

## Legal Skill or Systemic Structure A Quantitative Examination of the Reasons Prosecutors Win

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### Abstract

American criminal prosecutors win a very high percentage of their cases. There exist two competing explanations for this. One theory holds that prosecutors win because of variables at the individual level of analysis - they are skilled attorneys and most defendants are guilty. A second explanation attributes prosecutorial success to the structure of the American legal system, particularly prevalent plea bargaining and overworked public defense counsel. This paper tests the two theories by analyzing rates of public representation, rates of plea bargaining, and the success rates of private counsel in a typical Midwestern county (Jackson County, Illinois). Results strongly support the system-structural explanation for prosecutorial success.

### Introduction and Overview

American criminal prosecutors win a very high percentage of their cases. It is common knowledge in the law that many district attorneys' offices boast winning percentages of 90% or more, unheard of among private counsel. The literature confirms that this "knowledge" is accurate (Fisher 2000: 1150). Not a few D.A. win so many high profile cases that they turn a crime-busting reputation into a selling point in races for state governorships.<sup>1</sup> Almost no prosecuting attorney loses more cases than she wins.

There are two competing explanations for this. One theory holds that prosecutors win because of variables at the individual level of analysis - they are skilled attorneys and most defendants are guilty. This is a common perception among laymen (Gordon and Huber 2002: 335). The U.S.A. is a strongly anti-crime society, and many Americans assume that top attorneys choose to make a career of prosecuting felons.<sup>2</sup> The prevalence of "legal eagles" in the mass media provides support for this belief. *Law and Order* is consistently among the most popular television shows, and Robert Tannenbaum writes bestselling novels about a martial artist prosecutor who has never lost a homicide case.<sup>3</sup> Prosecutors are widely viewed as victorious because of skill.

The theory that prosecutorial victory rates are due to individual-level characteristics of attorneys and defendants receives some support among scholars.

Linz, Penrod, and McDonald (1986) conclude that prosecutors win more often than defense counsel because juries see them as well organized and prepared. McGuire (1995) argues that “repeat players” of all varieties enjoy success in the courts, and that prosecutors are skilled repeat players. Frazier, Bishop, and Lanza-Kaduce (1999) point out that prosecutors are good at employing tough sentencing provisions (here in the case of juveniles) to obtain convictions or advantageous settlements.

A second explanation attributes prosecutorial success to the structure of the American legal system, rather than traits at the individual level of analysis. Critical scholars contend that the prevalence of plea bargaining and the weaknesses of the public defense system explain prosecutorial victory rates. Ogletree points out that a large number of defendants are represented by public counsel at risk of burnout, and that these defendants are likely to lose (1993: 1241). More recently, other authors have suggested that – in some regions- most prosecutorial victories are the result of plea bargaining and weak public representation (Emmelman 1996; Bibas 2001).

This debate matters. If prosecuting attorneys win 85% of their cases because talented counsel enter law enforcement in large numbers – or because most of those charged with crimes committed them – the legal system is working well. Guilty defendants are going to jail, and those putting them there are skilled lawyers. The situation is less rosy if those accused of crimes, guilty or innocent, feel their lawyers are neophytes and plea-bargain to avoid prison. In either case, study of this area of jurisprudence can shed light on issues relevant to our society.

This project contributes a Large-N study of prosecutorial success rates in a representative Midwestern county to the literature dealing with prosecutorial success. Three questions are answered: 1.) *In Jackson County (IL) during 2006, what percentage of criminal defendants elected to plea bargain instead of pursuing a trial win or dismissal?*<sup>4</sup> 2.) *What percentage of Jackson County defendants was represented only by an employee of the county public defender?* 3.) *What is the significance of the difference in winning rates between public and private defense counsel?*

If the data indicate that the majority of Jackson County defendants are represented by public counsel, and that the majority of these defendants elect to plea bargain, the hypothesis that prosecutors win due to structural realities of the legal system will be supported. A finding that private trial attorneys enjoy a high success rate against the Jackson County prosecution would further bolster that hypothesis. On the other hand, a finding that prosecutors win against both public and private counsel, and despite relatively low rates of plea bargaining, would support the “skill thesis.”<sup>5</sup>

## A Critical Theory of Victory

The theory of this paper is that prosecutors do not win due to legal skill but rather due to the structure of the legal system and the disadvantaged status of their opponents within it. To say this is not to say prosecuting attorneys are inept; few people who finish last in their law school class become Illinois district attorneys. With top law firms paying \$200,000 annually to associates, however, it is also unlikely that the best young lawyers go into D.A. work. Prosecutors are probably average lawyers who would maintain a decent winning percentage against equal opponents. However, the fact that many prosecutors win 90% of their cases implies that the game is rigged for them.

