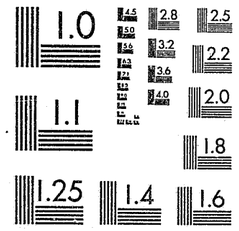

Vol II

ASSIGNED COUNSEL VS. PUBLIC DEFENDER SYSTEMS IN VIRGINIA:

A Comparison of Relative Benefits

This report was prepared under a grant from the National Institute for Justice, 81-IJ-CX-K002.

October 31, 1982

Barry J. Cohen
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American Institutes for Research
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TABLE OF CONTENTS

LIST OF TABLES

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First, we wish to thank the many judges, commonwealth's attorneys, public defenders, court appointed counsel, private attorneys, and court clerks from the State of Virginia who gave so unstintingly of their time during lengthy interviews. Their informed observations and insights were invaluable.

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Defending the Indigent: Background *

Public officials have long wrestled with the problem of providing legal services to indigent criminal defendants. The landmark Supreme Court decisions in Gideon v. Wainwright (1963) and Argensinger v. Hamlin (1972) reinforced the need to fulfill this legal obligation. But no known system seems to be sufficiently reliable, efficient and affordable to satisfy all critics. The traditional solution to the problem has been the purchase of private attorneys' services on a case-by-case basis. Proponents of this assigned counsel system praise the extensive, personalized services it provides. But critics point to the high cost of such services and question the quality of the representation the system provides. An increasingly preferred alternative is the public defender office, since its attorneys are said to have a greater familiarity with criminal law and the criminal justice system. But public defender offices have come under attack

*This report is based on and is an elaboration of a chapter to be published in "The Defense Counsel," Vol. 18, Sage Criminal Justice Annuals (William F. McDonald, Ed.), forthcoming. Authors of that chapter are Cohen, Semple, and Crew.

as well, particularly on issues of quality. Recall the now classic interchange reported by Jonathan Casper: "Did you have a lawyer when you went to court the next day? No, I had a public defender" (1972: 101). There also exists the problem that intense specialization of this sort entails, the so-called early "burn-out" of the public defender.

For the public policymaker, the choice between assigned counsel and the public defender system is hardly a clear one. The question put to us by the State of Virginia was: If there is no absolutely preferable system, what are the relative positions of each on the cost and quality dimensions? The answer was intended to help the State reach a decision about expanding its four-jurisdiction experiment with the public defender model. We collected data from those four jurisdictions and from four "matched" assigned counsel jurisdictions, and have arrived at a preliminary answer.

We hardly expect Virginia policymakers to be entirely satisfied, however, because the findings are somewhat mixed. Like other researchers before us, we found that public defender systems <u>do</u> cost less per case than assigned counsel systems. But the findings are mixed with regard to the <u>quality</u> of representation provided, as we measured it.

Specifically, public defender cases, as compared to assigned counsel cases, are associated with:

- more pleas of guilty;
- more dismissals;
- fewer findings of guilt; and
- longer case processing.

There are no discernable differences in the severity of the sentence.

The presentation that follows describes these findings in more detail. It also describes differences in cost and quality among the full jurisdictions with which each mode of representation for the indigent is associated. First, we address the quality of representation by comparing various factors across types of jurisdictions and across types of attorneys. We then compare the relative costs of the two modes of representation. We close with thoughts about the implications of our findings and some comments on the politics of defense representation in Virginia.

It will be noted that our analysis does not include direct comparisons between state-provided types of counsel and privately retained counsel. On the one hand, this simplifies our analytic task. We can ignore the client and

case characteristics that distinguish public defender and assigned counsel experiences from private attorney experiences. In Virginia the former provide representation to the same indigent client population. On the other hand, this approach has limitations. It leaves us unable to say whether state-provided representation is comparable to that of private attorneys. We also cannot assess the contribution of counsel-type differences to differences in case outcome for various client and case characteristics. Our analysis, therefore, is restricted to the basic question which motivated this inquiry: What are the relative merits of the public defender and assigned counsel systems for supplying indigent defense services?

Literature Review

The uncertainty about the merits of various systems of defense for the indigent is reflected in the literature. With regard to the assigned counsel system, the issues typically addressed concern the appropriate level of attorney familiarity with criminal law and the criminal courts, the preparation of lists of those willing to serve, and the manner in which the judge draws the names from that list. Advocates for the assigned counsel method point to the opportunity it affords to train young attorneys, the

infusion of new ideas, methods, and enthusiasm into the criminal justice process and the financial support it provides for the criminal bar generally. The more pervasive attitude expressed in the literature, however, is that the assigned counsel system is inadequate: the attorneys are too inexperienced; they lack the resources necessary to perform competently; their neutrality is jeopardized by dependence on the judges for assignment; and, typically, they become involved in the case only after consequential procedural actions have been taken (Goldberg and Lichtman, 1977).

The main alternative to purchasing private attorneys' services is to use an organization solely devoted to indigent representation. Such "public defender" organizations come in a variety of forms: a private corporation under contract to the state, a criminal justice arm of a legal services organization, a group of individual attorneys contracting collectively with the state, or the classic organization of public employees. In this classic model, the director of the office may be appointed or elected, and then in turn be supervised by an elected or appointed citizen group or board of public officials. The considerable enthusiasm for the public defender method derives from its presumed efficiency and from its lawyers'

intense specialization in criminal law and in representing the indigent.

