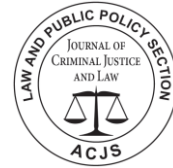


If you cannot afford an attorney, none will be appointed for you: Exploring rates of representation by counsel in Texas misdemeanor courts



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Abstract: All misdemeanor defendants in the United States have the right to be represented by a lawyer if they are facing the possibility of incarceration. Yet implementation of that right is often left to local policymakers, and rates of non-representation (defendants proceeding without lawyers) vary enormously. Through an examination of data from Texas counties in 2019, we find non-representation rates were highest in the state's poorest and most rural counties. But we also find signs that local policy choices matter. Counties with public defender offices, and those with less restrictive policies on financial eligibility for indigent defense services, appointed lawyers to substantially more misdemeanor defendants, and had substantially lower non-representation rates as a result. State officials should encourage policy choices that can effectively uphold defendants' constitutional rights and create more equitable access to counsel, no matter where a defendant happens to be prosecuted.

Keywords

Indigent defense, Defense counsel, Right to counsel, Access to counsel, Lawyers, Legal representation, local policy.

Introducing Non-Representation

Appointing counsel to poor defendants is part of most Americans' core understanding of how the criminal justice system works. A large majority of people in the United States know poor defendants are entitled to lawyers (Belden, Russonello & Stewart, 2002). They support paying for indigent defense and recognize the importance of making sure public defenders do high-quality work (Belden Russonello Strategists, 2017). Outside of unflattering depictions in some police procedurals, defense lawyering enjoys a vaunted position, exemplified in the behavior of the nation's founders, and evoking the principle that every person should have their day in court (Lippman, 2011; Shniderman, 2014).

It would mystify many Americans, therefore, to know that in some misdemeanor courts there is very little evidence that a right to defense representation exists at all (Harvey et al., 2018). While there are no national estimates for rates of non-representation by counsel among misdemeanor defendants, studies have illustrated the ways policymakers sometimes use their discretion to prevent defendants obtaining lawyers. Judges may fail to advise defendants they have a right to counsel,

encourage them to consult with prosecuting attorneys about a deal in their case without legal advice, or make arbitrary determinations about defendants' financial status rendering them ineligible for appointment of indigent defense counsel (Boruchowitz, 2017; Davies & Morgan, 2019; Harvey et al., 2018; New York State Office of Indigent Legal Services, 2016). Studies of court dockets report many more misdemeanor defendants 'waive' their right to counsel than in felony courts (Choy, 2016; Harlow, 2000; Natapoff, 2018; Wright & Logan, 2006). One United States Senator speaking in 2015 concluded that "No Supreme Court decisions in our history have been violated so widely, so frequently, and for so long" than those relating to the right to counsel in misdemeanors (Grassley, 2015, p. 1).

In this article, we present what we believe to be the first systematic comparison of non-representation rates in misdemeanor courts using county-level data from the state of Texas. We focus our analyses on understanding the determinants of those rates, including their interactions with rates of representation of defendants by privately retained and court-appointed lawyers respectively. Our analyses illustrate the diversity of non-representation rates across the state and their connections to county characteristics. Most critically, they also identify strong associations between policy choices that county officials make and rates of non-representation in misdemeanor courts. These results imply that there may be specific things policymakers can do to reduce the extent of non-representation by counsel in misdemeanor courts.

When Non-Representation is a Problem

In Law

The Sixth Amendment to the United States Constitution enshrined a defendant's right to "the Assistance of Counsel for his defence" upon its ratification in 1791.¹ However, the right of poor defendants who were unable to afford a lawyer to have one appointed to them came much later.

In 1932, the United States Supreme Court established that defendants facing capital charges were entitled to lawyers when it reversed the convictions of nine young Black men sentenced to death in a trial featuring only a token defense showing (Acker, 2007; *Powell v. Alabama*, 1932). Six years later, the court held that all felony defendants in federal court cases had a right to appointed counsel (*Johnson v. Zerbst*, 1938). In 1963, the Court expanded that right to felony defendants in state courts (*Gideon v. Wainwright*, 1963), and further extended it to state court misdemeanor cases nine years later (*Argersinger v. Hamlin*, 1972).

However, the right to be represented by counsel in American courts did not imply that all defendants *must* have a lawyer. The Court also held in *Faretta v. California* that defendants were entitled *not* to be represented by counsel if they did not wish to be.² Defendants retained the right to decline representation, Justice Potter Stewart wrote in the majority opinion, provided they exercised it "knowingly and intelligently" (*Faretta v. California*, 1975, p. 835 citing *Johnson v. Zerbst*). Even universal non-representation is not necessarily unlawful in the United States, therefore, assuming defendants' waivers of the right to counsel meet the Court's test in each instance.

That said, the justices authoring these opinions stressed that proceeding without counsel was generally unwise. Unrepresented defendants faced clear "dangers and disadvantages," wrote Justice

¹ The 1876 Texas Constitution also guarantees counsel for criminal defendants (Tex. Const. art.1, sec. 10: "In all criminal prosecutions the accused shall have ... the right of being heard by himself or counsel, or both....").

² We note that this is not true in all parts of the world, where counsel is sometimes mandated for defendants, and was also not always true in the more expansive visions of legal progressives in the early twentieth-century United States (Mayeux, 2020; Ribeiro & Fondevila, 2023).

Stewart (*Faretta v. California*, 1975, p. 835). In *Argersinger*, Justice William O. Douglas pointed out that misdemeanor cases could involve “thorny constitutional questions” and that conviction could have “serious repercussions” for a defendant (*Argersinger v. Hamlin*, 1972, pp. 33, 37). The defendant who represents themselves, as the saying goes, has a fool for a client (De Britaine, 1682).

When it came to misdemeanor cases, two other decisions of the Supreme Court allowed states discretion over whether to provide counsel where defendants were not sentenced to incarceration. In *Scott v. Illinois*, the court held that the right to appointment of counsel applied only in cases where incarceration was imposed (*Scott v. Illinois*, 1979). It later added in *Alabama v. Shelton* that counsel was also required when that incarceration followed a suspended sentence (*Alabama v. Shelton*, 2002).

