Governments in the United States must offer free legal services to low-income people accused of crimes. To provide these services, many jurisdictions rely on assigned counsel systems, where private attorneys represent indigent defendants on a contract basis. These defendants are more likely to be convicted and incarcerated than defendants with privately retained attorneys. Using detailed court records, we investigate the mechanisms behind this disparity and consider their policy implications. We find that adverse selection among lawyers is not the primary contributor to the assigned counsel penalty. We conclude that reform efforts should address moral hazard in assigned counsel systems.

I. Introduction

Governments in the United States are constitutionally required to provide legal counsel, free of charge, to low-income (i.e., indigent) people accused of crimes. In 2004, nearly 70% of felony defendants in large, urban jurisdictions were represented by publicly provided legal counsel rather than defense attorneys they retained on their own. To provide indigent defense services, some jurisdictions use public defenders, who are government employees. Jurisdictions also rely, either exclusively or to complement a public defender, on private attorneys who elect to serve in an assigned counsel system. Attorneys serving as assigned counsel generally do not get to choose their clients and face a different incentive structure than those in the private market.

Research has shown that defendants represented by assigned counsel are more likely to be convicted and often receive harsher punishments than those represented by either retained counsel or public defenders (Iyengar, 2007; Cohen, 2014). These disparities in outcomes in the criminal justice system could have far-reaching impacts on recidivism, educational attainment, labor market outcomes, economic mobility, and the well-being of defendants, as well as their families and communities (Pager, 2003; Hjalmarsson, 2008; Geller, Garfinkel, & Western, 2011; Raphael, 2011; Lovenheim & Owens, 2014; Aizer & Doyle, 2015; Agan & Starr, 2018). Inadequate indigent defense is also a potentially important contributor to the persistent racial gap in criminal justice outcomes, as nonwhite men represent a disproportionate share of people in poverty and in prison.

State and local governments have considered several interventions aimed at reducing the disparities in outcomes between indigent and nonindigent clients. For example, jurisdictions have tried mandating attorney participation in indigent defense, allowing indigent clients to select their own attorneys, or altering the financial incentives of attorneys tasked with providing indigent defense services. Behind each of these strategies is a different implicit assumption about the underlying source of the disparities: low-quality attorneys, inadequate court assignment mechanisms, or improper attorney incentives. However, there is limited evidence on the relative importance of any of the potential sources of disparities.

In this paper, we take advantage of comprehensive data on criminal court cases and attorneys to investigate the relevant mechanisms behind the less favorable case outcomes typically observed among defendants with assigned as opposed to privately retained counsel. Our empirical setting is Bexar County, Texas. Bexar County district courts have historically used an assigned counsel system in which a third party, with no specific information about the case or lawyer, assigns private attorneys to indigent clients from a pool of lawyers who have registered with the county. Unlike in their private practices, attorneys assigned to indigent defendants cannot turn clients’ cases down, and indigent defendants cannot select among attorneys. Assigned attorneys are also not paid market rates; rather, they are compensated based on a court-determined fee schedule. These features of the assigned counsel system may affect the composition and incentives of participating lawyers.

We begin by confirming existing research findings in our data. Defendants in Bexar County with assigned counsel are more likely to be found guilty and to be incarcerated, and they receive longer sentences and larger fines on average. The differences are statistically significant and economically meaningful; for example, a defendant is 50% more likely to be convicted with assigned relative to retained counsel, and conditional on conviction can expect a sentence that is 11% longer. There are four possible explanations for these gaps:

1. Case characteristics: Indigent clients may be harder to defend than nonindigent clients for a variety of reasons, some of which may be unobservable.
2. Adverse selection: Attorneys who register to serve as assigned counsel may be worse than attorneys who do not.
3. Matching: The mechanism used to assign clients to attorneys in indigent cases may not work as well as the...
endogenous process in the private market for retained counsel.

4. Moral hazard: Attorneys may exert less effort in cases in which their clients are assigned, relative to cases in which their clients pay them directly.

Previous studies have typically attributed much, if not all, of the disparities in case outcomes for indigent clients to differences in case characteristics and adverse selection in the assigned counsel pool (Iyengar, 2007; Roach, 2014). Our administrative court records not only contain rich information about clients and their cases, but also permit us to track individual attorneys across cases and over time. Therefore, we can not only condition on detailed case characteristics but can also include attorney-by-year fixed effects, which allow us to examine whether the same attorney in the same year obtains different outcomes in otherwise similar cases in which he or she is assigned as opposed to retained on average. We can thus more precisely quantify the role of adverse selection among attorneys in determining case outcomes.

We find that differences in observable case characteristics (including client, offense, and court characteristics) generally can explain between one-third and one-half the disparities in outcomes among cases handled by assigned and retained attorneys. In supplemental tests, we show that any unobservable case characteristics likely play a small role in determining outcomes. While differences in outcomes due to the nature of criminal charges or the clients themselves may be legally problematic, unlike other potential sources of the assigned counsel penalty, they can be difficult to address via government intervention.

Most notable, our point estimates suggest that adverse selection explains less than one-quarter of the disparities in central case outcomes observed among clients of assigned as opposed to retained lawyers, and we can rule out with 95% confidence effects larger than 43%. Large disparities in outcomes between assigned and retained cases persist within attorneys handling both types of cases at similar points in their careers. This implies that policies aimed at improving the quality of indigent defense by mandating participation may generate some reductions in disparities but are unlikely to eliminate them. Indeed, in certain instances, government interventions aimed at reducing adverse selection might be counterproductive; for some outcomes, attorneys whose retained clients receive better-than-average outcomes can explain between one-third and one-half the disparities in case outcomes for indigent clients.

Given that large gaps remain in many outcomes even with a rich set of case and attorney controls, we next consider the potential roles for client-attorney matching and moral hazard in explaining the relatively worse outcomes observed among indigent defendants. While there are notable differences in the types of attorneys whom different clients choose on the private market and the types of attorney-client pairs we observe in assigned counsel, we find little evidence that being assigned a lawyer who looks like a better match, based on client revealed preferences in the private market, reduces the assigned counsel penalty. We conclude that policies that instruct court agents to use additional information to mimic the observed choices of defendants are unlikely to improve outcomes dramatically.

Given that attorney effort is unobservable and that quickly resolving cases is particularly incentivized by the assigned counsel fee schedule, there is a clear potential role for moral hazard. Therefore, in a final set of tests, we provide suggestive evidence on the importance of differential attorney effort across assigned and retained cases in driving the disparities in outcomes. First, we examine the length of court cases, from initial complaint to final adjudication, as a plausible proxy for attorney effort. We find that attorneys resolve assigned cases 12.5% faster than observably equivalent retained cases on average, consistent with reduced effort. Next, we examine how outcomes changed after the county altered its compensation structure to allow fixed, nonnegotiable compensation for more types of cases. Although the results are merely suggestive, they provide further evidence that lawyer effort is sensitive to expected compensation. Finally, we present evidence from a 2010 survey of Bexar County lawyers that reveals that by a variety of measures, attorneys tend to exert less effort for clients whose cases they were assigned as compared to clients who retained them.

