

June 2019

Gideon in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places

Andrew Davies

Alyssa Clark

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [Courts Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Andrew Davies & Alyssa Clark, *Gideon in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places*, 71 Me. L. Rev. 245 (2019).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol71/iss2/5>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

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

Andrew Davies & Alyssa Clark

ABSTRACT

I. INTRODUCTION

II. REPRESENTATION FOR CRIMINAL DEFENDANTS

III. CAPTURING AND THEORIZING ACCESS TO COUNSEL

IV. ACCESS TO COUNSEL IN TEXAS

V. DATA AND METHODS

A. Access to Counsel Metrics

B. System Metrics

C. Demographic, Geographic, and Political Metrics

VI. ANALYSIS AND RESULTS

A. Comparing Access to Justice in Urban and Rural Counties

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

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

VII. DISCUSSION: BEYOND THE STATISTICS – PROSPECTS FOR REFORM IN RURAL PLACES

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

Andrew Davies & 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 aspects of access to counsel, including rules governing eligibility for, and rates of actual use of, appointed attorneys. We find that Texas counties appointed counsel to an average of 29% of misdemeanor defendants in 2016-17, but that rates were significantly lower in rural than urban counties. Total expenditures averaged \$278 per case, though 8% of that amount was recouped from defendants. In rural areas specifically, we find the absence of any local towns and low lawyer populations were associated with especially low levels of access to counsel. The presence of an organized defense provider such as a public defender office, however, was associated with significantly higher rates of access to counsel in counties. Finally, we review our findings in the light of other research on the impact of programs targeting rural areas intended to improve access to counsel for defendants.

I. INTRODUCTION

Gideon's story as told in the Book of Judges is one of scarcity. Gideon gathered an army of many thousands for an attack on a Midianite camp in the desert in the east of Israel, but before he was able to launch it he received a message from God that his force was too large.¹ Gideon's army needed to be smaller, God explained soteriologically, so that the Israelites knew it was God that was saving them. Gideon first invites any person who is "fearful and trembling" to go home.² Then, taking the army to drink, God commands that he only keep the men who "lap the water with

* Ph.D., NY Office of Indigent Legal Services. We are deeply grateful to Joel Lieurance, Geoff Burkhart, Wesley Shackleford, and Claire Buetow of the Texas Indigent Defense Commission, and Heather Caspers of the Public Policy Research Institute at Texas A&M University, for helping us to understand Texas defense systems. We are also grateful to Bill Leahy, Kimberly Simmons, and Pam Metzger for their feedback on earlier drafts, and for the comprehensive and thoughtful review of our work by the *Maine Law Review* team. The findings, analysis and discussion presented in this article are attributed solely to the authors and do not necessarily reflect the official policy or position of the New York State Office of Indigent Legal Services.

** M.A., NY Office of Indigent Legal Services

1. *Judges* 7:2.
2. *Id.* at 7:3.

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 story, as told in the rural parts of America, is also about scarcity. America's rural counties struggle to provide legal services of any kind. Rural areas face intrinsic obstacles supplying counsel to criminal defendants unable to afford it.⁶ Geographic distances are too large, resource constraints too great, and the number of available lawyers simply insufficient.⁷ The practice of law in rural areas may be different if, as some evidence indicates, the Bar is more socially conservative, or more community-oriented.⁸ And people in rural places may be more inclined to resolve interpersonal issues without resorting to the law at all.⁹

For criminal defendants the consequences of rurality are potentially serious. Uncounseled defendants do poorly in court.¹⁰ With no check on executive power, plea deals can be more rapid, less considered, and less fair.¹¹ Uncounseled defendants face the real possibility of extended pretrial detention while lawyers are found.¹²

Yet, not all rural places are the same. States such as South Dakota have undertaken initiatives to incentivize lawyers to move to rural places and practice law there.¹³ In our own state of New York, following litigation, defense lawyers in Washington County (a jurisdiction partially located within the Adirondack mountain range) were able to implement a program to supply representation at every first

3. *Id.* at 7:5.

4. *Id.* at 7:15 to :25.

5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. See Andrew Lucas Blaize Davies & Alyssa M. Clark, *Access to Counsel in Local Courts in Rural New York State*, 17 N. Y. ST. B. ASS'N. GOV'T. L. & POL'Y. J. 15, 15 (2018); Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *Local Governance and Redistributive Policy: Explaining Local Funding for Public Defense*, 51 L. & SOC'Y. REV. 313, 313–45 (2017); Lisa Pruitt & Beth Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 221 (2010).

7. See Lisa Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. AND POL'Y REV. 15, 20 (2018).

8. See DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 20-22 (1990).

9. *Id.*; Hillary A. Wandler, *Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities*, 77 MONT. L. REV. 235 (2016).

10. *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Judiciary Comm.* (2015) (statement of Sen. Chuck Grassley, Chairman, S. Judiciary Comm.); ROBERT BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* (2009); Andrew Lucas Blaize Davies & Kirstin A. Morgan, *Providing Counsel for Defendants: Access, Quality, and Impact, in Lower Criminal Courts* (Alisa Smith & Sean Maddan eds., forthcoming 2019); Thomas B. Harvey, Jared H. Rosenfeld & Shannon Tomascak, *Right to Counsel in Misdemeanor Prosecutions After Alabama v. Shelton: No-Lawyer-Courts and Their Consequences on the Poor and Communities of Color in St. Louis*, 29 CRIM. JUST. POL'Y REV. 688 (2018).

11. ALISA SMITH & SEAN MADDAN, *THREE MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS* (2011).

12. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333 (2011).

13. Patrick G. Goetzinger & Robert L. Morris, *Project Rural Practice: Its People and Its Purpose*, 59 S.D. L. REV. 444 (2014).

appearance by a defendant in each of the county's dozens of local courts.¹⁴ Rurality, though seriously impinging on jurisdictions' ability to supply counsel to defendants, does not seem to absolutely prevent it. What, then, are the predictors of success in supplying access to counsel in rural areas?

In this Article, we adopt an empirical approach to this question. We begin with a brief review of what is known about access to counsel in criminal cases, stressing that notwithstanding the mandates of cases like *Gideon*, wide discrepancies in access to counsel for criminal defendants still exist. Next, we review what is known about how these discrepancies play out in relation to rurality. What has prior research shown to be true about the impact of rural circumstances on jurisdictions' ability to supply access to counsel for criminal defendants? In Section IV, we introduce our inquiry into access to counsel using data from Texas, the only state which, to our knowledge, maintains and publishes regular data on how policies and practices in the area vary in each of its 254 counties. In Section V, we present these data, as well as other data describing the counties, and examine the discrepancies in access to counsel by rurality. We close in Section VI with a discussion of how evidence from our present study compliments existing research—mostly qualitative in nature—on the differences in access to counsel in rural areas.

To our knowledge, our analysis, incorporating data from 254 localities, is the largest ever performed on access to counsel issues in rural areas. In brief, we find that access to counsel is indeed more limited in rural areas than in urban ones in misdemeanor cases. But we also show the tremendous diversity in rural places in terms of access to counsel rates. While we see our results as confirming the impact of rurality on access to counsel, therefore, we also note clear signs that access to counsel *is* possible in rural areas, given adequate resources, capable local leadership, and sensitivity to the distinctive nature of rural places.

II. REPRESENTATION FOR CRIMINAL DEFENDANTS

Legal representation for persons accused of crimes is required to be provided *gratis* to any defendant facing the possibility of incarceration pursuant to the mandates of *Gideon v. Wainwright*,¹⁵ *Argersinger v. Hamlin*,¹⁶ and *Scott v. Illinois*.¹⁷ A variety of other cases have clarified issues around the timing at which the right to assigned counsel first attaches,¹⁸ conditions under which counsel can be found to have been ineffective,¹⁹ where a conflict of interest prevents representation,²⁰ and the circumstances in which defendants may proceed without counsel.²¹

At first blush the requirements of these various decisions may seem to define

14. Kathleen Moore, *Public Defenders Making It to Arraignments in Washington County*, GLENS FALLS POST-STAR (June 27, 2017), https://poststar.com/news/local/public-defenders-making-it-to-arraignments-in-washington-county/article_87f6d843-ff6f-5cb3-9330-db4a6f299743.html [<https://perma.cc/8C5Q-QF6E>].

15. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

16. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

17. *Scott v. Illinois*, 440 U.S. 367 (1979).

18. *Rothgery v. Gillespie Cty.*, 554 U.S. 191 (2008).

19. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Strickland v. Washington*, 466 U.S. 668 (1984).

20. *Burger v. Kemp*, 483 U.S. 776 (1987).

21. *Godinez v. Moran*, 509 U.S. 389, 391 (1993); *Faretta v. California*, 422 U.S. 806, 807 (1975).

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 the District of Columbia provide defense services through statewide agencies, while the rest delegate the service to counties or other local jurisdictions.²³ A minimum of three alternative systems exist for providing counsel—staffed public defender offices, private “assigned counsel” lawyers appointed case-by-case, or a wide variety of alternative contractual arrangements.²⁴ Twenty-eight states utilize the Federal Poverty Guidelines to establish guidelines for those who are considered ‘too poor’ to hire a lawyer, and therefore entitled to one provided by the government, but other states utilize other metrics.²⁵ Actual funding for defense services themselves, meanwhile, varies widely—around ten-fold in per capita terms.²⁶

Notwithstanding that criminal defense services for persons accused of crimes are universally mandated, the level of devolution of responsibility for actually supplying those services to state and, often, local governments, has resulted in a wide variety of approaches, and appreciable differences in the extent to which criminal defendants are able to access counsel at all. In the next section, we review existing research on this diversity, particularly as it relates to the rurality of jurisdictions around the nation.

III. CAPTURING AND THEORIZING ACCESS TO COUNSEL

What determines access to counsel for criminal defendants in rural areas? Research and data on this issue at the national level are scanty indeed. The last report prepared by the Bureau of Justice Statistics on the issue, still widely cited, reports findings from 1996 showing that among felony defendants in state courts in the seventy-five largest counties in the nation, eighty-two percent were represented by court-appointed counsel.²⁷ To our knowledge, no data whatsoever at the national level exist to show the rate of assignment of counsel in misdemeanor cases, or in

22. THE CONSTITUTION PROJECT, DON’T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 16 n. 70 (2015) (citing Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 389 (2011)), https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf [<https://perma.cc/L2KG-YKT6>].

23. SUZANNE STRONG, U.S. DEP’T OF JUSTICE, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 1 (2016), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5826> [<https://perma.cc/W7FM-QNJH>].

24. See THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 53 (2009).

25. John P. Gross, *Too Poor To Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines To Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1194 (2013).

26. Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *State Politics and the Right to Counsel: A Comparative Analysis*, 43 LAW & SOC’Y REV. 187 *passim* (2009).

27. CAROLYN WOLF HARLOW, U.S. DEP’T OF JUST., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000).

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 ideologies, and their basic demographics including, indeed, their rurality.³⁰

Most prior work examining the provision of public defense services in rural places has focused on structural differences in defense systems. Pruitt and Colgan, examining five Arizona counties, found a general trend toward lower spending per capita on defense in rural places.³¹ They went on to note the several correlated features of rural counties which might account for this pattern: reduced tax bases and higher poverty rates meant fewer resources available to pay for services generally, and few opportunities to achieve economies of scale. Davies and Worden's research in New York, meanwhile, found through a different research strategy that criminal defense in rural areas actually costs more to provide. Their analysis compliments Pruitt and Colgan's because it attempted to control for the many things that depress rural expenditures on items such as defense (particularly the tax bases which impose constraints on counties' abilities to pay for defender services) and suggests that, net of these factors, the simple fact of rural geography imposes predictable additional logistical costs.³² Last, Davies and Clark examined opinions of judges in rural areas and found that while the overwhelming majority of judges favored counsel to be

28. Noting this regrettable absence, the first author of this paper (Davies) and colleagues at the National Legal Aid and Defender Association and the International Legal Foundation joined in calling for a national effort to track appointment rates in criminal cases at a meeting of the White House Legal Aid Interagency Task Force in Washington D.C. in 2016. That call has not yet been heeded. Andrew Lucas Blaize Davies, *Indicators of Access to Justice for Defendants in Criminal Cases*, in RECOMMENDED ACCESS TO JUST. INDICATORS FOR IMPLEMENTATION OF GOAL 16 OF THE U.N. 2030 SUSTAINABLE DEV. AGENDA IN THE U.S. 14 (2016); Jennifer Smith, *Proposal for Inclusion of Access to Counsel/Legal Aid Indicator*, THE INT'L L. FOUND. (2016); Jo-Ann Wallace & Radhika Singh Miller, *Proposed Indicators at the Intersection of the Civil and Criminal Justice Systems to Address Cyclical Poverty*, NAT'L L. AID & DEFENDER ASS'N (2016).

29. Alissa Pollitz Worden & Robert E. Worden, *Local Politics and the Provision of Indigent Defense Counsel*, 11 LAW & POL'Y 401, 407 (1989).

30. *Id.* at 8; Davies & Worden, *supra* note 26; Davies & Worden, *supra* note 6; Pruitt & Colgan, *supra* note 6; Alissa Pollitz Worden & Andrew Lucas Blaize Davies, *Protecting Due Process in a Punitive Era: An Analysis of Changes in Providing Counsel to the Poor*, 47 SPECIAL ISSUE: NEW PERSP. ON CRIME AND CRIM. JUST. STUD. L. POL. & SOC'Y 71 *passim* (2009), <https://www.emeraldinsight.com/doi/pdfplus/10.1108/S1059-4337%282009%290000047006> [<https://perma.cc/7HD6-UVDC>]; Alissa Pollitz Worden, Andrew Lucas Blaize Davies & Elizabeth K. Brown, *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423 *passim* (2010).

31. Pruitt & Colgan, *supra* note 6, at 275, Figure 13.

32. Davies & Worden, *supra* note 6, at 330, Table 2.

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

Beside funding and resource constraints, critics of defense systems have often also pointed at rural assignment procedures themselves—that is, the processes by which defendants actually are assigned an attorney and put in contact with them—as inhibiting access to counsel. In particular, criticism has focused on two things: the procedures put in place for the determination of financial eligibility for counsel, and the charging of fees to apply for, or receive, counsel's services.

Defendants must be judged “too poor to hire a lawyer” in the words of *Gideon* in order to qualify, but the definition of poverty was left open by the Court.³⁴ Thus, whereas some jurisdictions may allow almost all persons who seek to be represented by counsel at no charge access to it, others may impose stringent barriers, requiring significant documentation proving need, or setting the bar for qualification closer to the poverty line, such that a defendant's penury must be that much more acute to qualify.³⁵ Jurisdictions may choose to police eligibility determination more vigorously through auditing or even, in one Texas case, the deployment of Sheriff's deputies to check a person's assets and income.³⁶

The charging of application fees, the use of part-payment schemes where defendants must contribute some percentage of costs, and the pursuit of defendants for recoupment of costs after cases are ended are also common across the country.³⁷ Notwithstanding that defense for those unable to afford it is supposed to be provided *gratis*, these kinds of fees are often levied as a way to reduce program costs, and sometimes seemingly to expedite case disposition, as when fee schedules increase with case length or complexity.³⁸ The implications for access to counsel may be in

33. Davies & Clark, *supra* note 6, at 17; N.Y. CRIM. PROC. LAW § 140.20 (McKinney 2017) (requiring police officers to bring arrested persons to court “without unnecessary delay”); *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422, 427 (1991) (finding delays of over 24 hours are presumptively unnecessary).

34. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

35. Gross, *supra* note 25, at 1190; *see generally* N.Y. OFFICE OF INDIGENT LEGAL SERVS., DETERMINING ELIGIBILITY FOR ASSIGNMENT OF COUNSEL IN NEW YORK: A STUDY OF CURRENT CRITERIA AND PROCEDURES AND RECOMMENDATIONS FOR IMPROVEMENT (2016).

