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Article

**\*317 WHAT JUDGES THINK OF THE QUALITY OF LEGAL REPRESENTATION**

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Studying the **legal** profession poses several challenges. The evolution of law has moved lawyers away from a generalist practice towards increased specialization. This makes it difficult to compare lawyers across different practice areas meaningfully and to provide a comprehensive assessment of the legal profession. Judges are well situated to provide such an evaluation, given their experience and scope of cases. This Article reports the responses of federal and state judges to a survey we conducted in 2008. The questions relate to their perceptions of the quality of legal representation, generally and in criminal and civil cases; how the quality of legal representation influences how they and juries decide cases; and their recommendations for change in the profession. We find that judges perceive significant disparities in the quality of legal representation, both within and across areas of the law. In many instances, the underlying causes of these disparities can be traced to the resources of the litigants. The judges' responses also suggest that they respond differently than juries to these disparities, and that the effect of these disparities on juries may be more pronounced in civil than in criminal cases.

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**\*318 Introduction**

Evaluating the legal profession is a daunting task. The profession is highly decentralized, and lawyers work in myriad practice settings. Most litigation ends in settlement, [FN1] creating little or no public record. Lawyers increasingly specialize, [FN2] which complicates comparison across areas of law. Because lawyers and clients typically choose one another, it is difficult to separate lawyer ability from case characteristics. [FN3] For these reasons, much of our understanding of legal representation comes from careful examination of discrete segments of the profession, [FN4] practice set-

tings, [FN5] or geographic regions. [FN6]

What is missing is a comprehensive evaluation of legal representation. Lawyers--like most workers--are heterogeneous in ability, [FN7] but we have only a limited understanding of how lawyers of different quality are distributed within and across the profession. Human capital theory posits that higher wages attract higher-skilled workers, [FN8] but we have little empirical evidence to support or rebut this theory as applied to lawyers. A related point is that we lack a good understanding of how lawyers influence case outcomes.

Given the paucity of existing data, we decided to survey members of the profession. We decided against surveying lawyers, however, given their limited \*319 perspective and likely biases. [FN9] Instead, we decided to survey **judges**. Of course, **judges** are not without their own biases, [FN10] and their perception of lawyers is limited to written documents and in-court observations. But most **judges** preside over courts that have a general jurisdiction, and so they encounter lawyers in diverse areas of law and practice settings, which allows them to make comparisons across the population of lawyers.

Other scholars have surveyed **judges** to better understand institutional aspects of the **legal** profession, such as jury verdicts, [FN11] oral argument, [FN12] court-appointed experts, [FN13] clerkship hiring, [FN14] gender bias, [FN15] and judicial retirement, [FN16] to name a few. Our survey differs in focusing on how the adversarial system influences **legal** outcomes.

Our survey was of 666 federal and state **judges**--both appellate and trial--and was conducted in the spring and summer of 2008. The survey asked **judges** to answer questions relating to their perceptions of the **quality of legal representation**, and how that **quality**--and significant disparities in **quality** between opposing counsel--influences how they and juries decide cases. We also asked **judges** for their recommendations for improving law schools, the practicing bar, and the judiciary.

We found that **judges** perceive significant disparities in the **quality of legal \*320 representation** in criminal cases, and that these disparities occur in 20% to 40% of the cases they hear. Federal **judges** generally rate prosecutors as comparable in **quality** to public defenders and significantly better than court-appointed counsel or retained counsel. State **judges** agree with respect to the high **quality** of prosecutors but hold retained counsel in higher regard than public defenders or court-appointed counsel. In civil cases, **judges** gave their highest ratings to lawyers handling commercial litigation and intellectual property and their lowest ratings to immigration and family lawyers. Federal **judges** reported that the lawyers on one side of immigration and civil rights cases are consistently abler; in contrast, state **judges** found sharp **quality** differences in family law but did not find that the differences systematically favored one side. Both federal and state **judges** reported greater disparities in the **quality of representation** in civil cases than in criminal cases.

**Judges** see themselves as responding differently from juries to significant disparities in the **quality of legal representation**. The majority of **judges** responded that they engage in additional research to compensate for these disparities when they arise. In contrast, most **judges** thought that jurors are inclined, other things being equal, to favor the litigant with the higher-**quality** lawyer.

When asked to propose reforms aimed at improving **legal representation**, most **judges** suggested curricular changes, both doctrinal and clinical, in law schools. They also recommended reducing disparities in resources for **legal** services, either by increasing wages for lawyers in the public sector or by increasing public financing for indigent litigants. They cited a need to help **judges** handle increased caseloads by increasing the number of **judges**, and a high percentage of **judges** called for higher judicial salaries.

The Article proceeds as follows. Part I describes our design and methodology of the survey. Part II presents the results. Part III discusses implications of these results, and the final Part concludes.

## I. Data Description

We surveyed federal and state judges separately. We now describe the process by which we administered the survey, the questions we asked, and basic summary statistics.

**Federal Survey:** We mailed the federal survey to 456 active Article III district and appellate judges, randomly selected from the list of 834 such judges provided by the clerkship office at Northwestern University School of Law in the fall of 2007. [FN17] The randomization was conducted within each federal circuit, excluding the Federal Circuit; forty judges were selected from each \*321 circuit. [FN18] They were not asked to provide their names or any other unique identifiers. A few did identify themselves, however, offering to provide additional comments in person or by phone, and we contacted them.

**State Survey:** We administered the state survey with the generous help of the National Center for State Courts (NCSC), which sent the survey to judicial groups that had an affiliation with the NCSC. These included the American Judges Association (both trial and appellate judges), the Conference of Chief Judges (appellate only), and the justices of the state supreme courts. The NCSC sent the invitation via e-mail. Those willing to participate could click on a link that took them to the secure, encrypted online instrument. [FN19] As with the federal survey, the state respondents were assured anonymity. Because some state judges have a limited jurisdiction (for example, they preside over only criminal or only civil cases), we asked additional questions concerning the docket of the participating judge.

**Content of the Survey:** We describe the substantive questions and the judges' responses in greater detail in Part II. Most questions were in multiple-choice format, asking the judge either to provide his or her response on a five-point scale (for example, ranking the quality of legal representation from poor (1) to excellent (5)), or to choose a response among a nonordinal set of choices (for example, changes to the practicing bar that the judge believed would most benefit the judiciary). We also invited judges to provide open-ended comments at the end of the survey, which approximately one-quarter of the judges did. Where relevant, we integrate these comments into the Article.

In each table we report the number of judges who responded to each question. With some of the questions, the number of responses varies slightly because some judges did not answer all the questions. This variation occurs primarily among state judges when answering questions relating to criminal and some areas of civil law. [FN20]

**Summary Statistics:** We are particularly interested in two sets of comparisons: between federal and state judges and between appellate and trial judges. Table 1 breaks down the survey statistics by these categories, as do subsequent tables. [FN21]

\*322 A general note about the tables: most responses report a mean for each judge group. To evaluate statistical significance across judges on a single question, or within the same judge for a repeated set of questions, we ran an ANOVA (analysis of variance) test using a Bonferroni correction to evaluate the differences in means between multiple groups. [FN22] Unless otherwise stated, we report statistical significance levels at the  $p < 0.05$  level.

