

THE TRIALS OF INDIGENT DEFENSE: TYPE OF COUNSEL  
AND CASE OUTCOMES IN FELONY JURY TRIALS\*

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ABSTRACT

Previous research shows that clients of public defenders are not necessarily more likely to be convicted than those who hire private attorneys, but this work largely reflects cases adjudicated through plea bargains. Little attention has been devoted to how the context of a trial shapes outcomes across defendants with private and public defense counsel. In this article, I outline how disparities in resources and differences in courtroom roles may put public defenders at a distinct disadvantage in cases adjudicated through trial, leading to higher rates of trial conviction among indigent defendants. Then, I explore this using data from a National Center for State Courts (NCSC) study of 314 felony jury trials in four urban jurisdictions. The data include both the jury's verdict as well as the judge's evaluation of the defendant's guilt, which permit comparison of jury verdicts with probable bench verdicts. I find that judges' evaluations of defendant guilt do not differ across type of counsel, but defendants who rely on public defenders about twice as likely to be convicted by the jury compared to those who hire private attorneys. And, among defendants who would have been convicted by the judge, those who have a private attorney are nearly 2.7 times as likely to be acquitted by the jury. These disparities are not explained by differences in case characteristics, amount of evidence

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presented at trial, or evaluations of attorney skill. I conclude by urging further research to examine the mechanisms through which indigent defendants may be disadvantaged in jury trials.

## I. INTRODUCTION

The popular view of indigent defense is one of overworked and underfunded public defenders who put their clients at an extreme disadvantage in the context of trial. In a well-publicized lawsuit, the New York Civil Liberties Union recently argued that New York's indigent defense system fails to provide adequate representation, particularly at critical stages of the criminal process.<sup>1</sup> Stories about individual defendants, such as Terrance Miller, also offer vivid depictions of shortcomings of indigent defense at trial. Miller, who was facing drug charges in New Jersey, met his public defender for the first time outside of the courtroom just forty-five minutes before his trial. Due to case overload and rapidly shifting court schedules, the public defender had no chance to conduct an investigation or prepare for what Miller might say on the witness stand. Not surprisingly, Miller was convicted by the jury.<sup>2</sup> Stories like these imply that public defenders' representation of their clients—particularly at trial—may contribute to disproportionate conviction of indigent defendants.<sup>3</sup>

However, previous research does not bear out the inadequacy of indigent defense. Empirical studies find that defendants represented by public defenders are not more likely to be convicted than those who retain private counsel.<sup>4</sup> One explanation for this

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<sup>1</sup> Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010).

<sup>2</sup> Cohen, A. (2013, October 23). How much does a public defender need to know about a client? *The Atlantic*. Retrieved from <http://www.theatlantic.com/national/archive/2013/10/how-much-does-a-public-defender-need-to-know-about-a-client/280761/>.

<sup>3</sup> American Bar Association. (2004). *Gideon's broken promise: America's continuing quest for equal justice*. Chicago, IL: American Bar Association; National Right to Counsel Committee. (2009). *Justice denied: America's continuing neglect of our constitutional right to counsel*. Washington, DC: The Constitution Project and the National Legal Aid & Defender Association. Retrieved from <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>; Weitzer, R. (1996). Racial discrimination in the criminal justice system: Findings and problems in the literature. *Journal of Criminal Justice*, 24, 309–322.

<sup>4</sup> See, e.g., Cohen, T. H. (2014). Who is better at defending criminals? Does type of defense attorney matter in terms of producing favorable case outcomes? *Criminal Justice Policy Review*, 25(1), 29–58; Feeney, F., & Jackson, P. G. (1990). Public defenders, assigned counsel, retained counsel: Does the type of criminal defense counsel matter? *Rutgers Law Journal*, 22, 361–456; Hartley, R., Miller, H., & Spohn, C. (2010). Do you get what you pay for? Type of counsel and its effect on criminal court outcomes. *Journal of Criminal Justice*, 38, 1063–1070.

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disjuncture is that, despite inadequate resources, the majority of public defenders are dedicated and effective advocates for an extremely large proportion of indigent defendants.<sup>5</sup> An additional possibility is that aggregate statistics on conviction rates obscure inequalities at earlier stages of case processing<sup>6</sup> and across different methods of adjudication. But because about 95% of all felony cases are disposed through plea bargaining,<sup>7</sup> research examining conviction rates within particular jurisdictions is effectively studying guilty pleas.<sup>8</sup>

This article extends previous research by examining disparities in trial outcomes. The main goal is to consider whether defendants who are represented by the public defender are disadvantaged at trial. Building from classic sociological research on lower courts, as well as studies of jury decision making, I outline how courtroom roles and the structure of indigent defense restrict public defenders' ability to prepare for trial, aggressively counter the prosecution, and persuade the jury. Then, I use data from 314 felony jury trials, collected by the NCSC, to test whether defendants who rely on the public defender are more likely to be convicted by the jury. Next, I explore whether the public defender is particularly disadvantaged with the jury. To do this, I examine judges' evaluations of the jury trials and test whether indigent defendants would have been more likely to be convicted by the judge had the trial been a bench trial. Finally, I consider whether private attorneys are more likely to persuade the jury to acquit defendants whom the judge would have convicted.

## II. WHAT A DIFFERENCE A TRIAL MAKES

Sociological research on lower courts describes how routine interactions in the day-to-day grind of urban courts provide fertile ground for collaborative relationships among court actors.<sup>9</sup> Plea

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<sup>5</sup> Hanson, R. A., Hewitt, W. E., Ostrom, B. J., & Lomvardias, C. (1992). *Indigent defenders get the job done and done well*. Williamsburg, VA: National Center for State Courts; Wice, P. B. (2005). *Public defenders and the American justice system*. Westport, CT: Praeger.

<sup>6</sup> Hartley, R., Miller, H., & Spohn, C. (2010). Do you get what you pay for? Type of counsel and its effect on criminal court outcomes. *Journal of Criminal Justice*, 38, 1063–1070.

<sup>7</sup> Devers, L. (2011). *Plea and charge bargaining: Research summary*. Arlington, VA: Bureau of Justice Administration, U.S. Department of Justice. Retrieved from <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

<sup>8</sup> *But see* Harlow, C. W. (2000). *Defense counsel in criminal cases: Bureau of Justice Statistics special report*. Office of Justice Programs; U.S. Department of Justice, NCJ 179023.