Public defender mechanisms never stand alone in any given jurisdiction. Some kind of assigned counsel system always coexists with them to avoid conflict of interest in multiple offender cases, to provide for a release valve when the press of cases exceeds office capacity, to allow the jurisdiction to take advantage of the benefits of the assigned counsel system, and to provide a vehicle for avoiding excessive routinization in the indigent defense process. Such a "mixed" system presumably avoids some of the problems discussed above, but there remain a number of concerns about quality which we will be discussing in the context of the Virginia experience.

There are several empirical studies available regarding the comparative benefits of assigned counsel versus public defender systems. While there is strong support for the public defender approach, the results are by no means unanimous. Cohan (1977a) and Steggerda and McCutcheon (1974) found that the public defender method was less expensive. Singer et al. (1976) concluded, in the most comprehensive study to date, that it is more cost-effective as well. These studies, along with Nagel

(1973), also determined that the public defender method provided higher quality representation. However, Cohan (1977b), Vining (1978) and Clarke and Koch (1977) found no differences in the quality of representation between public defender and assigned counsel clients, and Kraft et al. (1973) concluded that the assigned counsel system was actually less expensive than the public defender alternative.

Data and Method

Data

The research discussed in this report is based on both quantitative data from official records and qualitative data from interviews with legal actors in the jurisdictions we visited. There are several quantitative sources. Case management data from the state crime files (the Offender Based Transaction System, OBTS) were provided by the Virginia Division of Justice and Crime Prevention. The files contain data on all prosecutions during the years 1977-1980 (over 48,000 individual case records). Information accessible includes the amount of time required for case disposition, police and prosecutorial disposition decisions, defendant pleas, type of counsel, type of disposition, and the associated sentence. The data can be

disaggregated into felonies and misdemeanors and according to whether a case was disposed of in circuit or district court. For purposes of this presentation we will be working primarily with the felony data.

Aggregate caseload data were collected from the Virginia Supreme Court's State of the Judiciary Reports and related sources made available to us by the Administrative Office of the Virginia Supreme Court. These data were collected for the years 1975-1980 and were used primarily in the cost analysis.* The final data set consists of information regarding the costs of providing defense to the indigent. These data came from the State Public Defender Commission Reports and the Virginia Supreme Court Criminal Fund Vending Records; they include fees paid to private attorneys for assigned counsel services and the operation costs of the four public defender offices. At present these data are in annual form, permitting a rough analysis of the expenditure trends over the study period.

The qualitative data were collected during interviews with prosecutors, court clerks, assigned counsel, privately retained counsel, public defenders, and judges. Questions

*They are actually available as early as 1972, but are not reliable back that far because of changes in the collection and crime definition methods.

fell into three categories: (1) specific comparisons on the nature and quality of the representation provided by different types of counsel (public defenders, private counsel and assigned counsel), (2) the characteristics of each type of counsel, in terms of the relationship to clients and to the court, and (3) the nature of case processing in the jurisdiction. We used the data from the interviews primarily to support and explain the quantitative findings reported in the tables and text. This combination of quantitative and qualitative data yields a balanced and relatively clear picture of indigent defense representation in Virginia.

Method

Our study included four "public defender" jurisdictions and four "assigned counsel" jurisdictions. As indicated in Table 1, each of the latter was "matched" with one of the former in terms of socioeconomic, demographic and criminal justice criteria. We were interested in whether the two types of jurisdictions and the two types of counsel differed in terms of quality and cost of representation.

TABLE 1

Demographic, Socioeconomic and Criminal Justice Statistics for Paired Jurisdictions

	Pooled		Matched Jurisdictions							
			Pair 1		Pair 2		Pair 3		Pair 4	
	Assigned Counsel	Public Defender	Assigned Counsel	Public Defender	Assigned Counsel	Public Defender	Assigned Counsel	Public Defender	Assigned Counsel	Public Defender
Population (July 1975)	363,557	448,386	87,358	88,602	63,066	100,585	108,674	45,245	104,459	213,954
Density per Square Mile (July 1975)	318	344	104	88	2,523	3,725	3,747	5,656	306	826
Per Capita Income in $ (July 1974)	4,529	4,753	4,795	4,193	5,487	5,448	4,300	4,116	3,968	4,794
Crimes per 100,000 (1975)	5,819	5,374	6,107	3,443	5,012	8,663	7,138	6,284	4,574	4,851
Percent Felony Caseload* (1978)	30	22	32.4	22	33.6	22.4	32.5	33.9	20.8	20.5

*This figure represents the percent of felony cases in each jurisdiction's total Circuit Court caseload for 1978.

Based upon data available in the OBTS file, we defined quality of representation in terms of several dependent variables. These included the following:

- whether the defendant was prosecuted;
- whether the defendant was tried before a jury or a judge;
- whether the defendant was found guilty or not guilty;
- whether the charge on which the defendant was convicted differed from the charge for which he or she was arrested;
- the relative severity of the defendant's sentence in terms of type (i.e., jail, prison, probation, etc.) and length;
- the total time from the defendant's arrest to his case disposition (i.e., guilty or not guilty).

In each instance the analytic strategy was to search for differences in each dependent variable that could be attributed to the major independent variables. In this report we describe such differences primarily in terms of appropriate cross-tabulations and proportions.*

Before we begin with a discussion of the findings, however, there are certain problems with the data that

*A more detailed analysis based on multiple regression techniques is provided in a companion report (Radtke, Semple, and Cohen, 1982). The findings are generally consistent with those reported here.

merit comment. First, there are obvious instances where OBTS data were incorrectly recorded, as in instances where disposition dates fell before offense dates. We removed cases involving such egregious errors from the file, but cannot otherwise directly assess the degree to which less obvious instances of misrecordings flaw the data.

