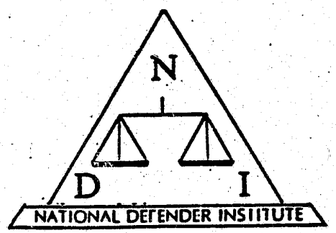
THE PLIGHT OF THE INDIGENT ACCUSED IN AMERICA: A STUDY OF THE ROLE OF PRIVATE COUNSEL IN INDIGENT DEFENSE



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VOLUME III

REPORT OF METHODOLOGY

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THE PLIGHT OF THE INDIGENT ACCUSED IN AMERICA: AN EXAMINATION OF ALTERNATIVE MODELS FOR PROVIDING CRIMINAL DEFENSE SERVICES TO THE POOR

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VOLUME III

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REPORT OF METHODOLOGY

I. PROJECT GOALS

This research project, officially known as "The Role of Private Counsel in Indigent Defense," was commissioned by the National Institute of Justice of the U.S. Department of Justice through a Criminal Justice Research Solicitation. It was intended as the first major study to examine the prevailing, albeit the most criticized, mode of providing legal defense services for poor persons accused of crime -- the use of lawyers in private practice. The various approaches to the use of private lawyers were to be analyzed in light of their implications for cost-effectiveness and quality of legal services provided to the poor. The results of the study were intended to provide program guidance to states and localities in meeting their constitutional duty to implement the right to counsel in criminal cases.

The overall objective of the research as stated in the research solicitation was "to provide practical information on the benefits, limitations, and costs of both traditional assigned counsel programs and also the various alternatives involving private attorneys now in use across the country." The research findings were to draw conclusions about alternative modes of private attorney participation in indigent defense representation that would aid policy-makers in designing and funding cost-effective, quality legal defense systems.

The project was to focus upon the goal of analyzing how various characteristics of systems for utilizing private attorneys in indigent defense work affect quality and cost. It was to obtain information about the ways that jurisdictions operate their systems, and to measure their comparative performance utilizing objective indicators. Secondly, it was to obtain detailed information about the relative costs of the various approaches to providing defense services through use of the private bar.

These goals were boiled down into three practical objectives by the researchers:

1) To define and categorize the various approaches, or models, employed by jurisdictions throughout the United States for providing criminal defense services to the poor that use lawyers in private practice;

2) To compare these models in order to determine the policy implications of a jurisdiction's selection of one model over another; and

3) To identify and describe programs having features that might bear replication in other jurisdictions.

The research solicitation required that the study be conducted in 6 to 8 sites exemplifying the various models of indigent defense systems employing the private bar.

II. OVERALL METHODOLOGY

Several means were devised to meet the project's objectives. These means and the particular objectives that they were designed to serve are described below.

A. Literature Search

The literature search had several purposes. First, by reviewing other studies conducted of indigent defense or of other systems in the "courts" area, the researchers hoped to see which indicators of attorney performance had been used in previous research. These could then be compared with the tentative indicators in the proposed research design for the present study to see which ones had been productive, whether any additional control variables should be considered, and whether the proposed variables should be augmented or streamlined.

The second purpose of the literature search was to conduct a "mini-survey" to ascertain the various models of private bar systems used throughout the country. In this way, the researchers planned to finalize the indigent defense system characteristics that they would seek in selecting the jurisdictions that would eventually be compared in the study. In other words, the literature review was to aid in deciding which were the key features that distinguished private bar indigent defense systems from one another.

Once the critical characteristics of defense systems had been defined, the literature search was to help in identifying the particular jurisdictions that embodied those characteristics. These were to become potential candidates for site visits and extensive study.

Finally, the literature search was to help in identifying jurisdictions that might be considered "innovative." While these jurisdictions might not be good candidates for the comparative research contemplated, they might nevertheless bear description in the final report as worthwhile examples for policy-makers to consider.

B. Site Selection

This phase entailed the selection, in as scientific a manner as possible, of the counties that would be included in the investigation. It involved the matching of critical system characteristics with sites and developing study hypotheses.

The first task was to select the "innovative" sites that would be visited in order to produce descriptions of their operations for policy-makers.

The second task, a much more complex undertaking, was to

secure several sets of two matching sites. The sites were to be matched in terms of court system characteristics and county characteristics, but were to differ in the model of private bar indigent defense system employed. Moreover, they were to employ some of those features of such systems that had been judged as critical during the literature review. This would ultimately enable the researchers to conclude that a particular indigent defense system characteristic was responsible for a particular result. For example, by comparing a "contract defense system" with a "coordinated assigned counsel system," one might be able to conclude that the contract system produced speedier or slower dispositions than the coordinated assigned counsel system.

In this way, a given county, by examining the results of the data, would be able to choose the characteristics that produced the results that the county was seeking.

C. Field Work

The basic purpose of the field work was to gather the descriptive, objective, and subjective data for the study.

D. Statistical Analysis and Report Preparation

This phase entailed computer analysis of all of the statistical data compiled during the field work in order to produce findings that would be helpful to policy-makers. In addition, all of the descriptive and interview data was to be cogently presented.

III. STEPS IN THE RESEARCH

A. Literature Search

By combing the relevant literature, the research team was able to ascertain a number of objective indicators of attorney performance that has been employed in previous studies. The following indicators were identified from the literature: Outcomes (acquitted/convicted/dismissed ratios); method of disposition (plea/trial ratios); length of sentence; type of sentence; speed of disposition; quality of plea negotiation (e.g., reduction to lesser offense); stage of entry by counsel into the case (e.g., early vs. late entry); pretrial motion practice; stage at which plea occurs; percentage of cases appealed; rate of pretrial detention; cost; and rate of waivers of counsel. The literature search also provided examples of some of the factors for which controls were instituted in statistical analyses: whether the case was initiated by information or indictment; relationship of the length of sentence and whether the case was pled or tried; prior convictions; pretrial release status; and the number of charges filed against a particular defendant.

All of these indicators of attorney performance were displayed on a matrix with the studies from which they were derived in order to visually observe the frequency with which they were used. Subsequently, those indicators were compared with the ones originally proposed for the study, and a final list was devised.

