

Criminal Defense in Chinese Courtrooms: An Empirical Inquiry

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Abstract

Scholars in the field of Chinese criminal procedure law study have long decried the meager legal protection afforded to criminal defendants on trial and the hapless status of Chinese criminal defense attorneys in the courtroom. Unfortunately, very little empirical evidence was available to shed light on how criminal defense was carried out in Chinese courtrooms. Based on observations of 325 actual criminal trials from 55 District People's Courts in J province, this study provides an opportunity to understand the mundane work performed by Chinese criminal defense attorneys. In particular, this study describes how criminal defense attorneys prepare and present their cases (as measured in terms of bail request, overall trial preparation, examination of defendants and witnesses, presentation of evidence, and overall defense strategy), and analyzes the outcomes of their performance. In addition, this study examines the discernible impact of criminal defense work due to types of legal representation utilized (legal aid vs. privately retained attorneys), numbers of attorneys representing the client, and the gender composition of the attorneys.

Keywords

criminal defense attorneys, Chinese criminal trials, courtroom performance, empirical study

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Introduction

Studies on the Chinese legal system have grown tremendously in the last two decades. Along with the sweeping social and economic changes in China, scholars have become increasingly interested in the progress concerning China's Criminal Law and Criminal Procedure Law reforms (e.g., Clarke, 2008; Epstein, 1991; Liang, 2008; Lo, 1995; Lubman, 1999; Potter, 1999; Zhu, 1989). The slow pace in the actual implementation of substantive legal reforms remains a major concern. Many examples of blatant abuse of government power, intimidation and trumped-up criminal charges against adversarial criminal defense lawyers are widely publicized (e.g., Big-Stick 306, 2011; Clarke & Feinerman, 1995; Dicker, 1993).

In comparing China's criminal justice system with that of Western industrialized nations, it is helpful to keep in mind China's historical context and the dramatic changes China has gone through in the last three decades. On one hand, the Chinese criminal trial procedure has been heavily influenced by China's indigenous legal tradition and the Soviet style continental legal system. As a result, the inquisitorial model has dominated China's trial procedure. For instance, the adjudicators (i.e., judges) play multiple roles actively in different phases such as investigation, prosecution, and adjudication (e.g., R. Chen, 1997). On the other hand, great strides have been made to reform China's criminal law and trial procedures, exemplified by the 1996 *Criminal Procedure Law* (96CPL), the 1997 *Criminal Law* (97CL), both of which aim to provide more legal protections and rights to criminal defendants and defense lawyers.

In such a unique historical, social and legal context, examination of China's criminal procedure and Chinese criminal defense lawyers' work shall pay attention to what could/should be done legally (or theoretically) according to the book/law and what have been and are being done in reality and practice. Such a comparison would allow us to see potential disjunctions between the two, and to better understand how defense lawyers carry out daily practices in China's current legal system.

One significant obstacle to research in this field has been lack of access to collect meaningful data. Although trials are now open to the public (with a few exceptions), any large-scale court observation turns out to be out of question given facility limitation and administrative restrictions (Liang, 2008). Majority of the existing empirical studies therefore have turned to other means such as interview of lawyers (e.g., S. Liu & Halliday, 2011), study of lawyers' online discussions (e.g., Halliday & Liu, 2007), study of court documents (e.g., Lu & Miethe, 2002), and study of online televised trials (Zhong, Hu, & Liang, 2011). All of these studies shed critical lights on our understanding of the limited roles played by Chinese defense lawyers in the current system and the problems faced by them in making progress. Nevertheless, important information about defense lawyers' work such as their preparation and presentation in courtroom and their interaction with the prosecution and the judges is largely missing. The current study benefits from invaluable access to field observation of 325 trials in J province in China. It aims to fill a void to explore criminal defense lawyers' actual work in the courtroom.

In the remainder of the article, we first review previous studies in this field and highlight what changes the new laws such as the 96CPL and the 97CL have brought to the current system and what defense lawyers are struggling with in their practice of the new laws. Second, we turn to the current study, discuss data collected based on field observations, and then present and analyze our data based on our research questions accordingly. Finally, we summarize the main findings of this study, highlight potential policy implications to future criminal law and criminal procedure reforms in China, and discuss also limitations of the current study.

Previous Research on Chinese Criminal Procedure and Defense

There is little doubt that in the post-Mao reform era China has witnessed sea changes in almost all dimensions, including its criminal justice system. Early studies by scholars such as Cohen (1968, 1970), V. Li (1978), and Leng (1985) disclosed the functioning of China's criminal justice system in the prereform era, in which very little rights were given to criminal defendants. Defense lawyers worked as state employees to help the court find the truth and reach a verdict instead of fighting for defendants' rights and freedom. Consistent with the nature of the socialist state and the inquisitorial system, one's individual rights (i.e., defendants' rights) were trumped by the collective rights (i.e., the rights of the people), and prosecution, police, and defense were all supposed to work with the court to punish the criminal and safeguard the interests of the people.

The adoption of the 96CPL and the 97CL (and subsequent revisions of them and other laws such as the *Lawyers' Law*) eventually signaled dramatic transitions in China's criminal law and procedure. Under the new laws, changes were made to better protect the rights of defendants in the criminal process (such as the right to request bail and the assistance of legal counsel), to shift the power from the police and the procurator (i.e., prosecutor) to the court and to set up a more neutral role for judges (e.g., via limiting judges' active roles in investigation and prosecution), and to expand the roles of defense lawyers (such as granting a broader scope of compulsory legal assistance, an earlier intervention in case investigation, an easier access to case files, and the right to call and cross-examine witnesses in trials). Although the new laws were by no means perfect and their practices were often far from what they promised (see discussion below), there is little doubt that they epitomized significant changes in China's criminal law and criminal procedure reforms (Fu, 1998; P. Liu & Situ, 2001).