<sup>9</sup> Eisenstein, J., & Jacob, H. (1991). *Felony justice: An organizational analysis of criminal courts*. Boston, MA: University Press.

bargaining is a natural extension of this, particularly when prosecutors and public defenders are overloaded. Negotiating cases allows actors to cooperate and increase their efficiency, such as through the establishment of “going rates” for particular types of cases.<sup>10</sup> In plea bargaining, relationships with prosecutors can be a significant advantage for public defenders—allowing them to secure better terms than private defense attorneys. Prosecutors may be more willing to openly share information with public defenders,<sup>11</sup> for example, and socializing in courthouse hallways and cafeterias provides opportunities to communicate informally and smooth over disagreements.<sup>12</sup> Prosecutors may also offer better deals to public defenders because they anticipate future bargaining—and they might need a favor later.<sup>13</sup> Some private attorneys who specialize in criminal defense work become courthouse regulars as well, but they are, overall, less likely to develop the kinds of “insider” relationships with prosecutors and judges that public defenders have.<sup>14</sup> Thus, in plea bargaining, indigent defendants may benefit from their public defender’s collegial relationship with the prosecutor.

But when cases go to trial, things are different. For one thing, the distribution of cases across public defenders and private attorneys may contribute to notable disparities in trial outcomes. Cases handled by private attorneys may be materially different from those that go to indigent counsel. For example, Hoffman, Rubin, and Shepherd suggest that some defendants who qualify for indigent counsel may be able to stretch their finances or borrow money to hire a private attorney.<sup>15</sup> They theorize that these “marginally indigent” defendants are more likely to hire an attorney when they are innocent, and when they have a stronger case. In addition, private attorneys can decide whether to take a case—and

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<sup>10</sup> Flemming, R. B., Nardulli, P. F., & Eisenstein, J. (1992). *The craft of justice: Politics and work in criminal courts*. Philadelphia, PA: University of Pennsylvania Press; Sudnow, D. (1965). Normal crimes: Sociological features of the penal code in a public defender office. *Social Problems*, 12, 255–276.

<sup>11</sup> Skolnick, J. (1967). Social control in the adversary system. *The Journal of Conflict Resolution*, 11, 52–70.

<sup>12</sup> Eisenstein, J., & Jacob, H. (1991). *Felony justice: An organizational analysis of criminal courts*. Boston, MA: University Press, at 27.

<sup>13</sup> Wice, P. B. (2005). *Public defenders and the American justice system*. Westport, CT: Praeger, at 65.

<sup>14</sup> Hanson, R. A., Hewitt, W. E., Ostrom, B. J., & Lomvardias, C. (1992). *Indigent defenders get the job done and done well*. Williamsburg, VA: National Center for State Courts.

<sup>15</sup> Hoffman, M. B., Rubin, P. H., & Shepherd, J. M. (2005). An empirical study of public defender effectiveness: Self-selection by the “marginally indigent.” *Ohio State Journal of Criminal Law*, 3, 223–255.

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they may turn down cases that seem less defensible. Private attorneys may therefore be working with a more promising set of cases, leading to lower rates of conviction among their clients. Selection into trial is also relevant here. Private attorneys are likely to be more liberal in advising their clients to go to trial,<sup>16</sup> whereas public defenders may try to avoid time- and resource-taxing trials for all but the strongest cases and the most persistent defendants. This means that the pool of cases brought to trial by public defenders may be stronger than those tried by private attorneys, leading to lower conviction rates for clients of public defenders.

But more important for this article is that bench and jury trials are more public and less routine forms of adjudication, and they tend to be more adversarial than plea bargaining. Though plea bargaining may incorporate adversarial components, trials are likely to produce more aggressive argumentation among attorneys. Below, I outline how more adversarial forms of adjudication put public defenders at a distinct disadvantage and may turn their collegial relationships with prosecutors from a benefit to a liability.

Once a defendant has decided to go to trial, billing practices, resources, and office organization structure defense counsel's investments in trial preparation. Although retainers are common among private attorneys, these are often limited to pretrial work, with trial preparation billed hourly. This incentivizes private attorneys to invest time and resources in trial preparation. Private attorneys can bill their clients for costs associated with investigation, deposing witnesses, and seeking expert opinions. On the other hand, most public defenders are salaried and face a high volume of cases and administrative pressure to clear cases—all of which create disincentives to spend time preparing for trial. And, while the high volume of cases handled by the public defender's office likely generates some economies of scale in terms of trial preparation, in-house trial preparation experts such as investigators, clinical psychologists, and forensic specialists are relatively rare.<sup>17</sup> Thus, private attorneys may be able to present a more robust defense, with exhibits and witnesses, than public

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<sup>16</sup> Cohen, T. H. (2014). Who is better at defending criminals? Does type of defense attorney matter in terms of producing favorable case outcomes? *Criminal Justice Policy Review*, 25(1), 29–58.

<sup>17</sup> Farole, D. J., Jr., & Langton, L. (2010). *County-based and local public defender offices, 2007*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice. Retrieved from <http://www.bjs.gov/content/pub/pdf/clpdo07.pdf>.

defenders.

Attorney skill may also enhance effectiveness at trial, although assessing attorney skill and determining how it shapes trial outcomes is a tricky proposition. Prior research using measures of overall skill or specific courtroom behaviors has found little effect on case outcomes.<sup>18</sup> But attorney characteristics that may be a proxy for skill, such as trial experience, are associated with more favorable case outcomes.<sup>19</sup> On this front, public defenders may be disadvantaged for two reasons.

First, public defenders are likely to be less experienced than private defense attorneys, in general. Over half of public defenders are hired right out of law school and most of them stay in the office for only four or five years.<sup>20</sup> Even seasoned public defenders have little experience with trial. To address this, some public defenders' offices siphon trial work to specialized attorneys in the office.<sup>21</sup> Professional and trial experience likely vary more widely across private attorneys. It is important to note, though, that some private attorneys practice in multiple legal areas, in addition to criminal defense, so their expertise in criminal law may be limited.<sup>22</sup> Public defenders, on the other hand, devote their full attention to criminal practice.