36. *See* Stephanie Butts, *Investigator Making Dent in County's Indigent Defense Costs*, WACO TRIBUNE (May 30, 2014), https://www.wacotrib.com/news/courts_and_trials/investigator-making-dent-in-county-s-indigent-defense-costs/article_1a2dd7ad-4b83-5680-ab5d-808f4b31f0b4.html [<https://perma.cc/9TJV-QF9T>]; *see also* Elizabeth Neeley & Alan Tomkins, *Evaluating Court Processes for Determining Indigency*, 43 CT. REV. 4 (2007).

37. *See* Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045 (2006); *Guilty and Charged*, NAT'L PUB. RADIO (May 19, 2014), <https://www.npr.org/series/313986316/guilty-and-charged> [<https://perma.cc/C8LF-WKBE>].

38. *See* ROBERT L. SPANGENBERG ET AL., NAT'L INST. OF JUSTICE, CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES (1986); Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323 (2009); Gerald A. Bos & Eugene Livaudais, *Reimbursement of Indigent Defense Costs Upheld*, 49 TULANE L. REV. 699 (1975).

the impact such fees have on defendant decision-making. Presented with the choice of whether to pay a fee to obtain a government-funded lawyer, obtain counsel privately, or simply proceed altogether uncounseled, defendants might alter their choices about requesting a lawyer at all.

Access to counsel is thus at once a matter of policy, practice, and dedication of funds. At the policy level, access to counsel manifests in the form of rules about who may be granted counsel and who may not. At the practice level, access to counsel manifests in terms of actual appointment rates—the proportion of defendants represented—and the choices judges and other authorities may make about requiring defendants to pay toward the cost of their representation. And at the point of dedication of funds, access to counsel is manifested in a decision by a government on how much to pay for counsel itself. Access to counsel is thus, in effect, a phenomenon that can be assessed and measured in all three ways. We return to the question of how these three dimensions can be captured empirically using data from Texas in Section V. First, however, we review the history of access to counsel in that state.

IV. ACCESS TO COUNSEL IN TEXAS

Policies on access to counsel in Texas are made at the local level, subject to the statutory language of Article 1.051 of the Texas Code of Criminal Procedure.³⁹ Counties are free to choose rules for financial eligibility determination among defendants.⁴⁰ Judges have the authority to determine the amounts defendants must repay for the services they receive on a case-by-case basis.⁴¹ Defense services themselves are largely funded from local revenues.⁴² And localities may also decide the service modality—whether defense will be delivered by staff attorneys in a public defender office, or by some other means. In 221 of the state’s 254 counties, defenders are either contractors, paid by local governments to handle certain numbers or types of cases, or are “assigned counsel”—attorneys appointed by judges to represent defendants on a case-by-case basis. These assigned counsel and contract systems vary in the financial terms they offer to attorneys and in their formality. While three counties have pioneered so-called “managed assigned counsel” programs where systems are in place intended to assign attorneys to cases based appropriately on skill level, caseload, and other factors, most allow judges considerable leeway in their choices on appointing and compensating attorneys.⁴³ In fourteen counties a county-based public defender office has been established to

39. TEX. CODE CRIM. PROC. ANN. art. 1.051 (West 2005).

40. Although the Texas Indigent Defense Commission has nominal authority to regulate these decisions, it has not created any standards to do so. TEX. GOV'T CODE ANN. § 79.034 (West 2013) (policies and standards).

41. TEX. CODE CRIM. PROC. ANN. art. 26.05(g) (West 2018).

42. The website of the Texas Indigent Defense Commission indicates total indigent defense costs in 2018 of approximately \$276 million while noting total disbursement by the state agency of \$38 million in grants to counties to assist with these costs. *See Indigent Defense Data for Texas*, TEX. INDIGENT DEFENSE COMM'N, <https://tidc.tamu.edu/public.net/> [<https://perma.cc/YRV2-YBR6>].

43. *Direct Client Services Chart 2018*, TEX. INDIGENT DEFENSE COMM'N (Jan. 25, 2018), <http://www.tidc.texas.gov/media/46142/direct-client-services-chart-2018.pdf> [<https://perma.cc/N8VF-SVWF>].

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 financial eligibility within three days in counties with populations of less than 250,000, and one day for larger counties.⁴⁵ Jurisdiction over cases transfers to either a District or County Court upon presentment of an indictment or prosecutorial information. The state's 462 District Courts handle primarily felony matters and may have overlapping geographic jurisdiction within counties.⁴⁶ While populous counties have many District Courts, many smaller counties have just one. Five hundred and one County Courts handle primarily misdemeanor cases. While the Texas Constitution requires one County Court to exist in each county, a further 247 Statutory County Courts have been created across the state to handle caseload overflow.⁴⁷ A total of 1,744 Justice and Municipal Courts also exist at the local level, but the jurisdiction of these courts is limited to cases where the maximum possible penalty is a fine. Justice and Municipal Courts may handle the early stages of misdemeanor or felony cases, however, including the determination of bail.⁴⁸ As a consequence, defendants are often detained pretrial without the benefit of counsel.⁴⁹

Texas is no stranger to controversy when it comes to access to counsel for criminal defendants. Prior to the 2001 passage of the Fair Defense Act, which required some oversight of counsel assignment procedures, Texas was characterized by "a complete absence of uniformity in standards and quality of representation" across the state, such that "[d]elay in appointing counsel soon after arrest is a pervasive and serious problem in a number of counties."⁵⁰ The passage of the Act did not appear to resolve access to counsel issues entirely, however, as evidenced by

44. To our knowledge, counsel at first appearance in court is provided in only two Texas Counties—Harris and Bexar. TEX. INDIGENT DEFENSE COMM'N, INDIGENT DEFENSE INNOVATION 14 (2018), http://www.tidc.texas.gov/media/58029/tidc_indigent_defense_innovation_2018.pdf [<https://perma.cc/JEC4-4DXV>]; Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23–47 (2016); EXPRESS-NEWS EDITORIAL BD., *Public Defender Should Be at All Initial Appearances*, SAN ANTONIO EXPRESS-NEWS, (July 21, 2018), <https://www.mysanantonio.com/opinion/editorials/article/Public-defender-should-be-at-all-initial-13092534.php> [<https://perma.cc/3D64-NBVQ>].

45. TEX. CODE CRIM. PROC. ANN. art. 1.051(c) (West 2015).

46. TEX. JUDICIAL BRANCH, COURT STRUCTURE OF TEXAS (Jan. 1, 2019), <http://www.txcourts.gov/media/1443399/court-structure-chart-jan-2019.pdf> [<https://perma.cc/56T6-88W9>].

47. *Id.*

48. *Id.* at 10.

49. THE CONSTITUTIONAL PROJECT, *supra* note 22, at 42; Douglas Colbert, Ray Paternoster & Shawn D. Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002).

50. TEX. APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: FINDINGS AND RECOMMENDATIONS ON INDIGENT DEFENSE PRACTICES IN TEXAS 7, 9 (Dec. 2000), <https://www.texasappleseed.org/sites/default/files/185-FairDefense-ReportFindingsRecommendations.pdf> [<https://perma.cc/9LJE-8TLY>].

two cases—one in the Supreme Court—where access to counsel was a central issue.