The results of this paper shed new light on policy-relevant mechanisms behind well-established disparities in outcomes for defendants with assigned as opposed to retained counsel, and in particular go some way toward dispelling the idea that such disparities are driven predominantly by bad attorneys electing disproportionately into assigned counsel roles. Indeed, they suggest that institutional factors that affect attorneys’ incentives to provide effective counsel may also be important in understanding these disparities. This is particularly notable given the emphasis on the provision of uncompensated (pro bono) service in the legal profession as a way to reduce socioeconomic disparities in both criminal and civil cases, with relatively little attention paid to the quality of the services provided. In addition to discussing this and other policy implications of our findings in more detail, we consider some potential long-run social costs of deficiencies in the assigned counsel system in the concluding sections of the paper.

II. Background

A. Indigent Defense in the United States and the Bexar County Context

In the United States, courts provide legal counsel for indigent defendants through public defenders or assigned counsel. Public defenders are government employees who exclusively represent indigent clients. Assigned counsel are independent private attorneys who volunteer for a potential selection pool, subject to minimum qualification criteria, and handle cases on a contract basis. Nationwide, 79% of
jurisdictions have a public defender’s office; that office is generally supported by an assigned counsel system that handles overflow cases and cases where the public defender’s office has a conflict of interest (DeFrances & Litras, 2000). In jurisdictions without a public defender, assigned counsel is solely responsible for indigent defense. Therefore, while jurisdictions’ reliance on assigned counsel varies, nearly all of them use court-appointed attorneys to some extent, and assigned counsel represent approximately one-fifth of indigent defendants nationwide (Strong, 2016). Similar to courts in most other jurisdictions in Texas, Bexar County district courts use an assigned counsel system almost exclusively.²

Attorneys may choose to work as assigned counsel for several reasons. Unlike in the private market, attorneys working as assigned counsel do not have to incur the costs of advertising or recruiting clients. In Bexar County, attorneys with at least one year of experience practicing criminal law can request that they be added to the felony assigned counsel list in June and December. Attorneys stay on the list as long as they maintain at least ten hours of continuing legal education credit each year and do not turn down cases they are assigned.³ Another reason to participate in assigned counsel is to gain experience handling criminal cases; this experience can later be advertised to potential clients. Finally, at the conclusion of a case, an attorney representing an indigent client is compensated by the court, which may make payment more certain than when an attorney must collect money from an individual client.

After defendants are booked, they have the opportunity to declare that they are indigent. As in most jurisdictions, in Bexar County the court makes a determination of indigence based on whether a defendant’s net income (income less certain necessary expenses) is below a certain amount per month.⁴ Attorneys in the county’s assigned counsel pool are then assigned indigent clients in one of two ways, depending on the specific court. Either a court coordinator or pretrial services officer interviews the client and identifies the set of eligible lawyers, based on the assigned counsel lists (formally known as “wheels”) maintained by the Criminal District Courts Administration Office. The judge then assigns an eligible lawyer to the case, sometimes based on who is physically present in the courtroom (in three courts) and sometimes based on whoever happens to be at the top of the wheel (in the other eight). When a lawyer takes a case, that person is moved to the bottom of the wheel. In both systems, attorneys must take on the clients assigned to them, and clients have no say on the attorney to whom they are assigned.

²Texas has historically delegated indigent defense provision to counties, and currently 90% of counties in the state use some version of assigned counsel as their primary form of indigent defense. During our sample period, the Bexar County Public Defender’s Office handled only appeals and cases in which the defendant had severe mental health issues.

³For detailed information on the experience requirements for participating attorneys, see http://tdic.tamu.edu/IDPlan/ViewPlan.aspx?PlantID=26 (accessed July 1, 2019).

⁴The threshold is a function of the poverty line. Those eligible for public assistance are automatically eligible to receive assigned counsel.³

³There are only three ways an attorney can be excused from a case he or she is assigned: (a) he or she is actively working on another assigned case, (b) he or she has a legal conflict with the case, or (c) he or she has registered vacation in advance and identifies the set of eligible lawyers, based on the assigned counsel lists (formally known as “wheels”) maintained by the Criminal District Courts Administration Office. The judge then assigns an eligible lawyer to the case, sometimes based on who is physically present in the courtroom (in three courts) and sometimes based on whoever happens to be at the top of the wheel (in the other eight). When a lawyer takes a case, that person is moved to the bottom of the wheel. In both systems, attorneys must take on the clients assigned to them, and clients have no say on the attorney to whom they are assigned.

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<table>
<thead>
<tr>
<th>TABLE 1.—Fee Schedule for Assigned Counsel in Bexar County</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case Type</td>
</tr>
<tr>
<td>---------------------------------</td>
</tr>
<tr>
<td>Initial jail visit</td>
</tr>
<tr>
<td>Flat fees</td>
</tr>
<tr>
<td>Pleas</td>
</tr>
<tr>
<td>Preindictment dismissals⁶</td>
</tr>
<tr>
<td>Postindictment dismissals⁶</td>
</tr>
<tr>
<td>Cases not disposed of by plea or dismissal⁶</td>
</tr>
<tr>
<td>Motion to revoke probation</td>
</tr>
<tr>
<td>(2005–July 2009)</td>
</tr>
<tr>
<td>Motion to revoke probation</td>
</tr>
<tr>
<td>(after July 2009)</td>
</tr>
<tr>
<td>Hourly rates</td>
</tr>
<tr>
<td>Court appearance</td>
</tr>
<tr>
<td>Evidentiary hearing</td>
</tr>
<tr>
<td>Trial</td>
</tr>
<tr>
<td>Out-of-court time</td>
</tr>
</tbody>
</table>

²Available only after July 2009

³Available only after November 2015.

Lawyers who have been assigned to a case must contact the defendant by the end of the first working day that they are assigned and represent the defendant until the conclusion of the case.⁵

The compensation lawyers receive for serving as assigned counsel in Bexar County is a function of the severity of the charge and the disposition of the case.⁶ Table 1 shows the assigned counsel fee schedules that were in effect in Bexar County during our sample period (2005–2013).⁷ During the entire period, lawyers who resolved a case via a plea bargain or were assigned to a case in which the district attorney filed a motion to revoke a client’s probation (MTR) could choose to be compensated with a flat fee. During the first half of our sample, in cases not resolved via a plea bargain and that were not MTRs, lawyers were restricted to an hourly rate of $50 to $150, depending on the severity of the case and how the time was spent.⁸ By comparison, on the private market in 2015, the median criminal defense attorney in San Antonio charged $200 per hour (State Bar of Texas, 2016). In July 2009, flat fees became an option for lawyers who resolved cases via dismissal, and the fee for representing clients facing MTRs...
increased. Finally, for cases resolved after November 2015 (6% of our sample), attorneys could request a flat payment of $200 for any other type of resolution. In practice, attorneys choose the flat fee in 75% of cases (Texas Task Force on Indigent Defense, 2010). Based on a 2010 survey of Bexar County attorneys (discussed further in section VC), this is because flat fee requests are not subject to review, whereas a judge can adjust, or even refuse, the hours requested by a lawyer. Additionally, if an attorney can get a case resolved quickly, the flat fee amounts will be higher than pay based on the hourly rate.