Second, and most importantly, there is considerable missing information on many of the variables. For example, disaggregating the felonies from the misdemeanors in the OBTS data set, we found that the amount of missing data on certain crucial variables in the misdemeanor file would preclude a sound and defensible analysis. In addition, the missing data were not randomly spread across jurisdictions. Consequently, we decided to focus on the felony file, which, although weak in places, was a much more complete data set.

Having decided to focus only on the felony data, we were still faced with a major missing data problem. Within the felony data set, the crucial variable -- type of counsel -- were recorded in only 52 percent of the cases. This made analysis of the full data set impractical and pointless. Faced with the necessity of eliminating almost half of our data, we made a second decision, to focus our

attention only on those cases that contained complete data on all of the variables we wished to examine. Thus, the 10,000 plus data set was reduced to the 2,078 cases used throughout the analysis.

Before beginning the analysis, we compared the reduced data set with the original 10,000 cases on each of the key variables, including client demographics, case severity process, and outcome. Despite the severe reduction in numbers, the smaller data set was a very close model of the larger set.

Third, one important source of information was not included in the study. We were unable to obtain background information on indigent defendants. It was not feasible to interview defendants given cost and time constraints. Instead we rely, where necessary, on findings reported elsewhere in the literature about the attitudes and beliefs of defendants (e.g., Casper 1972).

Finally, it should be noted that our sample of jurisdictions does not include the largest cities in the state. Rather, the public defender experiment has been implemented in what may be generally described as large- and medium-size cities. In comparing assigned counsel and public defender jurisdictions, we have attempted to match

cultural, social and demographic traits as closely as possible. Naturally, our findings will not be generalizable to all Virginia jurisdictions, and particularly not to the largest cities with the heaviest criminal caseloads. Still, some measure of extrapolation is appropriate, and our results should facilitate decision making on further efforts to modify and extend the indigent defense experiment in Virginia.

Findings

Individuals arrested for crimes in Virginia are first brought before a magistrate at the police station to determine eligibility for bail. Their first appearance before a judge comes in District Court, where an assessment of the seriousness of the charge is made (i.e., felony versus misdemeanor). If it is a felony, the judge determines only whether court appointed counsel is required, assigns one if appropriate, and then forwards the case to the Circuit Court for disposition. Felons who have not had counsel assigned in the lower court and are found to be eligible appear before a judge on "docket day," when those assignments are made and all cases are set for trial. On the trial date the felon enters a plea (referred to hereafter as the initial plea). Should the judge refuse

the plea another plea will be entered later as the final plea, but this is rare. Regardless, the case proceeds appropriately to disposition from this point on.

Determining Indigency

In order to understand the public defender and assigned counsel processes, the method of determining indigency (and hence eligibility for court appointed counsel) is crucial. We will briefly describe that method here. In all jurisdictions, the judge makes a preliminary decision based on the defendant's response, under oath, to questions about available resources and anticipated expenses. No particular factor or way of computing assets distinguished one jurisdiction from another. On the other hand, no particular formula or guidelines seemingly were applied anywhere. All judges reported that they were especially attentive to employment, income, and available savings, but the threshold used was never clear. When pressed, all judges indicated that it was usually obvious who was indigent and who was not. In response to questioning about a possible need for guidelines, several judges objected to such intrusion into their discretion. Each felt that such discretion permitted them to consider the whole case in a way that application of a formula could not.

It is difficult to assess the consequences of this fluid indigency assessment process. Judges plainly feel that the class of poor people benefits from their discretion, but the presence of any biases in the process or aberrations in any particular judge's behavior cannot be assessed except through an appropriate empirical analysis. Other studies have expressed concern about the absence of a consistent formula, and the issue certainly deserves attention.

Jurisdiction-Type Differences

The "pooled" jurisdictional data are the focus of this analysis. Because the assigned counsel and public defender jurisdictions are reasonably well matched (see Table 1), we are afforded a good opportunity to compare the similarities and differences in the two types of jurisdictions. Below, we describe the principal differences in these two representation systems as they exist at our sites, including structural characteristics and perceptions of the legal actors. We then present findings about jurisdictional-level differences in quality of representation, including processing and outcomes.

Assigned counsel jurisdictions. In all four of the assigned counsel jurisdictions, judges compile a list of attorneys willing to be assigned to indigent felony and misdemeanor cases. For the most part attorneys participate voluntarily, usually to supplement their income, gain trial experience, and establish a litigation reputation. Such motivations tend to be associated with younger, less experienced attorneys and they are in fact the ones who populate the system. Some of the judges expressed concern about the consequences of this for the quality of defense and described their methods of dealing with it. Most commonly, they indicated that this involved providing these attorneys with guidance from the bench on procedural matters. In other instances, judges have persuaded more senior members of the criminal bar to place their names on the list and then would choose them, out of order, for the more difficult cases. And, in one jurisdiction, more senior attorneys regularly advised the younger assignees in a kind of apprentice system, particularly with the more serious cases. This practice was an extreme version of what many claimed was a major advantage of the assigned counsel method, the opportunity it afforded to train new attorneys. On the other hand, as one attorney observed, what client would voluntarily give a trainee such enormous responsibility in so consequential a life situation?