First, prosecuting attorneys have the advantage of regularly facing public defenders in court. In the United States, public defense work does not attract the cream of the bar; few if any law schools encourage students to enter this area of practice. By both world standards and those of the U.S. legal profession, American public defenders are paid very low salaries (Ogletree 1993: 1240). They are almost universally over-worked, often handling seventy cases at once (State of Connecticut 2005). Prosecutors pitted against these attorneys are likely to often be successful, with this success attributable primarily to the structural disincentives attached to public defense work.

Second, prosecutors have the advantage of confronting a vulnerable category of legal opponents: accused criminals. Many criminal defendants want to get out of court quickly, avoiding a public trial by any means (Bonsignore et al 2006). This encourages plea bargains. Furthermore, according to conventional wisdom, some of a slate of charges is generally dropped when a defendant chooses to make a deal. Defendants' desire to avoid prison thus also facilitates plea bargaining. Bargains can be logical in criminal matters, and occur with great frequency (Emmelman 1996: 340).

The paper's hypotheses come from the theory that prosecutorial victory rates are not due to skill. I hypothesize that: 1.) *The majority of 2006 criminal defendants in Jackson County will be represented only by the county legal aid office;* 2.) *A majority of these defendants, and of Jackson County defendants overall, will plea bargain;* 3.) *Private trial attorneys will plea bargain less often and more successfully than public defenders, and have a higher overall winning rate against the Jackson County District Attorney than public defenders.*

## Data Collection Technique

To acquire the data needed for this paper, I used the Judici legal research service to obtain docket sheets for all felony cases decided during 2006 from the Jackson County Courthouse. Docket sheets are summaries of recently heard cases, which list

a defendant's personal attributes, type of counsel, plea, and sentence. These gave me information on the result of each criminal case decided during the year, as well as the characteristics of each defendant and the percentage of defendants represented by the county public defender.<sup>6</sup> This data was broken down to determine rates of plea bargaining and public representation, across defendant categories, in Jackson County. It was also used to construct a logistic regression model testing the effect of public and private representation on defendants' chances of winning a criminal case.

This data collection technique allowed me to measure the percentage of criminal charges resolved via plea bargain, percentage of criminal defendants represented by public defenders, and trial behavior of public and private counsel.

### **Plea Bargains and Public Counsel**

An examination of the available data largely confirmed the paper's initial hypotheses. It is the case that prosecutorial winning rates are enhanced by high levels of plea bargaining, that a sizable percentage of criminal defendants is represented only by public defenders, and that public defenders lose more often than private defense attorneys. That these things are true is not entirely surprising, but the extent to which each hypothesis received confirmation is.

The first hypothesis to be confirmed was that most criminal defendants are represented by unpaid public counsel. During 2006, 78% of Jackson County defendants (651/834) were represented in court by Legal Aid. Dependence upon public counsel was a constant across all groups of criminal respondents. 83% of female respondents had public counsel, as did 76% of males. Similar figures obtain for violent, non-violent, older, and younger defendants.

{{Figure A about here}}

In contrast, extremely small numbers of defendants retained a private attorney. Among defendants under the age of 30, only 97 of 455 were represented by private counsel. The same held true for middle aged and elderly defendants; 82 of 370 respondents over 30 had a paid attorney. Similarly, 496 of the 623 defendants charged with a non-violent crime did not seek a private lawyer. Even among respondents charged with a violent felony, the single most serious category of crime, the rate of paid representation was less than thirty percent (56/210).