Both the low hourly rates and flat fee options affect the incentives of assigned counsel. Under the flat fee structure, attorneys have an explicit incentive to resolve a case via plea. Flat fees are not uncommon in private criminal law, and retained attorneys typically set fees based on the complexity of the case. According to one San Antonio firm, someone with no prior criminal history charged with possession of less than 1 gram of marijuana will pay a flat fee of $1,000 to $4,000. At an hourly wage of $200, a retained attorney would expect to work 5 to 20 hours on such a case. If assigned, an attorney could receive a flat fee of $500 for a guilty plea, meaning that the typical attorney would spend no more than 2.5 hours on the case in order to receive his or her market wage. Prior to 2009, if an assigned attorney did not enter a guilty plea, his or her hourly wage would be $75, or $125 less than the median hourly rate for criminal defense attorneys.

B. Sources of Disparities in Assigned Counsel Case Outcomes

A robust finding in the literature on indigent defense is that defendants with assigned counsel fare worse than those with other forms of counsel (Iyengar, 2007; Anderson & Heaton, 2012; Cohen, 2014; Shem-Tov, 2017). There are several potential reasons for this. First, publicly financed counsel may handle different types of cases and clients. For example, defendants charged with white-collar crimes are more likely to use private counsel, whereas those with a prior criminal record are more likely to use public counsel (Harlow, 2000). Further, clients who are technically eligible for indigent defense may choose to borrow money to retain private counsel if they expect that the return to doing so is high, potentially leading to selection in the cases handled by assigned versus retained counsel. If individuals represented by assigned counsel are more likely to be guilty or commit crimes that are more serious, it may be socially efficient for them to be treated relatively harshly by the criminal justice system. On the other hand, if differences in outcomes are due to unlawful discrimination by agents in the criminal justice system, there is a stronger argument for government intervention. However, the tools the government has at its disposal to mitigate such differential treatment are more limited and may have unintended consequences.10

A second potential source of disparities in case outcomes stems from possible adverse selection in the assigned counsel pool. The regular, but typically low, compensation may attract primarily inexperienced or low-quality attorneys who are not capable of earning more as retained counsel. In the past, researchers have generally interpreted the observed worse outcomes for defendants randomly assigned to assigned counsel, as opposed to public defenders, in jurisdictions that simultaneously use both as evidence that adverse selection is important (Iyengar, 2007; Roach, 2014). For states and localities that rely on assigned counsel, the policy response to disparities introduced by adverse selection is clear: jurisdictions could mandate participation of some or all lawyers in the assigned counsel system. Many states already permit judges or public defenders to require any member of the state bar to provide indigent defense.

Another plausible reason that assigned counsel performs worse, particularly relative to retained counsel, is that any benefits associated with the ability of defendants to match endogenously with lawyers are lost when attorneys are assigned by a third party. Mutual trust facilitates communication between a lawyer and his or her client, which may help a lawyer uncover relevant facts, witnesses, alibis, or extenuating circumstances regarding a case. It also could help ensure the defendant behaves in a way that reduces the probability that he or she will be convicted or incarcerated, such as showing up on time, dressing and behaving appropriately in court, and refraining from suspicious activity while the case unfolds. To facilitate the matching process, most law offices offer free initial consultations. Websites offering legal advice suggest that people meet with at least two experienced attorneys before hiring one, that they should be looking for an attorney that makes them "feel comfortable," and that they should "trust [their] gut."11 This may also lead individuals accused of crimes to seek out attorneys who have similar backgrounds as their own. A large legal literature debates the merits of allowing low-income clients to select their own counsel.12 From a practical perspective, the U.S. Supreme Court has found that states are not required to allow indigent clients to choose their own attorneys (Morris v. Slappy, 461 U.S. 1, 1983; United States v. Gonzalez-Lopez, 548 U.S. 140, 2006). However, courts often use case and client characteristics, such as charge severity and language preference, to assign attorneys to indigent clients. If poor attorney-client matches contribute to relatively worse outcomes observed in assigned counsel cases, one possible policy response would be to expand the set of characteristics the court uses to determine the attorney-client match.

10 See Agan and Starr (2018) for an example.
12 See Nugent-Borakove and Cruz (2017) for a concise review.

Mandating that all lawyers offer their services to low-income clients or changing how the court assigns lawyers to clients will not reduce disparities caused by moral hazard. Given the low private returns to arguing assigned counsel cases, attorneys may exert less effort on them relative to cases on which they are retained. Because lawyer effort is not easily observed or measured, there is little evidence on the quantitative importance of this effect. One exception is Schwall (2016), who exploits a change in payment scheme from hourly to flat fee for indigent defense attorneys and finds evidence consistent with attorneys’ exerting less effort under the flat fee system. Roach (2017) similarly finds that increasing hourly pay for assigned counsel improves defendant outcomes, although how much of the effect arises from selection versus moral hazard is unclear. Legal scholars have highlighted potential moral hazard problems associated with remuneration by third parties (Carrington, 1979; Toone, 2014). While they do not entirely rule out adverse selection, interviews with defendants and other agents of the court also consistently suggest that privately retained attorneys tend to prepare more and pursue cases more zealously than assigned counsel (Klein, 1986; Anderson & Heaton, 2012). Changing how lawyers are paid or monitored while engaging in assigned counsel work could help to address moral hazard.

III. Data and Descriptive Statistics

A. Empirical Setting and Data Sources

The setting for our study is Bexar County, Texas, the home of San Antonio. According to Census data, Bexar County had a population of 1.7 million in 2010, making it the fourth most populous county in Texas. Bexar county is ethnically and racially diverse; in 2010, 59.1% of the population of the county identified as Hispanic or Latino, 29.5% of the population identified as white alone (not Hispanic or Latino), and 8.2% of the population identified as African American.

Our main data consist of comprehensive administrative records covering 64,209 felony charges filed in Bexar County district courts between 2005 and 2013. Bexar County began releasing these data in 2011 as part of a initiative to make court records more accessible (Gonzalez, 2011). The data include detailed information on each case, such as characteristics of the defendant, the offense with which the defendant was charged, case outcomes, and sentencing outcomes. In addition to the identities of the defendants, the records include the identities of defense attorneys, which allow us to follow individual lawyers as they interact with the Bexar County courts over time and across cases.

