trial and $2,000.00 if the case goes to trial. If the case goes to trial, appointed lawyers receive $200 for up to three hours of court time and $400 per day for more than three hours. (Joy & McMunigal, 2012, p. 47)

Joy and McMunigal (2012) noted that these attorneys "effectively earn $2.00 an hour" (p. 47) creating "an incentive to take on more cases than one can handle" (p. 47). The authors also noted that private counsel appointed as indigent defenders for murder cases typically are sole practitioners, negating the opportunities to run thoughts and defense by law partners and increasing the odds of mistakes (p. 47). Joy and McMunigal also noted that appointed counsel are less likely to communicate with clients than public defenders or private counsel and that appointed counsel are more likely to take matters to trial potentially in order to make the increased money offered by the sliding flat rate scale

(p. 47). Additionally, the authors theorized that appointed counsel likely spend less time preparing on cases than full-time public defenders (p. 47). Joy and McMunigal stressed that "there are few effective ways to monitor and remedy poor quality legal work in a criminal case after the fact" (p. 48).

Massachusetts Debate

Budget constraints, politics, and passion have created particularly explosive crisis in Massachusetts in regard to how the Sixth Amendment should be honored and protected. The crisis continues to impact the Commonwealth year after year as when state revenues relatively decrease due to economic forces such creates the need for even more indigent defense services (Grenier, 2011). This debate and crisis has resulted in modifications to the system in how counsel is provided to indigent defendants. The debate has become even more contentious as the press has fueled the flame as the reading public seems to take delight hearing criticism of defense counsel and their "astronomical, runaway costs" ("DAs to Protest," 2010).

The governor of Massachusetts sought to rework the funding and delivery of public counsel to indigent defendants, and to change a system, in the face of severe lobbying and opposition from the defense bar, which had existed for decades (Leahy, n.d.). While many politicians agreed on the attractiveness of cutting the budget for public indigent defense, they did not always agree how it should be done. The House Ways and Means Committee's Fiscal Year 2011 budget recommended a Committee for Public Counsel budget of $192,069,381 (Benedetti, 2010a, para. 1) and rejected Governor Patrick's budget idea to create a new public defender agency (falling under the control of

the governor's office), which called for 1,000 new lawyers and 500 support staff, aiming to save the commonwealth $45 million (Levenson, 2011). However, the governor's proposal was lambasted by almost all interest groups for different reasons. B. Fierro, III, of the Massachusetts Association of Court Appointed Attorneys, observed:

> that proposition strains credibility when the costs of 1,000 new staff attorneys and as many as 500 support staff are added to the state payroll. Unlike the private attorneys who do court-appointed work- the vast majority of whom are paid a paltry $50 an hour—the state will have to pick up the tab for office space, telephones, computers, health insurance, sick time, vacation and pensions for these new state workers. (Fierro, 2011)

Additionally, in a letter to the editor in response to the complaints of the district attorneys under funding to CPCS, the chief counsel noted that part-time public defenders do not receive benefits that the assistant district attorneys receive like retirement, vacation, or medical benefits, and cannot retire at age 55 (Benedetti, 2010c, para. 4). Additionally, D. Siegel (2011) of the New England School of Law argued the proposed changes would devastate the poor by gutting one of the best indigent defense systems in the country; he also suggested that no counsel should support it by accepting cases in such a system, which would result in unconstitutional results for clients (p. 2). In fact, Siegel noted the system proposed was not practical as 1,492 lawyers would be needed to adequately handle one half of the cases in district court alone, whereas the governor proposed 1,000 new lawyers handling all the cases in all trial (district, superior, and juvenile courts) and appellate courts (p. 2). Siegel asserted the only way to accomplish

such would create unconstitutional case loads, increase pretrial incarceration costs, increase ineffective assistance litigation, and increase wrongful convictions--all thereby increasing taxpayer long-run costs (p. 2).

The Massachusetts Bar Association chided the district attorneys in stating that it does the system no good for them to attack defense counsel because prosecutors' budgets are also thin (Murphy, 2010, p. 5). Additionally, the Massachusetts Bar Association (2011) noted that "the private bar system of representation is a national model and provides competent counsel at a cost effective level to the state" (p. 1). Governor Patrick fueled criticism of defense attorneys with his plan which took advantage of the political unpopularity of defense counsel. Estes (2011) noted that the governor's fiscal year 2012 budget called for eliminating the use of private attorneys to represent the indigent when presently 90% of the work was done by private attorneys and replacing them with 1,000 full-time newly hired counselors to replace these 3,000 private part-time counselors. The administration trumpeted its plan with arguments that it would save "at least $45 million from the $207 million budget for the Committee for Public Counsel Services, the state's public defender agency" (Estes, 2011, para. 3). However, the governor likely capitalized on the unpopularity of lawyers to advance his plan. Governor Patrick shocked many defense advocates by proposing to move the control and hiring of these new prospective state employees to the governor's office. In fairness to the governor's plan, Massachusetts is only one of six states where the public defenders fall under the judicial branch (Pazzanese, 2011). In an editorial, the *Lowell Sun* publicly criticized the plan:

> We also oppose the governor's desire to bring the new bureaucracy under his executive umbrella. Legal services for the indigent should not be politicized, yet we can see a new wave of patronage hires from Beacon Hill. This sounds more like a Massachusetts Stimulus Act for unemployed attorneys—and Deval devotees—than a restructuring act. (Editorial: "Public Defenders," 2011, para. 8)

The newspaper advocated for reforming the present system:

> He should institute CPCS accountability measures to determine if the private attorneys are billing the state properly for their services....We also suggest that the CPCS consider a global payment system for attorney services, similar to what the state is developing for its health-insurance program. Finally, and most important, the CPCS must reduce the number of cases coming into the system by strictly enforcing eligibility requirements for those seeking aid. (Editorial: "Public Defenders," 2011, para. 12)

CPCS has already attempted to forge ahead with unpopular cost-costing measures as a way to show it is hearing the pressure to reduce costs while attempting to not reduce compensation for time in court:

> 1. Mileage reimbursements for court are eliminated, 2. Court waiting time is reduced to one hour total per day; 3. Cap on hours billed per day reduced from 10 to 8; and 4. Billable hours for those licensed less than 2 years is reduced to 1500 hours per year. (Committee for Public Counsel Services, 2011)

In an editorial, the *Boston Herald* (2011) also questioned the wisdom and motivation of proposing to add 1,500 employees (lawyers and support staff) to the state

payroll when the governor also proposed cutting 900 other state jobs (Editorial: "Patrick's Power Grab," 2011). On May 4, 2011, an emergency budget for $42.2 million in funding for the Committee for Public Counsel Services was filed so that legal services for indigent clients would not run out of funds prior to the end of the fiscal year (Murphy, 2011, p. 1). Secretary of Administration and Finance J. Gonzalez noted, "I don't know how many years in a row where we're having to do a significant supp late in the year for a program where there's no ability on our part to control the cost" (as quoted in Murphy, 2011, p. 2). Governor Patrick in his fiscal year 2012 budget proposed to eliminate 3,000 private attorneys who handle 90% of the indigent criminal caseload, and, instead, hire 1,000 state lawyers and 500 paralegals to fill the void (Murphy, 2011, p. 2). Gonzalez believed this move would save $60 million a year and allow for better budgeting and planning for legal services once a year instead of attempting to pass supplemental budgets each year (Murphy, 2011, p. 2). Gonzalez stressed that action was needed as the CPCS budget had grown over $100 million from 2005 to present (Murphy, p. 2). However, he did not note "that 51% of the growth in the CPCS budget since 2004 is due to the 2005 increase in the rates paid to private counsel from $30 per hour, then lowest in the nation, to the current rate of $50 per hour for most cases" (Benedetti, 2010b, p. 4).

After considering the budget bill of the governor, the House budget planned for hiring 200 more public defenders and to reduce the caseload from 90% to 80% for private attorneys, while reducing the billable hours that private attorneys can charge by 300 hours to 1,500 a year (Murphy, 2010, p. 2). Hewitt (2011) also noted that CPCS lobbied its private attorneys to contact representatives to relay one's personal support for

Amendment 444, which would restore $15 million for private counsel compensation and Amendment 275, which would restore existing billable hour limitations (para. 5).

There is much controversy over whose version of cost saving proposals will actually save money or which is likely to be the most successful. Gonzalez criticized the House version stating that the administration believed that the House's belief that the House's plan would save $53.1 million was "overstated" (Murphy, 2011, p. 2). During the budgetary debate, Senator Donnelly of the Massachusetts Senate acknowledged that competing parties could not agree on what certain actions would create the most cost savings and that independent studies were warranted which would consider all the costs and benefits of hiring new personnel and replacing the old system and:

> whether the proposal was to maintain the current 90/10 ration between private and public attorneys or to change it to a 10/90, 80/20 or 50/50 ration, there was virtually no agreement between or among any groups on either costs or savings. The figures, both for and against the various proposals were roundly criticized as inaccurate or as comparing items that were, in fact, not comparable. Moreover, the criticism from both sides was, at times, heated and accusatory. Because of these challenges, I have decided to cosponsor Senator Creem's amendment #102 which will require an independent review by the Treasurer's office to study the efficacy of expanding the scope and cost of increasing a public component to handle 50% of all indigent cases before changing the current system. The study will include an assessment of fringe benefits, long-term pension benefits, long-term health care benefits, and non-payroll costs, as well as direct and indirect

> overhead of a public system. It will also assess the cost of the indirect overhead to private attorneys, including the CPCS payment unit, audit and oversight, training, and legal oversight and support staff, including fringe benefits and non-payroll costs. (Donnelly, 2011, p. 1)

Senator Donnelly continued that he would support a change to a 50/50 system if the Treasurer reports such would result in significant savings, but he didn't elaborate on what he considered to be significant (Donnelly, 2011, p. 1). Senator Donnelly's analysis also mirrors that of the approach in Michigan where a 14 member Commission was set up to review issues associated with delivery of counsel to the indigent defendant (Carroll, 2011g, para. 1).

Prosecutor associations such as the taxpayer funded Massachusetts District Attorneys Association (MDAA) have also argued that there is a disparity in funding and that they should get more of the budgetary pie, prompting some vocal public defenders to even attend the press conference and calling the district attorneys "disingenuous" to their faces (Valencia, n.d.). CPCS officially refuted much of the district attorneys' comparative talking points as false and backed up many of the arguments of the defense counsel who crashed the press counsel, "On October 7, the MDAA contacted legislators and demanded their support to gut the defense of the poor in the state's criminal justice system—apparently without regard for our state and federal constitutions" (Benedetti, 2010b, p. 2). The MDAA failed to account for the money spent on police, which accounts for some of the cost of prosecution, money spent on the state police, chief medical examiner, state crime lab, regional crime labs, drug forfeiture funds, Office of

the Attorney General, FBI, task forces, and free office space in the courthouses (Benedetti, 2010b, p. 2).

In the previous year, the *Boston Globe* (2010) supported the position of MDAA (Editorial: "State Can Save," 2010, para. 1), but its position did not fairly take into account all facts in supporting this stance as payroll and health care costs were not accounted for, nor was the fact that many services that CPCS provides. For example, cases regarding children or parents involving the Department of Children and Families in probate court do not involve district attorneys (Butler, 2010, p. 1). Private counsel who participate in accepting cases representing the indigent took particular offense to the assumptions made by district attorneys in asserting that more than enough funds were provided to indigent defense as compared to other states in New England (Valencia & Ellement, 2010, p. 1). In one press conference conducted by Massachusetts' District Attorneys Association, Attorney Scapicchio stood up and stated that the costs of the police and labs should be included as they are costs that help prosecute cases (Valencia & Ellement, 2010, p. 2). Suffolk District Attorney D. F. Conley stated that it was "ridiculous" to argue such (Valencia & Ellement, 2010, p. 2). However, Chief Defense Counsel A. J. Benedetti (as quoted in Valencia & Ellement, 2010) said it is prosecutors who are being "disingenuous":

> The CPCS uses a mix of staff and private attorneys to handle cases. The private attorneys are paid hourly rates to represent indigent criminal defendants in district, superior, and appeals courts. Attorneys are paid $50 an hour for a district court case, $60 an hour for a Superior Court case, and $100 hour to handle a

> murder case. Benedetti said the money spent by the CPCS on criminal cases includes payments to attorneys, payments to experts hired to challenge government evidence, and payments to private investigators- not just money for lawyers. Prosecutors do not have to pay for police officers, medical examiners and forensic experts out of their budgets, he said. (p. 2)

This debate had been politicized into an election issue by the district attorneys as they sent a letter to all candidates for state office on October 7, 2010:

> It is often said that the Commonwealth's fiscal spending should reflect the public's priorities and values. In recent years, a problem has arisen where the state's budget priorities and values are out of sync with the public, and it is the public who is paying dearly as a consequence. . . . Last year, the legislature appropriated $92 million to the district attorneys to prosecute close to 300,000 cases, but voted $168 million to CPCS to defend two-thirds of those cases. On a per case basis, this means that the district attorneys spent an average of $307 per case while CPCS spent over $842!! When neighboring states like Connecticut and Rhode Island can provide a system of indigent legal defense at a fraction of what the Massachusetts taxpayer is paying, it illustrates both the seriousness of the problem and that there are better ways of doing business.... We can restore prosecuting criminals and protecting public safety to their proper place of primacy in the public safety equation by reallocating the resources already dedicated to prosecution and indigent defense. How can this be done? By legislation that requires that the annual budgets of prosecutors and defenders are proportionate to