While there was some variation, most of our respondents felt that assigned counsel took their responsibilities seriously. The attorneys themselves said they did not treat assignment and private practice cases differently, although a few acknowledged that when the pressure was on preference had to go to their private clients. Monetary considerations alone sometimes necessitated this. Private clients could be called upon for funds for medical tests, document retrieval and so forth, whereas the assignment cases were limited to the fixed fee set by the court. And even if these fees went entirely for services, they could not compete with private fees; most assigned felony cases had a normal maximum of $200 whereas the going rate for a routine private case ranged between $500 and $750.

Assigned counsel typically responded to the criticism of ignoring state cases relative to private practice cases by emphasizing their professional status. Once in court, they claimed, their integrity was at stake. Clerks and judges offered some support for this; they did not note any differences in how assigned counsel handled appointed and privately retained cases. However, one clerk did offer the impression that habeas corpus petitions claiming lawyer incompetence were filed far less frequently by convicted

private clients than by convicted assigned clients. Similarly, a clerk in a public defender jurisdiction noted a sharp decline in such petitions since the public defender office opened. Certainly client expectations have much to do with whether habeas corpus petition charges are filed. Still, it would not be surprising if such alleged differential treatment existed, given the assigned counsel's need to attend to the development of a private practice.

Public defender jurisdictions. Virginia has adopted the classic public defender model. An appointed board consisting of judges, lawyers and lay persons sets policy and through its designated statewide director supervises the current four offices. Each office is run by a board-appointed "public defender" who, in turn, hires an attorney staff, one or more investigators, and clerical support. Despite state-level lines of authority and budget control, these offices appear to be well integrated into their local communities. Our respondents nearly always spoke in terms of "their public defender offices."

Like assigned counsel, public defenders become officially involved in a case at arraignment, when the defendant indicates the need for an attorney. The general

practice of the public defender office is to have one of its attorneys in the courtroom to assume responsibility for all cases that day. Since assigned counsel must be identified from the list and contacted later by the clerk, there is potentially a greater delay in connecting clients with assigned counsel than with public defenders.

In terms of overall client contact, however, the assigned counsel is perceived by most legal actors as having more frequent interaction with clients than do the public defenders. The latter point out, however, that contact time should even out when the efforts of the investigator are considered. These investigators gather evidence and interview clients and witnesses. Typically, they are former police officers or private investigators, but not attorneys. Their availability was routinely cited as the single greatest asset of the public defender system. Among other things, an investigative capability was perceived as creating a certain amount of parity between the defense attorney and the prosecutor's office, though with the entire police department available, prosecutors do retain quite an edge. Still, having some investigative assistance certainly puts public defenders ahead of assigned counsel, who normally have no such assistance at all.

It was universally acknowledged that there was considerable caseload pressure on public defenders, even if, as noted, the numbers were not overwhelming. Many of the judges, attorneys, and other persons whom we interviewed felt that public defenders handled cases more expeditiously, in part because their caseload pressure forced them to "plead out" more frequently than the less heavily pressured assigned counsel. Public defenders contended that their greater familiarity with the criminal law and criminal court gave them better insight as to when a case could be won, and hence a better sense of when it was appropriate to plea bargain. Moreover, they felt better skilled at plea bargaining than their peers because of their negotiation experience and acquired sense of "the going rate."

Case pressure is not simply a numbers problem, though. Public defenders also must contend with the unbroken routine of dealing with criminal felons day in and day out. While there are some interesting cases occasionally, most are similar in many ways, both in the questions at issue and how the case should be managed. This experience creates emotional pressure resulting in the "burn-out" effect so often mentioned by our respondents and in the literature. Many of those interviewed made reference to

this kind of pressure, and while some offices seemed unaffected by it, other offices exhibited the kind of turnover rate problems experienced nationally. Assigned counsel have a more diversified practice and hence do not suffer this burn-out effect nearly so frequently or quickly. Yet turnover may be high among members of this group as well. As their practices grow, attorneys drop off the assigned counsel list, leaving it to their younger, less experienced colleagues.

It should be noted that most legal actors in the public defender system, including assigned counsel, were impressed with the work done by their respective public defender offices. Putting aside personal issues (especially assigned counsel income concerns), the feeling was that although certain adjustments could be made it was basically a workable, affordable and preferable way of providing defense for the indigent.

Jurisdiction-level differences in quality. Several case processing and outcome issues are assessed using the OBTS file. First, we compare jurisdictions. We aggregated all records for each of the two types of jurisdictions, those employing assigned counsel and those employing public defender offices. We ask the question: Are the

jurisdictions as a whole comparable or different on case processing and outcome factors given the presence or absence of a public defender office. (In the next section we focus on counsel-level differences. There we pool the data along counsel lines, cutting across jurisdictions, and ask whether there are differences in processing and outcome associated with each type of attorney.)

At the first stage of case processing, the acquisition of counsel, we infer that the indigency rates for the two types of jurisdiction are roughly comparable. We base this inference on the fact that there was only a 10 percent difference in the rate at which clients are represented by privately retained attorneys (see Table 2). Privately retained counsel are utilized in about 40 percent of the felony cases in public defender jurisdictions and in about 30 percent of the cases in appointed counsel jurisdictions. In the jurisdictions with a public defender system, the felony counts are divided at a ratio of about 4:1 between public defenders and assigned counsels. It is worthwhile to remember that in public defender jurisdictions, assigned counsel still are much in evidence.