We merged these administrative court records with several other data sets. First, we obtained information from the State Bar of Texas on the characteristics of all attorneys licensed to practice in Texas. Specifically, the Texas Bar maintains information on when the attorney was licensed in Texas, the law school from which he or she graduated, the ethnicity and gender of the attorney, and the location of the attorney’s office. Both the case and bar data include the attorney’s bar number, allowing us to uniquely identify attorneys in both data sets and merge the two.

The case data also include the home address of the defendant. Using this address, we determine the census block group in which each defendant lives and then incorporate block group demographics from the Census Bureau’s 2009–2013 American Community Survey. This gives us additional information about defendants’ backgrounds. For example, the case data do not include defendants’ incomes, but defendants’ home addresses allow us to ascertain the poverty rates of their neighborhoods. Information on clients’ home addresses combined with State Bar records on attorneys’ office addresses also allows us to calculate the distance between clients’ residences and their lawyers’ offices. Physical proximity may affect the client’s ability to meet and communicate with their attorney.

B. Descriptive Statistics

Overall, assigned counsel represents 63% of felony cases that come before Bexar County District Courts. Table 2 provides descriptive statistics on case and attorney characteristics as well as case outcomes broken out for cases in which the lawyer was privately retained or assigned. Panels A and B of the table make clear the potential role that client and case characteristics may play in the relative performance of assigned counsel. Defendants represented by assigned counsel are slightly more likely to be female, more likely to be black and less likely to be white, and reside in more impoverished neighborhoods. They also tend to live in more unstable neighborhoods, where instability is defined as the fraction of housing units in the defendant’s block group that are vacant or whose current occupant moved in after 2009. Additionally, defendants represented by assigned counsel are less likely to be released on bond at some point during the adjudication process. They also have more serious criminal histories, as measured by both previous felony charges filed against them, as well as previous convictions. However, the cases represented by assigned counsel are more likely to be state jail felonies, the lowest-level felony offenses that can be charged in Texas, as opposed to more serious first, second, or third degree felonies. One of our primary goals is to quantify the role of adverse selection in the assigned counsel penalty in case outcomes. Therefore, it is critical to characterize the lawyers who participate in the assigned counsel system and, in particular, those who work as both assigned and retained counsel in the same year (as discussed below, these lawyers provide a crucial source of identification). Two-thirds of attorneys in our sample serve as both assigned and retained counsel in the same

As we discuss in appendix A, we use this measure to proxy for the ease of borrowing funds to retain an attorney on the private market.
year. In any given year, just over 50% of attorneys work as both assigned and retained counsel. This could potentially leave little scope for adverse selection into the assigned counsel pool. However, as panel C of table 2 reveals, there are systematic differences between attorneys who handle assigned and retained cases. For example, attorneys working as assigned counsel are more likely to be women and tend to have offices farther from where their clients live.

Of respondents to the Texas Task Force on Indigent Defense’s survey of lawyers (discussed further in section VC), 70% reported working on assigned cases. In appendix table A4, we present summary statistics only for the cases represented by attorneys who worked as both assigned and retained counsel in the same year.

Attorneys handling assigned cases also tend to be less experienced, as measured by both years since admission to the Texas Bar and previous number of cases tried. In figure 1A, we plot the average percentage of an attorney’s cases that are assigned by years since Texas Bar admission. There is a clear experience gradient, but even among attorneys with thirty years of experience, nearly half of a typical attorney’s cases are assigned. However, this masks some heterogeneity among lawyers in their assigned caseload, as these averages include attorneys who take on no assigned cases. Figure 1B shows that the probability that an attorney takes on no assigned cases rises with experience, although nearly two-thirds of lawyers with over thirty years of experience still take assigned counsel cases.

Among attorneys who take both assigned and retained cases in a given year, on average 65% of their cases are assigned as opposed to retained. Figure 1C shows the distribution of the percentage of cases assigned within a year, conditional on taking both types of cases. Among those who handle cases for indigent and nonindigent clients, attorneys with little experience tend to take relatively more assigned cases, whereas those with greater experience tend to have a more even mix of assigned and retained cases.

Panel D of table 2 indicates that, consistent with the previous literature, felony cases with assigned counsel tend to garner worse outcomes than cases with retained counsel on average. Cases with assigned attorneys in Bexar County are 18.3 percentage points more likely to result in a conviction on average. Assigned counsel cases are only slightly more likely to be resolved via a guilty plea. However, assigned counsel cases are substantially more likely to end in a nolo contendere (no contest) plea, where the client admits that the state has sufficient evidence to convict but neither admits nor denies guilt. Assigned counsel are also less likely to end in dismissal. Further, clients represented by assigned counsel tend to receive longer sentences and larger fines.

### IV. Empirical Methodology

We take advantage of the unique features of our data and setting to better measure and understand disparities in case outcomes for clients with assigned as opposed to retained defense attorneys. Unlike in existing studies, we can observe the same attorney working as both assigned counsel and retained counsel at the same point in his or her career. This allows us to control for both observable and unobservable differences between attorneys, such as education, charisma, or experience, that could also affect outcomes in criminal cases. If disparities in outcomes between assigned and retained counsel cases arise purely as a result of adverse selection, we should find similar outcomes, on average, in otherwise similar cases tried by the same attorney in the same year. After conditioning on case characteristics and including attorney-by-year fixed

![Table 2.—Case Characteristics and Outcomes for Retained and Assigned Counsel Clients](https://direct.mit.edu/rest/article-pdf/103/2/294/1915875/rest_a_00891.pdf)
The basic regression of interest for this analysis is

$$y_{ikt} = \delta + \beta_{1} \text{assigned}_{ik} + X_{it} \Omega + A_{ikt} \Pi + \epsilon_{ikt}$$  \hspace{1cm} (1)$$

where

$$X_{it} = [D_i, o_i, c_{it}]$$ and $$A_{ikt} = [a_{ik}, \gamma_{kt}]$$.