> their actual caseloads. Tell the Taxpayers You Support Legislation That Requires Fiscal Parity Between Prosecutors and Defenders [sic]. ("MDAA Letter to Candidates")

At the time many private counsel, including Ilg (2011), expressed frustration as they believed that it typically is the prosecution that delays cases as prosecutors routinely arraign defendants for narcotics charges and license suspension cases without having all their evidence in their possession which causes numerous delays and unnecessarily lengthy pre-trial detention. Attorney Bader-Martin (2011) also addressed these system costs in an email to CPCS counsel:

> Lastly, you should know that being a bar advocate is not a 'get rich quick' scheme by any means. If I don't work I don't get paid a cent. I don't get sick pay, vacation time, insurance, or a pension. I also am responsible for all costs related to my office, including all expenses, staff and research services, and I am also required to take continuing legal education credits - a good thing, but something only CPCS seems to require its lawyers to do, and of course, at my own expense. I also am required to account for every 6 minutes of the hours I do bill to CPCS. (p. 2)

A. Benedetti, head of the Public Counsel Services Committee, in opposing the governor's overhaul plan, stated that "the issues associated with the new plan are far greater than just whether full-time public defenders are less educated or skilled than their private counterparts. Not the cream of the crop. I'm talking about meeting minimal constitutional requirements" (as quoted in Oakes, 2011, p. 1). However, Iyengar of the

London School of Economics noted that public defenders are more effective in representing indigent defendants and suggested they are able to "secure shorter sentences, better negotiate pleas and in general seem to produce quicker outcomes for their clients than do their contract attorney's counterparts" (as quoted in Oakes, 2011, p. 1). Iyengar noted:

> On a pure wage-bill point, private attorneys will be slightly cheaper than public ones. But from a criminal justice budget point of view — which is of course the point of view that the state or federal government wants to take — it is still more costly to use private counsel than public defenders. (As quoted in Oakes, 2011, p. 1)

Oakes (2011) acknowledged that the salaries and benefits of public defenders cost the government more than the monies paid to contract attorneys, but the "private attorneys typically take a longer time to resolve a case, which raises overall costs" (p. 1).

Theoretical Foundation

Contributions of W. Stuntz (1997)

This research tests the theory advanced by W. Stuntz. Stuntz (1997) asserted that the criminal justice system is shaped by the rationing behavior of prosecutors, defense attorneys, judges, and the legislature and that pressures on one part of the system will have an impact on other parts of the system, which continue to harm the indigent defendant (pp. 10, 23). Stuntz (1997) noted that budgetary decisions impact and change the system, and the results of those changes continue to influence future legislative behavior (p. 9).

Stuntz (1997) did not conduct any research but he summarized the cause and effects of actions by legislatures, prosecutors, judges, and defense attorneys. He showed how actions by one group typically impact actions by the other groups and which then spurn future legislative action. Stuntz noted that the "criminal justice system is dominated by a trio of forces: crime rates, the definition of crime (which of course partly determines crime rates), and funding decisions- how much money to spend on police, prosecutors, defense attorneys, judges, and prisons" (p. 2).

Stuntz (1997) theorized that the actions of the players within the system tend to disadvantage the truly innocent indigent defendant as the system tends to cause defense attorneys to favor procedural motions instead of allocating resources to factual investigation and interviews (p. 2) which may expose true innocence. Stuntz noted that constitutional law does not set out the minimum actions that a defense attorney must take to ensure that the defendant received an adequate defense (p. 8). He indicated that the arguments about the ineffective assistance of one's counsel must prove gross negligence and that defendants are rarely successful with such an argument even when counsel failed to investigate certain matters or failed to raise constitutional claims (p. 8). Inactivity by counsel is not grounds for overturning a conviction, nor is the failure to interview witnesses (p. 8). To throw out a conviction, the convicted defendant has to show that the defense counsel failed to adequately defend him which caused him to lose, thus negating claims based on inadequate resources (p. 9). Thus, defense counsel do not have to be adequately resourced (p. 9) while "decisions about resources have important feedback effects on what the system looks like" (p. 9). When a defense counsel appears at trial, it

is difficult to access "how he or she got there" (Burke, 2008, p. 348) or what preparation was actually done, if any.

Since ineffective assistance of counsel claims are unlikely to prevail, defense counsel have a great deal of discretion in regard to how they allocate efforts on particular cases as their decisions are unlikely ever to be questioned. Stuntz (1997) advocated that defense counsel do not have to necessarily be deterred from activity due to the insufficiency of their compensation, but notes that "time" is their resource which limits their activity. Stuntz argued that defense counsel have only some much time and must allocate time to a multitude of cases which they handle. He notes that private attorneys are paid by the hour and may limit caseloads or charge more to allow more time to focus on a smaller amount of cases, but that defense attorneys must budget time to a case load they are given (p. 5). While full-time public defenders may be overburdened, the impact on private counsel who take on some indigent defendant may be greater, as they have to choose between working for their regular rate versus working for $50.00 an hour.

Stuntz (1997) noted that time constraints may cause public defenders to focus more time on procedural motions, such as motions to suppress or others, instead of investigating the facts and winning on the facts, as procedural motions are far less time consuming than investigations or trials (p. 14). While wealthy defendants will continually litigate motions as the costs of such motions clearly are worth it when faced with convictions or jail time, indigent defendants are not part of that balancing system (p. 14). Stuntz noted that a public defender may not have the time to advocate each motion which his indigent client may have so he needs to budget his time across a multitude of

cases, whereas market forces will dictate how aggressive a private defense attorney is (p. 15).

Stuntz (1997) theorized that appointed counsel approach litigation differently and not like well-funded counsel (p. 15). Stuntz stressed that when dealing with whether the defendant actually committed the crime, that is, merits litigation, appointed counsel devote less time as the system tends to drive publicly appointed counsel toward devoting time to procedural motions instead of toward investigation needed for merits litigation (pp. 16, 20). Accordingly, this should impact whether those who are truly innocent are convicted as the guilty typically will have more procedural motions to file (p. 16). Stuntz noted that:

> defense attorneys shifting time and energy away from factual investigation to criminal procedure litigation are probably shifting time and energy from one set of defendants to another and the losers in this shift are likely to be defendants with colorable but undiscovered factual arguments. (p. 20)

Stuntz (1997) also asserted that when more procedural motions are filed, prosecutors have less of an incentive to only charge strong cases, which further impacts the innocent as devoting defense resources to merits litigation is less and less likely (pp. 21-22). Stuntz (1997) observed that legislatures may also react to defense victories or wins on technical matters by limiting defense funding, but this actually has the wrong effect intended, as such will focus more attention on procedural matters, and less on merits litigation or investigations, which will harm the innocent and cause a greater percentage to prevail on motions than on the merits (p. 24). Stuntz noted that "factual

litigation probably suffers more- as resource constraints because more severe, procedural litigation's cost advantage becomes more compelling" (p. 24). Thus, the truly innocent defendant is most impacted by the system, if Stuntz is correct.

Stuntz (1997) theorized that to correct these inadequacies in the defense of the indigent, "Sixth Amendment law would force counsel to a given level, thereby forcing states to spend whatever it took to permit counsel to perform to that level" (p. 30). Stuntz noted that making "Gideon a formal right only, without any ancillary funding requirements, has produced a criminal process that is for poor defendants, a scandal" (p. 34). While not mentioned directly by Stuntz, such a "law" would likely require defense counsel to meet with defendant prior to trial, to prepare a defense for trial, to visit the crime scene, to visit the defendant in jail, and to interview all the witnesses identified by the government as witnesses. Time restraints imposed by the system generally do not afford enough hours in the day for an appointed defense counsel to do all this investigation and preparation, which a good attorney should do to get ready for trial.

If Stuntz's (1997) theory is correct, the time constraints put upon public defenders by the system, should cause court appointed defenders to perform worse than privately funded attorneys at jury trials, as they will have done less preparation and investigation for the merits aspect of the defense, as the system pressures them to allocate their time toward motion practice instead of merits litigation. Additionally, billing records of public defenders would support that success is more likely given the amount of investigation done; however, such would not control for plea bargaining cases and just trying cases that an attorney knows he or she will win.

Contributions of R. D. Hartley (2004)

Hartley (2004) tested Stuntz's (1997) theory by reviewing data in regard to the comparative effectiveness of public defenders in several performance areas and also compared rates of success at sentencing depending upon the type of counsel. Although he did not review attorney effectiveness before juries, Hartley undertook a study in regard to the quality of representation of public defenders versus private attorneys in light of whether clients were released on recognizance, whether the primary charge was reduced, whether they were confined, and in regard to sentence length (p. i). Hartley's data indicated that the type of counsel had "little or no effect" (p. i). However, the research provided a "base camp" for researchers to build upon in reviewing the effectiveness of counsel as he addressed many issues that public defenders encounter with their clients and with the system and its actors.

Hartley (2004) noted that public defenders run into problems in advocating for their clients as "they are co-opted by the courtroom workgroup" (p. 3). He noted that the workgroup consists of those "who all work together to make sure that cases flow through the criminal justice system effectively and efficiently. As double agents, public defenders not only work for their clients, but also and ultimately, for the state" (pp. 3-4). Hartley noted that the workgroup alters behavior as "their professions rely on this cooperation for continuation" (p. 27). Hartley stressed "scholars, however, have advanced somewhat contradictory views of co-option, and the courtroom workgroup. Some argue that because of the cooperation among the members of the courtroom workgroup and the relationship of public defenders to it, public defenders will be able to

negotiate more favorable outcomes for their clients than will private attorneys" (Champion, as cited in Hartley, 2004, p. 33). Glaberson (2013) more recently noted that a private firm volunteered to represent Bronx residents to demand hearings in stop and frisk cases when cases are continually delayed causing defendants to pled out just to not to have to keep coming back to court, suggesting that this dysfunctional system could be the result of public defenders involvement in the workgroup of an overburdened court (p. 1).

Hartley's (2004):

> data set utilized information on 2406 offenders convicted of felonies in Cook County Circuit Court. . . . The method of original data collection included selecting a random sample of all offenders convicted of felonies in 1993 from a list prepared by the Clerk of the Cook County Circuit Court. (p. 48)

Hartley (2004) noted:

> Type of counsel is the primary independent variable in the study. Other independent variables included in the analysis are the offender and case characteristics that prior research has shown to influence criminal justice outcomes at the various stages. I also control for the offender's race, ethnicity, gender (1=male; 0= female), age, employment status (1=unemployed; 0=employed), prior criminal record, whether a weapon was used during the offense, and whether the defendant was under some type of criminal justice control. (p. 50).

Hartley (2004) stressed that binary logistic regression was most appropriate for his research as:

> for dependent variables that are binary or dichotomous in nature, logistic regression is the appropriate statistical technique (Menard, 2002; Liao, 1994; Aldrich and Nelson, 1984). When the dependent variable has only two possible outcomes, the problem becomes explanation of the effect of y for a unit change in x. In short, the only changes possible are from 0 to 1 or vice versa. Logit deals with this by treating the dependent variable as a probability of being 1. (p. 52)

Hartley (2004) indicated that:

> specifically, the objective was to assess the effect of type of counsel on whether or not the defendant was released on his/her own recognizance, whether or not the defendant had the primary charge reduced, whether or not the defendant had any charges reduced or dropped, whether or not the defendant was sentenced to prison, and the length of the prison sentence for those who were incarcerated. (2004, p. 55).

Within Hartley's (2004) data set, "the total sample consisted of 2406 defendants, of whom 2201 (91.5%) were represented by public defenders and 205 (8.5%) retained a private attorney" (pp. 55-56). Hartley noted:

> Regarding the dependent variables, a majority of offenders (70%) had bail set; only 30 percent were released on their own recognizance. Most defendants (91.9) did not have their primary charge reduced, but 69.1 percent of those with more than one charge filed had at least one of those charges reduced or dropped.

> Nearly two-thirds (60.1%) of the defendants were sentenced to prison, and the average sentence length of those incarcerated was 53.9 months. (p. 58)

Hartley (2004) stressed that:

> defendants with private attorneys were 1.4 times more likely to be released on their own recognizance than were defendants with public defenders. This converts to a predicted probability of being released of 51 percent for defendants with private attorneys and 42 percent for defendants represented by public defenders. (p. 63).

"Regarding offender characteristics, only two variables are significant: sex, where males were less likely to be released, and unemployment, where those who were unemployed were less likely to be released" (Hartley, 2004, p. 66). Hartley (2004) determined:

> in sum, the effect of type of counsel was only significant for one of the five models; the decision about defendants being released on their own recognizance. The results of this model revealed that defendants represented by private attorneys were more likely to be released than defendants represented by public defenders. In most models, the legally relevant variables were significant predictors of decisions at each of the five criminal justice stages. (p. 90).

Hartley (2004) also observed:

> other potential limitations include the fact that existing studies are dated and use no controls for other factors relevant to the outcomes; some studies use qualitative

> analyses only, and most fail to examine the influence of type of counsel across a number of criminal justice outcomes. (p. 7).

