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# Attorney Competence in an Age of Plea Bargaining and Econometrics

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# Attorney Competence in an Age of Plea Bargaining and Econometrics

Jeffrey Bellin\*

## I. INTRODUCTION

One of the stories echoing in the halls of the Superior Court in Washington, D.C. is the sad tale of the criminal defendant who foolishly replaces his “free” Public Defender Service [PDS] lawyer with a second-rate hired gun. Even though they do not cost their clients a dime, PDS lawyers are extremely talented, and firing one is widely viewed as the tactical equivalent of shooting yourself in the foot.<sup>1</sup> Yet despite the countless real-world anecdotes and myriad fictional accounts centered on the talents of particular attorneys, the widespread belief in the salience of attorney differences is deeply problematic. Facts should control who wins or loses in court. With apologies to Atticus Finch, the idea that one’s choice of an attorney drives legal outcomes violates the sacred tenet of “equal justice under the law.”<sup>2</sup>

An important new study published in the *Yale Law Journal* and heralded in the *New York Times* applies sophisticated econometric analysis to the age-old question of how much difference an attorney makes.<sup>3</sup> The study finds vast differences in the outcomes of Philadelphia murder cases based on the type of attorney assigned to the case.<sup>4</sup> The authors conclude that these results suggest that

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<sup>1</sup> Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 938 (2010) (describing PDS as a “very fine and relatively well-funded defender organization”); Charles J. Ogletree & Yoav Sapir, *Keeping Gideon’s Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 218–19 (2004) (“The Public Defender Service (‘PDS’) of Washington, D.C. is renowned for its uncommonly skilled attorneys who are able to devote sufficient time to their cases . . .”).

<sup>2</sup> *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (expressing “constitutional understanding that each person . . . is entitled to equal justice under the law”); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001) (“‘Equal justice under law’ is one of America’s most firmly embedded and widely violated legal principles.”); James M. Anderson & Paul Heaton, *How Much Difference Does The Lawyer Make? The Effect Of Defense Counsel On Murder Case Outcomes*, 122 YALE L.J. 154, 156 n.2 (2012); HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

<sup>3</sup> Anderson & Heaton, *supra* note 2, at 154; Editorial, *Injustice in Murder Cases*, N.Y. TIMES, Dec. 24, 2011, <http://www.nytimes.com/2011/12/25/opinion/sunday/injustice-in-murder-cases.html>.

<sup>4</sup> Anderson & Heaton, *supra* note 2, at 159.

aspects of defense representation in Philadelphia may be unconstitutional under the Sixth and Eighth Amendments to the Constitution, and that the provision of indigent defense services must be overhauled, primarily through an infusion of additional funds.<sup>5</sup>

The first part of this Essay explores the authors' findings, which do not fit as neatly into mainstream thinking about indigent defense representation as the authors suggest. The study's dramatic findings appear to stem from a counterintuitive form of professional competence: aptitude at convincing one's client to plead guilty.<sup>6</sup> As discussed below, skill at obtaining a client's waiver of his constitutional right to a jury trial is not the traditional model of effective representation. If modern defense attorney competence primarily manifests in this manner, the implications for indigent defense and criminal justice generally are more revolutionary than the study's authors suggest. Indeed, one of the most interesting aspects of the study is its synergy with recent Supreme Court case law that boldly extends ineffective assistance of counsel claims to America's grotesque plea bargaining regime.<sup>7</sup>

Part II of this Essay switches focus to the extraordinary empirical methods employed to unearth the findings discussed in Part I. The study's authors wield powerful econometric analysis in a manner that is likely foreign to most criminal justice scholars and policymakers—the target of their efforts. This is only the latest in a long line of quantitative studies of attorney difference, but it may be the first to deploy an “instrumental variable” approach, the “most powerful weapon” in the econometric “arsenal of statistical tools.”<sup>8</sup> This sophisticated statistical technique introduces a number of caveats into the analysis, but, if successful in this context, calls into question the vast body of quantitative studies of attorney competence that rely on “traditional regression methods.”<sup>9</sup> The ultimate resolution of that methodological debate is beyond the scope of this Essay (and the abilities of its author). Nevertheless, it is critical for criminal justice scholars and policymakers to engage with empirical methods if they are to translate the fruits of those methods into policy prescriptions. As empiricists apply increasingly sophisticated tools to the extraordinarily complex criminal justice system, gaining

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<sup>5</sup> *Id.* at 193–95.

<sup>6</sup> Cf. Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 491–96 (2007) (arguing defense counsel should employ “forceful persuasion” to convince clients to plead guilty when in their best interest).

<sup>7</sup> See Josh Bowers, Lafler, Frye, and the Subtle Art of Winning By Losing, 25 FED. SENT'G. REP. 126, 127 (2012) (interpreting new case law to suggest that “a defense attorney's representation could be deemed unconstitutional if she were to fail to convince a defendant of the wisdom of pleading guilty in the face of the unlikelihood of a subsequent better plea or trial acquittal”); Anderson & Heaton, *supra* note 2, at 204 (noting that the study's findings are “consistent” with the Court's observations in *Lafler* and *Frye*).

<sup>8</sup> JOSHUA D. ANGRIST & JORN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS, AN EMPIRICIST'S COMPANION 114 (2009).

<sup>9</sup> Anderson & Heaton, *supra* note 2, at 186.

insight into the advantages and shortcomings of various methodological approaches can be just as important for non-empirically trained criminal justice observers as any particular study's substantive contributions.