In *Rothgery v. Gillespie County*, Walter Rothgery was arrested in error as a felon in possession of a firearm: he had no felony conviction.⁵¹ At his initial appearance in court, known in Texas as a “15.17 hearing” or “magistration,” he requested counsel but ultimately waived the right to have counsel present because he was told it would delay his release on bail.⁵² After his release he made several subsequent requests to be appointed counsel, which went unheeded, only obtaining it after a grand jury indictment fully six months after magistration.⁵³ Following the indictment, Mr. Rothgery was reincarcerated as a result of an increase to his bail but was later released after his newly appointed attorney produced evidence showing Rothgery was not a felon.⁵⁴ The Fifth Circuit held that no Sixth Amendment rights had been implicated because no prosecutor had been present at the initial hearing,⁵⁵ but the Supreme Court reversed, with Justice Souter writing that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”⁵⁶

A settlement in the class action lawsuit *Heckman v. Williamson County*⁵⁷ revealed by implication some of the factors that were behind low rates of access to counsel in that county. Data gathered by Texas Indigent Criminal Defense Commission (TIDC) revealed that access to counsel in misdemeanor cases had fallen to as low as eight percent in 2006 when the lawsuit was filed.⁵⁸ The settlement required the county to remedy a range of ills including assuring that all requests for counsel be conveyed and ruled upon within twenty-four hours; that defendants would be provided with attorney contact information; and that defendants should not be required to speak with a prosecutor prior to waiving their right to counsel. In addition, any decision by a defendant to waive counsel should be accompanied by a discussion on the record, and the settlement called for Williamson County to introduce measures that would increase public access to the courtroom.⁵⁹

Notwithstanding these efforts at policy reforms and court decisions, assurances of access to counsel for defendants in Texas are still only ambivalent. While appointment processes may begin at the initial court appearance, the actual presence of counsel in person is rarely assured. Localities are free to make policies governing access, which may impinge on the ability or inclination of defendants to seek it. And

51. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 195 (2008).

52. *Id.* at 196 & n.4; *see also* TEX. CRIM. PROC. CODE ANN. art. 15.17(a) (West 2019).

53. *Rothgery*, 554 U.S. at 196-97.

54. *Id.*

55. *Rothgery v. Gillespie Cty.*, 491 F.3d 293, 297 (5th Cir. 2007), *rev'd*, 554 U.S. 191 (2008).

56. *Rothgery*, 554 U.S. at 213.

57. *Heckman v. Williamson Cty.*, 369 S.W.3d 137 (Tex. 2012).

58. Jon Mosher, *Williamson County TX Settles “No Counsel Court” Lawsuit*, SIXTH AMENDMENT CTR. (Jan. 24, 2013), <http://sixthamendment.org/williamson-county-tx-settles-no-counsel-court-lawsuit/> [<https://perma.cc/H9D6-8J7U>].

59. Joint Motion to Dismiss, *Heckman v. Williamson Cty.*, No. 06-453-C277 (D. Ct. Williamson Cty., Jan. 14, 2013) <http://sixthamendment.org/wp-content/uploads/2013/01/Joint-Motion-to-Dismiss-Heckman-et-al-v.-Williamson-County-et-al-.pdf> [<https://perma.cc/8L4R-8SYB>] (full settlement agreement in the case).

transecting all of these considerations, Texas varies enormously in terms of urbanization, raising the question of whether the structure of courts and justice systems in urban and rural areas vary in fundamental ways, impinging systematically on access to counsel itself.⁶⁰ To examine the precise impact of rurality on access to counsel in Texas, we made use of the rich archives of data published online by TIDC. It is to our analysis of these data that we turn next.

V. DATA AND METHODS

How far do rural areas differ in terms of access to counsel, and why? To address this question, we gathered and analyzed data from the 254 counties in Texas, each of which (because defense is locally controlled in that state) is empowered to make its own decisions on access to counsel. Texas varies significantly in its level of rurality between the sprawling cities of Houston and Dallas to the (literally) desertified counties in the west of the state. It is, in effect, a perfect opportunity to compare rural and urban areas in terms of access to counsel.

In this endeavor, we are assisted greatly in the publication of comprehensive data on the website of the TIDC.⁶¹ There, the plans that counties are required biennially to submit to TIDC are available, containing information on the eligibility determination policies in place in each. TIDC also reports three data points that are invaluable to our inquiry: the percentage of misdemeanor charges defended with appointed counsel, the percentage of felony charges defended with appointed counsel, and the amount of funds recouped from defendants in each county, by year. Last, the site also posts data publicly on the total amount spent by each county on defense services. Unlike any other state of which we know, Texas publishes annual statistics for each of its 254 counties reflecting access to counsel from the perspectives of policy, practice, and funding.

We use these data to address three specific questions. First, in keeping with the few other analyses that already exist, is access to counsel lower in rural counties in Texas when compared to urban ones? Given the opportunity to examine this question with a larger sample of counties than in previously published research, we seek to confirm this earlier finding. Second, how diverse are rural counties in terms of access to counsel? Is rurality an absolute barrier to access, such that no rural areas show high levels of access, or is there variety among rural counties? Third, among rural counties themselves, what differences do we see between places where access is accomplished and those where it is not? Are there characteristics of counties—whether demographic, geographic, or political—which correlate with access levels in ways that allow us to predict when rural counties are more able to supply access to counsel effectively? This study is (to our knowledge) both the largest and the most direct attempt to study quantitatively access to defense counsel policy, practice, and funding, anywhere in the United States to date.

We gathered data both on the extent of access to counsel in each county and on

60. For a variety of visualizations of Texan rurality by county, see U.S. DEPT. OF AGRIC. ECON. RESEARCH SERV., https://www.ers.usda.gov/webdocs/DataFiles/53180/25598_TX.pdf?v=0 [<https://perma.cc/2GMY-77K4>].

61. TEX. INDIGENT CRIM. DEF. COMM'N, <http://www.tidc.texas.gov/> [<https://perma.cc/TU6V-5YJM>].

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	Mean	Standard deviation
<i>Access to counsel metrics</i>				
Eligibility threshold in District Court (n=239)	100%	200%	122.53%	20.68%
Eligibility threshold in County Court (n=238)	100%	200%	121.43%	18.29%
% Misdemeanors Appointed Counsel (n=253)	0%	123%	29.69%	22.42%
% Spending Recouped (n=254)	0%	74.10%	8.04%	8.60%
Expenditures per weighted case (n=251)	\$12.32	\$1,866.82	\$277.78	\$175.21
<i>System metrics</i>				
Felony cases brought to court (n=254)	0	40,918	1,100.29	4,033.49
Misdemeanor cases brought to court (n=254)	0	60,425	1,853.92	6,124.29
Juvenile cases brought to court (n=254)	0	7,647	114.77	546.48
Total Weighted Cases (n = 254)	5.67	184,970.1	5,021.24	17,792.21
Weighted Cases per Capita (n=254)	.01	.43	.06	.04
Indigent Defense Spending, thousands (n = 254)	\$1	\$45,200	\$1,026	\$3,958
County has institutionalized defender (n=254)	0	1	.14	.35
<i>Demographic, geographic, and political metrics</i>				
Rural-Urban Continuum Codes	1	9	5.19	2.62
County “Nonmetro” (n=254)	0	1	.68	.47
Total area in square miles (n=254)	148.7	6,192.3	1,057.47	656.73
Population (n=254)	74	4,525,519	417,951	389,477
Population per Square Mile (n=254)	.11	2,808.95	106.93	320.65

62. All data on indigent defense in Texas were obtained from TEX. INDIGENT CRIM. DEF. COMM’N, <http://tidc.tamu.edu/public.net/> [<https://perma.cc/2VUY-9V9V>].

% 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%
Median Household Income (n=254)	24,794	93,645	49,894.34	12,132.68
% Voting Republican, 2016 Presidential (n=254)	18.9%	94.6%	71.81%	16.29%
Attorneys per Square Mile (n=254)	0	18.24	.33	1.64
Attorney Median Wage (n=254)	49,330	148,000	84,235.98	18,996.52
Estimated property tax levy per capita (n=254)	\$168.70	\$166,316	\$1,506.56	\$4,033.49

A. Access to Counsel Metrics

We measure access to counsel from three perspectives—as a policy, as a practice, and as a dedication of funding. First, as a policy, access to counsel is captured by a county’s rules on eligibility. Eligibility policies are captured in our data through income cut-points. Typically, both for defense services and a range of other social and welfare support, applicants are assessed by comparison of their income to the Federal Poverty Line (FPL), a metric which has come in to criticism for its outdated assumptions about household expenditure patterns.⁶³ At their most stringent, counties considered anyone making more than the FPL to be ineligible—a position expressed as “100%” in our metric because the cut-point was set at 100% of the FPL. Others enacted less strict policies, with the least restrictive setting eligibility at 200% of FPL, meaning that any person with income below twice the poverty level could obtain counsel for free. Although District Courts and County Courts can set their own eligibility rules and we present data for each respectively in Table 1, they tended to operate in lockstep with one another within counties.

