

## **An Insiders' View of a Broken System?**

### **Defense Attorney Perspectives on the Status of Indigent Criminal Defense in Texas**

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## Abstract

One of the theoretical foundations of a democratic government is that all citizens should be equal before the law. Despite professed commitments to equal access to justice, reality is often starkly different for our nation's poor. This paper examines the structure and effectiveness of the court-appointed system for providing indigent defense as it exists in Texas. Drawing data from a random sample of criminal defense attorneys, the findings reveal that court-appointed attorneys are frequently lack access to special services and are poorly compensated. Additional evidence is presented that indicates that clients with retained counsel receive better legal representation than clients with court-appointed counsel.

*Of the questions which are before the American people, I regard no one as more important than the improvement of the administration of justice. We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man, and under present conditions, ashamed as we may be of it, this is not the fact.* President Taft in an Address before the Virginia Bar Association.

One of the theoretical foundations of a democratic government is that all citizens should be equal before the law. Many important governing documents have asserted the importance of equal access to justice. For example, the Magna Carta states “To no one will we sell, to no one will we refuse or delay, right or justice” and most state constitutions include a provision similar to New Hampshire’s which states “It is essential to the preservation of the rights of every individual, his life, liberty, property, and character that there be an impartial interpretation of the laws and administration of justice”. Despite these professed commitments to equal access to justice, reality is often starkly different for our nation’s poor. Consider the following:

In 1984, Calvin Burdine was on trial for capital murder. His attorney was Joe Frank Cannon, a court-appointed lawyer from Houston, Texas. At the conclusion of the trial, the jury foreman and Cannon’s co-counsel signed “affidavits saying Cannon slept through significant portions of the trial” (Connelly 1995, 18). The affidavit suggested that Cannon “has become so notorious for how quickly he picks juries in capital cases that the speed has become a courthouse joke” (Connelly, 1995, 18).

After years of watching herself and her children be abused by her husband, an Alabama woman had her husband killed. In a rare decision, the jury sentenced the woman - - the victim of the abuse - - to death. Reasons for this unusual decision may have been because her lawyers failed to present hospital records providing evidence of abuse, because an expert on domestic abuse did not interview the defendant until the night before he testified, or because “one of her court-appointed lawyers was so drunk that the trial had to be delayed for a day after he was held in contempt and sent to jail (Bright 1994, 1835).

In 1992, the United States Court of Appeals for the Fifth Circuit ordered a new trial for death-row inmate Francisco Martinez-Macias of El Paso because his legal representation had been incompetent. Martinez-Marcias’ court-appointed counsel was paid \$11.84 an hour for his work. In making its ruling the Court noted “the justice system got only what it paid for” (*Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992)).

While these anecdotes do not provide systematic evidence of a trend, they do reflect what many believe to be different standards of justice for the rich and the poor. Indeed, news accounts, law reviews, and court records are replete with stories of ineffective representation of our nation's poor.

Over the years the courts have decreed that all individuals, regardless of economic status, should have equal access to the law. In response, state legislatures and local governments have developed a variety of delivery vehicles designed to provide equal access. For many, the system remains far from perfect. Surprisingly, after years of good faith efforts on the part of policy-makers, there have been few systematic efforts to examine the effectiveness of the machinery designed to provide equal access to justice. This paper aims to partially fill that gap by focusing on one particular system -- court-appointed attorneys -- in one southern state (Texas). Unlike most examinations of indigent defense which draw data from court records, we focus on the attitudes of those who work day-in and day-out in representing indigents accused of criminal matters.

### **On the Need to Examine Justice as it Relates to the Poor**

The time is long past when one had to detail the purpose or justification for a governmental response to the need to provide legal services to indigent persons facing criminal charges. Re-runs of Henry Fonda as Clarence Earl Gideon in "Gideon's Trumpet" are known to all late-night television viewers and now it is somewhat difficult to explain why it took so long for the Court - - and indeed the people - - to recognize this "obvious" need. The image of a non-lawyer, who has been accused of an offense, attempting to defend himself or herself in a criminal

proceeding in which all the other court room participants are law school trained, offends anyone's sense of justice.

Despite general public commitment to the idea of equal access to justice, the public is frequently less supportive when the general concept is applied to specific circumstances. For example, those committed to the principle of justice for all, occasionally support proposals designed to expedite the imposition of death sentences by limiting the number of post-conviction appeals. A similar dichotomy is found in discussions of the provision of legal services to the poor. While the public remains committed, in principle, to each individual's right to an attorney, they frequently resist efforts to spend tax dollars on such services and often despise the attorneys who are asked to represent those accused of our societies most serious crimes. In a not unusual example, a Fort Worth, Texas attorney recently appointed to defend a client accused of burying his victim alive received an anonymous call which "obscenely assured him that he would be delivered into the torments of hell by a vengeful Almighty" for defending his client (Swickard 1997, B4).

This inconsistency in public opinion is more than an intellectual curiosity. The inability of the public to translate its general support for civil rights into specific policies which protect general rights is quite troubling. As suggested above, the common perception is that there exist two judicial systems - - one for the wealthy and another for the poor. This perception is reinforced when the public witnesses wealthy defendants such as OJ Simpson hire a team of high-priced defense attorneys to secure his acquittal. Understandably, the resulting attitude is that the wealthy are afforded, or rather can afford, a different standard of justice than the typical citizen. This view that all individuals are not equal before the law is certainly not new. Decades ago,

Reginald Smith noted that “(t)he administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons” (1919, 8).