## II. ATTORNEY COMPETENCE IN PHILADELPHIA MURDER CASES

Almost all of Philadelphia's murder defendants cannot afford representation.<sup>10</sup> These indigent defendants are represented by either staff attorneys from Philadelphia's Public Defender Service [PDs] or private, court-appointed counsel [PCAC].<sup>11</sup> Assignment is random, with every fifth murder defendant assigned to a PD.<sup>12</sup> James M. Anderson and Paul Heaton of the RAND Corporation exploit this "natural experiment" to determine if the type of attorney assigned to a case influences the outcome.<sup>13</sup> In reporting their results, the authors pull no punches. They conclude that "defense counsel makes an *enormous difference* in the outcomes of cases."<sup>14</sup> Specifically, compared to private, court-appointed counsel, PDs "reduce their clients' murder conviction rate by 19%," "reduce the probability that their clients receive a life sentence by 62%," and "reduce overall expected time served in prison by 24%."<sup>15</sup> The *New York Times* devoted a Sunday editorial to the study, advocating increased funding for indigent defense, in part because "[t]he conviction rate of clients represented by staff lawyers working for the [Philadelphia] public defender association . . . was 19 percent lower than those represented by court-appointed lawyers working alone."<sup>16</sup>

Anderson and Heaton, who possess a welcome blend of statistical and criminal justice expertise,<sup>17</sup> provide some intuitive explanations for the apparent difference in representation quality. First, the Philadelphia Public Defender office appoints two experienced attorneys to every murder case. Second, PDs are salaried employees.<sup>18</sup> By contrast, the alternative to a PD for indigent defendants in Philadelphia is a private, court-appointed counsel reimbursed at a rate so low it has been condemned by Stephen Bright as "outrageous even by Southern

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<sup>10</sup> *Id.* at 160 (95%).

<sup>11</sup> *Id.* at 159.

<sup>12</sup> *Id.* at 161.

<sup>13</sup> *Id.* at 159.

<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> *Id.* at 154.

<sup>16</sup> *Injustice in Murder Cases*, *supra* note 3 (relying on the study to advocate that court systems "pay court-appointed lawyers more").

<sup>17</sup> Anderson spent eight years as a public defender in Philadelphia; Heaton is a PhD economist. Anderson & Heaton, *supra* note 2, at 154.

<sup>18</sup> *Id.* at 161.

standards.”<sup>19</sup> Add together the empirically untested, but widely-accepted principles that (1) “two is better than one” and (2) “you get what you pay for,” and you have a fairly solid theoretical grounding for the authors’ findings.

A closer look at the study reveals, however, that the picture is more finely nuanced. In fact, the *New York Times* quote set forth above clumsily misstates Anderson’s and Heaton’s findings. Anderson and Heaton do not claim to have found any difference in the general “conviction rate”; in fact, they unequivocally state that “public defender representation does not affect overall guilt rates.”<sup>20</sup> The study finds, perhaps counter-intuitively, that indigent murder defendants have roughly the same chance of being acquitted of all the charges against them—a fairly robust 20% chance—whether they are represented by a PD or a PCAC.<sup>21</sup> Although the authors do not highlight it in their discussion, this finding is itself quite dramatic. The murder defendants the criminal justice system should be most concerned about are defendants who are innocent of any crime (for example, defendants who are mistakenly identified by eyewitnesses or falsely accused by jailhouse informants).<sup>22</sup> It is encouraging that the study finds that the likelihood of complete exoneration does not vary based on the counsel assigned.

Taking the 20% of ultimately exonerated murder defendants out of the equation leaves 80% who are convicted *of something*, and for whom counsel assignment does, according to Anderson and Heaton, make a “vast” difference.<sup>23</sup> The difference, interestingly enough, seems to be largely a matter of *how* defendants are convicted.<sup>24</sup> Clients of PDs plead guilty an astounding 76% more frequently than clients of PCAC.<sup>25</sup>

Anderson’s and Heaton’s findings support the conventional understanding of how plea bargaining benefits defendants. If a defendant is ultimately going to be convicted, he is better off being convicted through a plea bargain rather than a trial: a plea bargain allows the defendant to exchange his chance of acquittal for a less serious charge (e.g., manslaughter, instead of murder) and lighter sentence (e.g., 10 years, instead of 20 years or life).<sup>26</sup> Further, a defendant who pleads

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<sup>19</sup> *Id.* at 163 (quoting Joseph A. Slobodzian, *Pennsylvania Supreme Court Urged to Consider How Philadelphia Pays Death-Penalty Lawyers*, PHILA. INQUIRER (June 9, 2011), [http://articles.philly.com/2011-06-09/news/29638728\\_1\\_death-penalty-lawyers-death-penalty-capital-cases](http://articles.philly.com/2011-06-09/news/29638728_1_death-penalty-lawyers-death-penalty-capital-cases) (referencing a quote by Stephen Bright)).

<sup>20</sup> *Id.* at 187.

<sup>21</sup> *Id.* at 178–79. The data include both acquittals at trials and pretrial dismissals. *Id.*

<sup>22</sup> *Cf.* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 COLUM. L. REV. 801, 817 (2004) (arguing that priority for scarce defense resources should be given to defendants with the strongest claims of “factual innocence,” such as those who have been falsely identified by witnesses).

<sup>23</sup> Anderson & Heaton, *supra* note 2, at 212.

<sup>24</sup> *Id.* at 178, 187.

<sup>25</sup> *Id.* at 186.

<sup>26</sup> Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992).

guilty can claim leniency at sentencing on the ground that he has “accepted responsibility.”<sup>27</sup> Thus, the most plausible explanation of the study’s findings is that with more of their ultimately convicted clients pleading guilty, as opposed to being found guilty after trial, PDs predictably have: fewer clients convicted of the top line charge of murder, and fewer clients serving lengthy sentences, including life sentences.<sup>28</sup> On the other side of the equation, ultimately convicted clients represented by PCAC are more frequently convicted *after trial*, resulting in what plea bargaining’s critics call the “trial penalty.”<sup>29</sup> Defendants who are convicted after trial are typically convicted of more serious charges (here, murder) and receive lengthier sentences.

Given that their findings pinpoint a nontraditional form of attorney competence (getting to “yes” in plea bargaining), it is perhaps surprising that Anderson and Heaton ascribe the observed differences in outcomes to a traditional woe, the “failure of appointed counsel to prepare cases as thoroughly as the public defender.”<sup>30</sup> From this, Anderson and Heaton pivot to proposing a litany of familiar reform proposals, mainly variants of increased funding for indigent defense. They suggest higher reimbursement for PCAC,<sup>31</sup> higher fee caps for pre-trial preparation,<sup>32</sup> the provision of more non-attorney resources to assist PCAC,<sup>33</sup> more open discovery,<sup>34</sup> and a system of guidelines and checklists for all attorneys to follow.<sup>35</sup>

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<sup>27</sup> See *Commonwealth v. Bowen*, 975 A.2d 1120, 1126 (Pa. Super. Ct. 2009) (“Pennsylvania trial courts are permitted to consider a guilty plea as favorable to a defendant during sentencing, . . .”).