TABLE 2

Type of Counsel Assigned to All Felony Counts, by Type of Jurisdiction (N = 2078)

	Type of Jurisdiction		
Counsel Type	Assigned Counsel	Public Defender	TOTAL
Assigned	994 (72.2%)	87 (12.4%)	1081 (52.0%)
Private	370 (26.9%)	256 (36.5%)	626 (30.1%)
Public Defender	0 (0.0%)	342 (48.8%)	342 (16.5%)
Waived	13 (0.9%)	16 (2.3%)	29 (1.4%)
TOTAL	1377 (100.0%)	701 (100.0%)	2078 (100.0%)

There is also very little difference between the two types of jurisdictions in the rate of guilty pleas (see Table 3). However, there is a difference in the proportion of counts that are prosecuted. Whereas about 29 percent of the counts in appointed counsel jurisdictions were either dismissed or not prosecuted (nolle pros), the comparable figure in public defender jurisdictions is about 42 percent. It appears that on this dimension, the jurisdictional-level environment is influenced by the presence of the public defender office.

TABLE 3

Pattern of Defendant Pleas in
Assigned Counsel and Public Defender Jurisdictions
(Indigent and Non-Indigent Felony Counts (N = 2078)

	Type of Jurisdiction		
	Assigned Counsel	Public Defender	TOTAL
Plea Entered			
Guilty	770 (79.1%)	308 (76.2%)	1078 (78.3%)
Not Guilty	203 (21.9%)	96 (23.8%)	299 (21.7%)
Subtotal	973 (70.7%)	404 (57.6%)	1377 (66.3%)
No Plea*	404 (29.3%)	297 (42.4%)	701 (33.7%)
TOTAL	1377 (100.0%)	701 (100.0%)	2078 (100.0%)

* Nolle pros or dismissed counts

We examined the use of bench versus jury trials in the two jurisdiction types. In general, our respondents had seen no reason why the jurisdictions would differ. Assigned counsel might have a minor preference for bench trials since they allegedly require less court time. However, there was no strong feeling about this. In fact,

our data revealed no differences in the proportion of bench and jury trials across jurisdictions. (See Table 4.)

TABLE 4

Type of Trial Requested by Type of Jurisdiction (N = 2078)

	Type of Jurisdiction		
	Assigned Counsel	Public Defender	TOTAL
Bench Trial	889 (90.2%)	382 (90.7%)	1271 (90.4%)
Jury Trial	96 (9.8%)	39 (9.3%)	135 (9.6%)
Subtotal	985 (71.5%)	421 (60.0%)	1406 (67.7%)
Not Prosecuted	392 (28.5%)	280 (40.0%)	672 (32.3%)
TOTAL	1377 (100.0%)	701 (100.0%)	2078 (100.0%)

There were substantial differences in the pattern of count dispositions across the two types of jurisdictions. (See Table 5.) In general, only a small proportion of

TABLE 5

Count Disposition by Type of Jurisdiction (N = 2078)

	Type of Jurisdiction		
	Assigned Counsel	Public Defender	TOTAL
Disposition			
Guilty	913 (66.3%)	370 (52.8%)	1283 (61.7%)
Not Guilty	50 (3.6%)	26 (3.7%)	76 (3.7%)
Not Prosecuted	414 (30.1%)	305 (43.5%)	719 (34.6%)
TOTAL	1377 (100.0%)	701 (100.0%)	2078 (100.0%)

cases in both jurisdictions were resolved with a finding of not guilty. However, as we already have seen (Table 3), the proportion of cases not prosecuted in public defender jurisdictions was substantially higher than in appointed counsel jurisdictions. Thus, while cases that go to trial appear to be resolved in the same way, the overall pattern favors the public defender district.

If public defenders are more skilled in criminal law litigation and negotiation than are assigned counsel, as is generally argued, then one would expect weaknesses in cases to be more readily discovered, and hence weak cases more

readily dismissed in public defender jurisdictions. At the jurisdiction level this could mean more careful screening by prosecutors of all cases, and hence more dismissals regardless of counsel type, as we have observed here.

Looking finally at cases where there was a finding of guilt, there are essentially no differences in the types of sentences imposed on defendants (Table 6), with one important exception. While prison sentences are imposed at comparable rates, the lengths of these sentences were shorter in assigned counsel jurisdictions (a mean of 3.2 years compared to 4.3 years for public defender jurisdictions).

TABLE 6

Type of Sentence Imposed by Type of Jurisdiction (N = 2078)

	Type of Jurisdiction		
	Assigned Counsel	Public Defender	TOTAL
Sentence			
Prison	710 (77.8%)	288 (77.8%)	998 (77.8%)
Jail	148 (16.2%)	66 (17.8%)	214 (16.7%)
Probation	39 (4.3%)	15 (4.1%)	54 (4.2%)
Fine	16 (1.7%)	1 (0.3%)	17 (1.3%)
Subtotal	913 (66.3%)	370 (52.8%)	1283 (61.7%)
No Sentence*	464 (33.7%)	331 (47.2%)	795 (38.3%)
TOTAL	1377 (100.0%)	701 (100.0%)	2078 (100.0%)

* Not guilty, not prosecuted or "certified".

Thus, the pattern of defense quality across jurisdictions tends to favor the public defender approach with respect to the proportion of cases brought to trial and to reductions in the severity of the charge. There was no difference between the two types of jurisdiction with respect to the kind of trial requested (bench or jury trial), the initial plea entered, and the ratio of convictions to acquittals. However, persons in public defender jurisdictions tended to receive longer sentences on average.

Counsel-Type Differences

Outcomes. The next three tables examine count outcome differences associated with each type of counsel. For purposes of this analysis we grouped all records by type of counsel, regardless of the type of jurisdiction from which the record was obtained. This process may mask within counsel-type differences between types of jurisdictions. However, we are simply interested in differences among the major categories. Note also that we have included private attorney experiences in these tables. Recall in using this point of reference that the client population of private attorneys differs from that associated with state-provided counsel.