The costs of not providing equal access to justice are perhaps obvious, but are nonetheless worthy of mention so that the seriousness of this issue is clear. Individuals unable to afford appropriate legal representation may receive delayed justice, or worse, may be denied justice. As the examples above indicate, there are heavy human costs associated with inadequate legal representation - - costs which range from small fines and probation to lengthy incarceration and even death. As Justice William O. Douglas noted in *Furman v. Georgia*, 408 U.S. 238 (1972), “(o)ne searches our chronicles in vain for the execution of any member of the affluent strata in this society.” It might be tempting to dismiss concern over this issue since it seems to effect only the least advantaged among us, however, Smith reminds us that lack of justice for the poor holds consequences for the rule of law and society in general:

The effects of this denial of justice are far reaching. Nothing rankles more in the human heart than the feeling of injustice. It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy. The conviction grows that law is not justice and challenges the belief that justice is best secured when administered according to law. The poor come to think of American justice as containing only laws that punish and never laws that help. They are against the law because they consider the law against them. A persuasion spreads that there is one law for the rich and other for the poor. (1991, 10)

While it may be reaching a bit to suggest that the current disparity between rich and poor in our criminal courts will end in anarchy, Smith makes a point worthy of consideration - - when justice is denied, respect for laws and the system of justice is lessened.

## A Brief History of Criminal Indigent Defense

The Sixth Amendment to the U.S. Constitution provides that defendants accused of crimes are entitled to “assistance of counsel.” Despite this provision, it was not until the 1900s that states were required to provide legal counsel to indigents in criminal matters. *Powell v. Alabama*, 287 U.S. 45 (1932), provided that legal counsel must be provided for all indigents charged with capital crimes. In 1963, the Court held in *Gideon v. Wainwright*, 372 U.S. 335, that indigents must be provided legal representation if they are charged with a felony. The right to counsel was extended to individuals charged with misdemeanors that involve possible imprisonment in *Argersinger v. Hamlin*, 407 U.S. 24 (1972).

*Gideon* and subsequent cases created a body of law which, in some cases, radically altered the way states treated indigent criminal defendants.<sup>1</sup> Instead of providing counsel only when an indigent defendant appeared wholly incompetent, states were now required to provide legal representation for all criminal defendants who were unable to afford counsel. In a report prepared for the American Bar Association shortly after *Gideon*, Lee Silverstein noted “(b)y this group of decisions the Supreme Court has made it quite clear that counsel for the defense is just as vital a part of the machinery of justice as the trial judge, the prosecutor, and the police” (1965, 9).

States have responded to the requirement to provide indigent criminal defense in varied ways. In general, one of three indigent defense systems is used: public defender systems,<sup>2</sup>

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<sup>1</sup> While several Supreme Courts cases in the 1900s extended the right to legal counsel to the state criminal matters, some states were already providing this service.

<sup>2</sup> Public defender systems are staffed by either full-time or part-time attorneys who represent nearly all the indigent cases in the jurisdiction. Under ideal circumstances the public defender’s office, which represents the interests of the indigent defendant, is funded and staffed in a fashion that is comparable to the district attorney’s office, which represents the interests of the

contract defense systems,<sup>3</sup> and court-appointed systems.<sup>4</sup> Variation between states exists as to the machinery selected with some employing a combination of systems and others opting to use one system to the exclusion of all others. States also differ in whether the machinery is administered by the state or by local jurisdictions (typically counties). Finally, states differ in whether the state foots the bill for indigent defense, subsidizes local efforts, or relies entirely on local funding sources (for a summary of the various systems see Spangenberg 1986).

### **The Case of Texas**

The analysis in this paper focuses on the criminal indigent defense system in Texas for a variety of reasons. First, Texas is one of the nation's most populous states with counties that range in size from 107 (Loving) to 2.8 million residents (Harris). This size and diversity afford excellent opportunities to compare the delivery of indigent criminal defense in a variety of contexts. Second, Texas largely relies on county-based court-appointed counsel systems. These systems merit examination since about 60% of American counties rely on court-appointed counsel systems, and the nearly all remaining counties use this system for cases where contract or public defenders are disqualified (Spangenberg and Smith 1986, Schulhofer and Friedman 1993). Third, Texas' system has been said to be "arguably the least effective delivery system for indigent

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state. The chief public defender can be elected or appointed.

<sup>3</sup> Contract defense systems allow individual attorneys, law firms, or bar associations to "contract" to handle indigent cases for a specified fee. The fee is calculated either on a flat fee per case basis or a for specific period (usually annual).

<sup>4</sup> In a court-appointed system a member of the private bar is appointed on a case-by-case basis for each criminal defendant. The appointment is typically made by a judge, a court clerk, or drawn from a rotating list of eligible attorneys.

criminal defense” (Long 1994, 48). Texas is one of only seven states that fail to provide state funds for indigent representation, relying on counties to fund 100 percent of the program. The result is that Texas ranks 40th in the nation in per capita spending on indigent defense, expending \$.99 per capita per year (Spangenberg 1986). Moreover, the state permits each county to develop its specific machinery and does not provide any form of programmatic oversight (Long 1994, 48). Finally, and a more practical reason, our joint work with the State Bar of Texas’ Committee on the Provision of Legal Services to the Poor in Criminal Matters provided an opportunity to gather a variety of data related to indigent criminal defense in Texas.

