National Institute of Justice Topical Working Group Meeting on Right to Counsel and Indigent Defense

Meeting Notes

March 16–17, 2015

Arlington, VA

NIJ

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Right to Counsel and Indigent Defense

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Attendees

Patton Adams, Executive Director, South Carolina Commission on Indigent Defense
James Anderson, Senior Behavioral Scientist, RAND Corporation
Marea Beeman, Director, Justice Standards, Evaluation and Research Initiative, National Legal Aid and Defender Association
Robert Boruchowitz, Professor from Practice, Director Defender Initiative, Seattle University School of Law
David Carroll, Executive Director, Sixth Amendment Center
Timothy Curry, Managing Attorney, National Juvenile Defender Center (Day 1 only)
Anne Daly, Division Director, King County Department of Public Defense (Washington)
Andrew Davies, Director of Research, Office of Indigent Legal Services (Day 1 only)
Paul DeWolfe, Public Defender for the State of Maryland
James Doyle, Counsel, Bassil, Klovee & Budreau
Andrew Ferguson, Professor, UDC David A. Clarke School of Law
Jon Gould, Co-Director, Law and Social Sciences Program, National Science Foundation
Margaret Ledyard, Business Analyst, Travis County Criminal Courts (Texas)
James Meeker, Professor, University of California, Irvine
Preeti Menon, Senior Policy Associate, American University (Day 1 only)
Pamela Metzger, Professor, Tulane Law School
Kyle O'Dowd, Associate Executive Director for Policy, National Association of Criminal Defense Lawyers (Day 1 only)
Joshua Perry, Executive Director, Louisiana Center for Children's Rights
Norman Reimer, Executive Director, National Association of Criminal Defense Lawyers (Day 2 only)
Helena Silverstein, Co-Director, Law and Social Sciences Program, National Science Foundation
Erik Stilling, Tech & Info Management, Louisiana Public Defender Board (Day 2 only)
Nicole Gonzalez Van Cleve, Assistant Professor, Temple University
Jennifer Woolard, Associate Professor, Georgetown University (Day 1 only)

Federal Government

Kim Ball, Senior Policy Advisor, Bureau of Justice Assistance (Day 1 only)
Nadine Frederique, Social Scientist Analyst, National Institute of Justice (facilitator)
Jenni Katzman, Senior Counsel, Access to Justice Initiative (Day 1 only)
Angela Moore, Division Director, Justice Systems Research, National Institute of Justice
Andrew Stanner, Senior Counsel, Access to Justice Initiative (Day 1 only)
Suzanne Strong, Statistician, Bureau of Justice Statistics
Linda Truitt, Senior Social Science Analyst, National Institute of Justice

Purpose of Meeting

The purpose of the meeting was to assess the current state of the indigent defense field and guide the development of a comprehensive research agenda, with particular focus on key issues in indigent defense research.

History of the National Institute of Justice (NIJ) Efforts in Support of Indigent Defense Research

NIJ has made significant investments in research on indigent defense. Its history of supporting research on criminal defense issues includes:

- A 1973 study conducted by the National Legal Aid and Defender Association (NLADA) was the first national survey of the state of the art of legal defense services for the poor.
- An evaluation of an Early Representation by Defense Counsel Program in the 1980s.
- Implementation of indigent defense standards in the 1990s and later.

More recently, NIJ teamed with other agencies of the Office of Justice Programs (OJP) to co-host the OJP National Symposium on Indigent Defense in 2010. In 2011, NIJ worked with the Access to Justice (ATJ) Initiative to co-sponsor the Expert Working Group on International Perspectives on Indigent Defense in 2011; NIJ and ATJ also invited panelists to address research needs and alternative practices for indigent defense at the 2011 Annual NIJ National Conference. Over the past several years, NIJ has funded research projects that look at:

- The impact of defense counsel on homicide case outcomes;
- Investigations of holistic defense;
- Understanding the role of indigent defense for defendants with mental health disorders;
- Understanding the decision of parents and their children to waive counsel;
- The impact of early intervention by counsel; and
- Factors that lead to wrongful conviction.

NIJ also has a partnership with the National Science Foundation (NSF) to co-fund projects.

Other Federal initiatives have also contributed to the knowledge base on indigent defense.

- Bureau of Justice Statistics (BJS)
  - In 2014, worked with the U.S. Census Bureau to collect State-level expenditures on indigent defense and published a report using that data to create a national-level picture.
  - The National Survey of Indigent Defense Services is currently underway. The project is the first of its kind to collect census-level information on all forms of indigent defense service delivery, including public defender offices, legal aid programs, and systems that provide indigent defense through either contractual agreements with private law firms or the assignment of private counsel.
- Bureau of Justice Assistance (BJA)
  - Currently is funding a survey to gather perspectives on the American Bar Association 10 Principles and a national campaign to achieve right to counsel.
  - They are also funding mentoring programs, developing training for public defenders, working to improve metrics to look at culture change, developing a race reconciliation program, creating checklists to ensure that attorneys effectively represent their clients, and looking at system reform at the State level.

  - Currently has two solicitations for participatory research under "Smart Defense."
- ATJ
  - Currently is planning a May 2015 meeting with NIJ and NSF to identify needed research and promising practices and further interagency efforts;
  - Generated several statements of interest related to indigent defense; and
  - Helps make Federal grants more available to public defenders.

NIJ Goals and Meeting Goals

NIJ's goals related to indigent defense are to:

- Increase the research on indigent defense services, policies, and practices;
- Enhance the understanding of issues surrounding the availability of indigent defense services; and
- Develop practical and useful tools to improve the quality of indigent defense.

There are several points on which the field may have a consensus: regarding (1) Budget cuts have left defender systems in crisis, (2) defenders are often handling more than the standard caseload, and (3) there are not enough attorneys to meet the needs of jurisdictions. However, an obstacle for policymakers is the lack of systematic research that will help them make good decisions in appropriating funds.

To guide the development of a comprehensive research agenda, this meeting's goals are to:

- Discuss what is known in four identified topic areas:
  - Juveniles and access to counsel,
  - Barriers to counsel for adults,
  - Use of data and operational research, and
  - Assigned counsel and panel attorney systems;
- Identify current gaps in the research;
- Identify future actionable research questions; and
- Begin taking steps to craft a research agenda.

Topic Area 1. Juveniles and Access to Counsel

Background – Timothy Curry, National Juvenile Defender Center (View slides)

The problems in access to counsel are different for juveniles than for adults. For example:

- The juvenile justice system is focused on rehabilitation. Incarceration may not be based on the alleged delinquent act as much as on whether the juvenile was "rehabilitated."
- A recognition of child and adolescent development calls for greater care. Even a normative child has more difficulty appreciating consequences, resisting temptation and peer pressure, and making informed decisions under stress compared with adults; children also are more susceptible to coercion and have less understanding of their rights than adults. Children with additional factors such as trauma, mental health disturbances, learning disabilities, or emotional disabilities have even greater obstacles.
- There is a lack of formality in juvenile courts. The rehabilitative goal of the juvenile court, while important, can also lead to the misconception that all sides should cooperate and that corners can be cut in order to get children help. However, services for children can never come at the expense of due process. Due process is a right, not a privilege.
- Procedural justice is just as important in the juvenile court as it is in the adult court.

The collateral consequences of juveniles' court involvement need to be better understood because they can last a lifetime. Overarching areas of concern related to juvenile access to counsel include:

- Early appointment of counsel
  - Need to understand how many juveniles actually go without counsel. Basic research on how waiver for juveniles happens in different jurisdictions.
  - Cannot protect rights that have already been waived.
  - Inappropriate interactions with the State may occur before counsel involvement.
  - Obstacles to counsel exist on many levels (from system, judges, police and prosecutors, overworked defenders, ill-informed families).
- Effects of indigence determination
  - How are those determinations made? Is there consultation with counsel before waiver occurs so that the juvenile understands the consequences? Are juveniles presumed to be indigent or are their parents'/guardians' finances used in the determination? Procedures can take days and be highly invasive, whereas "waive and go home today" gives immediate reward.
  - Costs of retaining counsel or applying for indigent counsel can create conflict between parents and children.
- Waiver of counsel
  - Factors that coerce waivers include time-consuming indigence procedures, pressure from family, and pressure from court personnel.
  - Juveniles and their families waive without knowing what a defender can do for them.
  - Waivers are too easy.
- Post-disposition counsel
  - Many jurisdictions do not allow post-disposition counsel or have no system to provide it.
  - Disposition is often indeterminate.
  - Many jurisdictions do nothing to help juveniles reintegrate into the community.

Main Themes of Discussion

Participants proposed various topics and questions for research.

- Basic descriptive research—the value of creating a portrait of what currently exists. Some participants put a high priority on this type of research.
  - How many juveniles are without counsel—simply documenting the presence/lack of counsel;
  - How many waivers;
  - How many waivers as a result of lack of indigency;
  - Percentage of applicants who are found indigent;
  - What are lawyers doing in different jurisdictions at an early appointment stage? and
  - Lack of formality in juvenile courts leads to lack of data.
- Outcomes
  - Are outcomes prejudiced by the absence of counsel, and how does that vary by courtroom and by state?
  - Court outcomes vs. life outcomes (e.g., likelihood of finishing high school or losing home);
  - Use data from Juvenile Detention Alternatives Initiative to study how outcomes correlate with presence of counsel;
  - When measuring cost of outcomes, look on the post-disposition side, too;

  - What is the impact of a social worker? and
  - A longitudinal study of juveniles in/out of system followed over time would be ideal.
- Comparative research
  - With other countries that automatically grant counsel to juveniles and allow parents the option to provide private counsel—to see if their system works better and what are the lessons learned; and
  - With other States because access to counsel varies among States.
- Fiscal impact/other ways to study resource disparity
  - "Everything has a cost"—not getting counsel has a cost, too (going to jail costs money);
  - We know how much it costs to put someone in juvenile detention; we need to figure out how many more nights are spent in juvenile detention because of lack of counsel; and
  - Note that cost arguments are most effective in getting the legislature to bring about change.
- Qualitative study—how can a robust defender system change a culture?
  - Provide hypothetical questions to stakeholders and ask opinion-related questions; and
  - Are there adverse factors if there is more robust defense counsel (i.e., what is the ripple effect among an ecology of system players)?
- Need for definitions
  - "Indigence"—varies by State;
  - "Resources"; and
  - "Rehabilitation." This leads to the following questions:
    - When is a juvenile "rehabilitated"?
    - Categorizing rehabilitative services—social services vs. punitive. Are services skewed toward punishment?
    - How to measure? For example, time under lock, time under supervision, amount spent on social services?
- Indigency determination
  - Pressure to waive, even before finding out if juvenile is eligible.
  - Who determines indigency and appointment of counsel, and how does this affect the timing and rate of appointment?
  - Is there a fee to apply for indigency? How long does the process take? What kind of documentation is required, and how difficult is it to obtain? What other out-of-pocket fees are there, and what is the implication? (Some States charge for days of detention.)
- Viewpoints of judges
  - Correlation between paternalistic view of some judges and defendants (i.e., some judges assert that if they are doing their job correctly, juveniles don't need defenders); and
  - Judges aware of limited resources may pre-ration vs. those who act on the theory that this is what the child needs.
- Other questions/topics
  - Can defenders find other resources for juveniles?
  - What is the impact of judicial elections vs. judicial selections on the appointment of counsel in juvenile cases?
  - Research to support the assertion that keeping juveniles out of court avoids recidivism;

  - Feasibility of coupling Federal assistance to auditable reporting requirements. Although there are difficulties, it has not been done possibly because Federal agencies do not know what data they want; and
  - Public shock can create attention that precipitates change, even without waiting for research-based documentation, although research is helpful.

Topic Area 2. Barriers to Counsel for Adults

Background – Dr. Andrew Davies, Office of Indigent Legal Services, New York (View slides)

Barriers are both State-side and client-side.

State-side barriers—three categories:

- Systemic (i.e., the way the defender system is structured, funded and organized)
  - Presumably, if an attorney is not paid, there will be reduced access, although not a lot of research demonstrates that.
  - Do eligibility policies really preclude access to counsel?
- Procedural (i.e., aspects of the way the court is designed that get in the way of people being assigned counsel)
  - Examples: judges taking negative action because defendant asked for counsel; application fee goes up if defendant does not plead guilty.
  - What procedures are in place that do or do not affect access to counsel—not yet researched.
- Logistical (e.g., knowing whom to talk to, where to go, etc.)
  - Assignment procedures can be complicated, and differ by county.
  - In some locations, being incarcerated helps you get counsel faster.
  - How often is counsel present at the first court appearance?
  - Biases have not been studied—are people triaged in a way that is systematically biased (based on skin color, type of case, etc.)?

Client-side barriers include:

- Not all clients are the same.
- Lack of trust in the justice system.
- Innocent people may waive, based on the belief that "justice will prevail"—leading to more likely conviction?
- Barriers to defender-client interactions, such as:
  - Interpreter services may not exist for noncitizens, limiting access to counsel; and
  - Challenge of communicating with people with mental disabilities.
- Other characteristics that affect access may exist.

Research questions could address:

- What barriers exist?
- What causes barriers to come into existence?
- What impacts do they create for clients?
- How much information on these questions is available, and is it national in scope, systematic, and credible?

Main Themes of Discussion

Participants proposed various topics and questions for research.

- Access to data—challenges
  - What are the resources we can draw upon for defender purposes?
  - Some data can be pulled for academic study, but getting ongoing data is logistically challenging because computer systems are not fully integrated.
  - Another frustration is that some people/entities refuse to share data.
  - Some States have stronger sunshine laws than others; even if data is nominally public, there may not be a good mechanism to get it.
  - Data that is received may be "dirty"; definitions are nonstandard; data may be given in an unusable format (e.g., on paper or in PDF format).
  - Although institution-provided data is important, observational data is also more affordable to collect and can provide significant insights.
- Need for direct measures of quality of representation
  - A lot of the function of good representation is educating the client on reasonable expectations.
  - Advocacy as both trial advocacy (reduction of charge, etc.) and treatment advocacy (access to mental health services, etc.)—What client-based and system-based considerations push an attorney to advocate one way or the other?
- Impact of logistical barriers to access
  - Examples: Does someone need to come back another day for indigency screening? If the person doesn't have a phone, how does the defender contact the defendant?
  - Jail, sheriff, and prison guards exert enormous influence; there may be procedures in jails that prohibit public defenders from having time to visit clients. Chicago experimented with video counsel.
  - Is physical meeting space available to allow confidential meetings with clients?
- Determination of indigency
  - Who determines indigency? How? When? What are the different ways it is determined? What is the ideal way? How do you verify true indigence?
  - A standard model would help.
  - Standardized methods are needed for indigency determination—not absolute numbers on what indigency is, for example.
  - Is there a difference in indigency determination among systems that are more/less cash-strapped?
- Assignment of counsel
  - Unintended consequences should be studied (attorney could be more adversarial).
  - Who actually assigns attorneys, and when does it happen? When should it happen? When does it effectively happen?
  - How many different ways is it done in this country?
  - What is the cost of delayed assignment (e.g., days in jail because of no representation at the bond hearing, or social cost of the family structure falling apart)?
  - Research can consider the implications of early intervention on public safety and cost.

- Differences between adult misdemeanors and adult felonies
  - What is the culture? What attitudes do people have?
  - Misdemeanors are a larger problem, in some ways, in terms of scale and recent growth.
- Risk assessments
  - The same results if risk assessments are used?
  - What is the role of defense counsel and risk assessments during pretrial?
- Descriptive research vs. other types of research
  - Descriptive research alone is limited; can you add a piece to answer "why" questions?
  - Questions related to cause/effect/impact allow funders to do more with the project, getting more "bang for the buck."
- Use of research to ensure that States meet due process rights and public safety and cost considerations
  - Consider what we need to ask to find a best practice or to inform our message to stakeholders to produce changes.
  - Good research questions depend on whether the point of view is ground-up or top-down; the two different levels make it difficult to connect.
- Other questions/topics/considerations
  - Factors of race and economic condition of the client population should be considered;
  - The impact of elected judiciary/non-lawyer judges on access to counsel; and
  - Researching models that work probably requires snapshots of entire systems and the extent to which they can be formalized/coded so they can be replicated nationwide.
    - Consider that systems exist where rational actors might choose to waive.