Table 7 examines the relationship between the initial plea made by a defendant and the type of counsel involved. Earlier we found no differences in plea rates (i.e., guilty or not guilty) across the jurisdiction types, but we did find a difference in the proportion of no-pleas across jurisdictions. As shown in Table 7, the types of counsel differ significantly in the proportion of counts not prosecuted. Consistent with the jurisdictional findings, more public defender counts are not prosecuted (34.5%) than

is true for assigned counsel (25.1%).* We also observe in Table 7 that guilty pleas were entered for 83.9 percent of the public defender counts as opposed to 78.4 percent of the assigned counsel counts. Therefore, it appears that clients represented by a public defender are likely to be prosecuted on fewer counts. When a plea is entered, however, it is somewhat more likely to be a guilty plea. We also note that for each type of counsel, a guilty plea is more likely to be entered than a not guilty plea.

*In subsequent analyses reported elsewhere (Radtke, et al., 1982), a third picture emerges. In public defender jurisdictions, 31.0 percent of counts handled by assigned counsel are not prosecuted compared to 35.1 percent for public defenders. In assigned counsel jurisdictions 25.6 percent of counts handled by assigned counsel are not prosecuted. The findings reported above pool assigned counsel from both types of jurisdiction.

TABLE 7

Pattern of Defendant Plea by Counsel Type (N = 2049)

	Type of Counsel*			
Plea Type	Assigned Counsel	Private Counsel	Public Defender	TOTAL
Guilty	635 (78.4%)	255 (74.3%)	188 (83.9%)	1078 (78.3%)
Not Guilty	175 (21.6%)	88 (25.7%)	36 (16.1%)	299 (21.7%)
Subtotal	810 (74.9%)	343 (54.8%)	224 (65.5%)	1377 (67.2%)
Not Prosecuted	271 (25.1%)	283 (45.2%)	118 (34.5%)	672 (32.8%)
TOTAL	1081 (100.0%)	626 (100.0%)	342 (100.0%)	2049 (100.0%)

* Total count does not include 29 counts in which counsel was waived.

Taken at face value, these findings appear to confirm the idea that public defenders are somewhat more inclined to plead their clients guilty because of excessive case loads. However, it is important to remember that the "pool" of cases for which the defendant must lodge a plea is proportionately smaller for the public defender than the

court appointed attorney. Because public defenders appear to be somewhat more successful in having their clients charges dropped, their remaining cases could be considered relatively more difficult to defend, thus encouraging the public defender to plead the defendant guilty in exchange for other concessions.

The public defenders contend that they do not feel any excessive case pressure and that their clients do not suffer from the results of case negotiations. They claim that they are highly skilled at negotiating with prosecutors and can honestly persuade their clients, in cases of plea bargaining, that they have made the best deal possible. This would imply greater "client control" for Virginia's public defenders than is reported in the literature (Skolnick, 1967; Sudnow, 1967). While we did not talk to clients, the overwhelming impression among clerks, prosecutors, and judges was that public defenders as a group were in fact better skilled at bargaining and better informed about the "going rate" and the ins and outs of the process than were assigned counsel.

Table 8 shows the type of trial requested as a function of the type of counsel involved. This analysis is confined to only those counts that actually went to trial,

i.e., where the defendant pleaded "not guilty." The findings are consistent with the jurisdictional data. Bench trials (90.4%) are more prevalent than jury trials (9.6%). Assigned counsel and public defenders behave similarly with respect to the type of trial requested.

TABLE 8

Type of Trial Requested by Type of Counsel (N = 2078)

	Type of Counsel				
Trial Type	Assigned Counsel	Private Counsel	Public Defender	Waived Counsel	TOTAL
Bench Trial	744 (90.6%)	311 (87.1%)	216 (94.7%)	0 (0.0%)	1271 (90.4%)
Jury Trial	77 (9.4%)	46 (12.9%)	12 (5.3%)	0 (0.0%)	135 (9.6%)
Subtotal	821 (75.9%)	357 (57.0%)	228 (66.7%)	0 (0.0%)	1406 (67.7%)
No Trial*	260 (24.1%)	269 (43.0%)	114 (33.3%)	29 (100.0%)	672 (32.3%)
TOTAL	1081 (100.0%)	626 (100.0%)	342 (100.0%)	29 (100.0%)	2078 (100.0%)

* Pleaded guilty, nolle pros, or dismissed

As shown in Table 9, there are no pronounced differences in the disposition of cases between the types of indigent counsel. Public defender cases terminate in

dismissals slightly more often than assigned counsel cases (35.1% compared to 26.0%). And public defender cases end in a finding of guilt somewhat less frequently than assigned counsel cases (62.3% compared to 70.0%). If we combine dismissals and not-guilty findings, it appears that public defenders are slightly more successful than assigned counsel in getting favorable outcomes for their clients (37.7% compared to 30.0%) but are less successful than private counsel (50.0%).