Table 1

### Surveys Sent and Responses Received

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Table 1 shows that the overall response rate for federal judges was 52%. The district judge response rate was 52%, while the circuit judge response rate was 49%, a difference that was not statistically significant. For the state judges, the overall response rate was 37%--still significantly higher than the typical response rate for unsolicited e-mail surveys. [FN23] Because one of the state judicial organizations participating in the survey--the American Judges Association -- \*323 consists of both state trial and appellate judges, we were unable to determine the precise number of surveys sent to trial and appellate judges, respectively, within this group.

Table 2

### Judge Summary Statistics

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\*324 Table 2 reports summary statistics for the judges. [FN24] In this and the subsequent tables, the numbers preceding the question correspond to the number of the question in the survey.

The vast majority of judges have had experience in private practice--typically in a firm environment. A sizable percentage have also had experience practicing criminal law, the difference being that federal judges were more likely to have been criminal defense lawyers while state judges were more likely to have been prosecutors.

The number of responses varies by region, reflecting differences in the number of judges, but differences in response rates across regions were small and not statistically significant. Responses at the state trial level are disproportionately high from the region corresponding to the Sixth Circuit; the reason is doubtless the high level of membership of Kentucky judges in the American Judges Association. [FN25] With few exceptions, [FN26] their responses were not statistically distinguishable from other state trial judges.

## II. Results

We now report the judges' survey responses in categories described below. We reserve our interpretation of these results until Part III.

Overall Perception of the Legal Profession: Our first set of questions, reported in Table 3, sought to gauge judges' general impressions of the legal profession.

Each judge group rated the overall quality of legal representation in Question 1, between fair (3) and good (4). Federal district judges had the most favorable impression of the profession (3.839), statistically significantly higher than the other judge groups. The other judge groups were not statistically significantly different from one another.

In Question 2, judges were in general agreement that the quality of legal representation has remained "generally the same," with responses ranging from 2.962 (state trial) to 3.143 (state appellate). These differences were not statistically significant. Within each judge group, judges with zero to five years of experience rated the quality of lawyers lower than judges with twenty or more years of experience, although this difference was small and not statistically significant. Differences across geographic region within judge \*325 groups were similarly small and not statistically significant.

A substantial percentage across judge groups in Question 3 responded that oral and written argument were equally important. [FN27] For those who perceived a difference, the overwhelming majority identified written argument as more significant. Only a small fraction identified oral argument as being more important.

Table 3

#### General Impressions of the Quality of Legal Representation

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Perception of Criminal Lawyers: In a series of questions about legal representation in criminal cases, we asked the judges to compare the quality of representation of prosecutors with that of criminal defense lawyers. Criminal defense lawyers were further broken into three types: public defenders, court-appointed counsel, and privately retained counsel. We excluded the category of pro se litigants because in most instances defendants representing themselves are not lawyers. [FN28]

As reported in Table 4, federal judges differed from state judges in their overall impression of different criminal lawyers (Question 4). [FN29] Federal judges \*326 exhibited a clear divide, ranking public defenders highest, followed closely by prosecutors. [FN30] Both federal appellate and district judges deemed court-appointed and privately retained counsel markedly (and statistically significantly) worse, although they disagreed which group was the worst. [FN31] In contrast, state judges perceived greater parity among criminal lawyers, with both appellate and trial judges giving their highest ratings to retained counsel. Appellate judges generally gave similarly high scores to prosecutors and public defenders, [FN32] whereas trial judges thought privately retained counsel distinctly better than other criminal lawyers. [FN33]

In response to Question 5, judges noted the frequency with which they observe significant disparities in the quality of legal representation between prosecutors and defense attorneys of all types. On a five-point scale, judges across all categories gave an average response of approximately 2.0 (indicating they observe significant disparities between 21% and 40% of the time). The differences across judge categories were small and not statistically significant. The distribution of responses suggests not only similar averages and standard deviations but also similar distributions across type of judge.

\*327 Table 4

#### Perceived Quality of Legal Representation in Criminal Cases

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We then asked judges how they perceived the importance of legal representation on outcomes in criminal cases (Table 5). In Question 6, we asked judges what effect the different types of criminal lawyer have on case outcomes, on a five-point scale. Responses reveal statistically significant differences within judge category, within lawyer type, and in the interaction of judge category and lawyer type. Federal appellate judges generally assigned the least significance to the lawyers. With the exception of state trial judges, other judges did not perceive meaningful differences in influence on outcomes across categories of criminal lawyer. State trial judges reported that retained counsel had a significant influence on case outcomes relative to court-appointed \*328 counsel.

Question 7 sought to identify the lawyer characteristics that judges consider important--intellectual ability, experi-

ence, or resources. Judges were asked to rank them in order of importance. Our prior assumption--that appellate judges would attach highest importance to intellectual ability [FN34]--found support only among federal appellate judges. The other judge groups identified experience as most important. The different groups agreed, however, that the resources available to the client were the least important. Of course, resources might be positively correlated with experience and intellectual ability, increasing the likelihood that the defendant has an intelligent and experienced lawyer. [FN35] Moreover, from the perspective of the judge, the client's available resources are manifested more directly in the form of the lawyer. Finally, while judges recognize disparities in quality between the prosecution and defense, constitutional protections provide a baseline for the latter, something not available to civil litigants.

**\*329** Table 5

Importance of Legal Representation on Outcomes in Criminal Cases

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Perception of Civil Lawyers: Because criminal law is a single area of law and civil litigation encompasses numerous areas, we directed our questions relating to civil litigation not at the type of civil lawyer but at the area of law. We collapsed the categories of civil practice areas into the following: commercial litigation; civil rights; family; immigration; intellectual property; personal injury and malpractice; and tax and trusts and estates. [FN36]

**\*330** Question 8 in Table 6 replicates Question 1--perception of overall **quality of legal representation**--for each of these areas of civil practice. The **judges'** responses reflect a consensus regarding the practice areas that they see as having the highest **quality of legal representation**: commercial litigation and intellectual property. [FN37] The **judge** groups similarly agreed that immigration was the area in which the **quality of representation** was lowest. [FN38] We are cautious about comparing results in different courts, given differences in docket. The low number of responses by federal district **judges** regarding family law lawyers reflects the infrequency of family law cases in federal court, [FN39] and the low number of evaluations by state **judges** of immigration lawyers reflects the fact that immigration cases are not within state court jurisdiction.

**\*331** Table 6

Perceived **Quality of Legal Representation** in Civil Cases

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As with criminal cases, we were interested in disparities in **legal representation** in civil cases. To keep the survey to a reasonable length, in Table 7 we asked **judges** to identify the single area of law in which they most perceive significant disparities in the **quality of representation** and the single area in which they least perceive such disparities.