Second, ineffective attorneys are more likely to be able to linger in public defenders' offices than in private practice. Many public defenders' offices suffer from a lack of oversight and performance reviews.<sup>23</sup> However, private attorneys must operate within a legal

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<sup>18</sup> Linz, D., Penrod, S., & McDonald, E. (1986). Attorney communication and impression making in the courtroom. *Law and Human Behavior*, 10, 281–302; Shinall, J. B. (2010). Slipping away from justice: The effect of attorney skill on trial outcomes. *Vanderbilt Law Review*, 63, 267–306.

<sup>19</sup> Abrams, D. S., & Yoon, A. H. (2007). The luck of the draw: Using random case assignment to investigate attorney ability. *University of Chicago Law Review*, 74, 1145–1178.; Iyengar, R. (2007). *An analysis of the performance of federal indigent defense counsel* (NBER working paper, No. 13187). Cambridge, MA: National Bureau of Economic Research. Retrieved from <http://www.nber.org/papers/w13187>.

<sup>20</sup> Lynch, D. R. (1994). The impropriety of plea agreements: A tale of two counties. *Law and Social Inquiry*, 19, 115–133.

<sup>21</sup> Farole, D. J., Jr., & Langton, L. (2010). *County-based and local public defender offices, 2007*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice.

<sup>22</sup> Neubauer, D., & Fradella, H. (2011). *America's courts and the criminal justice system*. Belmont, CA: Wadsworth.

<sup>23</sup> Spangenberg, R. L., Riggs, J. W., Saubermann, J. M., Newhouse, D. J., & Beeman, M. L. (2006). *Status of indigent defense in New York: A study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*. West Newtown, MA: The Spangenberg Group. Retrieved from <http://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf>; Farole, D. J., Jr., & Langton, L. (2010). *County-based and local public defender offices, 2007*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice.

services market that should select out less effective advocates. Referral is the most commonly used method for finding a private lawyer,<sup>24</sup> and this should further point clients toward more experienced or skilled private lawyers.

Therefore, in processes of case selection, public defenders and private attorneys may each enjoy some advantages. Private attorneys are likely to have a stronger pool of cases overall, but public defenders may be more conservative in advising defendants to go to trial, ultimately leading to a higher “win” rate. But once a case is going to trial, private attorneys may have substantial advantages in trial preparation and litigation to the extent that they are able to invest more time and resources in case preparation and are likely to have greater skills and experience. Private attorneys may also enjoy some particular advantages with the jury. Below, I consider how public defenders’ “insider” roles in the courtroom limit their ability to persuade the jury through aggressive adversarialism or by conveying a personal commitment to the defendant’s innocence.

### A. *Swaying the Jury*

Previous research on jury trials points to substantial agreement between judges and juries in the determination of guilt and innocence—but when judges and juries do disagree in criminal trials, it is most commonly in the direction of a more lenient decision by the jury.<sup>25</sup> In their classic study of judge-jury disagreement, Kalven and Zeisel<sup>26</sup> found that the jury’s acquittal of a defendant whom the judge would have convicted (i.e., “normal disagreement”) stems from judge-jury differences in evaluations of the evidence and the jury’s consideration of value-based sentiments about the defendant and the law.<sup>27</sup>

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<sup>24</sup> Curran, B. A., & Spalding, F. O. (1974). *The legal needs of the public*. Chicago, IL: American Bar Foundation.

<sup>25</sup> Eisenberg, T., Hannaford-Agor, P. L., Hans, V. P., Waters, N. L., Munsterman, G. T., Schwab, S. J., & Wells, M. T. (2005). Judge-jury agreement in criminal cases: A partial replication of Kalven and Zeisel’s *The American Jury*. *Journal of Empirical Legal Studies*, 2, 171–206; Kalven, H., Jr., & Zeisel, H. (1966). *The American jury*. Chicago, IL: University of Chicago Press.

<sup>26</sup> Kalven, H., Jr., & Zeisel, H. (1966). *The American jury*. Chicago, IL: University of Chicago Press.

<sup>27</sup> Devine, D. J., Buddenbaum, J., Houpp, S., Studebaker, N., & Stolle, D. P. (2009). Strength of evidence, extraevidentiary influence, and the liberation hypothesis: Data from the field. *Law and Human Behavior*, 33, 136–148; Eisenberg, T., Hannaford-Agor, P. L., Hans, V. P., Waters, N. L., Munsterman, G. T., Schwab, S. J., & Wells, M. T. (2005). Judge-jury agreement in criminal cases: A partial replication of Kalven and Zeisel’s *The American Jury*.

Judges may not be influenced by oratorical skills or showmanship, but defense attorneys who engage in greater adversarialism may be particularly effective with the jury. A deft defense attorney may be able to weaken the state's case or draw attention to extra-legal factors that are favorable toward the defendant. Consistent with this, in Kalven and Zeisel's study of judge-jury differences, a judge explained that the jury's verdict differed from his because the defense attorney won over the jury with "an impassioned plea . . . in which he attacked the credibility of the state's witnesses."<sup>28</sup> In another case, the judge felt that the defense attorney's theatrics swayed the jury: "He grunts and laughs and disparages witnesses' testimony on the other side by holding his hands to his ears."<sup>29</sup> The study did not differentiate between public and private defense counsel, but these comments suggest that defense attorneys who are zealous advocates for their clients are more likely to earn an acquittal. For a public defender, the task of aggressively attacking the prosecution can create a sense of role conflict<sup>30</sup> because of his or her collegial relationship and expectation of future interactions with the prosecutor.<sup>31</sup> To the extent that public defenders are enmeshed in courthouse culture, and because they anticipate repeated interactions with prosecutors, public defenders may be constrained in their ability to aggressively attack the prosecution's case.

Finally, a public defender's advocacy for his client may be less convincing because of his role in the criminal justice system. Being a courtroom "insider" may put public defenders at a disadvantage with jurors if they are less able to anticipate or relate to the normative frames and everyday experiences that shape how jurors interpret evidence.<sup>32</sup> Recent research also suggests that jurors pick

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*Journal of Empirical Legal Studies*, 2, 171–206; Farrell, A., & Givelber, D. (2010). Liberation reconsidered: Understanding why judges and juries disagree about guilt. *Journal of Criminal Law and Criminology*, 100, 1549–1586; Kalven, H., Jr., & Zeisel, H. (1966). *The American jury*. Chicago, IL: University of Chicago Press.

<sup>28</sup> Kalven, H., Jr., & Zeisel, H. (1966). *The American jury*. Chicago, IL: University of Chicago Press, at 363.