Second, as a practice, we quantified access to counsel using appointment and recoupment rates. Texas produces two appointment rates—one for felony cases and one for misdemeanor cases—by dividing the numbers of cases in each category for which attorneys were paid in a year by the total of such cases filed. Here, we focus on the misdemeanor appointment rate. We do so partly because misdemeanors are an area in which access to counsel has been shown to be especially tenuous, but also because of a limitation of our data.⁶⁴ Because cases can only be counted as “paid” after their conclusion, whereas cases are counted as “filed” at their inception, appointment rates can generate seemingly invalid values above 100% where, for example, a large number of backlogged attorney bills from a prior year are paid all at once. To minimize this problem, we averaged appointment rates across two years (2016 and 2017) but still found thirty-five counties had rates in felony cases in excess of 100%, some many times higher, making analysis difficult. Misdemeanor appointment rates proved much more stable, however, perhaps owing to the higher

63. See generally Gross, *supra* note 25.

64. Entitlement to counsel for accused misdemeanants is more tenuous and variable across states. See generally B. Mitchell Simpson, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417–439 (2000).

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 whether funding levels for defense generally are relatively more fulsome or more meager. Weighted cases were calculated using the formula set forth in the National Advisory Commission standards for the weighting of cases in the defense function.⁶⁷ These standards weight felony cases, for example, to be equivalent to 2.67 misdemeanor cases and are a way to compare caseloads across jurisdictions in a way that captures not only how numerous, but also how serious the cases in question are.⁶⁸ Dividing each county's total expenditures on defense into the number of cases gives the amounts counties are accustomed to paying for representation in a single misdemeanor case—averaging around \$278. Counties which pay more, we infer, may be characterized as more willing to support the defense function financially, and, therefore, as having made more sizable financial commitments in support of access to counsel.

B. System Metrics

We present basic caseload information about our counties next. We obtained the total 2017 caseload of the court systems in each county—including cases where

65. See generally Anderson, *supra* note 38.

66. This metric standardizes spending on defense by dividing by the total number of cases represented, effectively showing the average amount spent on representing a client in a single case. However, the number of cases is 'weighted' such that felony cases, for example, are counted as equivalent to 2.67 misdemeanor cases, in recognition of their greater complexity. Weighting is a common practice in the computation of caseloads and is necessary for like-with-like comparisons between jurisdictions where caseloads are composed of significantly different proportions of felonies and misdemeanors. For jurisdictions that have "weighted" or "credited" some cases as requiring more time than others, see NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS IN LAW AND PUBLIC DEFENSE (2011) at 140.

67. NAT'L LEGAL AID & DEFENDER ASS'N, *National Advisory Commission on Criminal Justice Standards and Goals, The Defense (Black Letter)*, <http://www.nlada.org/defender-standards/national-advisory-commission/black-letter> [https://perma.cc/QHA5-2F5J].

68. The standards stipulate in calculating defender caseloads that felony cases should be considered equivalent to 2.67 misdemeanor cases, juvenile cases as equivalent to 2 misdemeanors, and appeals as equivalent to 16 misdemeanors. See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 65. No national standards exist for the weighting of capital cases, so we chose to follow a Tennessee practice of weighting them as equivalent to 80 misdemeanors. SUSAN MATTSON, FY2005-2006 TENNESSEE WEIGHTED CASELOAD STUDY UPDATE: DISTRICT PUBLIC DEFENDERS (2007) (for Tennessee standard). For criticism of the National Advisory Commission standards, see NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS IN LAW AND PUBLIC DEFENSE (2011).

defendants would have been represented by publicly funded counsel, where they retained their own attorney, or were represented by none. Weighting those caseloads in accordance with National Advisory Commission standards reveals that counties averaged over 5,021 misdemeanor-equivalent cases in 2017.⁶⁹ Expressing those same weighted caseloads in per capita terms gives a metric akin to a crime rate: where the average county in Texas had six cases brought to court for every 100 inhabitants, the county with the busiest court system had forty-three—more than two new misdemeanor-equivalent cases for every five people in the county. On average, counties spent just over \$1 million on defense services, though counties ranged from \$1,000 to over \$45 million. Lastly, fourteen percent of counties (or thirty-six individual counties) had some form of either public defender office or ‘managed assigned counsel’ system operating in it.⁷⁰ All others provided defense services through less clearly institutionalized means, including contract defenders and assigned counsel systems.

C. Demographic, Geographic, and Political Metrics

We employ the Rural-Urban Continuum Codes (RUCC) produced by the United States Department of Agriculture Environmental Research Service to distinguish the degree and type of urbanization in each county in Texas.⁷¹ There are a variety of approaches to measuring rurality in the United States, and choices among them depend on their appropriateness both to the questions being asked and the analytic approaches employed.⁷² In our case, the RUCCs are apt because they refer to counties rather than “metropolitan statistical areas” or other units—and counties are also the jurisdictions where decisions about the delivery of defense services are made. Second, RUCCs have often been utilized in the analysis of service delivery to hard-to-reach populations, particularly in health and human services.⁷³ Rather than simply capturing population density or land usage, the RUCCs focus on the size and proximity of urban centers among counties, and thus are particularly appropriate for identifying counties close to urban areas where service providers, including lawyers, are likely to be available. RUCCs are calculated decennially: we employ the most recent codes, from 2013.

RUCCs organize counties into nine categories. Most intuitively, a county’s position on the scale depends on whether it has an urban center inside it and on the size of that urban center. Also important in the scale, however, is whether a county

69. See *supra*, Table 1. “Misdemeanor-equivalent” refers to the fact that, for this metric, counts of other cases have been multiplied according to a weighting system to be expressed in terms of their relationships to misdemeanor cases. Thus, as the weight for a single appeal case is 16, a single appeal counts in this metric for 16 “misdemeanor-equivalent” cases. For details on these standards, see NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 67.

70. TEX. INDIGENT CRIM. DEF. COMM’N, <http://www.tidc.texas.gov/media/46142/direct-client-services-chart-2018.pdf> [<https://perma.cc/UB3K-J9C6>].

71. *Rural-Urban Continuum Codes*, ECON. RESEARCH SERV., USDA, <https://www.ers.usda.gov/data-products/rural-urban-continuum-codes.aspx> [<https://perma.cc/TDW5-DKUA>].

72. THOMAS C. RICKETTS & KAREN D. JOHNSON-WEBB, *WHAT IS “RURAL” AND HOW TO MEASURE “RURALITY”*: A FOCUS ON HEALTH CARE DELIVERY AND HEALTH POLICY (1996).

73. See Jeanne F. Cook, Keith A. Alford, & Pat Conway, *Introduction to Rural Families and Reshaping Human Services*, 15 J. FAMILY SOC. WORK 351, at 355-356 (2012).

borders another county with an urban center to or from which large numbers of its residents commute.⁷⁴ Thus, counties are considered “metropolitan” if they have any urbanized area over 50,000 people, or if they are adjacent to a county with such an area and over twenty-five percent of workers commute to or from that second county.⁷⁵ Metropolitan counties subdivide into three categories depending on whether the metropolitan area of which they are a part has a population over 1 million (Category 1), 250,000-1 million (Category 2), or under 250,000 (Category 3).⁷⁶ Hereinafter, we refer to counties in categories 1 through 3 as “urban.”

Nonmetropolitan counties (hereinafter referred to as “rural”), on the other hand, are ranked in categories 4 through 9 based on broadly similar rules. Categories 4 and 5 contain an urban area of at least 20,000; 6 and 7 contain an urban area of at least 2,500; and 8 and 9 contain only urban areas under 2,500. Classifications across each pair depend, again, on whether the county is adjacent to an urban county, following the same twenty-five percent commuting rule. The codes are summarized in Table 2, which also shows the numbers of Texas counties falling into each category.