In equation (1), $$y_{ikt}$$ is the outcome for defendant $$i$$ (or for case $$i$$; for our purposes, each case is associated with one defendant) with attorney $$k$$ taking place in year $$t$$ (where $$t$$ is defined by the complaint year of the case). In our main analysis, we focus on four outcomes: case dismissal, deferred adjudication, conviction, and incarceration conditional on conviction.\(^{17}\) **Assigned**\(_{ik}\) is a dummy variable indicating whether attorney $$k$$ was assigned (as opposed to retained) when representing defendant $$i$$. \(X_{it}\) is a matrix of defendant/case characteristics, which includes the following defendant characteristics in \(D_i\): defendant gender, defendant race, defendant age at the time of the offense, the poverty rate of the defendant’s block group, the fraction of housing units in the defendant’s block group that are vacant or whose current occupant moved in after 2009, whether the defendant was released during the adjudication process, the defendant’s complaint history (the number of felony charges a defendant had accumulated at the time of the relevant charge), and the defendant’s conviction history (the number of convictions a defendant had accumulated at the time of the relevant charge). \(X_{it}\) also includes \(o_i\), a dummy for one of 659 offense codes associated with the defendant’s case, and \(c_{it}\), a court docket dummy (which we define as a unique combination of court and charge year; in Bexar County, each court has one judge, and thus \(c_{it}\) controls for the judge the defendant faced).\(^{18}\) \(A_{ikt}\) is a matrix of case-varying attorney and attorney-client match characteristics. The vector \(a_{ik}\) includes directly observable and measurable attributes of attorney $$k$$ and his or her match with defendant $$i$$, including the total number of felony cases the attorney had represented in Bexar County (a measure of experience), as well as the fraction of those cases in which he or she served as assigned counsel. Both variables are measured at the date the case was filed.\(^{19}\) The vector \(a_{ik}\) additionally includes the (logged) distance in miles between the defendant’s home and his or her lawyer’s office, as well as an indicator for whether the attorney is the same race as the defendant. \(A_{ikt}\) also

\(^{17}\)In appendix tables A1 to A3 and appendix figure A1, we present results for other adjudication and sentencing outcomes.

\(^{18}\)Notably, the type of offense dictates the list from which assigned attorneys are drawn.

\(^{19}\)The number of cases previously handled likely best captures the amount of experience and skill an attorney brings to a particular case. However, attorneys typically advertise their years of experience, so in our analysis of client-attorney matching, we measure experience as years since Texas Bar admission.
includes attorney-by-year fixed effects $y_{kt}$. We cluster standard errors at the attorney level.\footnote{Including a second dimension of clustering, at the defendant or block group level, results in qualitatively identical standard errors.}

In this specification, $\beta_1$ is identified off variation within attorneys who work as both assigned and retained counsel in the same year. Thus, a significant coefficient on $\text{assigned}_{ik}$ implies a difference in outcomes for the same attorney when that attorney is assigned versus retained in similar cases handled at a similar point in the attorney’s career. Such a difference could arise from unmeasured elements of the match between the client and attorney or from variation in attorney effort, but cannot solely be attributable to attorney characteristics that are fixed in a given year and thus to adverse selection.

Identifying the source of a disparity by sequentially adding covariates can be problematic, particularly when the covariates are correlated. Therefore, we quantify the importance of any given factor in explaining the assigned counsel penalty using an order-invariant decomposition following Gelbach (2016). We specifically identify the size of the omitted variable bias in the unconditional estimate of the assigned counsel penalty, relative to the conditional estimate, that is attributable to two sets of covariates: the collection of variables $X_{ik}$, which we term case characteristics, and the collection of variables $A_{ik}$, which we term attorney characteristics. The amount of bias due to the omission of any particular set of covariates $B$ is equal to $(\text{assigned assigned})^{-1} \text{assigned } B \theta_B$, where $\theta_B$ is the estimated conditional correlations between the control variables in $B$ and the legal outcome from equation (1). Scaling the amount of the penalty (and the estimated standard errors) attributed to each factor by the average unconditional penalty allows us to compare the relative importance of each factor across outcomes. In our results, we present the unconditional assigned counsel penalty and then the percent of the penalty explained by measured case characteristics and attorney characteristics based on the decomposition.

V. Results

In section VA, we present our main results on how much of the assigned counsel penalty across different case outcomes can be explained by case and attorney characteristics, estimating equation (1) and using the decomposition methodology described above. To the extent that disparities in outcomes across cases with assigned and retained attorneys persist even after conditioning on case and attorney controls, client-attorney match quality and lawyer effort could be important explanations.

A. Case Characteristics and Adverse Selection

We begin by decomposing the source of the raw assigned counsel penalty for our main outcomes of interest in figure 2. For each outcome, the first bar in the figure shows the coefficient, and associated 95% confidence interval, on the dummy for assigned counsel from a model with no controls (the unconditional assigned counsel penalty). The final bar shows the estimated assigned counsel penalty conditional on all other covariates (the residual assigned counsel penalty).\footnote{Unconditional and conditional estimates are also reported in appendix tables A1 and A2.}

The intervening bars show contributions of case characteristics $X_{ik}$ and attorney characteristics $A_{ik}$ to the assigned counsel penalty based on the decomposition.\footnote{In appendix table A3, we break the decomposition results down further by defendant characteristics, offense fixed effects, court-by-year fixed effects, and attorney characteristics.}

Clients represented by assigned counsel are 13.5 percentage points (39% of the retained case mean) less likely to have their cases dismissed than defendants with retained attorneys. Adding case and attorney controls reduces this penalty by roughly half, leaving a significant 6.1 percentage point assigned counsel penalty. Observable case characteristics account for 31% of the unconditional disparity, while adverse selection on the part of attorneys accounts for 43% of the unconditional disparity, which is still smaller than the share of the unconditional disparity left unexplained after accounting for both case and attorney characteristics (the residual penalty).

In Texas, defendants with little or no previous contact with the justice system who are accused of low-level offenses can qualify for deferred adjudication, meaning that if they remain crime-free for a fixed period of time and comply with any other court orders, their case will be dismissed. Clients represented by assigned counsel are 5.6 percentage points (18% of the retained case mean) less likely to receive deferred adjudication. Case characteristics explain 36% of the gap. Meanwhile, attorney characteristics explain essentially none of the gap; that is, the disparity persists within attorneys trying similar assigned and retained cases within the same year. This leaves a 3.2 percentage point difference in likelihood of receiving deferred adjudication that is unaccounted for.

Overall, when guilty pleas, no contest pleas, and actual convictions in court (a rare outcome) are combined, clients represented by assigned counsel are 18.3 percentage points more likely to be convicted than clients represented by retained counsel. Approximately 34% of the assigned counsel penalty in conviction rates can be explained by differences in case characteristics, but even after additionally controlling for differences across attorneys, 47% of the assigned counsel penalty remains unexplained.

Turning to sentencing, defendants with assigned counsel are 7.5 percentage points more likely to be incarcerated conditional on conviction.\footnote{Appendix figure A1 includes outcomes for incarceration not conditional on conviction; however, those results are driven mainly by conviction. Appendix figure A1 also includes decompositions for other sentencing outcomes, including sentence length and fines.} Not surprisingly, differences in case characteristics explain the majority (77%) of the gap in incarceration outcomes. Attorney quality, again defined by the
same attorney’s outcomes in similar retained cases in the same year, accounts for none of the gap, leaving a residual penalty that corresponds to 31% of the raw difference in case outcomes. In other words, adverse selection appears to play almost no role in the longer sentences given to convicted indigent defendants.