In Policy

Beyond the preservation of a defendant’s rights, the presence of defense counsel serves a range of interests. Trial court judges report unrepresented people require special handling, slowing decision-making down and threatening the court’s appearance of impartiality (Boruchowitz, 2017; Clark et al., 2021; Laub, 1964). Lawyers too have a stake in appointed counsel systems, deriving financial stability and trial experience from representing appointed clients (Davies et al., 2021; Sukhatme & Jenkins, 2020; Weiss, 2005). Studies suggest that defendants represented by counsel may emerge from criminal legal proceedings with a more positive impression of the courts, regardless of whether their case resolved in their favor (Davidson et al., 2022; Harris, 2020; Raaijmakers et al., 2015; Shook et al., 2021).

Yet indigent defense systems also impose costs, and public officials must manage the allocation of defense services with attention both to legal mandates and fiscal constraints (Mayeux, 2016; Spangenberg et al., 1986). Critics have often contended that some of the decisions of courts and governments to ration indigent defense services are procedurally and distributively unjust, saving money by denying lawyers to people in genuine need and incorporating implicitly racial considerations into who gets representation (Gross, 2013; Ossei-Owusu, 2019). Research reveals correlations between indigent defense policy decisions and the wealth of localities, their racial demographics, and public opinion on whether the justice system is really tough enough (Dahaghi, 2022; Davies & Clark, 2019; Davies & Worden, 2009, 2017).

In People’s Lives

Professional standards require attorneys to act as unwavering and zealous defenders of their clients’ rights, suggesting counsel’s presence should generally help defendants (American Bar Association, 2015). However, few well-controlled studies of attorney impact exist, partly owing to the ethical impossibility of randomizing access to counsel. Prior work sometimes shows uncounseled misdemeanor defendants obtaining systematically worse outcomes in their cases; other studies show no effect or even opposite results (Smith & Maddan, 2020).

While effective attorneys may compel judges to change their decisions through their advocacy, other mechanisms might also be at work. Judges may be cautious not to punish defendants who are vulnerable due to their lack of legal representation (Hashimoto, 2007). Alternatively, judges may go easy on represented defendants not because their lawyer was persuasive, but because they believe they are less likely to fail to appear in court (Worden et al., 2017). Correlational designs cannot always overcome an obvious confounding factor: defendants with less serious cases may simply be less likely to seek legal assistance to begin with (Feld, 1989).

Importantly, a sub-field of well-controlled studies of the impact of counsel's presence at a defendant's first appearance in court does provide a clearer consensus on the value of representation to defendants at bail hearings. These studies often show that defendants are more likely to be released on bail when represented by lawyers, simultaneously reducing defendant legal entanglement and justice system costs (Anwar et al., 2022; Colbert et al., 2002; Fazio et al., 1985; Lacoë et al., 2023; Morgan et al., 2024; *Rothgery v. Gillespie County, TX*, 2008; Sixth Amendment Center, 2015; Worden et al., 2020).

Non-Representation in Texas

Some states, including Texas, go beyond the requirements of *Scott*, guaranteeing the provision of counsel in any misdemeanor case where incarceration is authorized, regardless of whether it is ultimately imposed (Capozzi, 2020). Yet misdemeanor non-representation rates – the rates at which people accused of misdemeanor offenses were represented neither by counsel appointed by a court nor by counsel they had retained privately – ranged from 0% to 100% across Texas counties in 2019. That is to say: in some Texas counties in that year, all defendants were represented either by a lawyer appointed for them or one whom they had hired. In other counties, not one defendant in a county misdemeanor court was represented by a lawyer (Texas Indigent Defense Commission, 2023a).

Such variety is possible because Texas, like around half the states in the United States, delegates to local governments the responsibility for delivering indigent defense services (Strong, 2016). Such states empower counties to make decisions on how to deliver services, including where to set the financial threshold to determine which defendants are poor enough to qualify. A defendant deemed able to afford an attorney in one county might thus be found unable to afford one in another (Davies et al., 2022).

In Texas, almost all misdemeanor cases where incarceration is a possible sentence are disposed in one of two types of county court (Texas Code of Criminal Procedure, Article 4.05, 1965). The default venue is the Constitutional County Court – one of which is required to exist in each of the state's 254 counties under Article V Section 15 of the Texas Constitution. Alternatively, counties may establish County Courts at Law with the permission of the state legislature and generally do so in response to caseloads that exceed the Constitutional County Court's capacity (Texas Government Code, Title 2, Subtitle A, Chapter 25, 1987). The judges in both sets of courts exercise discretion to appoint counsel in each case based on defendant requests and assessments of financial need, according to guidelines established by county governments (Texas Indigent Defense Commission, 2023b).

While misdemeanor non-representation rates are not in themselves evidence that courts are failing to guarantee defendants' right to counsel, they are at least suggestive that problems may exist. In a 2006 lawsuit, *Heckman, et al. v. Williamson County, TX* (trial court cause no. 06-453-C277), plaintiffs accused judges in that county of engaging in a "systematic and deliberate scheme to deprive persons accused of misdemeanor offenses...of their right to obtain court-appointed counsel" (Choy, 2016; Marsh, 2006). As evidence, plaintiffs highlighted that most misdemeanor defendants in the county pled guilty without counsel (Marsh, 2006). Court-appointed counsel was present in only 8% of misdemeanor cases in 2006, according to data from the Texas Indigent Defense Commission (Mosher, 2013).

Without admitting fault, the county and its judges agreed to a settlement in 2012. The terms required the county to decide applications for court-appointed counsel promptly, cease directing defendants to discuss cases with prosecutors before counsel was assigned, and inform defendants of the identity of their appointed lawyer when an assignment was made (*Joint Motion to Dismiss, Heckman et al. vs. Williamson County, TX*, 2012). By 2019, the rate at which defendants were

represented in misdemeanor cases by court-appointed lawyers in the county had risen to 57% (Texas Indigent Defense Commission, 2023a).