<sup>29</sup> Kalven, H., Jr., & Zeisel, H. (1966). *The American jury*. Chicago, IL: University of Chicago Press, at 365.

<sup>30</sup> Lynch, D. R. (1994). The impropriety of plea agreements: A tale of two counties. *Law and Social Inquiry*, 19, 115–133.

<sup>31</sup> Van Cleve, N. M. (2012). Reinterpreting the zealous advocate: Multiple intermediary roles of the criminal defense attorney. In L. C. Levin & L. Mather (Eds.), *Lawyers in practice: Ethical decision making in context* (pp. 293–316). Chicago, IL: University of Chicago Press.

<sup>32</sup> See, e.g., Bowers, W. J., Steiner, B. D., & Sandys, M. (2001). Death sentencing in black and white: Empirical analysis of the role of jurors' race and jury racial composition. *University of Pennsylvania Journal of Constitutional Law*, 3, 171–275.

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up on subtle cues from defendants and counsel.<sup>33</sup> If jurors observe that the defendant has a private attorney, they may perceive the attorney's willingness to represent the defendant as a signal that he is personally committed to the client's innocence, thus generating a kind of "innocence by association," which may increase the private attorney's persuasiveness.<sup>34</sup> Public defenders are less likely to generate this perception of personal commitment to the client's innocence, since they typically have little choice in the defendants whom they represent.

Considering all of these factors, including differences in trial preparation, skills and experience, and adversarialism, private attorneys may enjoy a substantial advantage over public defenders in the context of a trial. Therefore, I hypothesize that defendants who have private defense attorneys are less likely to be convicted in bench or jury trials. I also expect that clients who have private attorneys may be particularly advantaged when they take their cases to a jury trial. If private attorneys are able to be more aggressive, argumentative, and persuasive, as described above, they are likely to be more successful in appealing to the jury's sentiments and value-based judgments such as sympathy for the defendant.

### III. DATA AND METHODS

To examine differences in case outcomes across private defense attorneys and public defenders, I utilized data from felony jury trials collected as part of an NCSC study of hung juries. The NCSC's report<sup>35</sup> thoroughly describes the data collection procedures so I provide only an abbreviated description here. Data collection took place from 2000 to 2001 at four different sites: (1) the Central Division, Criminal, of the Los Angeles County Superior Court, California; (2) the Maricopa County Superior Court (Phoenix), Arizona; (3) the Bronx County Supreme Court, New York; and (4) the Superior Court of the District of Columbia. Within each of the sites, data were collected for all noncapital felony jury trials in all courtrooms for the duration of the data collection period.

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<sup>33</sup> Rose, M. R., Diamond, S. S., & Baker, K. M. (2010). Goffman on the jury: Real jurors' attention to the "offstage" of trials. *Law and Human Behavior*, *34*, 310–323.

<sup>34</sup> Kalven, H., Jr., & Zeisel, H. (1966). *The American jury*. Chicago, IL: University of Chicago Press, at 364.

<sup>35</sup> Hannaford-Agor, P. L., Hans, V. P., Mott, N. L., & Munsterman, G. T. (2002). *Are hung juries a problem?* Williamsburg, VA: National Center for State Courts. Retrieved from [http://www.ncsc-jurystudies.org/What-We-Do/~/\\_media/Microsites/Files/CJS/What%20We%20Do/Are%20Hung%20Juries%20A%20Problem.ashx](http://www.ncsc-jurystudies.org/What-We-Do/~/_media/Microsites/Files/CJS/What%20We%20Do/Are%20Hung%20Juries%20A%20Problem.ashx).

My analyses rely on data collected in case data forms completed by clerks or judges, as well as questionnaires administered to judges and jurors. The NCSC identified a total of 401 cases for inclusion in the study. Case data forms were returned in 358 of these, judicial questionnaires were completed in 357 cases, and juror questionnaires were completed by 3626 jurors (for an 80% response rate).<sup>36</sup> The NCSC assembled the data to construct a dataset with 351 usable cases, available from the Inter-University Consortium for Political and Social Research. My analytic sample is restricted to cases that have valid data on the jury's verdict ( $n = 303$ ) and the judge's projected verdict ( $n = 314$ ).

### A. *Dependent Variables*

The aim of this study is to explore the effect of defense attorney type on case outcomes in felony trials. I consider the jury's verdict, the judge's projected verdict, and jury leniency. For the purpose of this study, I determine jury conviction as conviction on the majority of the counts that a defendant faced. About two-thirds of the defendants in the data faced multiple counts. To assess the judge's likely verdict, I use data from the judicial questionnaires. Prior to the jury's verdict, judges indicated whether they would have decided the case in favor of the prosecution or the defense. When a judge indicated that he or she would have decided in favor of the prosecution, that case is coded as a likely conviction by the judge. Finally, I consider jury leniency—an outcome in which the defendant receives a more favorable verdict from the jury than he would have received from the judge. For this variable, I look specifically at defendants who would have been convicted by the judge ( $n = 222$ ). The distributions of jury conviction, the judge's projected verdict, and jury leniency are presented in Table 1.

Note that juries were less likely than judges to convict the defendants. Judges favored the prosecution in about 80% of the cases, but juries convicted the defendant on a majority of the counts in just over half of the trials (56.52%). When judges and juries differ, juries are much more likely to be lenient. Nearly a third of defendants (31.85%) who would have been convicted by the judge—had the trial been a bench trial—were acquitted by the jury.

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<sup>36</sup> Hannaford-Agor, P. L., Hans, V. P., Mott, N. L., & Munsterman, G. T. (2002). *Are hung juries a problem?* Williamsburg, VA: National Center for State Courts. Retrieved from <http://www.ncsc-jurystudies.org/What-We-Do/~media/Microsites/Files/CJS/What%20We%20Do/Are%20Hung%20Juries%20A%20Problem.ashx>, at 32.

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**Table 1: Case Outcomes in Felony Jury Trials Included in the NCSC Data**

	Conviction	Acquittal	Total cases
<i>Within all cases that have valid data on case outcome:</i>			
Jury's verdict <sup>a</sup>	161 (53.14%)	142 (46.86%)	303
Judge's projected verdict	254 (80.89%)	60 (19.11%)	314
<i>Within cases in which the judge would have convicted the defendant:</i>			
Jury's verdict <sup>a</sup>	136 (61.26%)	86 (31.85%)	222

<sup>a</sup> Jury conviction is defined as conviction on a majority of counts, excluding counts on which the jury hung.