When new grounds were breaking, Chinese lawyers and their lawyering responded gradually and steadily (though not without struggle). In 1979, the whole nation had just about 2,200 lawyers. After the reform was kicked off, the total number of lawyers began to rise: The number broke the 10,000 marker in 1982, increased more than tenfold to 100,198 by 1996, and peaked at 173,327 in 2009 (data from Chinese Statistical Yearbooks over time). Criminal defense, unquestionably the most controversial and risky among all legal practices in China, also stepped up. In 1981, Chinese lawyers

were involved in a total of 65,179 criminal cases; the number quickly jumped to 232,206 in 1989, and broke the 300,000 marker in 1999. The number hovered around 300,000s in the early years of the 21st century but rose to 495,824 in 2007; 511,971 in 2008; and went on to an all-time high of 564,204 in 2009 (data from Chinese Statistical Yearbooks).

Despite the changes in the written laws and the expansion of defense practice, whether and to what extent these changes have achieved meaningful results in actual legal practice remain unanswered, as lawyers and practitioners continued to run into insurmountable obstacles in their criminal defense work. Among all such obstacles, the most notorious are the so-called “Three Difficulties” (in Chinese, *sannan*), referring to the difficulties in meeting with the detained clients without police supervision, obtaining a copy of the prosecutor’s case files, and gathering evidence and cross-examining witnesses at trial. These difficulties consistently raised deep concerns for defense work (Halliday & Liu, 2007; S. Liu & Halliday, 2009; Lynch, 2011). During politically sensitive periods such as anticrime campaigns, defendants’ and defense lawyers’ rights are often further buried and discarded in the name of serving the greater interests and goods of the society (Liang, 2005; Trevaskes, 2002, 2003, 2007). Even Chinese domestic scholars openly criticized the inadequacy and ineffectiveness of the new measures of the 96CPL and the 97CL, pointing out long-existing problems such as the lack of legal protection of the defendant’s right to remain silent; few witness testimonies at trials; heavy reliance on written documents before, during, and after trials; and serious gaps in evidence law (e.g., lack of regulations on hearsay evidence and exclusionary rules¹; e.g., R. Chen, 1996, 2000; W. Chen, 2001; W. Chen & Liu, 2008; Long, 2008; Xiao, 2008; Zuo, 2009).

In addition, the prosecution and the police seemingly have another formidable weapon against criminal defense lawyers in China, the so-called “Big-Stick 306,” which refers to Article 306 of the 97CL. Along with Article 38 of the 96CPL, Article 306 makes it a criminal offense for a defense lawyer to

help the suspect of a crime or defendant to conceal, destroy, or fabricate evidence, collude with each other, threaten or induce witnesses to alter their testimony, provide false evidence, or engage in other activities to interfere with the litigation procedure of the judicial organs.

Although perfectly legitimate in rhetoric, the Big-Stick 306 was often wielded by the authority against defense lawyers who defended serious criminals “inappropriately” (e.g., Fu, 1998; Halliday & Liu, 2007; Hou & Keith, 2011; S. Liu & Halliday, 2009; Lynch, 2011). During the first five years after the 96CPL became effective (1997-2001), 142 criminal defense lawyers were arrested by the police and procuracy, among which 77 lawyers were illegally detained or even beaten, and 27 cases were directly concerned with perjury (S. Liu & Halliday, 2009, p. 932). Although the overwhelming majority of cases charged under Article 306 had resulted in acquittal in court (Hou & Keith, 2011, p. 393; Young, 2005), occasional notorious cases (e.g., Li Zhuang’s case) have raised the fear level to its extreme against potential defense

lawyers in China, and at the same time such abuse of power has aroused great indignation among scholars and practitioners (e.g., E. Li, 2010).

As S. Liu and Halliday (2009) argued, Chinese lawyers' difficulties in criminal defense have deep roots in the recursive nature of the criminal procedure reform. Those difficulties were produced in particular by interactions of recursive factors such as the indeterminacy of law, inherent contradictions, diagnostic struggles, and actor mismatch in lawmaking and implementation. For instance, in 2007 the amended *Lawyers' Law* tried to address some of these aforementioned concerns and placed more robust emphasis on the lawyers' professional defense of defendants' rights. Nevertheless, many provisions of the new law conflicted with the old ones such as the 96CPL. Although the official reply from the Legislative Affairs Commission of the National People's Congress Standing Committee in 2008 assigned precedence to the new *Lawyers' Law* in cases of conflict, such contradictions indeed make the implementation of the new law extremely difficult in reality due to bureaucratic resistance (Hou & Keith, 2011).

Given the extreme difficulty in collecting data and conducting research in this field, studies on how Chinese defense lawyers actually carry out their daily work and how effective is their defense work are quite limited. A few successful studies have relied on nonrandomly selected court documents to empirically examine the effectiveness of legal representation in various criminal cases. For example, statistical analyses from a series of such studies have shown that legal representation has no impact on the final sentences received by the defendants (Lu & Drass, 2002; Lu & Gunnison, 2003; Lu & Miethe, 2002). Nevertheless, as Lu and Miethe (2002, 2003) argued, different *defense strategy* might actually make a difference in persuading the court. For instance, strategies such as confession and asking for leniency (an attitude of cooperation rather than confrontation) are more likely to succeed in reducing sentences than challenging the facts of the case.

In addition, the *type* of defense lawyers might well make a difference in the courtroom. For instance, Liebman's (1999) study carefully traced the development of the legal aid system in China and showed how legal aid lawyers may have functioned differently in comparison with private lawyers in criminal cases. Often relying upon their expertise and relationship with the courts and the prosecution, local legal aid lawyers learned how to utilize their "cooperation" with the system to gain better access to case files and offer arguments on their clients' behalf. It is common for them to convince their clients to admit guilt to persuade the prosecutor to recommend lenient punishment (Liebman, 1999, p. 259). Consistent with the nature of China's inquisitorial system, it is still largely true that defendants who dare to challenge the system would not only have their claims rejected by the judges but also receive harsher punishment, whereas defendants who display a "cooperative" attitude (e.g., confession) often receive more favorable outcomes.

In short, compared with the prereform era, significant changes have occurred to China's criminal procedure and criminal defense in the new, reform era. At the same time, there are serious questions about how and to what extent these changes in the book are translated into actual practice. The majority of the studies in this field

indeed questioned and criticized the inadequate protection afforded by the current system to criminal defendants and pointed out the hapless situation faced by criminal defense lawyers. Nevertheless, very little has been done empirically to study Chinese criminal defense lawyers' actual work in courtrooms. Our explorative study is aimed to fill such a void. Specifically, using court observation data of 325 trials in J province in China, this study aims to empirically examine Chinese criminal defense lawyers' performance in three key dimensions: their trial preparation and presentation, the effectiveness of their defense work in courtroom, and potential variations of their work across different types of lawyers. The following research questions are addressed:

Research Question 1: How do Chinese criminal law lawyers prepare and present their case in courtrooms?

