

CRIMINAL DEFENSE RATE AND UNDERLYING WEALTH EFFECT: DATA ANALYSIS BASED ON JUDGMENTS OF FIRST INSTANCE IN SICHUAN PROVINCE IN 2015 AND 2016

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INTRODUCTION

Has criminal defense lawyers' spring already come? At least "the spring breeze has been blowing."¹ Since its enactment in 2012, China's new criminal procedure law has positively responded to issues related to the rights of criminal defendants.² And with the unfolding of judicial reform, pieces of good news for criminal defense have emerged one after another. The trial-centered procedural reform tries to establish a litigating structure that will "substantively and adequately protect rights of suspects,

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¹ Fazhi-Shengyin (法治声音), *Xing Bian Lüshi de Chuntian Yi Lai* (刑辩律师的春天已来?) [*The Spring of Criminal Counsel Is Here?*], XINGHAIJING (星海经) [XINGHAI CLASSICS], (Dec. 26, 2015), http://www.360doc.com/content/15/1226/14/12623819_523227126.shtml [https://perma.cc/47Y4-S2ED] (describing a criminal law forum hosted on December 12, 2015 by the Campus of East China University of Political Science and Law. Comment attributed to Mr. Xuan Dong (宣东), a partner of Beijing Jingdu (京都) Law Firm, and a member of the Criminal Committee of the National Lawyers Association.).

² Wendy Zeldin, *China: Amendment of Criminal Procedure Law*, Global Legal Monitor (Apr. 9, 2012), <http://www.loc.gov/law/foreign-news/article/china-amendment-of-criminal-procedure-law/> [https://perma.cc/WR2S-Y25H].

defendants, and defense lawyers.”³ The *Provisions on the Protection of the Practice Rights of Lawyers According to Law* from 2015 provides a comprehensive and detailed description of the protection of lawyers’ rights.⁴ The innovation of imposing lenient punishments on those confessing to their crimes and accepting punishments in criminal cases will promote lawyers’ roles in the criminal justice system, given that defendants need someone to help them navigate the complicated and confusing process. Recently, the initiation of *Notice by the Supreme People’s Court and the Ministry of Justice of Expanding the Scope of the Pilot Program of Full Coverage of Defense by Lawyers in Criminal Cases* (hereinafter referred to as “full coverage”) increased reliance on criminal lawyers since it requires that all cases applicable to the ordinary procedure should have defense lawyers.⁵ This series of reforms is good news for protecting lawyers’ rights, promoting lawyers’ roles, and expanding defense coverage, and has caused a boom in the entire legal profession. Xiong Xuanguo, the Deputy Minister of the Ministry of Justice, noted in January 2017 that China had reached its highest numbers in the legal profession, with more than 300,000 lawyers and 25,000 law firms at that time.⁶

Nonetheless, the improved environment for practicing criminal law and the prosperity of the legal profession does not naturally guarantee that there are more criminal lawyers available to defendants. After all, whether defendants can secure representation is not only affected by laws and public policies, but also the allocation of defense resources. Usually, defense resources are partly governed by the rule of the market, under the

³ Gu Yongzhong (顾永忠), *Yi Shenpan wei Zhongxin de Xingshi Bianhu Tuchu Wenti Yanjiu* (以审判为中心背景下的刑事辩护突出问题研究) [*Prominent Issues of Criminal Defense under the Trial-Centered Background*], 5 ZHONGGUO FAXUE 65, 66 (2016).

⁴ See *Provisions on the Protection of the Practice Rights of Lawyers According to Law* (promulgated by the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, et al., Sept. 16, 2015) (China) <https://www.cecc.gov/resources/legal-provisions/law-of-the-peoples-republic-of-china-on-lawyers> [<https://perma.cc/4ZHF-URWT>].

⁵ See *Notice by the Supreme People’s Court and the Ministry of Justice of Expanding the Scope of the Pilot Program of Full Coverage of Defense by Lawyers in Criminal Cases* (promulgated by the Supreme People’s Court, Instrumentalities of the State Council, Ministry of Justice, et al., Dec. 27, 2018) (China) <http://en.pkulaw.cn/display.aspx?cgid=5880c6f1d09a2845bdfb&lib=law> [<https://perma.cc/5TU2-9LXJ>].

⁶ Li Hao (李豪), *Xiong Xuanguo: Jiaqiang Lüshi Xiehui Jianshe Fahui Hao Lüshi Duiwu Zai Quanmian Yifazhiguo Zhongdi Zhongyao Zuoyong* (熊选国：加强律师协会建设发挥好律师队伍在全面依法治国中的重要作用) [*Strengthening the Construction of the Lawyers Association*], ALL CHINA LAW. ASS’N (Jan. 10, 2017 9:31 AM), <http://acla.org.cn/article/page/detailById/8921> [<https://perma.cc/UE7L-GRXB>].

assumption that the market treats defense as a legal service that the accused can purchase. Under the logic of a market economy where money talks, common sense is that the rich get better quality products or service, which can also be applied to the field of criminal justice. This logic has long been recognized in western countries as the “wealth effect.”⁷ As John H. Langbein in his book *The Origins of Adversary Criminal Trial* put it, the wealth effect refers to “the enormous advantage that adversary procedure bestows upon persons who can afford to hire skilled trial counsel, and to pay for party-conducted factual investigation.”⁸ In adversary criminal procedure, the wealth effect is a profound structural flaw, as most persons accused of committing serious crimes are indigent or near indigent.⁹

In China, for the past several years, official statistics produced by the Chinese government provide no clear criminal defense rate regarding how many defendants secure defense counsel.¹⁰ Specifically, the public remains unaware of how many lawyers have been involved in the criminal defense field, let alone what preferences lawyers hold towards different categories of criminal cases or defendants with various backgrounds.¹¹ Previous researchers relied on limited sample data, usually under criticism of universality and representativeness, to conduct empirical analysis on defense rates.¹² Moreover, meticulous research was virtually absent.¹³ Specific differences behind the overall defense rate still need exploration. In view of this, we try to use the methods of data mining, field investigation, and theoretical analysis to study the criminal defense rate, while keeping in mind that the wealth effect may exist in the criminal

⁷ JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 1 (2003).

⁸ *Id.* at 1–2.

⁹ *Id.* at 2.

¹⁰ See 《中国律师年鉴》最高人民法院工作报告 [Chinese Yearbook of Lawyers, Report on the Work of the Supreme People’s Court] ZHONGGUO FALU NIANJIAN [LAW YEARBOOK OF CHINA] (2016) [hereinafter LAW Y.B. CHINA].

¹¹ *Id.*

¹² See generally, Ji Xiangde (冀祥德), *Zhongguo Xingshi Bianhu Ruogan Wenti Diaocha Fenxi* (中国刑事辩护若干问题调查分析) [Investigation and Analysis of Several Issues Concerning Criminal Defense in China], 7 ZHONGGUO SIFA (中国司法) 1 (2011); Ma Jinghua (马静华), *Xingshi Bianhulv Jiqi Xingcheng Jizhi Yanjiu* (刑事辩护率及其形成机制研究) [Criminal Defense Rate and Its Formation Mechanism], 6 SICHUAN DAXUE XUEBAO (四川大学学报: 哲学社会科学版) [J. SICHUAN U.] (2011); Zuo Weimin (左卫民), *Zhongguo Yingdang Goujian Shenmeyang de Xingshi Falv Yuanzhu Zhidu* (中国应当构建什么样的刑事法律援助制度) [What Kind of Criminal Legal Aid System Should China Build?], 1 ZHONGGUO FAXUE (中国法学) [CHINESE JURIS.] (2013); Gu Yongzhong (顾永忠), *supra* note 3.