TABLE 9

Count Disposition by Counsel Type (N = 2049)

	Type of Counsel*			
	Assigned Counsel	Private Counsel	Public Defender	TOTAL
Disposition Type				
Dismissed**	281 (26.0%)	289 (46.2%)	120 (35.1%)	690 (33.7%)
Guilty	757 (70.0%)	313 (50.0%)	213 (62.3%)	1283 (62.6%)
Not Guilty	43 (4.0%)	24 (3.8%)	9 (2.6%)	76 (3.7%)
TOTAL	1081 (100.0%)	626 (100.0%)	342 (100.0%)	2049 (100.0%)

* Counts in which the defendant waived counsel are not included (N = 29)

** Includes nolle pros.

Table 10 suggests two differences between assigned counsel and public defenders in sentences assessed on those judged guilty. Public defender clients were somewhat more likely to be sent to prison, but were somewhat less likely to be sent to jail. In the proportions of imposed fines or probation, there was no difference among the types of counsel.

There was virtually no difference among the three types of counsel with respect to the length of prison or jail sentence meted out to their clients. The average length of prison sentence for assigned counsel, privately retained and public defender attorneys' clients was 3.1, 4.0, and 4.3 years, respectively.

TABLE 10

Type of Sentence Imposed by Type of Counsel (N = 2049)

Type of Sentence	Type of Counsel*			
	Assigned Counsel	Private Counsel	Public Defender	TOTAL
Prison	600 (79.3%)	224 (71.6%)	174 (81.7%)	998 (77.8%)
Jail	123 (16.2%)	61 (19.5%)	30 (14.1%)	214 (16.7%)
Probation	27 (3.6%)	18 (5.8%)	9 (4.2%)	54 (4.2%)
Fine	7 (0.9%)	10 (3.2%)	0 (0.0%)	17 (1.3%)
Subtotal	757 (70.0%)	313 (50.0%)	213 (62.3%)	1283 (62.6%)
No Sentence**	324 (30.0%)	313 (50.0$)	129 (37.7%)	766 (37.4%)
TOTAL	1081 (100.0%)	626 (100.0%)	342 (100.0%)	2049 (100.0%)

* Excludes 29 cases for which counsel was waived.

** Not guilty or not prosecuted.

Time from Arrest to Disposition

One of the more crucial variables with respect to both the quality of defense and the efficiency of the judicial process is the amount of time necessary to resolve a

criminal case. We examined the total time in days from the arrest of the defendant to the finding of guilty or not guilty. We looked at only those defendants who were actually prosecuted, and did not include those for whom charges were dropped. Further, we focused only on the indigent population.

Comparing public defender and appointed counsel jurisdictions we found that the average indigent case took 102.3 days in assigned counsel jurisdictions compared to 123.2 days in public defender jurisdictions. This represents a difference of just under 21 days in favor of the assigned counsel jurisdiction.

When comparing the case processing time from arrest to disposition by type of counsel, we found that the apparent advantage in favor of the appointed counsel held, but at a much lower order of magnitude. The times for the two counsel types were 106.2 days for appointed counsel, and 114.4 days for public defender attorney. Thus, the difference between the systems appears to relate more to the jurisdiction itself than to the type of attorney handling the case.

Cost Differences

Important as questions are about the quality of indigent representation, it is clear that the relative cost of each type of defense system is of equal or greater concern to policymakers. When asked about the advantages of a public defender office, the majority of our respondents volunteered the opinion that it costs less than the assigned counsel method. And several high level officials in Virginia state government said the cost issue would be the most important factor in the legislature's decision about whether to expand the public defender model to other cities.

We have made a preliminary attempt to address the matter of cost. Arriving at reasonable estimates is no easy task. Given problems with the availability of data, we made a number of assumptions and extrapolations. We are confident that the results are internally consistent (and hence amenable to internal comparison), though we would strongly caution against using the absolute dollar figures for any statements about actual costs.

The main data sets are: (1) the caseload data for felony, criminal misdemeanor and criminal juvenile courts for the years 1975-1980, and (2) the respective cost data

compiled by the Administrative Office of the Virginia Supreme Court and the Virginia Public Defender Commission.

Looking first at the cost data, expenses in the assigned counsel districts consist only of fees paid to attorneys by the court. State law establishes a maximum for various types of cases: our respondents indicated that most case assignments yield the following maximums, although lower fees are paid for cases with premature termination:

Felony charge, 20 years to death	$400
All other felony charges	$200
Misdemeanor charges	$100
Court of no record	$ 75

In the public defender districts there are also assigned counsel fees for cases not handled by the public defenders, as well as the costs of the public defender office itself. We have not included a variety of additional indigency related fees (such as witness expenses and tests) because these data were not available for the study time period. We assume no systematic differences in these additional minor costs across the types of jurisdictions over the years examined.

The published caseload data are not disaggregated by the indigency status of the defendant. Nor is there any indication in the published records of the percentage of cases handled by each of the three types of attorney. Finally, there is no published record of the percentage of time counsel is waived. To estimate indigency caseload, therefore, we employed the following equation in each jurisdiction:

$$Ic = (1-\%Pr)F + (1-(\%Pr+\%W))M + (1-(\%Pr+\%W))J$$

where:

Ic = Indigency caseload

Pr = Defendants represented by private attorney

W = Defendants waiving attorney

F = Felony caseload

M = Criminal misdemeanor caseload

J = Criminal juvenile caseload.

F, M and J were available for each year from the State of the Judiciary reports. Since judges do not normally allow defendants to waive counsel in felony cases, only the percent of defendants represented privately must be substracted to yield the indigency representation level there. According to our respondents, waivers are very

frequent in misdemeanor and juvenile courts, however, and must be subtracted from the caseload in those instances. We produced estimates of Pr and W for the felony and misdemeanor courts from our OBTS data, and projected those percentages over the 1975-1980 period on the assumption that there were no systematically different major changes in the level of indigency across these jurisdictions over this time period. We have no means of making independent estimates of Pr and W for juvenile court and therefore assumed, based on respondents' comments, that use of private counsel and waivers there was approximately the same as that in misdemeanor court.