Table 2: Rural-Urban Continuum Codes

Code	Description	TX Counties
<i>Metropolitan Counties</i>		
1	Counties in metro areas of 1 million population or more	35
2	Counties in metro areas of 250,000 to 1 million population	25
3	Counties in metro areas of fewer than 250,000 population	22
<i>Nonmetropolitan Counties</i>		
4	Urban population of 20,000 or more, adjacent to metro area	13
5	Urban population of 20,000 or more, not adjacent to metro area	6
6	Urban population of 2,500 to 19,999, adjacent to metro area	65
7	Urban population of 2,500 to 19,999, not adjacent to metro area	39
8	Completely rural or less than 2,500 urban population, adjacent to metro area	20
9	Completely rural or less than 2,500 urban population, not adjacent to metro area	29

We also obtained data on a range of other metrics, several obtained from the United States Census (total population, percent of population identifying as “white” alone, total area in square miles, population density, percent of population below poverty line, and median household income). We obtained the proportion of the county’s population that voted for the Republican candidate in the 2016 Presidential

74. RUCC codes “distinguish metropolitan counties by the population size of their metro area, and nonmetropolitan counties by degree of urbanization and adjacency to a metro area.” See *Rural-Urban Continuum Codes*, *supra* note 719.

75. *What is Rural?*, ECON. RESEARCH SERV., USDA, <https://www.ers.usda.gov/topics/rural-economy-population/rural-classifications/what-is-rural/> [<https://perma.cc/WS2V-ATUY>].

76. See *Rural-Urban Continuum Codes*, *supra* note 719.

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 imposed by rurality to provide broad access to counsel nonetheless.

A. Comparing Access to Justice in Urban and Rural Counties

We compared urban and rural counties on our metrics of access to counsel, defense services, and demographic, geographic and political factors. To perform the comparisons we employed “difference of means” t-tests, an analytical technique which assesses whether differences between groups are large enough that they are unlikely to be due to chance alone and are thus statistically significant as outlined in Table 3).⁸⁰

Table 3: Comparing Non-rural and Rural counties in Texas

Variable	Urban county mean	Rural county mean	Statistically significant difference in means?	t-test result
<i>Access to counsel metrics</i>				

77. See *Texas Election Results 2016*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/elections/2016/results/texas> [<https://perma.cc/Y8JY-TBM4>].

78. See Ian Monroe, *Search Lawyer Wage Data for Your County*, A.B.A. J. (Mar. 2011), http://www.abajournal.com/magazine/article/search_wage_data_for_your_county/ [<https://perma.cc/U4RE-8DJP>]; STATE BAR OF TEX. DEP’T OF RES. & ANALYSIS, ATTORNEY POPULATION DENSITY BY METROPOLITAN STATISTICAL AREA, (2018), <https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=40396&Template=/CM/ContentDisplay.cfm> [<https://perma.cc/2CRU-FV43>].

79. TEX. COMPTROLLER’S OFFICE, <https://comptroller.texas.gov/taxes/property-tax/docs/2017-county-rates-levies.xlsx> [<https://perma.cc/M2V7-2HS4>].

80. See STEVEN R. BROWN & LAWRENCE E. MELAMED, *EXPERIMENTAL DESIGN AND ANALYSIS* (1990).

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
Median household income	\$56,687	\$46,655	Yes	6.67 (252), p<0.01
Republican vote, 2016 presidential	66%	74%	Yes	-3.70 (252), p<0.01
Attorneys per square mile	0.98	0.03	Yes	4.47 (252), p<0.01
Median attorney wage	\$98,130	\$77,612	Yes	9.31 (252), p<0.01

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 felony caseload, and one-twelfth the misdemeanor caseload of urban ones. Per capita, however, caseloads are actually higher in rural areas, at six cases per hundred inhabitants in rural counties to five in urban counties—a slight, but statistically significant, difference. Rural county populations are slightly whiter and slightly more likely to be below the poverty line. Median household incomes are substantially lower and the proportion voting for the Republican candidate in the 2016 Presidential election substantially higher. Looking at the population of attorneys specifically, the differences are starker: rural counties have just one-thirty-fifth the population of attorneys of urban counties—a discrepancy so large it cannot be accounted for by population differences alone. Average annual wages for attorneys, meanwhile, are a full \$20,000 lower in rural counties than in urban ones.

Turning to access to counsel itself, however, some commonalities emerge. Most counties relied on assigned counsel and contract providers of defense, and the likelihood they had institutionalized their defense system was no greater in urban than rural areas. Spending per weighted case was only minutely higher in rural areas and not sufficiently so that the difference was statistically significant. Rules governing financial eligibility of defendants for free or subsidized attorneys did not differ significantly either, with both urban and rural counties averaging slightly below 125% of the Federal Poverty Line. While both urban and rural counties did recoup some proportion of their defense costs, they each recouped very similar amounts, around eight percent of costs. Finally, it was only in the rates of appointment of counsel in misdemeanor cases that a statistically significant urban-rural difference in access to counsel emerged. Just twenty-five percent of misdemeanor defendants in rural counties receive appointed counsel compared to thirty-nine percent in urban counties.

Are these statistics a sign that access to counsel for defendants in rural places is not as distinctive or different as scholars have previously imagined? Certainly we find no clear evidence here of wide disparities—excepting misdemeanor appointment rates, where rural residents clearly experience access to counsel at lower rates. That lack of access is not reflected, however, in any accompanying differences in policies governing eligibility for counsel, recoupment practices, or spending levels.

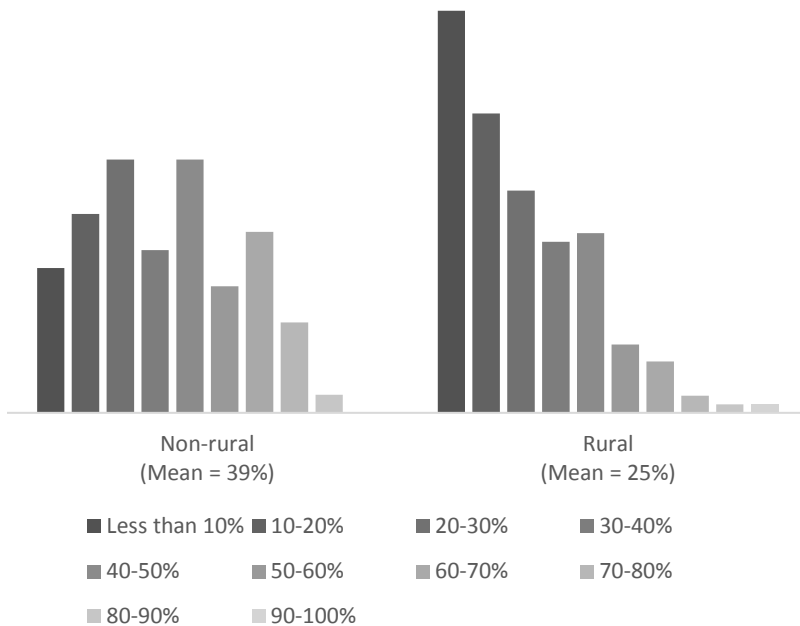
But we must also bear in mind that the metrics presented here, while illustrative, may not adequately capture access to counsel in its fullness. We do not have metrics that capture the precise nature or quality of defense services being provided in each county—for example, whether attorneys engaged in investigation, motion practice, or communicated with clients appropriately.⁸¹ Therefore, we are left with more questions than firm conclusions. The fact that defense services in rural areas cost the same as in urban ones does not mean they are identical, for example. Are countervailing forces at work—for instance, is the higher cost of transportation compensated by the lower cost of efficient processing in small courts carrying few cases? More research would be needed to know for sure.

81. See generally CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (A.B.A. 2015).

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

Figure 1: Misdemeanor appointment rates, comparing non-rural and rural counties.