In regard to the double-agent issue, Hartley's (2004) analysis should lead to more inquiry in regard to the inherent conflict that defense attorneys may have in advocating for their clients and also maintaining good will for relationships for the future with the court and the prosecutors, and whether or not such is more or less powerful of a force for privately retained counsel. More thought can also be put into whether judges and/or prosecutors give in to more lenient sentences for clients represented by privately retained defense counsel as such clients are supporting the legal industry by paying an attorney. Also, if one accepts Hartley's theories, prosecutors and judges may also be "weakened" by the workgroup because they do not want to get poor evaluations by the attorneys, and prosecutors may not want to make enemies as they may have to work in the private sector eventually. Prosecutors may have that long-term outlook, or perhaps it varies from individual to individual. However, such is also true that there are individual differences for defense attorneys who experience this quandary of personal relationships versus defending one's client zealously. More research could be done to highlight these relationships and influences amongst the courtroom actors, although ethics may prevent some from answering truthfully or with complete candor.

Neil (2004) did no additional research to aid in the development of theories, but commented on the quality of Hartley's (2004) work. Neil (2004) did not review or assess Hartley's data or conduct additional research but noted that "a study of Chicago-area courts found that public defenders are just as effective as private lawyers in persuading

judges to grant bail, accept plea bargains and sentence defendants appropriately" (p. 1). Neil appeared to be commenting on the research of Hartley in his dissertation but does not review his data or conduct additional research. Neil noted that "But for some defendants, the study found, retaining a private lawyer may be money well-spent, according to Miller-McCune" (p. 1). Neil reported that it may be beneficial for white defendants to get a private counsel as it makes them 2.7 times more likely to get bailed, while black defendants are twice as likely to get bail (p. 1).

Like Neil (2004), Jacobs (2010) did no additional research but commented Hartley's research without verifying samples or recalculating numbers. Jacobs, like Neil, stated that:

> the overall results of this study generally support the idea that there is no difference between private attorneys and public defenders regarding case outcomes. . . . The type of attorney representing the defendant was not influential on any of the four decision-making points examined here. (p. 1)

Jacobs (2010) suggested more research is needed in this area, particularly in regard to the impact of trials. He exposed a gaping hole in the research, which my study attempts to rectify, in noting, "researchers did not look at convictions vs. acquittals" (p. 1). Jacobs also adopted the reasoning of Hartley (2004) that public defenders are more effective because of the courtroom workgroup model of justice so they are in better position to negotiate versus a private attorney who may only be in the courtroom occasionally (p. 1). While the article seems to validate the findings of Hartley, there is no mention about whether or not this is true in other parts of the country or mention of other

studies that support Hartley's findings. Jacobs left unanswered why there is not more research in this area which has such an important societal and constitutional impact, particularly when it has such an impact on policy making. The present study examined the conviction/acquittal issue noted by Jacobs above.

Contributions of M. F. Hoffman, P. H. Rubin, and J. M. Shepherd (2005)

Hoffman et al. (2005) studied all felony cases in Denver, CO, in 2002 and presented findings suggesting that data showed that public defenders achieved poorer results than privately retained counterparts for their clients if one looked at actual sentences (p. 223). Contrary to Stuntz's (1997) hypothesis, Hoffman et al. theorized that underfunding or overburdening of public defenders may not be the sole reason for their poorer performances as compared to private counsel as clients may elect not to hire private counsel depending upon how bad their case is (p. 223). The authors noted that there had been "mixed results" in past empirical studies that have attempted to measure the effectiveness of public defenders and private lawyers (p. 223). Hoffman et al. believed they were the first to address actual sentences outcomes (Hoffman et al, 2005, p. 224). The authors noted that "observers continue to examine public defender effectiveness, researchers continue to find contradictory results (though only a few look at actual sentence outcomes) and policy makers want to know what it all means" (Hoffman et al, 2005, p. 227).

Hoffman et al. (2005) attempted to empirically test Stuntz's hypothesis by testing the effectiveness of different types of counsel by studying sentences received by defendants. Hoffman et al. examined all 5,224 felony cases in Denver in 2002, using

"regression analyses to measure the effect that the type of defense lawyer has on sentence outcomes and on the number of procedural motions filed (p. 229). Hoffman et al. found that public defenders actually filed more motions, but also achieved worse sentences (p. 230). The authors concluded that public defenders may achieve worse results because their clients can access the strength of the cases against them and do not want to waste their resources on hiring an attorney (Hoffman et al., 2005, p. 230). In coming to this belief, the authors:

> measured and then analyzed the relationship between three variables: 1) whether defense counsel was a public defender, a privately retained lawyer, or a court-appointed private lawyer; 2) defense counsel's effectiveness, measured by the actual sentence outcome; and 3) the number of motions filed by defense counsel. (p. 233)

The data showed that "the average public defender client was sentenced to almost five more years of imprisonment than the average private lawyer client (Hoffman et al., 2005, p. 241) and "almost three more years of incarceration than the average private lawyer client facing an equally serious charge" (p. 241). Hoffman et al. (2005) reasoned that public defenders perform worse not due to their motion practice as Stuntz (1997) suggested, but simply because they "attract less winnable cases" (p. 246). The authors concluded that "it is possible that all three effects operate in tandem to drive the outcome difference: the Stuntz effect, the traditional disadvantages faced by public defenders, and the self-selection-for-guilt phenomenon" (p. 248).

Hoffman et al. (2005) added much to the discussion in regard to the impact that type of counsel can have on the sentence received. They expanded upon the Stuntz (1997) theory and concluded it may have an impact but that self-selection caused public defenders to handle more difficult cases (p. 247). However, in regard to self-selection, it would be extremely difficult to determine exactly why a defendant elects to hire a private defense attorney and to isolate the reasons for such a decision. Furthermore, at the time that the defendant elects to hire or not to hire counsel, he or she may not be entirely aware of the strength of the government's case and the impact that a public defender or private counsel could have on the exclusion of a key part of evidence that may or may not exist. Additionally, Hoffman et al. implied the defendant can somehow assess the expected value of a private counsel's ability to impact the case versus the amount of money that they have and/or can scrounge together at the expense of certain other activities. To truly test the theory, one would need to measure how much the jail time is worth and access how much money is available to them to wager on their freedom. It is likely that defendants are not looking at the long term impact of their decisions but are interested in doing what they can to stay out of jail. Additionally, how could it be isolated in regard to the clients' ability to tap into family resources to raise funds for a private defense counsel or to truly capture the frequency that a defendant attempted to do so? Researchers should look to expand the Hoffman et al. conclusions and attempt to quantify how often defendants whom are appointed defense counsel, decide to hire private counsel, under the theory that they may not be impressed with the counsel that the

state provided to them and see whether there are substantial differences in jury acquittal rates or sentences for doing so.

Hoffman et al. (2005) stressed that Stuntz (1997) believed that indigent defendants were disadvantaged because "public defenders could not afford to litigate time-consuming pretrial motions as frequently as private counsel" (p. 227). Hoffman et al. noted that the "Stuntz syllogism" (p. 228) involved public defenders filing less pre-trial motions, overworked prosecutors are more likely to plea bargain the cases with more motions, and private will thus get better pleas than public defenders (p. 228). Hoffman et al. noted that Stuntz believed that outcomes were also driven by the counsel's guesses about outcomes and that attention to motions could potentially distract from time investigating and proving innocence via a factual investigation (Footnote 29, 228). Hoffman et al. attempted to "test the validity of the Stuntz theory by looking at actual sentence outcomes in a comprehensive econometric fashion" (p. 229).

Hoffman et al. (2005) determined that public defenders "achieved worse outcomes than private counsel" (p. 230) but theorized that clients "self-selected" (p. 230) for guilt. The authors theorized that indigent defendants could round up money for a private attorney if the client actually believed it would make a difference to their outcome (p. 230). Hoffman et al. believed that "public defenders' lower effectiveness may simply reflect the fact that, on average, they represent defendants with worse cases" (p. 230).

Hoffman et al. (2005) confirmed Stuntz's (1997) assumption that public defenders are less effective but did not believe it was due to private lawyers filing more motions as they found that after controlling for the seriousness of the offense, that public defenders

actually filed more motions than private counsel (p. 244). The authors theorized that public defenders spend less time evaluating cases because they receive "less winnable cases" (p. 246) and they believed their data demonstrated such. They noted that the indigent defendant must evaluate the odds of winning a case in deciding whether to hire counsel, but concede that they may not be the best evaluator of the strength of the case (pp. 246-247). Additionally, the authors theorized that the Stuntz effect may not be the result on the amount of motions file, but could be due to the amount of "time consuming motions" (p. 247) that the prosecutors internalized that a private counsel would file (p. 247). Hoffman et al. concluded that the Stuntz effect, the traditional disadvantages faced by public defenders, and client self-selection or assessment of their chances work together to negatively impact the results of the indigent (p. 248). Alternatively, the authors also noted that there also could be a Stuntz effect on the prosecutors in that they may believe that a trial with a private attorney could take longer, so they were more willing to offer a better deal to the privately represented (p. 248).

Contributions of R. Iyengar (2007)

Iyengar (2007) studied the performance of attorneys appointed to cases under the Criminal Justice Act where public defenders or hourly-wage private attorneys are appointed randomly to represent defendants in federal district court (p. 3). Iyengar determined that defendants who were assigned private attorneys on an hourly paid basis were more likely to be found guilty and received a 7.76 month longer sentence on average which she attributed to differences in attorney performance in plea bargaining and electing not to go to trial (pp. 3, 19). Iyengar (noted that "the variation in

performance raises questions of whether the current system meets its legal obligations of fairness as well as whether it is a cost efficient means of providing effective counsel" (p. 3).

Iyengar (2007) analyzed data from the Administrative Office of the U.S. Court Criminal Docket from 51 federal districts from 1997-2002 to develop her data set (pp. 2, 7) and in looking at three district in particular analyzed variables such as "attorney experience, law school quality, average caseloads and wages" (p. 2). Iyengar was able to isolate data in districts were cases were randomly assigned (p. 11). The study revealed that private attorneys paid on an hourly basis to represent the indigent had "less experience and attended lower 'quality' law schools" (p. 4). Of significance to this study, she noted that the "the practice of criminal law by its nature offers clear metrics, such as win rate and sentence length, to measure worker performance" (p. 4) which she used to compare the effectiveness of different types of public defenders. Iyengar highlights that the "two-tiered system of indigent defense, in which a substantial fraction of the cases are covered by contract works, is also used in many state systems" (p. 5) as it is used in Massachusetts in Lawrence District Court, the focus of the present study. Iyengar noted that this type of contract attorney performs worse than a full-time public defender which suggests "reforms and improvements [are] needed in state indigent defense systems" (p. 5) if utilizing this type of dual delivery system. Iyengar determined that defendants with private attorneys paid by the hour are more likely to be convicted by three-tenths of a percentage point (p. 12). The author noted that "highly experienced attorneys, regardless

of type, perform similarly while the lesser experienced public defenders perform better than the lesser experienced CJA panel attorneys" (p. 14). Iyengar emphasized the:

> analysis of case outcome and sentencing rates reveal differences but it is unclear if the overall difference between the public defenders and CJA panel attorneys is due to performance at trial or incorrect decisions about which cases to take to trial in the first place. (p. 17).

Iyengar (2007) determined that "it appears that attorney performance is responsible for a large fraction of the overall difference in expected sentence length" (pp. 19-20) and also revealed that "the difference between plea rates is insignificant after including wages, experience, caseload, and law school quality measures" (p. 25). The author noted that:

> experience and law school quality (along with caseload and wages) fully explain any differences in plea rates. . . . As indigent defense lawyers wages move 1 percentage point closer to the market wage, the probability that a defendant will be found guilty decreases by 2.7 percentage points if they have a public defenders and 5.5 percentage points if they have a CJA panel attorney. (p. 25)

This finding raised some questions about the data as related to Stuntz's (1997) theory as it suggested that a contract attorney would work on more profitable matters if such work was available and such must be the case if they were making close to market wage.

Contributions of D. S. Abrams and A. H Yoon (2007)

Abrams and Yoon (2007) asserted that:

> given the overall incarceration rate and average length of sentence, a veteran PD could reduce the likelihood of incarceration by as much as a fourth. . . .An attorney with 11 years of experience will, on average, obtain sentences that are 1.2 months shorter than someone with only one year of experience. (p. 1176)

Abrams and Yoon (2007) noted that measuring attorney performance is difficult due to difficulties in controlling nonrandom pairing in forming the attorney/client relationship (p. 1145). However, the researchers studied whether skill impacted case outcomes by "examining the performance of seventy-six public defenders for felony cases that were initiated between 2003-2005, representing 11,866 cases" (p. 1149). Abrams and Yoon determined that attorneys' characteristics did impact criminal cases, and that "attorney impact is substantial, and varies with observable characteristics" (p. 1177).

Most significantly, Abrams and Yoon (2007) determined that:

> a defendant who is randomly assigned the tenth percentile public defender has a 14 percentage point greater chance of receiving incarceration than one assigned to the ninetieth percentile public defender, [translating] to a 36 percent reduction in the probability of incarceration simply due to the attorney assignment. (p. 1173).