Theorizing Non-Representation

To our knowledge, little theorizing has been done around judicial (or jurisdictional) behavior when it comes to guaranteeing access to lawyers or other due process rights. We scanned the criminal justice, civil access to justice, and political science literatures to create a theoretical framework to inform our statistical modeling. Ultimately, we theorize, non-representation by counsel is the product of indigent defense policy choices, net of supply and demand factors which separately impinge on the frequency with which lawyers represent defendants.

Supply of, and Demand for, Counsel

Scholars investigating the geographic distribution of legal representation in civil cases have generated compelling evidence that supply of, and demand for, legal representation determine representation rates. Where civil litigants are predisposed to seek representation by counsel, non-representation rates are lower. Where the supply of lawyers is more constrained, non-representation rates are higher (Schultheis, 2014; Torlig et al., 2023). We suspect the same to be true in criminal courts.

Variation in demand for counsel may reflect the socio-economic or demographic makeup of a jurisdiction. Some of this may be a matter of group-level preferences. Sandefur (2008), for example, reported group-level differences in rates of agreement that particular legal problems required professional help from lawyers. But in the context of criminal cases, a simpler, administrative mechanism should also be at play. Increased rates of representation by appointed counsel should typify jurisdictions with high poverty rates. Where poverty rates are higher, representation by appointed counsel should be more common; representation by retained counsel should be less so.

When it comes specifically to indigent defense, ‘demand’ for services also takes other forms. The views of local taxpayers, whose resources will be deployed to provide free legal services to poor defendants, may weigh in the determination of what legal services are ‘needed’ for poor defendants. Indigent defense scholars often hypothesize that their service is doubly disfavored, as it distributes taxpayer funds to people who are not only poor but also criminally accused (Davies et al., 2021; Peterson, 1981). Davies & Worden (2009) suggest more conservative jurisdictions, and those with smaller tax bases, fund indigent defense at lower levels.

Demand for services may also come from the legal community itself. Prior work shows associations between the presence of local bar associations and expanded funding for indigent defense services (Worden & Worden, 1989). Formed to represent and advocate for the interests of the legal profession, bar associations might advocate for the expansion of legal services to increase members’ access to paid work. Others have noted, however, that the relationship could operate in the opposite direction if lawyers feel indigent defense services threaten their income (Johnstone, 1996; Kessler, 1987).

If limitations to the supply of lawyers reduces representation by counsel, then rural areas of the United States have the most reason to be concerned. A 2020 analysis by the American Bar Association showed the 1.3 million lawyers in the country clustered in urban areas at concentrations even higher than the general population (American Bar Association, 2020; Pruitt & Showman, 2014). In many urban counties, there is at least one lawyer for every hundred residents. Across the nation generally, 40% of counties had fewer than one for every thousand (American Bar

Association, 2020). Forty-five percent of Texas counties fit that description in 2021 (Metzger et al., 2022).

Such shortages may impinge on defendants' abilities to obtain counsel whether such counsel is court-appointed or privately retained. Research on civil legal services shows that advice-seeking behavior is less common when people are geographically isolated (Patel et al., 2008). Increasing the number of lawyers available can increase the probability that people obtain needed legal advice (Schultheis, 2014). Meanwhile, there is also evidence that indigent defense services are sometimes systematically less prevalent in rural areas (Davies & Clark, 2019).

Indigent Defense Policy Choices

Where defendants are unable to afford a lawyer but desire one, indigent defense policies and systems are the vehicle for translating that desire into actual representation. Net of demand for representation and supply of attorneys, county policies on how to provide indigent defense services may moderate non-representation rates indirectly through their impact on access to court-appointed lawyers. Accordingly, when it comes to representation specifically by court-appointed counsel in misdemeanor courts, local policy choices in the delivery of indigent defense should play a critical role.

For indigent defendants, their ability to obtain a court-appointed lawyer hinges on the operation of local systems to appoint those lawyers. Indigent defense systems vary significantly both in their structure and in the rules governing which defendants get to use them (Davies & Morgan, 2019). Local policy choices themselves might affect the number of people able to access appointed counsel, impacting rates of non-representation.

Counties may opt to provide indigent defense services through a dedicated public defender office staffed by lawyers or may choose an 'assigned counsel' arrangement where judges ask members of the local private bar to take individual cases for a fee. Extant research contrasting outcomes from each approach is voluminous and diverse, but some recent well-controlled studies and at least one meta-analysis suggest public defender offices often do provide higher quality legal representation and higher rates of court appointment of counsel (Anderson & Heaton, 2012; Caspi, 2023; Davies & Clark, 2019; DuHart Clark, 2021).

Counties also determine how to ration indigent defense services. 'Eligibility determination' procedures evaluate whether a defendant's circumstances or income qualify them for indigent defense services (Gross, 2013). Texas statutes allow counties to consider a range of factors when determining a person's eligibility for an appointed lawyer, including the defendant's income and assets, as well as their family size and financial obligations (Davies et al., 2022).

Calibrated correctly, eligibility determination policies set a reasonable financial qualification point above which a person should be expected to afford their own lawyer if they want one. If calibrated incorrectly, they have the potential to exclude people from eligibility for appointed counsel who may desire representation and yet have no way to afford it. In the worst-case scenario, a defendant may be evaluated as too 'rich' to afford an attorney under county policy yet in fact be unable to afford a lawyer. Such a defendant is effectively denied their right to access to any legal representation at all, flouting the guarantee of such counsel under the United States Constitution.

Data and hypotheses

To explore relationships among county characteristics and rates of representation in Texas counties, we gathered a cross-sectional dataset of representation rates for each county in the state in 2019. We also gathered data on other county characteristics relevant to the mechanisms discussed above. Descriptive statistics on all variables used in our models are shown in Table 1.