Next came the "mini-survey" of private bar indigent defense systems. Each piece of literature that described an existing system was scanned to select the characteristics that differentiated them from one another. A second matrix was prepared with the names of the jurisdictions described on one axis and the critical characteristics on the other axis. This allowed the researchers to categorize the various system types without resorting to using arbitrary labels that had been used to categorize indigent defense systems.

Next came the task of identifying particular jurisdictions. Each piece of literature that described an existing system operating in a particular jurisdiction was summarized in writing. Existing state and national surveys were also used to focus on parts of the country where private bar systems were prevalent. Where there were sites which promised to be fruitful areas to consider for site selection, telephone interviews were conducted to augment the literature summaries. In this way, a one-page profile of each prospective site was compiled.

B. Site Selection

For purposes of this study, a "site" consisted of an individual county. The sites were selected in accordance with project objectives. Inasmuch as there were two objectives which led in very different directions, two sets of sites were visited during the course of the project.

Since one of the objectives was to identify programs having features that might be worth replicating elsewhere, the first four sites were selected because of their innovative nature.

The second set of sites were selected for the purpose of making comparisons that would assist policy-makers in choosing between system models. There would be an in-depth comparison of a limited number of sites.

Thus, it was recognized from the very inception that only one, or, at the most, two, examples of a particular type of private bar system would be studied and that the findings would be applicable to only those sites. Generalizability of the characteristics of a particular type of representation would have to be made cautiously, for the characteristics observed would reflect, to at least some extent, the nature of the jurisdiction itself.

One approach to this problem would have been to select the very best, or worst, or some combination of the very best and worst of the private bar indigent defense systems across the country for study. This, however, would not have been particularly useful for evaluating the various models. If, for instance, one compared the best of the known "coordinated assigned counsel systems" with the worst of the "ad hoc assigned counsel systems," it would have come as no surprise to learn that the one provided higher quality representation than the other.

On the other hand, if one compared the best of these two methods, the situation would have been little better. For if the measures used had indicated one system to be superior to another, objections would have been raised that the two jurisdictions were so different from one another that any of those jurisdictional differences could account for the differences in the indigent defense systems.

Thus, in order to be as sure as possible that differences between indigent defense systems reflected differences inherent in the systems, it was essential to begin by finding jurisdictions that differed only with respect to their indigent defense systems. As a result, it was necessary to identify "matched" jurisdictions.

The requirement of having matched sites was only one of the criteria which the researchers found to be necessary in the screening process. The eight essential criteria imposed by the researchers for site selection were as follows:

(1) Each site was to have a matched site within the same state in order to enable the research team to compare the effects of system characteristics upon indicators of quality of performance in another jurisdiction. Thus, the study was limited to selecting states having variation in systems for providing defense services using the private bar.

(2) The sites selected must employ a system for providing defense services that involves the private bar, i.e., an ad hoc assigned counsel approach, a coordinated assigned counsel system, a contract defender system, or a part-time defender system.

(3) Of every two matched sites, they must employ two different types of indigent defense systems so that the systems could eventually be compared.

(4) The study was to include in the comparison a site with an ad hoc assigned counsel approach and a part-time defender system, since these are the two most commonly used private bar systems in the U.S.

(5) County characteristics employed in matching each pair of sites were: population size, population density, per capita income, crime rate, number of cases filed and disposed, percent black, percent below poverty level, percent manufacturing, percent population growth, size of the private bar, and type of county government.

(6) Efforts were made to assess the accessibility of data from court case files, prosecution files on prior records, and cost data and the cooperativeness of local officials.

(7) A check was made to determine whether there were any disruptions or changes in the systems occurring during the period being studied, or any atypical characteristics, that might skew the results of the data.

(8) Finally, in accordance with the recommendations of the Project Advisory Board, two of the sites selected had to be taken from rural America. All other sites were to have populations of between 200,000 and 500,000 population in order to ensure requisite caseloads for the docket studies.

A four-step process was employed in screening for site selection. First, based upon the literature review, the critical characteristics of the various types of indigent defense systems were identified. This led the researchers to divide the indigent defense systems into the types that would be included in the study.

Secondly, the potential counties for inclusion in the study were identified. In locating these sites, the first step was to eliminate all counties of more than 600,000 population or less than 200,000, using the 1970 census (the latest data then available). It was known that jurisdictions larger than 600,000 were all but guaranteed to have implemented a full-time defender system, and therefore not be of interest to this study. Also, such large jurisdictions would not be representative of many U.S. counties. Jurisdictions of less than 200,000 were eliminated on the basis of inspection of FBI Uniform Crime Reports. According to this data, smaller jurisdictions simply did not have enough crime in one or two years to allow the analyses that were planned in the original research design. (Note: this was later altered by deciding to include two matched rural sites in the research.)

Thus, all counties within each of the U.S. states that fell within the population limits were listed. The County and City Data Book was then used to determine, for each site, the types of demographic information listed under criterion #5 above. This demographic information was supplemented by information obtained from the American Bar Association and the National Association of Counties (also included under #5).

The inspection of the demographic information suggested about 30 possible matched sites around the country. However, since the purpose of the study was to compare indigent defense systems using the private bar, it was then necessary to ascertain the type of indigent defense system employed in each of the counties of interest. The researchers discovered, not surprisingly, that matched counties overwhelmingly tended to have identical systems of criminal defense. If one county employed a part-time defender system, its matched county was likely to do the same.

The third step entailed telephone calls to some 27 counties that were viewed as prospective sites. A one-page questionnaire to ascertain the characteristics of each of those sites was used in this step. As a result of those calls, some sites were eliminated from consideration, while others were seen as likely to produce valuable information.

Following the process of obtaining information from each of the potential sites, a matrix was prepared showing critical characteristics in each of the sites contacted. This matrix was used by the Project Staff and Advisory Board in making recommendations for sites.