*Some Background on Indigent Criminal Defense in Texas.* The effects of *Gideon*, had been long anticipated in Texas and its revolutionary consequences were not nearly as dramatic in Texas as was the case in many other states. This is in large measure due to the fact that as early as 1857, the Texas Code of Criminal Procedure provided, “(w)hen the defendant is brought into Court, for the purpose of being arraigned, if it appears that he has no counsel, and is too poor to employ counsel, the Court shall appoint one or more practicing attorneys to defend him.” This guarantee of legal counsel in criminal cases, regardless of ability to pay, has therefore been the law in Texas for some 130 years and over 100 years before *Gideon*. In addition to the Texas Code of Criminal Procedure, Article 1, Section 10 of the present (1876) Texas Constitution guarantees the right of counsel and this provision, has been found in every Texas Constitution since Texas became a Republic in 1836. (See, *Foster v. State*, 767 S.W. 2d 89 (Tex. Crim. App. 1990).

It appears that there are some slight differences between the U.S. Constitution’s Sixth Amendment and Article 1, Section 10 of the Texas Constitution which would permit Texas courts to provide a more expansive interpretation of the right to counsel. As of this date, these

differences have not been used, but such a possibility certainly exists. For example, in *Ramirez v. State*, 721 S.W. 2d 490, 492 (Tex. App. - Houston [1st Dist] 1988) Justice Levy argued for an expanded view of the Texas right of counsel provision and wrote in dissent that, “(t)he right to counsel clause (in the Texas Constitution), having been earned by our forefathers only through much blood and agony, should correspondingly be accorded liberal construction in favor of the right it was intended to secure.” If this view attracts support from other appellate courts, it may well be that Texas could take a national leadership role in right to counsel questions such as threshold showing required to secure legal assistance, the establishment of minimum levels of experience, training and overall competency of the counsel providing this representation, and the implementation of better standards for compensation and other financial requisites of effective assistance of counsel. While Texas presently appears to be far from any such leadership role, it is clear that the State has long recognized the primacy of the right of counsel and that right has been specifically extended to indigent defendants at least since 1857.

*Texas’ System of Indigent Defense Today.* Criminal cases in Texas are tried in the counties in which the offenses occur, and given that there are 254 counties each with the authority to develop its own delivery system, to say that there has been diversity in the provision of legal services to indigent defendants is, no doubt, a gross understatement.<sup>5</sup> It appears that until fairly

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<sup>5</sup> The overwhelming majority of Texas counties rely on the court-appointed counsel system, however, other delivery systems are found in various parts of the state. For example, Wichita County (Wichita Falls) utilizes a public defender office in which it is expected that the office will handle the vast majority of indigent cases, with appointed counsel being used only when there is a conflict of interest or similar particular need. Dallas County (Dallas) employs a public defender office in which the office only takes a portion of the indigent cases with a substantial number being handled by appointed cases. Often these latter cases are the ones that will require special experience or will be prolonged (e.g., capital cases). Tarrant County (Fort Worth) uses public defenders (no “office” in any sense of the word) that serve a particular court

recently, many of the counties merely assigned local attorneys to handle these cases with little or no compensation or funds for expenses. Because receiving these appointments was so unpopular, the bar associations in some counties developed a system whereby they assessed their membership and established a pool of funds from which attorneys who were willing to take these cases would be paid or paid additionally. Indeed, it was such an arrangement that resulted in a statute creating the first public defender effort in Texas. In 1969, the Tarrant County Bar Association (Fort Worth), which had been assessing its members for these funds, succeed in transferring that financial burden to the county by persuading the legislature to provide one public defender position for each district court in that county that handled criminal matters. Even at present, some county bar associations continue to assess members who do not want to take court appointments and use these funds to “sweeten” the remuneration paid by the courts to those attorneys willing to handle them (e.g. El Paso County).

Despite a lengthy history of requiring indigent defense in criminal matters, we have precious little systematic evidence about the effectiveness of these delivery systems in Texas and elsewhere. Most examinations of this topic have relied on aggregate state-wide data which describe the level of funding, the number of indigent cases heard, and the structure of the various delivery systems. At other times, the data employed focuses on disposition patterns within a particular jurisdiction (Ballard 1995) or rely on isolated court cases and anecdotes. What has

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and are expected to handle only a relatively small percent of the cases. This is commonly a part-time position often used by the judge to handle cases that can be disposed of quickly (.e.g., obvious probation cases [young person caught joy riding] or probation revocations). Finally, Young County (Graham) enters into a contract with a particular attorney or firm of attorneys to handle the vast majority of the indigent cases, with appointed attorneys being used only when there is a conflict of interest or similar need.

been largely missing from discussions of this topic are opinions gathered from those working within the system -- defense attorneys, prosecutors, and judges. As such, any examination of criminal indigent defense will remain incomplete. The actual participants in the process are uniquely positioned to offer assessments of how the system works in practice, which we suspect is quite different from the intent of legislative mandates. To our knowledge the only attempt to gather data from those actually working in the indigent defense systems has been by Spangenberg and his colleagues. These studies, while somewhat informative, are of limited value given that the data collection and analysis are less than rigorous.<sup>6</sup>

Given the lack of appropriate data and the pressing need for examination of this topic, we move beyond anecdotal evidence related to how Texas has carried -- or tried to carry -- the guarantee of equal access to justice into effect. Specifically, this paper reports findings from members of the criminal defense bar in Texas related to their perceptions of the court-appointed system and its effectiveness. It is our hope that these findings will shed light on the structure and effectiveness of the indigent criminal defense system in Texas.