<sup>28</sup> Anderson & Heaton, *supra* note 2, at 187 (suggesting this as “one interpretation” of the study’s findings); cf. 18 PA. STAT. ANN. § 1102 (West 2012) (murder sentencing provisions).

<sup>29</sup> See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) (arguing that defendants “who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes”).

<sup>30</sup> Anderson & Heaton, *supra* note 2, at 213; see also *id.* at 188 (“less preparation by appointed counsel”).

<sup>31</sup> See *id.* at 194 (“the overall amounts of compensation are very low” causing good attorneys to decline to participate.).

<sup>32</sup> See *id.* at 195.

<sup>33</sup> See *id.* at 197.

<sup>34</sup> *Id.* at 211.

<sup>35</sup> *Id.* at 210; *contra* *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (arguing that “detailed rules for counsel’s conduct . . . would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions”).

Anderson's and Heaton's proposals are all quite sensible. The oddity is that these proposals have only a generic connection to their empirical findings.<sup>36</sup> Traditionally, attorney competence has been viewed as some combination of investigative skill (legal or factual) and litigation prowess, plus work-ethic, all attributes that could be positively influenced through Anderson's and Heaton's proposals, and through increased funding more generally.<sup>37</sup> Yet there is little in this study's findings that support the notion that these attributes explain the differences in Philadelphia murder outcomes. As noted earlier, Anderson and Heaton find that attorney difference is not manifesting in the cases of (legally) innocent defendants (i.e., the 20% of murder defendants whose cases are dismissed or who are acquitted at trial).<sup>38</sup> These defendants fare equally well whether their cases are handled by PDs or PCAC.<sup>39</sup> This suggests that PCAC and PDs do a roughly equivalent job investigating and litigating cases at trial, the efforts that ultimately separate the innocent from the guilty.

In addition, it is hard to square an advantage in preparation and litigation skill with a higher rate of *guilty* pleas. Attorneys with an aptitude for winning at trial would be apt to try (and win) more cases, not push a greater percentage of clients to forego trial and plead guilty. Similarly, attorneys whose investigatory skill unearths more evidence would inevitably unearth more *exculpatory* evidence, again leading to more trials (or pretrial dismissals), not more *guilty* pleas.<sup>40</sup> True, PDs could also unearth more inculpatory evidence in their investigation, but it is unclear why that would lead to more guilty pleas. It is the evidence in the prosecution's possession that will determine the likelihood of conviction and, regardless of counsel's investigation, the defendant in a murder case (having participated in the killing . . . or not) likely has a pretty good sense of the evidence against him.<sup>41</sup>

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<sup>36</sup> Cf. Joshua B. Fischman, *Reuniting 'Is' and 'Ought' in Empirical Legal Scholarship*, 162 U. PA. L. REV. 117, 120 (2013) (highlighting weakness in empirical studies that "rarely explain how they derive an 'ought' from an 'is'").

<sup>37</sup> See *Strickland*, 466 U.S. at 690–91 ("Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. . . . [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").

<sup>38</sup> See Anderson & Heaton, *supra* note 2, at 178–79.

<sup>39</sup> *Id.*

<sup>40</sup> PDs might risk revealing exculpatory evidence to the prosecution prior to trial in an effort to obtain a better plea offer. But if the discovery of more exculpatory information was the reason that PDs were getting their clients to plead guilty more frequently, it should also lead to more PD clients being exonerated completely, something that is not borne out in the data.

<sup>41</sup> Perhaps counsel who thoroughly investigate claims use their *independent* knowledge of the facts to: convince skeptical clients that their advice to plead guilty is well-informed advice; or neutralize the arguments of clients who are unrealistically optimistic about the evidence that will come out at trial.

Anderson's and Heaton's findings of an equivalent acquittal-dismissal rate across attorney type, and a significantly higher rate of guilty pleas for clients of PDs, hints that PD effectiveness stems from neither better preparation nor litigation skill, but rather something else—an often overlooked defense skill that does not fit traditional paradigms of attorney competence. The data can only tell us so much,<sup>42</sup> but it points to the conclusion that PDs' relative advantage is overcoming client resistance to pleading guilty. Interestingly, this finding fits neatly into the recent ground-shaking developments in the Supreme Court's Sixth Amendment ineffective assistance of counsel jurisprudence: *Lafler v. Cooper*<sup>43</sup> and *Missouri v. Frye*.<sup>44</sup> In *Lafler*, the case most directly on point, the Supreme Court reversed Anthony Cooper's murder conviction because Cooper's counsel foolishly "advised [him] to reject [a] plea offer," and Cooper received a harsher sentence after trial.<sup>45</sup> This is a microcosm of the apparent deficiency of PCAC that is unearthed in Anderson's and Heaton's study. It is not that PCAC are bad litigators (as compared to PDs). PCAC underperform when they fail to convince their clients to plead guilty. The inspirational hero of *To Kill a Mockingbird*—who Anderson and Heaton invoke, although not in this context—fits right into this grim narrative of modern American criminal justice: Atticus Finch is a private, court-appointed counsel who, tragically, failed to convince his (ultimately convicted) client to plead guilty.<sup>46</sup>

After isolating the variable that appears to be the key to PDs' relative success—guilty clients pleading guilty—the next logical step is to ponder the mechanism by which they influence that variable. There are a number of possibilities. One could have to do with the plea offers themselves. Anderson and Heaton explain that there are only ten Philadelphia PDs who handle homicides, and (as already noted) two are assigned to each murder case.<sup>47</sup> This means that the PDs assigned to murder cases regularly interact with Philadelphia's specialized homicide prosecutors.<sup>48</sup> These regular interactions inevitably lead to repeat-player

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<sup>42</sup> The authors explain that the empirical approach utilized limits the ability to analyze relative attorney performance in different aspects of cases, such as in plea bargaining. *Id.* at 186.

<sup>43</sup> *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

<sup>44</sup> *Missouri v. Frye*, 132 S. Ct. 1399, 1410–11 (2012) (holding that defense counsel's failure to inform client of plea offer constituted deficient performance and remanding for inquiry into prejudice).