The sites ultimately selected for the in-depth comparisons were:

Saginaw County, Michigan and Berrien County, Michigan	coordinated assigned counsel contract
Summit County, Ohio and Montgomery County, Ohio	ad hoc assigned counsel (mixed system) hybrid coordinated assigned counsel
Boone County, Illinois and Jo Daviess County, Illinois	ad hoc assigned counsel part-time defender
Onondaga County, New York* and Albany County, New York*	coordinated assigned counsel (mixed system) part-time defender

The innovative sites were selected simply on the grounds that their design appeared to provide features which might bear replication in other jurisdictions. Four adjoining counties in the State of California appeared to provide an interesting mix of such features. Each of the four sites represented a somewhat different model of indigent defense system. The sites were: (1) Santa Clara County (independent assigned counsel program in a mixed system); (2) San Mateo County (bar association-run pure coordinated assigned counsel system); (3) Alameda County (bar association-run coordinated assigned counsel system in a mixed system); and San Francisco (bar association-run coordinated assigned counsel system in a mixed system).

The addition of these sites achieved several objectives. First, it afforded an opportunity to visit innovative sites which could not have been used for the in-depth comparisons because no matching sites were available for study. Secondly, since they were visited at the outset of the research, they served as a means of clarifying study issues and methodology and developing research hypotheses for the in-depth study. Third, they were used as sites to pre-test the interview instruments.

* But see page 23 regarding research constraints.

Inclusion of these sites added perspective to the study. Obviously, it made the study more representative of U.S. regions by adding the west coast to midwest and eastern U.S. sites. It also enabled the study to describe a variety of available options for assigned counsel administration, funding, and mode of operations.

C. Field Work

1. Innovative Sites. There were essentially two stages of work performed for the innovative sites. First, interview instruments were prepared for each of the types of actors to be questioned during the site visit. Actors interviewed were to include the administrative personnel of the indigent defense systems, prosecutors, judges, and fiscal personnel of the counties.

The site visits were brief and not in-depth as they were for the comparison sites. Each of the visits took place over 1½ to 2 days.

The site visits covered two general areas of questioning. First, the actors were asked to describe the operations of the systems. Secondly, they were questioned regarding the indicators of performance that would be used in the second phase of the research and other issues relating to the design of the docket studies. However, no docket studies were conducted in these sites.

2. Comparison Sites. The field work in the comparison sites was far more complex. It was performed in several stages in anticipation of conducting docket studies as well as personal interviews.

First, instruments were designed for a statistical analysis of costs and defendant case information and for interviews with the various actors.

Second, a preliminary visit was made to each site as described below.

Third, a "pre-site" instrument" was employed to list the sample of cases that would be culled for the sample to be taken during the site visit. This process ensured an adequate sample of cases for the docket study at the time of the field visit.

Next, local personnel were identified and confirmed for participation in the docket study.

Finally, the field visit took place commencing, in each site, with an orientation session for the docket study coders. The docket studies were supervised by a project staff member.

Simultaneously with the docket study, other project staff conducted interviews of criminal justice systems personnel.

a. Instrument Design.

Four instruments were employed in the statistical portion of the study. They were: the docket study instrument, the prior record instrument, the cost study instrument, and the misdemeanor short form instrument. The docket study instrument was used to code information taken from court files and docket books regarding the processing of criminal cases. The prior record instrument was used to record information on the same defendants who were in the docket study sample, but was limited to felony defendants (due to the availibility of data), and was often obtained from sources outside the dockets and court files. The cost study instrument was used to code information taken from the bills submitted by attorneys who were appointed to handle indigent cases by the court. The latter was not used in jurisdictions where most indigent defense work was handled by salaried lawyers, except for purposes of internal checks. The misdemeanor short form was used in some of the jurisdictions to ascertain the extent of compliance with Supreme Court mandates regarding the right to counsel in misdemeanor cases where jail time is imposed.

Interview instruments were prepared for each of the following categories of actors: a) judges, b) program directors, c) program advisory board members, d) county board members, e) prosecutors, f) fiscal personnel, g) police, h) social service agency/probation department, i) sheriffs, j) clients, and k) community members.

b. Preliminary Site Visit.

Several tasks were accomplished during the preliminary site visit. A special "Pre-Site Interview Instrument" was designed to elicit information that would assist in the field visit. The location and availability of data were determined and the identities of the essential actors to be interviewed. Questions were asked that would aid in refining the study design and revising data collection instruments. Courtesy visits were made to key officials to ensure cooperation with the study and to inform them of the scope and purpose thereof. Finally, personnel were identified to work on pre-selecting the sample of cases for the docket study.

c. The Pre-Site Instrument.

During the interim between the preliminary site visit and the field visit, the "pre-site instrument" was completed by local personnel in each site. This instrument, a one-page, 16 column document, was used to ensure that all cases coded in the docket study would be closed cases and that none would involve more than a single set of charges arising out of a single incident. In other words, it was important not to count a case as a felony drug case if in fact the person was charged on a previous date with aggravated murder, but the murder charge had been consolidated with the drug case for disposition.

d. The Docket Studies.

The docket studies each consumed approximately 6 days on-site, including orientation. In each case, project staff was assisted by students hired locally. In addition to the misdemeanor short form instruments, the cost instruments, and the prior record instruments, the following docket study instruments were completed: Saginaw - 357; Berrien - 341; Summit - 223; Montgomery - 244; Boone - 399; Jo Daviess - 407.

In each of the docket studies, a relatively equal sample was taken of cases handled by lawyers for the indigent accused and by the control group of privately retained counsel. This enabled the researchers to make comparisons between the performance of attorneys within each site as well as to compare the differences in attorney performance between each of the pairs of matched sites. Approximately equal numbers were sampled of felony assault and felony drug cases. Approximately equal numbers of felonies and misdemeanors were sampled in those jurisdictions where misdemeanors were included. In four jurisdictions, approximately 100 misdemeanor short forms were administered as well.

e. The Field Visit Interviews.