¹³ See sources cited *supra* note 12.

defense field. We hypothesize that the wealth effect is an underlying factor that affects the criminal defense rate in China, where the adversary trial system has not yet been well established. In order to verify this hypothesis, we will first determine the number of criminal defendants who secure defense attorneys, then delve into the cases and the differences between those who received defense counsel as opposed to those that did not.

I. DATA AND METHODS

Data were collected from 54,409 criminal judgments of first instance (cases first heard in a trial court) in 2015 and 2016 in Sichuan province that have been published online. After data cleansing¹⁴ and text mining, 20,899 judgments in 2015 (92.5% of those online, 44% of all criminal cases in that year) and 29,806 judgments in 2016 (93.7% of those online, 57% of all criminal cases in that year) were analyzed. These judgments were collected from the *China Judgments Online* (“CJO”) website in mid-May of 2017 by a part-time data analyst commissioned by the authors. At the time of data collection, there were 28,362 first instance criminal judgments in Sichuan in 2014, 22,600 in 2015, and 31,809 in 2016, in comparison to sporadic data in previous three years (292 in 2011, 2,893 in 2012, and 9,512 in 2013). The data uploaded to the CJO website after 2014 could be expected to be more complete and coherent than before due to the publishing of the *Provision of the People’s Court on the Internet to Disclose Judgment Documents* (“Disclosure Provision”) in 2014, which set that “disclosure of judgments by putting them online is a principle, while nondisclosure is an exception.”¹⁵ In addition, due to a timely uploading requirement when this study began to mine data in May 2017, we could expect that most judgments whose terms were given effect in 2015 and 2016 had been uploaded. Meanwhile, Sichuan Province was selected for having a certain degree of national representation because it had a population of more than 80 million, its economic development types are abundant, and the number of practicing lawyers was not abnormal compared to other province-level regions.¹⁶ Moreover, we (i.e., the two

¹⁴ See *infra* Tables 1–3.

¹⁵ See The Provision of the People’s Court on the Internet to Disclose Judgment Documents (promulgated by the Adjudication Committee of the Supreme People’s Court, Nov. 13, 2013, effective Jan. 1, 2014).

¹⁶ As of the end of 2017, there were more than 365,000 practicing lawyers nationwide. There are nine provinces with more than 10,000 lawyers (Hebei, Liaoning, Zhejiang, Fujian, Henan, Hubei,

authors) each live in Sichuan, which means the inspection and verification of relevant data can be carried out through field investigations more conveniently.

Readers should be aware that the data online does not cover all judgments each year within a jurisdiction. According to calculations based on available official data, 52.1% and 38.4% of the judgments in Sichuan in 2015 and 2016, respectively, were not online.¹⁷ In this sense, is it appropriate to judge the defense rate solely on the basis of the online judgments? To answer this question, it is necessary to grasp basic types, quantity ratios, and defense rates of cases that are not published online before judging whether the online cases are representative. Then, by calculating defense rates of both online cases and non-online cases, we can further estimate the defense rate for all cases.

Two main categories of non-online cases can be observed. The first category includes systematic missing cases that cannot be made public or are unsuitable for disclosure promulgated by Article 4 of the Disclosure Provision. Cases designated as “involving state secrets, personal privacy,” “juvenile crimes,” “closed by mediation,” and “others” cannot be published online.¹⁸ Despite our efforts to determine the accurate proportion of juvenile delinquency cases through investigation and interviews, determining an accurate number is difficult, and we believe

Hunan, Sichuan, and Yunnan); four provinces (cities) with more than 20,000 (Beijing, Shanghai, Jiangsu, Shandong); and one province (Guangdong) with more than 30,000. *Liishi Gongzheng Jiceng Falifuwu Zuixin Shuju Chulu* (律师、公证、基层法律服务最新数据出炉) [Latest Data on Lawyers, Notarization, and Grassroots Legal Services Released], [CHINA MINISTRY OF JUST.] (Mar. 14, 2018, 12:14 PM), http://www.moj.gov.cn/government_public/content/2018-03/14/634_17049.html [https://perma.cc/TS9E-PWG3].

¹⁷ There were 47,524 cases with 66,856 suspects in 2015 first-instance criminal cases; in 2016, first-instance criminal cases reported 52,294 cases and 71,645 suspects. By adding these numbers to the number of first-instance cases closed by ruling (there were 145 criminal rulings in the first instance in 2015 and 417 in 2016), the rate of online judgments can be calculated. *2015 Nian Sichuan Sheng Gaoji Renmin Fayuan Gongzuo Baogao Zhaiyao* (2015 年四川省高级人民法院工作报告 (摘要)) [2015 Sichuan Higher People's Court Work Report (Abstract)], [SICHUAN PEOPLE'S CONGRESS NETWORK] (Feb. 6, 2016), http://www.scspc.gov.cn/gzbg/sfygzbf/201602/t20160214_30478.html [https://perma.cc/6GX9-ZPAR]; *2016 Nian Sichuan Sheng Gaoji Renmin Fayuan Gongzuo Baogao Zhaiyao* (2016 年四川省高级人民法院工作报告 (摘要)) [2016 Sichuan Higher People's Court Work Report (Abstract)], [SICHUAN PEOPLE'S CONGRESS NETWORK] (Jan. 23, 2017), http://www.scspc.gov.cn/gzbg/sfygzbf/201701/t20170123_32128.html [https://perma.cc/HD49-R4XB].

¹⁸ Sherry Gong & Jun Wei, *China to Publish All Court Judgments, with Some Privacy Protections*, CHRONICLE OF DATA PROTECTION (Jan. 24, 2014), <https://www.hldataprotection.com/2014/01/articles/international-eu-privacy/china-to-publish-all-court-judgments/> [https://perma.cc/5JZ9-KGU6].

that they are highly relevant to the discussion here. According to previous research and the China Law Yearbook, juvenile delinquency cases account for about 5% to 10% of all crimes nationwide each year and the defense rate of juvenile cases must be 100%, as required by the law.¹⁹ Thus, the juvenile cases will have a great effect on the overall defense rate. Cases involving state secrets, personal privacy, mediation, and others are rarely seen based on interviews, data from Sichuan,²⁰ and data from the entire nation.²¹ Although the defense rate of those cases, as well as cases involving terrorism, mass incidents, or sensitive issues, may be higher than the average defense rate of online cases, due to their small number the impact of their overall defense rate can be ignored.²²

The second category includes random missing cases, which are supposed to be published online but are not for various reasons, including cases that have not yet entered into force, such as cases in the course of protesting by the prosecutor or appealing by the defendant. They are counted as cases closed by the court in that year and put into the statistics, but not published online. According to the 2014 National Court Bulletin, criminal appeals accounted for approximately 13% of first-instance cases, which may account for about a quarter of non-online cases in Sichuan Province.²³ In addition, a very small number of cases, such as death

¹⁹ The selection of this value has been confirmed by many parties: (1) According to the data of the China Law Yearbook, from 2004 to 2013, the number of offenders under the age of eighteen in the whole country accounted for 5%-10% of the total number of offenders in that year. See LAW Y.B. CHINA (2004–13). (2) Studies have shown that the proportion of minors in a province's "total crimes has also dropped from 9.99% in 2009 to 5.00% in the first half of 2013." Yao Wanqin, *The Current Situation of Juvenile Delinquency in China and the Correction of Preventive Countermeasure*, 4 CHINA YOUTH SOCIAL SCIENCE 112 (2015). (3) According to the data obtained via the author's interview of Chinese lawyers, in 2014, there were 1,416 cases of minors in Chengdu and 1,863 cases of defendants, both of which accounted for 12,183 cases of criminal first-instance trials and 11% of the number of defendants in the city.

²⁰ In 2015, the Sichuan Provincial Court sentenced twenty-nine criminals to more than ten years in prison for crimes such as "violent terror, inciting ethnic divisions, and illegally providing state secret information overseas." See THE RULE OF LAW CONSTRUCTION IN SICHUAN PROVINCE, LAW Y.B. CHINA 992 (2016).