Taken together, these results suggest that observed case characteristics play an important role in explaining the relatively worse case outcomes among indigent clients with assigned counsel. We examine the potential importance of unobserved case characteristics in the appendix; based on the results of numerous subsample analyses and alternative specifications, we conclude that they play a relatively limited role. Meanwhile, contrary to the conclusions of previous studies on indigent defense and implicit assumptions of practitioners (Iyengar, 2007; Roach, 2014; Hager, 2016; Ford, 2016), our findings indicate that adverse selection on the part of attorneys does not explain the vast majority of the residual variation in outcomes across assigned and retained cases. This result has important policy implications, as it implies that reforms that merely compel attorney participation in the assigned counsel system will not necessarily narrow disparities in case outcomes dramatically.

### B. Client-Attorney Match Quality

The previous results indicate that a large fraction of the assigned counsel penalty remains unexplained even after controlling for case characteristics as well as adverse selection of attorneys into the assigned counsel pool. Part of the residual penalty could arise from the inability of indigent clients to match with attorneys based on their personal preferences.

In table 3, we show that defendants who hire their own counsel match with attorneys with different characteristics from those who are assigned attorneys along several dimensions. Overall, nonindigent defendants are 11 percentage points more likely to retain counsel of the same race as they are. However, while black and Hispanic defendants are substantially more likely to retain a lawyer of the same race or ethnicity than to be assigned one of the same race or ethnicity,
white defendants are somewhat less likely to retain a white lawyer than to be assigned a white one. Defendants, male and female, also have a slight preference for male attorneys. Relative to when they are assigned, when attorneys are retained, their offices are located 7 miles closer, on average, to a defendant’s place of residence. Attorneys who are retained also tend to be more experienced than those who are assigned; they have tried over 80% more felony cases in Bexar County and have 3.7 additional years of experience (measured as years since Texas Bar admission) on average. Clients retaining their own attorney also choose attorneys who are more specialized in the category of crime of which they are accused.24

We now investigate whether assigned counsel penalties vary across dimensions along which clients have revealed preferences in the retained attorney market that are not reflected in the assigned counsel matching process: the attorney’s race, the attorney’s gender, how far the attorney’s office is from a client’s residence, the attorney’s years of experience, and the attorney’s experience with the specific offense (measured as the total number of cases handled in that offense category).

First, in table 4, we examine how the assigned counsel penalty varies by the race of the client and attorney. Again, we show results for four outcomes: dismissal, deferred adjudication, conviction, and incarceration conditional on conviction.25 Since racial preferences appear to be race specific, we estimate these models separately for black, Hispanic, and white defendants, and we show both the average difference for a racial match relative to an attorney of a different race as well as the average differences for having an attorney of each of the two other races/ethnicities relative to a racial match. All regressions have the full set of case characteristics $X_{it}$ and attorney characteristics $A_{it}$.26

While black defendants are more than twice as likely to retain a black attorney as to be assigned one, when indigent black defendants are assigned a black attorney versus a Hispanic or white attorney, they are slightly (but not statistically significantly) less likely to be seen their case dismissed (3.1 percentage points versus 2.3 percentage points less likely). Similarly, relative to black defendants assigned lawyers of different races or ethnicities, black defendants assigned black lawyers are about 20% less likely to receive deferred adjudication. Conviction rates are also higher for black defendants with attorneys of the same race, but again the difference relative to black defendants assigned attorneys of different races or ethnicities is not statistically significant. Finally, with respect to incarceration conditional on conviction, the assigned counsel penalty is about twice as large when black, as opposed to Hispanic or white, attorneys represent black clients, although the effects are imprecisely estimated. Taken together, these results suggest that government attempts to connect black clients with black attorneys may do little to improve their case outcomes, in contrast to results found in other social contexts, such as education and policing (Dec, 2004; McCrary, 2007).26

Could black attorneys generally be worse when serving as assigned counsel? If this were true, Hispanic and white defendants would also have particularly large assigned counsel penalties when assigned black attorneys. This does not appear to be the case; if anything, Hispanic defendants are less likely to be convicted and receive shorter sentences conditional on conviction, when they are assigned, as opposed to when they hire, black attorneys. Relative to black or white attorneys, Hispanic attorneys appear to have larger gaps in conviction rates for their Hispanic and white clients, but the estimated gaps are only marginally precisely estimated. We also fail to find evidence that white defendants who are assigned black counsel do much worse than white defendants who hire black counsel, although in contrast to the revealed preference that white defendants have for Hispanic versus white lawyers, we find that with respect to conviction, the assigned

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24 Here, we group offenses into eighteen different categories (e.g., arson, burglary, homicide, drug crime).
25 We show results for additional outcomes in appendix table A6.
26 This finding is consistent with multiple plausible mechanisms. For example, it could be due to behavioral differences on the part of black attorneys or to adverse treatment of black clients by white or Hispanic lawyers that is independent of the client’s economic status. Our data do not allow us to distinguish between these mechanisms.
counsel penalty is smaller for white attorneys representing white clients. In sum, despite an apparent preference for same-race or nonwhite lawyers on the private market, we do not find evidence that being assigned a lawyer from a client’s preferred racial or ethnic background results in a meaningful reduction in the assigned counsel penalty.

In table 5, we estimate how the assigned counsel penalty varies with respect to the attorney’s gender, the distance between an attorney’s office and defendant’s home, the attorney’s years of experience, and the extent to which the attorney specializes in the particular charge. We find little indication that having male, nearby, experienced, or specialized attorneys is related to lower conviction rates or shorter sentences for assigned versus retained work.

Overall, while there are notable differences in the types of attorneys with whom different clients match on the private market and the attorney they are assigned by the court, we find little evidence that being assigned a lawyer who looks like a better match reduces the assigned counsel penalty substantially. Therefore, we conclude that changing the process by which the court assigns attorneys to clients is unlikely to improve outcomes for indigent defendants dramatically.28

C. Moral Hazard (Attorney Effort)

The remaining significant assigned counsel penalty represents an upper bound on the influence of moral hazard. In this section, we present suggestive evidence from our administrative data and from a survey of lawyers that indicates that differences in attorney effort on assigned versus retained cases is likely an important contributor to the observed disparities in case outcomes. To the extent that moral hazard contributes to the assigned counsel penalty, changing the structure of assigned counsel compensation or the degree to which assigned attorneys are likely to improve outcomes for indigent defendants dramatically.

28Notably, Kamali-Shahdadi (2018) shows theoretically that in the presence of moral hazard on the part of assigned attorneys, allowing for endogenous matching between lawyers and indigent clients may not improve defense and could in fact worsen it.
attorneys are monitored could potentially improve case outcomes for indigent defendants.