Research Question 2: How effective is their defense work in courtrooms?

Research Question 3: Do the outcomes of their works vary across different types, numbers, and gender composition of lawyers?

Data, Method, and Research Questions

Data used for this article is based on a 2-year (2009-2011) pilot study jointly designed and carried out by researchers from the United States and China and funded by the John D. and Catherine T. MacArthur Foundation (He, McDevitt, & Li, 2011). The study was conducted in J province in China. J province has 9 prefectures and 85 counties, with a total population of 35 million at the time of the study. There are three major regions in this southeast province: the south, the north, and the west regions, reflecting different levels of economic development and population size (e.g., the southeast region being the most populous and urbanized, the west being rural and the least developed). Significant differences in court caseload, case types, court infrastructure, allocation of judicial resources, availability and quality of practicing lawyers are a reality. It is imperative therefore to include adequate representations from all regions. In the sampling design, one randomly selected District People's Court from each of the five major cities (with the largest population) is included in the sample, and a master list of all other District People's Courts in the province (excluding those from the five major cities) was compiled and the courts are grouped into three regions as explained hereinbefore. A random sample of 3 district courts in each region is drawn. The MacArthur project focuses only on the lowest level trial courts due to two major reasons. First of all, the lower courts handle majority of all criminal cases and yet are least visible in their decision-making process. Cases processed at this level may have the greatest impact on the general public's perception of crime, criminal trial, and criminal justice. Second, criminal cases tried by the higher courts (i.e., Intermediate or High Courts) are always more serious and more sensitive. The more restrictive access to trials at higher level courts, the longer time these trials usually take and the inevitably higher profile of our research activities may be detrimental to the overall success of the project. Our

research design is, therefore, necessarily modest but adequate to the stated objective laid out in our grant proposal. By adopting this limited design, however, we are able to increase the feasibility to answer two of the most critical questions: how the lower courts are actually functioning, and how legal representation is actually implemented in China. Using a standardized recording form, courtroom observations were eventually carried out by the research team covering two thirds ($n = 55$, or 67%) of the total number of District People's Courts in the Province ($n = 82$). Demographic characteristics of the prefecture-level cities and court access information are included in the appendix.

Data from a total of 325 criminal trial observations were collected. The criminal trial observations were conducted between 2009 (286 cases observed, or 88%) and 2010 (39 cases observed, or 12%) by trained research associates under the supervision of leading investigators of the MacArthur project. The major purpose of conducting court trial observations is to understand the courtroom dynamics involving the three key players, the judge, the prosecutor, and the defense attorney. In particular, we would like to know how Chinese criminal defense attorneys perform in the courtroom. We ask our research associates to attend trials where a defendant is represented by legal counsel. They are also asked to attend trials involving different criminal case categories and at different times. Majority of these court observations are conducted during the summer (August: 45.2% and July: 10.2%) and winter (December: 16.6%, November: 11.4%, and January: 10.2%) months, when student research associates (trained senior law students) are available. The distribution of days (in any month) for court observation seems to spread out relatively evenly.² Although the number of court trial observations we are able to conduct is unprecedented, we make no claim of either the exhaustiveness or proportionate representation of these observations in light of the total cases tried in the targeted courts.

Data Analyses and Findings

Table 1 presents the summary information of cases included in this study. First, as expected, overwhelming majority of these cases (95.1%) were publically prosecuted by government prosecutors; in more than half of these cases (54.5%), multiple prosecutors showed up in courtroom; it is common to have female prosecutors involved in criminal cases as they participated in almost half of these cases (48%). Second, a judge panel (as opposed to a single judge) was utilized in 88.1% of all cases, as a judge panel (*Heyiting* in Chinese) is still the predominant form of adjudication as stipulated in Chinese laws. Female judges involved in 63.1% of all cases in our sample.³ Third, in terms of criminal defense, 13.8% of all cases had *no* legal representation in courtroom, 48% utilized a single defense lawyer, and another 38.2% utilized multiple defense lawyers. Among cases with legal representation, majority of the cases involved privately hired lawyers while legal aid lawyers represented 18% of cases. Female lawyers involved in 22.2% of all represented cases, a much smaller representation in comparison with their involvement in judgeship and prosecution. Further breakdown of defense lawyers' previous legal experience⁴ by gender (not

Table 1. Basic trial information.

Variables	Frequency (percentage)	Other statistics
Prosecution type (<i>n</i> = 309)		
Private prosecution	15 (4.9%)	
Public prosecution	294 (95.1%)	
Judge composition (<i>n</i> = 302)		
Single judge	36 (11.9%)	
Judge Panel	266 (88.1%)	
Female judge (<i>n</i> = 325)		
Yes	205 (63.1%)	
No	120 (36.9%)	
Prosecution (<i>n</i> = 292)		
Single prosecutor	133 (45.5%)	
Multiple prosecutors	159 (54.5%)	
Female prosecution (<i>n</i> = 325)		
Yes	156 (48%)	
No	169 (52%)	
Defense attorney (<i>n</i> = 325)		
No	45 (13.8%)	
Single	156 (48%)	
Multiple	124 (38.2%)	
Female attorney (<i>n</i> = 325)		
Yes	72 (22.2%)	
No	253 (77.8%)	
Defense attorney type (<i>n</i> = 255)		
Legal aid	46 (18%)	
Privately retained	209 (82%)	
Defendant (<i>n</i> = 319)		
Single	147 (46.1%)	
Multiple defendants	172 (53.9%)	
Total trial length (in minutes)		<i>M</i> = 113.78 Median = 95 Range: 10-540 <i>SD</i> = 86.36

Note. The total numbers of cases (*ns*) vary due to missing values.

included in Table 1) show that 24.4% of male attorneys reported a legal experience of less than 5 years, 57.2% reported an experience of 5 to 10 years, and 18.3% reported more than 10-year experience. In contrast, 35.5% of female attorneys had an experience of less than 5 years, 45.2% reported an experience of 5 to 10 years, and 19.4% reported more than 10-year experience. It seems that the experience of senior female attorneys was rather comparable with that of senior male attorneys, but there were significantly more junior female attorneys (percentage-wise) compared with their

male counterparts. Finally, a total of 699 criminal defendants were charged in 319 cases: Single defendants were involved in 46.1% of the cases, and multiple defendants were charged in the rest of the cases (53.9%). The total length of a criminal trial ranged from a minimum of 10 min to a maximum of 540 min (i.e., 9 hr), with an average of 113 min.