Abrams and Yoon stressed that if one is represented by a more experienced attorney, a defendant is less likely to get a prison sentence, and if a sentence is received, it is less on average, than a defendant represented by a less experienced attorney (p. 1173). They also determined that "an attorney with an additional ten years of experience is 3.7 percentage

points less likely to have his client accept a plea to the original charge than a less experienced attorney" (p. 1172). Abrams and Yoon also found that:

> male attorneys are 3.0 percent more likely than female attorneys to have their client plead to the original charge [even though] there was no significant difference between male and female attorneys on whether the defendant received a prison sentence or the length of such sentence. (p. 1172)

Abrams and Yoon (2007) also noted that "attorneys from Tier 1 and Tier 2 schools obtain shorter sentences than those who attended Tier 4 schools [and] Hispanic attorneys' client receive sentences as much as 4.8 months shorter than white attorneys' client" (p. 1170), but there was "no statistically significant effect of attorney race on the likelihood of incarceration" (p. 1169). However, Abrams Yoon also determined that "going from the tenth to ninetieth percentile of public defender ability decreases the defendant's expected sentence length by 5.8 months, or 82 percent of the mean sentence" (p. 1166).

Abrams and Yoon (2007) also observed while skill matters, there are difficulties in measuring attorney abilities related to the way attorneys get cases. They noted that good attorneys may only get good cases, while poorer attorneys may have to take cases with poorer facts (p. 1147). The authors observed that in large firms, there may be many attorneys working on a case and that the better cases may be assigned to the more senior attorneys or to attorneys who are perceived to be better (p. 1147). Furthermore, if one has a good outcome, which may be based on the facts of your case, you are more likely to get better cases in the future (p. 1147). Given all these issues the authors noted that

"developing a hypothesis to test the differential effect of attorney characteristics- such as race, gender, or schooling- makes sense only if we believe that attorneys work in identical- or at least comparable- environments" (p. 1149). This issue was addressed by only comparing the success rates of public defenders against each other as the cases are randomly assigned within the data set (p. 1149); however, this issue present issues for the comparison of attorneys in Lawrence District Court between 2006-2013, which was addressed in the present study.

Contributions of J. M. Anderson and P. Heaton (2011)

Anderson and Heaton (2011) studied the effectiveness of public defenders as compared to court-appointed private counsel in Philadelphia where one in five defendants have been randomly assigned a public defender since 1993 (p. 3). Anderson and Heaton found that "compared to appointed counsel, public defenders in Philadelphia reduce their clients' murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall expected time served in prison by 24%" (p. 3). In Philadelphia:

> counsel appointed in murder cases- both capital and non-capital-receive flat fees for pre-trial preparation- $1333 if the case is resolved prior to trial and $2000 if the case goes to trial. The $2000 also includes the first half-day of trial. While on trial, lawyers receive $200 for three hours of court time or less, and $400/day for more than three hours. (p. 5)

Anderson and Heaton (2011) asserted that "the assignment process is almost completely mechanical and ministerial" (p. 15) which has eliminated selection basis and

"is additional evidence of the independence of our instrument" (p. 15). The authors noted that "because of the selection effect it is usually impossible to isolate and measure the magnitude of the effect of the lawyer and the system for providing that lawyer" (p. 2). Anderson and Heaton (2011) believed that several factors caused the difference in outcomes. They theorized that attorneys in the public defenders' office have more of an ability to work together on a case, unlike a privately assigned attorney who may misjudge the strength of the defense (p. 29). Anderson and Heaton also believed that failure to prepare was also a factor of privately assigned counsel in many cases (p. 30). Arguably, working on a case with team members at a public defenders' office, would give one an incentive not to look unprepared to one's peers, whereas a sole practitioner's true unpreparedness is less likely to be exposed (p. 30). Anderson and Heaton noted that it appeared that "appointed counsel generally spend less time with defendants and investigating and preparing cases less thoroughly" (p. 30). While the authors do not mention Stuntz to support their point about the deficiencies in investigation, their opinion supports the theory that lawyers pressed for time may do less investigation.

The most troubling aspect of the study was that the authors noted that based upon the 2,459 members of the sample studied, if they were represented by the Public Defender's Office, 270 defendants who were convicted, would have been acquitted of murder (p. 32). Anderson and Heaton (2011) noted this would have reduced prison costs by over $200 million dollars (p. 33). The authors urged the legal profession to adopt quality control mechanisms that other professions have in order to "minimize error and increase efficiency" (p. 34). Anderson and Heaton cited Stuntz to suggest that he noted

that legislatures can negatively impact the fairness of the system by failing the allocate enough resources for a just system (pp. 33-34).

Contributions of M. Roach (2010)

Roach (2010) attempted to analyze the impact of moral hazard and adverse selection while comparing the difference in outcomes for attorneys for the public defenders office as compared to private appointed counsel (p. 1). Roach (2010) noted that "unlike public defenders, assigned counsel are usually paid on a case-by-case basis, and handling indigent matters is not their full-time occupation" (p. 2). He stressed that "assigned counsel are private attorneys who choose to supplement their other work by representing indigent defendants" (Roach, 2010, p. 5). Roach noted that "these different systems potentially provide complicated incentives that can lead to agency problems, in particular adverse selection and moral hazard" (p. 2). Roach determined that "in state courts, assigned counsel generate significantly less favorable defendant outcomes then public defenders across a number of measures and that this differential is particularly sensitive to adverse selection effects" (p. 3).

Roach (2010) built upon the work of Iyengar (2007). Iyengar had examined federal cases and compared salaried public defenders to private attorneys assigned to defend the indigent. Roach added to the body of work established by Iyengar by looking at agency problems, by studying the effects of incentive issues, by looking at adverse selection issues, by measuring other options impact the defense panel, by comparing public defenders and assigned counsel in state courts, and by studying the likelihood of

being convicted of the most serious charge, as well as the time from arrest to adjudication (pp. 9-10).

Roach (2010) stressed that "random assignment is extremely important for the interpretation of any measured differences in outcomes since non-random assignment of cases introduces the possibility that selection bias is driving these differences (rather than any fundamental difference in the nature of the representation)" (p. 20). Roach (2010) noted the impact of moral hazard stating that such analysis "hinges on the idea that assigned counsel have incentives to take hidden actions based on the fee structure that affect their time spent on the case" (p. 24). Roach (2010) found that "the outcome gap between assigned counsel and public defenders is a more serious problem at the state level since the defendants with the most at stake receive the most disparate quality of representation as measured by these outcomes" (p. 34). Roach (2010) also noted that "assigned counsel pleas result in significantly less favorable outcomes for defendants than public defender pleas" (p. 35). In regard to adverse selection, Roach (2010) found that "a one dollar increase in the (CPI-adjusted) tenth-percentile attorney wage reduces the probability that an assigned counsel case results in a guilty outcome by 1.7 percentage points, and it reduces the expected sentence by 1.1 months" (pp. 40-41).

Roach (2010) determined that attorney actions may not always be in the client's best interests, but in their own interest, and that "economic theory would indicate that attorneys would attempt to balance attempts to maximize compensation, minimize the time spent on a case, and obtain the most favorable defendant outcome" (p. 50). He noted that differences in pay structures could have an impact on attorney decision-making

in regard to how to spend time on cases (p. 50). Roach (2010) concluded that "moral hazard might be a factor in assigned counsel cases, but if it is, it likely affects the duration of the case rather than outcomes related to the adjudication outcome" (p. 57). Joy and McMunigal (2012), after reviewing Anderson and Heaton, feared that deficiencies in relative performance could be related to a number of attorney self-interest factors including efforts to maximize income by failing to investigate, failing to file motion, to please the judges to get more appointments, or by advising clients to go to trial so the attorney can get more income (p. 2).

Contributions of E. Baer (2008)

Baer (2008) did not test Stuntz's (1997) theory, but the research had an impact upon the Stuntz equilibrium within the criminal justice system. Baer (2008):

> examined mock juror reactions to attorney characteristics, specifically gender, age, and presentation style. Two hundred and forty participants were asked to read a trial transcript and then determine their verdict in the trial and complete a 10-item persuasion scale regarding the defense attorney. (p. iv)

Because lawyers are so integral to trials, Baer (2008) wanted to assess if personality traits or their appearance impacted jurors. Previous studies had shown powerful presentation styles were more persuasive than powerless styles Hahn & Clayton; Holtgraves & Lasky; Hosman et al., as cited in Baer, 2008, pp. 69-70). Baer found:

> the older male attorney was the most persuasive attorney regardless of the presentation style used. It is possible that mock jurors expect an older male

> attorney to be experienced even if he is not well-spoken. The older male attorney was the only attorney in this study not affected by presentation style. (p. 86)

Baer (2008) thought that younger male attorneys with powerful styles would be the most persuasive; however, the data supported that older male attorneys to be the most effective no matter what presentation style they used (pp. 86-87). Baer also determined that a powerless presentation style by an older female attorney was not the least persuasive as expected, but a younger female with a powerful style was the least persuasive (p. 87). Baer's evidence supported that attorneys' characteristics affect different people differently. For example, a younger male attorney with a powerful style was more effective with female jurors than male jurors (p. 91).

Baer (2008) effectively noted the limitations in that:

> the survey sample was not a random sample due to the use of the snowball collection method. Because participants were asked to recruit people they knew to take the survey, it is possible that the new participants would have opinions similar to the person who asked them to participate. (p. 93)

Baer (2008) noted:

> the current research suggests that juror can be affected by attorney characteristics, such as gender, age, and presentation style. The results of this study and others like it could prove useful to attorneys and other legal professionals. In the adversarial system, attorneys are required to provide their clients with the best possible representation. It is important that the effects of attorney characteristics on jurors are correctly determined. If an attorney understood how his or her

> characteristics affected a jury, he or she would be better able to represent clients. This would be true for all extralegal factors that affect jury members. In addition, legal professionals could explain the effect of extralegal factors to jury members before a trial begins. If jurors are aware of the possibility of being influenced by information other than the evidence provided, they may be able to better focus on the facts of the case. (p. 98)

Baer (2008) could have an interesting impact upon the public defender system if delivery mechanisms for appointing indigents' defense counsel are changed in the states. For example, if a state chose not to contract with private counsel and instead employed a thousand new attorneys, one could theorize that these attorneys would be young as they could be just out of law school and looking for a job. Assuming the validity of Baer's theory, one could expect that younger defense attorneys would result in higher conviction rates. Further studies could address how this alteration would impact jury trials, particular when changes in delivery of counsel mechanisms are considered by legislators throughout the country. This research provides a foundation to analyze the results based upon changing demographics of counsel if states are successful in changing their counsel delivery systems to reduce costs.

Contributions of P. E. Mann (2004)

Mann (2004) crafted an informative article explaining the differences in how different people, courts, and states define how one is indigent. Mann (2004) argued often times people mistakenly believe there is just one definition for indigent:

> each jurisdiction applies its own unique combination of answers to: the administration, funding, and service delivery model by which they provide representation; the individuals who receive that representation; the types of cases in which representation is provided; and, the celerity with which counsel is appointed. . . . There are three basic forms of delivery: the public defender office; a contract system; or an assigned counsel/appointment system. Yet such simple titles are deceptive because, regardless of the primary delivery system that a jurisdiction claims to use, few systems conform wholly to the structures that these titles appear to dictate. (p. 1).

Mann (2004) also noted that up to 90% of all defendants receive appointed counsel (p. 2). Mann noted an important aspect of the system is in defining what a "case" is (p. 3). Some jurisdictions count defendants while others count docket numbers (p. 3). These were important points by Mann, but I thought she could have developed the importance of this accounting more, as such can have an important role in determining the efficiency of the system or in funding decisions as the accounting system helps define how much work each public defender is doing.

Mann (2004) also effectively summed up how different locales determine who is afforded counsel:

> Some systems look at the amount of time it would take a defendant to secure sufficient cash to hire an attorney, and therefore appoint counsel to people who have relatively high income and asset liability rations. Other locales design complex matrices that consider income and asset to liability ratios, family size,

> the type of case with which the defendant is charged, the cost of securing privately paid counsel to defend on the type of charge in the jurisdiction, and other factors. (p. 5)

Mann (2004) also noted that the judge can just appoint counsel if he or she wants (p. 5). Her article brought up many valid points, but Mann did not seize the opportunity to suggest that there should be a check on what the judge can do in appropriating public resources. Additionally, the article is thought-provoking and spurs discussion and thought as one can theorize about how various delivery mechanisms can be achieved. For example, in Massachusetts and other states, there are calls for more stringent checks on qualifications for appointment of counsel. Mann's argument leads to a question of whether counsel should be afforded to those who have equity in a home and whether taxpayers should pay when one could sign a mortgage or note with a counsel. That may have been appropriate decades ago, or it may functionally have happened when communities were more cohesive when people lived in an agricultural economy centuries ago. Also, in regard to alternate procedures, if vouchers are granted or approved, costs could be contained and clients could negotiate rates and contracts with lawyers and/or sign mortgages or notes. Future analysts could study how such a system would be different from the social policy debate in whether there should be subsidies or tax breaks for those attending private schools in areas where the public schools are having difficulties.

Contributions of M. Etienne (2008)

Etienne (2008) advanced the discussion and discourse in regard to workgroup theory and how systems can erode the successfulness of the attorney-client relationship (p. 427). Etienne aided the discussion and recent focus on the Sixth Amendment by concluding that the Federal Sentencing Guidelines caused the right to counsel to be weakened as it does not afford the full protection that it once did (p. 485). Etienne believed it weakens defense counsel and causes defense counsel to "be at the mercy of prosecutors" (p. 485) so as to avoid receiving sentences at the high end of the sentencing guidelines. "They have also seen a transition from zealous advocacy to one that emphasizes creativity and technical expertise" (p. 485). Etienne (2008) bases her opinions on empirical research and looks at the way that defense attorney advocacy has been altered by the guidelines (p. 427).