Fifty-seven percent of federal appellate **judges** identified immigration as the practice area in which they most often found such disparities, and 38% identified civil rights as that area, so that these two practice areas covered 95% of their responses. Federal district **judges** overwhelmingly identified civil rights, followed by personal injury/malpractice and immigration (16% and 8%, respectively), as the area of greatest disparity in **quality** between opposing counsel. Among state court **judges**, both appellate and trial, the most common response was family law (47% and 38%, respectively, for the two types of **\*332 judges**), and the second most common response was personal injury/malpractice (30% and 36%, respectively, for the two types of **judges**).

With respect to the least frequent significant disparities in the **quality of representation** (Question 10), we found that the practice areas that the **judges** rated as having the highest **quality of representation**--commercial litigation and intellectual property--exhibited very low frequencies of perceived disparity. Nearly two-thirds (64%) of federal appellate **judges** identified commercial litigation, followed by 31% for intellectual property, as areas of least disparity. Among federal district **judges**, the percentages were 36 and 48. Both state appellate and state trial **judges** most often cited commercial litigation (59% and 34%, respectively, for the two types of **judges**), followed by personal injury/malpractice (14% and 25%, respectively), as areas of least disparity. [FN40] The negative correlation between overall **quality of representation** and disparity in **quality of opposing counsel** suggests diminishing returns to **quality of representation**. **Quality** in a field could be high on average without being uniform, but perhaps the difference between a good lawyer and a very good lawyer is not seen by **judges** as significantly influencing outcome.

\*333 Table 7

#### Perceived Disparities in Legal Representation

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As a follow-up to Question 9a, we asked in Question 9b (Table 8): given the practice area that the **judges** identified as exhibiting the most frequent disparity in the **quality of legal representation**, which side's lawyer was of higher **quality**?

Of federal appellate **judges** who identified immigration as the area of greatest disparity, 74% responded that the defense lawyer (i.e., the government's lawyer) was of higher **quality**. Of federal district **judges** who identified civil rights as the area of greatest disparity, 88% responded that the defense lawyer was of higher **quality**. It is worth noting that in most civil rights cases, the plaintiff is an individual and the defendant is the government or a firm (i.e., an institution). In immigration cases, the government is typically defending an administrative decision to deport an individual. The federal **judges'** responses are consistent with the view that, at least in these practice areas, the government and firms have better legal representation than most individual plaintiffs.

\*334 In contrast, state **judges**--both appellate and trial **judges**--identified family law as the area exhibiting the greatest disparity, yet overwhelmingly (92% each) responded that the sides were equally likely to be of higher quality. This response makes sense because family law is not an area in which there are institutional differences between the lawyers representing one side of the litigation and the lawyers representing the other side.

Table 8

#### Direction of Perceived Disparities in Legal Representation

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Question 11 (Table 9), which repeats Question 7--relative importance of lawyer characteristics--but in the context of civil cases, reveals that federal appellate **judges** again placed the greatest emphasis on intellectual ability, while all other **judge** groups chose experience. Each **judge** group, however, placed greater emphasis on intellectual ability, and less on experience, in civil cases than in criminal cases. For federal district and state appellate **judges**, the difference in ranking between intellectual ability and experience was small and not statistically significant. State trial **judges'** emphasis on experience, however, was statistically significant.

**\*335** Table 9

Lawyer Characteristics in Civil Cases

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Implications of Lawyer Disparities on **Judges** and Juries: Since significant disparities exist in the **quality of legal representation**--at least as perceived by **judges**--what effect does that have on outcomes?

In response to perceived significant disparities in **quality** between opposing counsel (Question 14), more than 50% of each **judge** group reported that they conduct additional **legal** research, presumably to correct for the disparity. At the same time, at least 24% of the **judges** in each group responded that the **quality of legal representation** did not affect their approach to the case; [FN41] only a small percentage of each **judge** group reported being tougher on either the lower- or the higher-**quality** lawyer.

When asked how juries responded to these disparities (Question 15), a majority within each **judge** group except federal district **judges** thought that juries typically favored the litigant with the better lawyer. [FN42] Among federal appellate **judges**, 59% of **judges** chose this response; among district **judges**, **\*336** 47% chose this response--as did 73% of state appellate **judges** and 64% of state trial **judges**. Only a trivial percentage (ranging from 0% to 3%) of state **judges** thought the jury favored the litigant with the worse lawyer.

Table 10

Implications of Disparities in the **Quality of Legal Representation**

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Trial and the Shadow of the Law: Other things being equal, cases that proceed to trial and judgment are likely to reflect disagreement between the parties over the likely outcome; otherwise they would be inclined to settle, since settlement is cheaper than litigation. We were interested in the judges' perspective on the selection of cases for trial, reported in Table 11.

The judges' responses in Question 13 reflect general agreement among judge groups. [FN43] A majority within each group (ranging from 57% to 80%) **\*337** attributed the parties' failure to settle to the fact that one of the litigants exaggerated the likelihood of his prevailing at trial. A smaller percentage (ranging from 15% to 31%) thought cases go to trial when each side has approximately the same likelihood of prevailing on the merits--in other words, when the case is a toss-up. Other explanations drew little or no support from the judges.

When asked about the effectiveness of published opinions (Question 17) in providing guidance to prospective litigants, the majority of judges in each group responded "good" or "excellent." Federal appellate and district judges, and state appellate judges, gave comparable responses (between 3.885 and 4.040); state trial judges gave a lower score (3.632), statistically distinguishable only from the state appellate score (4.040).

Table 11

Implications of Disparities in the Quality of Legal Representation

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**\*338** Recommended Changes in the Legal Profession: Finally, we asked judges their thoughts on reforms that might improve the quality of legal representation, specifically reforms involving law schools, the practicing bar, or the judiciary (Table 12).

About law schools, judges were in general agreement. [FN44] The most common response in each judge group was that law schools should provide more coursework oriented to instilling practice-oriented skills. The second most popular response was expansion of core curriculum--that is, courses required of all students--to ensure a stronger foundation for practice. More than two-thirds of the judges in each group proposed changes in law school curricula, while no more than 10% in any group recommended higher admissions standards. Recommendations to make tuition more affordable drew slightly higher but still modest support (ranging between 5% and 14%).

With respect to the practicing bar, judges' responses were more varied. [FN45] Federal appellate judges most often recommended increased public financing for indigent litigants (30%), followed by alternatives to the hourly billing system (28%). Federal district judges also placed greatest emphasis on these changes, though in reverse order (32% for alternative billing and 22% for public financing). One federal district judge lamented that "the hourly billing structure encourages wasteful discovery motions and disputes." State judges similarly urged public financing for indigent litigants (33% of the appellate judges and 43% of the trial judges). Their second most common response, however, was to urge reducing the salary disparity between the private and public legal sector (26% of both trial and appellate judges).