Evidence from court records. As previously discussed, the fee structure for assigned counsel creates incentives to obtain pleas as quickly as possible. Under the flat fee arrangement, attorneys have no monetary incentive to prolong a case or take it to trial; in the hourly rate system, hourly rates are less than half of private market rates and incentivize quick resolution to be able to take on additional cases. In this context, a natural proxy for lawyer effort that we can calculate from the court records is case duration—the length of time that elapses between the complaint date, when charges were initially filed against the defendant, and the date when the case ends, for which we use the earlier of the judgment date and the adjudication date. Delaying cases can benefit defendants in a number of ways, including making it more likely that the prosecutor offers a favorable deal or that evidence or witnesses are lost (Feeley, 1979). Attorneys zealously defending their clients may pursue a variety of strategies to delay a case—for example, by requesting continuances for consultation purposes or for psychiatric evaluations, filing numerous motions, and using the discovery process to postpone hearings.

On average, cases represented by assigned counsel are 65% shorter than when counsel is retained. In panel A of table 6, we show results from regressions for the natural log of case length in days on the full set of case and attorney characteristics. The results suggest that on average, attorneys resolve assigned cases 12.5% faster than similar retained cases. In Gelbach decomposition results not shown, we find that 51% of the assigned counsel penalty for case length can be attributed to characteristics of the case (which includes clients’ bail status). Roughly 28% of the difference in case length can be attributed to characteristics of the attorney.

In practice, individuals detained pretrial may prefer to plead guilty or no contest quickly in exchange for an earlier release (Stevenson, 2018; Dobbie, Goldin, & Yang, 2018). Given the important role of pretrial detention in the potential benefit to the client of quick resolution, we divide our sample by whether the client had a bail bond posted. Conditional on all other features of the cases and attorneys, both detained and released clients’ cases resolve faster when represented by assigned counsel. However, cases are particularly short among indigent clients who are detained at any point prior to adjudication. While detained clients might prefer a quick resolution, the fact that we also observe shorter case lengths for released clients with assigned counsel suggests that the attorneys, rather than the clients, are driving this effect. Given the fee structure for assigned counsel, moral hazard on the part of attorneys is a compelling explanation for the results.

In panels B and C of table 6, we explore whether clients who are matched with attorneys who share characteristics that appear to be valuable on the private market have shorter or longer cases. There is little evidence that the assigned counsel penalty is larger for clients matched with attorneys of the same race or ethnicity. However, being assigned a lawyer...
whose office is farther from one’s home (something that is not desirable on the retained market) or being assigned a more experienced lawyer (something that is) is associated with slightly longer cases.

The expansion of the flat fee option in Bexar County during our sample period allows us to further explore how the compensation structure affects attorney behavior. For the first half of our sample, lawyers could increase their effective hourly wage only by convincing their client to plead guilty or no contest quickly. After 2009, having a case dismissed became relatively more attractive, as lawyers could earn at least the fixed fee on those as well. To assess the impacts of this change, in figure 3 we present the results of extensions of equation (1) in which we allow the assigned counsel penalty to vary with the year the case was filed. The black dots represent the estimated assigned counsel penalties for dismissals, nolo contendere pleas, guilty pleas, and deferred adjudications in each payment regime (before and after June 2009), with 95% confidence intervals indicated. The black horizontal lines show the average estimated penalties for cases filed in each payment regime (before and after June 2009), with 95% confidence intervals shaded.

The probability that a case was dismissed or a no contest plea was entered appears stable across regimes. However, relative to their retained clients, attorneys were less likely to enter guilty pleas and more likely to negotiate deferred adjudication for their assigned clients after fixed fees were possible for the latter (recall that a successfully completed period of deferred adjudication results in dismissal). The reduction in guilty pleas is particularly notable given these are entirely within the defense’s control and do not necessarily require any concession on the part of the prosecutor or judge the way that a dismissal does. We view these results as suggestive evidence that lawyers’ behavior is responsive to changes in the compensation structure.

**Evidence from a survey of attorneys.** Contemporaneous qualitative evidence from Bexar County further underscores how differences in effort on cases in which attorneys are assigned as opposed to retained could contribute to disparities in case outcomes. In April 2010, the Texas Task Force on Indigent Defense conducted a survey of Bexar County lawyers, the responses to which they shared with us. While too small to draw strong conclusions (93 attorneys responded to the survey), several patterns emerge. First, the survey revealed substantial dissatisfaction among criminal defense attorneys with the compensation structure for assigned counsel; 82% of lawyers surveyed had negative views about the county’s fee structure. In response to a follow-up question about incentives created by the fee structure, a majority said that the system did not provide an incentive to provide quality representation. Moreover, a plurality noted in open-ended responses that the fee structure encouraged pleas—in particular, pleas early in the process.

Reported differences in the task force’s survey in the number of hearings, motions filed, and time spent on cases provide additional evidence that attorney effort likely contributes to disparities in case outcomes. The average number of hearings respondents said were typically required to dispose an assigned felony case was 4.0, compared to 4.3 for a retained felony case ($p$-value for the difference = 0.06); for lawyers who reported an average number of hearings for both types of cases, the figures were 3.9 and 4.2 ($p$-value = 0.03). Retained counsel also filed pretrial motions in felony cases

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**Table 6.—Residual Assigned Counsel Penalty for Case Duration**

<table>
<thead>
<tr>
<th></th>
<th>All</th>
<th>Detained Preadjudication</th>
<th>Released Preadjudication</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assigned Counsel</td>
<td>−0.1341***</td>
<td>−0.2391***</td>
<td>−0.1391***</td>
</tr>
<tr>
<td></td>
<td>[0.0167]</td>
<td>[0.0333]</td>
<td>[0.0134]</td>
</tr>
<tr>
<td>Observations</td>
<td>52,488</td>
<td>18,902</td>
<td>33,586</td>
</tr>
</tbody>
</table>

**B. Racial and Ethnic Matches**

<table>
<thead>
<tr>
<th></th>
<th>Black Defendants</th>
<th>Hispanic Defendants</th>
<th>White Defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assigned Counsel</td>
<td>−0.0836*</td>
<td>−0.1191***</td>
<td>−0.1297***</td>
</tr>
<tr>
<td></td>
<td>[0.0380]</td>
<td>[0.0269]</td>
<td>[0.0391]</td>
</tr>
<tr>
<td>Assigned Counsel × Same Race Attorney</td>
<td>0.0112</td>
<td>−0.0395</td>
<td>0.0090</td>
</tr>
<tr>
<td></td>
<td>[0.1068]</td>
<td>[0.0447]</td>
<td>[0.0465]</td>
</tr>
<tr>
<td>Observations</td>
<td>8,847</td>
<td>30,720</td>
<td>12,921</td>
</tr>
</tbody>
</table>