Topic Area 3. Indigent Defense Data and Operational Research

Background

Part 1 – Pam Metzger, Tulane University School of Law

System errors (i.e., errors that came about because the system fostered the circumstances that produced it) can be prevented or mitigated when a culture is created that embraces the idea of finding errors. For public defenders, who tend to be independent, we must create a system that encourages data disclosure by showing why it is good and rewards them opportunities to improve outcomes/service delivery (for example, "I need this data from you on a regular basis because I think we can use it and shave off two months of your clients' time in jail") and maximize the use of scarce resources.

To change a culture, we must be open to looking at a systems approach and be committed to engaging in data collection.

Recommendations:

- Start from the ground up. What do defenders want in their data?
- Have a realistic approach to outcomes so that small defeats are seen as opportunities for future success.
- Work incrementally—pick just one or two areas in which to analyze data, and target its use to obtain buy-in (e.g., a file audit to check for guilty pleas after the statute of limitations expired).
- Focus on building in protection to ensure that data is accurate.
- Make data reporting minimally burdensome.

- Have an integrity-driven system.
- Policymakers should not use data to blame or correct but to protect where the cultural pressure is against change.

Part 2 – Dr. Margaret Ledyard, Travis County Courts, Texas (View slides)

Travis County, Texas, is one of the four sites involved in the North Carolina Systems Evaluation Project. The goal is to measure outcomes and create a toolkit that can be replicated. Because key terms and categories can be defined differently across jurisdictions, one component of the toolkit is a table of possible outcomes and their related codes. Key performance indicators for nine case outcomes were identified and categorized from the client's point of view as "best," "

worst," or "both," along with cost data for both felonies and misdemeanors.

Travis County is moving from private assigned counsel to a managed assigned counsel office run by a nonprofit, with a board that picks the list of attorneys and manages appointments. After receiving input from stakeholders (judges, defense bar, and policymakers) on appropriate performance measures, management dashboards were designed that allowed the managed assigned counsel office to see data almost in real time and to respond. The data can be used to assess policy, create benchmarks, continually assess, and compare outcomes after a policy change.

Main Themes of Discussion

Participants proposed various topics and questions for research and discussed the work that had been presented.

- Identifying errors and helping public defenders feel comfortable with using data and with change
  - Public defender as "hero"—similar in aviation and medical fields—it takes time to accept getting real-time data on performance and to empower other stakeholders to speak up.
  - A great public defender can still make a mistake.
  - In a culture where it's okay to make a mistake, improvements can be identified.
  - In a team practice, errors can't be hidden; they are discussed among team members, and ownership is taken away from the individual lawyer.
  - An appellate office can bring issues to the attention of the public defender's office issues and help them.
  - Definition of "error"—is this different from measuring quality?
  - Quantitative issues (meetings with client, filing motions, other basic actions) are not always done when the caseload is crushing, so some part of data collection will highlight real problems in the current system and will open conversations on resources.
  - Focusing on "best" —can be two measures: what the attorney thinks is in the best interests of the client, and what the client wants.
- Kinds of data that defenders would find useful
  - Predictive data about practices of judges and prosecutors to help defenders prepare.
  - They want to know what they could have done differently, but not in a public or embarrassing way.
  - Studying those systems that have best practices, and how they develop political will and shift the culture to fund the public defense appropriately.
  - Which few (three to four) actions by defenders would have the most impact on outcomes?

    - Important to know because we don't know whether conventional wisdom on best practices is right or wrong.
    - Need to articulate the essential parts of representation but use caution regarding triaging of cases—focusing on a few actions should not be for the purpose of helping public defenders increase caseloads.
    - How to deal with low-probability activities that have high rewards or high costs that triage would throw out?
    - Perhaps combine the consensus view of what should be done in the average case, and get reasonable assurance that those particular tasks are effective.
    - Also record things that defenders are *not* doing.
- Checklists
  - Although checklists do help to collect data, they are problematic because they tend to insulate people who are far from the "sharp end" and could give a message to public defenders that they have failed;
  - They should be science based; and
  - They are difficult to implement with high caseloads.

Topic Area 4. Assigned Counsel and Panel Attorney Programs for Indigent Defense

Background – Dr. Nadine Frederique for Dr. Alissa Worden, University at Albany, SUNY (View slides)

An assigned counsel system is not new; it is the organic default program that has existed for centuries. It has several weaknesses, however:

- Lack of funds;
- Lawyers who violate their professional duties;
- Lawyers are not always provided for clients;
- Undue influence of judges and elected officials;
- Lack of basic oversight and accountability;
- Lack of leadership from the organized bar; and
- Inadequately supported reforms.

The presence of assigned counsel programs varies across the country. Although conventional wisdom suggests that they are in rural areas, used in places with tight budgets, and found in conservative districts, this is not supported by data in New York. Other answers might be related to decentralized/absent State administrations or courthouse politics.

Much research has examined whether assigned counsel programs are better or worse than public defenders, but better questions would be those leading to an understanding of systems operation and how to improve it, such as:

- The working environments of assigned counsel programs;
- The infrastructure of assigned counsel programs; and
- Who participates, and why.

Answers could help identify promising programs, but because the independent variables can't be controlled, researchers can't manipulate the dependent variables. However, if researchers found

evidence related directly to practical, economic, or professional structures on the local level, it could be leveraged into program improvements. Also, if evidence shows that local conditions comparatively constrained a program, perhaps compensatory measures would help equalize that program's effectiveness.

Two challenging questions for researchers to address are:

- Are we getting the right data? Some States collect data, some don't; perhaps these efforts should be inventoried.
- Are we talking to the right people? There isn't much information from the client's perspective, for example.

Main Themes of Discussion

Participants proposed various topics and questions for research.

- Payment systems and compensation rates
  - Is it by the case, an hourly rate, or a maximum?
  - Pay rates vary across jurisdictions—what is the impact of this variation?
  - Are there caps? Are they flexible or hard caps? How do they affect the effective rate of pay? How does that impact quality of representation?
- Administered assigned counsel vs. assigned counsel by judge/county administrator
  - Is there a difference in outcomes and client satisfaction?
  - Which factors are important (e.g., reduced caseload, training, etc.)?
- Quality determination
  - Is there an administrator who oversees and monitors vouchers, or is it done by judges?
  - What are the qualifications? Are attorneys chosen by a judge or by a committee that involves representatives from constituencies? What are good indicators for screening panels?
  - Is there recertification of attorneys in these systems? How often? Who does the recertification, and what do they look at?
  - Access to resources (social workers, investigators, etc.)?
  - What is the method of assignment (e.g., random)?
    - In Comal County, Texas, defendants can choose from a list; this is also the model in England.
    - Giving a voucher may allow defendants to feel more control over their defense—"consumer perspective of justice."
  - What is the compensation rate?
- Client satisfaction (possibly a better way to determine quality than court outcomes?)
  - What are good ways to understand what clients are thinking?
  - Issues/challenges with surveys—reaching clients released from the system, accuracy, low response rates, and anonymity concerns.
    - A client satisfaction survey may not be the key to defense success, but it still has value;
    - Suggestion is to start with a robust field study, then follow up with a survey; and
    - How/who to administer survey? At a kiosk, online, or in person?
  - When do you contact clients?

        - Clients' expectations change over time as they go through the legal process; a single snapshot may not be sufficient.
    - Does client satisfaction lead to future business for an attorney (network analysis)?
        - Suggested question, "Would you recommend this attorney to a friend/family member?" rather than, "Did you like your attorney?" or "Did you feel your attorney treated you with respect?"
    - Client satisfaction with the attorney vs. client satisfaction with the legal system overall.
- Other questions/topics/considerations
    - Accountability—study examples of systems where accountability is provided;
    - Retention rates;
    - Ways to offer institutional and organizational support in the context of contract attorney systems (resource availability, networking, etc.); and
    - Team-based/holistic defense
        - How could those services be provided in a rural area?
        - Different on the civil side—a trend toward "de-bundling" services.

Large Group Discussion

Additional Comments on the Four Identified Main Topic Areas

Participants offered further thoughts on the four identified main topic areas.

- Indigency determination
    - How much is spent on indigent screening? What percentage of people are found to *not* be indigent? Does screening cost more than assuming indigency?
    - Burdens on clients to prove indigency—how does it impact their perception of the justice system?
    - Indigency screening could be used as a revenue generator in some jurisdictions.
    - Does the private counsel object to indigent qualifications or standards not being enforced?
    - Is there widespread fraud?
    - A national survey on indigency standards would be helpful.
        - A BJS survey instrument exists.
- Variance across localities
    - What explains variance in response to indigent defense? What sort of institutional/political factors come into play?
    - What kind of nongovernment organizations step in to fill voids in defense, and what explains that?
- Interaction of the indigent defense system with other participants
    - Court- and prosecutor-driven research is important because rights get violated even before the defense gets involved.
    - What pressures do prosecutors face?
    - How do judges and prosecutors feel when confronted with issues of indigent defense?
- Specialty courts
    - Where have they been successful? What has contributed to that success? Are there models to follow?

        - Some research has been conducted/is underway; more is needed.
    - How is "success" defined? Is "success" having counsel (doesn't always happen) or having no relapse? Specialty courts may be where clients are most vulnerable to violations of due process rights.
    - What are the standards for specialty courts? What criteria are there for who gets in? What is the role of counsel?
    - What is the true cost? (Consider jail time for sanctions vs. original sentence.)
    - Collateral consequences—impact on the workforce.
    - Flaws of specialty courts as related to those of juvenile courts.

Other Topics NIJ Should Consider for Future Research

Participants offered other ideas for research beyond or cutting across the four identified main topic areas.

- Status offenses as a subset of juvenile offenses (e.g., truancy court, or cases of children in need of supervision)
    - What happens to juveniles in truancy? What is their attorney's role?
- Restoration of rights mechanisms
    - What is available in each State? What mechanisms trigger it? How do you access the process?
- Quality representation
    - How do you envision or define (it's hard to operationalize)? Need to go beyond basic descriptive data.
- Reduced caseloads
    - In jurisdictions that have reduced caseloads, are there different outcomes? If so, what's driving them?
    - Is there a difference in client satisfaction?
    - What is the effect on other participants (e.g., judges) and costs (e.g., reduction in number of days spent in jail)?
- Errors
    - There is a need for ground-up research on latent/undiscovered errors—find out what they are (by audit?), determine the causes, and come up with procedures to address them in a way that practitioners experience.
    - Test what we think are best practices to find out if they really are.
- Crisis situations
    - See as opportunities to research the effects of deprivation of the right to counsel in real time—document damage, look at ripple effects on other systems.
- Implications of low-quality/no representation
    - Do judges behave differently when the defendant is not represented?
    - Do prosecutors have different strategies?
- Effects of defender practices on downstream outcomes.
- Use of technology to track activities and collect data.

Prioritization of Research Issues, Questions, and Gaps

Non-Federal Government participants were asked to name the one or two research issues they would rank as highest priority.

- Quality
  - What it means/how it is defined in terms of both inputs and outcomes;
  - Find a way to think about defense successes along the lines of "near misses" and "good catches" to understand what a good defense in the early stages can do;
  - Expand measures of quality to all players—defenders, judges, prosecutors—and a systematic analysis of different methods to result in an expansive definition of quality in the system;
  - What makes a quality system a quality system?
  - Can we identify what matters most, and why? What is the impact of a quality defense on case outcomes, life outcomes, family situations, recidivism, and other criminal justice factors (e.g., costs of jail time)?
  - How does changing the way we do things impact what we care about (e.g., quality, fairness)? and
  - Reinterpret outcomes to include treatment advocacy as well as trial advocacy.
- Indigency standards/screening
  - Existence of indigency standards and how they are applied;
  - What hoops must defendants go through to get an attorney? Is screening used for other purposes? and
  - Does indigency screening work for/against the defendant?
- Response to a crisis situation (e.g., in Louisiana)
  - An opportunity to respond; and
  - Compare before/after (do more than just descriptive work).
- Lack of counsel
  - Role of the judiciary and prosecutors in making that happen; and
  - A stunning number of people are convicted with no lawyer, including at misdemeanor courts.
- Funding issues
  - How is indigent defense funded, and why it is chronically underfunded? and
  - Hard numbers on what happens when the system shuts down, supported by narratives.
- Effective practices
  - Pick a metric of success, and determine what single piece of practice accomplishes that most often (e.g., what is the most important thing a defender can do to achieve a pretrial release?).
- Caseload
  - Measure the impact of caseload limits on jurisdictions and what difference it makes.
- Systems-based approach to errors
  - Focus on the robustness of the system to people making errors.
- Early appointment
  - What is its impact on pretrial release issues, and how beneficial has it been?
- Collateral consequences
  - Review these particularly as they impact the workforce, since they could move research more quickly into policy-oriented actions.

- Foundation for a larger study
  - Collect what lawyers should do, apply it in one district, and collect the data, which must be flexible, translatable, and transferable for others to adopt.

Further Discussion

Additional discussion occurred along several themes.

- Number of people who go unrepresented
  - Few places keep track of how many waivers occur;
  - Different administrative procedures to get waiver—also, was waiver valid or not? Hard to obtain that data;
    - Idea that pleading guilty waives the right to a lawyer is widely accepted but incorrect.
  - Match docket sheets with jail population on a given day (snapshot)?
  - Observational—pick random day and watch court proceedings?
  - Get courts to want to be partners. Partner with Supreme Courts in each State? and
  - Low-hanging fruit—obtaining estimates of the number of people who go unrepresented could be step 1 in multiphase project.
- What defenders do with their time (tied to quality)
  - Use technology to find some passive way of tracking time spent on activities.
  - Show public defenders the importance of data at ground level (why it matters to them/their clients); gradually build a culture that is data-driven to get progressive buy-in from defenders.
  - Maximum of 8–10 data points—hone in on points that are narrowly described with great accuracy and are tangible in the short run for both administrators and lawyers.
  - Perhaps better to document a measure of effort rather than time spent "lawyering"?
  - Possible resistance to data collection because defenders feel like it's "holding their feet to the fire." High caseloads may also prevent data collection efforts.
  - Use of a case fractionalization scale (lawyer is paid when case develops to a certain point)—the sooner data is reported, the sooner the lawyer is paid—gives an incentive.
  - There may be questions of accuracy if the time is filled in retroactively.
  - Granularity—within each case, how many minutes are on each task (asking for a lot)?
  - Desired granularity depends on the category of the research question—for some, a rough estimate is fine.
- Suggestion was to look at a jurisdiction with a public defense office and one with a panel office, and to compare counties within the same State (e.g., New York).
- Existing studies
  - Classic literature on defenders and the courtroom exists—may be outdated but is still relevant.
- Discovery
  - Take advantage of the variance in discovery processes, and measure the difference it makes and its interaction with the defense process. Use Florida as a potential example?
- Other players
  - Investigators—are they underused in assigned counsel districts?

  - Interview investigators, interpreters, sheriffs to learn about practices of their jurisdictions.
- Sentencing advocacy and Bearden hearings[1]/appearances and outcomes
  - Could be easy to set up an experiment and track these.
  - Looked at in some studies but almost never happens.

Next Steps

NIJ is committed to furthering our research on indigent defense. This meeting will be one of several ways in which we inform our future research agenda. NIJ will continue discussions with our federal partners and strategize about future directions for research, additional meetings, and partnerships to achieve the goal of infusing research into the indigent defense field.

[1] *Bearden v. Georgia,* 461 U.S. 660 (1983). This refers to the hearing that results from failure to pay court penalties. If a State determines that a fine or restitution is the appropriate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay. The Bearden hearing is used to determine this.

Return to Text

Juveniles & Access to Counsel

Tim Curry, Managing Attorney
National Juvenile Defender Center
March 16, 2015

Why Juvenile Defense Is Different

- Goal is rehabilitation.
- Children can't be expected to advocate against adults but are entitled to a voice.
- It's not just about the alleged delinquent act.
- Child & adolescent development calls for greater care.
- Consequences can last a life-time.

In re Gault, 387 U.S. 1, 36 (1967)

- "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable to the seriousness of any felony prosecution."

In re Gault, 387 U.S. 1, 36 (1967)

- It's a 14th Amendment Due Process Right, applying the 6th Amendment right to counsel.
- Services cannot come at the expense of due process – it remains an adversarial system.

Why Is a Rehabilitative System Still Adversarial?