²¹ From the national data, it can also be confirmed that the total number of cases of national security and violent terrorist crimes concluded by courts at all levels in 2015 was only 1,084, accounting for only 0.09% of all criminal cases in the country in that year. See *The Work of China's Courts 2015*, SUPREME PEOPLE'S COURT OF CHINA 8–10, (Aug. 2, 2018) <http://english.court.gov.cn/pdf/TheWorkofChina'sCourts2015.pdf> [<https://perma.cc/YC9U-V4NZ>].

²² See *id.*

²³ See *2014 National Court of Justice Statistics Bulletin*, SUPREME PEOPLE'S COURT OF CHINA, <http://gongbao.court.gov.cn/Details/0991c1055c4811d3c927d1ce0dfe57.html> (last visited Jan. 19, 2020) [<https://perma.cc/3Z8L-CDVU>].

penalty cases, are still kept confidential, but the number should be too small to influence the overall rate.²⁴ Of course, other factors, including delays uploading cases due to court workloads, cannot be ruled out. In general, we estimate that the percentage of random missing cases in Sichuan Province is between 25% and 45% of all cases.²⁵ However, in light of the overall randomness (except a very small number of death penalty cases), we speculate that the defense rate of non-online cases is not substantially different from online cases.

In sum, this study mainly uses quantitative research methods, but is supplemented by a certain degree of qualitative research. Qualitative research materials mainly come from fieldwork conducted by the authors throughout January–February 2016 and June 2016 in Sichuan Province, in Chengdu and Leshan. It should be acknowledged that there might still be errors in data because of the intrinsic nature of text mining, although this study has endeavored to scientifically design its analysis and has repeatedly checked data through multi-line verifications with machine identification and semi-artificial combination. There can be no guarantee of 100% accuracy; however, in this study, factors in collecting, sieving, and calculating data, which may influence data accuracy, are footnoted for readers' consideration.

II. FINDINGS

A. CRIMINAL DEFENSE RATE IN SICHUAN

Analysis of first instance online judgments reveals that 26,992 defendants were involved in criminal trials in 2015 with 6,901 defendants having obtained at least one defense lawyer.²⁶ In 2016, there were 37,886

²⁴ An accurate number of death penalty cases is not published. According to a white paper published by the State Council Information Office of the People's Republic of China, the death penalty has been under strict control. *White Paper on Judicial Reform in China*, at 7 (Sept. 10, 2012) http://www.scio.gov.cn/zfbps/ndhf/2012/Document/1226620/1226620_4.htm [<https://perma.cc/CZ4Z-DFHE>].

²⁵ This speculation is based on the total number of non-online cases in 2015 and 2016 minus the estimated number of systematic missing cases.

²⁶ See *infra* Table 3. The 25,639 figure recorded as the total number of accused involved in criminal trials in 2015 in Table 3 is several hundred less than this 26,992 figure due to the classification difficulties detailed in the explanatory note below Table 3. The 6,441 figure recorded as the number of accused with attorneys in 2015 in this Table is also less than the 6,901 figure because some respondents had retained more than one lawyer.

defendants with 8,632 of them being represented by at least one defense lawyer.²⁷ All in all, the defense rate of online cases at the provincial level was 25.6% in 2015 and 22.8% in 2016.²⁸ (For defense rates at the municipal level, see Table 1).

Table 1. Defense Rate at Provincial and Municipal Levels.

	2015 Defense Rate		2016 Defense Rate	
	Online Cases	All Cases	Online Cases	All Cases
Provincial	25.6%	29.3%	22.8%	26.7%
Chengdu	26.2%	29.9%	23.1%	26.9%
Zigong	17.7%	21.8%	16.4%	20.6%
Panzhuhua	32.2%	35.6%	22.4%	26.3%
Luzhou	26.4%	30.1%	23.5%	27.3%
Deyang	24.1%	27.9%	20.8%	24.8%
Mianyang	24.0%	27.8%	22.2%	26.1%
Guangyuan	29.9%	33.4%	26.5%	30.2%
Suining	30.1%	33.6%	25.3%	29.0%
Neijiang	22.5%	26.4%	18.0%	22.1%
Leshan	26.8%	30.5%	27.1%	30.7%
Nanchong	28.5%	32.1%	29.5%	33.0%
Meishan	23.1%	26.9%	23.2%	27.0%
Yibing	24.5%	28.3%	22.9%	26.8%
Guang'an	28.4%	32.0%	25.8%	29.5%
Dazhou	29.4%	32.9%	26.0%	29.7%
Ya'an	21.3%	25.2%	24.8%	28.6%
Bazhong	26.5%	30.2%	22.4%	26.3%
Ziyang	21.9%	25.8%	19.1%	23.1%
A'ba	15.9%	20.1%	15.3%	19.5%
Ganzi	18.8%	22.9%	17.6%	21.7%
Liangshan	17.9%	22.0%	15.7%	19.9%

In addition to online cases, we take non-online cases into consideration, including, but not limited to, juvenile delinquency cases. After calculating the formula,²⁹ we get a more optimistic and probable

²⁷ *Id.* The previous explanation for figure differences applies here as well.

²⁸ *See infra* Table 1.

²⁹ For conservative considerations, this study assumes that the percentage of juvenile cases with a 100% defense rate is at the lower limit of 5% of the total number of criminal cases, and the other non-online cases have the average defense rate. The two are substituted into the defense rate calculation formula:

overall defense rate for Sichuan Province: 29.3% in 2015 and 26.7% in 2016. These defense rates are relatively high among those in existing studies.³⁰ We also find that the defense rate of online cases in 2016 decreased by 2.8 percentage points compared with 2015, and the overall defense rate in 2016 decreased correspondingly by 2.6 percentage points compared with 2015. One of the possible reasons for the slight drop may be that an increase in the number of defense lawyers in 2016 did not compensate for an increase in the number of defendants in criminal cases.³¹

B. CLIENT-RETAINED DEFENSE RATE AND STATE-APPOINTED DEFENSE RATE³²

Despite being criticized for its quantity and quality, state-appointed defense has changed. Legal aid has gradually become an important means of defense for defendants, especially those in felony cases. Previous research has shown that the state-appointed defense rate is sometimes higher than the client-retained defense rate.³³ However, the data show that the client-retained defense rate in Sichuan is significantly higher than the appointed defense rate.³⁴ The two are not yet on par with each other.

According to analysis of the online cases, client-retained lawyers defended 91.9% of the 6,901 defendants who procured defense in 2015, and lawyers appointed by the state defended only 8.1%. In 2016, client-retained lawyers defended 93.2% of 8,632 defendants, and state-appointed lawyers defended only 6.8%. For these two years, the number of state-

$$DefenseRate_{Overall} = \frac{DefenseRate_{Online} * NumDefendants_{Annual} * 0.95 + 1 * NumDefendants_{Annual} * 0.0}{NumDefendants_{Annual}}$$

This calculation aims at providing a more realistic defense rate for readers' reference, and attempts to ensure that the true overall defense rate is at least not lower than this value.

³⁰ See sources cited *supra* note 12.

³¹ Although there were a total of 9,982 defense lawyers involved in criminal cases in 2016, an increase of about 22% more than the 8,178 in 2015, the total number of defendants in the online cases analyzed in 2016 was more than 40% higher than that in 2015, so the decline in the defense rate is understandable. See *infra* Tables 2–3.

³² In China, the state-appointed attorney, or the legal aid lawyer is equivalent to either public defenders or assigned counsel in the United States, which is differentiated from a private lawyer hired by the suspect or the defendant.

³³ Zuo Weimin (左卫民), *supra* note 12, at 84.