Table 1: Descriptive Statistics

Variable	N	Mean	St. dev.	Min.	Median	Max.
<i>Dependent variables</i>						
Appointed representation rate (%)	252	30.36	22.02	0.00	27.50	100.00
Retained representation rate (%)	195	24.62	18.47	0.00	21.00	100.00
Non-representation rate (%)	194	45.89	26.32	0.00	47.50	98.00
<i>Independent variables</i>						
<i>Demand for counsel:</i>						
Black or African American (%)	254	6.35	6.66	0.00	4.00	34.00
Hispanic (%)	254	35.19	23.22	4.00	27.00	99.00
Population below poverty (%)	254	13.63	4.96	3.00	13.00	35.40
Misdemeanor cases disposed (thousands)	254	1.783	5.447	0.00	0.381	44.459
Republican vote (%)	254	71.79	16.32	19.00	76.00	95.00
Tax revenues per capita (\$ thousands)	254	0.74	1.04	0.21	0.47	12.02
Local bar association (1=bar association present)	254	0.40	0.49	0.00	0.00	1.00
<i>Supply of lawyers:</i>						
Criminal attorneys within 30 miles of court per thousand cases disposed	252	29.19	52.75	0.00	21.82	666.67
Rural-Urban Continuum Codes (1=nonmetro)	254	0.68	0.47	0.00	1.00	1.00
<i>Indigent Defense Policy Choices:</i>						
Public Defender Office (1=office present)	254	0.15	0.35	0.00	0.00	1.00
Welfare presumption (1=presumption present)	254	0.92	0.28	0.00	1.00	1.00
Incarceration presumption (1=presumption present)	254	0.67	0.47	0.00	1.00	1.00
Income threshold for appointed counsel (as pct. Federal Poverty Line)	250	122	20.62	75	125	240

Dependent Variables

Data on the total number of misdemeanor filings in each Texas county and the number in which a defendant was represented by retained private counsel at the time the case was disposed were obtained from the Texas Office of Court Administration (OCA, Office of Court Administration Texas Judicial Council, 2022; Texas Judicial Branch, 2022). For the number of cases with appointed

counsel, we relied on a separate report from the Texas Indigent Defense Commission (TIDC, 2023a).³

We separately computed rates of representation by counsel for defendants by appointed counsel, by privately retained counsel, and by no counsel, in misdemeanor cases for each Texas county. In each case, we followed formulas used by the Texas Indigent Defense Commission. For appointed counsel rates, we divided the total number of cases with appointed counsel by the total number of cases disposed in the county. For retained counsel rates, we performed a similar operation using the number of cases with privately retained counsel as reported by the OCA in the numerator. For non-representation rates – the proportion of defendants proceeding without any type of counsel – we subtracted the total number of cases with either type of counsel from the total number of dispositions, as follows:

Non-representation rate =	Total misdemeanor cases — (misdemeanor cases with retained counsel + misdemeanor cases with appointed counsel)
	Total misdemeanor cases

OCA data indicated zero cases in which defendants retained private counsel in 55 counties – calculations we quickly determined as likely errors. We chose to exclude those 55 counties from analyses of retained counsel rates. Because retained counsel data were also used in the computation of non-representation rates, those counties were also excluded from analyses of non-representation rates. (Our data on appointed counsel rates were unaffected by this deletion.) Across 194 counties with valid data, we compute a mean rate of non-representation in misdemeanor cases of 46%.

Demand for Counsel

Since demand for counsel may vary as a function of the cultural, socio-economic, or demographic makeup of a county, we collected data on proportions of county population identified as Black or African American, as Hispanic, and that fell below the poverty line, according to the United States Census Bureau. We also obtained data on the total number of misdemeanor cases disposed of in each county, recognizing that court caseloads themselves partly determine the demand for counsel.

To account for variation in demand for indigent defense services associated with political values in a county, we sought a measure of popular conservatism. The proportion of county voters that voted for Donald Trump, the Republican candidate in the 2016 U.S. presidential election, was used as a proxy popular support of punitive criminal justice policy choices in each county (Davies & Worden, 2017).⁴

³ Texas' Office of Court Administration also captures and publishes a metric for rates of appointment of counsel in the same report referenced here. This metric defines 'appointed representation' slightly differently and is not favored by TIDC. We collected data from both sources and performed all analyses with each. We ultimately favored the TIDC metric after discovering that there were no substantive differences in the results with either dataset, but that the OCA data had significantly more missing values than the TIDC data.

⁴ We deemed this a reasonably valid proxy for degree of punitive criminal justice policy preferences. While Donald Trump went on to sign federal criminal justice reform legislation in 2018, his campaign prior to assuming office was characterized by 'tough on crime' rhetoric, support for law enforcement groups, and accusing opponents of being 'soft' on (Hill & Marion, 2018).

To understand counties' capacity to pay for indigent defense services, we collected data on 'tax capacity' – total county revenues from taxes and fees, per head of county population (Census Bureau, 2021).⁵ We also assessed the presence of a local bar association by combining a list of local bar associations published by the State Bar of Texas with another published by the Texas Criminal Lawyers Association (State Bar of Texas, 2022; Texas Criminal Defense Lawyer Association, 2022). We concluded that 40% of Texas counties had some form of local bar association in 2019.

Supply of Lawyers

We expected that counties with fewer lawyers (relative to the number of cases disposed) would have higher non-representation rates. We expected lawyer scarcity would reduce the number of people represented by court-appointed and retained counsel alike: the lack of lawyers should reduce the availability of representation for all, whether they can afford a lawyer or not, especially since assigned counsel systems rely on a supply of private lawyers as appointees to represent indigent defendants.

We quantified the scarcity of criminal lawyers by ascertaining the number of such lawyers within a 30-minute drive of the county misdemeanor court and dividing by the number of cases disposed annually. Although Texas had over 100,000 practicing lawyers in 2019, a minority practiced criminal law. To estimate the number of criminal lawyers we combined four lists. The first was the State Bar of Texas' membership list, which identified 14,273 lawyers who self-reported practicing criminal law. To overcome any undercounting due to the self-reported nature of the list, we combined it with the membership roster of the Texas Association of Criminal Defense Lawyers, the Texas Indigent Defense Commission's list of attorneys accepting an indigent defense appointment in 2019, and a list from the Texas Board of Legal Specialization of attorneys who had received a criminal practice certification. The final deduplicated list included 15,729 attorneys. Using ArcGIS we drew thirty-mile drive-time radii around each misdemeanor court in each county and computed the number of attorneys whose business addresses fell inside each radius. The resulting totals were divided by the number of misdemeanor cases (measured in thousands) disposed to create a ratio of available attorneys per thousand cases.