With respect to changes to the judiciary (Question 20), a plurality of judges (ranging from 15% to 36%) chose increasing the number of authorized judgeships and increased technological tools. In contrast, less than 5% of any group urged the regulation of judicial tenure through term limits or mandatory retirement. The option of imposing greater sanctions on lawyer misconduct also drew only modest support, ranging from 7% to 12%. A relatively high percentage of judges in each group selected "other," and a large fraction of these responses, particularly among federal judges, used the comment space to **\*339** advocate higher judicial salaries. [FN46]

Table 12

Recommended Changes to the Legal Profession

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**\*340** These results collectively reflect a general agreement among judges-- federal and state, appellate and trial--regarding their perceptions of the legal profession, both with respect to the quality of lawyering and its effect on themselves and juries. The responses of state trial judges differed most from the responses of the other judges. [FN47] We discuss the major findings and their implications in Part III.

III. Discussion

The survey offers insight into the legal profession, specifically the adversarial process, and provides a unique opportunity to compare representation in different areas of the law and different types of courts. Judges, while uniquely situated to evaluate the legal profession, provide only one perspective. A singular viewpoint is admittedly a limitation of our study. The responses would doubtless differ if provided by lawyers or clients. These groups have their own perspectives and biases, but judges are no different. For example, judges' responses are surely shaped by their professional experience. Many judges were formerly prosecutors or private practitioners, [FN48] and their experiences in these legal jobs may in-

fluence their views about criminal law generally, or areas of civil practice. Also, judges on average belong to an older cohort of lawyers, and so their responses may reflect differences among generations.

In this final Part, we augment the quantitative results of the survey with comments volunteered by a number of judge respondents.

With respect to the relative importance that judges attach to oral and written argument (Table 3, Question 3), we find that appellate judges--both federal and state--deem written argument the more important of the two. This reflects the fact that appellate judges generally allot little time to oral argument per case compared to the time spent reading briefs. State trial judges place significantly less weight on written advocacy, probably because of heavy caseloads that deter them from inviting lengthy written submissions. Overall, the judges' relative emphasis on written argument contrasts with surveys of practicing lawyers, who see legal writing to be of minor importance. [FN49] One \*341 possible explanation is that for many attorneys, particularly those involved in transactions rather than litigation, legal writing is only a small part of their work. While the judges surveyed tended to downplay the importance of oral argument, [FN50] some jurists, notably Justice Scalia, argue that it serves a valuable purpose. [FN51]

The judges' views of criminal lawyers (Tables 4 and 5) inform controversy over the relative effectiveness of these different types of defense counsel. [FN52] Federal appellate and district judges in our sample express high regard for prosecutors and public defenders but low regard for court-appointed counsel and retained counsel, which is consistent with the previous legal [FN53] and economic [FN54] literature.

Retained counsel represent 25% and court-appointed counsel 33% of federal criminal defendants. [FN55] If the quality of legal representation matters to criminal case outcomes, as recent studies suggest, [FN56] a majority of indigent federal criminal defendants may be serving longer sentences by virtue of not \*342 having been represented by a federal public defender. The Constitution has been interpreted to place a floor under the quality of assistance of counsel tolerated in criminal cases, [FN57] but one federal district judge described the work of defense attorneys other than public defenders as "exceedingly poor."

The responses by state judges--who find a similar frequency of disparity in legal representation in criminal cases but greater parity between prosecutors and defense attorneys--are at odds not only with the experience of federal judges but also with the views of scholars [FN58] and journalists, [FN59] who paint an unflattering picture of the performance of court-appointed counsel in state courts.

The judges' responses to Question 4 (Table 4) suggest which combinations of prosecutor and defense counsel are most likely to result in disparities in the quality of legal representation in criminal cases. For federal (appellate and district) judges, it is when a prosecutor opposes either court-appointed or retained counsel. For state appellate judges, it is more likely when the prosecutor opposes court-appointed counsel. For state trial judges, however, a pattern is less apparent. Although judges may disagree on the relative ordering by skill level of the different types of criminal lawyer, the responses to Question 5 indicate that each judge group perceives significant disparities in quality of counsel in 20% to 40% of all criminal cases. Given the judges' consistently positive impressions of prosecutors, the results suggest that criminal defense lawyers are indeed inferior.

The view among judges--except state trial judges--that the different types of criminal lawyer, including prosecutors, do not influence case outcomes significantly (Table 5, Question 6) challenges the belief of some scholars that prosecutors have a great impact on outcome. [FN60] One explanation is that judges \*343 see themselves--or, in jury cases, jurors--as playing a more important role in the case than lawyers. One federal district judge commented that our survey "understate[s] the extent to which the facts--not the lawyers-- are perceived by the jurors and result in a substantially cor-

rect verdict. My observation over my many years is that the jurors get it right if the judge presides fairly and judiciously.” On this view judges and jurors, at least in criminal cases, may largely neutralize the effect of disparities in quality of counsel by leaning in favor of the weaker counsel.

Some judges criticized the behavior of criminal lawyers. One state appellate judge noted that the power wielded by prosecutors created a “mentality of winning at all costs, rather than seeking the truth.” Another judge found fault with defense lawyers, concluding that “the legal system could be greatly enhanced if the justice system required both the prosecution and the defense to seek the truth.”

The judges' evaluations of the quality of representation in civil cases (Table 6, Question 8) agree with the literature on the legal profession. Each judge group gave its highest ratings to representation in intellectual property and commercial litigation, and its lowest ratings to representation in civil rights, family law, and immigration cases. This ordering is consistent with Marc Galanter's hypothesis that repeat players (typically the “haves”) have the resources, experience, and intelligence to successfully pursue litigation while the “one-shotters” (often the “have-nots”) are litigants who typically have limited financial means, are inexperienced in litigation, and lack good education. [FN61]

A logical extension of Galanter's hypothesis is that repeat players will be represented by higher-**quality** lawyers. The **judges'** responses are consistent with this claim. Litigants in intellectual property and commercial litigation-- areas in which the **judges** gave their highest ratings--are usually firms, which typically oppose other firms. [FN62] Conversely, civil rights, family law, and immigration--areas to which **judges** gave their lowest ratings of **quality of representation**--are ones in which one or both litigants are individuals typically inexperienced in litigation.

Disparity in **legal representation** relates directly to the pairing of litigants. A “have-not” litigant will, other things being equal, fare less well when litigating against a “have” litigant, as a result of disparity in the **quality of legal \*344 representation**. The **judges'** responses are consistent with this claim. For example, plaintiffs in civil rights and immigration cases typically litigate against the government or an employer, whom federal **judges** overwhelmingly identified as providing higher-**quality legal representation**. In contrast, family law typically involves individual litigants (family members) litigating against one another, which explains why state **judges** did not perceive any systematic advantage to either plaintiffs or defendants.