Approximately 50 persons were interviewed in each of six of the project sites. In two sites, Albany and Onondaga, where no docket studies were conducted, approximately 15 persons were interviewed in each site. In the first six sites, two visits were made. The first, pre-site, visit in each site consumed 2-3 days, while the site visits were 6 days. Three to four project personnel were used on each pre-site visit, while the site visits employed four project personnel apart from the students assisting in the docket study. There were no second visits in either Albany or Onondaga Counties.

f. The Cost Study.

The Cost Study Instrument was completed, along with the docket study in each site, for 100 to 200 attorney fee vouchers per site. In addition, cost-related questions were included in the interviews, and financial reports and data were collected during the field visits.

IV. DESIGN OF THE STATISTICAL STUDY

A. Use of Control Groups

One might have expected that, for the statistical study, the researchers would simply have collected data about the performance of court-appointed lawyers in each of the matched sites and then compared the results in each pair of sites to see if there were significant differences. This approach, however, fails to recognize that there may be differences in the functioning of jurisdictions, even where the jurisdictions have been closely matched in terms of demographic and other characteristics.

Had that approach been used, it could have led to incorrect deductions because of the differences in the jurisdictions. For example, if the indicator of speed of disposition was examined in two jurisdictions, and appointed lawyers in both jurisdictions processed cases in about the same length of time, one might reach the conclusion that there were no significant differences between the two appointed counsel programs. However, if the speed of disposition was generally slower in one of the jurisdictions, it would be wrong to conclude that the two appointed counsel programs had achieved similar results.

To control for jurisdictional differences, the research gathered information about the performance of retained as well as appointed counsel in each site. In this way, the differences between the appointed counsel systems in each pair of jurisdictions could be assessed by comparing the differences in the performance of retained and appointed counsel in a given site.

B. Selection of Crime Types

One of the critical considerations in designing the methodology for the docket study was the selection of crime types. The question was posed, would the study investigate differences in performance using all types of felonies and all types of misdemeanors, or should it be limited to a small number of crime types?

Ideally, the study would have gathered sufficient information about each of the major categories of felonies and misdemeanors so that an analysis comparing different indigent defense system behaviors for each category of crime would have been possible.

This, however, was not possible with the time and money constraints of the grant. On the one hand, it seemed best to gather data for all types of felonies and all types of misdemeanors. This would allow conclusions about attorney behavior in general, not merely attorney behavior with respect to, say, assaults or burglaries. On the other hand, it seemed best to gather data for only a limited set of crimes. It was recognized that, at least for felonies, attorney behavior can differ depending upon the specific type of crime that has been charged. Averaging together, for example, the number of motions filed for murder cases and the number of motions filed for all the lesser felonies might yield an absolutely meaningless number. More than likely, this approach would also increase the variability in gathered data so that it would be more difficult to detect the existence of actual differences. Finally, it might be that the various indigent defense system models would not differ with respect to "run-of-the mill" crimes, but would show their strength (or lack of it) with respect to serious offenses such as murder or rape. Gathering data on all types of crimes would tend to obscure these differences.

It was decided that with respect to felonies, the generalizability of the results would be sacrificed in favor of being able to detect differences. A subset of felony crimes would be examined. With respect to misdemeanors, however, the concensus was that misdemeanors,

regardless of charge, are treated similarly by attorneys. Therefore, the decision was made to gather data on the objective indicators of performance for all types of misdemeanors.

Which felonies to examine was not an easy decision. The FBI Uniform Crime Reports were used as guidelines for selecting crimes with a sufficient frequency so that in a year, or at most two, there would enough of a given crime type charged and prosecuted in a jurisdiction to allow statistical analyses.

An additional consideration with respect to the frequency of charges stemmed from the fact that data be gathered about the performance of retained as well as assigned counsel. Thus, whatever crimes were selected, they had to be crimes that would be frequently represented by both assigned and retained counsel. Thus, burglaries, although a common crime, were eliminated from consideration, since it would be relatively rare for a burglar to be able to afford to retain his/her own counsel.

Questioning of the participants in the criminal justice systems of each of the to-be-visited sites yielded the expectation that there would be greater differences in performance between assigned and retained counsel for crimes against persons than for crimes against property. Considering these constraints, the decision was made to gather data for two types of felonies, assaults and drug cases.

C. Measuring the Quality of Attorney Performance

Even while selecting sites, the researchers were aware of a controversy concerning the method by which they proposed to gather data about the quality of attorney performance. During the innovative site visits in California, judges, defense counsel, and prosecutors were asked their opinions about the best objective indicators of attorney performance that could easily be determined from court files.

Almost uniformly, the interviewees stated that such measures would be invalid and gave persuasive examples of how any potential objective indicator might fail to uncover the differences between types of attorneys.

For example, whether or not an attorney waives the preliminary hearing might be suggested as an objective indicator of effectiveness. But attorneys may waive the hearing because they are not prepared and do not wish to expend a great deal of effort on the case or because they have investigated the case and decided for tactical reasons not to proceed with the hearing. The rate of waiving the preliminary hearing might be equivalent between two groups of attorneys, suggesting no difference in the quality of representation, but, unknown to the researchers, because the court docket would not reveal the reason for waiving the hearing, there might be a trememdous difference in the quality of representation.

Thus, the statistical analysis of court records might show no differences when in fact there were wide disparities in the quality of representation.

The research team planned to compensate for this possible shortcoming of court file data as indicators of quality by interviewing the various actors in each site. Although the California interviewees contended that observation of trial attorneys by other experienced criminal trial attorneys was the only adequate means of evaluating attorney performance, it was hoped that the combination of case processing data and interviews would provide a good indication of whether or not differences really existed between the various sites and between the two groups of attorneys in each site.

D. Data to Be Collected

A sample of 400 cases were to be drawn from the dockets in each site. In order to test for differences between appointed and retained counsel at each site, 200 of the cases at each site were to be cases assigned to appointed counsel, and 200 cases would be represented by retained counsel.

In order to determine whether there were differences in the disposition of felony and misdemeanor cases, 200 cases were to be felonies, and 200, misdemeanors.

The following table depicts the research as it was originally designed for the statistical aspect of the study.