³⁴ See *infra* Tables 2–3.

appointed defense lawyers only accounted for 6–7% of the total number of lawyers involved in the criminal cases that were published online (see Tables 2–3).³⁵

Of course, it is difficult to describe the actual situation based solely on the data of online cases. Even after factoring in generous assumptions about the data, the state-appointed defense rate would not be more than 7.3% in 2015 and no more than 6.8% in 2016.³⁶ In that case, we include the non-online cases by assuming that all juvenile delinquency and capital punishment cases have received state-appointed lawyers (which they have not) and that defense rates of other non-online cases are consistent with those of online cases. If we assume there is one lawyer in each defense case, which is standard, then around 4,000 defense lawyers were appointed by the state in both 2015 and 2016, accounting for only one-third of the annual client-retained defense lawyers in rough estimation.

In 1996, China’s criminal procedure law stipulated that the number of defense attorneys in each case should not exceed two. Before that, the practice of law appeared a bit chaotic given that only one defense attorney was allowed in some jurisdictions while in other places, several defense attorneys represented a defendant.³⁷ On the surface, the law seemed to set a limit on the number of defense attorneys; at the same time, it clarified the defendant’s right to two defense attorneys.³⁸

Our study finds that the phenomenon of “double lawyers” is very common. About one in ten defendants who have legal representation secure a two-lawyer defense team. Data also show that the “double lawyers” phenomenon is distinctly different between client-retained defense and appointed defense. Very few cases had two lawyers appointed by the state to work for one defendant. On the other hand, the number of defendants who hired two lawyers was about thirty times more than the number of those with two state-appointed lawyers. Specifically, 5,681

³⁵ See *infra* Tables 2–3.

³⁶ Based on the estimation that juvenile delinquency cases account for 5% of all cases and capital punishment cases 0.3%, and the extreme likelihood that defendants in these cases were defended by state-appointed defense lawyers, the specific calculation formula is:

$$\text{AppointedDefenseRate}_{\text{Overall}} = \frac{\text{AppointedDefenseRate}_{\text{Online}} * \text{NumDefendants}_{\text{Annual}} * 0.947 + 1 * \text{NumDefendants}_{\text{Annual}} * 0.05}{\text{NumDefendants}_{\text{Annual}}}$$

³⁷ See Chen Weidong (陈卫东) & Zhang Guiyong (张桂勇), *Lun Lvshi zai Xingshi Susong zhong de Zuoyong* (论律师在刑事诉讼中的作用), [On the Role of Lawyers in Criminal Proceedings], 5 FA XUE JIA 60 (1996).

³⁸ *Id.*

defendants hired one lawyer and 658 (accounting for 9.5% of the total number of defendants defended) hired two lawyers in 2015; while 528 defendants got one state-appointed lawyer, only twenty-two had two state-appointed lawyers, and twelve had both one appointed and one hired. In 2016, 7,199 defendants hired a lawyer, and 849 (9.8%) hired two; while 543 received one state-appointed lawyer and thirty-one had two. Ten defendants had both.

Table 2. 2015 Defense Rates (“DR”) for Client-Retained Lawyers and State-Appointed Lawyers.³⁹

	Retained DR	Appointed DR	All Lawyers	Retained Lawyers	Appointed Lawyers
Provincial	23.5%	2.1%	7,400	6,994	406
Chengdu	24.3%	1.8%	2,637	2,466	171
Zigong	16.9%	0.8%	148	141	7
Panzhihua	25.7%	6.4%	324	264	60
Luzhou	23.1%	3.3%	402	353	49
Deyang	22.0%	2.1%	317	291	26
Mianyang	23.3%	0.7%	426	414	12
Guangyuan	28.9%	0.9%	341	331	10
Suining	28.4%	1.7%	312	295	17
Neijiang	20.9%	1.7%	242	224	18
Leshan	25.3%	1.5%	220	206	14
Nanchong	27.6%	0.9%	413	400	13
Meishan	22.4%	0.7%	208	202	6
Yibing	21.1%	3.4%	353	306	47
Guang'an	24.0%	4.3%	188	162	26
Dazhou	27.4%	1.9%	305	286	19
Ya'an	20.2%	1.0%	126	120	6
Bazhong	24.8%	1.7%	195	183	12
Ziyang	18.3%	3.6%	220	186	34
A'ba	15.6%	0.3%	51	50	1
Ganzi	14.8%	4.0%	35	28	7
Liangshan	13.9%	4.0%	108	86	22

³⁹ These data were collected by and are on file with the author.

Table 3. 2016 Defense Rates (“DR”) for Client-Retained Lawyers and State-Appointed Lawyers.⁴⁰

	Retained DR	Appointed DR	All Lawyers	Retained Lawyers	Appointed Lawyers
Provincial	21.5%	1.6%	9,480	8,877	603
Chengdu	21.9%	1.2%	2,727	2,593	134
Zigong	15.6%	0.8%	223	211	12
Panzhihua	19.2%	3.2%	253	219	34
Luzhou	21.6%	1.9%	676	624	52
Deyang	19.9%	0.9%	448	430	18
Mianyang	21.3%	0.8%	536	517	19
Guangyuan	25.7%	0.8%	399	388	11
Suining	24.1%	1.1%	365	350	15
Neijiang	15.5%	2.4%	294	256	38
Leshan	23.5%	3.6%	391	341	50
Nanchong	28.7%	0.8%	528	515	13
Meishan	21.9%	1.3%	315	299	16
Yibing	21.2%	1.7%	596	552	44
Guang’an	23.5%	2.3%	263	240	23
Dazhou	23.9%	2.1%	340	315	25
Ya’an	22.1%	2.7%	254	226	28
Bazhong	21.6%	0.9%	218	210	8
Ziyang	16.2%	2.9%	272	232	40
A’ba	15.3%	0.0%	89	89	0
Ganzi	14.3%	3.3%	46	38	8
Liangshan	14.7%	1.0%	247	232	15

C. DEFENSE RATES OF DIFFERENT CATEGORIES OF CRIMES⁴¹

Data based on online cases in Sichuan province reflect five main types of defense rates and related categories of crime as follows: (1) very

⁴⁰ These data were collected by and are on file with the author.

⁴¹ The classification of case types refers to the general understanding in practice and the types of cases with higher frequency of occurrence in statistics. The special one is the “other cases with the death penalty,” which are listed for the needs of later research. It mainly includes some of the less common crimes involving the death penalty in addition to the types of cases listed in the form, such as arson, explosion, kidnapping, trafficking in women and children, and endangering public safety.

high defense rate (more than 70% for both years), including “corruption and bribery,” “illegal absorption of public deposits,” and “intentional homicide” cases; (2) high defense rate (more than 50%, less than 70%), such as “production and sales of counterfeit and shoddy goods” and “multi-level marketing” (“MLM”) cases; (3) moderate defense rate (more than 30%, less than 50%), such as “others with the death penalty,” “rape,” “intentional injury,” “illegal detention,” “fraud,” and “organize and introduce prostitution” cases; (4) low defense rate (more than 20%, less than 30%), such as “drugs,” “robbery,” “opening casinos,” and “picking quarrels” cases; (5) very low defense rate (less than 20%), such as “guns,” “traffic” (including “hit-and-run” and “dangerous driving”), “theft,” “snatch,” and “theft of trees.”⁴²

Table 4. 2015 Defense Rates of Different Categories of Crimes.⁴³

	2015				
	Accused	Accused with Lawyer(s)	App. Lawyers (p-t)	En. Lawyers (p-t)	DR***
Guns	831	114	2	122	13.7%
Traffic	4,197	677	10	712	16.1%
Others with the Death Penalty	106	52	6	52	49.1%
Corruption and Bribery	185	136	2	170	73.5%
Counterfeit and Shoddy Goods	77	47	0	50	61.0%
Drugs	4,112	1,160	179	1,085	28.2%
Theft	6,660	822	132	751	12.3%
Robbery	736	247	29	248	33.6%

⁴² See *infra* Tables 4–5. Note that in the Criminal Code of China, “snatching” differs from robbery in that snatching refers to catching someone unawares and overtly taking their property.