<sup>45</sup> *Lafler*, 132 S. Ct. at 1384 ("[A]ll parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial.").

<sup>46</sup> LEE, *supra* note 2, at 223. Anderson and Heaton note that Finch is "revered," but do not mention that his client was convicted at trial and thus, like the clients of many PCAC, might have been better served by a guilty plea. Anderson & Heaton, *supra* note 2, at 209 n.169.

<sup>47</sup> Anderson & Heaton, *supra* note 2, at 161.

<sup>48</sup> The Philadelphia DA's office website notes the existence of a specialized homicide unit. Resources, OFFICE OF THE DISTRICT ATTORNEY, CITY OF PHILADELPHIA, [http://www.phila.gov/districtattorney/careers\\_InProsecution.html](http://www.phila.gov/districtattorney/careers_InProsecution.html) (last visited Oct. 1, 2014).



relationships that could result in PDs receiving more generous (or from a defense perspective, fairer) plea deals.<sup>49</sup> Relatedly, PDs may be able to draw on a robust institutional memory of the pleas offered to prior PD clients, and can leverage that data to convince prosecutors to provide similar plea offers to current clients. If PDs receive (or are able to negotiate) sweeter plea deals for their guilty clients, they would have an easier time convincing those clients to plead guilty. By contrast, PCAC, who manage a caseload consisting of cases other than homicides, will have less robust relationships with the specialized homicide prosecutors and might receive worse (i.e., standard) plea deals as a result. “Selling” these tougher plea deals to their clients is more difficult, resulting in more convictions at trial.

Another possible explanation for the higher guilty plea rate among the clients of PDs is that PDs are loath to take “not guilty” for an answer.<sup>50</sup> One of Anderson’s and Heaton’s interviewees highlighted the PDs’ “time-intensive efforts to persuade clients to plead” guilty, and Anderson and Heaton report a general sentiment among their correspondents that PDs are “more effective at persuading defendants to accept plea deals.”<sup>51</sup> At the same time, it appears that PCAC are more receptive to a client’s wish to exercise his Sixth Amendment right to a jury trial.<sup>52</sup> This may be, as the authors suggest, a function of the financial incentives for PCAC.<sup>53</sup> The irony here is that this explanation of how PDs outperform PCAC

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<sup>49</sup> Stephanos Bibas, *Plea-bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2475 (2004) (“Prosecutors who are friendly with particular defense counsel are likely to offer more generous deals to those lawyers’ clients.”). Anderson and Heaton deem “unlikely” the possibility that their findings come from “differences in the way that the prosecutor or judge treats a defendant with an attorney of a particular type” because they “found no evidence of this in the interviews we conducted.” Anderson & Heaton, *supra* note 2, at 188.

<sup>50</sup> This fits into an existing vein of scholarship on the proper role of defense counsel. *See, e.g.*, Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1206 (1975) (“Virtually every aspect of today’s system of criminal justice, in short, seems designed to influence defense attorneys to adopt the motto: when in doubt, cop him out.”); Smith, *supra* note 6, at 491–96 (advocating pressuring clients, “innocent and guilty alike,” to plead guilty when it is in their best interest: “I seldom worry about exerting too much pressure. I worry instead about failing to exert enough.”).

<sup>51</sup> Anderson & Heaton, *supra* note 2, at 196, 205 (“public defenders are thought to be more effective at persuading defendants to accept plea deals”); Smith, *supra* note 6, at 491 (arguing that counsel must be “relentless” and “have to spend time” persuading those defendants whose interests are best served by pleading guilty). The specific persuasion involved is not described, but the words chosen are likely critical. Advice about chances at trial likely fall on a spectrum from “you may lose”; “you will probably lose”; “you will definitely lose,” to “I will withdraw as your attorney if you do not accept this plea.” *See* Alschuler, *supra* note 50, at 1310 (discussing “badgering” “cajolery” and “verbal abuse” that can be employed by counsel to convince a reluctant defendant to plead guilty). Each articulation likely changes the likelihood a client will plead guilty. Anderson and Heaton also suggest that PDs spend more time developing a relationship of trust with their clients that enables clients to accept their advice to plead guilty. *See* Anderson & Heaton, *supra* note 2, at 196.

<sup>52</sup> Anderson and Heaton note that their interviews support the sentiment that “appointed counsel . . . are more likely to take cases to trial.” Anderson & Heaton, *supra* note 2, at 195–96.

<sup>53</sup> *Id.* at 164.

turns traditional criticisms of indigent defense representation on its head. Counsel for indigent defendants are often criticized for sidestepping the time commitment and financial drain of trial by pressuring clients to take guilty pleas<sup>54</sup>—the same characteristic that Anderson’s and Heaton’s data highlight as a sign of attorney competence in Philadelphia.

With some rough theories of how PDs might be outperforming PCAC in Philadelphia murder cases, we can turn to proposals to address the disparity. Contrary to Anderson’s and Heaton’s contentions, their data do not support traditional proposals to remedy inadequacies in indigent attorney representation. In fact, more funding for PCAC could potentially exacerbate the existing problem. More resources would attract more skilled litigators, and allow more trial preparation, leading PCAC to try *more* cases, resulting (presumably) in even worse outcomes for their clients. In addition, it is not clear that PCAC representation is actually at fault in many of the scenarios painted above. If, for example, PCAC receive less generous plea offers from prosecutors, their lower guilty plea rates and worse outcomes are attributable not to their own performance, but to differential treatment by prosecutors.<sup>55</sup> The solution would then lie in reforming the behavior of prosecutors, not defense counsel. Judges might be enlisted as well to ensure that defendants are offered roughly equivalent plea deals (perhaps the next stop in the *Lafler-Frye* line of cases).<sup>56</sup> On the other hand, if the problem is that PCAC are too eager to say “yes” when clients assert a desire to go to trial, the most obvious

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<sup>54</sup> See, e.g., Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309, 317–18 (2013) (explaining that “[s]cholars have long criticized plea-bargaining” as “inherently unfair to defendants,” in part, because public defenders and “private attorneys appointed by the court for low hourly rates and subject to caps on compensation” have “little incentive . . . to try cases and great incentive to plead cases out quickly”); Stephanos Bibas, *Pleas’ Progress*, 102 MICH. L. REV. 1024, 1038 (2004) (“Court-appointed private counsel typically receive hourly fees subject to a low cap, which makes trials unprofitable.”); Susan Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 578 (2013) (“Many state-level defense attorneys literally cannot afford to go to trial.”); Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 1006 (2012) (“[I]nnocent defendants, especially those who are indigent, may be pushed to take a plea by their lawyers: ‘defense attorneys have powerful incentives to avoid trial, even when a trial would be in the client’s interest.’”) (quoting Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988 (1992)).