TYPE OF COUNSEL		CASE TYPE	SAMPLE SIZE
Retained	Felonies	Assault Cases	50
		Drug Cases	50
	Misdemeanors		100
Appointed	Felonies	Assault Cases	50
		Drug Cases	50
	Misdemeanors		100

However, in the rural jurisdictions of Boone and Jo Daviess County, all felony and misdemeanor cases were included in order to obtain large enough samples. In addition, in the two Ohio counties, misdemeanors were eliminated entirely from the study because the appointed counsel were used primarily for felony representation. The Illinois data will enable future researchers to observe the difference that it makes if one narrows a docket study to two felony crime types as opposed to including the universe of felony cases in the study. The Ohio data will allow researchers to compare a docket study having both felonies and misdemeanors with docket studies which include only felonies.

E. Selection of the Sample of Court Dockets

As noted above under the discussion of the preliminary site visit, a certain amount of spade-work was done before going to the sites to gather the objective data. Each jurisdiction was visited to confirm that court personnel were willing to cooperate, that the indigent defense system was of the type that the research team had been informed of by telephone, to locate the necessary data, to ensure that data sources contained the information needed, and to arrange for access to the data during the site visits.

During the pre-site visits, the research team inquired as to the number of misdemeanors that had been charged in the year(s) that would be studied. A sampling fraction was then determined which would allow a selection of 100 misdemeanor cases, distributed across the entire year.

At the beginning of the site visit proper, the researchers would randomly select a misdemeanor case number and from that point on, examine every nth case. After the 100 cases had been coded, the team would determine whether approximately half were cases handled by assigned and half, cases handled by retained counsel. If this were not the case, a determination was made as to how many more cases of the less frequent type of representation were required to bring that sample up to 50 in number. This was used to determine a second sampling fraction.[1]

[1] In determining this fraction, the researchers considered the relative frequencies of retained and assigned counsel, E.g., if it was found that 75 of the original cases were represented by retained counsel, and 25, by assigned counsel, 25 more assigned counsel cases were needed. If the jurisdiction had handled 1,000 misdemeanors that year, to determine this second sampling fraction we did not simply divide 1,000 by 25; we divided 1,000 by 75. In this way, we used the information that we had already obtained about the sample to guide our decision. In this instance, we would have recognized that we needed to sample three times as many cases as we wanted for inclusion in the sample.

A second random start was made and a second sample drawn, from cases across the entire year. From this second sample, only cases taken by the less frequent type of counsel were coded.

Selection of the felony samples in Michigan and Ohio were much more difficult because of the decision to examine only felony assault and felony drug cases. In order to select a random sample of those cases, the researchers required a list of all felony assault and felony drug cases in the jurisdiction.[2]

This process required the use of the pre-site instrument which was discussed on page 9, supra. Either local personnel or NDI staff had to go through the docket books prior to the site visits. These books listed the defendants' names, charges pending, statute number of the offense(s), type of defense counsel (hopefully), date of case disposition, and method of case disposition. This information was listed on the Pre-Site Instruments for all felony assault and felony drug cases. In addition, it was necessary to check for whether or not other charges were pending against the defendant at the time that he/she was charged with the current offense. It was decided that, since the final resolution of the felony drug or assault case under consideration might be combined with the resolution of those other charges, that it was better to avoid such cases. Similarly, cases which were not yet closed were eliminated from the sample.

After the pre-site instruments were completed in Ohio, it was determined that every single felony assault and drug case in the year would have to be included in the sample and that the sample needed to be expanded to include an additional calendar year.[3] In Michigan, however, the frequencies of felony assault and drug cases proved sufficient to allow the researchers to determine a sampling fraction and to randomly pre-determine exactly which felony cases the coders would examine in Saginaw and Berrien Counties.

[2] Simply knowing the frequencies of these cases would not have been much help. We would have known how often cases of this type occurred, but not where to find these cases in the court files.

[3] It was also necessary to expand the sample to two years in Illinois. This decision was not the result of information gathered from the pre-site instrument, however. It was known to be necessary because of the small size of the dockets in those rural counties.

V. Design of the Cost Study

The objective of the Cost Study was to ascertain all of the direct costs of providing counsel through use of the private bar in the jurisdictions where docket studies were conducted. In this way, the researchers were able to compare each of the sets of two matched sites. This enabled the study to draw conclusions about the relative costs of different models of private bar indigent defense systems.

A number of sources were used to obtain the cost data. The most critical source of cost data was the Cost Study Instrument. This was coded from attorney fee vouchers and Court Orders to pay attorneys' fees which were either filed along with the court's case files or obtained from some other court official or county auditor. The Cost Study Instrument provided information about: the amount of money paid; the number of hours spent by attorneys on each case; whether or not fees requested had been cut; whether or not supporting services were reimbursed; the number of appearances made by the attorney; how much work was performed; and hourly rates.

In the part-time defender and contract defender jurisdictions, no data on per case fees were available, since attorneys were not paid by billing for each individual case. Other sources of data were substituted in those jurisdictions. Such data included: the budget allocated and expended; the number of personnel employed; the numbers and types of cases handled; and, where feasible, the number of person-hours expended on the defender work.

For the part-time defender and contract systems, an additional means of assessing case costs used was the "Delphi study." This involved interviewing the defenders and contract lawyers in order to obtain their estimates of time expended on various types of indigent criminal cases with alternate means of case disposition (e.g., trial, plea, dismissal).

In an effort to ascertain other direct costs of providing defense services besides attorney time, a variety of data sources were used. Indirect costs were assessed by examining the percentages of time expended by various court and county personnel for tasks related to defense services. These fractions of their time were then applied to their total annual wages. Other data sources used included county budgets, county auditor reports of expenditures, annual courts' reports, and other financial data, depending upon availability in each jurisdiction.

In comparing costs across jurisdictions, it was necessary to ensure that the same items were included or excluded in each case. Thus, the researchers determined whether, in each site, the budgets or case fees included costs for transcripts, expert witnesses, travel, xerox, office rent, etc. If, in one jurisdiction, the assigned counsel's office included staff that performed client eligibility screening, it was necessary to include in the comparison jurisdiction's costs the time of other individuals performing the same task, even though those persons were not paid from the assigned counsel budget.