⁴³ These data were collected by and are on file with the author. Notes for Tables 4 and 5: (1) * There is a discrepancy between the data in this table and the number of lawyers based on geographical divisions partly because the geographical classification in this study ignores cases under the jurisdiction of the railway court and partly because vague expression of some judgments or use of abnormal expressions led to failure of classification. (2) ** The number of cases and the number of defendants in this table are slightly less than the corresponding number based on geographical divisions, because a very small number of cases have failed to be classified according to the type of case. (3) *** The defense rate here is calculated based on the ratio of the number of defense lawyers to the number of defendants in a certain type of case. It is inevitable that in rare cases, different defendants have committed more than one crime but all is unified under the main offence, which may result in limited error.

	2015				
	Accused	Accused with Lawyer(s)	App. Lawyers (p-t)	En. Lawyers (p-t)	DR***
Rape	28	15	0	17	53.6%
Snatch	224	33	3	32	14.7%
Homicide	202	177	91	104	87.6%
Injury	1,953	736	60	754	37.7%
Illegal Detention	493	195	5	208	39.6%
Opening Casinos	962	250	0	277	26.0%
MLM	144	70	1	74	48.6%
Picking Quarrels	1,264	416	6	440	32.9%
Tree Theft	220	38	2	37	17.3%
Fraud	1,005	411	13	441	40.9%
Illegal Absorption	105	77	0	101	73.3%
Org. Prostitution	204	79	0	86	38.7%
Others	1,931	689	16	759	35.7%
Total	25,639**	6,441	557*	6,520*	--

*Table 5. 2016 Defense Rates of Different Categories of Crimes.*⁴⁴

	2016				
	Accused	Accused with Lawyer(s)	App. Lawyers (p-t)	En. Lawyers (p-t)	DR***
Guns	1,389	148	9	150	10.7%
Traffic	6,901	899	21	919	13.0%
Others with the Death Penalty	127	46	8	40	36.2%
Corruption and Bribery	968	722	2	886	74.6%
Counterfeit and Shoddy Goods	120	61	0	65	50.8%
Drugs	5,043	1,089	123	1,068	21.6%
Theft	8,991	956	157	848	10.6%
Robbery	870	258	27	254	29.7%
Rape	123	43	4	41	35.0%
Snatch	243	42	3	42	17.3%

⁴⁴ These data were collected by and are on file with the author.

	2016				
	Accused	Accused with Lawyer(s)	App. Lawyers (p-t)	En. Lawyers (p-t)	DR***
Homicide	189	157	89	82	83.1%
Injury	2,528	892	89	876	35.3%
Illegal Detention	607	146	4	149	24.1%
Opening Casinos	1,302	230	0	253	17.7%
MLM	114	71	0	84	62.3%
Picking Quarrels	1,843	528	17	552	28.6%
Tree Theft	288	39	6	35	13.5%
Fraud	1,075	417	8	461	38.8%
Illegal Absorption	220	155	0	197	70.5%
Org. Prostitution	372	119	1	135	32.0%
Others	2,646	1,000	16	1,114	37.8%
Total	35,959**	8,018	584*	8,251*	--

First, as the most serious crime in a conventional sense, cases of intentional homicide expectedly have the highest defense rate.⁴⁵ Statistics show that the defense rate of intentional homicide cases is at least 80%, which is far higher than the defense rate for rape, robbery, and other serious crimes punishable by death.⁴⁶ The defense rates of the latter range from around 30% to 50%.⁴⁷ It is worth mentioning that the high defense rate of intentional homicide cases derives not only from the state-appointed defense, but also the client-retained defense, for which the ratio of the client-retained to the appointed defense is 1:1. Not every defendant facing an intentional homicide charge is equipped with lawyers when going to a criminal trial. For example, in cities like Deyang, Guangyuan, Ganzi, Mianyang, Nanchong, and Yibin, the defense rate of the intentional homicide case in 2016 was less than 80%, which means at least one or two intentional homicide cases lacked defense lawyers.⁴⁸

One reason why the defense rate of intentional homicide cases has not reached 100% could be due to case circumstances. These types of cases are relatively light and do not amount to a punishment by life sentence or

⁴⁵ See *supra* Tables 4–5.

⁴⁶ See *supra* Tables 4–5.

⁴⁷ See *supra* Tables 4–5.

⁴⁸ The number of the intentional homicide cases online is small, only a few cases in each region. Even if only one case lacks a lawyer, it will have a great impact on the value of the defense rate.

the death penalty, even if the charge is, for example, intentional homicide or attempted murder. The above argument is supported by the fact that all homicide cases without lawyers are heard in trial courts rather than intermediate courts, given that criminal cases that might sentence defendants to life imprisonment or the death penalty must be adjudicated by intermediate courts according to the law. Twenty-one intentional homicide cases in 2016 where defendants lacked a lawyer were all attempted or aborted intentional homicides. The average sentence was six years.

Another reason for the lack of a 100% defense rate may be related to the ambiguity of the standard for appointing a defense lawyer by the state. “May” be sentenced to death or life imprisonment as a standard is unclear and fluid compared to other, solid conditions for obtaining a state-appointed defense lawyer, like being “blind,” “deaf,” “dumb,” or “juvenile.” According to our fieldwork in public security organizations, the meanings of “possible death penalty,” the “possible life sentence,” and the related range, may be difficult to grasp by police, who decide whether a defendant is entitled to a state-appointed lawyer in practice.

Second, the defense rate of corruption and bribery crimes, as well as crimes that undermine the socialist market economic order, are also higher. Most of these defense rates are higher than 50%.⁴⁹ Although the distinctive defense rates in various crimes are the result of complex two-way choices by the defendant and the lawyer, data show that defense resources are clustered around these crimes committed by officials and businesspersons.⁵⁰ Moreover, the number of appointed defense lawyers in these aforementioned cases is low to zero.⁵¹ These criminal cases often do not meet the conditions for getting an appointed lawyer. In other words, all lawyers in these cases were hired by defendants.

Third, the types of cases with moderate defense rates are relatively diverse, including crimes of property, such as “fraud;” crimes undermining social management order, such as “organize and introduce prostitution;” and crimes that violate citizens’ personal rights, such as “rape,” “injury,” and “illegal detention.”⁵² Although called moderate, these cases have defense rates higher than 30%, while the average defense

⁴⁹ See *supra* Tables 4–5.

⁵⁰ See *supra* Tables 4–5.

⁵¹ See *supra* Tables 4–5.

⁵² See *supra* Tables 4–5.

rate of all cases is less than 30%.⁵³ Cases with moderate defense rates have some appointed lawyers intervene. Among them, “rape,” “injury,” and “others with the death penalty” have appointed lawyers that can account for about 10% of the total number of lawyers in this category of cases.⁵⁴ By contrast, very few lawyers were appointed for “fraud” and “organize and introduce prostitution.”⁵⁵ Where criminal legal aid resources are distributed, they may be inclined to violent felony cases, and there are few lawyers appointed to cases of economic crime.

Fourth, cases with very low defense rates mainly concentrate on theft, certain drug crimes, and traffic crimes.⁵⁶ The defense rates of “theft” and “snatch” are not more than 20%.⁵⁷ In comparison, even “robbery,” with a defense rate around 30%, is relatively high because robbery cases are more likely to be granted lawyers by the state.⁵⁸ In terms of drug crimes, about 80% of them involve smuggling, trafficking, transportation, and drug making.⁵⁹ A large number of drug-trafficking cases involve defendants that are trafficking small amounts,⁶⁰ usually accounting for more than half of all drug trafficking cases. Furthermore, more than half of drug-related criminals are unemployed.⁶¹ It can be speculated that because there are a large number of accused in drug crimes, especially the small amount cases, defendants generally lack the economic conditions for hiring lawyers. In terms of traffic crimes, we cannot tell whether defendants in these cases are unable to hire a lawyer from the current analysis, but at least we know sentencing in traffic crimes is usually not

⁵³ See *supra* Tables 4–5.