<sup>55</sup> Anderson and Heaton do not mention interviewing any prosecutors for their study. Anderson & Heaton, *supra* note 2, at 189 n.87 (explaining that they interviewed “three judges, four current or recent Defender Association lawyers, and thirteen counsel who took appointments during the study period.”); cf. Robert Weisberg, *Empirical Criminal Law Scholarship and the Shift to Institutions*, 65 STAN. L. REV. 1371, 1372–73 (2013) (describing prosecutors as “the most important and unexamined of all categories of officialdom”); Ronald F. Wright & Ralph A. Peeples, *Criminal Defense Lawyer Moneyball: A Demonstration Project*, 70 WASH. & LEE L. REV. 1221, 1262 (2013) (“An understanding of defense attorney success requires a detailed knowledge of prosecutors.”).

<sup>56</sup> Cf. *Lafler*, 132 S. Ct. at 1391–92 (Scalia, J. dissenting) (arguing that “the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law” and wondering whether the majority would consider it to be unconstitutional if a prosecutor were to “make no plea offer at all”).

financial solution is not increased funding for indigent defense,<sup>57</sup> but rather cutting the reimbursement rate for trials. Ideally, the financial incentives would be balanced so that PCAC are indifferent, economically speaking, between trial and guilty pleas. However, reducing counsels' financial incentive to go to trial is risky as it might endanger innocent clients (i.e., clients who currently go to trial *and win*) who may be more heavily pressured to plead guilty.

Finally, it is necessary to point out that Anderson's and Heaton's findings undermine not only the efficacy of traditional reform proposals, but also the assumptions underlying the need for reform. The traditional worry about shoddy defense work is that it results in convictions of innocent clients.<sup>58</sup> Anderson's and Heaton's data do not bring out that concern. Defendants appear to be just as likely to be exonerated whether they are assigned a PCAC or a PD.<sup>59</sup> The principal disparity unearthed in this study is that one set of guilty murder defendants (those represented by PCAC) is being sentenced more harshly than another (those represented by PDs).<sup>60</sup> The perspective shift from the danger of erroneous convictions of the innocent, to the danger of tougher sentences for the guilty, shakes the basic assumption underlying traditional discussions of attorney competence. Equality of outcomes among indigent defendants is a worthy goal, but if we are talking about a subset of murder defendants who are ultimately convicted, how do we know what type of equality to prefer? Anderson and Heaton assume that the desired form of equality is a world where every murder defendant receives the lower sentences obtained by PDs—as it surely is from a defendant's perspective.<sup>61</sup> But they never explain why that world is preferable to equality at the higher level of sentences obtained by PCAC. Someone who thinks that murder defendants should have their guilt adjudicated by juries (rather than through informal plea bargaining),<sup>62</sup> and if found guilty punished accordingly, might

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<sup>57</sup> Anderson & Heaton, *supra* note 2, at 188 (emphasizing as explanation for outcome differences that PCAC “have comparatively few resources” and receive “extremely low compensation”).

<sup>58</sup> *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (explaining need for counsel, in part, because a client unversed in the law “though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence”); Brown, *supra* note 22, at 817.

<sup>59</sup> Anderson & Heaton, *supra* note 2, at 178–79.

<sup>60</sup> *Id.* at 180.

<sup>61</sup> *Id.* at 208 (suggesting reforms that would “allow appointed counsel to achieve results comparable to those of public defenders”). The average nominal sentence length is: PCAC, 20.9 years; PDs, 18.1 years. *Id.* at 178 Table 2. The actual time served in Philadelphia was traditionally significantly less than the nominal sentence (e.g., 16 years of actual time served for a 30 year sentence), but Anderson and Heaton suspect that defendants are increasingly incarcerated for a higher proportion of their nominal sentences due to the national movement toward “truth-in-sentencing” laws. *Id.* at 169.

<sup>62</sup> See *Lafler*, 132 S. Ct. at 1398 (2012) (Scalia, J. dissenting) (describing criminal trials as “the exorbitant gold standard of American justice”).

reasonably prefer the latter. Here is how Steven Schulhofer articulates a related sentiment commonly voiced by criminal justice scholars:

The mission of the criminal justice system is to ascertain guilt and appropriate punishment. Structural flaws only increase the importance of resolving these issues in the sunlight of open, adversarial proceedings before a neutral decision maker, rather than permitting them to be settled behind closed doors by agents who have few incentives to act in the interests of their principals.<sup>63</sup>

Switching to the conservative critique of plea bargains, plea bargains in violent crime cases may be a windfall not for prosecutors, but for defendants (at least from the point of view of the victims' families and concerned community members).<sup>64</sup> Someone who sees plea bargaining in this light could look at the same data Anderson and Heaton present and conclude that the problem is not that the clients of PCAC are being sentenced too severely after jury verdicts, but rather that the guilty clients of PDs are getting off too leniently, through plea deals. The ultimate recommendation for policy makers, then, would not be what Anderson and Heaton suggest (turning all indigent murder defense over to PDs),<sup>65</sup> but rather turning all indigent murder defense over to PCAC.

In sum, Anderson's and Heaton's findings support a paradigm shift in thinking about attorney competence, particularly in the age of *Lafler* and *Frye*. The secret to attorney success hinted at by this study does not appear to be thorough preparation (as Anderson and Heaton argue), but a different attribute: greater success in convincing clients to plead guilty. Focusing on this aspect of the study reveals a less familiar and more provocative aspect of attorney competence that challenges traditional conceptions of what ails the American system of indigent defense representation. It may be that a lawyer's celebrated willingness (and even ability) to go to trial is one of the most hazardous attributes of an

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<sup>63</sup> Schulhofer, *supra* note 54, at 2003.