Etienne (2008) based many of her conclusions on interviews or self-reporting by defense counsel. This is a positive and a negative of the research. While insightful to solicit and review how counsel report they are affected by the change, counsel may not always be truthfully self-critical in their assessment out of concern they may be discovered, sanctioned, or looked down upon for revealing the true effects or impact upon them. Additionally, even if they are told they are secret, they could always be fearful that answers could ultimately be revealed and be used to criticize them. Etienne (2008) opined from these interviews that "empirical research suggests that some lawyers have redefined what it means to be a good advocate in the face of the perceived rigidity and severity of the Guidelines" (p. 427). This is a general statement as "some" is not

defined and is very broad. It is apparent the guidelines have had an impact, but there is no revelation in regard to the total impact or impossible to define how much all counsel have been affected. However, Etienne addressed how counselors act or are assigned, which could have an impact upon the overall justice system, which was important to examining the impact of how counsel are provided or delivered to indigent clients in the current study.

Etienne (2008) argued that "through substantive sentencing policy, Congress has chilled criminal defense advocacy, thereby thwarting the right to counsel and other procedural safeguards that depend on the assistance of counsel" (p. 428). However, Etienne (2008) did not address the impact on public defenders versus private counsel or talk about how this is different between assigned counsel for the indigent versus private counsel in making these assessments. Etienne suggested the laws have diluted attorney zealousness, "although court rulings on the constitutional right to counsel have remained steadfast, the United States Sentencing Commission, under congressional authority, has diluted the right by reshaping defense attorney conduct through the enactment of substantive criminal sentencing rules and policies" (p. 429).

Etienne (2008) attempted to "investigate the extent to which criminal defense lawyers perceive that their advocacy decisions are influenced by the acceptance of responsibility determinations or other provisions of the Guidelines, and how these attorneys respond to their perceptions" (p. 430). The author interviewed 40 attorneys and acknowledged limitations of deriving opinions from their interviews. Etienne noted that "all empirical research requires the researcher to make a series of limiting choices. One

obvious limitation of this study is its reliance on the perceptions of defense lawyers to the exclusion of other participants in the criminal justice system. It is possible--even probable--that prosecutors, judges, witnesses, probation officers, and others might provide different 'truth' about the Guidelines' effect on attorney advocacy" (p. 430, at footnote 13). The author acknowledged she was reporting only on perceptions of the counsel, but it is questionable what impact perceptions have and when the actual impact is more important; however, it would be nearly impossible to study this as one would not be able to control behavior of a counsel and study it both before and after the guidelines, particularly when counsel age, become more experienced, and adopt different tactics and techniques in court.

Etienne (2008) provided appropriate background about the Guidelines in order to shape the context of her data and opinions and notes that the guidelines assign points for certain types of offenses, one's criminal record, and for conduct after the offense, and argued this scoring system is the basis for litigation and advocacy between the defense and prosecution (p. 433). Etienne believed that the point system has weakened the role of the judge and increased the power of the prosecutors creating an imbalance between the prosecutor and defense counsel roles particularly when the prosecutor has all the discretion in regard to how to charge a case which determines the minimum sentences (pp. 433-434). A weakness in the research was that only 40 counselors were interviewed in two jurisdictions, while the author elected not to reveal what jurisdictions she visited. Etienne revealed only that they were large jurisdictions with diverse populations (p. 436, footnote 43). This approach limits peer review of the work, as additional questioning

within the sample pool is foreclosed, as Etienne decided, perhaps appropriately, to protect her subjects to improve the quality of their responses. The author, an attorney who previously practiced for 5 years in federal district court, asked the defense counsel a series of questions and coded the responses based upon her impression of the replies. Etienne presented a compelling viewpoint as she relayed examples of counsel not feeling hampered by the system and revealing that counselors are uncomfortable with the change in procedure (p. 467).

Etienne (2008) gave excellent practical pointers in regard to the impact on the attorney/client relationship, for example noting, "You sit and talk with them and say, 'it's your word against a couple of cops,' for instance. And it can be a five-point swing. And it translates into a lot of time in jail" (p. 476) if one brings this motion and does not prevail. The judge can construe it as a lack of cooperation in regard to post-allegation conduct. Etienne noted that lawyers believe that clients might perceive this talk as the lawyer letting them know that they are lying and that such negatively impacts the lawyer/client relationship (p. 476). In a 2003 law review article, Etienne advocating that the "acceptance of responsibility provision of the Guidelines had the unintended effect of restricting zealous advocacy because some judges have imposed higher sentences on defendants whose lawyers employed aggressive defenses" (Etienne, 2003, p. 102). She earlier had noted that "the responsibility provision allowed these judges to equate a vigorous defense with a lack of contrition or remorse" (Etienne, 2003, p. 109).

Etienne (2008) relates to the workgroup theories of Hartley (Hartley, 2004, p. 3), and leads to the notion of examining the impact that appointing counsel can have on the

public and private counsel success rates, as public counsel likely will have much more experience and familiarity with that particular court versus private counsel, who are more likely to travel around to various courts in a county or state.

Contributions of J. C. Hoeffel (2007)

Hoeffel (2007) showed how the requirements of the Sixth Amendment have expanded. Hoeffel suggested budgetary pressures impact other areas of the system as theorized by Stuntz (1997). Justice Scalia has confirmed that "the Sixth Amendment counsel of choice … commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best" (*United States v. Gonzalez-Lopez,* 2006, as cited in Hoeffel, 2007, p. 525). Hoeffel also cited the importance of Chief Justice Burger, who opined that the Sixth Amendment did not mandate an attorney-client "meaningful relationship" (*Morris v. Slappy,* as cited in Hoeffel, 2007, p. 525). These statements alone could support proponents who advocate for a voucher system to have better control over costs while giving the defendant more control over the election of his or her counsel. As noted by Hoeffel, "A client chooses a lawyer with whom he or she can develop the bedrock principle of trust. Without this trust, the relationship is indeed meaningless, and the client will choose another attorney" (Hoeffel, 2007, p. 527). Allowing one to select their counsel, after shopping around, would more promote the interests of justice and the Sixth Amendment than would randomly appointing counsel to a defendant. Some trust could be established early with the implementation of this procedure, and it would also likely produce cost savings and reduce defaults. This would allow for more efficiencies and

potentially better match clients with counsel. For example, it makes little sense to match a non-Spanish speaker attorney with a client who speaks only Spanish. It would be difficult to establish a rapport and trust with that client.

Hoeffel (2007) advocated that an indigent defendant should have the right to continue on with the same lawyer once an attorney-client relationship has formed, as substituting in new counsel, without granting continuances, results in less effective counsel and a functional penalization for being indigent (p. 528). Hoeffel noted that frequently different counsel in the defender's office may be used at different events leading up to the trial (p. 528). She advocated that the Sixth Amendment right to counsel rulings need to be advanced to allow for the continuation of ongoing relationship between counsel and indigent defendants (Hoeffel, 2007, p. 528). The author noted that the courts first addressed selection of counsel issues and obtaining continuances to do so in 1988 in *Wheat v. United States* (1988). A Mr. Wheat wanted to substitute in a counsel who had already successfully represented Mr. Wheat's co-defendants; the Supreme Court ruled that his presumption in favor of counsel of his choice was overcome by the showing of "'a serious potential for conflict'" (*Wheat v. United States*, as cited in Hoeffel, 2007, p. 530). Hoeffel noted that the Court addressed an analogous issue of selecting counsel in *Caplin & Drysdale, Chartered v. United States,* 1989); however, Hoeffel stressed that the court reasoned that one has no right to spend others' money for an attorney in a case where the defendant's assets had been forfeited (p. 531). This seems to be analogous to the fact that courts will appoint who is next on the list in indigent cases, leading to a question of whether that the most efficient way to approach this delivery of services

dilemma. The system likely would become more efficient if the defendant had to invest his time in securing an attorney. More thought or research should go into investigating any efficiencies or challenges that might emerge if defendants were given a voucher to secure counsel. Future analysis should address why one can represent oneself and assume those risks; at the same time, one may not be allowed to make informed decisions about the conflicts between a lower-priced lawyer's own time and his or her financial interests balanced against one's own financial interests. One should consider the risks of losing one's liberty in deciding what type of counsel is best. Hoeffel noted that "the court was all too willing to give Anthony Faretta every benefit of the doubt in granting his wishes, emphasizing that 'the right to defend is given directly to the accused, for it is he who suffers the consequences if the defense fails'" (*Faretta v. California*, as quoted in Hoeffel, 2007, p. 537).

Hoeffel (2007) was useful in analyzing and assessing the efficiency of alternatives to the current delivery mechanisms in place for appointing defense counsel. The author noted that a continuation of attorney-client relationships for the indigent "will foster the defendant's belief in the legitimacy of the criminal process" (Garcia, as cited in Hoeffel, 2007, p. 540). Currently, some defendants might believe that a court-appointed lawyer will not fight as hard for a client, even it is not true. Efficiencies could result if an indigent defendant were afforded the option to invest in his or her case by interviewing attorneys who take appointed cases. If a defendant were allowed to select an attorney, potentially if he or she defaulted the attorney would be removed, which would likely act to eliminate many defaults. Clients who do not like their attorney may default to attempt

to get a new counsel. Hoeffel noted that "if a client trusts his lawyer, the quality of representation is vastly increased. An effective defense at trial, the negotiation of a good plea bargain, and the development of mitigating evidence for sentencing all require the full cooperation of the client" (Poulin, as cited in Hoeffel, 2007, p. 541). "Trust also means that the defendant is far more likely to follow his lawyer's advice and instincts" (*Slappy*, as cited in Hoeffel, 2007, p. 542). Hoeffel (2007) noted that the outcome likely suffers when there is no trust between a criminal defense lawyer and his or her client (p. 542).

Hoeffel (2007) stressed that there are weaknesses in the system, as "many public defenders do not have the time, resources, or abilities to meet with their clients often, keep them informed, or develop trust" (Natapoff, as cited in Hoeffel, p. 543). Some counselors do not have a personal investment in case like privately hired counsel may have and defendants have little right to replace them (Rosen, as cited in Hoeffel, 2007, p. 543). Hoeffel (2007) observed that random appointments can compromise the system due to poor matches between attorneys and clients:

> A client who consciously chooses or prefers an aggressive litigator may be more likely go to trial than a client who prefers a lawyer whom he knows gets great deals from the prosecutor. Regardless of what the defendant knows in advance, each lawyer will choose her own strategies at every step, as there are usually multiple possible strategies. Choosing his lawyer may be the most important choice the defendant will make in the presentation of his defense. (Hoeffel, 2007, p. 544)

Hoeffel (2007) argued:

> This should not only include the continuation of a relationship within a trial, but between trials. In other words, given the importance of trust, autonomy, and fairness to the right to counsel of choice, the court should appoint the same attorney to represent an indigent defendant in his subsequent cases, if the defendant so chooses. (p. 549)

Contributions of the *Harvard Law Review* Article, "Rethinking" (2011)

In "Rethinking" (2011), the *Harvard Law Review* spurned thinking in regard to the potential for alternative delivery mechanisms for counsel and how the court sets the rules for representation, and, ultimately, argued there is a gap in literature in assessing how cuts in funding impact the success rates of counsel. The law review noted, most importantly, that:

> Criminal defense is personal business. For this reason, the Constitution's ample procedural protections for criminal defendants are written not just to provide a fair trial, but also to put the defendant in control of his own defense. . . . [The] right to the assistance of counsel has many facets, but its most ancient and fundamental element is the defendant's right to counsel of his own choosing. (p. 1550)

In "Rethinking" (2011), the *Harvard Law Review* discussed the substantive component of the right to counsel in addressing conflicts of interest and a waiver of such, representation by non-attorneys, and self representation and causes one to theorize on how waivers could impact the delivery of counsel to indigents (p. 1552). "Rethinking" asserted there is a gap in the literature in regard to how policies or initiatives impact the

effectiveness in counsel. *Wheat v. United States* (1988) upheld the right to conflict-free representation (as cited in "Rethinking," p. 1552). The court noted that the trial court retained the right to ensure there was conflict-free representation and such was not the choice of the defendant to waive it (as cited in "Rethinking," pp. 1552-1553). The Court stressed that the:

> presumption in favor of a defendant's choice of counsel ... may be overcome ... by a showing of a serious potential for conflict, notwithstanding a defendant's waiver. [The courts have the] inherent and nearly exclusive authority to regulate the practice of lawyers who appear before them. (pp. 1553-1554)

"Rethinking" (2011) noted a gap in the literature in regard to the correlation between budget initiatives and cuts upon attorney performances as it assesses whether non-lawyers could more efficiently handle criminal cases if the rules were changed to allow such. However, it is not clear yet whether cost cutting has impacted the effectiveness or whether further cuts could be made while still preserving current effectiveness. The law review article noted the courts' refusal to allow accountants and disbarred attorneys to represent defendants was not a violation of the Sixth Amendment and discussed whether having such a skilled person is really functionally different than electing to represent oneself (pp. 1555-1556). Interestingly, "Rethinking" noted that:

> defendants would fare better with counsel but responded that counsel was less likely to be effective where a defendant is unwilling to accept assistance [and] defendant has the inherent right to determine how to best to conduct his [sic] defense, even if his decisions ultimately work to his detriment. (p. 1557)

The most intriguing aspect of this review was the discussion of "conflicts of interest" and thoughts that it inspired in regard to possible adjustments in delivery mechanisms for indigent services. "Rethinking" (2011) noted, "Conflicts of interest undoubtedly present serious risks to defendants—recall that the Sixth Amendment provides a right to conflict-free counsel-and may even threaten the adversarial process itself" (p. 1562). "Rethinking" questioned "where conflicts are only potential, defendants should have the right to weigh the risks themselves, given defendants' superior knowledge of their own defense strategy" (p. 1564). In considering such, potentially a flat fee system could work where a voucher was presented to acquire a flat fee counsel, but the state and Federal constitutions would have to be amended to allow waivers of ineffective assistance of counsel claims in such scenarios, which is unlikely.