Some of the **judges'** comments suggest that disparity in **quality of legal representation** is both more common and more extreme in civil cases than in criminal ones. One federal district **judge** described the **quality of legal representation** in civil cases as “shockingly poor” and “unevenly balanced,” in contrast to criminal cases, which were “generally adequately represented”; “the imbalances [in criminal cases were] much slighter than in civil cases.”

Much less has been written about the inadequacies and disparities of legal representation in civil cases [FN63] than in criminal cases. [FN64] Disparities in resources [FN65] and quality [FN66] of legal representation in criminal cases are tempered by constitutional protections of the heightened burden of proof for the prosecution [FN67] and the entitlement of the defendant to effective assistance of counsel. [FN68] These constitutional guarantees do not extend to civil cases, to the potential detriment of poorer litigants. As one state appellate judge commented, “The unrepresented and under-represented (e.g., limited representation) clients are flooding state courts, and are causing many undesirable outcomes--both in individual cases, and for society as a whole.” Disparities in the quality of legal representation may promote inefficiencies in the development of the civil law if they cause parties with meritorious claims to lose or not bring suit in the first place.

\*345 When comparing judges' responses across criminal and civil cases, it appears that judges view the two types of cases as drawing upon different lawyer qualities. The greater emphasis among judges on experience as a decisive quality

factor in criminal cases relative to civil cases (Table 5, Question 7; Table 9, Question 11) is open to more than one interpretation. One is that criminal lawyers often appear in court without cocounsel, making the lawyer's personal experience more influential on the outcome. [FN69] Also, experience may enable criminal lawyers to develop greater familiarity with opposing counsel and the court. [FN70]

The survey also provides insight into judge and jury decisionmaking. While existing scholarship suggests that judges and juries agree on case outcomes in a majority of cases, [FN71] the judges' responses to Questions 14 and 15 (Table 10) may help to explain the residual disagreements. [FN72] When litigants \*346 have lawyers of unequal quality, judges can frequently correct the imbalance through their own research, [FN73] whereas juries cannot and therefore respond to the inequality in representation by gravitating toward the litigant with the stronger lawyer. This finding is consistent with evidence [FN74] that the quality of legal representation has a strong effect on case outcomes. If the stronger lawyer coincides with the litigant with the stronger case on the merits, then one would expect judges and juries to agree on the outcome. If, however, the weaker lawyer coincides with the litigant with the stronger case on the merits, then judges and juries are likely to disagree. One federal district judge suggested that judges were performing the job of the lawyers: "It is frustrating having to conduct research, raise fundamental issues sua sponte, and having the litigants reap all the benefits."

Judges expressed concern about the effectiveness of the bar at trial advocacy. One federal district judge remarked that lawyers are "smart, well-prepared and know the law and write great briefs--but if the case goes to trial, their trial skills are nowhere near what their pre-trial skills were." The same judge expressed concern about the "vanishing trial" trend's impact on the development of legal doctrine, writing that "it may be as the disappearing trial continues to go away, there will be some areas of the law that will no[t] continue to develop as they otherwise would." [FN75]

Judges also expressed concern about the selection of cases for trial (Table 11, Question 13). A majority of judges reported that most cases that proceed to trial, rather than being settled before trial, do so because one side had an unrealistic assessment of its chances of success if the case went all the way to judgment (although some judges thought that cases go to trial because each side has the same chance of prevailing). The unrealistic assessment may be the \*347 lawyer's, or it may reflect the fact that the client adheres to unrealistic expectations against the advice of his lawyer. [FN76] One federal district judge remarked, "although published opinions may influence attorneys, it appears that they have little effect upon litigants' decisions. Litigants often believe their case is unique; they are often result driven, seeking 'Burger King' justice--'justice, my way.'"

The judges' recommended reforms of the legal profession reflect greater agreement about ways to improve law schools and the practicing bar than their recommendations concerning the judiciary itself (Table 12). More than two-thirds of the judges in each group selected changing law school curricula (Table 12, Question 18). A federal district judge, noting the poor quality of written briefs and motions, commented, "Clearly, more emphasis should be placed on legal writing in law school." Relatively few judges expressed concern about the quality of law students, although one judge commented, "There are many third, fourth, and even fifth tier law schools that are pumping out graduates who are unprepared and have difficulty finding jobs." Recent trends in legal employment support this view. [FN77]

Judges' concern over economic disparities within legal practice corresponds to long-term trends (Table 12, Question 19). A large fraction of judges recommended reducing the salary disparity between the private and public legal sectors, which has been growing more or less steadily since 1985. [FN78] Recent studies suggest that law graduates gravitate to these higher-paying jobs, despite the availability of loan forgiveness of student debt should they work in public interest. [FN79] Flattening salary disparities across practice areas in general may create a more consistent quality distribution of lawyers in the profession, to the extent that compensation no longer drives their employment decisions. [FN80] A large fraction of judges took a demand-side approach to addressing the salary issue. They recommended increasing public fin-

ancing for indigent clients, suggesting that an increasing number of individuals are unable to afford a lawyer. [FN81]

**\*348** Some judges focused on what they considered changes in the culture of the legal profession. One state trial judge commented: “The legal ‘profession’ is a business (at least since advertising was allowed) and is no longer a profession.” And a federal district judge commented: “I think that it is impossible to overemphasize the need for a more civil tone in litigation. We need more collegiality and courtesy, and less of the petty squabbles, sniping, and needless acrimony that is all to[o] common in the practice of law today.” Another federal district judge wrote that many lawyers “prefer to win dishonestly rather than lose honorably.” One state trial judge similarly commented, “The attitude too often seems to be ‘if I can get away with it and not get caught or sanctioned then I will do it.’ Money seems to be the only standard by which an attorney is gauged.”

A state appellate judge identified the central problem as a lack of information about the quality of legal representation:

We have some bad lawyers whose clients would have had good, even winning cases, but for these lawyers. I wish there was some way to let the public know how bad these lawyers really are. It's almost a crime that these lawyers are able to continually advertise themselves as experienced specialists in one field of the law or another, with apparent success, because they seem to keep getting clients.

This response echoes concerns among scholars that the institutional design of the legal profession exploits litigants' inability to evaluate the performance of lawyers. [FN82]

In response to suggested changes to benefit the judiciary, a large fraction of the judge respondents, especially federal judges, expressed particular concern with judicial salaries. This rate of response is particularly notable, given that salaries were not one of the listed categories; judges raised it on their own. The salaries of federal district court judges have declined in real (that is, inflation-adjusted) dollars by 21.5% since 1969. [FN83] The decline is particularly striking when compared with salaries in law firms; law partner profits have grown on average 74.1% during this period, [FN84] and significantly more at elite firms. Anecdotes abound of judges leaving the bench for greater compensation, [FN85] although some scholars question the justification for higher judicial salaries. [FN86]

### **\*349 Conclusion**

This Article is an empirical study aimed at improving our understanding of the quality of legal representation, the existence and consequences of disparities in that quality, and how the disparities might be lessened or compensated for by changes in the profession or the judiciary. It is important to identify disparities in quality within and across areas of the law, but it is equally important to consider what, if anything, to do about them. To the extent that law is purely a private good--as in many civil cases it is--disparities, even vast ones, between the contestants may be tolerable. But the legal process is also an important public good. Especially in a case-based legal system such as that of the United States and the other nations that derive their legal system ultimately from England, litigation not only protects private and public rights but also is the vehicle for the development and refinement of the law itself. That function can be distorted by large disparities in the quality of legal representation, even if judges and jurors apply effective correctives (as they may, especially in criminal cases). This Article cannot answer the question whether the current state of legal representation is tolerable, but we hope that it will stimulate further inquiry.

