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GIDEON

**GIDEON IN THE DESERT: AN EMPIRICAL
STUDY OF PROVIDING COUNSEL TO
CRIMINAL DEFENDANTS IN RURAL PLACES**

*Andrew Davies¹ & Alyssa Clark^{**}*

ABSTRACT

Access to counsel for criminal defendants is a continuing challenge in rural localities, notwithstanding the mandates of Sixth Amendment jurisprudence. In this Article, we first review the state of the law on access to counsel in criminal cases, noting the latitude allowed to state and local governments in their policy decisions. We then examine empirical approaches to measuring access to counsel and describe in detail both the law and the data on this issue from the state of Texas. We present exploratory analyses of those data comparing rural and urban places for various

their tongues, as a dog laps” rather than cup the water in their hands.³ Gideon was left with 300 men, and God promises they will prevail. Sure enough, the soldiers simulate an attack of a large army using trumpets and torches, and the Midianites flee without a fight.⁴

Gideon v. Wainwright's⁵

the right to counsel for criminal defendants relatively precisely. And yet, notwithstanding these guidelines, considerable latitude exists for states and localities to vary in the extent to which they provide access to defense counsel. Just fourteen states guarantee that counsel will be present and available to assist defendants at their first appearance in court, rather than at some later stage.²² Twenty-eight states and

counties outside these large jurisdictions.²⁸

Analysis of other related issues have been conducted at the national level, however, particularly examining the amounts that states and localities spend on providing counsel to indigent defendants. While expenditures are in large part a function of the supply of defendants, careful analyses have exposed the other political and geographic factors that are also at work. Worden and Worden's work in Georgia in the 1980s revealed that the presence of an active bar association in a county was associated with higher spending on indigent defense, suggesting that bars might operate as a kind of interest group pushing for increased services.²⁹ Other analyses have revealed defense spending varies predictably with other characteristics of local jurisdictions, particularly their respective wealth, their predominant political

present in court, they were often unable to rely on it. Judges in rural areas reported counsel was almost never present during the unscheduled and *ad hoc* arraignment proceedings that New York law requires must be held as soon as possible after a defendant's arrest, and despite the judges' clear preferences, there were few if any mechanisms in place to address that deficit.³³

the impact such fees have on defendant decision-making. Presented with the choice of whether to pay a fee to obtain a go

handle at least some of the county's caseload, while a further four regional defender offices serve twenty-two additional counties. An office in Lubbock County dedicated only to the defense of capital cases serves 177 counties in the state.

Criminal defendants in Texas do not generally have access to counsel in person at the earliest stages of their cases, though they must have counsel "appointed" (even if in name only) at their first appearance before a judicial officer.⁴⁴ A request for appointment at the initial appearance must be followed by a screening process for

transecting all of these considerations, Texas varies enormously in terms of urbanization, raising the question of whethe

a variety of county characteristics including but not limited to their rurality. Our intent in procuring a diverse dataset was to permit us to examine not only the basic differences in access levels between counties deemed ‘urban’ and ‘rural’ but also to permit examination of the characteristics of rural counties which were associated with particularly high or low levels of access. These data were obtained from the TIDC website as well as a variety of other sources.⁶² Basic descriptive statistics concerning the data we gathered can be found in Table 1 and are described further below. Unless otherwise noted, all data refer to 2017.

Table 1: Descriptive Statistics

Variable	Lowest value	Highest value
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% of population White (n=254)	40.30%	100%	84.15%	10.06%
% of population below poverty (n=254)	2.8%	41.5%	16.34%	5.94%

caseloads of this type. Just three counties had appointment rates over 100%. On average, appointment rates in misdemeanor cases were 29.6%.

We constructed a measure of recoupment using TIDC's published data on how much counties recovered from defendants for the services they received. Dividing that number by the total the county spent on defense, we obtained a measure expressing recouped funds as a proportion of overall spending, which is intended to capture the degree to which defendants themselves were, as a group, required to cover the cost of their defense. On average, counties recouped eight percent of defense spending. Where counties reported recoupment as a higher percentage of the overall cost of defense, we infer that access to counsel is diminished.⁶⁵

Last, in terms of funding, we capture access to counsel as a resource commitment as "dollars spent per weighted case."⁶⁶ The amount each county spends per case is a reasonable way to assess wh

election from the New York Times.⁷⁷ Attorney wage data were obtained from a database constructed by the American Bar Association, and the number of practicing attorneys per square mile was computed by dividing county-level attorney counts from a report by the State Bar of Texas by the total area of each county.⁷⁸ Estimated property tax levies were calculated by the Texas Comptroller's office.⁷⁹

VI. ANALYSIS AND RESULTS

How does access to counsel in criminal cases vary with rurality? We approach this question three different ways. First, we look at urban and rural counties respectively to assess whether our metrics of access to counsel—eligibility policies; appointment and recoupment practices; and spending per case—differ across the two groups at levels that can be considered statistically significant. Second, we examine the diversity in misdemeanor appointment rates between urban and rural counties, seeking to discover the extent to which access to counsel rates are consistent among counties in each group or whether they overlap. Third, we examine differences between rural counties and ask: what factors are associated in rural counties with higher rates of access to counsel? In so doing, we raise the question of whether certain factors, when present in a county, may allow it to overcome the constraints