### **Research Design**

To gauge the Bar's attitudes related to the provision of legal services to the poor in criminal matters, a survey was mailed to a sample of criminal defense attorneys. Three sources of

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<sup>6</sup> In one study (Spangenberg 1993), surveys were distributed to lawyers attending a continuing education course. Such data gathering efforts are vulnerable to selection bias and may be quite unrepresentative of the population. Additionally, Spangenberg pooled these surveys with those drawn from a small random sample to create the impression that all the data were representative of attorney opinions. Finally, Spangenberg's data analysis technique is largely descriptive and makes no attempt to establish significant relationships or "explain" the patterns he observes.

information were used to identify eligible attorneys: (1) all those Board Certified in criminal law; (2) all subscribers to the State Bar's *Criminal Law Digest*; and (3) all members of the Texas Criminal Defense Lawyers Association. These sources yielded a population of roughly 6,000 criminal defense lawyers from which a list of 3,000 names were randomly selected. The Research Division of the State Bar of Texas mailed the survey to members of the sample employing a variation of the Total Design Method (Dillman 1978).

The response rate for the survey was 46 percent (n=1,376) reaching attorneys in 87 percent of Texas' 254 counties. The five most populace counties were adequately represented (Harris [Houston] n=248, Dallas n=154, Bexar [San Antonio] n=148, Tarrant [Fort Worth] n=108, and Travis [Austin] n=64). Male respondents constituted 83.7 percent of the sample. Over 80 percent of the respondents were white (81.1 percent); the rest of the sample was comprised of 11.7 percent Hispanic, 5.0 percent black, 1.4 percent Native American, and 0.9 percent Pacific Islander.<sup>7</sup>

The basic design of the survey included both open and closed ended questions grouped into five broad categories: (1) Respondents were asked to provide information regarding the machinery currently used to provide representation for indigents in their jurisdictions; (2) Respondents were asked to evaluate the level of support, both as to attorney remuneration and the provision of support services provided by the courts; (3) Respondents were queried about costs associated with a criminal defense practice in their counties to determine the "real wages" or

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<sup>7</sup> These numbers are just slightly different from those reported by Spanhel and Shimatsu (1996) who examine both the civil and criminal bar in Texas. They report that the Texas Bar is composed of 91.8 percent Anglo, 4.8 percent Hispanic/Latinos, 3.2 percent African-American, and 0.2 percent Native-American.

the "effective rate" of the attorneys' fees and thereby the reasonableness of the fees being ordered by the courts; (4) Respondents were asked to evaluate the quality of representation provided by retained and court-appointed counsel; and (5) Respondents were asked a variety of demographic questions. In addition to traditional questions on gender and ethnicity, questions in this section were designed to determine the respondents' level of experience in trial and appellate courts, as well as the distribution of their cases between retained and appointed defendants.

### **Some Descriptive Findings**

Given the dearth of information from the criminal defense bar related to indigent defense, an appropriate first step is to simply describe the nature of the system and the attorneys who handle the court-appointments. We have already noted the tremendous diversity among Texas counties, consequently, we expect these differences to be manifest in a variety of aspects of the indigent defense system. To this end, we divided the respondents into three groups: (1) those from counties with over 500,000 residents (6 counties); (2) those from counties with 10,000 - 500,000 residents (153 counties); and (3) those from counties with fewer than 10,000 residents (95 counties).

*The Lawyers.* Table 1 presents a summary of the characteristics of the respondents. As noted above, we believe this sample is an accurate reflection of the Texas criminal defense bar since our figures are consistent with those reported elsewhere (Spanhel and Shimatsu, 1996). In general, the large counties are slightly more diverse, both in ethnic and gender terms, than the criminal defense bar. While an indigent's court-appointed counsel is likely to be a Anglo male in all the counties, this is especially true in the small counties where 90.5% of the respondents were

Anglo and 87.1% were male.

(Table 1 about here)

There are also differences related to experience and the nature of the attorneys practice across the county classifications. Lawyers responding from small counties had, on average, over two years more experience than their colleagues in the largest counties. More relevant to our concern here is the nature of the workload among attorneys. In the smallest counties, attorneys report devoting 38 percent of their time to criminal defense work compared to respondents from the largest counties who devote 54 percent of their time to criminal work. Additionally, 40 percent of the attorneys in the largest counties indicate that as they have become more experienced, the number of the court-appointed assignments they receive has “declined substantially.” In contrast, only 17 percent of the attorneys in the state’s smallest counties make a similar claim. The picture painted by these figures is of two very different lawyers. In the largest counties, the court-appointed counsel is likely to be less experienced, devote the majority of his or her time to criminal work, have a heavy court-appointed case load which eases as the lawyer gains more experience. In the smallest counties, the lawyer is a bit more seasoned, but is a Jack-of-all-trades who will likely always handle a fair number of court-appointed cases due to the small size of the eligible lawyer pool in the county. In sum, the court-appointed cases appear to serve as a training ground in the states largest counties and more of a career-long endeavor in the smaller counties.