- Procedural Justice.
- Right to Counsel is the right to expressed-interest representation.
- Consequences of court involvement.

Overarching Areas of Concern for Juvenile Access to Counsel

- Early Appointment
- Indigence Determinations
- Waiver of Counsel
- Post-Disposition Counsel

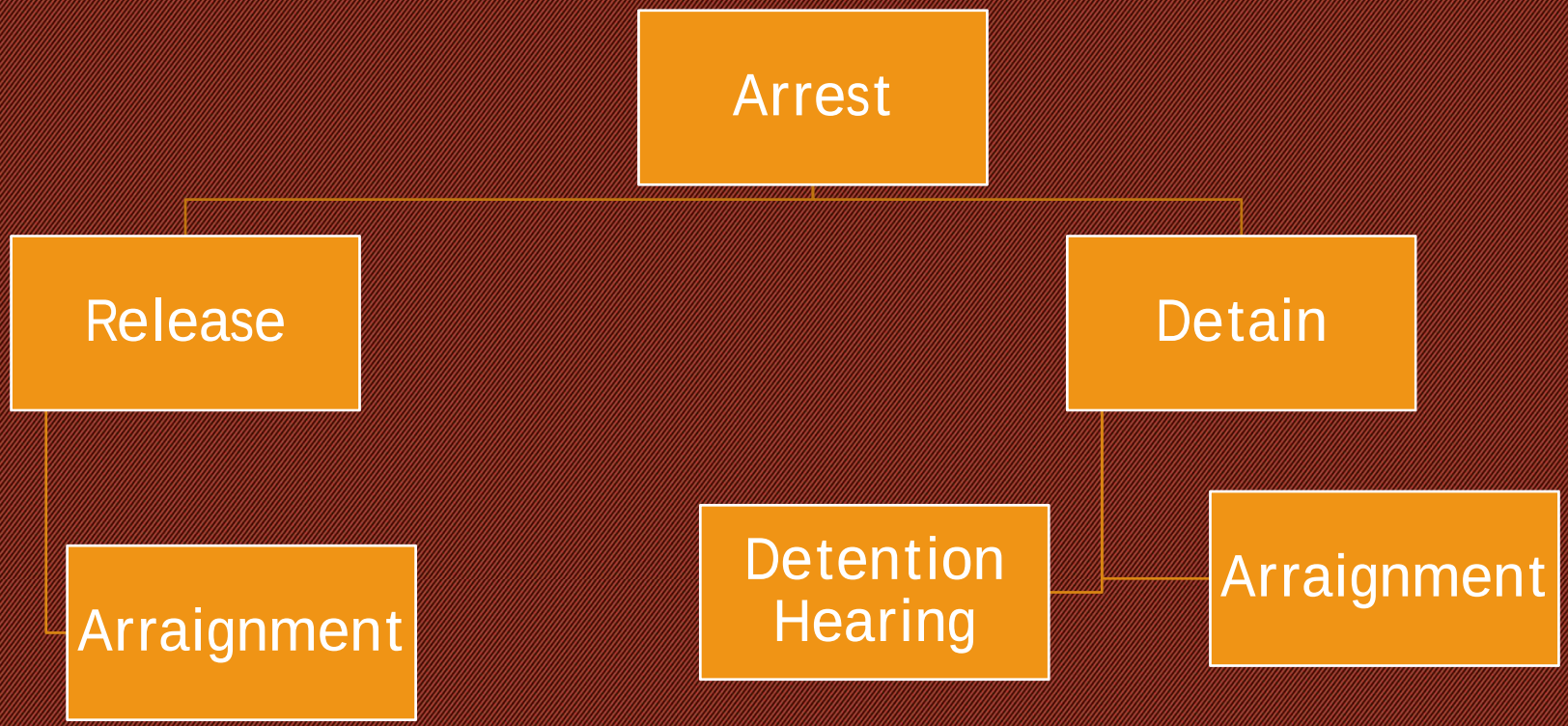
Early Appointment of Counsel

Early Appointment of Counsel

- Timing is key!
- Can't protect rights that have already been waived.

- In some jurisdictions, as high as 80-90% of youth appear before a judge without a lawyer.

Timing of Appointment



N.P. v. Georgia

DOJ Statement of Interest:

"[D]ue process requires that every child who faces the loss of liberty should be represented from their first appearance through, at least, the disposition of their case by an attorney with the training, resources and time to effectively advocate the child's interests."

Early Appointment of Counsel

<u>What's at Stake?</u>

- Liberty
- Inappropriate services
- No voice of the child
- Lack of procedural justice
- Rights waived
- PLEAS!
- Life-long collateral consequences

Early Appointment of Counsel

Obstacles

- Systems are not set up to provide appointment
- Judges accept it
- Defenders accept it
- Police and Prosecutors leverage it
- Families don't know better

Indigence

Indigence

- It's a right; not a privilege.
- Procedures can take days and can be highly invasive.
- Exercising the right to counsel requires delays—and possibly continued detention.

Indigence & Family Income

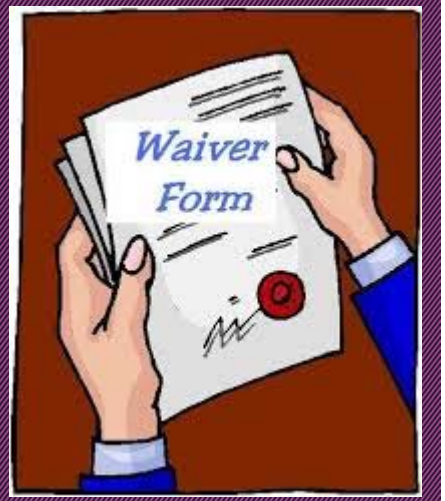
- Kids don't have their own resources.
- Kids have no control over family income.
- Costs can create real conflict between parents and children.

Result: Kids (or even parents) waive counsel

Waiver of Counsel

Factors that Coerce Waiver

- time-consuming indigence procedures;
- pressure from family members who cannot afford the time or expense;
- pressure from prosecutors, judges, and court personnel to resolve it quickly;
- lack of available and qualified defense attorneys on-hand.



If you waive your rights, we can resolve this today.

Waiver Without Comprehension

- Trust the system.
- What can a juvenile defender do for you?
- What will you have to figure out on your own?
- What's could happen tomorrow? A year from now? When you're 18?

Waiver Is too Easy

- Allow waiver ONLY after child has had meaningful opportunity to consult with a juvenile defense attorney.
- Require waivers hearings – on the record, in presence of defense counsel.
- Require explicit findings as to how waiver is knowing, intelligent, and voluntary.

Post-Disposition Access to Counsel

Post-Disposition Access to Counsel

- Disposition is often indeterminate – requires independent monitoring.
  - Isolation or other abusive treatment;
  - proper educational services;
  - proper medical treatment;
  - access to court-ordered services;
  - proper reentry planning; etc.
- Lack of statutory right to post-disposition counsel or no system to provide it.

Return to Text

Barriers to Counsel for Adults

Andrew Davies, Ph.D., NYS Office of Indigent Legal Services

Presentation at the Topical Working Group Meeting
on Right to Counsel and Indigent Defense
March 16, 2015

With thanks to Maureen Cain, Norm Reimer, Jim Bethke, Risa Gerson, Nadine Frederique, Melissa Mackey
and others who provided guidance and content, yet are not responsible for any errors herein.

Barriers to Counsel for Adults - Definitions

- Access to counsel is…
  - First contact with client (timing)
  - Frequency of client interactions (quality)
- Barriers are…
  - State-side – when governments, courts and defenders reduce access
  - Client-side – when clients decide to forego counsel
- Research can generally address…
  - Describing & documenting barriers
  - Examining their causes
  - Examining their impacts

Barriers to Counsel for Adults – State-side

- ‘No counsel courts’ – Heckman et al. v. Williamson County (2013)
  - Independent administration **Systemic factors?**
  - Requests for counsel must be transmitted & ruled on w/in 24 hours
  - Defendant must be provided with attorney contact information **Logistical factors?**
  - No waiver without discussion of defendant decision to waive on the record
  - Defendant may not be required to speak with prosecutor prior to waiver.
  - Court proceedings must be public **Procedural factors?**

Find the settlement here: http://sixthamendment.org/wp-content/uploads/2013/01/Joint-Motion-to-Dismiss-Heckman-et-al-v.-Williamson-County-et-al-.pdf

Barriers to Counsel for Adults – Systemic

- **Funding, Compensation, Charging defendants**

To reduce expenditures, the Public Defender Office is restricting services by reducing the number of conflict attorneys the office has on contract.

Conflict attorneys are necessary for appointment in cases where there are multiple defendants who cannot afford an attorney. The number of conflict attorneys is being reduced from seven to two, and those two remaining attorneys will handle the most serious felony cases.

The remaining cases will most likely be assigned to private attorneys, who will be handling the cases **without compensation.**

26th Judicial District Public Defender Office restricts legal services due to finances

Nikki Henderson

Like 27 Tweet 4 Pin it Share 2

03/05/2015 03:56 PM 03/05/2015 04:11 PM

The 26th Judicial District Public Defender Office for the Parishes of Bossier and Webster provides legal services to numerous indigent adults and juveniles.

Despite diligent efforts by the Public Defender Office to reduce expenditures and increase revenues, it is unable to secure the financial resources necessary to provide competent legal representation for all of its clients and must begin restricting services effective March 5, 2015.

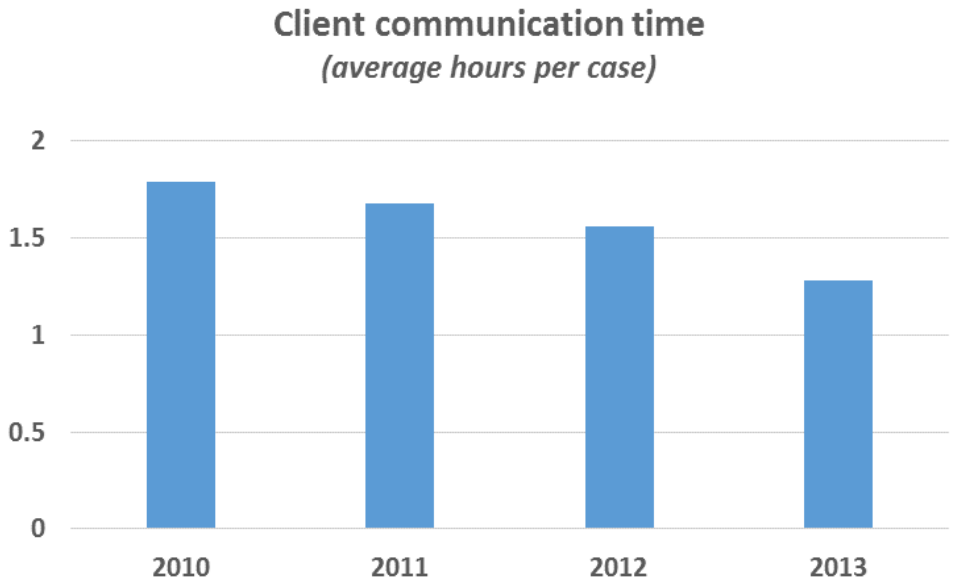
Henderson, Nikki – March 5 2015.
http://www.arklatexhomepage.com/story/d/story/26th-judicial-district-public-defender-office-rest/10034/w9LZ9RZ4OUeZw7bYI4s01Q

Barriers to Counsel for Adults – Systemic

- **Defender funding**
  - Support staff, Salaries, Resources to do the job (overtime, mileage)
  - The consequences:
    - **Slipping through the cracks in an underfunded program:** 'Comparing the number of cases assigned to the number of cases billed, they see about 12-15% "shrinkage". The program has no idea what happened to these cases.'
    - **Following up in a better-funded program:** "Client meetings are double-booked in anticipation of no-shows. The office administrator follows up on missed appointments."
- **RQ: How does defender funding affect access to attorneys?**

Barriers to Counsel for Adults – Systemic

- **Attorney compensation**
  - *Roulan v. County of Onondaga (2013)*
  - Suit originally brought, 2008
    - No lawyers for minors without evidence of parent indigence
    - No payments to lawyers not on the panel, even if originally retained by defendant
    - No lawyers prior to determination of eligibility



King, G. (2014), *A Study of Criminal Cases and Indigent Defense in Four New York Counties*.

- **RQ: How do rules of compensation affect access to attorneys? ('Chilling effect'?)**

Barriers to Counsel for Adults – Systemic

Q. Is appellate counsel required to seek input from the client regarding the appeal and to otherwise communicate regarding same?

A. Yes. In fact, the most significant source of client complaints is the failure of counsel to communicate and counsel is therefore strongly advised to do so. As noted below however, this does not require a face to face meeting with the client.

← Court policy

Q. Is assigned counsel in a criminal case authorized to visit an inmate at his or her place of confinement.?

A. No. Since an appeal must be based on th
the client to discuss the facts involved in a
however, and this office will assist in arra
of confinement requires prior approval. Th
absolutely necessary he or she may seek

New standard →

IX. Meeting with the Client

To establish a relationship of trust and confidence, counsel must meet with the client. If the client is incarcerated, the meeting should occur in the jail or prison, unless such a meeting would not be in the client's best interest. If the client is not incarcerated, a meeting may occur at counsel's office. If that is not feasible or if a visit at another site might yield more relevant information, counsel should make appropriate arrangements. Once a relationship has been established, counsel may communicate by phone, but should be mindful that such conversations with incarcerated clients typically are not secure. Further, counsel should consider the security of phone calls to clients who live with co-defendants or co-respondents or anyone who might use information about the client in a harmful way.

- **RQ: How do rules of compensation affect access to attorneys? ('Chilling effect'?)**

Barriers to Counsel for Adults – Systemic

- **Charging defendants**
  - ‘She was $11.00 over income and stated “What lawyer will represent me for $11.00?”’ (NYSBA Task Force on Family Court, Final Report 2013, p.106)
  - Upfront fee ‘can range from $10 to $400’ (NPR Guilty & Charged)
  - Recoupment fees (Anderson 2009)
- **RQs:**
  - **How does charging defendants affect access to counsel?**

State-By-State Court Fees

MAY 19, 2014 4:02 PM ET

NPR conducted a nationwide survey — with help from NYU's Brennan Center for Justice and the National Center for State Courts — of common fees courts are charging to defendants and offenders. Read the related investigation here.