Rural places might impose logistical demands for people seeking counsel. Infrequent court dates, challenging terrain, limited access to public transportation, or even cultural differences in rural legal settings, might all exert independent influences on counsel's availability. To account for this possibility, we used the United States Department of Agriculture's Rural-Urban Continuum Codes from 2013, dichotomized to distinguish 'metro' from 'non-metro' counties.

Indigent Defense Policy Choices

In Texas in 2019, a few counties had public defender offices. We expected the presence of a local public defender office would be associated with higher rates of appointed counsel, lower rates of retained counsel, and lower non-representation rates overall. We coded for the presence of a public defender office in each county in 2019 using information from the Texas Indigent Defense Commission (Buetow, 2020).

⁵ Because tax capacity data are not gathered from every county every year by the Census Bureau, we used data from counties in 2017, 2018, and 2019 to create a complete dataset. Data from 2017 and 2018 were inflated to 2019 dollars using the Consumer Price Index to estimate tax capacity in 2019.

We expected that counties that rationed indigent defense services more strictly would have lower rates of appointed counsel, higher rates of retained counsel, and higher non-representation rates. By reviewing indigent defense plans for each county, we were able to capture how often they used ‘presumptions’ for determining indigence – that is, policies that stated certain persons would be presumed entitled to appointed counsel based on a single characteristic. Counties were coded as having a ‘welfare presumption’ if plans stated that a person eligible for or receiving welfare benefits would, on that basis alone, be presumed entitled to appointment of counsel. We coded for an ‘incarceration presumption’ if plans stated that a person would be entitled to appointment of counsel on the sole basis they were incarcerated.

We also coded the income thresholds in each county below which a person would be entitled to counsel. Most plans stated that any person with an income below some multiple of the Federal Poverty Line (FPL, \$12,490 for a single person with no dependents in 2019) was presumptively entitled to appointment of counsel. Where plans used a dollar amount instead of a percentage of FPL as an income presumption (for example, \$1,000/month), we translated this into a percentage of the FPL. On average, counties set the income threshold for ability to afford a lawyer at 122% of the FPL, or an annual income of \$15,238 for a single person with no dependents. We hypothesized that the higher a county’s income presumption (as measured by the percentage of the FPL) the higher its rate of appointed counsel, and the lower its non-representation rate, would be.

Results

We report the results of ordinary least squares regression models of appointed counsel (Table 2), retained counsel (Table 3), and non-representation rates (Table 4) in misdemeanor cases across counties in Texas in 2019.

Table 2: Regressing Appointed Representation Rate in Misdemeanor Cases

	Estimate	St. error	t-value	P-value
<i>Demand for counsel:</i>				
Percent Black or African American	0.289	0.250	1.153	
Percent Hispanic	-0.056	0.101	-0.555	
Percent below poverty	-0.008	0.305	-0.027	
Misdemeanor cases disposed (thousands)	-0.153	0.301	-0.507	
Percent Republican	-0.200	0.148	-1.348	
Tax revenues per capita	-2.609	0.927	-2.812	**
Local bar association (1=bar association present)	6.208	3.000	2.069	*
<i>Supply of lawyers:</i>				
Criminal attorneys within 30 miles of court per thousand cases disposed	0.030	0.025	1.215	
Rural-Urban Continuum Code (1=nonmetro)	-5.868	3.163	-1.855	†
<i>Indigent Defense Policy Choices:</i>				
Public Defender Office (1=office present)	19.099	4.067	4.696	***
Welfare presumption (1=presumption present)	2.030	5.256	0.386	
Incarceration presumption (1=presumption present)	1.578	3.020	0.523	

	Estimate	St. error	t-value	P-value
Income threshold for appointed counsel (as pct. Federal Poverty Line)	0.146	0.063	2.309	*
<i>Intercept</i>	25.178	17.489	1.440	

$R^2 = 0.27$; $F(13, 234) = 6.71^{***}$

P-values: $*** < 0.001$; $** < 0.01$; $* < 0.05$; $t < 0.1$

We find no evidence that appointment rates track with poverty rates, court caseloads, or county demographics. Even though court-appointed counsel is a service aimed at people of limited means, we find no indication that places with higher poverty rates deliver indigent defense more often.

We did find evidence that the presence of a local bar association is associated with higher rates of appointment of counsel in misdemeanor cases, consistent with the hypothesis that organized groups representing attorney interests might seek expansion of services to indigent defendants.

We also found an association with county revenues per capita. Contrary to expectations, counties with higher tax revenues per capita appointed counsel in smaller proportions of cases – possibly a reflection that counties with higher tax revenues also have wealthier populations and lower demand for appointed counsel.

Regarding the supply of lawyers, we find no evidence that the ratio of lawyers to cases changes appointment rates, though we do find that in non-metro counties, rates of court-appointed counsel are on average close to six percent lower than in metro ones. While the shortage of lawyers in rural places may not be associated with reduced appointment rates, something about rural places certainly is – whether the large distances to travel to court, differences in culture relating to legal representation, or something else.

The most substantively significant associations in our model of appointment rates appear among indigent defense policy choices. Counties with public defender offices had appointed counsel rates that averaged 19 percentage points higher than counties without in 2019. Recalling that the average rate of court-appointed counsel across all counties was around 30% (see Table 1), counties with established public defender offices provided those services at substantially higher rates.

Our results also show that counties that restrict court-appointed counsel to defendants in the most extreme poverty appoint counsel less often. Counties in Texas ranged from eligibility rules that restricted appointment of counsel to persons earning income under 75% of the poverty line, all the way up to 240% (see Table 1). Substantively, our findings imply that a difference of one hundred percentage points on this metric (that is, the difference between a county appointing counsel only for defendants with income below the poverty line, and one doing so for any defendant up to twice that level) was associated with a 14.6-point change in the appointed counsel rate. We do not, however, find any associations between court-appointed counsel rates and the use of welfare or correctional presumptions in eligibility determination.