*The Structure.* As noted above, each county is allowed to develop their own machinery for the provision of legal services to the poor. Indeed, each judge within a jurisdiction frequently develops their own procedures for selecting counsel for indigent defendants (Ballard 1995). An

overview of the structure of the court-appointed system in Texas' various counties is provided in Table 2. In general, there is tremendous structural similarity across the counties. Of note is the perceived smaller role that judges play in the largest counties. For the decisions to appoint counsel and to determine the defendant's indigent status, judges in large counties tend to rely on court clerks more than is the case in medium and small counties.

(Table 2 about here)

*Compensation and Support.* The issue of who foots the bill is often central to discussions related to indigent defense. In the public arena, the discussion focuses on whether the state or county should fund indigent legal services and at what level. There is, however, another group who helps to foot the bill of indigent defense - - attorneys. As Perini noted, "(n)o group [other than court-appointed defense attorneys] is called upon to forego salaries and to pay the cost of their office overhead. Not prosecuting attorneys, not judges, not attorneys for the Texas Department of Corrections, the Board of Pardons and Paroles, the Dallas County Sheriff's Office, the Dallas Police Department, or deputy attorneys general. Criminal defense lawyers in private practice alone are called upon to make such sacrifices..." (1983, 423). To determine if perceptions related to compensation and support vary across Texas, respondents were asked a variety of questions which are summarized in Table 3. While there are few differences across the county classifications, several findings are of note. First, most jurisdictions appear to have a fee schedule and adhere to it. However, it appears that despite adherence to the schedule, attorneys frequently make a financial sacrifice. Respondents report that in one-quarter of their court-appointed cases they spend money out of their own pocket and that they typically recoup less than 30% of their normal fee from the county. In short, the criminal defense bar provides a subsidy to

the county. Not surprisingly, respondents indicate that the current levels of compensation affect the quality of representation provided to indigent defendants (67.8% for all counties), although this perception is stronger in large counties (73.1%) than in small counties (57.0%).

(Table 3 about here)

*Perceived Effectiveness.* The ultimate aim of the provision of legal services to the poor is to insure equal access to justice. Just as justice should be color blind, so should it be economically blind. While investigating disposition patterns is useful (Ballard 1995), those involved in the provision of legal services are uniquely positioned to offer insights not discernable from court records. The defense attorneys' responses to questions regarding the effectiveness and fairness of the court-appointed system are presented in Table 4. Again, there are few differences across the county classifications. Over 70 percent of the respondents believe that clients with retained counsel receive better legal representation than those with court-appointed counsel. When respondents were asked to evaluate their *own* efforts, one in four responded that they provide their retained clients with better representation. The table also provides some evidence that clients with retained counsel receive more favorable plea offers and sentences.

(Table 4 about here)

### **Defense Attorney Evaluations and Satisfaction Explained**

The descriptive assessment, while informative, does not explain why attorneys hold particular attitudes. Of particular concern is what factors help shape attorney attitudes toward the system and their perceptions that the current indigent defense system advantages clients with retained counsel. At a minimum, the machinery that provides legal services to the poor should

strive to provide a standard of justice that is on par with societies most advantaged. In addition to this minimum standard, it seems reasonable that an indigent defense system would strive to win the approval of its main participants -- attorneys, prosecutors, and judges.

To address these two issues, we constructed measures of differential judicial treatment and satisfaction with the court-appointed system. The differential judicial treatment measure combines six questions which asked respondents to assess if retained and indigent clients received disparate treatment by the judicial system.<sup>8</sup> A high score on this scale indicates that retained clients are advantaged relative to indigent clients. The satisfaction scale is calculated by combining three questions that asked respondents to state their level of satisfaction with various aspects of the court-appointed attorney system.<sup>9</sup> A high value on this scale indicates high levels of satisfaction.

Given our discussion, a number of factors can reasonably be expected to influence an attorney's perception of equality under the law and overall satisfaction with the court-appointed system. We expect that attorneys who practice in jurisdictions where the judge makes the appointment to be more like to perceive differential treatment and be less satisfied.<sup>10</sup> Texas judges are elected on partisan ballots and many believe the judicial system is overly influenced by politics.

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<sup>8</sup> The questions asked if the respondent perceived differences in how indigents and retained clients were represented, how *their* representation efforts differed, if they devoted less time to indigent cases, if judges treated them differently when representing indigent clients, and if they noticed different plea offers and sentences. Exact wording is available from the authors.

<sup>9</sup> The questions asked the respondent to express their level of satisfaction with the court-appointed system in general, with the method of determining indigence status, and the level of compensation. Exact wording is available from the authors.

<sup>10</sup> Coded 1 if the judge makes the appointment, 0 if not.

One respondent observed “El Paso County has long practiced a system whereby lawyers are appointed based on political favors and paybacks” while another opined “I have been refused appointments because I cannot afford to give money to the judge’s reelection campaign.”