⁵⁴ See *supra* Tables 4–5.

⁵⁵ See *supra* Tables 4–5.

⁵⁶ See *supra* Tables 4–5.

⁵⁷ See *supra* Tables 4–5.

⁵⁸ See *supra* Tables 4–5; Zhōnghuá rénmín gònghéguó xíngfǎ (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by the Fifth Nat’l People’s Cong., July 1 1979, rev’d Mar. 14, 1997), art. 17, <https://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china> [<https://perma.cc/3SCB-ZLJF>].

⁵⁹ See Tongji (佟季) & Yan Pingchao (闫平超), *2007 Nian Zhi 2011 Nian Quanguo Fayuan Shenli Dupin Fanzui Anjian Qingkuang Fenxi*, (2007 年至 2011 年全国法院审理毒品犯罪案件情况分析) [*Analysis of the Situation of Drug Crime Cases in National Courts from 2007 to 2011*], RENMIN FAYUAN BAO (人民法院报) (June 27, 2012), http://www.cssn.cn/fx/fx_fxxf/201310/t20131023_459636.shtml [<https://perma.cc/U7C4-JCJ9>].

⁶⁰ See Meng Chen (孟晨), *Qiantan Lingbao Fandu Fanzui Xianzhuang ji Dafang Duice* (浅谈零包毒品犯罪现状及打防对策) [*Present Situation of Retail-Pack Drug Crime and its Countermeasures*], 2 CHINA PUBLIC SECURITY (2019) http://en.cnki.com.cn/Article_en/CJFDTotat-GGAQ201902029.htm.

⁶¹ Tongji (佟季) & Yan Pingchao (闫平超), *supra* note 59.

severe. Specifically, the maximum penalty for dangerous driving offenses is only six months of detention.⁶² Probation and suspended sentences are more applicable for hit-and-run cases in which defendants often compensate the victim, so the necessity of hiring a lawyer is not great.

Although the client-retained defense rate is much higher than the appointed defense rate in cases with low defense rates, some of those accused of felony crimes who are at an economic disadvantage will still be able to benefit from the appointed defense system. For instance, this would be true in cases involving drug crimes and theft, despite the fact that the ratio of appointed defense to client-retained defense is 1:9.⁶³ This finding is due to the large scale of such cases. They consume more appointed defense resources in a sense of absolute number, accounting for nearly half of all appointed lawyers. This is in stark contrast to the intentional homicide cases, which enjoy about one-sixth of the appointed defense in the sense of absolute number, but the ratio of appointed defense to the client-retained defense reaches 1:1.⁶⁴

D. WEALTH EFFECT

In the past, research on the defense rate mostly followed the path of rights protection, which regards the defendant as a “passive” recipient of criminal justice. Therefore, existing literature tends to start from the point of how to promote defendants’ defense rights and holds a vague view that poor defendants are less likely to be defended. Data of online cases show evidence to support this common sense conclusion. To a large extent, economic factors affect defense rate; in other words, a “wealth effect” exists in the field of criminal defense.

On the one hand, defendants with better economic conditions can more readily obtain criminal defense; some of them can even hire two defense lawyers.⁶⁵ First, certain types of crimes reflect the economic

⁶² Zhōnghuá, *supra* note 58, at art. 133; Zhōnghuá rénmin gònghéguó xíngshì sùsòng fǎ (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People’s Republic of China] (promulgated by Nat’l People’s Cong., July 1, 1979) (amended Oct. 26, 2018), arts. 288–90.

⁶³ See *supra* Tables 4–5.

⁶⁴ See *supra* Tables 4–5.

⁶⁵ It should be noted that getting double lawyers is not necessarily the will of the defendant or someone situated in making the decision of entrustment. Sometimes, a defendant with two lawyers may also be a lawyer’s defense service strategy: adding a lawyer can often reflect the value of the high cost and enhance the customer experience; adding a lawyer also means that one more lawyer can share the professional honor for handling a “big case” and increase the lawyer’s reputation.

condition of the defendant. Accordingly, the defense rate of these crimes can reveal if economic factors play a role in the allocation of defense resources. Higher defense rates typically appear in duty and economic crimes, in which defendants generally have money because they hold a position in government required for committing duty crimes and they have the ability to capture large economic benefits from those crimes.

The above data analysis has already shown that the high defense rate of duty and economic crimes has three features. First, the overall defense rate is high and stable. The defense rate of online corruption and bribery cases and illegal absorption of public deposit cases is as high as 70%, and the defense rate of MLM and fraud is nearly 50%.⁶⁶ As the number of defendants changed, the defense rate remained high. For example, the number of defendants in corruption and bribery cases surged from 185 in 2015 to 968 in 2016, an increase of nearly four times, and that category's defense rate remained above 70%.⁶⁷ Accordingly, the number of defense lawyers has increased from 172 to 888.⁶⁸ Among the number of new defense lawyers added in 2016, 40% of them participated in corruption and bribery cases.⁶⁹ Second, the client-retained defense rate is extremely high. Defendants in these economic cases hired almost all of the defense lawyers; the number of state-appointed defense lawyers was close to zero.⁷⁰ Third, the ratio of double lawyers is relatively high. The analysis also finds that the double lawyers phenomenon is prominent in crimes such as corruption, bribery, and illegal absorption of public deposits. In such cases, defendants with two lawyers accounted for 25% of the total number of defendants with at least one lawyer. By contrast, the corresponding ratio in all online cases is only 9.5% in 2015 and 9.8% in 2016.

However, in this paper, the phenomenon of double lawyers is mainly used to support the argument that the economic ability of defendants who hire two lawyers is stronger, because objectively this defendant can afford the cost of two lawyers. The defendant's subjective will or whether it is recommended by lawyer(s) is not discussed here.

⁶⁶ See *supra* Tables 4–5.

⁶⁷ See *supra* Tables 4–5.

⁶⁸ See *supra* Tables 4–5.

⁶⁹ See *supra* Tables 4–5.

⁷⁰ See *supra* Tables 4–5.

Table 6. 2015 Demographics of Defendants and Related Defense Rate.

		2015			
		Defendants	Defendants with Lawyer(s)	Defense Rate	Appointed DR
Gender	Male	17,856	4,523	25.3%	2.1%
	Female	1,853	613	33.1%	5.0%
Age	18~27	4,309	1,063	24.7%	2.5%
	28~37	3,526	950	26.9%	2.4%
	38~47	3,802	1,057	27.8%	2.8%
	48~57	1,458	400	27.4%	2.0%
	>~58	587	152	25.9%	4.1%
Occupation	Unemployed	4,879	1,250	25.6%	2.9%
	Peasant	5,883	1,343	22.8%	2.9%
	Worker	388	151	38.9%	6.7%
	Freelance	472	186	39.4%	1.1%
	Businessmen	39	18	46.2%	0.0%
	Gov. Employee	64	48	75.0%	0.0%
Education	Illiterate	738	136	18.4%	6.2%
	Primary	4,831	1,071	22.2%	3.1%
	Junior High	7,269	1,915	26.3%	2.1%
	Senior High	1,333	435	32.6%	1.0%
	Technical Secondary	636	184	28.9%	1.4%
	Junior College	457	238	52.1%	1.5%
	Undergraduate and above	289	155	53.6%	1.7%

Moreover, the defendant's occupation can substantially reflect the defendant's individual economic status. Therefore, occupation as an indicator can be used to examine the effect of economic factors on the defense rate.⁷¹ This study found that the defense rate of online cases is consistent with the defendant's occupational and educational level.⁷²

⁷¹ Since not all of the judgments are marked with the four types of identity information, some of the judgments have only one name of the defendant listed; each sub-item study is based on the number of valid analysis samples in which relevant information can be extracted. *See infra* Tables 6–7.