The cost study was conducted for cases commenced during calendar year 1981. It was not feasible to include cases commenced later, because some of the cases in the sample would not have been completed, and thus, fee vouchers would not have been available.

The same principle was applied to the docket study. Only closed cases were used, because otherwise, the dispositions would not have been available for comparison.

While the use of 1981 cases and costs dates the study somewhat, it ensures that the results of the analysis are valid.

VI. DATA ANALYSIS

A. Design of the Analysis

The overall approach to the data was an analysis within the framework of variance. A univariate analysis of covariance was computed for each dependent variable.

As described in the discussion of project constraints below, the design of the data-gathering and analysis varied for each site. For the two sites in Michigan, data was collected for both felonies and misdmeeanors handled by appointed and retained counsel. The analyses of variance were therefore conducted within a 4 (type of counsel - Saginaw - retained/appointed; Berrien - retained/appointed) by 2 (type of crime - felony/misdemeanor) by 2 (type of felony - assault/drug) design. Standard contrasts were used to test the latter two effects. The effect of type of counsel was tested by special contrasts created to test for interaction differences between type of counsel and site and simple effect differences between appointed and retained counsel at each site.

As previously noted, in Ohio, the existence of public defender offices that handled most of the misdemeanor cases meant that data on the performance of appointed counsel could be collected only for felonies. Therefore, the analyses of covariance for the Ohio data were conducted within a 4 (type of counsel-appointed/retained Summit County; appointed/retained Montgomery County) x 2 (type of felony-assault/drug) design. Again, standard contrasts were used to test the latter effect while the effects of type of counsel were tested by special contrasts testing for interaction differences between type of counsel and site and simple effect differences between appointed and retained counsel at each site. Because of the crime rates and dispersion of court locations in Ohio, it was necessary to gather data from two years (1980 and 1981) in order to obtain approximations of the desired sample sizes of 100 felony assault and 100 felony drug cases.

As we have pointed out, data in Illinois were gathered in rural, and therefore, less populated counties. As a consequence, it would have been necessary to gather data on crimes committed during the entire decade in order to obtain a sample of 100 felony assault and 100 felony drug cases. Therefore, all types of felony cases were sampled in the two Illinois

counties. Felony cases in Illinois, as a result, could not be analyzed for differences between felony assault and felony drug charges. The analyses of covariance were thus conducted within a simpler, 4 (type of counsel-appointed/retained Boone County; part-time defender/retained Jo Daviess County) by 2 (type of crime-felony/misdemeanor) framework.

B. Description of Dependent Variables

The central question of this investigation was whether and how appointed counsel differed from retained counsel in their representation of defendants and the outcomes they achieved for them. The variables which were measured in an attempt to capture the quality of representation are presented below. The table also shows how the data were coded for purposes of analysis.

Variable	Coding
bond status at time of case disposition	in jail out of jail (r.o.r. or bond)
change in bond status	yes-after first appearance in jail, at time of disposition, out of jail no-after first appearance in jail, at time of disposition, in jail
case disposition:	
a) dismissal	case dismissed case not dismissed
b) trial	case tried case not tried
c) trial vs. plea	plea entered case tried
d) type of plea	to original charge(s) to lesser or some of original charges
e) trial outcome	guilty not guilty
f) trial outcome	guilty of original charge(s) guilty of lesser or some of original charge(s)
g) motions filed	yes no
h) overall disposition	found not guilty (dismissal or trial outcome) found guilty (plea or trial outcome)

sentence:	
a) incarceration	incarcerated not incarcerated
b) type	incarceration probation fines,court costs,restitution, deferred or suspended prosecution

Note: The above variables were coded such that the first listed response was entered as a 1 and the second listed response as a 2. For the last listed variable, the third alternative was entered as a 3.

length of incarceration	in months
number of motions filed	
number of attorney appearances in court	
number of days from first appearance to disposition	
number of days from first appearance to sentencing	

It was recognized that any set of variables would require interpretation. For example, would it be considered "better" to have completed a case in fewer or more days? The answer to this question would depend in part on the number of days that a case took and one's perspective. If the case was completed in such a short time that lack of preparation was demonstrated, that would indicate poor performance. However, if the case took so long that serious court backlogs were created, this would be considered a problem. From the county administrator's perspective, speedier dispositions would mean a lower cost, which is an advantage, assuming that quality representation was provided.

Another variable that is open to more than one interpretation is the number of court appearances. Again, it would be important to look at the numbers in the results. If, for example, there were 20 appearances in a misdemeanor case, it would appear as if the attorney had made a number of unnecessary motions for continuance. However, if there were only 1 or 2 appearances in a misdemeanor case, it might look as if the system were a plea bargaining mill, and that the attorneys had failed to properly interview the defendant or to investigate the facts.

C. Use of Control Variables

In performing the analyses of the data, it was necessary to control for the characteristics of defendants. For example, it was thought that if the clients of appointed counsel had significantly more prior convictions than the clients of retained counsel, this could skew the outcomes. Thus, the statistical model had to be adjusted for such variations among defendants.

Two sets of control variables were used, one set for a combined sample of misdemeanor and felony cases, and a second set for felonies alone.

For the combined sample of misdemeanor and felony cases, two control variables, bond status and number of charges, were used. The bond status of the defendant at the first arraignment was used because earlier research had shown it to be related to the defendant's prior record. Since no prior record information was available for misdemeanor cases, this variable was used as a means of accomodating for the existence of priors. The number of charges pending against a defendant was thought likely to exert an effect on case processing, and it was controlled in order to better isolate the effects of attorney performance on case processing.

Felonies were also analyzed alone. Additional control variables were available for felony cases. The additional control variables used in analyzing felony cases were: prior convictions, defendant sex, race, and age. Initial bond status and number of offenses were also used as control variables for the felony case analyses.