"Rethinking" (2011) also questioned the "argument that state bar regulations faithfully track minimum standards of basic competence" (p. 1567). The authors of the article theorized that, if not for the bars to entry, courses could be created to increase the pool of defenders, whereby individuals could qualify to represent people in criminal cases without going to law school or passing the bar, or through an internship or academies to meet Sixth Amendment standards (p. 1569). "Rethinking" suggested that there was room for such mechanisms as the "choice of counsel is not absolute" (p. 1570). A defendant cannot compel an unwilling counsel to have the state pay any attorney he or she selects, amongst other limitations (p. 1570). Waivers may be impossible as "difficult questions may arise even under this framework, especially if a court determines that a

defendant lacks the basic ability to make such a choice for himself in the first place" (p. 1571).

Contributions of R. A. Posner and A. H. Yoon (2011)

Posner and Yoon (2011) did not study Stuntz (1997) directly, but their research had an impact upon the Stuntz equilibrium within the criminal justice system (p. 1). The authors examined the responses of judges to a 2008 survey with multiple choice and open-ended questions both relating to the quality of legal representation and such qualities' perceived influence on civil and criminal cases (pp. 1, 3). Surveys were sent out to 456 randomly selected federal judges, and the National Center for State Courts sent out a link to the survey to judges affiliated with it, which resulted in a total of 666 federal and state judges providing responses (Posner & Yoon, 2011, p. 2).

Posner and Yoon (2011) found that "judges perceived significant disparities in the quality of legal representation in criminal cases, and that these disparities occur in 20% to 40% of the cases they hear" (p. 2) and determined "federal judges generally rate prosecutors as comparable in quality to public defenders and significantly better than court-appointed counsel or retained counsel" (Posner & Yoon, 2011, p. 2). State judges agreed with the high quality of prosecutors but believed that privately retained counsel were of a higher quality generally than public defenders or court-appointed counsel (Posner & Yoon, 2011, p. 2).

With particular relevance to Stuntz (1997), the responses of the judges in regard to their impression of lawyers in the criminal process were most important (Posner & Yoon, 2011, p. 5). Federal judges ranked public defenders the highest and then

prosecutors but ranked court appointed and privately retained counsel the worse (p. 5). State judges perceived "greater parity amongst criminal lawyers, with both appellate and trial judges giving their highest ratings to retained counsel" (p. 5).

Judges were also asked about the impact of representation on criminal case outcomes in Question 6 of the survey (Posner & Yoon, 2011, p. 5). State trial judges believed that privately retained counsel "had a significant influence on case outcomes relative to court-appointed counsel" (Posner & Yoon, 2011, p. 5). When asked the significance of disparities of skill between lawyers:

> a majority within each judge group except federal district judges thought that juries typically favored the litigant with the better lawyer. Among federal appellate judges, 59% of judges chose this response; among district judges, 47% chose this response- as did 73% of state appellate judges and 64% of state trial judges. (Posner & Yoon, 2011, p. 8)

Additionally:

> The view among judges—except state trial judges—that the different types of criminal lawyer, including prosecutors, do not influence case outcomes significantly challenge the belief of some scholars that prosecutors have a great impact on outcome. One explanation is that judges see themselves—or, in jury cases, jurors—as playing a more important role in the case than lawyers. (Posner & Yoon, 2011, p. 10)

One judge suggested in a response that "jurors get it right if the judge presides fairly and judiciously" (Posner & Yoon, 2011, p. 11). Posner and Yoon (2011) believed

that it is possible, if this theory is correct, for judges and jurors in criminal cases to lean in favor of the less skilled counsel to correct disparities in skill (p. 11).

Contributions of C. W. Daly (2005)

Daly (2005) addressed many of the ethical dilemmas and competing forces at work in Stuntz (1997) in reviewing the crisis in Massachusetts with "part-time 'bar advocates,' attorneys who accept indigent cases on a contract basis" (p. 679). Daley (2005) noted that numerous bar advocates refused to accept new cases due to low compensation which resulted in the Supreme Judicial Court ordering the release of defendants in custody if the system was not adequately funded by the legislature (p. 679).

Daly (2005) noted in Massachusetts, the Committee for Public Counsel Services (CPCS) is charged with representing "all indigent defendants who face charges that carry jail sentences" (p. 680). In 80% of the cases within the committee's jurisdiction, the CPCS must contract with private lawyers who volunteer to take court-appointed cases at a reduced rate (pp. 680-681). These bar advocates all across the commonwealth refused to take cases in protest over low rates beginning in 2003 (Daly, 2005, p. 681). Daly (2005) noted, prior to trial:

> the dissatisfaction with the fee system and the refusal of bar advocates to take new cases coalesced into a suit brought by nineteen indigent criminal defendants alleging abridgement of their rights under both the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights because they were held in custody without counsel. (pp. 681-682)

Justice Spina ruled that the defendants rights were violated and that "when private attorneys take court-appointed cases, they are entitled to a rate of compensation more modest than that of the marketplace, but they are not pigeon-holed into pro bono work" (*Lavallee,* as cited in Daley, 2005, p. 683) in refusing to honor the attorney general's request to assign counsel cases without their consent. Justice Spina noted that "the duty to provide counsel falls squarely on the government, and the cost of public safety and the burden of a systemic lapse is not to be borne by defendants" (*Lavallee,* as cited in Daley, 2005, p. 683). Justice Spina ordered that:

> No defendant entitled to court-appointed may be required to wait more than forty-five days for counsel to file an appearance [and] ordering such relief recognizes the public's strong interest in bringing serious criminals to justice swiftly, but it also recognizes society's vital interest in the fair conduct of criminal proceedings. *(Lavallee,* as cited in Daley, 2005, p. 683)

This pay issue stressed the system for years but was not addressed until "it shook the collective consciousness of the voting public" (Lewis & Saltzman, as cited in Daly, 2005, p. 684). A bill was quickly passed raising pay by $7.50 an hour, but it resulted in Massachusetts' bar advocates being paid at one of the lowest rates in the country, even with the increase (Daly, 2005, p. 685). In advocating for change, Daly (2005) suggested that leaders, when crafting future legislation and policies, should address "how bar advocates view their responsibilities to the public interest where the immediate outcome of their refusal to take appointments is that suspected criminals are released from

custody" (p. 686) and under what circumstances bar advocates "validly refuse an appointment for 'cause'" (p. 686).

Contributions of T. H. Cohen (2011)

Cohen (2011) did not examine Stuntz (1997), but the research has an impact upon the Stuntz equilibrium within the criminal justice system (p. 1). Cohen reviewed whether there were differences in adjudication and sentencing based upon the type of counsel (p. 1). The author evaluated case data from assigned counsel, privately retained counsel, and public defenders using the State Court Processing Statistics series for felony cases filed in May in 2004 and 2006 for a sample of 40 of the nation's 75 most populace countries (p. 11). Cohen reported that in 2004 and 2006, 80% of the defendants he studied with felony charges were represented by a public defenders or assigned counsel, while the remaining one fifth hired their own counsel (p. 14).

Cohen (2011) noted that "assigned counsel systems have been criticized for appointing attorneys with inadequate skills, experience, and qualifications" (p. 4), but some have argued that these weaknesses can be reduced with proper oversight systems (p. 4). Cohen noted that public defenders may be more successful than bar advocates as they may have more talented attorneys and they are also able to easily use or employ investigators, experts, or administrative help (p. 5); Cohen also stressed that appointed counsel do not typically do not have luxury of specializing in just one type of law and are only supposed to take indigent cases to supplement their practices in some cases (pp. 5-6). Also, public defenders' close relationships with prosecutors and judges may also allow them to strike better deals in certain cases (p. 6). However, Cohen noted that

private attorneys may be more successful in some cases because they "cannot be as easily pressured into emphasizing expeditious case resolution over vigorous advocacy" (p. 6) and also may have more resources to assist their defense than the indigent (p. 6).

Summary and Conclusions

The major theme in the literature is Stuntz's (1997) theory that the criminal justice system is a system in balance and that pressures in one part of the system will affect other parts of the system (p. 5). Researchers have examined the relative effectiveness of types of counsel related to many part of the criminal process, including the results of a bail hearing, sentences, charge reduction, and likelihood of confinement; however, a gap exists in the literature related to attorney effectiveness in jury trials. Hartley (2004) tested Stuntz's theory in a study on the comparative effectiveness on the likelihood of release on personal recognizance, whether charges were reduced, whether the client was confined, and what sentence was received (p. i). Although Hoffman et al. (2005) empirically tested Stuntz's theory in demonstrating that public defenders achieved poorer results if one looked at actual sentences, researchers have not examined whether there are significant differences between private counsel and publicly appointed counsel in state district court jury trials, nor have studies been conducted related to the impact of cost-cutting initiatives on the performance of publicly appointed counsel. Because of what is at stake, it is important to determine if the type of lawyer handling a case significantly affects whether a defendant is acquitted after a jury trial.

Stuntz (1997) believed that the criminal justice system is a system in balance and that stresses in one part of the system would impact other parts of the system (p. 5).

Stuntz also believed that the costs of the system drive attorneys toward filing more procedural motions at the expense of investigation (p. 2). There is a void in the literature in regard to whether cuts in courts' budgets affect how well attorneys appointed to represent the indigent perform. According to Stuntz, decreases in compensation for publicly appointed counsel shall cause less investigation and more convictions for those appointed to represent the indigent. The literature has inadequately addressed whether the success rates of private counsel and publicly appointed counsel change in comparison to each other in the face of budget cuts over a multiyear period. If Stuntz's theory holds, private counsels' acquittal rates should improve as related to attorneys who were publicly appointed to case. The purpose of this study was to determine if there are significant differences between the acquittal rates in jury trials for defendants with publicly appointed counsel versus private counsel, and whether the performance of publicly appointed counsel has been adversely impacted over the years due yearly budgetary restrictions. This research may help legal professionals, judges, attorneys, litigants, and legislators by understanding the impact of budgetary decisions and influences on the criminal justice system and jury trials in particular.

Chapter 3: Research Method

Introduction

The purpose of this study was to address the gap in the literature in regard to attorney effectiveness related to verdicts in jury trials. Benedetti (2011) noted that the "efforts to control costs will help to preserve the most important features of our respected and effective system for delivering legal services" (p. 5). I quantified jury results from 2008 to 2013 in Lawrence District Court in Essex County, MA, in years before and after August 15, 2011, when the following cost-saving measures were implemented on or after the change date:

1. Mileage reimbursements were eliminated and counsel were instead urged to attempt to use mileage as a tax-deductible expense.
2. Billing for spent waiting in court was reduced from two hours to one hour.
3. The presumptive hourly cap on hours billed per day for District Court cases was reduced from 10 hours to 8 hours unless a waiver was granted.
4. Billable hours for attorneys licensed to practice law for less than 2 years are now limited to 1500 hours per year. (Benedetti, 2011, p. 5)

I compiled a data set and conducted analysis using a logistic regression model to address whether there were significant differences between publicly appointed counsel and privately retained counsel regarding the likelihood of a defendant being acquitted after a jury trial and whether there were changes in effectiveness after August 15, 2011, when cost-cutting initiatives were implemented.

Research Design and Rationale

To assess whether private or public attorneys were more likely to get a not guilty verdict at trial, I developed a data set by reviewing the jury sheets for all cases having criminal jury trials between January 1, 2008 and December 31, 2013, and then the case files. The actual case file for each jury trial was pulled and reviewed to compile the dataset.

To test Stuntz's (1997) theory, as was done by Hoffman et al. (2005), I designed the study to show the relationship between what type of counsel was used and the effectiveness as measured by acquittal or a finding of guilty by a jury. The dependent variable was the result of trial after a jury trial. The result could only be guilty or not guilty. The independent variable was what type of counsel the defendant had (private or publicly appointed private counsel). Whether counsel is appointed is determined by the judge after an assessment of income and recommendation by the probation department. The control variables used for the logistic regression model were (a) the judge who presided over the trial, (b) whether an interpreter was used, (c) the gender of the judge, (d) the gender of counsel, and (e) the gender of the defendant. Baer (2008) and Martin and Garces (2008) showed that these covariates can influence the results of trials.

To address the research question, I analyzed the acquittal rates for the all cases from 2008 and 2013 reaching the jury session. A binary logistic regression was used to compare the acquittal rates for publicly appointed counsel based upon the whether the defendant hired counsel or had counsel assigned to them by the court. Additionally, the acquittal rates of both privately retained counsel and publicly appointed counsel were

compared for all years from 2008 to 2013 to review whether the onset of cost-cutting initiatives significantly impacted the effective rates of the types of counsel to address that gap in the literature.