⁷² *See infra* Diagram 1.

Defendants with higher paid occupations have a higher defense rate.⁷³ For example, three out of every four defendants who worked for governmental bureaus or institutions were able to obtain criminal defense services—most often client-retained defense—which is more than three times the defense rate of defendants who were unemployed.⁷⁴

Table 7. 2016 Demographics of Defendants and Related Defense Rate.

		2016			
		Defendants	Defendants with Lawyer(s)	Defense Rate	Appointed DR
Gender	Male	30,046	6,922	23.0%	1.7%
	Female	3,144	891	28.3%	2.5%
Age	18~27	7,179	1,450	20.2%	1.5%
	28~37	6,937	1,592	22.9%	1.7%
	38~47	7,132	1,697	23.8%	1.7%
	48~57	3,289	891	27.1%	1.2%
	>=58	1,185	283	23.9%	2.9%
Occupation	Unemployed	6,609	1,338	20.2%	2.3%
	Peasant	8,176	1,556	19.0%	2.2%
	Worker	575	210	36.5%	2.8%
	Freelance	670	188	28.1%	0.7%
	Businessmen	78	31	39.7%	2.6%
	Gov. Employee	151	114	75.5%	1.3%
Education	Illiterate	1,275	175	13.7%	3.5%
	Primary	7,734	1,331	17.2%	2.5%
	Junior High	11,131	2,431	21.8%	1.3%
	Senior High	2,073	590	28.5%	1.0%
	Technical Secondary	1,098	295	26.9%	1.1%
	Junior College	879	377	42.9%	0.0%
	Undergraduate and above	779	461	59.2%	0.4%

On the other hand and in sharp contrast to those defendants with better economic and occupational conditions, poor defendants are less likely to obtain criminal defense services, let alone hire two lawyers. Poor

⁷³ See *infra* Diagram 1.

⁷⁴ See *infra* Diagram 1.

defendants facing serious penalties might find it impossible to hire even one defense lawyer. Defendants in cases of theft, snatch, and drug crimes, especially small-quantity drug trafficking cases, are often at the margins of society. They cannot afford a defense lawyer, which is clearly reflected in the very low defense rate of no more than 20%.⁷⁵ Particularly, the defense rate of theft is only about 10%.⁷⁶ That is less than half of the overall defense rate of all cases and only one-seventh of the defense rate of the economic crimes. In extreme cases, some defendants who are charged with the most serious crimes, like intentional homicide, do not have the financial capacities to hire a lawyer. Once access to state-appointed defense is unavailable for any reason—such as when an attempted homicide case is adjudicated in a trial court that falls outside of the scope of mandatory appointment of a lawyer—these defendants are likely to go on trial without any help from a defense lawyer.

From the perspective of defendants' occupations, unemployed defendants have a much lower defense rate than employed defendants. For example, more than 90% of the defendants in rape cases are farmers or are unemployed with a junior high school education.⁷⁷ As such, they are financially incapable of purchasing sufficient legal services. When the number of defendants increased from 28 in 2015 to 123 in 2016, the defense rate dropped from 53.6% to 35%, which is distinctly different from the scenario in corruption and bribery cases.⁷⁸ In sum, the lower the occupational and educational level of the defendant, the lower the proportion of defense services,⁷⁹ which confirms the considerable effect of the defendant's economic conditions on the defense rate.

⁷⁵ See *supra* Tables 4–5.

⁷⁶ See *supra* Tables 4–5.

⁷⁷ See *supra* Tables 6–7; due to their sensitive nature, these data remain on file with the author.

⁷⁸ See *supra* Tables 4–5.

⁷⁹ See *infra* Diagram 1.

Diagram 1: Occupational and Educational Level of Defendants and Related Defense Rate



III. INTERPRETATIONS AND IMPLICATIONS

“Adversary criminal trial was initially devised, therefore, as a special-purpose procedure for cases of treason.”⁸⁰ When the Treason Trials Act of 1696 introduced reforms allowing treason defendants to have trial and pretrial counsel, aristocratic defendants and legislators would have considered the wealth effect to be the least of their troubles. Nearly a century later, after this adversary procedure unforeseeably extended to

⁸⁰ LANGBEIN, *supra* note 7, at 3.

common felonies, in which many defendants could not afford the cost of counsel, the wealth effect became visible.⁸¹

In increasingly sophisticated and specialized modern criminal litigation, the significance of defense lawyers to the defendant cannot be overstated. In a sense, the issue of a wealth effect parallels the issue of equality and access to justice. At present, the criminal trial in China is in the course of continuous transformation into the adversary trial system, a transformation that is not yet complete.⁸² Dealing with the negative aspects of the wealth effect associated with the adversary system remains an urgent problem to be solved. Given that the overall level of criminal defense in China is determined by both the market (client-retained defense) and the state's ability and willingness to pay (appointed defense), the existence of the wealth effect makes the latter crucially significant to the promotion of a higher defense rate and improvement of the overall level of rights protection for criminal defendants. In the long run, reducing or even eliminating the wealth effect requires strengthening the state's regulatory role in the defense market and providing defense services for economically disadvantaged defendants.

Data from this study have shown that the state's input has generated significant and positive consequences in the field of appointed defense, at least in the cases of the most serious crimes.⁸³ Accordingly, the negative aspects of the wealth effect have been weakened. Moreover, the resources of appointed defense are mostly concentrated on "drug," "theft," "intentional homicide," and "injury" crimes, where defendants are more likely to have lesser financial capabilities.⁸⁴ The concentration of the state's attention on certain crimes means that the poor can benefit more from the appointed defense system. Therefore, we can reasonably expect that when the resources invested in appointed defense increase, more defendants who are unable to hire lawyers by themselves will have lawyers appointed by the state. Thus, the inequality between the defendants due to their personal economic conditions will possibly be relieved.

Nonetheless, there are still major limitations in China's appointed defense system. The most severe among them is that the amount of legal aid resources invested by the state is relatively limited in comparison to

⁸¹ See *id.* at 103.

⁸² See Rongjie Lan, *A False Promise of Fair Trials: A Case Study of China's Malleable Criminal Procedure Law*, 27 PACIFIC BASIN L.J. 153 (2010).

⁸³ See *supra* Tables 4–5.

⁸⁴ See *supra* Tables 4–5.

the large number of defendants.⁸⁵ As this study's data from online judgments reveal, in 2015 only 8.1% of the defendants with lawyers were due to state-appointed lawyers; the corresponding proportion in 2016 was 6.1%.⁸⁶ The remaining defendants hired lawyers by themselves.⁸⁷ Looking at the total number of defendants in the entire year rather than defendants who have lawyers, state-appointed defense only accounts for about 1.5% of them.⁸⁸ Even if we include the estimates for cases of juvenile delinquency or capital punishment, the defense rate attributed to appointed defense does not exceed 10%.⁸⁹ In addition, defendants who committed serious crimes meet the criteria of compulsory appointed defense while defendants in poverty are only appointed defense lawyers at the state's discretion.⁹⁰ This appointed defense system—which is supposed to solve disparities between the rich and poor with regard to access to legal services—has gradually evolved into a system that simply provides aid to defendants facing serious charges, and leaves indigent defendants behind.