Yes | Yes, with caveats | No

State	Electronic monitoring[1]	Probation or supervision	Public defender or legal costs	Room and board[2]	Increased civil and/or criminal fees since 2010
Alabama	✔	✔	✔	✔	✔
Alaska	✔	✔	✔	✔	
Arizona	✔	✔	✔	✔	✔
Arkansas	✔	✔	✔	✔	✔
California	✔		✔	✔	✔
Colorado	✔	✔	✔	✔	✔
Connecticut	✔		✔	✔	✔
Delaware	✔	✔	✔	✔	✔
District of Columbia			✔		

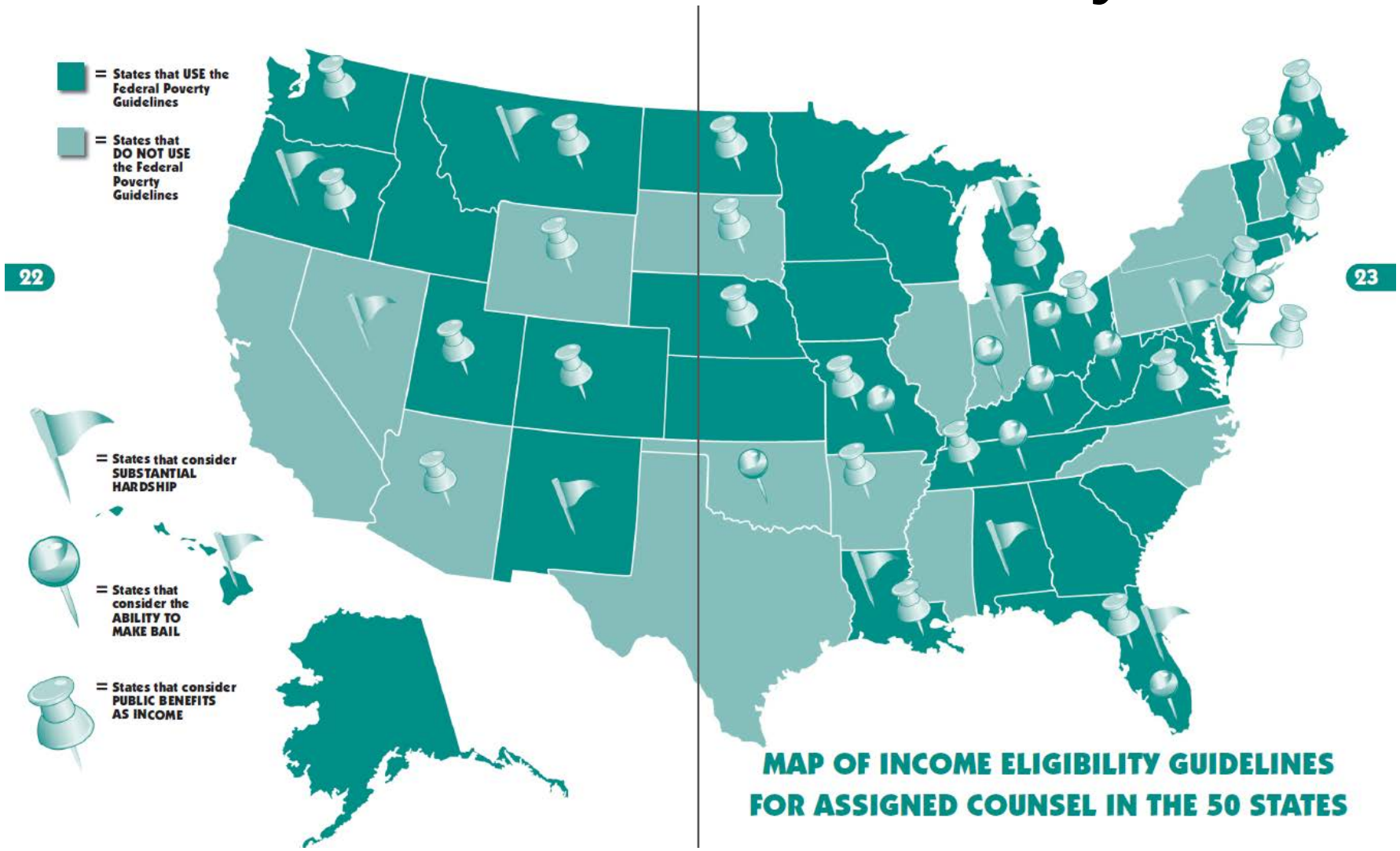
SHARE

Comment

“In at least 43 states and the District of Columbia, defendants can be billed for a public defender.”

NPR, Guilty & Charged, 2014

Barriers to Counsel for Adults – Systemic



From Gross, J., (2014). *Gideon at 50: A Three Part Examination of Indigent Defense in America, Part 2, Redefining Indigence, Financial Eligibility Guidelines for Assigned Counsel.* NACDL.

Barriers to Counsel for Adults – Systemic

Investigator making dent in county's indigent defense costs

Story Comments Image (4) Print Font Size: 10

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Staff photo— Rod Aydelotte

McLennan County Sheriff's Office Detective Eric Carrizales, the new indigent defense investigator, talks to people filling out paperwork in the courthouse Wednesday. The county reports a huge drop in requests for court-ordered attorneys since Carrizales began investigating them in November.

Posted: Friday, May 30, 2014 12:01 am | *Updated: 2:55 am, Wed Jul 23, 2014.*

By STEPHANIE BUTTS
sbutts@wacotrib.com

The presence of a new McLennan County indigent defense investigator has substantially reduced the number of requests for court-appointed, county-funded attorneys.

McLennan County Indigent Defense Coordinator Cathy Edwards said she has seen about a 40 percent drop in requests since sheriff's office Detective Eric Carrizales began investigating them in November. Edwards said she received as many as 50 applicants in

Barriers to Counsel for Adults – Procedural

- **TX Code of Criminal Procedure 17.09 Sec. 4**
  - the judge or magistrate in whose court a criminal action is pending may not order the accused to be rearrested or require the accused to give another bond in a higher amount because the accused:
    (1) withdraws a waiver of the right to counsel; or
    (2) requests the assistance of counsel, appointed or retained.

- **RQs:**
  - **What court procedures act to deny or limit access to counsel?**
  - **What is the impact on defendant decision-making?**

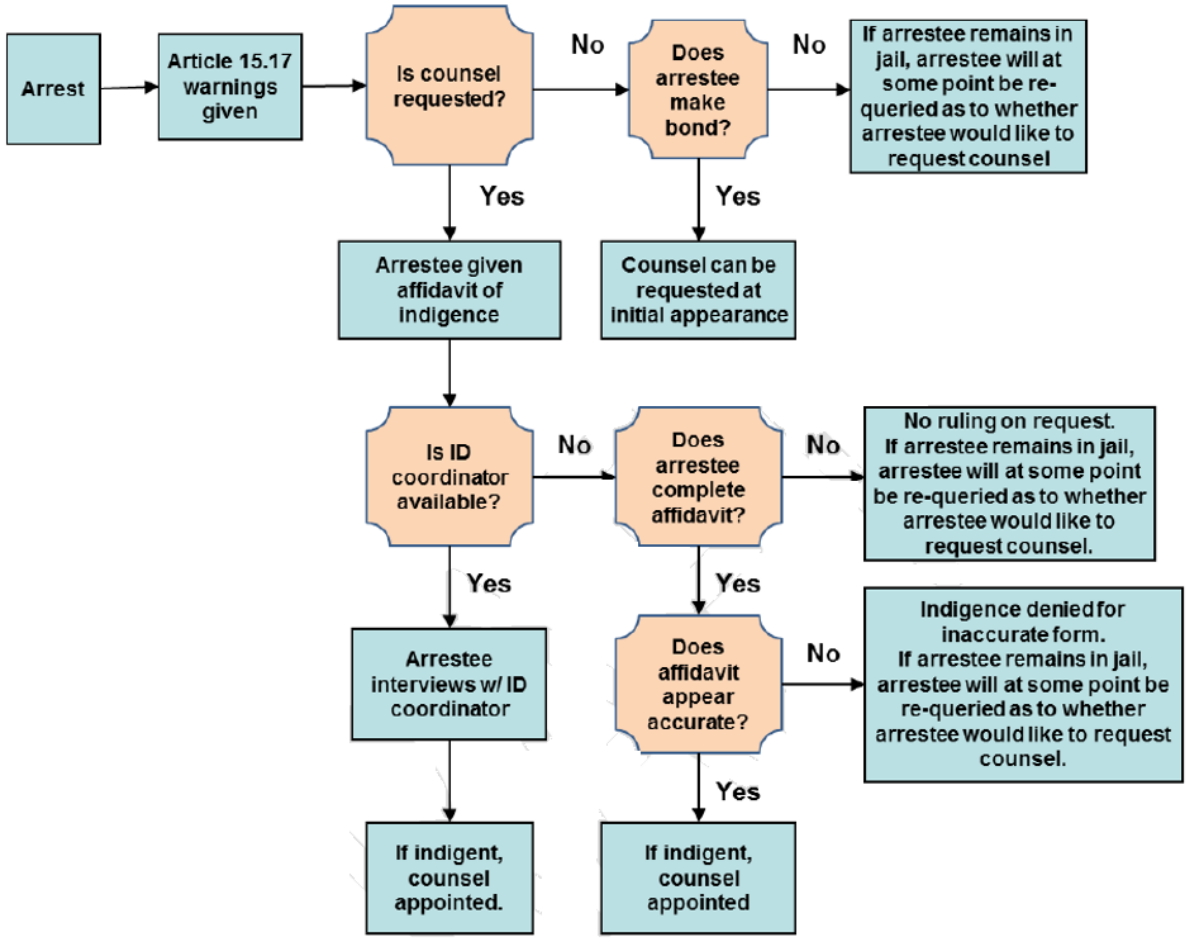
Barriers to Counsel for Adults – Procedural

- **Colorado Revised Statutes 16.7.301**
  - Section 4 (repealed 2013): in misdemeanor cases, "The application for appointment of counsel…shall be deferred until after the prosecuting attorney has spoken with the defendant…"
- **Three Minute Justice (NACDL, 2011)**
  - '…the amount of the lien will be $50.00 for a plea at arraignment and $350.00 for a plea after arraignment.'
  - Informal pressure from court actors?
- **RQs:**
  - **What court procedures act to deny or limit access to counsel?**
  - **What is the impact on defendant decision-making?**

Barriers to Counsel for Adults – Logistical

- **Assignment procedures**

Figure: Procedures for Requesting Counsel at the Article 15.17 Hearing



Barriers to Counsel for Adults – Logistical

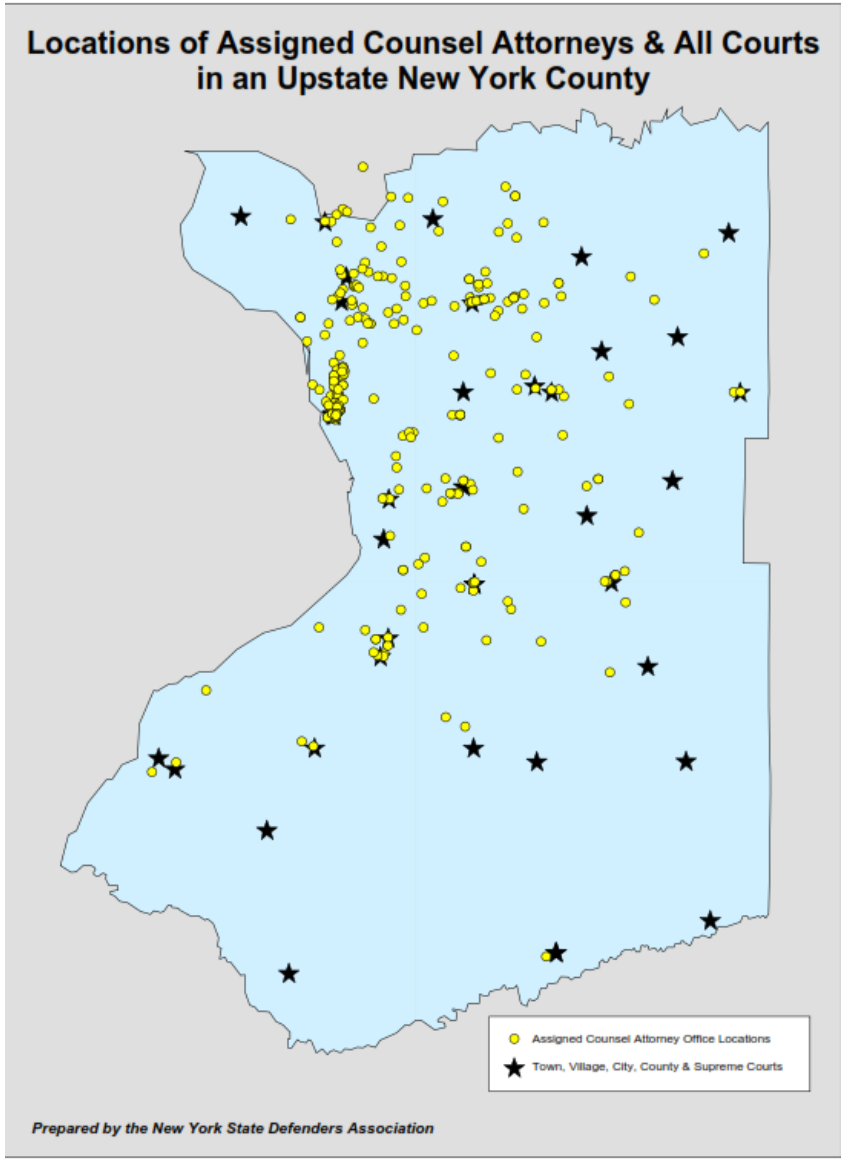
- **Assignment procedures**
  - Assignment is by fax from the court. If incarcerated, someone will meet with them the following day. If they are not incarcerated appointment wait times are presently 6-8 weeks.
  - Courts employ a 'referral sheet' which is provided to the PD. An attorney is assigned to pick up on their way out of court at the end of the day. The PD will review the sheets the following day, and discover which defendants were sent to jail.
  - Courts should fax the 'securing order'. Not all judges do this, however. Sheriff's Dept also sends out a complete jail roster daily. [Attorney] and his colleagues look over the list & see if there are any new names. If someone's booked in the defenders call the jail and try to find out why they're there. Only 'out of paranoia of forgetting someone' does [Attorney] track people down in this way.
- **RQ: Does the way defender services are organized impact access to counsel?**

Barriers to Counsel for Adults – Logistical

- **Assignment procedures**
- **System design**
  - Assigned counsel vs. institutionalized defenders?

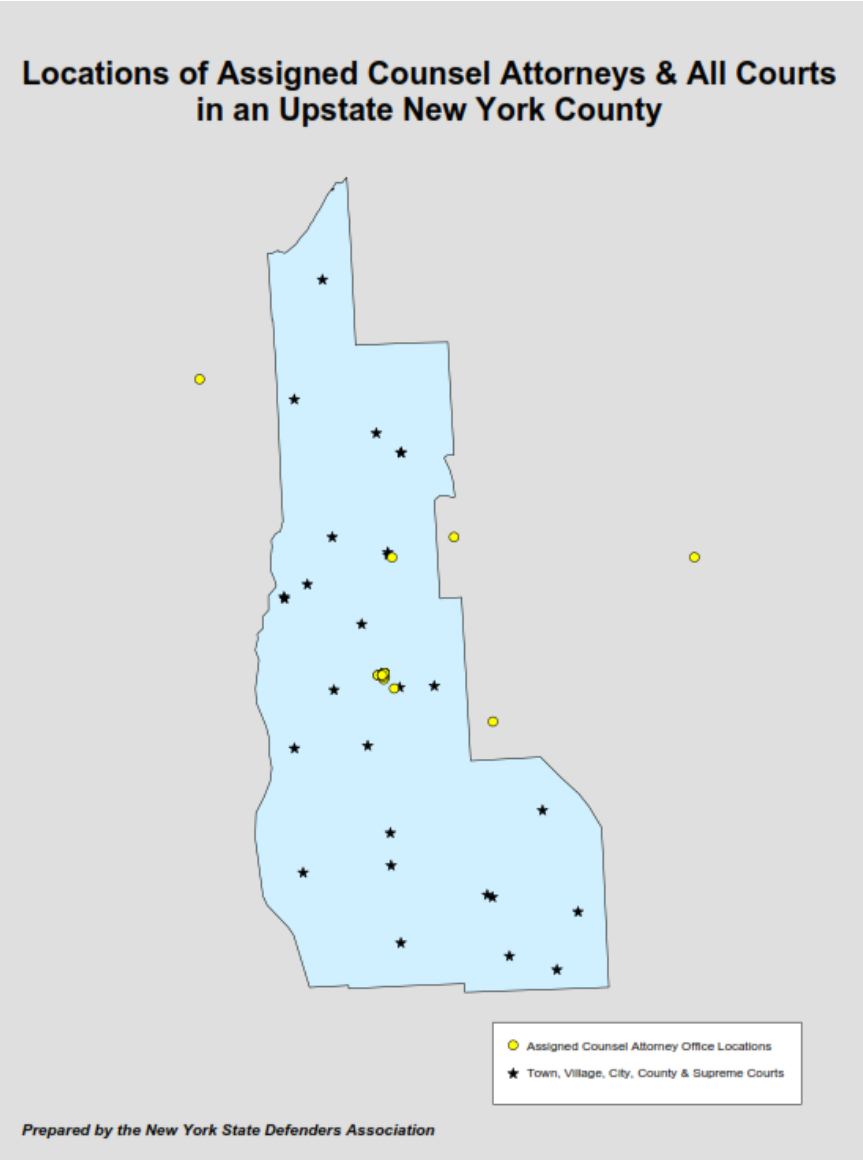
Barriers to Counsel for Adults – Logistical

- **Assignment procedures**
- **System design**
  - Assigned counsel vs. institutionalized defenders?