### B. Independent Variables

The type of defense counsel is the primary indicator of interest for this study. Each attorney was classified on the case data sheet as a private attorney, a court-appointed attorney, or a public defender. Most of the defendants in these felony jury trials relied on public defense counsel; fewer than 20% had a private attorney. Public defenders represent a majority of defendants (50.90%), while about 30% of defendants rely on court-appointed attorneys.<sup>37</sup> Previous research suggests that defendants who are provided with court-appointed attorneys have higher rates of conviction than those who

<sup>37</sup> There is notable variation across jurisdictions in the distribution of defense counsel. Nearly 30% of defendants in the Bronx hired a private attorney while only 10% of defendants in Washington, D.C., did so. This may be due to differences in defendants' knowledge of private attorneys and/or local differences in the legal markets for private criminal defense work. Use of public defenders and court-appointed attorneys also varies across jurisdictions, with public defenders representing the vast majority of indigent defendants in Los Angeles and Maricopa (90.20% and 85.71%, respectively), and court-appointed attorneys representing a majority of the indigent defendants in the Bronx (61.22%) and Washington, D.C. (59.72%). These differences likely stem from variations in court organization, funding structures, and policies around indigent defense case assignment. Each of the models includes an indicator for location in order to account for some of the variations across jurisdiction, but exploring these factors in detail is beyond the scope of this article.

have private attorneys and those who have public defenders.<sup>38</sup> However, wide variation across jurisdictions in the recruitment, assignment, and compensation of court-appointed attorneys<sup>39</sup> makes it difficult to say anything concrete about how the organizational structure of the court-appointed attorney program shapes case selection, trial preparation, attorney experience, and advocacy. I will therefore focus on differences in outcomes across private attorneys and public defenders, controlling for court-appointed attorneys since they are likely to differ from these two groups.

Assessment of attorney skill is based on judges' and jurors' ratings of the defense attorney on a scale from 1 ("not at all skillful") to 7 ("very skillful"). For the jury ratings, I average the ratings of defense attorney skill across all juror respondents within each jury. The numbers of witnesses, expert witnesses, and exhibits presented by the defense were recorded on the case data sheets. I collapse these into categories to most parsimoniously capture their relationships with case outcomes. Table 2 presents descriptive statistics for these and other variables included in the analyses, along with their distributions across types of defense counsel. Note that juries gave higher skill ratings to private defense attorneys, but judges' assessments of attorney skill do not differ across public defenders and private attorneys.

To assess whether private attorneys get cases that are different from those of public counsel, I consider the total number of counts, including lesser charges, faced by the defendant. In addition, the judge or clerk also characterized the case based on a list of eighteen crimes, which I combine into four categories: (1) murder or manslaughter, (2) violent crimes (e.g., rape, sexual battery, robbery, assault, and child abuse), (3) drug-related crimes, and (4) nonviolent, nondrug crimes (e.g., burglary, larceny or theft, arson, DUI/DWI, and weapons charges). The strength of the evidence against the defendant was assessed by the judge at the close of the trial but before the jury's verdict was delivered. Judges rated the evidence presented at trial on a seven-point scale from 1 ("evidence

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<sup>38</sup> Anderson, J. M., & Heaton, P. (2012). How much difference does the lawyer make? The effect of defense counsel on murder case outcomes. *Yale Law Journal*, 122, 154–217; Cohen, T. H. (2014). Who is better at defending criminals? Does type of defense attorney matter in terms of producing favorable case outcomes? *Criminal Justice Policy Review*, 25(1), 29–58; Feeney, F., & Jackson, P. G. (1990). Public defenders, assigned counsel, retained counsel: Does the type of criminal defense counsel matter? *Rutgers Law Journal*, 22, 361–456.

<sup>39</sup> Spangenberg, R. L., Riggs, J. W., Saubermann, J. M., Newhouse, D. J., & Beeman, M. L. (2006). *Status of indigent defense in New York: A study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*. West Newtown, MA: The Spangenberg Group.

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strongly favored prosecution”) to 7 (“evidence strongly favored defense”). I code cases with ratings of 1 to 2 as having evidence favoring the prosecution, cases with ratings of 3 to 5 as being close cases, and cases with ratings of 6 to 7 as having evidence favoring the defense.

**Table 2: Descriptive Statistics and Tests of Differences in Cases, Defendants, and Attorney Performance Across Private and Indigent Defense Attorneys**

	Proportion or <i>Mean (and SD)</i> for All Cases	Proportion of Cases or <i>Mean (and SD)</i> within Attorney Type			$\chi^2$ ( <i>df</i> )
		Private Attorney	Public Defender	Court- Appointed	
<b>All cases</b>	---	.196	.506	.298	
<b>Defendant Characteristics</b>					
Gender					
Female	.097	.127	.105	.063	2.008 (2)
Male	.903	.873	.895	.937	
Race/ethnicity					
Black, non-Hispanic	.548	.446	.530	.647	18.753** (4)
Hispanic	.295	.308	.274	.323	
White, Asian, or other	.157	.246	.196	.030	
Criminal history					
No criminal record	.207	.383	.154	.185	19.000** (4)
Has record, jury unaware	.570	.467	.642	.511	
Has record, jury aware	.223	.150	.204	.304	
<b>Case Characteristics</b>					
Type of crime					
Murder/manslaughter	.174	.210	.178	.141	17.996** (6)
Violent crime	.306	.323	.331	.250	
Drug-related	.289	.161	.248	.446	
Non-violent, non-drug	.232	.307	.242	.163	
Counts	2.728 (2.139)	2.839 (1.681)	2.601 <sup>a</sup> (2.096)	2.753 <sup>a</sup> (2.483)	--
Evidence (judge's evaluation)					
Favors prosecution	.371	.310	.375	.402	5.167 (4)
Close case	.539	.655	.519	.500	
Favors defense	.090	.035	.106	.098	
Exhibits presented					
None ( <i>ref.</i> )	.336	.164	.364	.395	9.417 (4)
1-3	.315	.382	.311	.279	
4 or more	.349	.455	.325	.326	
Non-defendant witnesses					
None ( <i>ref.</i> )	.436	.300	.487	.436	8.743 (4)
1-2	.381	.417	.373	.372	
3 or more	.183	.283	.139	.192	
Expert witnesses					
None ( <i>ref.</i> )	.912	.923	.898	.929	.899 (2)
1 or more	.088	.077	.102	.071	
<b>Attorney Skill</b> { 1 = low to 7 = high }					
Jury's rating	4.439 (1.105)	4.774 (1.135)	4.433 <sup>b</sup> (.980)	4.263 <sup>b</sup> (1.259)	--
Judge's rating	5.098 (1.462)	5.328 (1.502)	5.018 <sup>a</sup> (1.416)	5.151 <sup>a</sup> (1.444)	--

\* p < .05; \*\* p < .01; \*\*\* p < .001

<sup>a</sup> Not significantly different from mean for private attorneys based on a two-sample test of differences in means.