Consequently, the question of how to reduce the negative impact of the wealth effect becomes a question of how to enlarge state input and expand the range of legal aid under current resources' carrying capacity. Currently, the scheme of on-duty legal aid lawyers and the pilot program of "full coverage" are undoubtedly of great significance for reducing the wealth effect on criminal defense. Before its formal establishment by the Criminal Procedure Law of 2018, the system of on-duty legal aid lawyers had experienced years of trials since 2006.⁹¹ By guaranteeing the autonomy and voluntary nature of the defendant's guilty plea, the on-duty

⁸⁵ The proportion of legal aid funds in developed countries and regions is generally between 1% and 0.1% of their fiscal expenditure, but the legal aid funds allocated by the Chinese government only account for 0.01% or even 0.001%. This amount includes management fees and the actual funds used for handling cases have only accounted for about 30% of the total cost. See Chen Yongsheng (陈永生), *(Xingshi Falv Yuanzhu de Zhongguo Wenti he Yuwai Jingyan) (Criminal Legal Aid in China: Issues and Extraterritorial Experiences)* [China Issues and Extraterritorial Experiences in Criminal Legal Aid], 1 (BĪJIÀO FĀ YÁNJIŪ) (比较法研究) [COMP. L. RES.] 32, 39 (2014).

⁸⁶ These data were collected by and are on file with the author.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Hong Lu & Terance D. Miethe, *Legal Representation and Criminal Processing in China*, 42 BRITISH J. CRIMINOLOGY 267, 270 (2002).

⁹¹ See Cross-Regional Seminar on "Access to Legal Aid in Criminal Justice Systems – Quality Assurance, Holistic Services and Equity in Access," *Outcome of the Cross-Regional Seminar on "Access to Legal Aid in Criminal Justice Systems — Quality Assurance, Holistic Services and Equity in Access," held in Guangzhou City, People's Republic of China, 24–25 January 2018*, ¶ 16, U.N. Doc. E/CN.15/2018/1 (May 7, 2018).

legal aid lawyer has played an important supporting role in imposing lenient punishments on those confessing to their crimes and accepting punishment in criminal cases.⁹² “Full coverage” requires that all cases applicable to the common procedure should have defense lawyers. If the defendant cannot hire a defense lawyer, the court should notify the legal aid agency to provide one. These two systems establish rules that the state should appoint defense lawyers to defendants regardless of their economic conditions, potential penalties, and whether or not they plead guilty. If they can be smoothly implemented, the limitations of the traditional legal aid system would be overcome to a certain extent and the wealth effect in criminal defense could be suppressed.

However, the “full coverage” program is still in the pilot stage; neither its depth nor breadth suffices. The carrying capacity of existing resources and the specific effects of implementation remain to be seen. Even if the “full coverage” of defense is fully realized in the cases to which the common procedure applies, it is also impossible to fundamentally solve the wealth effect in those cases to which the simplified or speedy procedures apply, which account for nearly two-thirds of all criminal cases.⁹³ Despite the fact that on-duty legal aid lawyers can provide legal assistance for defendants in simplified and speedy procedures, structural defects (such as ambiguous identity due to not being treated as an ordinary defense lawyer, no right to investigate and collect evidence, etc.) may hinder the overall reduction of the wealth effect. Furthermore, legal services established in Western countries to only solve defense problems at the “first mile” are often followed by connection mechanisms to further support indigent defendants, which do not exist in China.⁹⁴ For the indigent Chinese defendant, where to find free but necessary legal service after the “first mile” remains a general unresolved problem.⁹⁵

⁹² See Yao Li (姚莉), *Renzui Renfa Chengxu Zhong Zhiban Lvshi de Juese yu Gongneng* (认罪认罚程序中值班律师的角色与功能) [*The Role and Function of the On-duty Lawyer in the Guilty Plea*], FASHANG YANJIU (法商研究) [LEGAL STUDIES] (May 21, 2018), <http://www.criminalprocedurereform.cn/zh/node/6072> [https://perma.cc/EQ7R-D894].

⁹³ See Chen Guangzhong (陈光中) & Zhang Yinan (张益南), *Tuijin Xingshi Bianhu Falv Yuanzhu Quanfugai Wenti zhi Tantaoyao* (推进刑事辩护法律援助全覆盖问题之探讨) [*Discussion on Promoting the Full Coverage of Criminal Defense Legal Aid*], 3 FAXUE ZAZHI (法学杂志) [CHINA UNIV. POL. SCI. & LAW L.J.] (2018).

⁹⁴ Gu Yongzhong (顾永忠), *Zhuigen Suyuan: Zailun Zhiban Lvshi de Yingran Diwei* (追根溯源: 再论值班律师的应然地位) [*Tracing the Source: Re-discussing the Status of Lawyers*], 9 FAXUE ZAZHI (法学杂志) 13, 7–8 (2018).

⁹⁵ *Id.*

From this point of view, deepening and perfecting the full coverage of criminal defense and the system of on-duty legal aid lawyers may be one way to eliminate the wealth effect, but we need to find another way. This paper proposes to reinforce the idea of configuring criminal defense resources based on the defendant's economic conditions and to construct a corresponding system. In past reforms, this idea was intended to respond to the wealth effect in criminal defense. Namely, if the defendant meets the economic criteria (i.e., poverty) for obtaining legal aid, regardless of the procedure of the case or the defendant having confessed or not, he or she should be assisted by an aid lawyer appointed by the state.⁹⁶

Although the criteria of poverty has always existed in the official discourse system, the specific practice lies at the margins and operates with significant difficulty. First, the fact that a defendant has economic difficulties does not currently guarantee that the defendant will get an appointed lawyer. Resource allocators have discretion on whether to provide one. Once a resource faces scarcity, the needs of a poor defendant can easily be sacrificed. Second, this practice also faces operational difficulties. Since it is hard to prove the economic difficulty of a defendant, verification from certain departments is used to make a nominal determination that the defendant meets the criteria. As a result, the standard becomes obscured, increasing the subjectivity of legal aid and ultimately leading to unsustainable situations concerning resources. Consequently, this hinders giving aid to the genuinely poor defendant.

Since the current reforms cannot be achieved overnight, the state's intervention in the wealth effect is still a long-term systematic project. At present, using the defendant's economic status as the standard indicator for the compulsory grant of an appointed defense lawyer should be put on the agenda. As long as the defendant's economic situation meets certain enumerated standards, regardless of the procedure that the case uses, legal aid must be provided if the defendant agrees. Investigation of the defendant's economic situation should be routine. As for how to determine the economic status of the defendant, developing region-specific systems would be better than sticking to the old method of self-proof by the

⁹⁶ See Zhou Changjun (周长军) & Qi Yanping (齐延平), *Wanshan Xingshi Falv Yuanzhu Zhidu Mibu Renquan Sifa Baozhang Duanban* (完善刑事法律援助制度弥补人权司法保障短板) [*Perfecting the Criminal Legal Aid System to Make Up for the Short-Term Guarantee of Human Rights Judicial Guarantee*], *GUANMING RIBAO* (光明日报) (July 14, 2017, 5:08 AM), <http://www.hnlhds.com/a/quyingdenglu/2017/0714/756.html> [<https://perma.cc/7PY6-LWJ8>].

defendant.⁹⁷ Either that, or the judicial branch should comprehensively consider the basic conditions of the defendant or a presumption of defendants' economic difficulties. Both are good examples that warrant further exploration.

⁹⁷ After "Opinions on Improving the Legal Aid System" (Zhong Ban Fa, 2017) mandated improvement to the legal aid economic hardship system for detained criminal suspects and defendants, Inner Mongolia took an innovative step by creating a commitment system concerning economic difficulties; namely, criminal suspects and defendants can submit sworn affidavits of qualification for legal aid first. If the affidavit is found to be false, legal aid can be terminated immediately. See *Notice of the Legal Aid Center of Inner Mongolia Autonomous Region on Establishing a Commitment System for Legal Aids of Detained Criminal Suspects and Defendants*, NEI FA YUAN No. 14, 2017 (China).