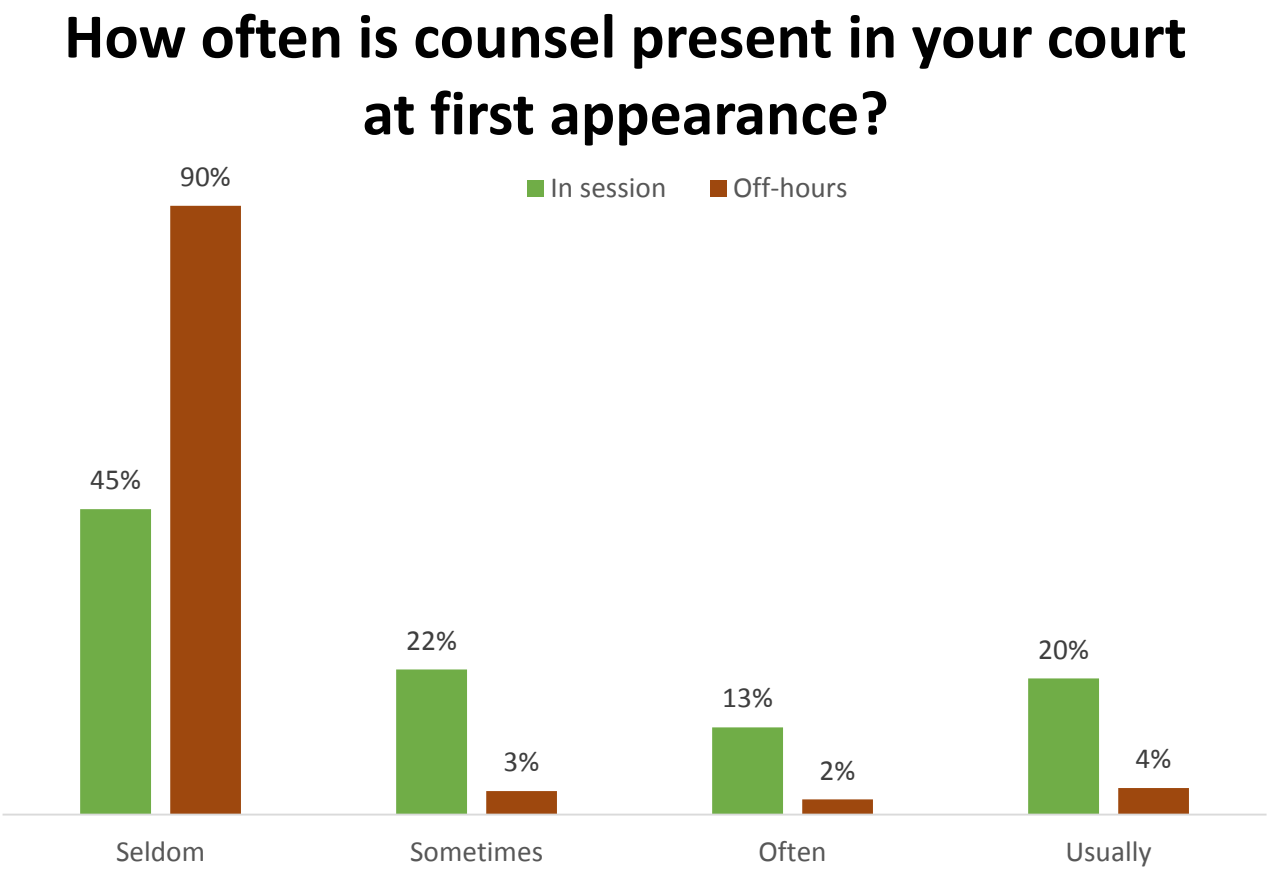
Barriers to Counsel for Adults – Logistical

- **Assignment procedures**
- **System design**
  - Assigned counsel vs. institutionalized defenders?



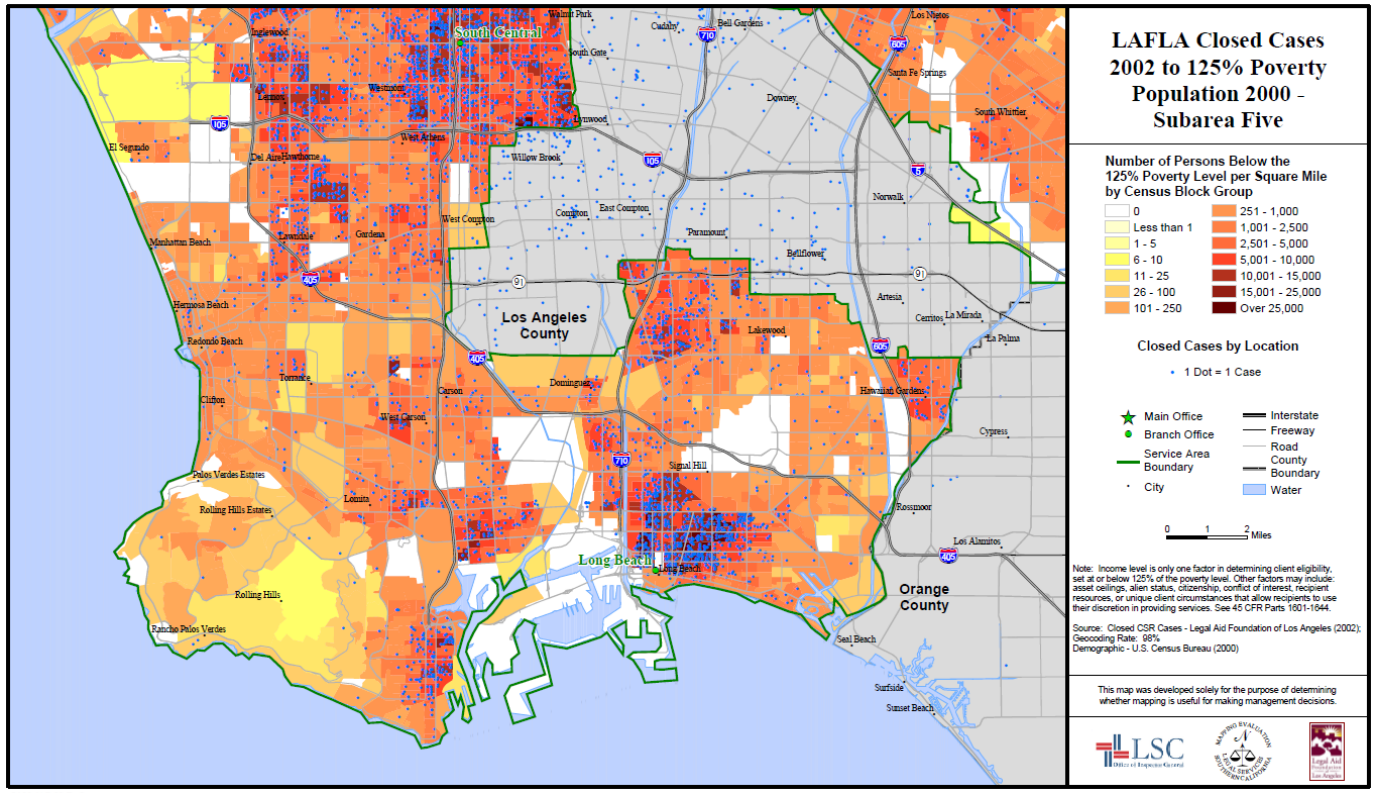
Barriers to Counsel for Adults – Logistical

- **Assignment procedures**
- **System design**
  - Assigned counsel vs. institutionalized defenders?
  - Court system design



Barriers to Counsel for Adults – Logistical

- **Assignment procedures**
- **System design**
  - Assigned counsel vs. institutionalized defenders?
  - Court system design
  - Client choice? (Comal County, TX)



EVALUATION OF LEGAL SERVICES MAPPING

http://www.oig.lsc.gov/mapping/mapping.htm

Barriers to Counsel for Adults – Logistical

- **Assignment procedures**
- **System design**
- **Bias?**

THE YALE LAW JOURNAL

L. SONG RICHARDSON & PHILLIP ATIBA GOFF

Implicit Racial Bias in Public Defender Triage

ABSTRACT. Despite the promise of *Gideon*, providing "the guiding hand of counsel" to indigent defendants remains unmanageable, largely because the nation's public defender offices are overworked and underfunded. Faced with overwhelming caseloads and inadequate resources, public defenders must engage in triage, deciding which cases deserve attention and which do not. Although scholars have recognized the need to develop standards for making these difficult judgments, they have paid little attention to how implicit, i.e., unconscious, biases may affect those decisions. There is reason to suspect that unconscious biases will influence public defender decisionmaking due to generations of racial stereotypes specific to stigmatized groups and crime. This Essay urges legal scholars and practitioners to consider how implicit biases may influence the rationing of defense entitlements and suggests ways to safeguard against the effects of these unconscious forces.

Barriers to Counsel for Adults – State-side

- Review of RQs: How do the following things affect access to counsel?
  - Systemic
    - Defender system funding
    - Attorney compensation
    - Charging defendants
  - Procedural
    - Court-efficiency efforts
  - Logistical
    - Assignment procedures
    - System type
    - Biases
- Credible, national in scope, systematic

Barriers to Counsel for Adults – Client-side

- **Declining the right to counsel**
  - Lack of trust

Casper, J.D., (1970-1), "Did you have a lawyer when you went to court? No, I had a public defender." *Yale Review or Law and Social Action*, vol.1, p.4.

"You say the Public Defender is like that?"

"Sure, you know, [it's as if someone says to a junkie] 'Well, here's the bag of dope. If you want it, you can take it; if you don't. . .' Well, you know, you say, 'Yeh, I want it, I want it, you know, I'm sick, man,' you know. That's the way it is, man. It's nothing big to him. Like I say, he makes deals like this every day."

Others made similar comments:

"He seemed like he didn't care one way or the other. He just cop out, you know. Like, like you see a police walking on the street writing a ticket out, you know. He puts a ticket on the car. He don't care whose car it is. Just like you, man. [The Public Defender] say, just, you know, 'You cop out to this', and you say, 'no', and he says, 'I see if I can get a better deal.' Then he brings another offer: 'You cop out to this.' Just like that, you know. Just checking on the cop-outs."

"A public defender is just like the prosecutor's assistant. Anything you tell this man, he's not gonna do anything but relay it back to the public defender [*sic:* he means the prosecutor], they'll come to some sort of agreement,and that's the best you're gonna get. You know, whatever they come to and he brings you back the first time, well, you better accept it because you may get more."

". . .he just playing a middle game. You know, you're the Public Defender, now you, you don't care what happens to me, really. . .you don't know me and I don't know you. . .this is your job, that's all. . .so, you're

Barriers to Counsel for Adults – Client-side

- **Declining the right to counsel**
  - Lack of trust
  - Innocents
  - Non-citizens

Table 6. Estimated total operating expenditures and services in programs that provide indigent criminal defense in the Nation's 100 largest counties, 1999

Operating expenditures	Total programs	Type of program: Public defender	Assigned counsel	Contract
Number of programs	314	123	126	65
Operating expenditures (in thousands)				
Total	$1,205,136	$880,920	$247,204	$77,012
Median	1,500	4,536	538	319
Mean	3,850	7,221	1,962	1,185
Minimum	<1	100	<1	8
Maximum	94,400	94,400	13,143	9,000
Percent of programs where operating expenditures include:				
Expert services	81.1%	84.6%	83.3%	84.6%
Investigator services	92.9	95.9	90.5	95.4
Interpreter services	70.2	80.5	68.3	53.8
Transcript services	65.1	81.3	60.3	50.8
Social services	34.0	49.6	21.4	18.5

Defrances & Litras (2000). *Indigent Defense Services in Large Counties, 1999.* Bureau of Justice Statistics, Washington D.C., NCJ# 184932.

Five Ways in Which Innocence Can Put Innocents at Risk

1. With confidence, police investigators commit false-positive errors and presume innocent suspects guilty.
2. Naively believing that truth and justice will prevail, innocent suspects waive their rights to silence and to counsel.
3. Despite or because of their plausible and vigorous denials, innocent suspects trigger highly confrontational interrogations.
4. Certain interrogation techniques (e.g., isolation, false evidence, minimization) increase the risk of a false confession.
5. In contrast to the assumption that "I'd know a false confession if I saw one," police overbelieve the confessions of innocent people.

Kassin, Saul (2005). On the Psychology of Confessions: Does Innocence put Innocents at Risk? *American Psychologist*, 60/3, 215-228.

Barriers to Counsel for Adults – Client-side

- **Declining the right to counsel**
  - Lack of trust
  - Innocents
  - Non-citizens
  - Mentally disordered persons
- **RQs:**
  - **Who is more likely to decline counsel?**
  - **How can they be reached?**
  - **Do barriers to counsel have disparate impacts on different populations?**

Five Ways in Which Innocence Can Put Innocents at Risk

1. With confidence, police investigators commit false-positive errors and presume innocent suspects guilty.
2. Naively believing that truth and justice will prevail, innocent suspects waive their rights to silence and to counsel.
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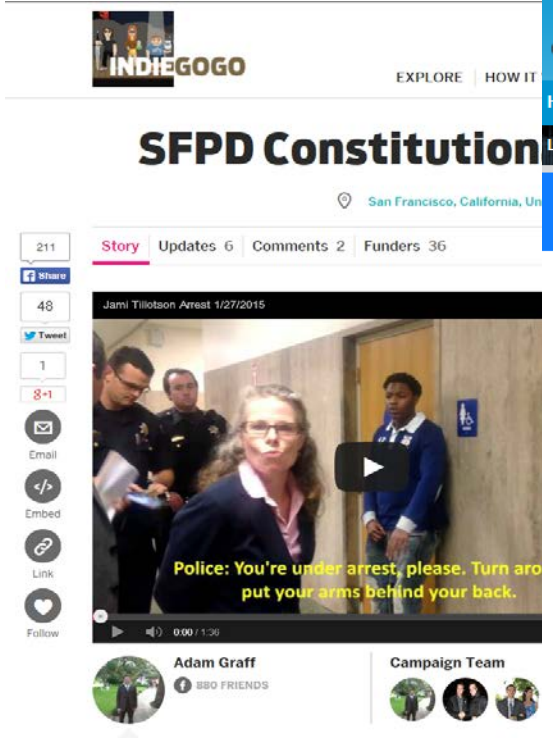
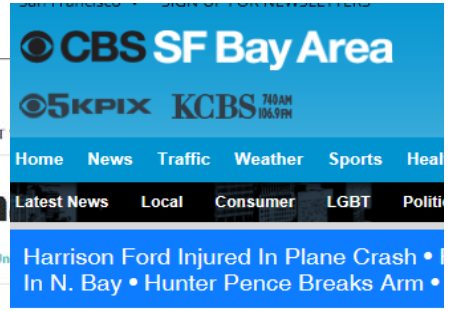
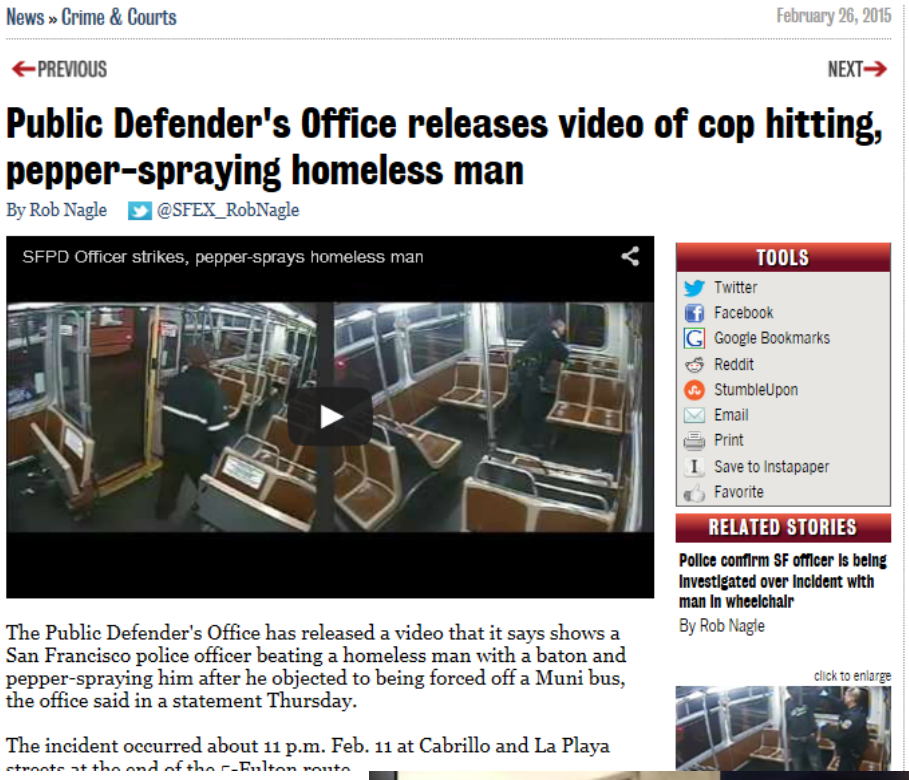
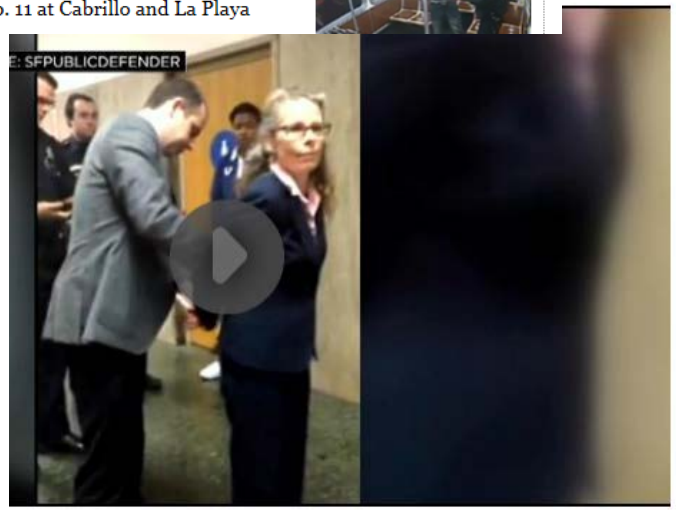
Barriers to Counsel for