The prevalence of public counsel in the legal system makes the confirmation of Hypothesis Two rather unsurprising: most defendants settle cases by immediate plea bargain, losing without a fight. Of the 834 felony cases brought in Jackson County during 2006, 525 were resolved by an opening plea of guilt on the part of the defense. Another 86 remain unresolved, in virtually all cases while

lawyers continue to work out a deal. In total, 74% of criminal matters were settled by some form of plea bargain.<sup>7</sup>

A very secondary, but significant, subset of Jackson County cases reached resolution on technical grounds. In 117 cases, the District Attorney's office entered a *nolle prosequi* filing - choosing not to press charges due to witness unreliability, the unavailability of evidence, or the reluctance of a victim to testify.<sup>8</sup> In an additional 97 matters, defendants were able to get the case against them dismissed.<sup>9</sup> These are important findings. However, it must be noted that only 25% of defendants opposed an accusation in any way. Plea bargains were made in more than 70% of cases. Bargaining is three times more common than all other responses to a criminal charge.

{{Figure B about here}}

One fact highlighted by the frequency of legal deal-making is the rarity of criminal trials. In 2006, almost no Jackson County defendants elected to plead not guilty. While a fair number utilized legal technicalities to successfully dismiss cases, defendants entered pleas of innocence in 8 of 834 cases. These claims were fairly unsuccessful; only three of the defendants pleading not guilty were found innocent, while five were convicted and sent to prison. The vaunted American right to a jury trial was invoked twice, unsuccessfully. Like the prevalence of public counsel in the legal process, the infrequent invocation of full due process helps explain prosecutorial victory rates.

It is worth pointing out that defendant decisions to bargain, like prosecutorial winning rates more broadly, are the product of systemic variables. Defendants do not bargain because prosecutors are talented. Rather, they do so because bargaining is logical in a congested justice system (Emmelman 1996). Were bargains to result from overwhelming prosecutorial skill, or the indisputable guilt of most defendants, it would be reasonable to expect plea deals to offer defendants terms just better than those they would receive after an inevitable trial defeat. It would also be reasonable to expect bargaining behavior to be constant across categories of defense counsel.

{{Figure C about here}}

On the other hand, if the variables influencing bargaining rates are the over-congestion of the legal system and the specific weaknesses of public defense counsel, different expectations arise. Here, it would be logical to expect "solid pleas" – deals offering defendants a good deal in exchange for their obligingly removing themselves from the legal system. It would also be reasonable to expect private

attorneys, who do not share the specific weaknesses of P.D., to obtain better deals for their clients than public counsel.<sup>10</sup> My findings support this second position.

First, extremely advantageous plea deals are the absolute norm in Jackson County. During 2006, offenders were found guilty of only 43% of the charges initially involved in the case they bargained. These were mostly misdemeanors – so that, for instance, a defendant initially charged with battery might be convicted of disturbing the peace. Out of an initial set of 1236 charges involved in 525 bargained cases, 532 were dismissed entirely. Another 174 were amended to be less severe. Defendants received convictions on only 540 counts, barely more than the number of counts dismissed.

Second, private attorneys were able to obtain better plea deals for their clients than public counsel. Defendants who bargained while represented by private counsel saw only 115 charges survive, out of an initial set of 310. A greater number of charges facing these defendants were dismissed than prosecuted, and more than 20% of the primary charges against them were amended. While the clients of public defenders were found guilty of roughly 45% of the counts on which they were initially charged, the clients of paid lawyers were found guilty of about 35% of initial counts.

Both of these findings support the position that high rates of plea bargaining do not result from prosecutorial skill. Defendants do not plea bargain because they fear an inevitable defeat, but rather because bargaining makes good logical sense. Given the cost of trial, even innocent defendants confront systemic incentives to bargain. The frequency with which defendants do so – like the over-representation of public counsel in the criminal legal system - obviously boosts the winning percentages of Jackson County district attorneys.

### **The Successes of Private Counsel**

Finding that a large majority of criminal defendants are represented by public counsel, and that a large majority of defendants resolve cases by plea bargaining, provides some insight into why prosecutors win. However, merely demonstrating this does not suffice to disprove the skill hypothesis of prosecutorial victory. To do that, it is necessary to examine the performance of skilled private counsel against a prosecutorial staff. If prosecutors are highly successful against both public defenders and paid counsel, it would be logical to conclude that they are simply good lawyers. On the other hand, if private lawyers succeed against the prosecution while public defenders do not, it would be logical to conclude that the structural disincentives facing one category of disadvantaged attorneys explain prosecutorial victory rates.