Trial Preparation and Representation

To capture the full representation and performance of defense lawyers, we focus on a number of measurements (see in Table 2). First of all, the information on bail request and its outcome⁵ is tracked. It appears that bail request is a rather rare practice by Chinese criminal defense lawyers, as less than 20% of them requested bail for their clients. Unfortunately, the reasons why such a practice is rare are unknown, especially when the data show that more than 64% of bail requests were granted by the court! It is possible that defense attorneys are rather selective in their bail request, but it is equally possible that different types of lawyers may hold different views on bail request and granting of such requests (see discussion below).

Based on defense lawyers' overall performance in courtroom (e.g., written and oral defense, attitude), we dichotomize their trial preparation as either "prepared" or "unprepared"⁶: Lawyers were prepared in 80.5% of the total cases, but a significant percentage of them (19.5%) were not prepared. Although 46.8% of defense attorneys provided written defense to the court, more than half of them (53.2%) did not provide any written defense. As criminal defendants do not have the right to remain silent⁷ in China, it is critical for the defense attorneys to examine carefully their clients, especially after the equivocal questioning conducted by the prosecution and the judges. Our data show that 84% of defense attorneys examined their clients directly in courtrooms, but 16% of them, a not insignificant percentage, did not. It has been well documented that witness appearance and testimony in Chinese trials are extremely rare (less than 1% as reported by Lynch, 2011). Given the harsh reality, the fact that more than 22% of criminal defense attorneys actually examined witnesses in courtroom in our sample is a little surprising and may be due to local practice in J province. Overall, it shows that Chinese criminal defense lawyers still mainly rely on examination of their own clients rather than the key witnesses in the trial.

We also document information on evidence presentation by defense attorneys, another well-acknowledged difficulty to their practice in China. Our data show indeed a decent percentage of evidence production (56.4%) in the courtroom by defense lawyers, though this could still be considered low by Western standards. When the number of evidence produced in court is examined, it appears that two or more pieces of evidence were produced in majority of cases, and more than four pieces of evidence were produced in more than 20% of cases. We further break down the nature of evidence produced in courtroom into one of two categories: evidence regarding mandatory circumstances (*fading qingjie*) or discretionary circumstances (*zhudingqingjie*),⁸ and the

Table 2. Defense Attorneys' Pretrial and Trial Performance.

Variables	Frequency (percentage)	Other statistics
Bail request (n = 281)		
Yes	53 (18.9%)	
No	228 (81.1%)	
Bail request outcome (n = 51)		
Granted	33 (64.7%)	
Denied	18 (35.3%)	
Trial preparation (n = 325)		
Prepared	231 (80.5%)	
Unprepared	56 (19.5%)	
Written defense provided to court (n = 284)		
Yes	133 (46.8%)	
No	151 (53.2%)	
Examination of defendant (n = 287)		
Yes	241 (84%)	
No	46 (16%)	
Examination of witness (n = 276)		
Yes	63 (22.8%)	
No	213 (77.2%)	
Evidence presentation (n = 275)		
Yes	155 (56.4%)	
No	120 (43.6%)	
Number of evidence presented (n = 141)		M = 2.8
One	33 (23.4%)	
Two	51 (36.2%)	
Three	25 (17.7%)	
More than 4	32 (22.7%)	
Nature of evidence presented (n = 123)		
Mandatory circumstances	38 (30.9%)	
Discretionary circumstances	85 (69.1%)	
Defense-provided witness (n = 325)		
No	223 (68.6%)	
1-2	58 (17.8%)	
3 or more	44 (13.5%)	
Challenge to prosecution evidence (n = 282)		
Yes	132 (46.8%)	
No	150 (53.2%)	
Challenge outcome (n = 94)		
Accepted by court	36 (38.3%)	
Denied by court	58 (61.7%)	
Overall strategy utilized (n = 325)		
On behavior of crime	34 (10.2%)	

(continued)

Table 2. (continued)

Variables	Frequency (percentage)	Other statistics
Confusion with another crime	243 (74.8%)	
Asking for leniency	8 (2.4%)	
Not-guilty defense	126 (38.8%)	
Strategy accepted by court		
On behavior of crime	8 (out of 34, 23.5%)	
Confusion with another crime	16 (out of 243, 6.6%)	
Asking for leniency	4 (out of 8, 50%)	
Not-guilty defense	5 (out of 126, 4%)	
Recording of defense arguments in trial transcript (<i>n</i> = 325)		
Arguments not recorded	77 (23.7%)	
Arguments distorted	8 (2.5%)	

Note. The total numbers of cases (*ns*) vary due to missing values.

data show that the majority of evidence presented (69.1%) was regarding discretionary circumstances. As expected, defense attorneys were *not* able to produce their own witnesses in more than two third of cases (68.6%); nevertheless, they still managed to produce favorable witnesses in 31.3% of cases.

Close to half of defense lawyers (46.8%) openly challenged evidence produced by the prosecution in court, but their challenges were often not successful as the majority of their challenges (61.7%) were denied by the court. Given the imperfect, transitional adversarial nature of the Chinese criminal trials, however, the percentage (38.3%) of defense attorneys' challenges (from the variable "challenge outcome" in Table 2) that were accepted by the court is noteworthy.