- **Declining the right to counsel**
  - Lack of trust









Barriers to Counsel for Adults – Trust

- **Declining the right to counsel**
  - Lack of trust…elections?
  - ‘Campaign rhetoric ranges from anodyne promises of efficiency in the spending of taxpayer dollars, to specific plans to restrict coverage of certain categories of defendants, to more insidious promises to undermine the advocacy system by pursuing less vigorous defenses.’ (p.817)

Public Defender Elections and Popular Control over Criminal Justice

*Ronald F. Wright**

Voters in the United States select some of the major actors in criminal justice, but not all of them. Among the major figures in the criminal courtroom, voters typically elect two of the three: the prosecutor and the judge, but not the public defender. Prosecutors in almost all states are elected at the local level. Judicial elections offer more of a mixed bag, but a strong majority of jurisdictions elect their judges in some form or other. Unlike prosecutors and most judges, however, the public defender is typically not an elected official, even though the defender is a public employee with important budgetary and policymaking authority over criminal justice. Why the difference? Do we believe that voters would behave markedly differently when electing public defenders? Or do we believe that public defenders themselves would respond to voter input in less desirable ways than other criminal justice officials? As it happens, we have some actual experience to draw upon in answering these questions because a few jurisdictions actually do elect their public defenders. Florida, Tennessee, and a few places in California and Nebraska elect their chief public defenders at the local level, and have done so for decades.[1]

Part I of this Article reviews the existing evidence about the election of criminal justice officials and presents new evidence about the campaigns and outcomes in public defender elections. Voters respond to candidates for the public defender's office much in the same way that they react to candidates for the prosecutor's office: they choose the incumbent, even more often than they do for legislators and chief executives.[2] The candidates themselves also behave fairly similarly in public defender and prosecutor election campaigns. Both the prosecutor and the defender candidates spend a disappointing

Wright, R. F., (2010), “Public defender elections and popular control over criminal justice”, *Missouri Law Review, Symposium 2010*.

Barriers to Counsel for Adults – Client-side

HOUSTON

Defense attorneys protest Houston judge's procedures

Defense attorneys say misdemeanor jurist's handling of arraignments is 'unethical,' 'unconstitutional,' 'illegal'

By Brian Rogers | June 27, 2014 | Updated: June 27, 2014 8:08pm

2

Photo: Cody Duty, Houston Chronicle

Review of RQs

- How much work is there on the existence, causes, and consequences of the following barriers?
- How much of is it credible, systematic and national in scope?

	Existence	Causes	Consequences
State side			
Systemic			
Funding	Quite a bit	Some	
Compensation			
Eligibility & other rules	Some		
Procedural			
Court efficiency efforts	Some	Some	Some
Logistical			
Assignment procedures	Some	Some	Some
System type			
Biases	Some		
Client side			
Lack of trust	Some		
Innocence	Some		
Non-citizens	Some		
Mental disorders	Some	Some	Some

Thank you!

Andrew Davies
Director of Research, NYS Office of Indigent Legal Services
80 South Swan St, 29th Floor
Albany NY 12204
Andrew.davies@ils.ny.gov
518-461-1889

Return to Text

Measuring Success

Meg Ledyard, PhD

Travis County Criminal Courts

North Carolina Systems Evaluation Project

- 4 Sites: North Carolina Indigent Defense Services, Travis County, TX, Knox County, TN, Connecticut
- Measure Outcomes, Create Toolkit

Toolkits

Case Outcomes

Access to Attorneys

Pretrial Release

Case Outcome KPI's

Client Outcomes	Key Indicator
Best	I. Percent of cases that ended in non-conviction, disaggregated by dismissal without leave, non-criminal responsible, and deferred prosecution
Best	II. Percent of convictions that ended in an alternative to incarceration**
Best	III. Percent of felony cases that ended in a conviction where the conviction was a non-felony*
Best	IV. Average Percent of sentence avoided for cases that ended in a conviction and the average jail or prison sentence received (months)*
Worst	V. Percent of cases defendant is convicted of the highest charge and all charges and convicted of the highest charge and some, but not all, charges*
Worst	VI. Percent of alternative to incarceration convictions that ended in supervised probation**
Worst	VII. Percent of convictions and jail sentences that were time served*
Both	VIII. Average case cost (per-case attorney fees only)
Both	IX. Average cost of court fees and fines (excludes restitution, attorney fees)

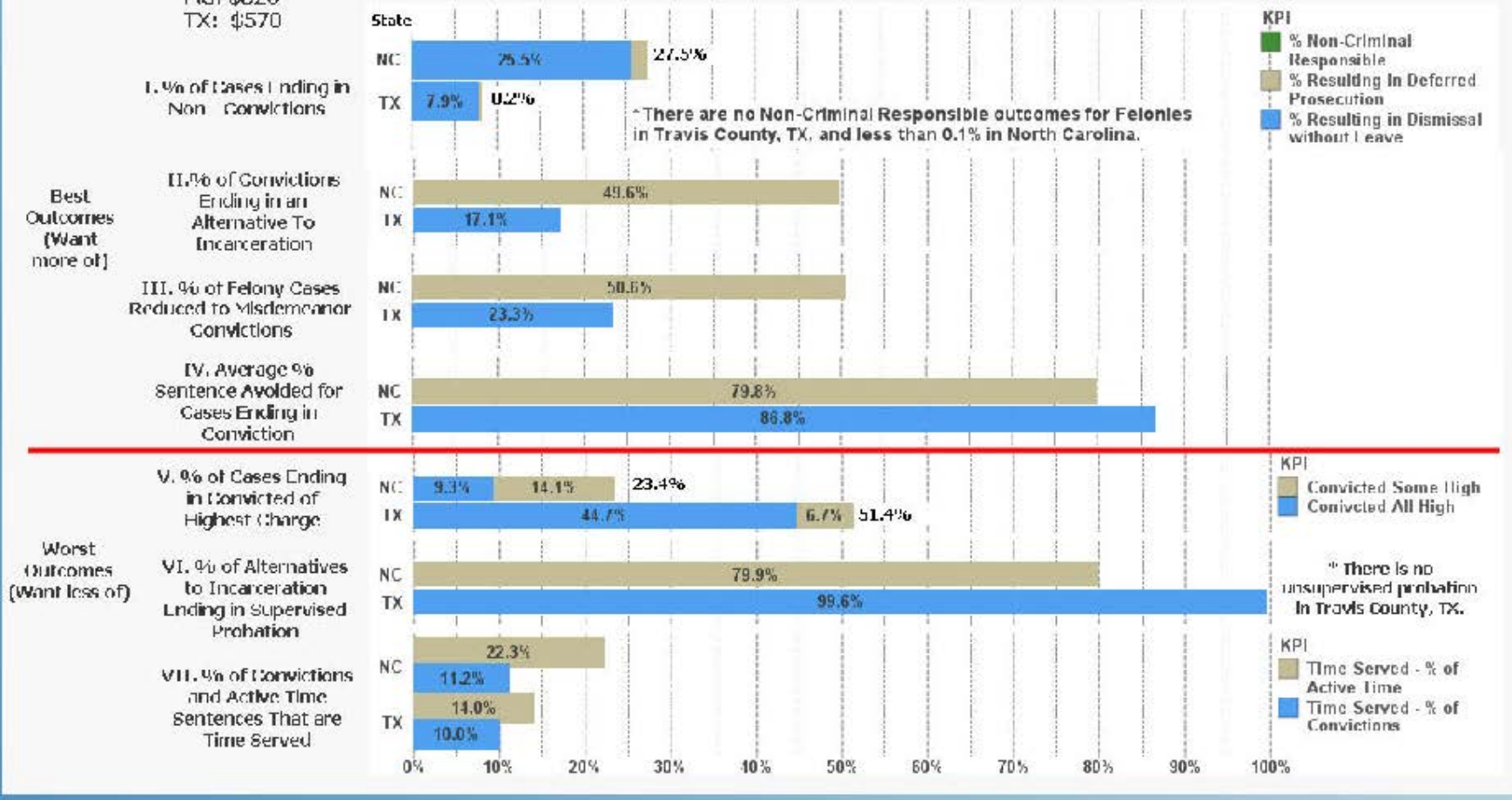
NCSEP Data

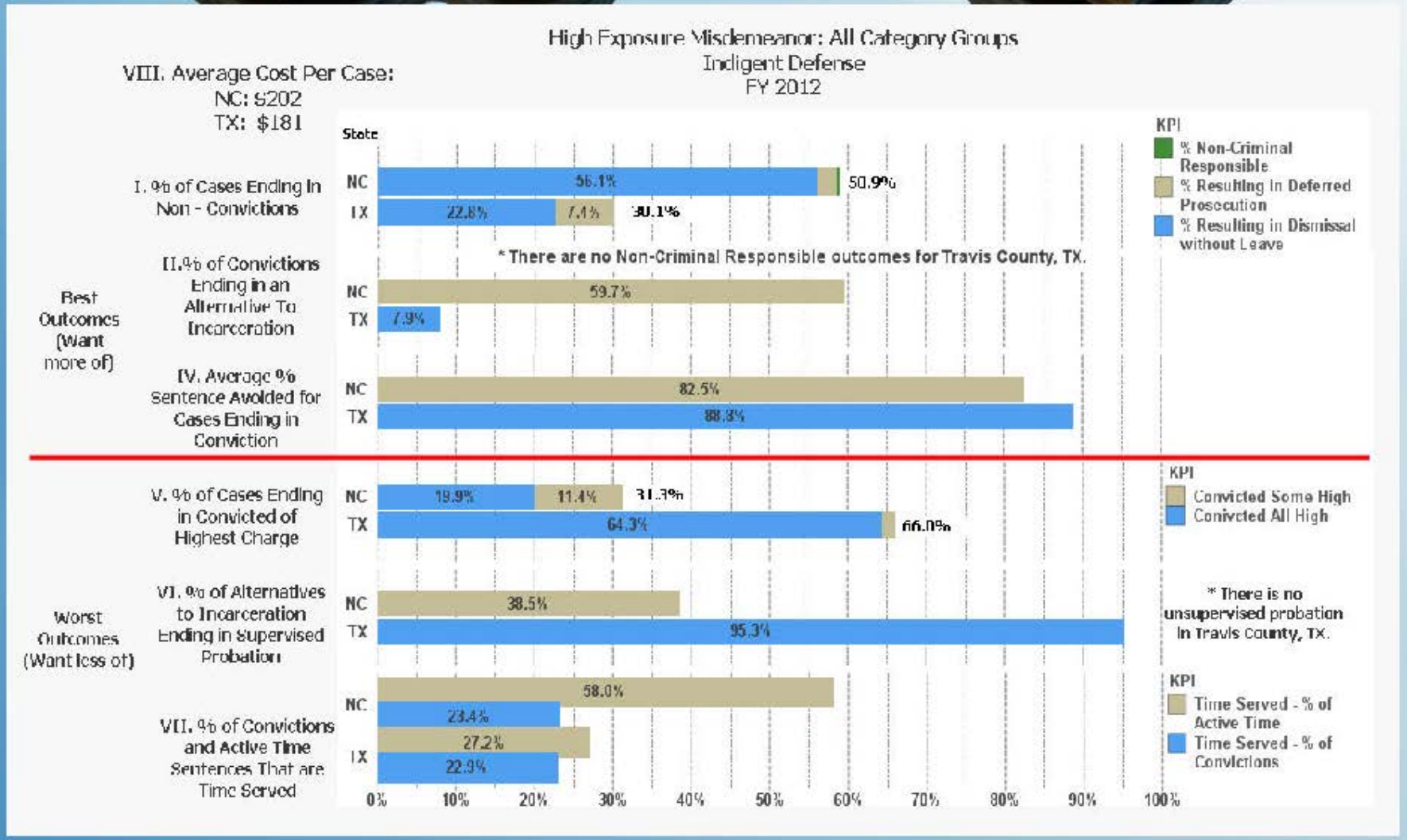
- North Carolina and Travis County, TX
- FY 2012 – Cross Section
- FY 2009 – FY 2012 – Time Series
- NCSEP Graphs:

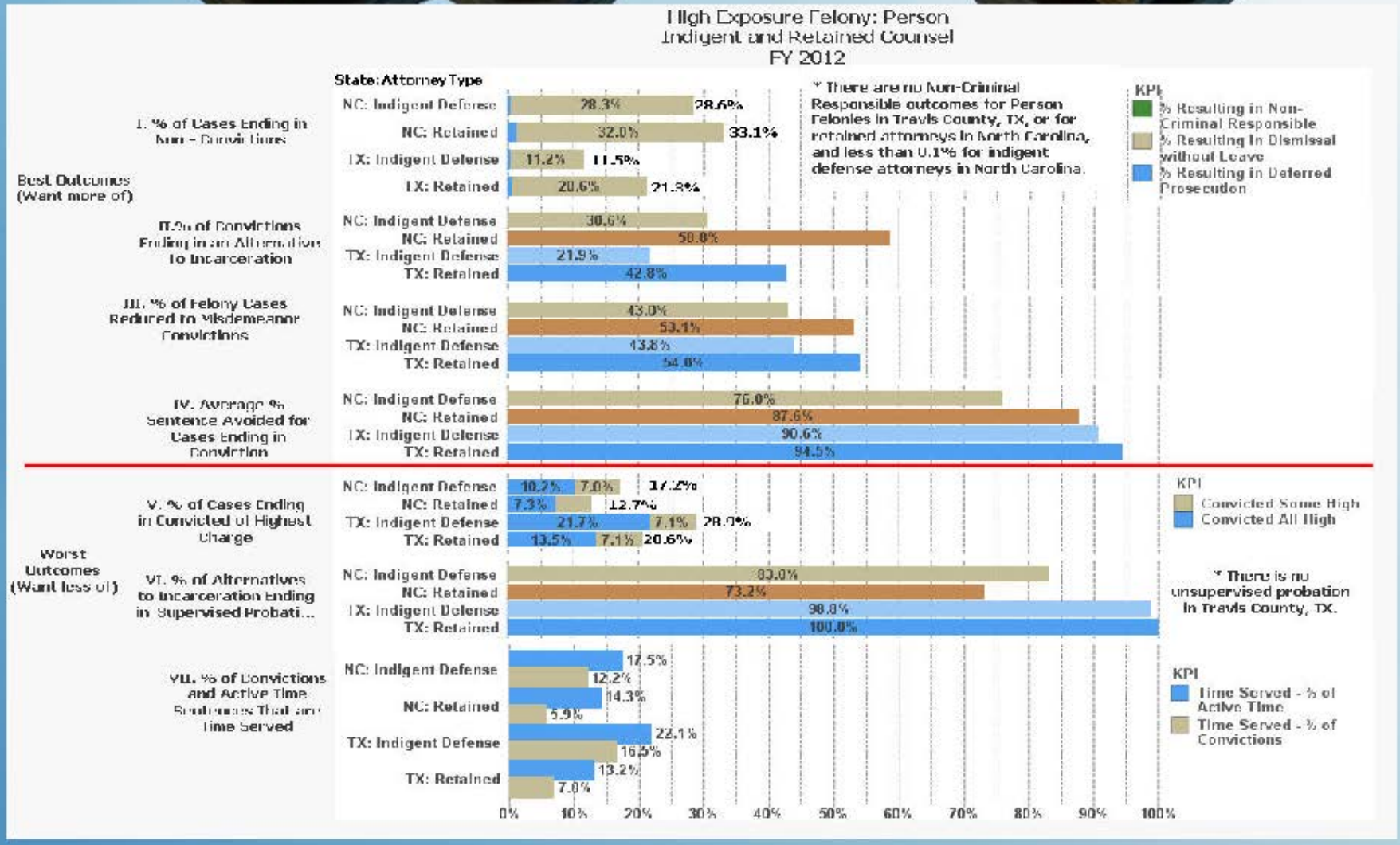
  Caseload, Interactive Graphs, Access to Attorneys