<sup>b</sup> Significantly different (p < .05) from mean rating for private attorneys, based on a two-sample test of differences in means.

Finally, I consider defendant characteristics including gender, race/ethnicity, and criminal history. Based on information from the case data sheets, I divide defendants into three categories: (1) those with no criminal record, (2) those with a criminal record of which the jury was unaware, and (3) those with a criminal record of which the jury was aware.

### *C. Analytic Approach*

My goal is to determine whether clients of private attorneys are less likely to be convicted at trial and whether disparities in outcomes may be attributable to case and defendant characteristics, the presentation of witnesses and exhibits, or attorney skill. All three of my dependent variables (judge's projected conviction, jury conviction, and jury leniency) are binary, so I estimate logistic regression models. Each of the models incorporates fixed effects for the four jurisdictions included in the data.

Models predicting jury conviction and jury leniency exclude cases with missing data on jury verdicts ( $n = 48$ ), and models predicting the probable conviction by the judge and jury leniency exclude cases with missing data on the judge's preferred verdict ( $n = 38$ ). Independent variables have missing data on less than 8% of cases, with the exception of the indicator of exhibits presented at trial, which is missing for 12.8% of the sample. Rather than drop cases with missing data, I use multiple imputation to create twenty full datasets and then I combine results across datasets, taking into account the variance in imputed values.<sup>40</sup> To assess the sensitivity of my results to this procedure, I estimated models using listwise deletion with and without complete-case weights. Findings presented here are robust to these alternative specifications.

## IV. RESULTS

The key question for this article is whether reliance on public defense counsel brings disadvantages for indigent defendants who take their cases to trial. Table 3 presents odds ratios from logistic regression models estimating differences in case outcomes across type of defense counsel. I begin by examining whether the judge would have convicted the defendant had the trial been a bench trial rather than a jury trial.

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<sup>40</sup> Royston, P. (2004). Multiple imputation of missing values. *The Stata Journal*, 4, 227–241.

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**Table 3: Odds Ratios from Logistic Regression Models Predicting Jury Trial Outcomes**

	Outcome: Judge Would Convict				Outcome: Jury Conviction				Outcome: Jury Leniency			
	Model 1		Model 2		Model 3		Model 4		Model 5		Model 6	
	OR	(SE)	OR	(SE)	OR	(SE)	OR	(SE)	OR	(SE)	OR	(SE)
<b>Type of Defense Attorney</b>												
Private attorney	1.444	(.604)	1.766	(.978)	.402**	(.139)	.391*	(.163)	2.916*	(1.239)	2.694*	(1.347)
Court-appointed attorney	1.590	(.622)	1.199	(.649)	1.315	(.416)	1.253	(.469)	.677	(.265)	.858	(.316)
Public defender ( <i>ref.</i> )	----		----		----		----		----		----	
<b>Defendant Characteristics</b>												
Female			.561	(.327)			.908	(.455)			1.357	(.902)
Race/ethnicity												
Black, non-Hispanic			1.395	(.885)			.598*	(.311)			1.541	(1.055)
Hispanic			.846	(.520)			.355*	(.184)			3.319	(2.227)
White, Asian, or other ( <i>ref.</i> )			----				----				----	
Criminal history												
No criminal record ( <i>ref.</i> )			----				----				----	
Criminal record, jury unaware			2.688	(1.530)			2.375*	(1.031)			.351	(.190)
Criminal record, jury is aware			4.468*	(3.094)			2.814*	(1.424)			.459	(.283)
<b>Case Characteristics</b>												
Type of crime												
Murder/manslaughter			7.367*	(6.546)			2.503	(1.306)			.398	(.263)
Violent crime			.636	(.342)			1.137	(.487)			.449	(.259)
Drug-related			1.117	(.695)			1.258	(.565)			.499	(.290)
Non-violent, non-drug ( <i>ref.</i> )			----				----				----	
Counts												
Evidence			1.255	(.222)			.971	(.070)			1.075	(.085)
Favors prosecution ( <i>ref.</i> )												
Close case			----				----				----	
Favors defense			.020***	(.022)			.306**	(.105)			2.338*	(.916)
Exhibits presented												
1-3			1.127	(.604)			.707	(.287)			1.140	(.564)
4 or more			.949	(.518)			1.288	(.569)			.593	(.343)
Non-defendant witnesses												
None ( <i>ref.</i> )			----				----				----	
1-2			.688	(.321)			.416*	(.151)			2.300	(1.010)
3 or more			.992	(.669)			.904	(.476)			1.226	(.790)
At least one expert witness			.561	(.388)			1.291	(.688)			.548	(.273)
<b>Attorney Skill</b>												
Jury's rating			.803	(.167)			.662**	(.107)			1.185	(.162)
Judge's rating			.903	(.145)			.885	(.101)			1.433	(.277)
N	314		314		303		303		222		222	
Wald test for added parameters ( <i>df</i> )	.84 ( <i>2</i> )		2.17** ( <i>18</i> )		5.08** ( <i>2</i> )		2.64** ( <i>17</i> )		5.02** ( <i>2</i> )		1.58 ( <i>18</i> )	

\* p &lt; .05; \*\* p &lt; .01; \*\*\* p &lt; .001 (two-tailed tests)

\* Indicators of jurisdiction (Bronx, LA, and Maricopa, with DC as a reference category) are included in the models, but not shown here.