<sup>64</sup> See CAL. PENAL CODE § 1192.7(a)(2) (prohibiting plea bargains in "serious felony" cases unless prosecution would be unable to prove its case or the ultimate sentence would be substantially the same); Michelle Theriault Boots, *State Puts an End to Sentencing Deals in Serious Crimes*, ANCHORAGE DAILY NEWS (July 23, 2013) available at <http://www.adn.com/2013/07/23/2987774/law-department-puts-an-end-to.html> (explaining that Alaska's new partial ban on plea bargains in "serious cases" arose out of outrage over an "inappropriately soft plea agreement," and quoting proponent's claim that the policy will "better protect victims and ensure perpetrators are held accountable for their crimes"); Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063 (2006) ("[A]n AUSA who knows that he or she will have to explain the proposed plea agreement to the case agent or the victim is less likely to undersell the case with an overly lenient plea offer."); Schulhofer, *supra* note 54, at 1988 (stating that prosecutor's plea agreements "diverge from those that would most efficiently serve the public interest in optimal deterrence" and that this "divergence usually takes the form of unduly lenient sentence offers").

<sup>65</sup> Anderson & Heaton, *supra* note 2, at 213–14.

assigned attorney. At a minimum, the study's findings highlight that attorney deficiency in the plea bargaining context is not well theorized and could benefit from new and counter-intuitive policy responses (as well as additional empirical research) that focus as much on prosecutors and judges as on defense counsel themselves.<sup>66</sup>

### III. THE INTRIGUING WORLD OF ECONOMETRICS

The second part of this Essay focuses on methodology. Anyone who analyzes Anderson's and Heaton's findings would be remiss not to comment on the process by which those findings were obtained. The exercise is a constructive one because it has implications beyond this particular study, and (as noted above) more empirical research on this topic is needed to unravel the mysteries of attorney competence in a criminal justice system dominated by plea bargaining. Generally speaking, as empirical studies like Anderson's and Heaton's appear with greater frequency in criminal justice policy discourse, it is increasingly important for criminal justice scholars to grapple with the complexity of modern econometric analysis. The goal is not to criticize or endorse the methodology—that must be left to empiricists—but rather to recognize when methodological approaches and the assumptions that underlie them require caveats both in the reporting of certain findings and the reliance on those findings to support policy changes. In some instances, this appreciation may lead not to a distrust of more sophisticated empirical analysis, but to a preference for such methods over less rigorous, traditional approaches.

Anderson's and Heaton's study begins with a fairly intuitive design. They analyze a vast data set of 3,157 Philadelphia murder cases keyed to representation type.<sup>67</sup> Since indigent defense representation in Philadelphia is initially randomly distributed between PDs and PCAC, and then influenced through seemingly outcome-neutral mechanisms (e.g., the discovery of an attorney's conflict of interest), one could plausibly draw conclusions about attorney differences by comparing outcomes of murder defendants represented by PDs with those represented by PCAC. Anderson and Heaton provide this analysis using a basic

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<sup>66</sup> See Klein, *supra* note 54, at 591 (proposing changes to plea rules to “encourage equal treatment of offenders”); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2674 (2013) (“[M]uch remains to be done to give true content to the meaning of effective plea bargaining counsel.”). The Philadelphia study may understate the importance of plea bargaining to modern indigent defense competence since a relatively large percentage of Philadelphia murder cases go to trial. Anderson & Heaton, *supra* note 2, at 178. Cf. Thomas H. Cohen, *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. JUST. POL'Y REV. 35 (Oct. 4, 2013), available at <http://cjp.sagepub.com/content/early/2012/10/03/0887403412461149.full.pdf+html> (using empirical methods to discern attorney quality, while noting that “[t]he vast majority of convicted defendants plead guilty irrespective of who represented them in court,” with only 3–4% of defendants going to trial).

<sup>67</sup> Anderson & Heaton, *supra* note 2, at 165–66.

empirical tool, “ordinary least-squares (OLS) regression analysis” that “adjusts for observable differences in characteristics [e.g., criminal record] between those with private appointed counsel versus those with public defenders.”<sup>68</sup> The results of this analysis are somewhat different from those discussed in Part I. Using OLS, Anderson and Heaton find no statistically significant difference between the two representation types in the likelihood of being convicted of any charge, or the likelihood of being convicted of murder,<sup>69</sup> and only a modest difference in sentence length.<sup>70</sup> Again, the outcome differences can be explained by the finding that clients of PDs plead guilty much more frequently than clients of PCAC.<sup>71</sup>

Anderson and Heaton acknowledge that “traditional regression methods” like OLS are “the primary approach” used in the vast body of studies of indigent defense attorney competence.<sup>72</sup> They do not adopt the OLS regression results as their ultimate findings, however. Anderson and Heaton suspect that despite the random assignment, the group of defendants ultimately represented by PDs is meaningfully different from the group ultimately represented by PCAC.<sup>73</sup> This means the results of the head-to-head comparison described in the preceding paragraph are “misleading because the case mix [is] not . . . comparable” (apples to oranges).<sup>74</sup> To make the two groups of defendants equal (apples to apples), Anderson and Heaton utilize a sophisticated econometric tool, “instrumental variable (IV) analysis.”<sup>75</sup> IV analysis is possible here because of the presence of a suitable “instrument,” the initial random counsel assignment. IV analysis

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<sup>68</sup> *Id.* at 185.

<sup>69</sup> *Id.* (“OLS estimates suggest public defenders do not affect murder convictions . . .”).

<sup>70</sup> Anderson and Heaton note as well that every PD case is staffed by a “mitigation specialist” who is “trained to develop mitigation evidence” for use at sentencing should the defendant be convicted. *Id.* at 161.

<sup>71</sup> *Id.* at 187 Table 4.

<sup>72</sup> *Id.* at 185–86 (implicitly criticizing previous studies by stating that these methods are not the best way to “cleanly measur[e] attorney effects”); Wright & Peeples, *supra* note 55, at 1241 (noting “[t]he rich history of quantitative studies of defense counsel quality”); Cohen, *supra* note 66, at 4 (noting “extensive literature comparing different attorney types in terms of their effectiveness”); David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1164 n.60 (2007) (relying on initial random assignment within Clark County public defender office to measure attorney difference using OLS, while noting “a few caveats” to the random nature of even the initial assignment process); Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel*, NAT’L BUREAU OF ECON. RESEARCH, Working Paper No. 13187, 3 (Jun. 2007), available at <http://www.nber.org/papers/w13187> (relying on initial random assignment of cases to federal public defenders or court-appointed counsel and OLS).