Our data further break down the utilization of four popular defense strategies in Chinese defense lawyers' practice, and track the success rate of each strategy. The first strategy focuses on the behavior of the defendant(s) and challenges whether the defendant's behavior was criminal or noncriminal (*zuiyufeizui de dingxing*). This strategy was adopted by defense lawyers in about 10% of all cases, and out of 34 trials, only 8 (23.5%) turned out to be successful and accepted by the court (see "strategy accepted by court" in Table 2). The second strategy argues that the prosecution confused defendant's behavior with another (illegal) behavior and wrongfully applied the officially charged crime(s) to the defendant's case (*cizuiyubizui de bianhu*). Such a strategy turned out to be the most popular one in our data, and was utilized in 74.8% of all cases. Nevertheless, its success rate (6.6%) is extremely low. As previous studies showed that asking for leniency (while admitting guilt) on behalf of their clients is the defense strategy most likely to be accepted by the court (Liang, 2008; Lu & Miethe, 2003), our data show a surprisingly low utilization of such a strategy (2.4%), but the success rate (50%) is unquestionably the highest. Finally, the "play-the-tough-ball" strategy of claiming innocence was utilized rather frequently in our sample (38.8%), but its success rate (a mere 4%) is the lowest. To go one step further, our researchers

Table 3. Defense Versus Prosecution: Length of Presentation and Interruption.

Length of presentation	Defense (D)	Prosecution (P)	Ratio (D/P)
M (in minutes)	18.15	27.10	0.87 : 1
Median (in minutes)	10	25	0.66 : 1
Interruption			
Being interrupted? (yes)	93 (31.6%)	56 (18.1%)	
Average number of interruptions	0.80 (all cases) and 2.81 (interrupted cases only)	0.30 (all cases) and 1.71 (interrupted cases only)	
Prosecution's interruption of defense presentation			
Being interrupted? (yes)	58 (26%)	10 (17.5%)	

interviewed defense attorneys at the end of the trials and asked whether the official transcripts provided by the court faithfully and truthfully documented their legal arguments. Our data show that defense attorneys' arguments were *not* recorded in a significant portion of all cases (23.7%). In a small number of cases (2.5%), in addition, the defense attorneys found that the arguments they made in the court were distorted in the transcript.

Effectiveness of Defense Work

Previous studies have frequently noted the disadvantaged position held by Chinese defense lawyers who are often overpowered by the prosecution (R. Chen, 1996; W. Chen, 2001; Liang, 2008; Xiao, 2008). To examine their treatment in court trials, we focus on two measurements in Table 3, the total length of their presentation in court and the frequency of being interrupted. As shown, on average (disregarding case types), defense lawyers spent an average of 18.15 min in making their court presentation as compared with prosecution's 27.10 min, and the ratio of the former to the latter is 0.87 to 1; the median of the prosecution's presentation length (25 min) more than doubled that of the defense (10 min) with a ratio of 0.66 to 1 (the defense to the prosecution). Granted, such disparate presentation length could have reflected the fact that the prosecution has the burden to prove the case, but it also reflects the obstacles faced by Chinese defense lawyers as they try to put together a solid defense to counter the prosecution.

Interruption could be a powerful tool to use in courtrooms, especially in an adversarial system. The frequency of interruption reflects not only the nature of the system but also the asymmetrical power displayed by different parties in the courtroom. A rare study by Liao (2009) documented the number, function, and causes of Chinese courtroom interruptions, and showed that Chinese prosecutors interrupt the most and the defense lawyers the least, and the powerless defendant is the most interrupted party in the courtroom. Our counts here show that interruptions were *not* as widely present in our sample; nevertheless, they were not evenly

Table 4. Comparison Among Key Variables by Type of Defense Attorneys.

Variables	Legal aid	Privately retained	Chi-square/t test
Bail request			
Yes	2 (4.5%)	44 (22.0%)	
No	42 (95.5%)	156 (78.0%)	7.182**
Trial preparation			
Prepared	26 (59.1%)	174 (84.9%)	
Unprepared	18 (40.9%)	31 (15.1%)	15.24***
Written defense provided to court			
Yes	29 (67.4%)	91 (45.5%)	
No	14 (32.6%)	109 (54.5%)	6.817**
Examination of defendant			
Yes	35 (83.3%)	175 (85.0%)	
No	7 (16.7%)	31 (15.0%)	0.070
Evidence presentation			
Yes	11 (26.2%)	128 (64.6%)	
No	31 (73.8%)	70 (35.4%)	21.024***
Defense-provided witness			
Yes	17 (37.0%)	76 (36.4%)	
No	29 (63.0%)	133 (63.6%)	0.006
Challenge to prosecution evidence			
Yes	3 (7.1%)	114 (56.7%)	
No	39 (92.9%)	87 (43.3%)	34.198***
Total trial length (in minutes)	110.73	117.54	0.501

* $p < .05$. ** $p < .01$. *** $p < .001$. (two-tailed).

distributed either. Defense lawyers were interrupted by the presiding judge⁹ in 93 cases (31.6%) while the prosecutors were interrupted in 56 cases (18.1%). On average, defense lawyers were interrupted 0.80 times in all cases and 2.81 times in actual interrupted cases; in contrast, prosecutors were interrupted 0.30 times in all cases and 1.71 times in actual interrupted cases. If the frequency of interruptions reflects the power balance between these two competing parties, Chinese defense lawyers still have a long way to catch up. Judges' interruption was more frequent when the defense lawyers were examining defendants (26%) than witnesses (17.5%; not presented in table). It simply reaffirms the powerless position of defendants in the courtroom. In sum, though our measurements here do not gauge the effectiveness of defense lawyers' work directly, comparisons between the defense and the prosecution on presentation and interruption clearly show the dominance of the latter in the courtroom. Along with the low success rates among different defense strategies as shown in Table 2, a serious doubt can be raised as to the effectiveness of defense lawyers' efforts in the courtroom.

Table 5. Comparison Among Key Variables by Number of Defense Attorneys.