Having arrived at usable caseload and cost figures it remained only to divide the former into the latter. We aggregated the four assigned counsel jurisdictions and three public defender jurisdictions* and arrived at the cost per case results reported in Table 11. While a cost per count advantage in favor of the public defender system existed between 1975 and 1977, the differences have reversed sharply since then. This can perhaps be explained in terms of the start-up costs of the Petersburg office in 1979.

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*One jurisdiction was dropped from this portion of the analysis because there was too much missing data in our OBTS file at the misdemeanor court level to develop estimates.

TABLE 11

Indigency Caseload Costs per Case by Type of Jurisdiction*

Year	Type of Jurisdiction: Assigned Counsel	Public Defender	Dollar Differences
1975	$ 91	$ 60	-$31
1976	125 (+38%)	95 (+59%)	- 30
1977	109 (-13%)	97 (+2%)	- 12
1978	118 (+9%)	90 (-7%)	- 28
1979	112 (-5%)	116 (+29%)	+ 4
1980	115 (+3%)	139 (+19%)	+ 24

* The figures in parentheses indicate percent change from previous year.

Judges in our study jurisdictions suggested that the trend should be toward an increasing disparity over time, to the benefit of public defender offices. Looking at cases where the indigency status is not clear, judges report a stronger tendency to approve a questionable indigency claim when a public defender is available than

when an assigned counsel would be necessary. As one judge put it, there is no additional cost to the government, and therefore no cost to giving the defendant the benefit of the doubt. Behavior resulting from this attitude should increase public defender caseloads, relative to assigned counsel caseloads, and therefore drive down the former's cost per case relative to that of the latter.

Of course, it may be objected that this behavior by judges could tax the energies of current public defenders. This could reduce quality and possibly add to "burn-out" over time. Thus, a more appropriate focus than absolute cost differences would be cost-effectiveness differences (Singer et al., 1976). Also, to the extent that judges are overly liberal in approving indigency claims, they may force public defender offices to hire additional attorneys. This would drive up relative costs over time.

The best resolution of the problem is a more objective, standardized method of determining indigency. As we have seen, though, judges resist this constraint on their discretion. And when one judge was directly confronted with this issue he contended that the problem was not that severe, since there are few cases where the indigency claim is unclear. That is an empirical matter.

The accuracy of the observation, and its consequences for public defender costs, remain to be seen.

Conclusion

This study has looked at indigent defense representation in Virginia from several perspectives. Legal actors in the criminal justice system are inclined to favor the public defender method. From a defendant's perspective, the weight of our findings are mixed. From society's perspective, evaluations of case outcomes will vary with prevailing beliefs about the appropriate level of severity in criminal case dispositions and sentences. Our one measure of process delays indicates an advantage in the assigned counsel method. While cost differences have recently favored the assigned counsel approach, as measured by our findings, we would expect it to reverse as offices become institutionalized and efficiencies are set in place.

These results present a mixed and somewhat ambigious portrait of the public defender method of indigent criminal representation in Virginia. That conclusion is basically consistent, as we have seen, with the literature on indigent representation generally. Yet the story does not end with these findings. Some additional observations about the Virginia experience are in order.

First, in one assigned counsel jurisdiction we visited (a medium size city) there was a consensus that, in the abstract, the public defender system is the better of the two methods. However, there was an equally strong consensus that it should not be employed in that jurisdiction. The issue was not cost. It was acknowledged that the assigned counsel method is more expensive. Neither was attorney income the central concern, although many young attorneys said the money was helpful. Rather, there was a strong feeling of community among the attorneys. Young attorneys regularly called the more experienced members of the bar for guidance. Senior attorneys willingly served as assigned counsel on the more difficult cases. Indeed, judges sometimes assigned both a senior and a junior attorney to a case in a kind of apprenticeship system. Most believed that such actions resulted in high quality representation for indigents, as well as excellent training for young attorneys. They contended that in their community a public defender office, for all its benefits, could not serve the clients, society, or the legal profession as well.

Second, there are, as noted, four public defender jurisdictions operating in Virginia. The original implementation plan called for a fifth jurisdiction to be

employing that method by now. However, lawyers in that designated community, one of the most populated in Virginia, successfully resisted placement of a public defender office there. Behind all the dialogue one issue clearly emerged as the central concern: the income loss private attorneys would suffer due to decreased assigned counsel fees.

This concern with income certainly was on the minds of Virginia legislators when they recently considered a bill to expand the public defender system statewide. The Public Defender Commission presented impressive cost data supporting its position. And the public defenders themselves had received considerable favorable press attention over the last few years. Yet the bill was never reported out of committee. Opponents contended that more experience was needed and that the state should move slowly on the expansion issue. While we lack hard evidence, informal discussions with state officials and informed observers leads us to conclude that three factors account for official reticence this year: (1) the public temper in the state is strongly anti-crime, and there was some concern that an expansion of the public defender office would be inappropriate at this time; (2) lawyers did not want to jeopardize the income benefits realized from

assigned counsel cases; and (3) the state is experiencing the same mood as the rest of the country on the question of government expansion. The bureaucratization associated with public defender offices is viewed as inconsistent with that mood.

The Public Defender Commission will probably try again to gain legislative approval for statewide adoption of the method. While research conclusions like ours should enhance its arguments, there are indeed sufficient countervailing feelings that render the future of the public defender system in Virginia unclear.

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