<sup>73</sup> Anderson & Heaton, *supra* note 2, at 185–86.

<sup>74</sup> *Id.* at 172.

<sup>75</sup> See ANGRIST & PISCHKE, *supra* note 8 (describing IV as the “most powerful weapon” in the econometrics “arsenal of statistical tools”).

“essentially isolates the portion of variability in outcomes that is attributable to the initial random assignment” of counsel.<sup>76</sup>

The move to IV analysis is a powerful one. IV analysis with the addition of various controls brings out a 19% reduction in the likelihood of a murder conviction for clients represented by PDs (OLS regression alone revealed no statistically significant difference), and strongly enhances the otherwise modest sentencing differential between representation types.<sup>77</sup> A 7% decrease in the likelihood of receiving a life sentence becomes a 62% decrease; a 1.2 year decrease in expected time served more than doubles to 2.6 years.<sup>78</sup> The authors label this application of IV analysis their “preferred specification,” and it is these results that the authors highlight throughout the paper, and that will be adopted by criminal justice reformers and media organizations (such as the *New York Times*) as the study’s ultimate “findings.”<sup>79</sup>

Criminal justice scholars may remember IV analysis for its pivotal role in the debate about the deterrence effect of the death penalty.<sup>80</sup> Criticizing studies that relied on IV methodologies to find a deterrent effect, John Donohue and Justin Wolfers suggested more generally that empiricists “interested in policy debates should insist upon clarity and intuitive plausibility in all aspects of research design and analysis.”<sup>81</sup> The primary flaw that Donohue and Wolfers targeted in the death-penalty-deterrent studies—a flawed instrument<sup>82</sup>—is fortunately not apparent here. Nevertheless, the move to IV analysis implicates Donohue’s and Wolfers’ call for “clarity and intuitive plausibility” in research designs. With respect to clarity, the use of IV requires the acceptance of assumptions whose validity can be difficult to assess. Anderson and Heaton seem to view the sole meaningful assumption in play in their design as an assumption that “the initial assignment of counsel is truly

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<sup>76</sup> Anderson & Heaton, *supra* note 2, at 172.

<sup>77</sup> The authors acknowledge that the “inclusion of additional controls . . . is not strictly required” (since IV analysis preserves the initial *random* distribution of cases), but argue that their inclusion “may yield more precise estimates of attorney effects, and the controls may also be helpful for addressing any unrecognized departures from randomization.” *Id.* at 181.

<sup>78</sup> *Id.* at 179–80.

<sup>79</sup> *Id.* at 181.

<sup>80</sup> Richard Lempert, *The Inevitability of Theory*, 98 CALIF. L. REV. 877, 897 n.75 (2010) (explaining that “a spate of econometric research . . . reinvigorated the deterrence argument” in support of the death penalty only to be met with “recent critical research” that “call[s] the latest deterrence findings into question”).

<sup>81</sup> John J. Donohue & Justin Wolfers, *The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 842 (2005); see also Fischman, *supra* note 36, at 154, 166 (summarizing steps “that scholars can take to make empirical research more relevant to the study of law”).

<sup>82</sup> Donohue & Wolfers, *supra* note 81, at 828.

random.”<sup>83</sup> The reference materials they cite, however, speak of other, more layered assumptions. Here is one summary of the underlying theorem:

[A]n instrument that is as good as randomly assigned, affects the outcome through a single known channel, has a first stage, and affects the causal channel of interest only in one direction can be used to estimate the average causal effect on the affected group.”<sup>84</sup>

It is not clear from Anderson’s and Heaton’s discussion that these assumptions are all satisfied in their study or, if not, why they need not be. For example, a “key” assumption for IV analysis, deftly incorporated in the just-quoted summary, is that the “instrument” (initial random assignment) while “correlated with the causal variable of interest” (ultimate representation) must be “uncorrelated with any other determinants of the dependent variable” (legal outcomes).<sup>85</sup> Although there are no obvious flaws in this assumption as applied to Philadelphia murder cases, one can imagine scenarios where it does not hold. For example, Anderson and Heaton note that at the defendant’s initial appearance, a magistrate assigns either the Defender Association [PDs] or a “to-be-determined appointed counsel.”<sup>86</sup> They note that defendants in this latter group “are not immediately assigned counsel, but their names are sent to court appointments for assignment to a court-appointed counsel.”<sup>87</sup> This suggests that defendants assigned to PCAC may not actually be assigned counsel until *after* a similarly-situated defendant assigned to a PD. If this delay disadvantages defendants initially assigned to PCAC, initial counsel assignment would influence case outcomes through a mechanism other than eventual representation (a violation of the “key” assumption).<sup>88</sup> Perhaps the delay is actually insignificant or can be safely overlooked, but the authors’ reluctance to more fully explain how the assumptions underlying IV are satisfied in their study leaves readers to wonder if they have fully considered contrary possibilities. Future studies using IV analysis to measure attorney differences might address (and test) the assumptions underlying the model

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<sup>83</sup> Anderson & Heaton, *supra* note 2, at 173 (explaining that the “key requirement” for the IV analysis “will be satisfied” if “the initial assignment of counsel is truly random”).

<sup>84</sup> ANGRIST & PISCHKE, *supra* note 8, at 117, 154–55; *see also* Donohue & Wolfers, *supra* note 81, at 827.

<sup>85</sup> ANGRIST & PISCHKE, *supra* note 8, at 116; Anderson & Heaton, *supra* note 2, at 173 (“The key requirement for the IV analysis to deliver valid causal estimates is that the instrumental variable—in this case, initial counsel assignment—affects eventual representation but is otherwise uncorrelated with case outcomes.”).

<sup>86</sup> Anderson & Heaton, *supra* note 2, at 170.

<sup>87</sup> *Id.*

<sup>88</sup> *Cf.* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 387 (2011) (stressing that earlier assignments of counsel allow a client “to believe in an assigned counsel’s dedication to the case”).



more comprehensively to enhance confidence in the efficacy of this novel application of an instrumental variable approach.