**C. Other Match Dimensions**

<table>
<thead>
<tr>
<th></th>
<th>Distance from Home to Law Office</th>
<th>Years since Bar Admission</th>
<th>Male Attorney</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assigned Counsel</td>
<td>−0.1974***</td>
<td>−0.2096***</td>
<td>−0.1537***</td>
</tr>
<tr>
<td></td>
<td>[0.0308]</td>
<td>[0.0324]</td>
<td>[0.0367]</td>
</tr>
<tr>
<td>Assigned Counsel × Match Dimension</td>
<td>0.0345**</td>
<td>0.0452*</td>
<td>0.023</td>
</tr>
<tr>
<td></td>
<td>[0.0121]</td>
<td>[0.0199]</td>
<td>[0.0404]</td>
</tr>
<tr>
<td>Observations</td>
<td>52,488</td>
<td>52,488</td>
<td>52,488</td>
</tr>
</tbody>
</table>

This table shows coefficients on assigned counsel (and, in panels B and C, its interaction with different client-attorney match dimensions) from the model with all controls, including case, client, and attorney characteristics, as well as offense code fixed effects, court docket fixed effects, and attorney-by-year fixed effects. The dependent variable is the natural log of the number of days that elapsed between the complaint date and the earlier of the judgment and the adjudication date. Sample excludes motions to revoke probation (MTRs). Standard errors adjusted for heteroskedasticity and clusters at the attorney level in brackets. Significant at 10%, 5%, 1%, and 0.1% levels.
substantially more often than assigned counsel (71.4% versus 60.5% of cases; \( p \)-value = 0.08); for those who reported average pretrial motions for both types of cases, the figures were similar (69.9% versus 61.1% of cases; \( p \)-value = 0.004).

Even more striking was that survey respondents reported spending on average 16.8 hours on felony cases on which they were assigned counsel, about half the 33.5 hours they reported spending on felony cases on which they were retained counsel (\( p \)-value = 0.01). Limiting attention to lawyers who reported average hours spent on both assigned and retained felony cases, the gap remains stark at 16.3 hours for assigned cases and 26.7 hours for retained cases (\( p \)-value = 0.03). In percentage terms, the magnitude of this disparity echoes what we found for overall case length between cases handled by assigned and retained counsel. These findings are also in line with those of Anderson and Heaton (2012), whose interviews with various agents of the court in Philadelphia suggested that certain institutional factors may serve to reduce the amount of time lawyers on assigned counsel put into preparing cases.

D. Implications for Recidivism

Our results provide a window into the sources of disparities in outcomes for defendants with assigned as opposed to retained counsel. These disparities are important to understand not just because of their immediate impacts on indigent individuals but also because differences in treatment by the criminal justice system may have long-run impacts as well. One potential long-run social cost of the disparate treatment is higher rates of future crime among low-income individuals (Aizer & Doyle, 2015). To shed some light on this, we consider the relationship between attorney-specific assigned counsel penalties and future recidivism of those attorneys’ clients. We first generate attorney-specific assigned counsel penalties from estimating conviction using equation (1), but including interactions between the assigned counsel dummy and attorney fixed effects. We then regress the probability that a defendant has felony charges filed against him or her again in the next three years on our full set of case characteristics. Because those incarcerated cannot recidivate (at least temporarily), we exclude defendants who were imprisoned from...
FIGURE 4.—ATTORNEY-SPECIFIC ASSIGNED COUNSEL PENALTIES FOR GUILT AND INDIGENT CLIENT RECIDIVISM

The figure plots estimates of attorney-specific residual assigned counsel penalties for whether the defendant is found guilty against the probability an attorney’s indigent clients recidivate. Recidivism is defined as having a felony charge in Bexar County within three years of case resolution. Excludes defendants who were incarcerated from the sample. The size of each dot is proportional to the fraction of that attorney’s cases that are assigned multiplied by the fraction that are retained. The regression line is also weighted by the share of each attorney’s cases that are assigned multiplied by the share that are retained.

In figure 4, we plot attorney-specific assigned counsel penalties against the average residualized recidivism rates for their assigned clients. The size of each dot is proportional to the fraction of that attorney’s cases that are assigned times the fraction that are retained, and the regression line is weighted in the same way. We find a positive and statistically significant relationship between attorney-specific assigned counsel penalties and recidivism among indigent clients. In other words, indigent clients represented by attorneys with greater assigned counsel penalties are more likely to recidivate in the future.

VI. Conclusion

In this paper, we investigate the sources of the relatively worse outcomes in cases handled by assigned as opposed to retained counsel using detailed administrative data from one large county in Texas. We observe the same lawyer handling similar cases under different case allocation regimes. This allows us to differentiate among four possible mechanisms driving the disparity in outcomes for indigent clients: differing case characteristics, selection of low-quality attorneys into assigned counsel, lower-quality matches between attorneys and defendants, and reduced effort on the part of lawyers. The relative importance of each of these mechanisms has a direct bearing on the appropriate policy response to a system recently decried as “broke and broken” (Uphoff, 2010) and “a mockery of justice for the poor” (Pfaff, 2016).

We find that although case characteristics are important in understanding the disparities, they are not solely responsible for the worse case outcomes generally observed among indigent relative to nonindigent defendants. Meanwhile, adverse selection among lawyers electing to serve as assigned counsel, while significant, can explain less than half of the disparity in outcomes among clients of assigned as opposed to retained lawyers. We also find little evidence that court-determined matches between clients and attorneys that happen to replicate more closely private market matches deliver better case outcomes.

To the extent that case characteristics, adverse selection, and match quality together can explain only a fraction of the disparities in outcomes between cases tried by assigned and retained counsel, our results point to an additional role for moral hazard in generating these disparities. Our finding that lawyers working in assigned cases resolve these cases faster is consistent with this interpretation. Further, survey evidence highlights striking gaps in the average number of hearings, motions filed, and hours spent on cases handled by assigned relative to retained counsel.

While the extent to which our results apply to assigned counsel that works in conjunction with a fully staffed and funded public defender’s office is an open question, our findings have important implications for policymakers seeking...
ways to provide a fair and accessible system of legal representation for those charged with crimes. An important component of the disparities in case outcomes is differences in case and client characteristics, which may be difficult to address via government intervention. Meanwhile, policies aimed at improving attorney-client matches, such as more sophisticated court assignment mechanisms, are unlikely to improve case outcomes for indigent defendants dramatically. Efforts to mitigate adverse selection in the assigned counsel pool, such as pro bono–style requirements that all attorneys represent a certain number of indigent clients each year, will go only a limited way toward reducing disparities in outcomes. Ensuring that there are appropriate incentives in place for individual attorneys to mount robust defenses in assigned counsel cases may be an effective strategy for improving the quality of indigent defense. To the extent that inadequate indigent defense is an important contributor to the persistent racial gap in criminal justice outcomes, improving incentives for attorneys who defend indigent clients could represent an important step in ensuring equal access to justice for all Americans.

REFERENCES