Contrary to the supposition that rural counties are simply incapable of supplying access to counsel, Figure 1 shows there is significant diversity in misdemeanor case appointment rates across both urban and rural counties. In both groups, counties seem to run the gamut from appointing counsel in almost no cases to appointing it in almost all of them. Whatever the impact of rurality on appointment rates, it is not determinative: there are plenty of rural counties where many defendants in misdemeanor cases are assigned counsel and plenty of urban ones where they are not.

But the two plots do, of course, appear substantially different. Whereas urban counties show no particularly obvious tendency toward either high or low

⁸² For ease of reading, the three counties with appointment rates over 100% are omitted from Figure 1.

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.

For this analysis, we used ordinary least squares regression to examine relationships in the data pertaining to the 172 rural counties. Regression is a method which can be used to quantify the strength of relationships between particular variables while holding other variables constant.⁸³ For example, the method allows us to study whether counties with more strict eligibility policies appoint counsel at lower rates, while simultaneously controlling for other factors that might obscure or confound any relationship, such as the number of cases or the average income of county residents. Importantly, this method can never, strictly speaking, allow for us to infer that any relationship between two variables is causal in nature. But inferences about possible causal relationships can be made.

We began our analysis with a series of hypotheses about factors likely to influence access to counsel. First, we expected access to counsel to be an economic issue. Counties with larger tax bases, we thought, would generally extend access to counsel more widely because they would have the fiscal capacity to do so. At the same time, we expected median income in a county to be associated with reduced access to counsel because wealthier populations would tend to have less need of free defense services, being able to retain counsel privately.

Second, we expected access to counsel to be a reflection of the court system itself. Our prior analyses in New York have found that where case volume is higher, courts are more likely to find ways that defendants can be brought together in large enough numbers at predictable times to allow counsel.⁸⁴ Accordingly, we controlled for the number of court cases in the county per capita. We also expected that where the public defender system was institutionalized in the form of a centralized office or other managed program, access to counsel would likely be greater.

Third, even among rural counties, we expected access to counsel to be higher where counties had urban centers and larger numbers of lawyers. Urban centers tend to be where lawyers live and work and will also tend to be the places that courts with

83. *See generally* COLIN LEWIS-BECK & MICHAEL LEWIS-BECK, APPLIED REGRESSION: AN INTRODUCTION (2d ed. 2015).

84. KARISE CURTIS & ANDREW LUCAS BLAIZE DAVIES, SUMMARY REPORT OF THE 2014 SURVEY OF TOWN AND VILLAGE MAGISTRATES: COUNSEL AT FIRST APPEARANCE (2014).

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 and punitive where political climates are more conservative, we expected that the size of the Republican vote in the 2016 presidential election would be associated with lower access to counsel. The results of our analysis are shown in Table 4.

Table 4: Results of regressing access to counsel metrics onto county characteristics (rural counties only).

	County Court eligibility rate	Recoupment rate	Appointment rate (misdemeanors)	Spending per case
Tax levy per capita (thousands)	-0.11 (0.13)	-0.06 (0.06)	0.10 (0.14)	13.33 (11.68)
Median household income (thousands)	0.07 (0.18)	-0.01 (0.08)	-0.30 (0.19)	-1.25 (2.32)
Court cases per capita	-27.22 (32.43)	2.51 (15.46)	-52.46 (33.11)	-680.16 (455.26)
Institutionalized defender	-2.12 (4.47)	-4.13 (2.13)*	10.94 (4.61)**	50.27 (53.31)
Any town over 2,500	-4.55 (3.50)	2.39 (1.63)	12.68 (3.61)**	-50.86 (41.89)
Attorneys per square mile	25.14 (22.11)	-6.07 (10.47)	46.35 (22.57)**	110.74 (253.85)
Republican vote 2016	-0.06 (0.11)	0.12 (0.05)**	0.24 (0.12)**	-0.91 (1.35)
Eligibility rate			0.09 (0.09)	0.25 (0.89)
Recoupment rate			-0.06 (0.17)	-2.88 (1.90)
Appointment rate (misdemeanors)				-0.01 (0.89)
Median attorney wage				-0.00 (0.00)
Constant	129.39	-1.57	2.40	584.18
R ² , n	0.03, 161	0.09, 172	0.15, 160	0.10, 159

Cells contain unstandardized coefficients and standard errors.

* = $p < 0.1$, ** = $p < 0.05$

85. Pruitt & Colgan, *supra* note 6; Wandler, *supra* note 9.

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, political or economic factors. Appointment rates were eleven points higher in counties where the defense function was institutionalized, suggesting that the presence an identifiable agency whose job it is to provide defense services will tend to be associated with improved access to counsel. Rates were a full thirteen percentage points higher in counties with a small town. These differences are substantial, considering average appointment rates in rural counties were just twenty-

86. We also performed this analysis for District Court eligibility rates. Results were substantially the same.

87. Some indication of the controversy that may surround eligibility determination may be gleaned from a study we conducted in New York. See N.Y. OFFICE OF INDIGENT LEGAL SERVS., *supra* note 35 at 5.

five percent. Incremental changes in the population density of attorneys, and in county politics, also made a difference. Rural counties averaged 0.03 attorneys per square mile—but appointment rates in counties with double that density were 1.4% higher. Contrary to our expectations, we also found that counties where the Republican vote at the 2016 presidential election had been higher appointed counsel in misdemeanor cases more often. A 1% increase in that vote was associated with a 0.24% increase in appointment rates.

Eligibility policies themselves, meanwhile, do not feature in our findings. We show no relationship between the policies a county may put in place to determine financial qualifications for entitlement to counsel and the actual rate at which counsel are assigned. We take this as further confirmation of our suspicion that eligibility policies are not themselves determinative of assignment practices. Rather, judges are empowered to make assignments in cases where they feel it is fit, and it is likely that eligibility policies, while a factor in those decisions, are not the last word. Indeed, we find precious little evidence of their influence at all.

Last, we assessed correlates of spending per case. While we expected spending per case to be contingent on local politics, economics and geography, we found no evidence of strong relationships here. Nor did we find evidence that recoupment and appointment practices themselves were significantly associated with spending, suggesting that where counties use eligibility and recoupment as supposed cost-cutting measures, they may not be particularly effective.

VII. DISCUSSION: BEYOND THE STATISTICS—PROSPECTS FOR REFORM IN RURAL PLACES

Our results reaffirm the practical importance of rurality in determining access to counsel for criminal defendants. The statutory framework governing access to counsel in all Texas counties is identical, and yet defendants in misdemeanor cases face a substantially lower likelihood of receiving appointment of counsel in rural areas than in urban ones. Among rural counties, access to counsel improves where counties have the trappings of urbanization: small towns and more attorneys living locally. The institutionalization of the defender function itself is also consequential. In part, we have rediscovered, albeit with a larger and more powerful dataset, the reality that rural areas impose logistical barriers to providing defense services at all.

Elsewhere in our results we detect other narratives. First, not all rural areas are the same. Overall, misdemeanor appointment rates in rural areas, though significantly lower than urban areas on average, ranged equally widely in rural and urban counties alike. Second, institutionalization of the defense function matters. In places where counties have taken the step of forming an agency dedicated to providing defense representation, access to counsel was better. Third, the local political climate makes a difference. Strongly Republican counties were more likely to recoup a larger proportion of defense system funding from defendants themselves (a trend in keeping with what has been described elsewhere about the impact of conservative political environments on defense policy and justice policy generally), but were also more likely to appoint counsel at higher rates in misdemeanor cases.⁸⁸

88. Worden & Davies, *supra* note 30, at 193-94.

Regarding institutionalization of the defense function in particular, we note Maine is the only state in the United States that relies entirely on an assigned counsel system for providing defense representation. Unlike other states, all of which rely to some extent on staffed offices in the “public defender” model to supply representation, Maine has retained the more traditional model whereby judges assign cases to attorneys in private practice who provide representation for a fee paid by the government.⁸⁹ These systems are frequently criticized on structural grounds: private attorneys accepting ad hoc assignments may be distracted by their commitments to paying clients, and may not benefit from the *esprit de corps* of being a member of a public defense institution.⁹⁰ Some analyses suggest there is merit to these concerns: one study of homicide cases in Philadelphia indeed showed that institutional defenders significantly outperformed assigned counsel at case disposition.⁹¹ To this we add our finding that assigned counsel systems in rural Texas also provided less access to counsel for defendants than institutional defenders. We do not automatically conclude all assigned counsel systems must be failures, however. Rather, we recommend to those who choose to deliver defense services in this way that they work to establish mechanisms to assure the quality of services provided through adequate funding, oversight, and other efforts to create a culture of excellence in delivery of representation.