High Exposure Felony: All Category Groups
Indigent Defense
FY 2012

VIII. Average Cost Per Case:
NC: $520
TX: $570




High Exposure Misdemeanor: All Category Groups
Indigent Defense
FY 2012
VIII. Average Cost Per Case:
NC: $202
TX: $181
State
KPI
% Non-Criminal Responsible
% Resulting in Deferred Prosecution
% Resulting in Dismissal without Leave
I. % of Cases Ending In Non - Convictions
NC
TX
56.1%
50.9%
22.8%
7.4%
30.1%
* There are no Non-Criminal Responsible outcomes for Travis County, TX.
II. % of Convictions Ending in an Alternative To Incarceration
59.7%
7.9%
Best Outcomes (Want more of)
IV. Average % Sentence Avoided for Cases Ending in Conviction
82.5%
88.3%
V. % of Cases Ending in Convicted of Highest Charge
19.9%
11.4%
31.3%
64.3%
66.0%
KPI
Convicted Some High
Conivcted All High
VI. % of Alternatives to Incarceration Ending in Supervised Probation
38.5%
95.3%
Worst Outcomes (Want less of)
* There is no unsupervised probation in Travis County, TX.
VII. % of Convictions and Active Time Sentences That are Time Served
58.0%
23.4%
27.2%
22.9%
KPI
Time Served - % of Active Time
Time Served - % of Convictions
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%


High Exposure Felony: Person
Indigent and Retained Counsel
FY 2012
State:Attorney Type
Best Outcomes (Want more of)
I. % of Cases Ending in Non - Convictions
NC: Indigent Defense 28.3% 28.6%
NC: Retained 32.0% 33.1%
TX: Indigent Defense 11.2% 11.5%
TX: Retained 20.6% 21.3%
II. % of Convictions Ending in an Alternative To Incarceration
NC: Indigent Defense 30.6%
NC: Retained 58.8%
TX: Indigent Defense 21.9%
TX: Retained 42.8%
III. % of Felony Cases Reduced to Misdemeanor Convictions
NC: Indigent Defense 43.0%
NC: Retained 53.1%
TX: Indigent Defense 43.8%
TX: Retained 54.0%
IV. Average % Sentence Avoided for Cases Ending in Conviction
NC: Indigent Defense 76.0%
NC: Retained 87.6%
TX: Indigent Defense 90.6%
TX: Retained 94.5%
* There are no Non-Criminal Responsible outcomes for Person Felonies in Travis County, TX, or for retained attorneys in North Carolina, and less than 0.1% for indigent defense attorneys in North Carolina.
KPI
% Resulting in Non-Criminal Responsible
% Resulting in Dismissal without Leave
% Resulting in Deferred Prosecution
Worst Outcomes (Want less of)
V. % of Cases Ending in Convicted of Highest Charge
NC: Indigent Defense 10.2% 7.0% 17.2%
NC: Retained 7.3% 12.7%
TX: Indigent Defense 21.7% 7.1% 28.0%
TX: Retained 13.5% 7.1% 20.6%
VI. % of Alternatives to Incarceration Ending in Supervised Probati...
NC: Indigent Defense 83.0%
NC: Retained 73.2%
TX: Indigent Defense 98.0%
TX: Retained 100.0%
* There is no unsupervised probation in Travis County, TX.
VII. % of Convictions and Active Time Sentences That Are Time Served
NC: Indigent Defense 17.5% 12.2%
NC: Retained 14.3% 5.9%
TX: Indigent Defense 22.1% 16.5%
TX: Retained 13.2% 7.0%
KPI
Convicted Some High
Convicted All High
KPI
Time Served - % of Active Time
Time Served - % of Convictions
0% 10% 20% 30% 40% 50% 60% 70% 80% 90% 100%

Travis County, TX

- Moving from Private Assigned Counsel to Managed Assigned Counsel
- Need Performance Measures
- Working Closely with Judges, Defense Bar, and Policy Makers
- Management Dashboards

Using Data to Assess Policy

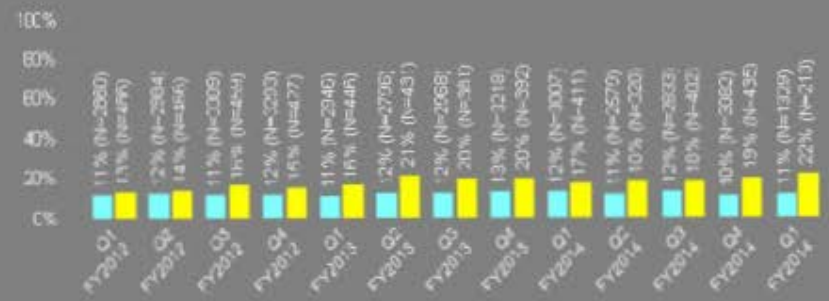
- Create measures today – Benchmarking
- Continuous assessment
- Compare outcomes after a policy change

Overview
Appointments By Attorney
Appointment Detail
Appointed Cases By Attorney
Budget
Voucher Detail
Sheet6
Copy of Appointments By Attorney
County
District
Appointments
Case Type
Misdemeanor
Felony
Month
Class of Highest Charge
1st Degree Felony
2nd Degree Felony
3rd Degree Felony
State Jail Felony
Class A Misdemeanor
Class B Misdemeanor
Total Spent on Investigators - (Includes Capital)
Month Paid
Fiscal Year
Percent of Cases Ending in Dismissal
Attorney Type
Appointed
Hired
Percent of Cases Resulting in Alternative to Incarceration
Average
Last 30 Days
Time to Disposition
Division
Percent of Appointments that are Bench or Invoice
Month Appointed

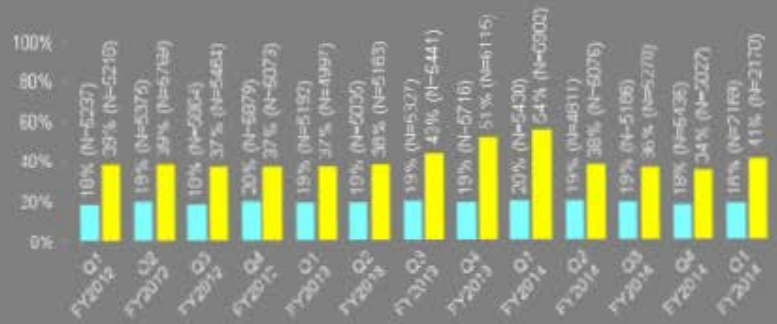
Dismissed

Dismissed

Appointed
Retained



Appointed
Retained



Court
Court Type
Class of High Charge
Category of High Charge
Disposed at Jail Cal
Attorney Type
Method of Disposition
injail

Current Selections

injail

Attorney Name

ACOSTA SYLVIA	661
AGUIRRE MONTELONGO ALEJANDRO	7
ALDERETE ERNEST JIM	10
ALNAZAN ANTONIO	2
ALVARENGA SELENA M	209
ALVAREZ ADAN O	3
ANDARZA IVAN ARTURO	3
ANDARZA JESUS ALBERTO	19
ANDERSON WILLIAM LANG	1
ARSCHUTZ KENT C	133
ARTHES MECIL EUGENE	6
ARTONDO JUAN MAURICIO	165
ARAGON JOSEPH	28
ARANA VICTOR ARTURO	5
ARELLANO KRISTY LEE	2
AUSTIN SUNDAY LISA	4
AYE ZAWAR O	4
BACHMAN MARJORIE IRENE	48
BACON JACK P	61

Court Type
Court
Class of High Charge
Category of High Charge
Disposed at Jail Cal
Attorney Type
injail

Current Selections

Attorney Name

ABREO ROSANNA LUE CHURCH
ACEVEDO ERNEST
ACEVEDO JOSEPH
ACEVEDO PAUL R
ACOSTA SYLVIA
ADAIR AMBER MICHELLE
ARVILAP MARIO
AGUILAR WILFRED R
AGUIRRE MONTELONGO ALEJANDRO
AKAFFIOING BASSEY OTU
AKWA LINDA AGAT
ALBRIGHT DENNIS JAMES
ALCALA JUAN MANUEL
ALCARE BERNARDO
ALDERETE ERNEST JIM
ALLEN H
ALLENSWORTH WILLIAM WOODWARD
ALLFORD ABBY DINSMORE

Future

Continued Collaboration

Let us know if you want to join!

Continually adjust measurements and visualizations to aid in management of new office

Return to Text

Assigned Counsel and Panel Attorney Programs for Indigent Defense: Toward a Research Agenda

Alissa Pollitz Worden

School of Criminal Justice, University at Albany, SUNY

Presentation at the Topical Working Group Meeting on Right to Counsel and Indigent Defense
Arlington, Virginia
March 17, 2015

Assigned counsel: The Colonial origins of a federalist (non)-system

- Provision of counsel in criminal cases was controversial under early English law and in the colonies – juries, not lawyers, were thought to be a defendant's best protection from error
- Occasionally, in capital cases, judges would assign local lawyers to represent poor defendants *pro bono*
- The authors of the Constitution, many lawyers themselves, included the 6th Amendment guarantee of counsel – for federal cases -- but did not foresee it as a promise of state-supplied representation for common defendants

The practice of law is a dark and knavish business…

We are not inattentive to the almost universally prevailing complaints against the practice of lawyers…. Dedham MA legislature, 1786

'That no person or persons shall be compelled to fee any attorney or councillor to plead his cause…' (NJ law, 1676)

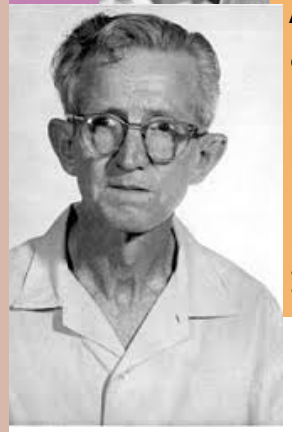
In all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defence… U.S. Constitution, 1791

Legal representation as a right and policy problem of providing lawyers

- Even as the Supreme Court gradually established a right to counsel in criminal court, it left funding and operations to state and local authorities
- Courts adapted, for decades, by simply assigning lawyers *ad hoc*
- Institutionalization of these informal assigned counsel 'systems' were the default option in most states....
- ....Until rapidly increasing caseloads led some courts and states to establish funding and public defender offices

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.
Powell v Alabama, 1932

Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society.
Gideon v Wainwright 1963



Another trait of the average lawyer … is his aversion to the practice of criminal law….
Justice Vanderbilt, 1949

Beginning to design alternatives:

- The professionalization and growth of the private bar in early to mid-twentieth century resulted in a status hierarchy of fields of practice – with criminal defense work at the bottom
- Increasingly, many lawyers were reluctant to take on *pro bono* or under-compensated work for assigned clients (and were underqualified in the field)
- States adapted by establishing alternatives to AC programs – but in many states these alternatives were local county or district options
- Some states began to partially fund public defense: public defender offices
- But the policy issue remains one of the most 'federalist' in the nation – universally described in research literature as '***a patchwork of policies***'

The Achilles' heels of assigned counsel programs?

A state of crisis…a system that [lacking] fundamental fairness

Funding … is shamefully inadequate.

Lawyers … sometimes violate their professional duties by failing to furnish competent representation.

Lawyers are not provided in numerous proceedings in which a right to counsel exists…

Judges and elected officials often exercise undue influence over indigent defense attorneys.

Indigent defense systems frequently lack basic oversight and accountability.

Efforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.

The organized bar too often has failed to provide the requisite leadership.

Model approaches …often are not adequately funded and cannot be replicated elsewhere absent sufficient financial support.

Gideon's Broken Promise (American Bar Association, 2004)

Strengths of AC systems?

- Flexbility in assignments
- Involvement of the Bar
- Economies of scale
- Good fit in sparsely populated areas
- Conflict of interest cases

Questions about AC systems?

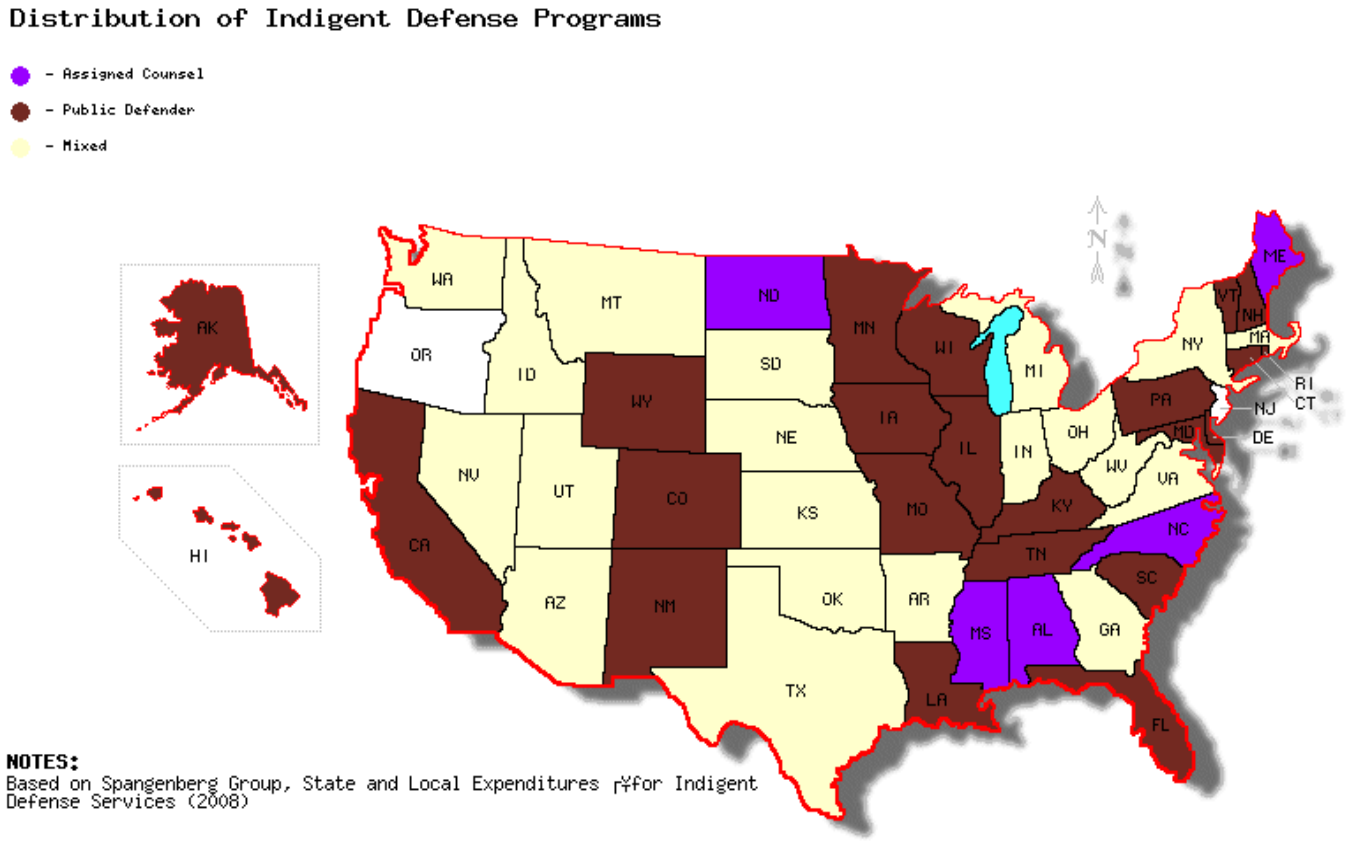
- Lack of oversight
- Lack of data and monitoring
- Lack of political independence
- Lack of program advocacy
- Lack of support for investigation, research, experts

What do we know? What do we need to find out?