Overall, judges would have convicted about 81% of the defendants. As shown in Model 1, defendants who have private attorneys are estimated to be about 40% more likely to be convicted by the judge, but the difference is not statistically significant. Model 2 incorporates defendant characteristics, case characteristics, and indicators of attorney skill. Several of these are associated with conviction by the judge, including the defendant's criminal history, the type of crime, and the strength of the evidence in favor of the prosecution. Judge and jury ratings of attorney skill are not significantly associated with probable conviction by the judge. Because of this, I do not consider the other independent variables in detail here. Most important for this article, defendants who are

represented by the public defender are not more likely to be convicted by the judge than those who hire a private attorney.

Model 3 estimates the likelihood of conviction by the jury. Defendants who hire private attorneys are nearly 60% less likely to be convicted compared to those who rely on the public defender (OR = .402;  $p < .01$ ). These results support my hypothesis that hiring a private attorney is associated with lower likelihood of conviction in jury trials. Model 4 adds defendant characteristics, case characteristics, and attorney skill ratings. Defendant race/ethnicity is associated with jury conviction. Compared to white defendants, black defendants were 40% less likely and Hispanic defendants were about 65% less likely to be convicted (OR = .598;  $p < .05$  and OR = .355;  $p < .05$ , respectively). Defendants who do not have a criminal record are less likely to be convicted by the jury (OR = 2.349;  $p < .05$  when jury was unaware of the record; OR = 2.819;  $p < .05$  when jury was aware of the record). Case characteristics also shape the likelihood of conviction. The number of counts is not associated with conviction, but the strength of evidence matters. Defendants are less likely to be convicted by the jury when the judge reported that the case was close (OR = .306;  $p < .001$ ) or that the evidence favored the defense (OR = .169;  $p < .01$ ). Note, however, that the judge's evaluation of the evidence is more strongly correlated with the judge's probable verdict (see Model 2) than with the jury's verdict. The presentation of exhibits and use of expert witnesses is not associated with jury conviction, but having at least one witness testify on behalf of the defense reduces the likelihood of conviction by nearly 60% (OR = .412;  $p < .05$ ). Jury ratings of attorney skill are also associated with lower likelihood of conviction (OR = .662;  $p < .001$ ).

As shown in Table 2, private attorneys represent more black and Hispanic defendants, as well as more defendants who do not have criminal records—and these characteristics are associated with lower likelihood of conviction by the jury. However, including them does not significantly reduce the odds ratio associated with having a private attorney (test of difference between Model 3 and 4:  $\chi^2_{(df=1)} = 1.241$ ;  $p = .266$ ). This indicates that differences in defendants and cases across types of defense counsel do not explain the disparity in rates of conviction among clients of private attorneys and public defenders.

To further explore the nature of private attorney advantage in jury trials, I consider whether clients of private attorneys are more likely to benefit from jury leniency. I focus here on defendants who

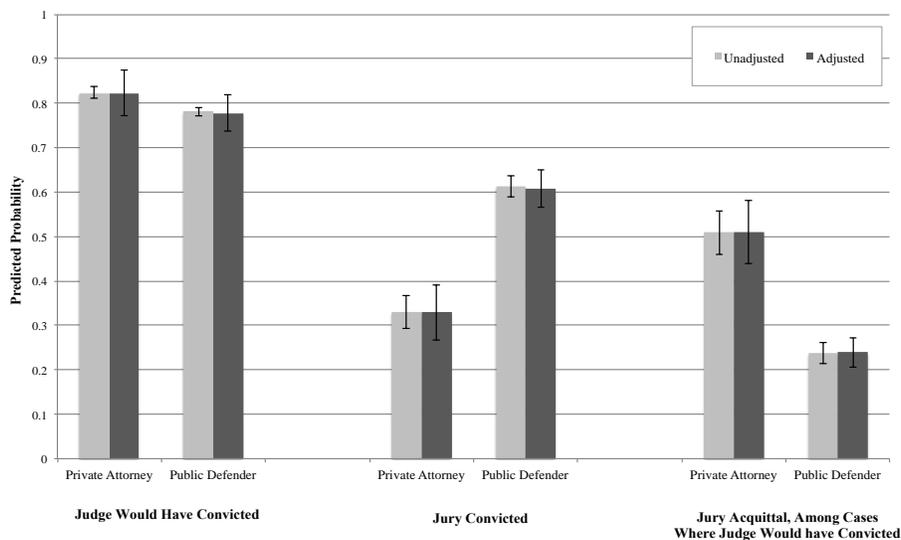
would have been convicted by the judge ( $n = 222$ ), and I estimate the likelihood that the jury acquitted these defendants. As shown in Model 3, private attorneys are more likely than public defenders to sway the jury toward acquittal when the judge would have convicted their clients. Among defendants who would have been convicted by the judge, those who had a private attorney are nearly three times as likely to benefit from jury leniency than those who were represented by the public defender (OR = 2.916;  $p < .05$ ). I next explore whether defense attorneys' advantage in securing jury leniency for their clients persists after accounting for case and defendant characteristics.

Model 6 indicates that the likelihood of being acquitted by the jury, when the judge would have convicted, varies across defendant race/ethnicity, types of criminal charges, and the number of witnesses called. Consistent with Kalven and Zeisel's study of judge-jury differences, jury leniency is more likely when the judge reported that the case was close. Accounting for these factors reduces the magnitude of the private attorney advantage (from OR = 2.916,  $p = .012$  to OR = 2.694,  $p = .048$ ), though the change in the odds ratio is not statistically significant ( $\chi^2_{(df=1)} = .130$ ,  $p = .721$ ). Among defendants who would have been convicted by the judge, those who are represented by a private attorney are about 2.7 times as likely to be acquitted by the jury, compared to those who are represented by a public defender. Put another way, defendants who relied on the public defender were one-third as likely to benefit from jury leniency compared to those who hired a private attorney (OR = .351;  $p < .05$  in a supplemental analysis).