Variables	No attorney	Single attorney	Multiple attorney	Chi-square/ ANOVA
Bail request				
Yes	4 (26.7%)	22 (15.0%)	27 (22.7%)	3.194
No	11 (73.3%)	125 (77.3%)	92 (77.3%)	
Trial preparation				
Prepared	11 (64.7%)	112 (76.2%)	108 (87.8%)	8.618*
Unprepared	6 (35.3%)	35 (23.8%)	15 (12.2%)	
Written defense provided to court				
Yes	5 (21.7%)	81 (55.9%)	47 (40.5%)	12.422**
No	18 (78.3%)	64 (44.1%)	69 (59.5%)	
Examination of defendant				
Yes	11 (73.3%)	124 (82.1%)	106 (87.6%)	2.832
No	4 (26.7%)	27 (17.9%)	15 (12.4%)	
Evidence presentation				
Yes	9 (56.3%)	72 (51.1%)	74 (62.7%)	3.544
No	7 (43.8%)	69 (48.9%)	44(37.3%)	
Defense-provided witness				
Yes	2 (4.4%)	50 (32.1%)	50 (40.3%)	19.798***
No	43 (95.6%)	106 (67.9%)	74 (59.7%)	
Challenge to prosecution evidence				
Yes	6 (37.5%)	52 (35.4%)	74 (62.2%)	19.576***
No	10 (62.5%)	95 (64.6%)	45 (37.8%)	
Total trial length (in minutes)	83.18	100.00	141.65	11.688***

*p < .05. **p < .01. ***p < .001. (two-tailed).

Type, Number, and Gender Composition of Defense Lawyers

To further examine the outcome differences across types of defense lawyers, we break down key performance variables¹⁰ by legal aid and privately retained lawyers in Table 4 and test the significance of the differences based on Pearson’s chi-squares. There are a number of interesting findings. First, in bail request, overall trial preparation, evidence presentation, and challenge to prosecution, significant and large margins were found in favor of the privately retained lawyers. More specifically, privately retained defense lawyers were significantly more likely to request bails for their clients, to be prepared for the trial, produce evidence in favor of their clients and challenge the prosecution’s evidence in courtroom. This may be due to the zealously of privately retained lawyers in their practice and the stronger inclination of the legal aid lawyers to cooperate with the prosecution (Liebman, 1999). Second, in one variable, written defense submitted to the court, legal aid lawyers outperformed their counterparts, i.e., they are significantly more likely to produce and submit written defense to the court. However, this finding does not

Table 6. Comparison Among Key Variables by Involvement of Female Defense Attorneys.

Variables	No female attorney	With female attorney	Chi-square/t test
Bail request			
Yes	34 (16.0%)	19 (27.5%)	4.497*
No	178 (84.0%)	50 (72.5%)	
Trial preparation			
Prepared	172 (78.9%)	59 (85.5%)	1.457
Unprepared	46 (21.1%)	10 (14.5%)	
Written defense provided to court			
Yes	101 (45.9%)	32 (50.0%)	0.333
No	119 (54.1%)	32 (50.0%)	
Examination of defendant			
Yes	182 (84.3%)	59 (83.1%)	0.053
No	34 (15.7%)	12 (16.9%)	
Evidence presentation			
Yes	116 (56.0%)	39 (57.4%)	0.036
No	91 (44.0%)	29 (42.6%)	
Defense-provided witness			
No	174 (68.8%)	49 (68.1%)	0.013
Yes	79 (31.2%)	23 (31.9%)	
Challenge to prosecution evidence			
Yes	96 (45.3%)	36 (51.4%)	0.798
No	116 (54.7%)	34 (48.6%)	
Total trial length (in minutes)	111.71	121.34	0.900

* $p < .05$. ** $p < .01$. *** $p < .001$. (two-tailed).

necessarily contradict the previous findings. It may well be that the legal aid lawyers, unlike their privately hired colleagues, consider submitting written defense the best strategy to counter the prosecution without direct confrontation with the prosecutors in the courtroom. It is also possible that the legal aid lawyers are so overwhelmed by their workload and often only manage to find time to put defenses in writing instead of spending more time to prepare for the oral presentation of the case in the courtroom. Finally, no significant differences were found in examining defendants, producing defense witnesses, and the total length of trial between these two types of defense lawyers.

In Table 5, our data examines the potential impact of legal representation based on the number of lawyers utilized. In addition to potential differences between defendants with and without legal representation, we also contrast the work between defendants represented by a single attorney and defendants represented by a team of attorneys. On one hand, no significant differences were found across different numbers of lawyers in three variables, including bail request, examination of defendants, and producing evidence; on the other hand, statistically significant differences were found in other variables including trial preparation, submitting written defense, producing defense witnesses, challenging prosecution evidence, and the total length of trial. A close examination of these differences discloses nuanced differences between the two: Single lawyers are more likely to produce written defense¹¹; team lawyers seem to be

better prepared for the trial, more likely to produce defense witnesses and challenge the prosecution's case; and team lawyers also extend the trial length significantly.¹² Overall, using a team of defense lawyers in trials does seem to strengthen the zealotry of the criminal defense in the Chinese courtroom.

In Table 6, we test the effect of having female attorneys involved in a trial. The traditional image of lawyering is definitely masculine, and to fit into the "tough" combat environment, female attorneys often have to adjust their practice to be the "Rambo-like" litigator in an adversarial system (Piece, 1995). Our finding in Table 6 suggests that there is very little gender-specific difference. The only variable that shows statistically significant difference is bail request, in which female attorney's involvement actually makes such a practice *more* likely. A closer examination of the data shows that female attorney's involvement, as measured in most variables in Table 6, pointed to the direction where *more* zealous defense work was done (though the differences were not statistically significant). Granted, in most of cases, female attorneys worked with their male colleagues as a team, and therefore our interpretation has to be viewed with caution.¹³

Discussion and Conclusion

In this study, we gained invaluable information based on court observations of the actual work of Chinese criminal defense lawyers. We paid particular attention to understand defense lawyers' preparation and presentation in the courtroom and to compare their work with that of the prosecution to gauge the effectiveness of their work. In addition, we further examined potential differences in their works by different types, numbers and gender composition of defense lawyers. Although still primitive and explorative in nature, our study presents a number of interesting findings.