- Descriptive questions:
  - How common are AC programs? Where are they?
  - What explains the persistence of AC programs?
- Some frequently asked evaluative questions:
  - Are AC programs better, worse, or the same as other indigent defense projects?
  - What are the economic and political conditions that shape AC programs' work?
  - How do AC programs' infrastructures vary?
  - How should we assess the expertise and competence of work in AC programs?

How common are assigned counsel programs?

- Nobody knows the distribution of clients across AC vs public defender programs nationwide
- Many states that have established public defender offices still have courts that rely all, or in part, on AC lawyers
- In some states (like New York) most conflict defender programs are AC
- While the historical trend has been toward more reliance on public defender offices, there has also been an increase in contract arrangements (which, like AC, rely on the private market for legal services)

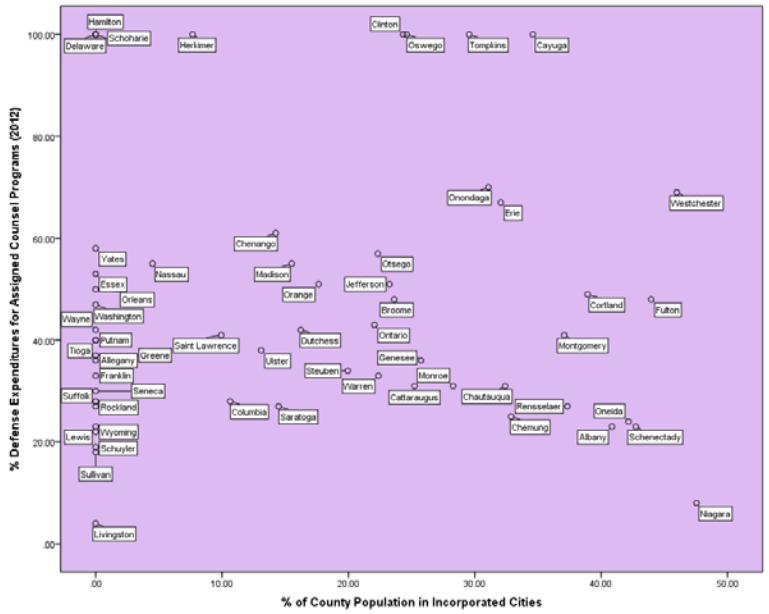


Where *are* the assigned counsel programs? – conventional wisdom

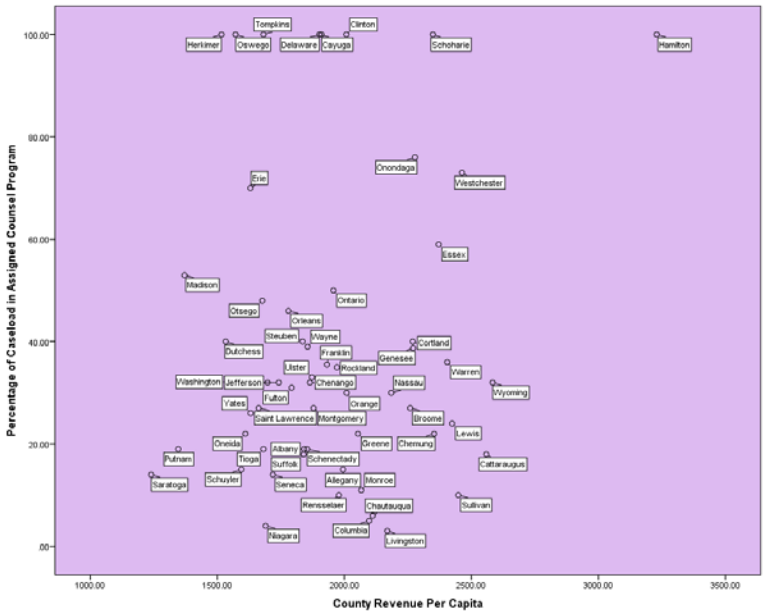
- Where they're the only practical option: Rural and sparsely populated areas?
- Where policy makers have tight budgets: Counties facing declines in revenues?
- Where constituents are averse to institutionalizing redistributive programs: Conservative districts and jurisdictions?

Conventional wisdom? -- Some examples from upstate New York

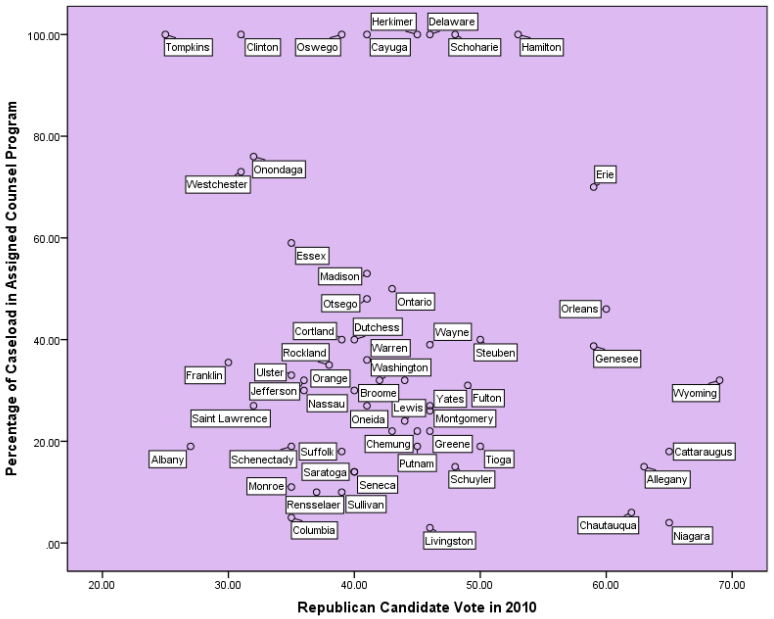
Population density and intensity of AC program use: no correlation



County resources and intensity of AC program use: no correlation



Republican vote and intensity of AC program use: no correlation



Other answers? Perhaps AC programs are retained where…

- State legislatures, executives, and judicial officials have left public defense to local decision makers (inertia is a powerful force)?
- Bar associations have successfully lobbied for continuing programs (or opposed establishment of public defenders or other alternatives)?
- Judges have preferences for AC programs?

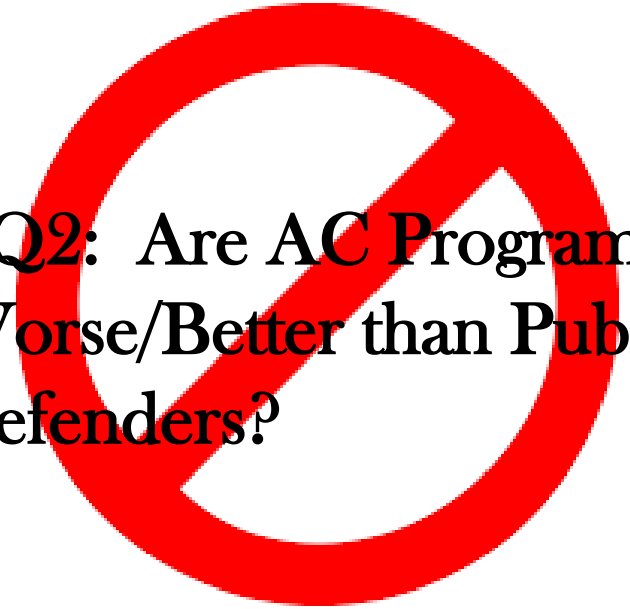
RQ2: Are AC programs worse/better than public defenders?

- Roach, 2011
- Hartley, Miller & Spohn, 2011
- Harlow, 2000
- Champion, 1989
- Hoffman, Rubin & Shepherd, 2005
- Stover & Eckhart, 1975
- Taylor et al, 1974
- Hanson & Ostrom, 1998
- Wheeler & Wheeler, 1980
- Williams, 2002
- Wolf-Harlow, 2000
- Beck & Shumsky, 1997
- Casper, 1967
- Blumberg, 1967
- Nardulli, 1986
- Wheeler & Wheeler 1980

This question has been explored many times, but the answer remains cloudy .....

Why haven't we figured this out?

- There is little consensus on what 'better' or 'worse' legal representation means
- Measures of outcomes (verdicts, sentences) may say as much about client populations as lawyer effectiveness
- Measuring 'good lawyering' is more than a matter of individual performance
- Organizational, resource, and capacity measures have seldom been included in comparative studies
- So perhaps it is best to simply table this question until we know more about AC funding, independence, and structure



RQ2: Are AC Programs Worse/Better than Public Defenders?

Moving toward a more promising (but challenging) research agenda:

- Describing and assessing AC programs' working environments
- Investigating the infrastructure of AC programs
- Identifying participants in AC programs

Describing AC programs' working environments

- RQ3: Who decides how much funding AC programs get? (budget model?)
- RQ4: Are AC programs independent of funding authorities? Independent of local court officials?
- RQ5: What types of record-keeping, accounting, case management, and quality monitoring systems do AC programs use?

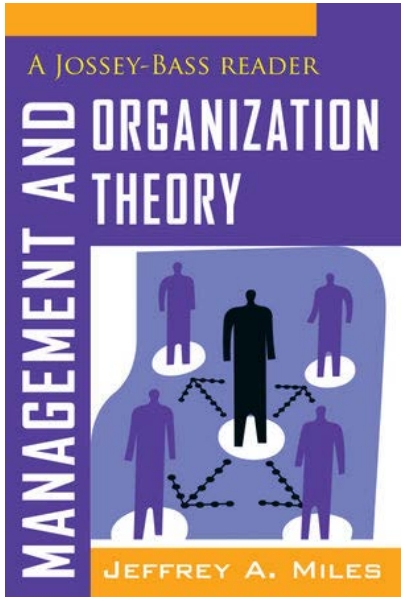
BUDGET & FINANCIAL PLAN

BUDGETED REVENUES, EXPENDITURES, AND CHANGES IN CURRENT N ASSETS

	Last Year (Actual) 2012	Current Year (Estimated) 2013	Next Year (Adopted) 2014	Proposed 2015	Proposed 2016	Pr
REVENUE & FINANCIAL SOURCES						
Operating Revenues						
Charges for services	$0.00	$0.00	$0.00	$0.00	$0.00	
Rental & financing income	47,154.00	0.00	0.00	0.00	0.00	
Other operating revenues	117,979.00	214,457.00	125,000.00	120,000.00	120,000.00	1
Nonoperating Revenues						

Investigating the infrastructures of AC programs

- RQ6: Who administers AC programs?
- RQ 7: How do eligibility standards vary – on paper and in practice?
- RQ8: Who screens clients for eligibility in AC programs?
- RQ9: What protocols cover investigators? other resources?



Who participates in AC panels – and why?

- RQ10: Who are the lawyers? (credentials? skills? experience? caseloads?)
- RQ11: How is continued accreditation documented for AC panels?
- RQ12: How does the caseload burden vary in AC programs?
- RQ13: What are the incentive systems baked into AC programs for lawyers?
- RQ14: Are indigent clients prioritized by AC lawyers?

Would it matter if we knew what research said about these questions?

a) ***Yes:*** We might be able to identify promising programs

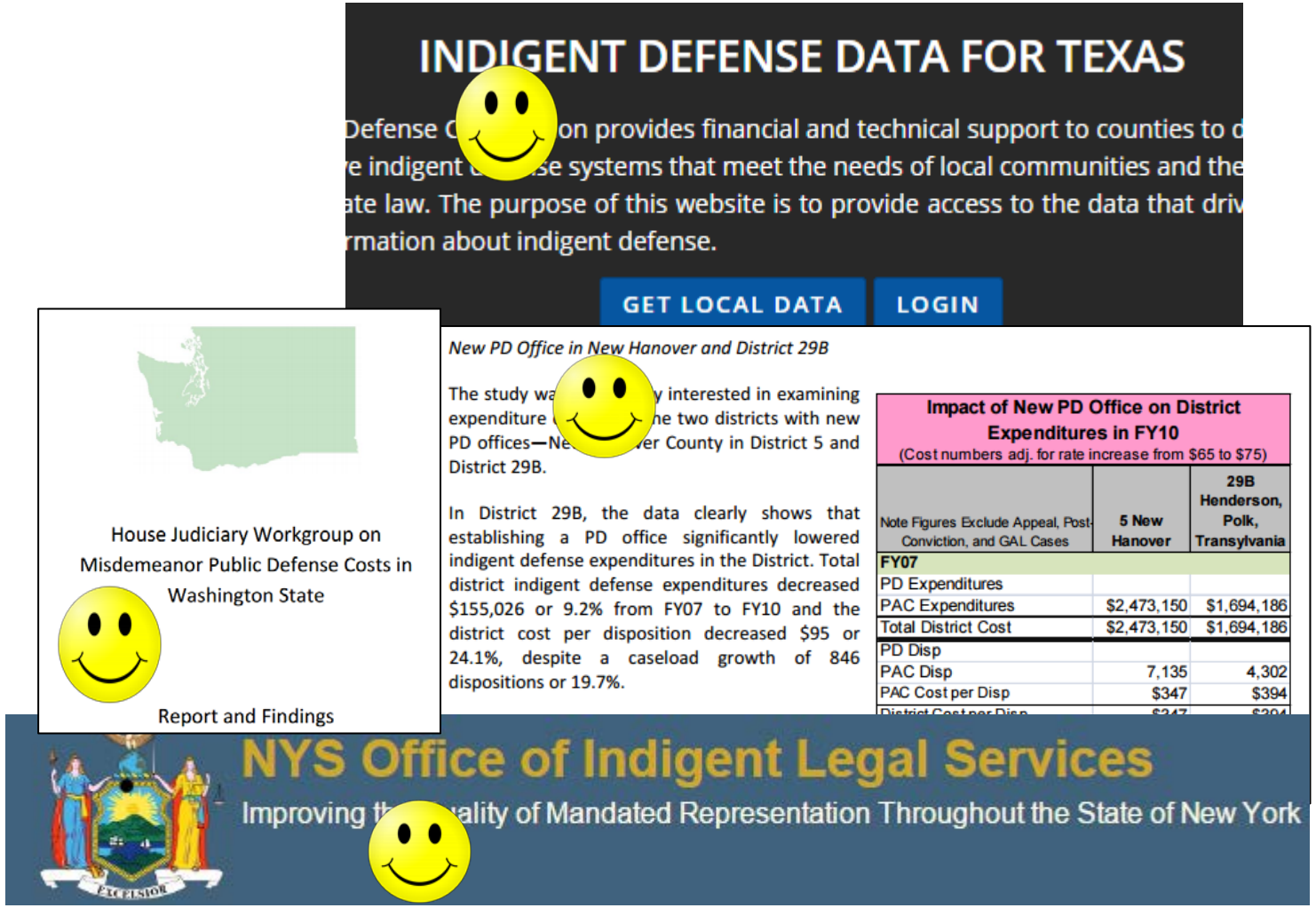
b) ***Maybe not***: We can't control the independent variables (x) so we can't manipulate the dependent variables (y)

c) ***Maybe yes***: If we find evidence that relates directly to practical, economic, and/or professional structures at the local level, we might be able to leverage better programs?

d) ***Maybe yes***: If we found evidence that local conditions comparatively constrained any program, we could argue for compensatory measures to equalize that program's effectiveness

Challenges for research: Are we getting the right data?

- More states are investing in systematic data collection and analysis
- DOJ has committed new funding for research, program innovation, and evaluation
- Defender organizations and researchers are partnering to improve data collection
- Most important: people are organizing, collaborating, and investing in sharing findings (like this conference!)



Challenges for research: Are we asking the right people?

- Making decisions: What do community leaders say about AC programs?
- Measuring outcomes: How do clients perceive their AC lawyers and their work?
- In the trenches: What can we learn from AC panel lawyers, AC administrators, prosecutors, and judges?

The future of research on assigned counsel programs?

(With thanks to Nadine Frederique for bringing everyone together to talk about the future of public defense)