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[FN1]. Marc Galanter & Mia Cahill, “[Most Cases Settle](#)”: Judicial Promotion and Regulation of Settlements, 46 *Stan. L. Rev.* 1339, 1340 (1994).

[FN2]. See Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* 41 (1994); see also Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 275 (1993).

[FN3]. See David S. Abrams & Albert H. Yoon, [The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability](#), 74 *U. Chi. L. Rev.* 1145, 1146 (2007).

[FN4]. See, e.g., Kenneth Mann, *Defending White-Collar Crime: A Portrait of Attorneys at Work* (1985) (white collar defense); Lynn Mather et al., *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (2001) (divorce); Arthur Lewis Wood, *Criminal Lawyer* (1967) (criminal law); Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar* (2001) (unpublished Ph.D. dissertation, University of Illinois at Chicago) (on file with authors) (personal injury).

[FN5]. See, e.g., Lincoln Caplan, *Skadden: Power, Money, and the Rise of a Legal Empire* (1993); Jerome E. Carlin, *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (1962); Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (1996); Jerry Van Hoy, *Franchise Law Firms and the Transformation of Personal Legal Services* (1997).

[FN6]. See, e.g., John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982); see also John P. Heinz et al., *Urban Lawyers: The New Social Structure of the Bar* (2005); Erwin O. Smigel, *The Wall Street Lawyer: Professional Organization Man?* (1964).

[FN7]. The distribution of LSAT scores for matriculating students follows a normal distribution. See E-mail from Philip Handwerk, Institutional Researcher, Law Sch. Admission Council, to author (July 28, 2009) (on file with authors).

[FN8]. See Lawrence F. Katz & Kevin M. Murphy, *Changes in Relative Wages, 1963-1987: Supply and Demand Factors*, 107 *Q.J. Econ.* 35, 36 (1992) (stating how shifting modern labor markets favor “more-educated and ‘more-skilled’ workers over less-educated and ‘less-skilled’ workers”).

[FN9]. See Richard Birke & Craig R. Fox, [Psychological Principles in Negotiating Civil Settlements](#), 4 *Harv. Negot. L. Rev.* 1, 17-18 (1999) (citing surveys showing that most people, including a majority of lawyers, believe themselves to be better than average in their field).

[FN10]. For example, legal scholars have examined the impact of differences in ideology among federal judges on outcomes in administrative law and environmental cases. See Frank B. Cross & Emerson H. Tiller, [Essay, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals](#), 107 *Yale L.J.* 2155 (1998)

(administrative law); Richard L. Revesz, [Environmental Regulations, Ideology, and the D.C. Circuit](#), 83 Va. L. Rev. 1717 (1997) (environmental cases). These articles prompted a critical response from Chief Judge Harry Edwards. See Harry T. Edwards, Essay, [Collegiality and Decision Making on the D.C. Circuit](#), 84 Va. L. Rev. 1335 (1998).

[FN11]. See Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 45, 56 (1966).

[FN12]. See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. Rev. 3.

[FN13]. See Joe S. Cecil & Thomas E. Willging, [Accepting Daubert's Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity](#), 43 Emory L.J. 995, 997 & n.7 (1994); Louis Harris & Assocs., [Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases](#), 69 B.U. L. Rev. 731, 731-33 (1989).

[FN14]. See Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, [The Market for Federal Judicial Law Clerks](#), 68 U. Chi. L. Rev. 793, 796-97 (2001); Christopher Avery, Christine Jolls, Richard A. Posner & Alvin E. Roth, [The New Market for Federal Judicial Law Clerks](#), 74 U. Chi. L. Rev. 447, 451 (2007).

[FN15]. See Kimberly A. Lonsway, Leslie V. Freeman, Lilia M. Cortina, Vicki J. Magley & Louise F. Fitzgerald, [Understanding the Judicial Role in Addressing Gender Bias: A View from the Eighth Circuit Federal Court System](#), 27 Law & Soc. Inquiry 205 (2002).

[FN16]. See Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. Empirical Legal Stud. 495 (2005).

[FN17]. Prior to joining the University of Toronto, Professor Yoon was a professor at Northwestern University School of Law from 2001 to 2008.

[FN18]. Judge Posner was, for obvious reasons, not surveyed. The total number of mailings was 456 rather than 480 because some circuits had fewer than forty active district and circuit judges.

[FN19]. The state survey was administered through SurveyMonkey.com, which offers encrypted, web-based surveys.

[FN20]. For the sake of completeness, we include in the tables all judge responses for each question.

[FN21]. We present unweighted results in the tables. Although the state survey was administered to all members of the four state judge organizations, we could not determine how representative these organizations were of the general state judge population. Aggregate statistics about state judges exist-- see, for example, Bureau of Justice Statistics, U.S. Dep't of Justice, *State Court Organization* (2004) --but are published only intermittently, and report demographics (e.g., age, gender, ethnicity) that differ from what we asked in our survey. The absence of these state judicial data prevented us from engaging in poststratification weighting (to adjust for over- or underresponses based on judge demographics).

[FN22]. The Bonferroni correction allows multiple comparisons without assuming either independence or homogeneity of variance. We chose this correction to allow comparisons for repeated measures. We also used it on single questions where the assumption of homogeneity of variance did not hold. These normalizations produced similar results to other normalization approaches (i.e., Scheffé and Sidák).

[FN23]. See N.J. Schweitzer et al., [Rule Violations and the Rule of Law: A Factorial Survey of Public Attitudes](#), 56 DePaul L. Rev. 615, 628 n.39 (2007) (citing a study showing that the average response rate for unsolicited e-mail surveys

ranges from 4% to 10%).

[FN24]. Among the respondents, one federal judge and twenty-four state judges did not reveal whether they were appellate or trial court judges. Although included in Table 1 for the sake of completeness, these twenty-five judges were omitted from Table 2 and subsequent tables.

[FN25]. E-mail from Shannon Roth, Admin. Manager, Nat'l Ctr. for State Courts, to author (Sept. 30, 2008) (on file with authors).

[FN26]. One notable exception was Question 6, *infra* Table 5, in which Kentucky judges viewed prosecutors and public defenders as having a greater effect on case outcomes, and court-appointed counsel as having less effect.