We also recognize that while some of the diversity in access to counsel was accounted for in our statistical analyses, much was not. Fully eighty-five percent of the diversity—or more technically the “variance”—in misdemeanor appointment rates among these counties remained unexplained in our model.⁹² Much of the variety of experience among rural areas remains to be explained; while structural factors like the presence of small urban centers and an institutionalized provider of defense services clearly make a difference, there remains ample scope to speculate that other local cultural factors, some of which may not be readily amenable to quantification, may also be at play.

For further discussion of this possibility, we turn partly to our own experience building programs intended to foster access to counsel across rural upstate New York, and partly to the published work of others engaged in similar projects. Like Texas, New York is a locally-controlled system featuring large numbers of local courts operating with little oversight. Somewhat distinctively, though, recent litigation and legislation in New York has required the Office of Indigent Legal Services to improve access to counsel across the state. Specifically, it has been mandated to implement programs to provide counsel to all defendants at first appearances in court, to reduce defender caseloads statewide, and to revise eligibility

89. Scott Dolan, *Lawmakers To Air Proposal for Maine's First Public Defender Office*, PORTLAND PRESS HERALD (Jan. 14, 2016), <https://www.pressherald.com/2016/01/14/lawmakers-to-air-proposal-for-maines-first-public-defender-office> [<https://perma.cc/7Z7J-MHG2>].

90. See SIXTH AMENDMENT CTR., *THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES* (2015).

91. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 159 (2012).

92. The R2 values in Table 4 measure the proportion of the variance in the dependent variable (in this case the misdemeanor appointment rate) that can be accounted for by the independent variables. In this analysis, the R2 was 0.15.

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 injections of state monies intended fully to fund these improvements.⁹³

Past work in New York examining the implementation of reforms to access to counsel contains important lessons both for would-be reformers and for researchers. First, written policies on eligibility may not capture the nuances of how access to counsel is really granted. We surveyed all of the judges on New York's 1,215 justice courts in 2014 and asked them about how eligibility was determined and whether counsel was present in their courts at defendants' first appearances.⁹⁴ Presiding over mostly-rural jurisdictions averaging just 7,000 in population, these judges rarely resorted to formal imposition of eligibility determination processes when assigning counsel. In most cases, financial eligibility was a simple determination based on the defendant's demeanor or avowal. Judges took these shortcuts because they recognized assigning counsel was the procedurally safest option, protecting verdicts from potential appeal. They saw it as more efficient, avoiding any additional delay from defendants returning to court multiple times only to say they had still not retained counsel. And they saw its presentational and symbolic value too: some judges simply believed that in any court counsel for both sides should be present and took seriously their obligation to guarantee that sense of fairness.⁹⁵ Therefore, access to counsel policies may be more complicated than simple income cut-points suggest. To improve access to counsel, policies and their impact need to be properly studied and understood.

Second, access to counsel reform in rural areas is achievable, but even when funding and resources are available, it requires careful planning and support from unlikely allies. Two studies, one on the implementation of programs to provide counsel at first appearance in five diverse counties in upstate New York and one on a program to provide access to counsel during police station interviews in Chicago, revealed some of these complexities.⁹⁶ In New York, even with full funding for the programs provided by state government and a cohort of committed and determined defense administrators overseeing program development, the task of improving access to counsel in rural places required personal commitment and support from key local players. Reform was most successful when it had the support of the local judiciary, who had to accept the logistical demands of assuring presence of counsel; of county legislatures and executives, who had to approve and oversee the program; and of prosecutors and law enforcement, whose own roles and responsibilities would change with the introduction of new services.⁹⁷ These alliances and collaborations could be hard to sustain, testing defenders' diplomatic skills and their ability to

93. William J. Leahy, *The Right to Counsel in the State of New York*, 51 IND. L. REV. 145 at 145 (2018).

94. Davies & Clark, *supra* note 6, at 17; Alyssa M. Clark et al., *Access to Counsel for Criminal Defendants in Lower Criminal Courts* (unpublished manuscript).

95. Davies & Clark, *supra* note 6, at 18.

96. Alissa Pollitz Worden et al., *Court Reform: Why Simple Solutions Might Not Fail: A Case Study of Implementation of Counsel at First Appearance*, 14 OHIO ST. J. CRIM. L. 521 (2017); Chicago Appleseed Fund for Justice, *STATION-HOUSE REPRESENTATION IN CHICAGO AT SIX MONTHS: OUTCOMES, OBSTACLES, AND RECOMMENDATIONS* (2017).

97. Worden et al., *supra* note 94, at 549-50.

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 success but also object lessons in why simply injecting funding into rural programs is not enough to generate an impact. To improve access to counsel, resources must be accompanied by careful plans for implementation and a realistic approach to bringing needed partners aboard.

Third, understanding the full range of factors that are at play when producing access to counsel policy and reform requires research approaches that go beyond the readily identifiable and quantifiable characteristics of places. It is easy—but perhaps too easy—to say that access to counsel is just inherently harder to provide in rural areas where resources are scarce and logistical obstacles large. These things do indeed impinge on access to counsel, but they do not absolutely determine it. During our work in New York, we were able to identify sets of counties where quantitative approaches to understanding their policies simply fell short: their levels of spending on defense were either consistently higher, or consistently lower, than we predicted based on what we could quantify.⁹⁹ To understand what we were missing, we went back to interview data that we had on file with defenders in these over- and under-performing counties, and discovered striking contrasts. Not only were the counties in question clearly separated by the economic, demographic, and political factors that we could quantify, but they were also separately by three other dimensions that we labeled ideas, influence, and infrastructure. Defenders in well-funded counties were charismatic leaders (people with “ideas”) who wielded local political clout (had “influence”) and who had set up offices which had internal strength in the form of adequate supporting, non-attorney staff (“infrastructure”). Those in poorly-funded counties were, in starkest contrast, demoralized, disenfranchised, and poorly institutionalized. Strong local leadership, effective alliance building, and simple geniality are not readily measurable so they don’t feature in our regression analysis. Yet research applying qualitative approaches can be used to great effect to demonstrate their importance empirically.

These findings are a clear reminder of the fact that counties, rural or urban, are not simply collections of statistics specifying population density and tax bases. They are also communities—political communities, in particular—where relationships, personality, and history go an awfully long way toward explaining policies on issues like access to counsel. Success in guaranteeing access to counsel in rural areas, though it may require funding injections and rule changes, also requires coalition-building, leadership, and persistence. Political reform, particularly in an unpopular and largely disregarded policy area like indigent defense, occurs not simply as a consequence of stable characteristics of places. It occurs as part of a political process, often a negotiation, where relationships and power structures and institutions are the factors that shape policy. Poor access to counsel doesn’t simply follow from poor funding and geographic obstacles; it also follows from the discretion of judges, the agendas of politicians, and the energy of local administrators.

98. Chicago Appleseed Fund for Justice, *supra* note 94, at 7-10.

99. Davies & Worden, *supra* note 6, at 331.

From the perspectives of reformers working on rural justice issues, this should be encouraging. There is something to be said for the distinctiveness of rural areas in terms of the challenges they face inherent to their rurality. But there is nothing inevitable about rurality that need prevent access to counsel from being achieved. With dedications of resources, and perhaps even more importantly, local leadership and commitment, access to counsel should be attainable in every county in the United States.