IV analysis also implicates the “intuitive plausibility” of the study since it requires an assumption about what is occurring with respect to case assignments that is not supported by the observable data, anecdotal evidence, or even any theoretical explanation. As Anderson and Heaton recognize, the results of their IV analysis dictate a conclusion that murder cases are non-randomly distributed between PDs and PCAC, such that PDs consistently end up with harder cases.<sup>89</sup> This explains why OLS reveals only small outcome differences, but “the more credible IV results” show drastic ones.<sup>90</sup> As far as the authors can discern using conventional tools (empirical observation of case characteristics and interviews of court personnel and defense attorneys), however, Philadelphia murder cases are assigned without regard to case difficulty.<sup>91</sup> The sorting mechanism that consistently reroutes harder cases to PDs, upon which the study’s IV findings ultimately depend, is apparently unknown to both the authors and the many Philadelphia court insiders they interviewed; the authors cannot identify the outcome-sensitive sorting mechanism and make no effort to describe it.<sup>92</sup> This means that at the end of the day, one must either accept that despite an initial random assignment, “harder” Philadelphia murder cases migrate post-assignment but pre-arraignment<sup>93</sup> from PCAC to PDs, *or* that the authors’ application of IV is flawed in this context. The plausibility of either possibility diminishes somewhat the power of the authors’ findings. As noted above, traditional regression analysis also finds that PDs achieve better outcomes while pleading out their cases at a higher rate,<sup>94</sup> raising all the issues discussed in Part I, but the benefits of the PDs’ approach become substantially more muted in the absence of IV analysis.<sup>95</sup>

A reader may wonder if the interpretive questions raised in the preceding discussion explain why so few (if any) previous attorney quality studies rely on IV analysis, even though the pattern here (an initial random assignment followed by non-random shifting between attorneys due to conflicts and the like) presumably repeats in “natural experiments” across a variety of jurisdictions.<sup>96</sup> On the other

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<sup>89</sup> Anderson & Heaton, *supra* note 2, at 185–86.

<sup>90</sup> *Id.* at 185.

<sup>91</sup> *Id.* at 189 n.87 (expressing confidence that the interviews conducted along with the study “achieved saturation within the population of respondents”).

<sup>92</sup> See Anderson & Heaton, *supra* note 2.

<sup>93</sup> *Id.* at 166–67 (noting that the study uses “the identity of the attorney at the formal arraignment” as a proxy for representation at disposition).

<sup>94</sup> *Id.* at 178, 180.

<sup>95</sup> *Id.* at 180.

<sup>96</sup> Cf. Kuo-Chang Huang, Kong-Pin Chen & Chang-Ching Lin, *Does the Type of Criminal Defense Counsel Affect Case Outcomes? A Natural Experiment in Taiwan*, 30 INT’L REV. L. & ECON. 113, 114 (2010) (applying traditional regression analysis to explore indigent defense representation in Taiwan where “two types of counsel—public defenders and legal aid attorneys—are randomly

hand, Anderson and Heaton are undoubtedly correct that client-attorney sorting muddies any effort to ascertain attorney competence by comparing case outcomes.<sup>97</sup> Consequently, if IV works to counteract non-random sorting here, it would seem important to utilize it, or some analogous statistical correction, in other quantitative studies of attorney competence. Yet to date, this has not been the norm.<sup>98</sup> Indeed, it is disappointing that Anderson and Heaton do not make explicit (or disavow) one potential takeaway from their study—that much of the quantitative representation research that came before is undercut by the failure of the empiricists involved to utilize an IV approach.<sup>99</sup> After all, if more difficult cases migrate after an initial random assignment toward certain attorney-types, then differential outcomes simply reflect that sorting, saying little about attorney quality.<sup>100</sup>

#### IV. CONCLUSION

Anderson's and Heaton's impressive study of attorney influence in Philadelphia murder cases illuminates the complex issue of representation quality and highlights the modern dilemma of ascertaining attorney competence in a world of plea bargaining. If, as the Supreme Court informs us, plea bargaining "is the criminal justice system,"<sup>101</sup> we need to change how we think about attorney competence, and this study suggests that the change may be a radical one. The study's reliance on powerful econometric tools also highlights the challenges for criminal justice scholars and policymakers who attempt to incorporate modern empirical findings into their arguments and decision-making. Empirical studies of

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assigned to those defendants who cannot privately retain lawyers," and concluding that both groups are "equally effective"). One possibility for the absence of attorney-difference IV studies is that random assignment of indigent defendants to different types of defense counsel is not a common occurrence, leading to a dearth of suitable instruments.

<sup>97</sup> See *id.* at 113 (noting that the problem of "case selection bias" plagues studies of attorney quality).

<sup>98</sup> Anderson & Heaton, *supra* note 2, at 186.

<sup>99</sup> The authors do state that their study "demonstrate[s] the difficulty of cleanly measuring attorney effects using traditional regression methods that cannot readily account for defendant sorting behavior," but they also cite two OLS studies of randomly assigned representation favorably. *Id.* at 184–86 (citing Iyengar, *supra* note 72, at 35; Abrams & Yoon, *supra* note 72, at 1169); see also Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent"*, 3 OHIO ST. J. CRIM. L. 223, 234 (2005) (using OLS to conclude that "[c]ontrary to our guesses, . . . court-appointed lawyers [in Denver] achieved results that were . . . substantially better than public defenders"); Cohen, *supra* note 61, at 25–26, 48–50 (using traditional regression analysis to examine attorney difference, and concluding that assigned counsel perform worse than both retained counsel and public defenders, while recognizing "the possibility of selection bias" in the results).

<sup>100</sup> Cf. Hoffman et al., *supra* note 99, at 229–30.

<sup>101</sup> *Frye*, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

criminal justice questions should be welcomed by everyone who believes these questions are important ones, and more sophistication is generally better than less. But sophistication comes at a price for those who seek to rely on the resulting findings. As empirical methods figure more prominently in criminal justice debates, policymakers and criminal justice scholars must enhance their own sophistication so that they can assess not only the exciting findings these new methods produce, but also the caveats inherent in the methodologies employed.