Attitudes related to compensation and support necessary to provide an adequate defense are also likely to influence an attorney’s perception of the system. We expect that those who believe that low levels of compensation affect the quality of representation<sup>11</sup> to be less satisfied with the system and to believe that it is dysfunctional. We also expect those who expended their own money to represent indigent clients to hold less positive views of the system.<sup>12</sup> Individuals who indicate that they receive the necessary support services should be more likely to be satisfied and feel the system operates as designed.<sup>13</sup>

We also include a number of variables that account for individual traits of the respondents. Attorneys who have practiced law for a number of years are expected to be less satisfied since they will have a greater opportunity to experience the system’s blemishes.<sup>14</sup> In contrast, we expect those that actively seek court-appointments to be satisfied with system.<sup>15</sup> We also control

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<sup>11</sup> Coded 1 if respondent believes the level of compensation affects the quality of representation, and 0 if not.

<sup>12</sup> Coded 1 if respondent has spent their own money, 0 if not.

<sup>13</sup> Coded 1 if you believe you receive the necessary support services, 0 if not.

<sup>14</sup> Coded as the number of years the attorney has practiced law.

<sup>15</sup> Coded 1 if the respondent currently seeks court-appointments, 0 if not.

for the attorney's gender<sup>16</sup> and ethnicity<sup>17</sup> since others have found that these factors influence perceptions of the judicial system. Finally, given the county differences noted above, we include measures of the respondent's county. The patterns above indicate that respondents from medium, and especially small counties, will have more positive outlooks than their colleagues in larger counties.<sup>18</sup>

Our measures of the differential treatment and satisfaction with the court-appointed system were regressed on the factors believed to shape attorney attitudes. Turning our attention first to the perception that clients with retained and court-appointed counsel are treated differently, we find mixed support for our hypotheses (see Table 5). As expected, attorneys from small counties are less likely than their colleagues from large counties to perceive differential treatment of indigent and retained clients ( $b=.730$ ,  $s.e. = .162$ ). The indigent case load in these counties is considerably smaller and these attorneys spend less of their total practice engaged in criminal defense. This relationship is likely the result attorneys in smaller counties not having as many contacts with the court-appointed system. The other variable that performs as expected is our measure of access to support services. Not surprisingly, attorneys who believe they have access to sufficient support services tend to see few differences in how retained and indigent clients are treated ( $b=.730$ ,  $s.e. = .162$ ). Attorneys with sufficient resources are able to put on the defense they believe is appropriate and are therefore likely to approve of the outcome.

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<sup>16</sup> Coded 1 if female, 0 if male.

<sup>17</sup> Coded 1 if minority, 0 if Anglo.

<sup>18</sup> We include two dummy variables in our model. A medium population county is coded 1 if a medium-sized county, 0 if not. A small population county is coded 1 if a small-sized county, and 0 is not.

(Table 5 about here)

Two variables do not perform as expected. Respondents who believe compensation affects the quality of representation are actually likely to believe that differences between retained and appointed clients are minimal ( $b=1.695$ ,  $s.e. = .168$ ). Also surprising is the fact that those who currently seek court-appointed work tend to believe that differences exist between retained and indigent clients ( $b=-.320$ ,  $s.e.=.156$ ). We theorized that those who perceived differential treatment would not seek out work in a system they perceived to be unfair. More examination of these surprising relationships is warranted.

Our final analysis concerns the factors which shape an attorney's overall satisfaction with the court-appointed system (see Table 6). As with the examination of differential treatment, our expectations received mixed support. Attorneys practicing in jurisdictions where the judge makes the appointment decision are less satisfied than their colleagues appointed by other means ( $b = -.339$ ,  $s.e. = .171$ ). Several respondents were critical in their open ended responses about the influence politics played in the judicial process. Most of this criticism was directed at the judge.

Similar to the findings reported above, respondents who believed they had access to the necessary support services were more satisfied than their colleagues who felt they lacked appropriate support ( $b = 1.784$ ,  $s.e. = .173$ ). In fact, of the factors considered here, access to the necessary support services has the greatest effect on an attorney's overall level of satisfaction with the indigent criminal defense system. Minorities and those from medium-sized counties were also more likely to be more satisfied.

Again, a few relationships do not perform as expected. Respondents who believe that compensation levels affect the quality of representation are more satisfied than those who do not

hold this view ( $b = 1.071$ ,  $s.e. = .178$ ). Surprisingly, attorneys who have spent their own money to represent indigents are also more likely to be satisfied ( $b = .429$ ,  $s.e. = .185$ ). This finding is in contrast to our expectation that the lack of appropriate remuneration would result in feelings of dissatisfaction toward the system. Finally, those who currently seek court-appointed work are more likely to be dissatisfied ( $b = -.635$ ,  $s.e. = .166$ ). For these individuals, seeking court-appointed work may be more a result of simply needing the work. In contrast, those not directly encountering the system on a daily basis may perceive that it is functioning better than reality would indicate.