First of all, though all odds are against them, our data show that Chinese criminal defense lawyers have no problem taking up challenges in the courtroom. From assuming legal representation, to trial preparation and all aspects of courtroom presentation (e.g., examination of defendants and witnesses, evidence production, and challenging prosecution), Chinese defense lawyers are fully engaged in the legal battle. It is difficult to evaluate their performance though, because of the lack of universal yardsticks. On one hand, when comparing their performance in criminal trials with that of their counterparts in Western nations, Chinese criminal defense lawyers' work would seem subpar; on the other hand, their performance was rather impressive and remarkable, given China's historical, social and legal contexts (especially the rapid changes occurred in the last two to three decades). In addition, there are signs of continued interest and effort in moving toward a more adversarial system from the government (e.g., the 12CPL) and the grassroots (e.g., lawyers taking up more and more criminal defense work and adjusting their defense strategies).

Second, in the current Chinese legal system, the effectiveness of defense lawyers' works seems to have fallen short despite their efforts. Our data show that the prosecution still dominates the trial process (in presentation time and interruptions), and defense lawyers' counterarguments do not fare well in the courtroom. The unsatisfactory reality epitomized in Chinese criminal trials is likely to continue for quite some

time given the obstacles that Chinese defense lawyers have to face in their daily practice. Evidence from our research reconfirms the disjunction between what the new laws have promised in the book and what can be achieved in actual operation. It is not easy to go through the transition from the well-entrenched old system to the current semiadversarial system, and it presents a challenge not only to the defense lawyers but also to other players in the courtroom including judges and prosecutors (e.g., R. Chen, 2000; S. Liu, 2006; S. Liu & Halliday, 2009). While the reactionary forces (such as bureaucratic resistance, inherent contradictions in laws) may hold up the pace of progress, it is unlikely that Chinese legal reforms would go backward. To move forward, the biggest obstacle seems to be coming from further structural reforms (e.g., more, if not complete judicial independence). Our data show that once the green lights are given, the Chinese lawyers will no longer be afraid of using the new laws in their practices.

At the same time, a defense strategy still matters under the current system and this is confirmed in our data. Consistent with past studies, when the defense “works with” the prosecution and the court (e.g., through defendant’s confession in exchange for leniency), the pleas made by the defense are more likely to be accepted. On the contrary, when the defense plays the hard ball (e.g., challenge the criminal charge by claiming innocence), their strategies would largely fail. Nevertheless, it is interesting to see that Chinese defense lawyers are taking up a variety of defense strategies today and seemingly becoming more contentious and adversarial. When Lu and Miethe (2002) studied Chinese criminal legal representation base on 237 cases in 1999, *no* defense lawyers claimed innocence on behalf of their clients. Their empirical examination of confessions (2003) in criminal cases between 1986 and 2001 further noticed that the proportion of Chinese defendants who refuse to admit their guilt *increased significantly* over time (when contrasting pre- and postreform eras) and the legal representation *decreases* the odds of confession (though it also decreased the odds of acquittal). It is very telling that lawyers in our data set claimed innocence of their clients and challenged official charges against their clients in a significant portion of cases. Granted, lawyers in our sample are well learned and knew that strategies matter in the Chinese context, but their defense choices revealed their aggressive practice. It is reasonable to expect such a trend to continue in the future.

Third, our data also explored how different types of attorneys may matter. As instinctive as it is, this issue was rarely studied with very few exceptions (e.g., S. Liu & Halliday, 2011 for an analysis of how attorney’s political view and embeddedness may impact their criminal defense work). Our data first contrasted the work of legal aid lawyers with that of the privately retained lawyers and showed that the latter largely outperformed the former and represented their clients more zealously and aggressively. The legal aid lawyers apparently relied more on written defense than their colleagues, but fell short on other measurements. It is not clear whether this is a strategic decision or due to the nature of their work (e.g., training, being overloaded, or being more cooperative with the government). Although the legal aid attorneys could be helpful and even effective in some cases (e.g., Liebman, 1999), our comparison here raised some questions with regard to their willingness to provide zealous legal representation (if that is the ultimate desired goal).

In terms of the number of defense lawyers, our analysis shows that utilization of defense lawyers in trial would strengthen the zealotry of the defense, especially when multiple defense attorneys work together as a team.¹⁴ Note that our data do not measure the final outcome of the trial (e.g., conviction or sentencing), as previous studies casted doubt on the effect of having legal representation in reducing official punishment (Lu & Drass, 2002; Lu & Gunnison, 2003; Lu & Miethe, 2002). It may be likely nevertheless, that defense representation would carry more and more weight as China moves toward a more adversarial system and as defense lawyers assume more and more meaningful roles therein. However, given the general lack of effectiveness of lawyers' presentation in the current Chinese legal system, our data show that utilizing defense teamwork seems to be the most effective means to achieve better representation, though such a luxury would be certainly out of reach for majority of Chinese criminal defendants.

Our examination of female attorneys' involvement in criminal trials in comparison with their male counterparts showed that female attorneys provide equally effective legal representation. In some cases, female attorneys are more helpful and effective. This is consistent with S. Liu and Halliday's (2011) finding that female lawyers are significantly *less* likely to report the difficulty in meeting suspects than are their male counterparts (S. Liu & Halliday, 2011). How the traditional gender roles would play out in this complex context and how Chinese female defense lawyers battle in the semiadversarial system clearly warrant further study in the future.

To summarize, we would like to acknowledge a few limitations of this study. First of all, though our sampling covers extensively the District People's Courts in J province, it is by no means a representative sample of the whole nation. Our study is explorative and tentative. J province's experience could be more representative to provinces with similar level of economic development. In addition, the positive development observed in our study of J province criminal courts may serve as a model for the less-advanced cities and places in the future. Second, due to the design of the study (i.e., field observation) and difficulties in implementation and data triangulation, measurements utilized are imperfect and some key control variables (e.g., crime type, offense severity) and outcome variables (e.g., final sentences) are missing. Future studies could definitely benefit from evaluating defense lawyers' work from multiple angles and based on multiple sources.

Third, this study suffers from lack of a viable theoretical framework. Unfortunately, given the paucity of studies and lack of empirical data, there is no ready theory to be applied and tested in this very subject to our best knowledge. A few studies such as S. Liu and Halliday (2009, 2011) provided some initial theoretical frameworks to the study of Chinese defense lawyers from different perspectives (e.g., overall difficulty in reform, the impact of political embeddedness on practice), but none can be readily applied to the *actual courtroom practice* by Chinese criminal lawyers. Our empirical study provided a rare look at how defense lawyers actually perform inside the courtroom, and findings of this study hopefully can contribute to further theoretical discussion and theory building in the future.