Table 3: Regressing Retained Representation Rate in Misdemeanor Cases

	Estimate	St. error	t-value	P-value
<i>Demand for counsel:</i>				
Percent Black or African American	-0.714	0.247	-2.896	**
Percent Hispanic	-0.253	0.101	-2.519	*
Percent below poverty	-0.886	0.316	-2.799	**
Misdemeanor cases disposed (thousands)	0.157	0.273	0.576	
Percent Republican	-0.214	0.161	-1.332	
Tax revenues per capita	4.564	1.095	4.167	***
Local bar association (1=bar association present)	1.821	2.868	0.635	
<i>Supply of lawyers:</i>				
Criminal attorneys within 30 miles of court per thousand cases disposed	-0.062	0.066	-0.941	
Rural-Urban Continuum Code (1=nonmetro)	-6.363	3.096	-2.055	*
<i>Indigent Defense Policy Choices:</i>				
Public Defender Office (1=office present)	6.758	4.226	1.599	
Welfare presumption (1=presumption present)	5.208	4.939	1.054	
Incarceration presumption (1=presumption present)	-4.410	2.926	-1.507	
Income threshold for appointed counsel (as pct. Federal Poverty Line)	0.063	0.063	0.995	
<i>Intercept</i>	54.644	18.310	2.984	**

$R^2 = 0.27$; $F(13,178) = 5.077^{***}$

P-values: *** <0.001; ** <0.01; * <0.05; 1 <0.1

Modeling rates at which defendants were represented by retained counsel, we find significant associations with county demographics. Defendants in counties with higher Black and Hispanic populations respectively retained counsel at lower rates. County poverty rates were also associated with reduced use of (costly) retained counsel. As a further instance of the impact of wealth on the use of retained counsel, we also found a strong, positive association with county tax revenues.

We found no associations with the proportion voting Republican, case volumes, or the presence of a local bar association. Unlike appointed counsel rates, retained counsel rates show more associations with indicators of poverty, but none with our indicator of organized lawyer groups.

When it came to the supply of lawyers, we again found no association between rates of retained counsel and the number of lawyers locally – but did find an association with rurality. Rural counties averaged retained representation rates six percentage points lower in our model than urban ones.

We did not find any associations between rates of retained counsel and indigent defense delivery system measures. Implicitly, we find no evidence to suggest that indigent defense policy choices affect the number of people who hire retained counsel – even though we do find evidence (in Table 2) that those choices are associated with rates of representation by appointed counsel.

Table 4: Regressing the Non-Representation Rate in Misdemeanor Cases

	Estimate	St. error	t-value	P-value
<i>Demand for counsel:</i>				
Percent Black or African American	0.454	0.341	1.331	
Percent Hispanic	0.207	0.139	1.491	
Percent below poverty	1.025	0.434	2.362	*
Misdemeanor cases disposed (thousands)	0.200	0.378	0.530	
Percent Republican	0.409	0.221	1.847	†
Tax revenues per capita	-0.140	1.515	-0.092	
Local bar association (1=bar association present)	-8.521	4.011	-2.125	*
<i>Supply of lawyers:</i>				
Criminal attorneys within 30 miles of court per thousand cases disposed	-0.033	0.088	-0.375	
Rural-Urban Continuum Code (1=nonmetro)	12.63	1.294	2.941	**
<i>Indigent Defense Policy Choices:</i>				
Public Defender Office (1=office present)	-18.45	5.834	-3.162	**
Welfare presumption (1=presumption present)	2.123	6.822	0.311	
Incarceration presumption (1=presumption present)	-1.123	4.027	-0.279	
Income threshold for appointed counsel (as pct. Federal Poverty Line)	-0.234	0.087	-2.693	**
<i>Intercept</i>	0.186	0.252	0.735	

$R^2 = 0.31$; $F(13,177) = 6.235^{***}$

P-values: *** <0.001; ** <0.01; * <0.05; † <0.1

Our analysis of non-representation rates shows that counties with higher poverty rates also have higher non-representation rates, but shows no associations with other county demographic variables. Counties with more Republican voters show higher rates of non-representation, though the relationship is only marginally significant; and those with a bar association present have non-representation rates an average of eight percentage points lower.

Rural counties have non-representation rates an average of almost thirteen percentage points lower in our model, but we do not show any association with the number of attorneys specifically. This is consistent with our models of appointed and retained representation in Tables 2 and 3, showing lower levels of each type of representation in rural counties.

We find evidence that indigent defense system choices are associated with non-representation rates. Specifically, counties with public defender systems had non-representation rates over eighteen percentage points lower than those without them – almost precisely mirroring the positive association between such offices and appointed counsel rates in Table 2. Counties with less restrictive policies on financial eligibility similarly had lower non-representation rates. In this model, a difference of one hundred percentage points in the income guideline for court-appointed counsel was associated with a twenty-three-point reduction in non-representation rates.

Discussion

Non-representation rates vary across Texas counties in ways that raise troubling questions. First, they are inequitable, impacting most deeply counties with large numbers of poor people. They also vary directly with the presence of organized bar associations, implying that in some counties defendants might go unrepresented simply because lawyers have not organized. And they suggest it is an especially acute problem in rural areas.

But more than anything, they illustrate that counties have at their disposal policy choices on how to deliver indigent defense services that might mitigate rates of non-representation among misdemeanor defendants. Indigent defense delivery system choices have a direct association in our models with both misdemeanor defendants' use of court-appointed counsel, and the likelihood they will be represented by any type of counsel at all. Our results are summarized in Table 5.

Table 5: Summary of results from Tables 2, 3 and 4. Cells contain coefficients and standard errors.