Methodology

I collected the results and data from all jury trials in Lawrence District Court, MA, for the years 2008, 2009, 2010, 2011, 2012, and 2013. I used the total sample of jury trials for each year to avoid any sampling issues, errors, or adverse issues related to sampling size. Additionally, these years were selected because the data were readily accessible and case files had been destroyed. Since the trial records were public and historical, the files were analyzed, and there was no need for obtaining consent, or conducting interviews, exit studies, or pilot studies. To access the data, clerks for Lawrence District Court, MA, granted access to court records. These records represented the best source of data related to attorney effectiveness, as the case files contained all the data that were relevant to the case, such as when the case was tried, the sex of the defendant, the type of counsel, the counts tried, the verdicts, and the names of the judge, prosecutor, and defense attorney. There was no other official source for the record of each jury trial other than these documents.

Data were input into SPSS 21.0 for Windows for analysis. Descriptive characteristics of the data were calculated. Frequencies and percentages were run for categorical data, including the judge who presided over trial, whether an interpreter was used, gender of the judge, gender of counsel, and gender of the defendant. Means and

standard deviations were established for data over the 6 years. The following research questions were examined:

Research Question 1: Is the success rate of publicly appointed counsel before cost-cutting measures significantly different after cost-cutting measures?

$H_0$1: The success rate of publicly appointed counsel is not significantly different before and after cost-cutting measures.

Ha1: Success rate of publicly appointed counsel is significantly different before and after cost-cutting measures.

To address RQ1, I ran a test of proportions to determine if statistically significant differences exist on the success rate of publicly appointed counsel before and after cost-cutting measures. The success rate of publicly appointed counsel was measured before cost-cutting measures and after cost-cutting measures. The statistical significance was determined using an alpha value of .05. The one-proportion z test is an appropriate method for this analysis, as whether statistical proportional differences exist within the same population measured at two times was examined (Tabachnick & Fidell, 2012). When the calculated *z*-value is larger than the critical *z*-value of $\pm$ 1.96, there will be failure of the null hypothesis as such will expose a significant proportional difference (Tabachnick & Fidell, 2012). An alpha value of 0.05 was used so as to establish a 95% certainty that differences did not randomly occur (Tabachnick & Fidell, 2012).

Research Question 2: Is the success rate of privately retained counsel before cost-cutting measures significantly different after cost-cutting measures?

$H_0$2: Success rate of privately retained counsel is not significantly different before and after cost-cutting measures.

Ha2: Success rate of private defenders is significantly different before and after cost-cutting measures.

To address RQ 2, I ran a test of proportions to determine if statistically significant differences exist on the success rate of private defenders before and after cost-cutting measures. The success rate of privately retained counsel before cost-cutting measures was compared to the success rate after cost-cutting measures were implemented. The statistical significance was determined using an alpha value of .05 using the one-proportion *z* test (Tabachnick & Fidell, 2012). There was failure to accept the null hypothesis when test results showed that the calculated *z*-value was larger than the critical *z*-value of $\pm$ 1.96 as a significant proportional difference is exposed. An alpha value of 0.05 was assigned to have 95% certainty that differences were not random (Tabachnick & Fidell, 2012).

Research Question 3: Does type of counsel predict the result of jury trials, after controlling for judge that presided over the trial, whether an interpreter was used, gender of judge, gender of counsel, and gender of defendant?

$H_0$3: Type of counsel does not effectively predict the result of jury trials, after controlling for the judge who presided over trial, whether an interpreter was used, gender of the judge, gender of counsel, and gender of the defendant.

Ha3: Type of counsel effectively predicts the result of jury trials, after controlling for the judge who presided over trial, whether an interpreter was used, gender of the judge, gender of counsel, and gender of the defendant.

To address RQ3, I used a binary logistic regression to determine if type of counsel effectively predicted the result of jury trials, after controlling for the judge who presided over trial, whether an interpreter was used, gender of the judge, gender of counsel, and gender of the defendant. The independent variable in this analysis was the type of counsel (public vs. private) which was treated as a dichotomous variable (Tabachnick & Fidell, 2012). The result of jury trial (not guilty vs. guilty) was used as the dependent variable, which was treated as a dichotomous variable. The judge who presided over the trial was used as a nominal variable. Additionally, whether an interpreter was assigned to the trial was used as the control variable and treated as a dichotomous variable (yes vs. no). The gender of judge, gender of counsel, and gender of defendant were used as control variables and treated as dichotomous variables (male vs. female). The statistical significance was determined by applying an alpha value of .05.

I used a binary logistic regression to exam how the set of variables predicted a dichotomous dependent variable. A logistic regression was used to estimate the probability of an event occurring and to test the odds of which type of counsel would predict the probability of a finding of guilty or not guilty by a jury (Stevens, 2009). The Nagelkerke R^2 was used to assess the variability accounted for on the dependent variable by the predictor variables (Tabachnick & Fidell, 2012). The overall model significance was assessed for the logistic regression by examining the collective effect of the predictor

variables (Tabachnick & Fidell, 2012). If statistical significance was found, the independent variable would be assessed with the Wald coefficient (Tabachnick & Fidell, 2012) as the major assumption is that the outcome variable must be discrete and there should be no outliers in the data, and there should be a linear relationship between the odds ratio and the independent variable (Tabachnick & Fidell, 2012).

Threats to Validity

I used the total sample of all jury trials in Lawrence District Court, MA, from 2008 to 2013 to minimize threats to internal or external validity. Since historical data were used, it was unlikely that there were threats due to the interaction of the variables. Weaknesses in the data were likely attributable to the fact that only one court was used and that historical data from only particular years were used. The study could have been enhanced if more courts were used or historical data from more years were used.

Ethical Procedures

I minimized ethical considerations by using historical documents, which negated the need to interview participant attorneys or defendants. IRB approval was requested and approved (**02-13-14-0119270)** prior contacting court officials. Institutional permissions were also received prior to accessing the historical records. All copies of court records will be stored in a safe to prevent materials from being distributed. Copies of case files will be also maintained in a safe. I redacted all defendants' names in the data sets, and case numbers were assigned for each defendant to preserve the confidentiality of the defendants. The names of attorneys and judges were assigned codes, even though public information was used.

In sum, using court records, I compiled a data set from the total sample of cases empanelled of jury trials in Lawrence District Court from 2008 to 2013. Data were input into SPSS 21.0 for Windows for analysis. Descriptive statistics were conducted to describe the characteristics of the data. Frequencies and percentages for categorical data were run, including the judge who presided over trial, whether an interpreter was used, the gender of judge, the gender of counsel, and the gender of the defendant. Tests of proportions and binary logistic regression were used to analyze the success rates of the types of counsel and whether appointed counsel's relative effectiveness decreased in light of the implementation of cost-saving measures. The data collection process and results are reported in Chapter 4.

Chapter 4: Results

I analyzed the verdicts of indigent defendants and self-financed defendants who had a jury trial in Lawrence District Court, MA, from 2008 to 2013. The results of this research are important because the study was designed to contribute to Stuntz (1997), who theorized that stresses on one part of the criminal justice system will be compensated for elsewhere in the system. I analyzed if the success rate of publicly appointed counsel before cost-cutting measures were implemented is significantly different than after cost-cutting measures were implemented, if the success rate of privately retained counsel before cost-cutting measures were implemented is significantly different than after cost-cutting measures were implemented, and whether the type of counsel predicts the result of jury trials after controlling for other variables.

In Chapter 4, I review the method of data collection and discrepancies from the plan presented in Chapter 3. The sample is discussed, and a report of the descriptive statistics is presented. Statistical analysis is presented by research questions, including probabilities associated with variables. Finally, a summary of the answers to research questions is presented.

I examined 640 jury verdicts for individual counts from January 1, 2008, until December 31, 2013. Verdicts were examined during spring 2014 in Lawrence District Court. Jury sheets were used to pull the docket numbers for each jury trial, and then case files were reviewed. This sample contained many cases that were actually arraigned earlier than 2008. Thirty-one verdicts were removed for having "DV" as the outcome of the case; the jury had never deliberated on the counts as the judge dismissed those counts

after the prosecution's case was presented. Thus, data analysis was conducted on 609 jury verdicts. A majority of the verdicts came from before the intervention date of August 15, 2011, when defense attorney funding was adjusted (*n* = 324, 53%). The majority of the verdicts had defendants who did not use an interpreter (*n* = 481, 79%). Of those who did use an interpreter, the largest proportion of counts had defendants who spoke Spanish (*n* = 124, 20%). The majority of the defendants (*n* = 518, 85%), the judges (*n* = 458, 75%), and counsel (*n* = 466, 78%) were male; while the majority of the prosecutors were female (*n* = 455, 75%). The majority of the verdicts involved appointed counsel (*n* = 338, 56%), and the majority of the outcomes were not guilty (*n* = 320, 53%). Most of the verdicts involved multiple counts on the same defendant (*n* = 320, 53%). Frequencies and percentages for verdict descriptors are presented in Table 1.

Table 1

Frequencies and Percentages for Verdict Descriptors

Descriptor	*n*	%
Time		
Pre	324	53
Post	285	47
Interpreter		
None	481	79
Khmer	2	0
Korean	1	0
Spanish	124	20
Vietnamese	1	0
Defendant gender		
Female	91	15
Male	518	85
Judge gender		
Female	150	25
Male	458	75
Counsel gender		
Female	134	22
Male	466	78
Judge		
JudgeA	14	2
JudgeB	174	29
JudgeC	1	0
JudgeD	1	0
JudgeE	1	0
JudgeF	143	24
JudgeG	2	0
JudgeH	5	1
JudgeI	117	19
JudgeJ	2	0
JudgeK	34	6
JudgeL	48	8
JudgeM	63	10
JudgeN	4	1
Counsel		
Appointed	338	56
Private	270	44
Verdict		
Guilty	289	48
Not guilty	320	53

(Table continues)

Descriptor	*n*	%
Number of counts		
Single	289	48
Multiple	320	53

Note. Percentages may not sum to 100% due to rounding error.

Research Question 1

Is the success rate of publicly appointed counsel before cost-cutting measures significantly different after cost-cutting measures?

To examine the first research question, I used a two-sample test of proportions to assess whether there was a difference in the proportion of not guilty verdicts for appointed counsel verdicts before and after cost-cutting measures were implemented on August 15, 2011. The proportion of not guilty verdicts before August 15, 2011, was 54% *(n* = 84 / 157) while after cost-cutting measures it was 55% *(n* = 99 / 181). Results of the test were not significant, $z = 0.20$, $p = .854$, suggesting that there was no significant difference in the proportions. Because the results were not significant, Null Hypothesis 1 could not be rejected in favor of the alternative hypothesis. Results for the two-sample test of proportions are presented in Table 2.

Table 2

Two-Sample Test of Proportions for Not Guilty Verdicts Before and After Cost-Cutting Measures for Appointed Counsel

	Before		After			
Counsel	%	*N*	%	*N*	*z*	*p*
Appointed	54	157	55	181	0.20	.854

Research Question 2

Is the success rate of privately retained counsel before cost-cutting measures significantly different after cost-cutting measures?

To examine the second research question, I conduct a two-sample test of proportions to assess whether there was a difference in the proportion of not guilty verdicts before and after cost-cutting measures were in place for private counsel verdicts. The proportion of not guilty verdicts before August 15, 2011, was 51% *(n* = 85 / 167), while after cost-cutting measures it was 50% *(n* = 51 / 103). Results of the test were not significant, $z = 0.20$, $p = .873$, suggesting that there was no significant difference in the proportions. Results for the two-sample test of proportions are presented in Table 3.

Table 3

Two-Sample Test of Proportions for Not Guilty Verdicts Before and After Cost-Cutting Measures for Private Counsel

	Before		After			
Counsel	%	*N*	%	*N*	*z*	*p*
Private	51	167	50	103	0.20	.873

Research Question 3

Does type of counsel predict the result of jury trials, after controlling for the judge that presided over the trial, whether an interpreter was used, gender of judge, gender of counsel, and gender of defendant?

To examine the third research question, I conducted a binary logistic regression. Although the jury was rendering the verdict in each of these cases, every case also had a

judge presiding over it. Thus, which judge was presiding over the jury trial was controlled for. Judges who had more than 10 jury trials were assigned titles A-N. Judges who had less than 10 verdicts were lumped into an "other" group. A preliminary cross-tabulation between verdict and judge group was conducted to assess the judge group used as the reference category. JudgeF had the highest percentage of guilty verdicts, and was thus used as the reference category for the judge group variable. The interpreter variable was coded as 0 = *no interpreter*, 1 = *used any interpreter*. All genders were coded as 0 = *female*, 1 = *male*. The outcome was coded as 0 = *guilty* (no success), 1 = *not guilty* (success). Counsel type was coded as 0 = *appointed*, 1 = *private*.

The results of the binary logistic regression showed significance for the overall model, $\chi^2(13) = 32.67$, $p = .002$, Nagelkerke $R^2 = .07$, suggesting that 7% of the variance in the likelihood of a not guilty verdict can be attributed to counsel, judge group, gender of judge, gender of counsel, and gender of defendant. The individual predictors were examined further for significance.