[FN27]. The chi-square test of independence was statistically significant, indicating that the responses were meaningfully different across the judge groups.

[FN28]. Both federal and state judges noted in their comments the challenges posed by pro se litigants. One state trial judge commented, "If one party is pro se, which is frequent, I bend the rules of evidence and procedure somewhat to accommodate the pro se litigant."

[FN29]. Responses in Question 4 reveal statistically significant differences within judge groups, within lawyer type, and in the interaction of judge group and lawyer type. We conducted tests for statistical significance using multivariate analysis of variance (MANOVA), running Wilks's lambda, Pillai's trace, Lawley-Hotelling trace, and Roy's largest root tests. These tests produced similar results rejecting the null hypotheses that the responses (within judge group, within lawyer type, and in the interaction of the two) are the same.

[FN30]. For each federal judge group, the difference in ranking between prosecutors and public defenders was small and not significant.

[FN31]. For each federal judge group, the difference in ranking between court-appointed and private counsel was small and not significant.

[FN32]. The differences in scores among state appellate judges for prosecutors, public defenders, and retained counsel were small and not statistically significant.

[FN33]. For state trial judges, the perceived differences between prosecutors, public defenders, and court-appointed counsel were small and not statistically significant.

[FN34]. See, e.g., Kurt X. Metzmeier & Peter Scott Campbell, [Nursery of a Supreme Court Justice: The Library of James Harlan of Kentucky, Father of John Marshall Harlan](#), 100 *Law Libr. J.* 639, 640 (2008) (stating "that the technical skill that made [Harlan] a good appellate lawyer was a hindrance before a jury" (citing Thomas Z. Morrow, *Recollections of an Old Time Democratic Mass Meeting 21-22 (1911)*)).

[FN35]. See Owen M. Fiss, Comment, [Against Settlement](#), 93 *Yale L.J.* 1073, 1077 (1984) ("Resources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory."); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95, 103 (1974) (describing how repeat litigants-- who typically have greater experience and expertise than one-shot litigants-- usually also have greater resources).

[FN36]. Another germane factor in civil cases is the practice setting of the civil lawyer: for example, solo practitioner, small firm, or large firm. We ultimately excluded these questions because we were not sure that, as a general matter, judges would be aware of the practice settings of the lawyers who appear before them.

[FN37]. State trial judges also gave similarly high ratings to practitioners in personal injury and malpractice, and tax and trusts and estates.

[FN38]. Federal district judges and state trial judges gave similarly low ratings to lawyers practicing civil rights and family law. Federal and state appellate judges also gave low ratings to family law.

[FN39]. In the annual Federal Judicial Caseload Statistics, Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 51 tbl.C-3 (2009), available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>, family law cases are not recognized as a separate category for bringing suit.

[FN40]. Personal injury was the second most cited practice area for both Questions 9a and 10; this reflects differences of judicial perception across geographic jurisdictions.

[FN41]. The sum of these two responses exceeds 100% for both federal appellate and trial judges, an odd result since a “no effect” response seems mutually exclusive of the other choices in the question. We suspect that a small fraction of judges viewed conducting additional legal research as part of their approach to any case before them. For an interesting discussion of the normative and positive implications of independent research by judges in cases, see Edward K. Cheng, [Independent Judicial Research in the Daubert Age](#), 56 *Duke L.J.* 1263 (2007).

[FN42]. For appellate judges--who do not interact with juries--we cannot determine whether their perceptions are based on their review of appellate records, prior experience as a trial judge, or legal experience prior to joining the bench.

[FN43]. The Cramer's V statistic was 0.13, reflecting small differences in response patterns across judge groups.

[FN44]. The Cramer's V statistic was 0.16.

[FN45]. The Cramer's V statistic was 0.20.

[FN46]. As illustrated by the table below, federal judges were more likely to cite the need for higher judicial salaries than were state judges.

Supplemental Table Judges' Concerns over Judicial Salary

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[FN47]. We ran a repeated measures ANOVA for all the ordered response questions (Questions 1-2, 4-8, 11, and 17) with an unstructured correlation structure, which allows the correlation to vary from one question to the next. State trial judges were statistically significantly different from state appellate and federal district judges.

[FN48]. See, e.g., Albert Yoon, [Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000](#), 91 *Calif. L. Rev.* 1029, 1044 tbl.2 (2003) (showing that 11.4% of retired federal judges were prosecutors immediately before joining the federal bench and 38.9% worked in private practice).

[FN49]. See Frances Kahn Zemans & Victor G. Rosenblum, *The Making of a Public Profession* 126-27 (1981) (describing how survey respondents emphasized analytic and interpersonal skills rather than writing skills).

[FN50]. See also Robert A. Leflar, *Internal Operating Procedures of Appellate Courts* 31 (1976) (stating that some judges believe oral advocacy is relatively unimportant to their understanding of cases).

[FN51]. See The Fla. Bar, *Florida Appellate Practice* § 17.10 (4th ed. 1998) (quoting Justice Scalia as saying that oral argument “give[s] counsel his or her best shot at meeting my major difficulty with that side of the case”); see also John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 *Cornell L.Q.* 6, 11 (1955) (“[O]ral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves.”); Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 *Ohio St. L.J.* 1385, 1387 (1990) (“Oral argument keeps judges from unreflectively adopting their law clerks' view rather than developing their own view through reflection.”).

[FN52]. See, e.g., Morton Gitelman, *The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases--An Empirical Study*, 24 *Ark. L. Rev.* 442 (1971); Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in *The Defense Counsel* 151, 167 (William F. McDonald ed., 1983); Robert V. Stover & Dennis R. Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 *Am. J. Crim. L.* 265 (1975).

[FN53]. See, e.g., Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 *Calif. L. Rev.* 425, 478 (2004) (citing studies attesting to the quality of federal public defenders); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 *Cardozo L. Rev.* 1, 49-50 (2008) (discussing the gap in quality between federal public defenders and court-appointed (Criminal Justice Act panel) attorneys).

[FN54]. See Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), available at <http://www.nber.org/papers/w13187> (discussing how federal public defenders earn sentences approximately eight months shorter, on average, than federal court-appointed lawyers).

[FN55]. See *id.* at 34.

[FN56]. See Abrams & Yoon, *supra* note 3, at 1173 (showing that a “defendant who is randomly assigned the tenth percentile public defender has a 14 percentage point greater chance of receiving incarceration than one assigned to the ninetieth percentile public defender”).

[FN57]. *Strickland v. Washington*, 466 U.S. 668 (1984) (interpreting the Sixth Amendment's Counsel Clause as guaranteeing the effective assistance of counsel, whether appointed or privately retained).