Figure 1 provides a comparison of predicted probabilities of conviction by judge and jury across types of defense counsel. Lighter bars on the left side of the figure show unadjusted probabilities of conviction across attorney type calculated from Models 1, 3, and 5, while the darker bars represent predicted probabilities of conviction, adjusted for covariates included in Models 2, 4, and 6. As shown in the left-most panel, the probability of conviction by the judge does not differ by type of counsel. The center panel shows the probability of conviction by the jury. Comparing the unadjusted and adjusted probabilities indicates that very little of private attorneys' advantage is attributable to the differential distribution of cases and defendants across attorneys, or to higher skill ratings garnered by private attorneys. Even after adjusting for the factors, as shown by the darker bar, defendants who hire a private attorney have about a 33% chance of conviction—

compared to a 61% chance of conviction among those who rely on the public defender. Finally, the right panel shows the substantial advantage in jury leniency enjoyed by clients of private attorneys. Even after accounting for all of the covariates in Model 6, the darker bars indicate that, among defendants who would have been convicted by the judge, those who have a private attorney have a more than 50% chance of being acquitted by the jury. In contrast, those who rely on the private attorney have only a 24% chance of benefitting from jury leniency.

**Figure 1: Predicted Probabilities of Conviction by Jury, Conviction by Judge, and Jury Leniency**



## V. DISCUSSION

The goal of this article is to extend research on the effectiveness of indigent defense by focusing on disparities across types of defense counsel in the context of trials. Although the proportion of criminal cases going to trial has declined over the past several decades,<sup>41</sup> inadequate defense provided for indigent defendants at trial is a serious concern. Cases that go to trial tend to involve more severe

<sup>41</sup> Galanter, M. (2004). The vanishing trial: An examination of trials and related matters in federal and state courts. *Journal of Empirical Legal Studies*, 1, 459–570; Kritzer, H. M. (2013). The trials and tribulations of counting “trials.” *DePaul Law Review*, 63, 415–441.

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charges, the potential of more severe punishments, and defendants who more vehemently maintain their innocence. While public defenders and private attorneys each may have some advantages and disadvantages when putting cases in front of a judge, I have argued that public defenders may be particularly disadvantaged with the jury because the structure of indigent defense organizations restricts the public defender's experience with and investment in trial preparation.

Consistent with my hypotheses, analyses of judges' projected verdicts in these cases indicates that rates of conviction in bench trials do not differ across public and private defense counsel. However, as expected, I also find that defendants who rely on the public defender are more likely to be convicted by the jury than those who hire a private attorney. Even after accounting for case characteristics, defendant characteristics, and disparities in ratings of attorney skill, defendants who rely on the public defender are twice as likely to be convicted by the jury as those who hire a private attorney. Among defendants who would be convicted by the judge, those who rely on the public defender are about one-third as likely to benefit from jury leniency.

While public defenders' disadvantage with the jury is clear, the reasons for this disadvantage are not. Of the defendant characteristics and case characteristics I was able to consider, none explained the relationship between type of defense counsel and jury conviction or jury leniency. Juries gave higher skill ratings to private attorneys, and juries' ratings of attorney skill are associated with lower likelihood of conviction—but this does not contribute to the association between type of defense counsel and jury conviction or leniency. Instead, having a private attorney *and* having an attorney who is rated as more highly skilled both decrease the likelihood of conviction. Differences in the presentation of experts, witnesses, and exhibits also did not explain the advantage of having a private attorney. It is likely that quality matters more than quantity on these fronts, but this study was not able to assess characteristics of exhibits, credibility of witnesses, and the deftness with which an attorney presents these things, which may be deciding factors for the jury.

Selection likely plays an important role here, including the sorting of cases to types of attorneys and the decision to take cases to trial. I am limited in the defendant characteristics and case characteristics that I am able to consider; further research should explore and account for the important issue of selection.

Nevertheless, the lack of disparities in probable conviction by the judge suggests that the cases tried by private attorneys were not overwhelmingly more favorable for the defense. However, further research should take a close look at these matters, particularly in the selection of cases that private defense attorneys and public defenders take to trial, as this may be an important factor in case processing, case outcomes, and the defendant's right to trial.

This study contributes to the literature on indigent defense and inequalities in criminal justice by considering how attorneys' roles may affect their performance and outcomes in jury trials. The empirical analyses employ a relatively substantial sample of jury trials regarding a broad range of criminal matters from four diverse urban areas. I am aware of no previous studies that have examined the effects of type of defense counsel on jury verdicts in particular. However, there are several limitations worth noting. In particular, there are a number of potentially relevant factors that I am unable to consider, including the defendant's socioeconomic status, which may confound the relationship between type of attorney and jury verdict. In addition, a lack of complete and detailed information about attorney characteristics such as trial experience, skills, and familiarity with other courtroom actors limits my ability to explore differences across public defenders and private defense attorneys. Finally, the judge's overall preference in favor of the prosecution or defense makes it difficult to make a precise comparison to the jury's verdict, leading to overestimation of judge-jury differences. Related to this, I am not able to assess the role of type of counsel in the small number of cases in which the judge would have acquitted but the jury convicted (i.e., jury harshness rather than leniency).

Despite these limitations, this study signals the importance of taking a closer look at the organization of public defenders' work in order to uncover how, where, and when indigent defendants may be disadvantaged in criminal courts. On the one hand, public defenders' embedded, cooperative relationships within the courtroom may confer an advantage when resolving cases through negotiation and bargaining. But the nature of the public defender system, particularly in urban areas, puts public defenders under immense pressure to handle heavy caseloads with very limited resources.<sup>42</sup> Results here suggest that public defenders are at a

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<sup>42</sup> Farole, D. J., Jr., & Langton, L. (2010). *County-based and local public defender offices, 2007*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice; Wice, P. B. (2005). *Public defenders and the American justice system*. Westport, CT: Praeger.

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distinct disadvantage in the more adversarial forum of a jury trial. From a policy standpoint, this is an important finding. Numerous voices have called for a dismantling of the public defender system or a rapid infusion of resources and increased oversight.<sup>43</sup> A more nuanced approach might consider how court organization and the structure of indigent defense programs affect attorney effectiveness at various stages of the criminal justice process. This would allow us to pinpoint and target the areas where the disparities between public and private defense counsel are largest. As a step in this direction, the present study suggests that improving public defenders' effectiveness in trial advocacy could advance equal justice for rich and poor.

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<sup>43</sup> See, e.g., American Bar Association. (2004). *Gideon's broken promise: America's continuing quest for equal justice*. Chicago, IL: American Bar Association; Harvard Law Review. (2000). Gideon's promise unfulfilled: The need for litigated reform of indigent defense. *Harvard Law Review*, 113, 2062–2079; National Right to Counsel Committee. (2009). *Justice denied: America's continuing neglect of our constitutional right to counsel*. Washington, DC: The Constitution Project and the National Legal Aid & Defender Association.