{{Figure D about here}}

To test the theory that paid lawyers enjoy success against prosecutors, while public defenders do not, I constructed a logistic regression model. The dependent variable in the model was whether or not a criminal defendant won or lost his case.<sup>11</sup> The key factor variable was whether the defendant was represented by a public defender or by a private attorney. The other independent variables in the model were: defendant's prior record, time elapsed since the last criminal charge against defendant, defendant's age, defendant's sex, defendant's county of residence, and whether defendant was charged with a violent or non-violent crime.

The results of the model confirm the structural hypothesis of victory. Representation by a privately retained lawyer has a strongly significant positive effect on a defendant's chances of winning a criminal case. In statistical terms, the effect of the counsel quality variable on defendant success rates is significant at the .000 level; there is virtually no chance that this effect is overstated or does not exist. The Waldheim score for this variable is 14.33, and the beta coefficient is 1.349. Whether or not a respondent is defended by private counsel is the most effective positive predictor of whether or not he will win a criminal case.

Several other results of the model are worth noting. The strongest negative predictor of defendant victory is age. With a Waldheim score of 15.2 and a beta coefficient of -1.742, this variable is slightly more significant than counsel quality. Criminal respondents over the age of thirty are much less likely to win cases than those under the age of thirty. This variable is significant even in a model controlling for prior record; many judges simply seem to lose patience with older criminals. Unsurprisingly, being charged with a violent crime is also a significant negative predictor; defendants in battery and assault cases are more likely to lose than those accused of non-violent offenses like theft ( $B = -1.869$ ;  $p = .013$ ).

Interestingly, the second strongest positive predictor of courtroom success – after counsel type – is female sex. The effect of this variable was significant at the .001 level, with a beta of 1.177 and a Waldheim score of 10.43. Women are far less likely to lose criminal cases than men. Further, this finding is not an artifact of the fact that women commit less brutal crimes than men; it holds true with the variable “type of crime” controlled for. While women face obstacles in many social arenas, it may be that vestigial chivalry on the part of judges advantages female criminal defendants.

None of the other variables in the model had notable effects. Whether or not a defendant had a prior record had virtually no effect on her chance of victory ( $B = -.133$ ,  $p = .221$ ). Residency in the county in which charges were brought did not affect the win rates of respondents ( $B = .372$ ,  $p = .214$ ). Finally, the amount of time elapsed since a defendant's last criminal indictment was insignificant ( $B = .034$ ,

p=.769). It is worth noting that these variables all measure the strength of an individual's legal position; the only legal position variable to achieve significance was counsel type. With quality of counsel controlled for, there exists no significant difference in win rates between respondents with strong legal positions and respondents with weak positions. More specifically, weak position defendants defended by paid counsel are more likely to win than strong position defendants represented by public defenders.

These regression results provide substantive support for the argument that prosecutors win because of the structure of the legal system – which allows them to regularly confront tired public counsel and frightened opponents (Ogletree 1993). The finding that private counsel not only win more often than public defenders, but also secure better plea deals for their clients, further supports that argument. Overall, more than 70% of Jackson County criminal matters are plea bargained as soon as possible and almost 80% involve defendants represented only by public counsel. These things, not skill, are responsible for the high success rate of prosecutors.

## Conclusion

This study took a quantitative look at three questions: 1.) *In Jackson County (IL), what percentage of criminal defendants is represented only by public counsel?* 2.) *What percentage of defendants plea bargain?* 3.) *What differences, if any, exist between the winning rates of public and private counsel?* The data provided interesting, and perhaps disturbing, answers to these questions.

In Jackson County, eighty percent of all criminal defendants were represented by public defenders. Sixty-three percent of criminal charges were met by an immediate plea of guilt, many others by a prolonged plea bargain. Importantly, this behavior was not due simply to guilt. Private lawyers, working with clients from the same area, enjoyed considerable success against the prosecution. All data compiled supports the thesis that prosecuting attorneys win because of the structural realities of the contemporary legal system, not because of ability.