### **Discussion and Future Directions**

To withhold the equal protection of the laws, or to fail to carry out their intent by reason of inadequate machinery, is to undermine the entire structure and threaten it with collapse. For the State to erect an uneven, partial administration of justice is to abnegate the very responsibility for which it exists, and is to accomplish by indirection an abridgment of the fundamental rights which the State is directly forbidden to infringe. To deny law or justice to any persons is, in actual effect, to outlaw them by stripping them of their only protection. It is for such reasons that freedom and equality of justice are essential to a democracy...(Smith 1919, 5)

Reginald Smith may have been prone to overstatement, but his sentiment is well-placed. The principle that all individuals, regardless of economic status, are entitled to access to justice is widely held. Unfortunately, it appears that the implementation of this principle may have fallen short. The findings presented here provide one of the first efforts to describe the court-appointed indigent defense in Texas and the picture that is painted is revealing. Attorneys in Texas frequently spend their own money to represent their court-appointed clients and are compensated for only a fraction of their time and effort. The job of representing an indigent client who most

likely does not make a favorable court appearance is compounded by a lack of necessary support services. The result of this system is a consensus among 75 percent of those surveyed that retained defendants receive better representation than indigent defendants. This analysis also makes an initial attempt to identify ways to minimize the differential treatment of retained and indigent defendants and improve overall satisfaction with the system. Moving away from appointment procedures controlled by the court's judge and providing attorneys with the requisite support services would improve attorney perceptions of the system.

Obviously, much work remains to be done. The preceding analysis yielded some results which were contrary to our expectations. These merit further analysis. We also need to gather additional data to round out our picture. At this writing, a survey similar to the one sent to defense attorneys is being prepared for the state's prosecutors. Finally, we plan to complete the data by surveying judges with criminal jurisdictions.

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**Table 1**

**Characteristics of Those that Defend Indigents in Texas**

<b>Characteristic</b>	<b>All Counties</b>	<b>Large Counties (&lt;500,000)</b>	<b>Medium Counties (10,000 - 500,000)</b>	<b>Small Counties (&gt;10,000)</b>
<u>Gender</u>				
Male	83.7%	81.5%	85.6%	87.1%
Female	16.3	18.5	14.4	12.9
<u>Ethnicity</u>				
Anglo	81.1%	76.0%	83.3%	90.5%
Black	5.2	7.6	2.1	2.3
Hispanic	11.6	13.6	12.9	6.2
Native American	1.2	1.5	1.7	0.3
Pacific Islander	0.9	1.3	0.0	0.7
<u>Type of Practice</u>				
Percent Solo Practitioner	66.0%	64.0%	69.5%	67.7%
Average Number of Employees	2.37	3.21	2.50	1.99
<u>Experience</u>				
Mean Years Practicing Law	14.97	14.21	14.96	16.56
Mean Years Practicing Criminal Law	13.63	12.99	13.98	14.73
Mean Years Practicing Criminal Defense Law	12.12	11.64	12.48	12.86
Percent of Time Doing Criminal Work	49.16%	54.22%	49.20%	38.12%
Percent indicating # of court-appointed cases has declined substantially as their career advanced	33.2%	40.5%	33.5%	17.3%
Mean # of trial court cases per year	72.46	82.15	67.71	54.82
Mean # of court-appointed trial cases per year	35.22	39.54	32.01	29.39
Mean # of appellate cases per year	5.30	6.97	4.29	2.91
Mean # of court-appointed appellate cases per year	2.0	5.69	3.45	2.41

**Table 2**

**Structure of the Court-Appointed System in Texas**

<b>Characteristic</b>	<b>All Counties</b>	<b>Large Counties (&lt;500,000)</b>	<b>Medium Counties (10,000 - 500,000)</b>	<b>Small Counties (&gt;10,,000)</b>
<u>Method of Appointment</u>				
Judge Appoints	52.6%	36.5%	61.2%	78.9%
Clerk Appoints	29.7	40.6	24.8	11.4
Volunteer	1.5	1.7	2.0	0.9
Judge and/or Volunteer	12.9	17.4	9.6	6.0
Rotating List	0.6	0.7	0.8	0.3
District Attorney Appoints	0.2	0.0	0.0	0.6
Other	2.5	3.1	1.6	2.0
<u>Inclusion on List Determined by...</u>				
All Included	15.6%	14.4%	7.0%	25.4%
Volunteer	30.5	21.4	52.0	32.4
Volunteer and court qualifies	32.0	39.1	26.0	21.7
Volunteer and CLE	5.1	7.4	2.6	2.2
Volunteer, qualify, and CLE	3.5	4.8	3.1	1.1
All included unless opt out	2.8	1.5	3.5	3.4
Be Politically connected	2.8	4.3	1.3	0.5
Other	7.8	7.2	4.4	12.5
<u>Formal Provisions Exist for Selection in Complex Cases</u>				
Yes	22.6%	25.5%	23.6%	16.2%
No	40.3	34.0	49.2	46.4
Don't Know	37.1	40.5	27.2	37.3
<u>Indigent Status Determined by...</u>				
Judge	62.2%	45.7%	80.4%	82.0%
Clerk	29.0	43.9	12.4	11.1
Judge and/or Clerk	4.3	5.7	4.4	1.4
Defendant	1.7	1.7	0.8	2.3
Don't Know	2.9	3.0	2.0	3.2
<u>Are there Written Criteria for Determining Indigent Status?</u>				
Yes	32.3%	35.0%	31.6%	27.4%
No	33.7	28.3	40.0	39.9
Don't Know	34.0	36.7	28.4	32.8
<u>Criteria Typically used for Determining Indigent Status</u>				
In Jail	65.4%	71.7%	64.9%	53.1%
Ability to Pay	13.1	12.7	10.8	15.4
Formal Criteria	9.4	5.4	9.0	17.7
Judge Decides	5.1	4.9	5.9	4.8
Requested Counsel	4.6	2.7	5.9	7.4
Eligible for Food Stamps	1.0	1.3	0.9	0.6
Misc.	1.5	1.3	2.7	1.0