Since only data relating to felony cases was collected in Ohio, one of the analyses conducted for the data gathered in Michigan was ommitted. In Michigan, one set of analyses, controlling only for bond status after first arraignment and number of offenses charged, was conducted on both felony and misdemeanor data. That analysis was ommitted for the data collected in Ohio. Only the analyses which controlled for all the variables for which we had been able to obtain information for felony cases were performed. Furthermore, one of the covariates employed in Michigan was eliminated from the Ohio analyses. In Michigan, the court files indicated the number of charges filed against a defendant at one time. In Ohio, each charge was associated with a separate file. Therefore, the covariate "whether other offenses were charged" was not relevant for the Ohio data.

VII. RESEARCH CONSTRAINTS

A number of real-life constraints were inherent in conducting this research, which was an effort to apply scientific techniques to the study of complex and varying indigent defense systems, unique U.S. communities, and the practice of law which is considered by most lawyers to be an art incapable of measurement by statistical means.

The initial contoversy faced by the researchers was the existence of two, somewhat conflicting goals implied in the research solicitation: a) to conduct a scientific study of the relationship between indigent defense system characteristics and indicators of cost and quality of representation, and b) to study and report on a wide range of systems in order to make the study of greater practical utility to criminal justice planners. For purposes of the first goal, the ideal approach would have been to utilize only one or two states so that the majority of characteristics could be kept constant, thus making it possible to accurately assess the impact of varying particular characteristics. For purposes of the second goal, it would be valuable to examine as many jurisdictions as possible during the field visits. It was the consensus of project staff, consultants, and the NIJ Project Monitor that it was most consistent with the priorities of the NIJ and of U.S. states and counties that the project examine the widest range of systems possible while still maintaining the original research design of drawing statistical comparisons.

A second controversy revolved around the appropriateness of applying social science techniques to the measurement of attorney effectiveness. During the initial (innovative) site visits, judges, defense counsel, and prosecutors were asked to give their opinions regarding the best objective indicators of attorney performance for purposes of the docket study. Almost uniformly, the interviewees stated that such tests would be invalid, and gave persuasive examples of how each potential indicator might cut both ways. They contended that observation of trial attorneys by other experienced criminal trial attorneys was the only adequate means of evaluating attorney competence. Assuming, for purposes of discussion, that this view is correct, then the statistical analysis might show no differences between two jurisdictions having wide disparities in the quality of representation because the differences cancel themselves out when grouped together. For example, let us take the question of whether or not an attorney waives the preliminary hearing as an indicator of effectiveness. In one case, the attorney waives the hearing because he is not prepared and does not wish to expend a great deal of effort on the case. The second attorney has thoroughly investigated the case and developed a theory of defense. He/she decides, for tactical reasons, not to proceed with the hearing. No differences would be shown in the data analysis.

As in any research in the courts area, the availability of precise data presented some difficulties. For example, it was thought that how early the attorney interviews the client and commences work on the case would be a valuable indicator of attorney effectiveness. However, there is no uniform or official data available on this event. In some jurisdictions, attorneys are not informed of their appointment soon enough in order

to contact their clients in time to preserve perishable evidence. In other jurisdictions, attorneys are informed of their appointment relatively soon, but, because it is not cost-effective for them, allow their clients to languish in jail, and do not interview them until the date of their second court appearance. In still other jurisdictions, attorneys scrupulously interview their clients soon after arrest. In an effort to capture some information about the timing of this event, coders were asked in the docket study to provide the earliest possible date, e.g., the date of court appointment, the date of attorney's filing of appearance, or the date on which the attorney appeared in court. No data was available on the date of client interview. Moreover, an attorney's appearance or appointment did not necessarily mean that the attorney actually commenced work on a case. And finally, it was impossible to compare accurately between types of counsel, since the courts have one event, the date of appointment, for assigned counsel, but record another event, the appearance date, for retained counsel.

Other types of data that were not available included certain bond data and data relating to the implementation of the Argersinger case. It was often impossible to ascertain from court records whether or not the defendant was out of custody at the time of trial. Similarly, since motions to reduce bond were often made orally, it was not feasible to correctly ascertain whether or not such a motion had been filed by the attorney (thus indicating a degree of effort on the lawyer's part). With respect to Argersinger, it was hoped that the record would reflect whether, in a misdemeanor case where the defendant served some jail time, there had been a formal waiver of counsel. No such waivers were found in the records.

Perhaps the most difficult type of data to obtain was cost data. This was particularly true in the case of the contract defender system and the part-time defender system. While, for the assigned counsel systems, some cost data was available for each case because of the necessity of the appointed attorney to file a fee petition, funds for the contract and part-time defender systems were awarded in a lump sum. As a result, it was not feasible to break out the proportions of felony, misdemeanor, and other cases handled. Moreover, these systems typically prepare no statistical reports detailing the types of cases handled.

In addition to the existence, or availability, of data, there were some problems in obtaining access to data. Several examples of difficulties in accessing data presented themselves during the course of the study. However, we must commence by stating that we were extremely gratified in general that the great majority of personnel in almost every jurisdiction not only cooperated with the study but expended a great deal of effort in assisting the project.

The following are examples of some of the problems encountered in obtaining needed information. In order to evaluate the docket study data pertaining to defendant sentences, it was necessary to obtain prior record information on each case sampled. One possible source of that data, the LIEN system, was uniformly unavailable; the researchers were informed that such records were available to police and prosecution agencies only. As a result, it was necessary to expend a considerable amount of effort in obtaining prior record information; the researchers were forced to investigate a different means of obtaining that information in each site. Difference sources ultimately used in the various sites included the sheriff's office, the prosecutor's private card files, and the court files. However, no jurisdiction visited maintained adequate prior record information for the majority of the misdemeanor cases; as a result, the study was limited to employing this data for felony cases.

A similar problem was encountered in another jurisdiction which contended that computerized court records were not official records open to public inspection. However, with the assistance of a letter from the NIJ Project Monitor, the study was able to access that information.