	Appointed counsel rates	Retained counsel rates	Non- representation rates
<i>Demand for counsel:</i>			
Percent Black or African American	0.289 (0.250)	-0.714 (0.247) **	0.454 (0.341)
Percent Hispanic	-0.056 (0.101)	-0.253 (0.101) *	0.207 (0.139)
Percent below poverty	-0.008 (0.305)	-0.886 (0.316) **	1.025 (0.434) *
Misdemeanor cases disposed (thousands)	-0.153 (0.301)	0.157 (0.273)	0.200 (0.378)
Percent Republican	-0.200 (0.148)	-0.214 (0.161)	0.409 (0.221) †
Tax revenues per capita	-2.609 (0.927) **	4.564 (1.095) ***	-0.140 (1.515)
Local bar association (1=bar association present)	6.208 (3.000) *	1.821 (2.868)	-8.521 (4.011) *
<i>Supply of lawyers:</i>			
Criminal attorneys within 30 miles of court per thousand cases disposed	0.030 (0.025)	-0.062 (0.066)	-0.033 (0.088)
Rural-Urban Continuum Code (1=nonmetro)	-5.868 (3.163) †	-6.363 (3.096) *	12.630 (1.294) **
<i>Indigent Defense Policy Choices:</i>			
Public Defender Office (1=office present)	19.099 (4.067) ***	6.758 (4.226)	-18.450 (5.834) **
Welfare presumption (1=presumption present)	2.030 (5.256)	5.208 (4.939)	2.123 (6.822)

	Appointed counsel rates	Retained counsel rates	Non- representation rates
Incarceration presumption (1=presumption present)	1.578 (3.02)	-4.410 (2.926)	-1.123 (4.027)
Income threshold for appointed counsel (as pct. Federal Poverty Line)	0.146 (0.063) *	0.063 (0.063)	-0.234 (0.087) **
<i>Intercept</i>	25.178 (17.489)	54.644 (18.310) **	0.186 (0.252)
R ²	0.27	0.27	0.31

P-values: *** <0.001; ** <0.01; * <0.05; † <0.1

Non-Representation and its Impact on Poor & Minority Populations

Court-appointed counsel systems exist to provide access to lawyers where defendants cannot afford counsel privately. Yet our findings show higher rates of non-representation in counties with poorer populations. They show lower rates of representation by privately retained counsel in counties with large poor, Black, and Hispanic populations, and in counties with smaller tax bases. And they also *fail* to show any associations that would indicate a corresponding *increase* in rates of appointed counsel in counties where populations are poorest. In sum, these findings raise doubts about whether indigent defense systems in Texas in 2019 provided lawyers to any defendant “too poor to hire a lawyer” as the court in *Gideon v. Wainwright* stated they must.

One explanation could be that defendants in counties with larger poor, Black, or Hispanic populations disdain private counsel specifically for reasons other than poverty. It’s possible. But these findings are at least consistent with another intuitive reading: that court-appointed counsel systems are failing to fill gaps in representation in communities where defendants are least likely to be able to afford their own lawyers. If true, such systems would be failing to fulfill their most basic purpose – providing lawyers to people who cannot afford them.

Bar Associations and the Private Market for Legal Representation

Where bar associations existed in counties, our findings showed appointment rates were six points higher, and non-representation rates almost nine points lower. This finding is startling in light of equivocation by some bar associations that expanded indigent defense will impinge on the market for privately retained defense (Calcagni, 2016; Kessler, 1987).

Importantly, our findings also reveal that in Texas indigent defense policy choices that do show associations with appointment rates (which we return to below in greater detail) do not show them with rates of retained counsel. While strict eligibility policies are associated with low rates of court-appointed counsel and public defender offices are associated with high ones, neither is associated with differences in rates of representation by counsel on private retainer.

This could be evidence that, from the perspective of the legal professionals seeking to generate business, indigent defense policy choices by Texas counties have threaded a needle. While expansive indigent defense policy choices are associated with higher appointment rates, there is no evidence that they encroach on the business of lawyers who represent paying clients privately.

The Special Challenge of Rural Places

There is something different about rural counties. Unlike any other factor in our model, rurality is simultaneously associated with lower rates of both appointed and retained counsel. Consequently, non-representation in rural Texas is especially high. Rural places simply have a shortage of any kind of representation. Our findings suggest that the explanation goes beyond the low supply of attorneys. Defendants in rural places may prefer not to be represented or may face other logistical or personal barriers to obtaining representation.

While the circumstances of rural places might pose particularly forbidding obstacles to providing counsel, rural counties as much as urban ones have policy tools at their disposal. Rural Texas is the location for several public defender offices which may be effective in raising rates of representation (Buetow, 2020; Davies & Clark, 2019). Eligibility policies, too, vary in rural places (Davies et al., 2022). We turn to the discussion of those policy tools next.

Eligibility Policies

Relaxed eligibility policies were associated with higher rates of representation by court-appointed counsel, and lower rates of non-representation, in our data. On average, court-appointment rates were almost 15 points higher and non-representation rates 23 points lower in counties that set income thresholds 100 percentage points higher (e.g. at 200% of the Federal Poverty Line instead of 100%). We observed no impacts on rates at which defendants retained counsel privately. In counties where counsel was appointed more widely by courts, there was no reduction – indeed, no significant difference in either direction – in the number of people hiring their own lawyer.

There is of course a defense for income thresholds varying from county to county. The cost of retaining counsel varies from place to place, as does the cost of living (Clio, 2023; Glasmeier, 2023). Restrictive income guidelines are appropriate where the cost of retaining a lawyer privately would be affordable for most poor defendants.

Our findings belie the argument that eligibility policies are being used appropriately in Texas to restrict the availability of court-appointed counsel only to those who need it. We do not have data on the cost of lawyers by county – but if eligibility rules tracked with the cost of hiring a lawyer and were appropriately excluding people wealthy enough to retain counsel, we would expect strict eligibility regimes to be associated both with lower rates of court-appointed counsel *and* higher rates of defendants retaining counsel privately. Instead, we only see the former.

This pattern suggests that court-appointed counsel, where it is available, fills a gap in representation rates that individual defendants cannot fill using their own resources. Where access to such counsel is restricted, defendants do not find the funds to retain their own lawyers. Instead, they simply go unrepresented at higher rates. These findings suggest that restrictive eligibility policies are functioning to deny access to court-appointed counsel – and therefore representation by any counsel at all – to poor defendants. They also suggest that counties with higher rates of court-appointed representation are closer to providing counsel at the correct rate. And they imply that some defendants who were denied court-appointed counsel by counties with restrictive policies were never able to hire a lawyer privately to begin with.