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**Appendix A: Tables and Figures**

**Figure A: Representation by Defendant Category**

	Public Defender	Private Lawyer	Totals
Male Defendants	485 (.76)	150 (.24)	635
Female Defendants	166 (.83)	33 (.17)	199
Defendants Under 30	358 (.79)	97 (.21)	455
Defendants Over 30	288 (.78)	82 (.22)	370
Violent Defendants	154 (.73)	56 (.27)	210
Non-Violent Defendants	496 (.79)	127 (.21)	623
All Defendants (2006)	651 (.78)	183 (.22)	834

**Figure B: Criminal Case Resolutions for Defendants**

Plea Bargain	Nolle Prosequi	Full Dismissal	Trial Defeat	Trial Victory	Totals
525 (.70)	117 (.16)	97 (.13)	5 (.007)	3 (.004)	747 <sup>12</sup>

**Figure C: Resolution of Charges**

	Guilty	Dismissed	Reduced	Totals
Public Lawyer	<b>425 (.45)</b>	<b>402(.43)</b>	109 (.114)	<b>936</b>
Paid Attorney	<b>115 (.36)</b>	<b>130 (.41)</b>	65 (.21)	310
Totals	540	532	174	1236

**Figure D: Logistic Regression**

Variable	Beta	Standard Error	Waldheim Score	Degrees of Freedom	Significance Level
Type of Attorney*** <sup>13</sup>	1.349	.356	14.333	1	.000
Prior Record	-.133	.109	1.501	1	.221
Recent Arrest	.034	.115	.086	1	.769
County of Residence	.372	.299	1.546	1	.214
Violent Crime*	-	.756	6.107	1	.013
	1.869				
Sex***	1.177	.364	10.430	1	.001
Age (Under/Over 30)***	-	.447	15.202	1	.000
Constant Term	1.742	1.564	2.864	1	.091
	-				
	2.648				

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<sup>1</sup> Former DuPage County D.A. Jim Ryan is a good example of this; he parlayed local success into the Illinois Attorney Generalship and a try for Governor.

<sup>2</sup> Despite the fact that the U.S. murder and violent crime rates are currently at their lowest level since 1967, publicagenda.org notes that 53% of Americans describe the “reduction of crime” as their chief governmental priority.

<sup>3</sup> The Butch Karp books.

<sup>4</sup> A plea bargain is the entry by a defendant enters of an initial plea of guilty to one or more charges, with no initial plea of innocence or demand for a trial date made.

<sup>5</sup> In short, the skill hypothesis will be supported where prosecutors perform well against both categories of defense counsel – especially where this performance includes trial wins. Finding that D.A. regularly defeat public counsel, while losing to

private attorneys, would support a structural hypothesis. In that situation, the weakness of the public bar, which is a result of structural variables like salary, would explain prosecutorial success.

<sup>6</sup> The defendant characteristics which appear on docket sheets include: sex, age, residence, prior record, time since last arrest, nature of the crime charged, and counsel type.

<sup>7</sup> This figure does not distinguish between cases handled by public defenders and by private counsel. The purpose of this analysis was the testing of Hypothesis Two in isolation. However, it is the case that private counsel bargain less often than public counsel.

<sup>8</sup> A “no pros” filing simply means that the prosecution has elected not to formally pursue a particular case.

<sup>9</sup> Successful technical challenges to the legality of a search were the most common grounds for these dismissals.

<sup>10</sup> For example, private attorneys can make significantly more credible threats to proceed to trial in a criminal case. Public defenders often have dozens of cases to defend at once, while many private counsel can afford to focus a great deal of time on two or three matters.

<sup>11</sup> A win was coded as a trial victory or a full dismissal of charges. For this analysis, plea bargains in which the defendant received no jail time and a sentence of withheld judgment on all counts were also considered to be wins. In legal terms, they are.

<sup>12</sup> Numbers in this table exclude cases as yet unresolved, almost all of which will be bargained.

<sup>13</sup> In Figure D, the logistic regression table, stars indicate statistical significance. As is standard in political science, one star indicates that a variable is significant at the .05 level. In other words, there is only a 5% chance that such a variable (violence of the alleged crime) does not have an important effect on the dependent variable. Two stars indicate that the variable is significant at the .01 level; there is only one chance in 100 that it is not important. Three stars indicate a variable significant at the .001 (or .000) level. There is only one chance in 1,000 that a “three star” variable does not have the predicted effect.