Only one access problem proved to be insuperable during the project; all others were able to be surmounted or accomodated in some way. That problem related to conducting docket studies in the New York State court system. The major obstacle appeared to be a New York statute that mandated the sealing of court cases where the defendant's case was dismissed or acquitted. This would have eliminated all favorable outcomes from the docket study. This problem surfaced primarily in Albany County, where the public defender balked at participating in the study, not wishing to sustain an examination of his system. As a result of the dual difficulties of access to court files and the lack of defender cooperation, docket studies were not conducted in New York State. However, New York State was nevertheless included in the study because of the large number of assigned counsel counties in the state.

The selection of crime types for use in the docket study was a major concern. It was thought to be more "elegant" to limit the study to two crime types in order to draw more meaningful comparisons in analyzing the data. On the other hand, there are some drawbacks in this, since there is no crime type that is universal, and thus, it is not completely fair to generalize about a system based upon a limited sample of crime types.

Moreover, the limitation of the docket studies to two crime types placed some burdens upon the study. Because of this limitation, the universe of cases was smaller than desired; as a result, it was necessary to include cases from more than one year in the study. This consumed additional time and may have decreased reliability because of the fact that, over time, more changes creep into the system that can help to skew results. Sample sizes

were also affected by the crime type limitation in another way. The researchers found that one of the crime types selected, assault, lent itself to representation by appointed counsel, thus making it difficult to obtain a large enough sample of retained counsel cases. On the other hand, drug cases lent themselves to representation by retained counsel, so that it was difficult to obtain sufficient appointed counsel sample sizes.

In addition to the crime type limitation, another factor presented problems in obtaining adequate sample sizes. The researchers chose, for purposes of manageability, to gather all court file data in one city. However, in those counties which had not unified their court systems, sample sizes were reduced, thus necessitating the use of two or more years of data.

One of the most cumbersome aspects of the research was the hiring, training, and supervising of a new group of coders in each site. The decision to use local personnel was the result of two goals: 1) to save funds in transporting and housing personnel; and 2) to further cooperation in each jurisdiction by making them feel part of the project. The detriments to this approach were: 1) identifying and training each new set of coders consumed a great deal of time; 2) it was not always possible to ensure attendance, and adding personnel midstream was not desirable; 3) there was a lack of uniformity in decision-making between sites notwithstanding coding guides, training and supervision designed to alleviate such problems; and 4) the degree of ability demonstrated by coders in the different sites varied considerably. This drawback was overcome in the last two sites visited by hiring very high quality coders in the first site and retaining them for the second site. The project also benefited by hiring a secretary during the site visit phase who had been thoroughly schooled in criminal justice research and who personally participated in the coding of the docket studies.

In selecting the sites to be visited, it was necessary to choose between two options: a) ensuring geographical representation of U.S. regions, and b) including as many models of systems as possible in the study. Because of NIJ's frequent preference for geographical representation, project staff conferred with the Government Project Monitor on this issue. The Project Monitor opted for including more types of systems in the study rather than conducting docket studies in southern and western U.S. counties. As a result, the sites where docket studies were conducted are clustered in midwestern states which reflect the range of indigent defense systems using the private bar.

While not exactly a constraint, future researchers should take note that docket study instruments need some revision when research is conducted in more than one site. For example, some changes were made in this project's instruments to accomodate such variations as types of sentences allowed by law. Although such changes were made, numbering on the questionnaires was kept constant so that no change would be needed for the computers. However, some additional printing expense was incurred.

In addition to changes in the docket study instruments, more radical changes were needed in the interview questionnaires to account for major changes in the indigent defense systems from assigned counsel plans to contract or part-time defender plans. These changes were especially important when non-staff interviewers assisted in conducting the interviews.

As previously noted, the docket studies were conducted in phases. One of the most important reasons for this was the complexities inherent in the criminal court docket. It was necessary, prior to bringing in a full team to commence the study, to have already eliminated cases which could not be used in the sample for one reason or another and to have devised means, if necessary, to ensure a sufficient sample size. This proved to be an important step in the process, as it was necessary to add more cases in some of the sites. The means devised to deal with this problem was a "pre-site instrument" filled out by local court clerks or law students with all of the eligible cases. It allowed the project personnel to eliminate cases which had not been closed and cases that were complicated by consolidation with other, non-related cases and then to count the cases remaining in the sample.

Moreover, the very subject matter of the study presented its own complexities. One such complexity was present in the "mixed" system in Montgomery County (Dayton), Ohio where the full-time defender agency coexists with the coordinated assigned counsel program. Indeed, the defenders not only co-exist, but also handle all court proceedings that take place at the lower court level including preliminary hearings of felonies, dismissals of felonies that take place in lower court, and early reductions of felonies to misdemeanor cases. The result of this merging of functions between the defender and assigned counsel systems resulted in eliminating from the docket studies in both Montgomery and Summit Counties all events that occurred in the lower courts. Similarly, all misdemeanor cases were omitted from the Ohio docket studies because misdemeanors are primarily handled by the defender offices in both Ohio counties. The seeming erosion of the docket study due to the need to eliminate the early stages of felony cases was considerably ameliorated by the fact that very few felony cases are disposed of in the two Ohio counties in the lower courts (unlike some of the other jurisdictions visited).

Finally, there was one constraint that nearly led the researchers to eliminate the two Ohio sites from the docket studies. The team was concerned lest the comparison of retained and assigned counsel be skewed. This concern followed the discovery that the public defender "pre-selects" the cases which are farmed out to the assigned counsel. As a result, there was a possibility that the cases handled by assigned and retained counsel might not be comparable. However, following consultation with the NIJ Project Monitor, it was concluded that there was no clear indication that the cases referred to assigned counsel were substantially different than those handled by the public defender office.

In sum, while there were substantial constraints that were inherent in the type of study selected, most were surmounted without too much difficulty. In some cases, the constraints caused some modification of the study, such as the elimination of felonies from the dockets in Ohio, the substitution of Illinois for New York in the docket studies, and the inclusion of all felony cases in Illinois in order to obtain a sufficient sample size in those rural counties.

APPENDICES

END