In most Texas counties (and in most jurisdictions nationally) judges retain important discretion in how to apply eligibility rules (Clark et al., 2021). In all but five Texas counties, judges can make exceptions for defendants who do not qualify on paper but are experiencing ‘substantial hardship’ (Davies et al., 2022). Some writing on eligibility determination emphasizes the ways judges use discretion to undermine formal procedures on financial assessment (Deprang, 2015). Our data are not inconsistent with this discretion. But they do also provide some of the first evidence to our

knowledge that formal eligibility thresholds can function to restrict access to counsel for defendants who need it.

Using Public Defender Offices

We find clear evidence that counties with public defender offices have lower non-representation rates. The presence of a public defender office is associated with court-appointment rates that are 19-points higher, and non-representation rates 18-points lower. Rates of representation by retained counsel, however, do not vary with the presence of public defender offices.

Why would public defender offices be associated with higher rates of representation? We suspect the answer lies in the roles such offices can play in local politics. Because our study is cross-sectional, we cannot see whether public defender office creation causes an increase in rates of representation by court-appointed counsel over time. But other work has shown how public defender offices can earn respectability and traction in local politics in ways that assigned counsel systems cannot, due to their different leadership structures and other conflicts of interest (Davies & Worden, 2017; Sukhatme & Jenkins, 2020). Whether and how public defender office creation may result in added budgetary support and programmatic expansion in agencies is a question for future research.

Limitations and Future Research

We recognize that many of our theoretical statements imply causation and that our dataset does not allow us to judge whether changes in indigent defense policy-making – or any other factor – have the power to change rates of representation over time. However, we do regard this cross-sectional effort as an important first step in understanding the dynamics of representation by counsel across counties that has the potential to generate further questions that could be addressed in future studies.

We did our best in our models to account for other ‘demand’ and ‘supply’ factors that could influence non-representation rates. Of course, we are unable perfectly to measure every important variable. Defendants in some counties may (knowingly and intelligently) choose not to be represented in greater numbers than in others for reasons other than those implied by racial and ethnic demographics, the popular Republican vote, or the presence of a local bar association. Defendants in certain counties may simply be wealthier than in others in ways that are not captured by poverty rates in the general population or tax revenue data. We do not have direct measures of the aggregated preferences or wealth of defendants themselves. Such data would allow us more accurately to account for variations in demand for services among defendants, and to state with greater confidence whether defendants were being denied access to counsel unfairly.

Our ability to model the causal impact of policy choices is limited by the cross-sectional design of our data. With data on rates of representation by counsel in counties before and after public defender offices were created, for example, we could make clearer statements about whether those offices cause high rates of representation or are simply established in counties that trend high to begin with. With data on case files of individuals denied appointed counsel we could more directly investigate the reasonableness of those denials, and whether such defendants ultimately retained counsel privately. But we cannot do those things with the data examined here.

While our data speak to the rates at which defendants are represented by counsel, we cannot make any claims about the quality of counsel received by defendants. Even in counties where rates of representation are high, the services provided by defense lawyers assigned to represent indigent clients are frequently criticized as inadequate (Constitution Project, 2009). Our work in this research is limited to addressing a threshold condition: the mere presence of any kind of lawyer. While we are not naïve to the possibility that some lawyers in high representation-rate counties provide

inadequate services, it still seems to us that building systems that reliably connect defendants with counsel is the primordial question for scholars and policymakers of indigent defense. Discussions about the quality of counsel are predicated on counsel being accessible; our concern is that in some parts of Texas, it is not.

We also lack data on judicial attitudes and behaviors. While our analyses produced strong evidence that indigent defense policies are associated with court-appointed representation rates, the assignment of counsel is often the sole authority of judges. Other scholars suggest that judicial attitudes to the value of counsel, their approach to advising defendants of their rights, and their choices on how to implement policies in areas like eligibility, can all influence representation rates – in some cases, far more profoundly than policy choices (Boruchowitz, 2017; Clark et al., 2021; Davies & Morgan, 2019; Dunn, 2022; Gross, 2013; Hall, 1974; New York State Office of Indigent Legal Services, 2016; Provine, 1986). While our data and findings are quite compatible with those possibilities, they cannot illustrate or account for them directly.

Last, our data come from a period before the COVID-19 pandemic of 2020. While criminal legal systems have in many places now returned to pre-pandemic functions, some shifts (for example, toward use of ‘remote’ or ‘zoom’ court) may have changed the ways defendants interact with courts, and attorneys. The impact of those profound changes on rates of representation – especially in rural and remote jurisdictions – merits further study.

Conclusion

Our findings suggest that non-representation may be a solvable problem. Counties have at their disposal policy levers that, should they choose to pull them, are associated with more people getting counsel. Counties that set higher limits on the income of people that can receive counsel, and that use public defender offices, generally appoint counsel to more people. And they have fewer defendants who proceed with no counsel at all.

Texas counties concerned about non-representation in courts should examine their policy choices. Counties with restrictive eligibility policies should consider whether recalibration is needed to make sure they deny access to court-appointed lawyers only to those who can truly afford to retain counsel privately (Davies et al., 2022; New York State Office of Indigent Legal Services, 2016). Counties using assigned counsel systems rather than public defender offices to provide counsel should make sure that defendants have adequate opportunities to apply for counsel and get legal advice when it is needed.

Where counties adopt policies associated with limited access to court-appointed counsel, we see clear indications that some defendants simply lose access to counsel altogether. Counties with restrictive eligibility policies and no public defender office appoint counsel in fewer cases, but we do not see any evidence that defendants are more likely to hire counsel instead. Rather, these are the places where non-representation rates are the highest.

Rates of representation by retained counsel are lowest in counties where populations are Black, Hispanic, and relatively poor. But we see no sign that court-appointment rates rise to fill the gaps that poverty creates in these counties. Instead, counties with higher rates of poverty also have higher rates of non-representation. If indigent defense systems are failing to alleviate disparities in access to counsel arising from differences in wealth, then they are failing to address the one problem they are intended to solve.

Texas should examine why it is that, in some counties in 2019, not a single misdemeanor defendant was represented by counsel. The state must grapple with the question of whether local discretion in the delivery of those services is having the effect of denying defendants their Constitutional right to legal representation. The creation of public defender offices, and changes to

indigency determination procedures, show promise as policy instruments that could reduce non-representation by providing attorneys to poor defendants – in some places, for the first time.

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