Eligibility rate, District Court	119%	124%	No	-1.74 (237), p=0.08
Eligibility rate, County Court	119%	123%	No	-1.52 (236), p=0.13
Appointment rate, misdemeanors	38.8%	25.3%	Yes	4.67 (251), p<0.01
Percent defense costs recouped	8.12%	7.99%	No	-1.11 (252), p=0.91
Spending per weighted case	\$269.70	\$281.70	No	-0.50 (249), p=0.61
<i>System metrics (selected)</i>				
Felony cases brought to court	2,896.56	747.41	Yes	5.14 (252), p<0.01
Misdemeanor cases brought to court	4,907.18	398.30	Yes	5.83 (252), p<0.01
Weighted cases per capita	0.05	0.06	Yes	-2.41 (252), p=0.02
County has institutionalized defender	0.16	0.13	No	0.53 (252), p=0.60
<i>Demographic, geographic and political metrics (selected)</i>				
Total area (sq mi)	977	1095	No	-1.34 (252), p=0.18
People per square mile	289	20	Yes	6.77 (252), p<0.01
Percent White	82.0%	85.1%	Yes	-2.34 (252), p=0.02
Population below poverty	15.3%	16.8%	Marginal	-1.96 (252), p=0.05

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Table 3 presents selected metrics for defense services, demography, geography and politics. Although not significantly different in geographic size, we find rural counties in Texas have around one-fourteenth the population density, one-fourth the

B. Comparing Diversity in Misdemeanor Appointment Rates Between Rural and Urban Counties

In that spirit, we focus in next on misdemeanor appointment rates—the one area in which significant differences were found between rural and urban counties. Does the fact that average appointment rates are significantly lower in rural counties imply that that rurality imposes absolute limits on access to counsel? To find out, we prepared two plots, shown in Figure 1, showing the diversity of appointment rates in misdemeanor cases in rural and urban counties separately. Counties where appointment rates are close to 0% appear on the left of each plot. Counties where appointment rates are close to 100% appear on the right.⁸²

appointment rates, rural ones are strongly skewed toward the left, closer to zero. While rurality does not absolutely determine appointment rates, and while it is evidently possible for counties to overcome the constraints it imposes on their ability to appoint counsel, there are still profound differences in appointment rates in this group of counties.

C. What Factors Are Associated with Higher Rates of Access to Counsel in Rural Areas?

We have shown that access to counsel in rural areas is, in one domain at least, lower than in urban ones. But we have also shown that the range in access to counsel among rural counties on that same metric is considerable. All of this raises a new question: what are the characteristics of rural counties which appear to be most successful in providing access to counsel? By answering this question, it might be possible to begin to identify factors that predict “success” among counties in providing access to counsel despite their rurality.

higher case volumes are located. In combination, these circumstances seemed to us to make access to counsel more likely. Our RUCC codes allowed us to identify all counties with a center of at least 2,500 people in it, so we used this indicator in our analysis. Following in the work of other scholars that have studied lawyer scarcity, we also expected that the population of lawyers in rural areas would impact access to counsel.⁸⁵ We therefore controlled for attorneys per square mile.

Fourth, building on prior analyses which have shown justice policies, including defense services, to be more stringent an

The first column of Table 4 shows the results of our analysis examining the associations between the variables above with County Court eligibility rates.⁸⁶ Our analysis reveals that eligibility rates are entirely uncorrelated with any of the variables we used in our analysis. This is somewhat surprising: we had expected counties of particular types—politically conservative, lacking in resources, or otherwise—would use eligibility policies to restrict access and thereby control the costs of providing counsel.⁸⁷ One possibility for the lack of any such relationships is that counties recognize that eligibility policies are the only available tool controlling the cost of providing counsel. Other more direct approaches include changing the terms of contracts with providers or negotiating different hourly rates.

In the next column of Table 4, we examine correlates of the practice of recoupment. Here our analysis shows two important findings. First, counties with an institutionalized defender function (either a public defender office or another managed defense program with its own staff) have recoupment rates around four percentage points lower than counties with no such function—a substantial margin given that on average counties recouped just eight percent of costs annually. Second, we find counties which voted for the Republican candidate in the 2016 presidential election recouped more of what they spent for defense. The results suggest a 1% increase in the vote for the Republican candidate is associated with a 0.12% increase in the recoupment rate. Rural counties averaged seventy-four percent support for that candidate but ranged as high as ninety-four percent: counties at the top of that range therefore recouped between two and three percentage points more of indigent defense costs than those at the mean.

The next column contains the results of our examination of appointment rates in misdemeanor cases. For these analyses we retained the variables used in the analyses for the first two columns and added eligibility and recoupment policies as predictors. Our logic was that while we thought appointment rates would likely be influenced by the factors previously mentioned, eligibility policies and recoupment practices themselves could also cause appointment rates to be lower or higher. Where eligibility policies were more lenient, we expected higher appointment rates; where recoupment rates were higher, we expected defendants to be deterred from requesting assignment of counsel, and therefore, appointment rates would be lower. Consistent with the structure of Texas courts, we employed County Court eligibility rates for our analysis of appointment rates in misdemeanor cases.

Our results suggest that appointment rates in misdemeanor cases are far more a product of the simple unavailability of attorneys in rural areas than they are of policy,

standards statewide, setting the income threshold for eligibility for counsel at 250% of the Federal Poverty Line. Those reforms have also, critically, been supported by

withstand or adapt to resistance. In Chicago, likewise, logistical problems dogged the implementation of the new program, requiring implementers to revisit and refine protocols and procedures that were failing.⁹⁸ These were ultimately stories of

From the perspectives of reformers working on rural justice issues, this should