Appendix

J province District Courts ($n = 82$) and Registered Lawyers ($n = 4,208$; 2008 Data)^a.

Prefecture-level cities	Population	GDP/capita (Yuan)	District courts (total)	District courts (observed)	Registered lawyers (2008)	Lawyer density ratio	Legal aid lawyers
City A	7,790,000	34,840	10	9	518	15,039	17
City B	6,830,000	33,615	12	11	1,326	5,151	28
City C	3,760,000	18,261	10	8	211	17,820	14
City D	3,030,000	17,851	9	3	148	22,782	21
City E	2,890,000	19,348	10	3	180	16,056	20
City F	2,840,000	21,515	5	5	131	21,679	9
City G	2,770,000	24,334	7	5	173	16,012	10
City H	2,630,000	25,407	12	5	152	17,303	23
City I	2,490,000	62,651	7	6	831	2,996	9
Total	35,030,000	28,647	82	55 (67%)	3,670 (4,208) ^b	7,642	151

Note. Because the breakdowns of "Government lawyers" and "In-residence corporate lawyers" by "prefectures" were not made available, the "total registered lawyers" used in this Table is 3,670 (i.e., 3,519 + 151).

^aChinese national lawyer density ratio: China national ratio: 1 per 8,867 (U.S. ratio: 1 per 281). Calculations are made based on census population data and the 2008 registered lawyers' figures reported by Provincial Lawyer's Association. Another report puts the total number of lawyers in J province at 4,584. In 2008, a total of 26,937 criminal cases were represented by lawyers.

^bRegistered J province lawyers ($n = 4,208$; Year 2008) are of 4 major categories:

1. Law Firm lawyers ($n = 3,519$; 83.6%); There were 391 law firms in the province.
2. Government lawyers ($n = 414$; 9.8%)
3. Legal aid office lawyers ($n = 151$; 3.6%)
4. In-residence corporate lawyers ($n = 124$; 2.9%)

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Notes

1. In 2010, two new evidential rules, together known as the 2010 evidence rules, went into effects including the “rules on certain issues relating to examining and judging evidence in death penalty cases” and the “rules on certain issues relating to the exclusion of illegal evidence in criminal cases.” The effect of these new rules is still subject to debate and test (e.g., Daum, 2011; Lewis, 2011; Rho, 2011). Most recently, the amended 2012 Criminal Procedure Law (12CPL) further adopted evidentiary exclusionary rules against evidence illegally obtained through torture (e.g., Articles 50, 53, 54), but its effect in practice remains to be seen.
2. The breakdown in any month when court hearings are observed is 26.2% (1st to 7th), 19.0% (8th to 14th), 24.6% (15th to 21th), and 28.3% (22nd to 31th).
3. This percentage is seemingly rather high. The national statistics show that there were 44,502 female judges by 2009, 23.5% of all judges in China (<http://news.qq.com/a/20090128/000256.htm>, last accessed on August 25, 2012). Informed by our field interviews, compared with lawyering, more women prefer judgeship given its job stability and security, and this may reflect well in our data.
4. Information on attorneys’ legal experience is gained from follow-up interviews with attorneys after trials, and is recorded into the court observation form.
5. Information on bail is gained from follow-up interviews with attorneys after trials, and is recorded into the court observation form.
6. The research associates who attended and observed the trials make such an evaluation based on factors such as defense lawyers’ defense performance (written and oral) and their attitude. In practice, Chinese defense lawyers may present written defense (*shumianbianhu* in Chinese) and oral defense (*koutoubianhu*), though they often overlap. In this variable specifically, if a defense lawyer presented either written or oral defense, and actively participated in trial (i.e., good attitude), then the lawyer’s performance is recorded as “prepared”; otherwise, it is recorded as “unprepared.”
7. Some local governments have introduced a new practice called “zero testimony” (*ling kou-gong*) in the new century, but such a practice is *not* guaranteed by Chinese laws and is not equivalent to the “right to remain silent” in Western standards (see Liang, 2008, p. 140).
8. In sentencing, the Chinese law distinguishes facts into either mandatory circumstances or discretionary circumstances. Mandatory circumstances (e.g., mental condition of the defendant) are stipulated in the Criminal Law and *should* be considered by judges in rendering sentences (though such consideration may or may not actually affect the sentencing outcome given judges’ discretion). In contrast, discretionary circumstances (e.g., attitude of the defendant after arrest) are not stipulated by the Criminal Law; nevertheless, they are often recognized by judges in their practices and *could* be considered in judges’ discretion.
9. Unlike Liao’s (2009) study, only interruptions by judges were recorded in our study.
10. Note that a few measurements used in Table 2 are *not* included in Tables 4 to 6 mainly due to significant numbers of missing values.
11. This could be due to the correlation between legal aid workers and attorneys who worked solo, as 38 out of 46 legal aid lawyers in our data set worked solo.
12. Note that there is a high correlation between the number of defendants in a case and the number of defense lawyers. It is likely, therefore, that the extended trial length is due to the nature of the case (e.g., complexity of the issue, the number of defendants) rather than the actual work of the legal team.

13. Only 19 female lawyers defended their cases alone in our data set. Such a small sample makes cross-tabulation and comparison (vs. single male attorneys) statistically impossible. A further examination shows that 17.6% of them requested bail for their clients, 88.2% were prepared for trial, 55.6% submitted written defense, 88.9% examined their clients, 41.2% produced their own evidence, 52.6% provided favorable defense witnesses, and 31.6% challenged the prosecution in the courtroom.
14. One anonymous reviewer raised an interesting issue with regard to the team defense: Is it a choice of the defendant or a decision by the firm? Unfortunately, our court observation data did not contain relevant information. Given the fact that majority of criminal defendants in China are poor (just like other nations), our guess would be that team defense was most likely utilized in cases with multiple defendants (as in our data). Nevertheless, as the reviewer pointed out, it is also likely that defense lawyers from different firms represent multiple defendants in the same case to avoid conflict of interest, and sometimes a seasoned lawyer teams up with junior lawyers to provide mentorship in a case. This issue deserves further study in the future.

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