Defendant gender was a significant predictor of outcome, $B = -0.66$, Wald $\chi^2(1) = 6.88$, $p = .009$, $OR = 0.52$, suggesting that if the defendant was male, the odds of a male defendant receiving a not guilty verdict compared to getting a guilty verdict are (1/0.52), or 1.92 times more likely than a female defendant. JudgeA was a significant predictor, $B = 0.59$, Wald $\chi^2(1) = 5.43$, $p = .020$, $OR = 0.91$, which suggested that if JudgeA was the judge on the verdict, the case was (1/0.91) =1.09 times more likely to receive a not guilty verdict compared to if JudgeF was the judge. JudgeB as a judge was a significant predictor, $B = 0.56$, Wald $\chi^2(1) = 5.49$, $p = .019$, $OR = 0.75$, suggesting that if JudgeB

was the judge on the verdict, the case was (1/0.75) 1.33 times more likely to receive a not guilty verdict compared to if Judge F was the judge. JudgeM as a judge was a significant predictor, $B = 0.81$, Wald $\chi^2(1) = 6.38$, $p = .012$, $OR = 0.26$, suggesting that if JudgeM was the judge on the verdict, the case was (1/0.26) 3.84 times more likely to receive a not guilty verdict compared to if JudgeF was the judge. No other covariates were significant predictors of verdict. Counsel type (appointed vs. private) was not a significant predictor of verdict, $B = -0.14$, Wald $\chi^2(1) = 0.55$, $p = .460$, $OR = 0.87$. Because counsel type was not a significant predictor, the null hypothesis could not be rejected in favor of the alternative hypothesis.

Table 4

Results for Binary Logistic Regression Predicting Verdict

Source	*B*	*SE*	Wald $\chi^2(1)$	*p*	*OR*	$CI_{95\%}$ for OR LL	UL
Interpreter (ref: no)	0.09	0.22	0.17	.679	1.09	0.72	1.67
Defendant gender (ref: female)	-0.66	0.25	6.88	.009	0.52	0.32	0.85
Judge group (ref: Judge F)							
Other	0.42	0.55	0.59	.442	1.53	0.52	4.46
JudgeA	0.59	0.68	5.43	.020	0.91	0.29	18.73
JudgeB	0.56	0.24	5.49	.019	0.75	0.10	2.80
JudgeI	0.17	0.27	0.02	.893	0.84	0.07	10.23
JudgeK	1.35	0.33	1.02	.313	0.26	0.02	3.56
JudgeL	0.05	0.35	0.02	.878	0.06	0.53	2.09
JudgeM	0.81	0.32	6.38	.012	0.26	0.20	4.24
Judge gender (ref: female)	1.24	0.27	0.95	.331	0.29	0.02	3.50
Counsel gender (ref: female)	0.05	0.22	0.05	.822	0.05	0.68	1.63
Prosecutor gender (ref: female)	0.32	0.20	2.43	.119	0.73	0.49	1.09
Counsel type (ref: appointed)	0.14	0.19	0.55	.460	0.87	0.61	1.26

Note. Model $\chi^2(13) = 32.67$, $p = .002$, Nagelkerke $R^2 = .07$.

Additional covariates of time period (before vs. after cost-cutting measures) and multiple charges (single vs. multiple) were added into the model, but resulted in no significantly change, $\chi^2(2) = 2.17, p = .338$. Because the model did not significantly improve with the addition of time period and multiple charges, the model was not interpreted with these additional variables.

Summary

I examined a total of 609 verdicts to assess the research questions. Research Questions 1 and 2 examined the impact of the cost-cutting measures on the success rate (not guilty) of both appointed and private counsels. No significant differences were found; thus the null hypotheses could not be rejected. Research Question 3 examined the impact of counsel type on outcome while controlling for judge that presided over the trial, whether an interpreter was used, the gender of judge, the gender of counsel, and the gender of the defendant. Results of the logistic regression showed that verdicts with JudgeA, JudgeB, and JudgeM as judges were significantly more likely to receive a not guilty verdict compared to when JudgeF was a judge. Additionally, if the defendant was male he or she was more likely to receive a not guilty verdict compared to a female defendant. However, the results showed no impact of counsel type on the outcome, so Null Hypothesis 3 could not be rejected. The manner in which the results contribute to Stuntz's (1997) theory will be discussed in Chapter 5 in addition to suggestions for further research and the research's potential to aid positive social change in the criminal justice system.

Chapter 5: Discussion, Conclusions, and Recommendations

Introduction

I aim to contribute to Stuntz's (1997) theory that the criminal justice system operates in a balanced system, where increased demands at one point are compensated for at other points (p. 5). I examined all jury trials that occurred in Lawrence District Court in Essex County, MA, from January 1, 2008, to December 31, 2013, and analyzed the differences in jury verdicts between defendants represented by publicly appointed counsel versus defendants represented by privately retained counsel throughout the years. In addition, I examined whether cost-cutting initiatives affected appointed counsel's success rates as compared to the success rates of privately funded counsel in jury trials. The data revealed no significant differences between the success rates of both types of counsel before and after cost-cutting measures were implemented, and there was no significant differences found between the success rates of publicly appointed counsel versus privately retained counsel.

Interpretation of the Findings

This research is important as there have been few empirical studies conducted in regard to the effectiveness of publicly appointed counsel. Stuntz (1997) theorized that stresses on one part of the criminal justice system will be compensated for elsewhere in the system; this study sought to contribute to his theory. Given that funding for appointed counsel has faced continual scrutiny over the last decade, the ability to ensure that all citizens, regardless of economic status, receive fair trials could be impacted by continual cuts. However, this research showed that in the Lawrence District there were

no significant differences in effectiveness in jury trials between publicly appointed counsel and privately retained counsel. Additionally, the effectiveness of public defenders did not decrease in light of funding changes. However, the research suggested that there was a 7% variance in the likelihood of a not guilty verdict attributed to counsel, judge group, gender of judge, gender of counsel, and gender of defendant.

In Research Question 1, I examined whether the success rate of publicly appointed counsel before cost-cutting measures was significantly different after cost-cutting measures. The data indicated that there was no significant difference. Research Question 2 was focused on whether the success rate of privately retained counsel before cost-cutting measures was significantly different than the success rate after cost-cutting measures. The data revealed no significant difference. With Research Question 3, I examined whether the type of counsel predicted the result of jury trials, after controlling for the judge that presided over the trial, whether an interpreter was used, gender of the judge, gender of counsel, and gender of defendant. The data indicated that the gender of the defendant and the judge presiding over the trial could have a significant impact on the likelihood of receiving a not guilty verdict, but the type of counsel was not a significant predictor of the verdict.

These data add to the limited body of literature surrounding Stuntz's (1997) theory about the equilibrium of the criminal justice system. Hartley (2004) tested Stuntz's theory by reviewing data on the comparative effectiveness of types of counsel related to whether clients were released on personal recognizance, whether charges were reduced, whether the client was confined, and what sentence was received (p. i). Hoffman, Rubin,

and Shepherd (2005) attempted to empirically test Stuntz's theory in demonstrating that public defenders achieved poorer results if one looked at actual sentences. The data in this research could not confirm that Stuntz's equilibrium was in effect in Lawrence District Court in jury trials from January 1, 2008, to December 31, 2013; the data showed that there was no difference in effectiveness between publicly appointed counsel and privately retained counsel during this time period. Additionally, the study also shows that 7% of the variance in the likelihood of a not guilty verdict can be attributed to the counsel, judge group, gender of judge, gender of counsel, and gender of defendant.

Limitations of the Study

Many variables, both known and unknown, affect the outcome of a jury trial. A limitation of this study was that I only studied one court. This resulted in a limited sample. Additionally, it only analyzed the impact of one set of cost-cutting measures enacted on August 15, 2011; thus, I examined only the results before and after the change was implemented. While it is possible that this change was not significant enough to impact the performance of publicly appointed counsel, it is also possible that publicly appointed counsel did not immediately perceive that they were being compensated less. It would be difficult to isolate when the publicly appointed counsel each experienced the full impact of the cost-cutting measures.

Recommendations

Given the importance of the criminal justice system, further research would greatly aid legislators in balancing the needs of the court system versus other priorities in society, and aid defense attorneys and prosecutors in determining how to best present

their cases given the evidence that they have to work with. While a Stuntz effect was not exhibited from this limited study at one courthouse, it is unknown what sort of stimuli or cuts would produce an exhibited effect on the success rate of publicly funded counsel. Additionally, it is quite possible that there was an impact, albeit not measurable.

A future study could potentially better capture a Stuntz (1999) effect in jury trials by studying functional victories. In this study, almost half of the jury trials involved cases where there were multiple criminal counts. In some cases, the defendant was acquitted of a portion of the charges. I did not quantify the importance of being acquitted on the most serious charge, as the study was designed to value all convictions the same whether it be for operating after suspension or for assault with a dangerous weapon. Additionally, I did not place value on being acquitted of the originally charged count, but being convicted only of a lessor included offense. Further studies could attempt to measure the significance of an acquittal in some charges versus an acquittal in other charges.

A limitation in the study also was that a cut in funding likely would take time to produce an impact on the effort or motivation of the defense counsel. While the cuts in pay went into effect on August 15, 2011, defense counsel likely would not experience the impact of the cuts until months, or even years, later due to docketing delays in getting to trial, amongst other reasons which could be studied. Further studies could attempt to eliminate data from the months surrounding the implementation of cost-cutting to measure to determine whether such had an impact on what the data showed. However, it appears that eliminating jury trials from 2011 altogether would not have impacted the results.

Other researchers could use this data set also to correlate the success rate of publicly appointed counsel as related to how much time they spent on investigation by using a review of public billing records. Stuntz (1997) theorized that public defenders may not be as successful as private counsel because investigation is cut back when poorly paid attorneys are pressed for time. A researcher could file public records requests for the billing records in certain sets of cases and review whether the billable hours for investigation were linked to the success rate of publicly appointed counsel in jury trials.

In addition, researchers could study whether the total amounts billed or time spent on a case, beyond just investigation, was a significant predictor of success at a jury trial by studying these records. Furthermore, a researcher could study whether the limits on certain types of bills from publicly appointed counsel limited the amount of compensation received, or if publicly appointed counsel found other things to bill to earn the same amount of money.

In some cases, the indigent initially were appointed counsel, but later hired their own private attorneys. Further research could isolate those cases and see if private counsel in those cases were more successful than publicly appointed counsel. Furthermore, a qualitative study may be warranted to ask defendants why they decided to hire private counsel and if they were ultimately satisfied with the decision.

Implications

It is important that all citizens are treated equally in the criminal justice system regardless of race, color, creed, or socioeconomic status. This research may be used to draw policy discourse toward how individuals are treated within our criminal justice

system and to continue to ensure that adequate funding is provided for the representation of the indigent. This research can be used to enhance the perception of the effectiveness of publicly appointed counsel as compared to privately retained counsel. Some defendants may believe that they have a better chance of receiving a not guilty verdict if they hire their own counsel. This research does not support such a perception, as there was no significant difference in effectiveness in jury trials between publicly appointed counsel and privately retained counsel between 2008 and 2013.

This research could help to build trust and respect between a defendant who cannot afford to retain private counsel and his or her appointed counsel. Some indigent defendants may not have full trust in attorneys provided to them by the government and/or may believe that publicly appointed counsel are not as successful as private attorney. A lack of trust between attorneys and clients affects the quality of representation of indigent defendants because clients' lack of faith and confidence could cause them to withhold information from their counselors or otherwise negatively impact attorney/client communications. These issues can cause attorneys to not be fully prepared for the trial or miss out on information that could assist in the defense. This lack of trust, faith, and communication could also result in individuals being convicted who should not be convicted.

This research may spark increased policy debate in regard to delivery mechanisms for counsel and whether or not budgets should be increased for public defense, and how counsel should be delivered to the indigent. Legislators may feel empowered to cut more funding as compensation is trimmed but effectiveness does not fall off; however,

further study is likely needed over a much wider population before such should be considered. However, this research likely can at least trigger additional debate.

The results of this study should be routed to and be considered by judges, clerks of court, defense attorneys, district attorneys, policy makers, and legislators. It is important to remind those involved in the system that jury trials are affected by many variables, some which can be identified and by some that cannot. Each individual involved in the system should act to ensure that each defendant is treated as equally as possible, but all concerned should be aware that differences do exist. Judges, clerks, and counsel to attempt to minimize the differences experienced by defendants to the extent possible, while legislators should appropriately balance the tough budgetary implications of their decisions.

This research should also cause policy makers to look closely at other ways of funding indigent defense, which may not have been attractive in the past. Perhaps, legislators could allow email communication between defendants and counsel while in jail in order to reduce travel costs and enhance communication. Additionally, it may be time to examine flat rates for the defense of certain cases or providing bonuses to attorneys when their clients do not default in order to minimize costs. Alternatively, instead of introducing flat rates, billing systems could be simplified to become more user-friendly in order to allow counsel more time to spend on investigation instead of billing, because Stuntz (1997) theorized that publicly funded counsel, due to funding limitations, sacrificed investigation when pressed for time.

Conclusion

While the data revealed that there was no significant difference found between the success rates of privately retained counsel and publicly appointed counsel, and the cut in funding did not exhibit a Stuntz (1997) impact on the success rate of publicly appointed counsel, further research is needed, given the importance of fairness in our system of justice. While the effects may have not been exhibited with these data, further cutting could jeopardize the fairness of the system. Actions by policy makers and financial cuts within the justice system must not affect the quality of the representation that all defendants deserve.

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