**Table 3**

**Compensation and Support Services Provided to those that Defend Indigents in Texas**

	<b>All Counties</b>	<b>Large Counties</b>	<b>Medium Counties</b> (10,000 - 500,000)	<b>(&gt;10,000)</b>
<u>Does court maintain a fee schedule?</u>				
No	13.4	8.9	14.0	22.1
Don't Know	12.2	12.0	8.4	15.4
<hr/>				
Yes	70.0%	73.9%	62.2%	67.4%
No	16.3	12.5	26.8	16.1
<u>Have you ever spent own money on defense of an indigent client?</u>	73.1%	74.1%		70.8%
No		25.9	26.6	
<u>In what percent of cases do you spend own money?</u>		29.10	25.54%	
<u>What percent of your normal fee do you recoup when doing court-appointed</u>	29.28%	28.62%		30.07%
<u>Do you receive the support services you</u>				
Yes		37.1%	43.2%	
No	61.0		56.8	60.1
<u>Approximately what percent of your</u>				
<u>denied?</u>	30.70%		36.11%	33.65%
<u>more money than attorney in court-</u>				
<u>appointed cases?</u>	39.6%		43.4%	37.9%
“frequently” or “always”				
<u>quality of representation?</u>				
Yes	67.8%	73.1%	67.9%	57.0%
Don't Know	9.3	8.8	6.3	12.6

**Table 4**

**Perceived Effectiveness of Representation Provided to Indigents in Criminal Matters in Texas**

<b>Characteristic</b>	<b>All Counties</b>	<b>Large Counties (&lt;500,000)</b>	<b>Medium Counties (10,000 - 500,000)</b>	<b>Small Counties (&gt;10,000)</b>
<u>In general, do retained or indigent defendants receive better representation?</u>				
Retained usually or always better rep.	75.0%	78.4%	70.0%	71.5%
No difference	24.0	20.5	28.8	27.9
Indigents usually or always better rep.	0.9	1.0	1.2	0.6
<u>Compared to your retained cases, do you spend more or less time on your court-appointed cases?</u>				
More time on retained cases	39.3%	42.5%	35.4%	35.3%
Equal Time	54.0	51.8	55.1	57.7
More time on appointed cases	6.7	5.6	9.5	6.9
<u>Do <b>your</b> retained or indigent clients receive better or worse representation?</u>				
Retained usually or always better rep.	25.8%	26.2%	27.1%	23.6%
No difference	74.0	73.6	72.1	76.4
Indigent usually or always better rep.	0.2	0.1	0.8	0.0
<u>Do retained or indigent defendants receive better plea offers?</u>				
Pleas better for retained	40.2%	45.9%	36.1%	31.3%
No difference	57.8	52.1	61.0	67.5
Please better for indigent	1.9	1.9	2.9	1.2
<u>How does judge treat retained and appointed counsel?</u>				
Retained always/usually treated better	15.5%	20.1%	14.2%	7.0%
No Difference	77.7	70.5	80.9	90.2
Appointed always/usually treated better	6.8	9.4	4.9	2.7
<u>Do retained or indigent defendants receive better sentences</u>				
Retained always/usually receive better sentences	26.5%	33.8%	24.6%	13.0%
No Difference	66.3	57.4	67.6	83.6
Indigents always/usually receive better sentences	7.2	8.8	7.8	3.4

**Table 5**

**Determinants of Defense Counsel's Perception that Retained and Indigent Defendants are Treated Differently in Texas**

<u>Variable</u>	<u>b</u>	<u>Beta</u>	<u>s.e. of b</u>
Judge Makes Appointment	-.216	-.042	.161
Believe compensation affects quality of representation	1.695	.305	.168**
Have spent own money on indigent defense	.005	.001	.174
Believe you receive necessary support services	.730	.140	.162**
Number of years practicing law	.007	.027	.009
Currently seek court-appointed work	-.320	-.062	.156**
Gender	-.192	-.027	.212
Ethnicity	.214	.034	.188
Medium population county	-.465	-.073	.197*
Small population county	.730	.140	.162**
Constant	17.683		.570**

R<sup>2</sup> = .165

F = 20.311\*\*

n = 1039

\* = significant at .10

\*\* = significant at .05

**Table 6**

<u>Variable</u>	<u>b</u>	<u>_____</u>	<u>s.e. of b</u>
Judge Makes Appointment		-.059	.171**
of representation	1.071	.171	
Have spent own money on indigent defense		.064	.185**
	1.784	.302	
Number of years practicing law	-.009		.009
Currently seek court-appointed work		-.108	.166**
	-.014	-.002	
Ethnicity	.503		.201**
Medium population county		.065	.205**
	-.123	-.018	
Constant	5.732		

R<sup>2</sup>  
F = 29.190\*\*  
n = 1112

\*\* = significant at .05