[FN58]. This view is consistent with the scholarly criticism of court-appointed attorneys in criminal cases. See, e.g., Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 *U. Pa. J. Const. L.* 23, 27 (2008) (describing the “meet 'em and plead 'em” process in which court-appointed lawyers meet their criminal clients and minutes later seek to reach plea agreements with the prosecutor); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U. L. Rev.* 759, 767, 810-11 (1995) (discussing the prevalence of ineffective assistance of counsel in capital cases).

[FN59]. For example, a series of articles regarding the representation of indigent state criminal defendants by court-appointed counsel found the system expensive and inefficient, causing defendants to fare worse than if they had been

represented by a public defender. See Alan Maimon, *Conflicted Justice*, Las Vegas Rev.-J., Mar. 25, 2007, at 1J; Alan Maimon, *Court Officials Review Indigent Defense*, Las Vegas Rev.-J., Mar. 27, 2007, at 1A; Alan Maimon, *Probe Finds Uneven Justice*, Las Vegas Rev.-J., Mar. 5, 2007, at 1A.

[FN60]. See, e.g., Jennifer Bennett Shinall, [Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes](#), 63 Vand. L. Rev. 267, 274 (2010) (arguing that prosecutors matter more than defense attorneys in criminal jury trials); Frank O. Bowman, III & Michael Heise, [Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level](#), 87 Iowa L. Rev. 477, 526-30 (2002) (discussing the discretionary authority of prosecutors that can have significant effects on sentence outcomes).

[FN61]. Galanter, *supra* note 35, at 98-100.

[FN62]. Of course, even among the “haves,” disparities in the quality of legal representation may still occur, affecting case outcomes. See David Luban, *The Adversary System Excuse*, in *The Good Lawyer* 83, 98-99 (David Luban ed., 1983) (“[W]e have no reason at all to believe that when two overkillers slug it out the better case, rather than the better lawyer, wins.”).

[FN63]. But see Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 Loy. L.A. L. Rev. 1087 (2009); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 Mich. L. Rev. 953 (2000); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L. Pol’y & Ethics J. 699 (2006).

[FN64]. See, e.g., David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1 (1973); Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths--A Dead End?*, 86 Colum. L. Rev. 9, 59-112 (1986); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 686-88 (2007).

[FN65]. See Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 Fordham L. Rev. 355, 365 n.43 (1996) (describing the vast disparity in expenditures in federal criminal cases between prosecutors and public defenders).

[FN66]. See Primus, *supra* note 64, at 683-84 (recognizing that ineffective assistance of counsel occurs far more frequently than suggested by the number of overturned criminal convictions).

[FN67]. *In re Winship*, 397 U.S. 358, 364 (1970).

[FN68]. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[FN69]. See Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 Rutgers L. Rev. 281, 333 (1991) (stating that many criminal lawyers are solo practitioners or members of small law firms (quoting Affidavit of Hon. W.F. Coleman, *State v. Wilson*, Nos. 89-301, -302 (Miss. Cir. Ct. Oct. 31, 1988))).

[FN70]. See Abrams & Yoon, *supra* note 3, at 1158.

[FN71]. See Kalven & Zeisel, *supra* note 11, at 55-56 (finding in a study of over 3500 criminal cases that the judges and juries agreed on the verdict 75.4% of the time); see also Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. Empirical Legal Stud. 171, 173 (2005)

(reaching results similar to Kalven and Zeisel's in a replicated study). For a discussion of scholarship motivated by the Kalven and Zeisel study, see Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 *Law & Soc. Inquiry* 323 (1991).

[FN72]. It may also be that the level of agreement between judges and juries differs between criminal and civil cases. In a supplemental question, state judges were asked in what percentage of cases they thought juries reached the right outcome:

Table S1 State Judges' Perceived Accuracy of Jury Decisions

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Appellate and trial judges agree that jurors reach the right outcome in the majority of both criminal and civil cases but are less likely to do so in civil than in criminal cases. One explanation is that judges believe that the appropriate outcome is more apparent in criminal cases than in civil cases, thus warranting the high conviction rate of criminal defendants. See Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 *N.C. L. Rev.* 423, 440, 449 (2007) (stating that in their study of state court criminal trials, 78% of represented state court defendants charged with felonies between 1990 and 2000 were convicted at trial); Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 *Wash. U. L.Q.* 151, 152, 180 *tbl.F* (2005) (citing federal felony conviction rate of more than 80% between 1989 and 2002). If so, it may imply that judges think criminal juries are doing their job properly.

[FN73]. Cf. Fiss, *supra* note 35, at 1077 (discussing “the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities”).

[FN74]. See Abrams & Yoon, *supra* note 3, at 1173 (finding that defendants who are assigned public defenders in the ninetieth percentile of ability have an incarceration rate fourteen percentage points lower than those with public defenders in the tenth percentile of ability); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 *Law & Soc'y Rev.* 419 (2001) (showing in a randomized study that plaintiffs with legal representation fared much better than those without).

[FN75]. For an empirical examination of trends in trial rates in state and federal court, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. Empirical Legal Stud.* 459 (2004).

[FN76]. See Gerald R. Williams, *Negotiation as a Healing Process*, 1996 *J. Disp. Resol.* 1, 24-25 (finding that, in a random sample of cases scheduled for trial, attorneys in 53% of the cases actually going to trial attributed the failure to settle to “a refusal by one party or the other to agree to the terms recommended by their own attorney”).

[FN77]. See Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, *Wall St. J.*, Sept. 24, 2007, at A1.

[FN78]. See NALP, *Starting Salaries: What New Law Graduates Earn: Class of 2009*, at 8 (2010); see also Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 *N.Y.U. L. Rev.* 829, 865-74 (1995) (showing salary trends across different areas of law).

[FN79]. See Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 *Am. Econ. J.: Applied Econ.* 1, 3 (2009).

[FN80]. Of course, if noneconomic factors (e.g., hours, stress) closely correlate with salary, then the lawyer-sorting process may look the same.

[FN81]. See Jonathan D. Glater, *Amateur Hour in Court*, N.Y. Times, Apr. 10, 2009, at B1 (noting that legal fees have prompted many litigants to represent themselves or forego litigation altogether); see also Margery A. Gibbs, *Courts See More People Being Own Lawyers*, Denv. Post, Nov. 25, 2008, [http:// www.denverpost.com/ci\\_11066610](http://www.denverpost.com/ci_11066610) (same).

[FN82]. See Hadfield, *supra* note 63, at 968-72.

[FN83]. Frank B. Cross, Response, *Perhaps We Should Pay Federal Circuit Judges More*, 88 B.U. L. Rev. 815, 816 (2008).

[FN84]. See *id.*

[FN85]. See, e.g., Neil A. Lewis, *Judge Leaves Appeals Court for Boeing*, N.Y. Times, May 11, 2006, at A31 (noting that Judge J. Michael Luttig attributed his decision to retire from the U.S. Court of Appeals for the Fourth Circuit, to become general counsel of Boeing, in part to his desire for a higher salary).

[FN86]. See Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate*, 1 J. Legal Analysis 47, 57 (2009).

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