The Status of Indigent Criminal Defense in Texas:

Some Preliminary Findings

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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.

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

One of the theoretical foundations of a democratic government is that all citizens should be equal before the law. 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. The work we report on today is part of an on-going assessment of the delivery of legal services to the poor in Texas.

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. 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. 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 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).

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. Simply put, 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 affect only the least advantaged among us, however, Reginald 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 another for the poor. (1919, 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.[1] 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).

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,

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[1] 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.

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).[2]

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.[3] It appears that until fairly 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

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[2]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.

[3] 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 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.

counties developed a system whereby they assessed their membership to establish 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, succeeded 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 compensation 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 focus on disposition patterns within a particular jurisdiction (Ballard 1995) or rely on isolated court cases and anecdotes. What has 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. We believe that the actual participants in the process are uniquely positioned to offer assessments of how the system works in practice and we suspect their observations will be of a system that operates quite differently from the intent of legislative mandates.

We are encouraged that this Subcommittee has begun the process of evaluating the delivery of legal services to the poor. As we have noted above, we believe this matter is important and it should come as no surprise, for a number of reasons, that the legislative and judicial developments in Texas will serve as examples of others. 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 roughly 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 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 capital 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).

An Assessment of the Indigent Criminal Defense System in Texas by the State Bar of Texas

Committee on the Provision of Legal Services to the Poor in Criminal Matters

In 1994, the State Bar of Texas established a standing committee on the provision of legal services to the poor in criminal matters. The charge or mission of the committee was:

> . . . to study the system of defense of indigent persons in criminal law matters in Texas, collect data and other information relevant to their defense and to develop recommendations for action by the State Bar of Texas, the Texas Legislature, and all other entities that are or should be involved in the provision of quality representation to indigent persons involved in criminal law matters.

The committee was initially composed of forty (40) members selected by the President of the State Bar. These members were all practicing attorneys and included trial court judges, prosecutors, defense attorneys, and both state and federal public defenders. At the first meeting of the group, a consensus developed around the recognition that before doing anything else we had to learn what was presently being done with regard to meeting the needs of the poor in criminal law matters. As a result the Committee agreed that its first task would be to gather information which it could then use to determine its goals and the paths to those goals. It was further agreed that the Committee should expand its membership to include the services of someone versed in survey methodology and data analysis.

Gathering Data

As noted above, Texas counties are responsible for providing indigents with counsel and the other requisites for defending against criminal charges. Yet, the Committee noted, there had never been a systematic study of how the poor in this State are given representation in criminal matters. Given that there are some 254 counties in Texas, each of which has devised its own system for responding to this need, there was an obvious need to learn what was being done in this area before the Committee could intelligently discuss what changes or improvements should be made.

Not only did the Committee not know how the counties were handling this responsibility, there was nothing but anecdotal information that could be used to evaluate the current system: Were those working in the system generally satisfied with the current system? Was the system in need of major reform or minor modifications? Did these assessments vary by jurisdiction? These, and a host of other questions, needed to be answered before the Committee could proceed with policy recommendations to the entire Bar or the Texas Legislature.

While some information, such as the number of indigent cases per jurisdiction, could be gleaned from public records, much of the information we required was only available from the people who were actually involved in these tasks and filing this role. To gain this information, the Committee decided to design and administer surveys to three different groups. First, in November 1995 the Committee sent a questionnaire to a sample of 3,000 defense attorneys (see Appendix A). Second, in March 1997 a similar survey was sent to every prosecutor in Texas (n

= 1,942) (see Appendix B). Finally, in the next few days a third survey will be mailed to every county and district judge with criminal jurisdiction (See Appendix C). The sampling procedure and survey method is described in more detail below.

While each of the surveys was tailored specifically to the target audience, every effort was made to keep question wording as similar as possible. Despite some necessary variations, the questions tended to cluster around several broad topics. First, respondents were asked to provide information regarding the current method used to provide representation for indigents in their jurisdictions. Questions in this section include queries to determine how attorneys are appointed and how indigent status is typically determined in the various counties. Second, respondents were asked to evaluate the level of support, both as to attorney remunerations and the provision of support services provided by the courts. Based on anecdotal comments and the experience of the committee members, we had reason to believe that court appointed attorneys in many areas of the state were not adequately compensated, that they were frequently denied (or deterred from seeking) essential support services, and that these circumstances adversely affected their ability to provide appropriate defense. Specifically, respondents were asked about their experiences and observations regarding whether current compensation and support levels attracted qualified counsel and whether these affected the quality of representation provided by counsel.

Third, to determine the "real wages" or "effective rate" of the attorneys' fees and thereby the reasonableness of the fees being ordered by the courts, the respondents were queried about costs associated with a criminal defense practice in their counties. One of the Committee's chief concerns was that in many areas of the state members of the criminal defense bar were actually subsidizing the counties. It was believed that instead of being a burden equally shared by all members of the community, or even all members of the bar, criminal defense attorneys were being asked to provide their professional services for compensation that barely covered - - or even failed to cover - - their overhead costs. Thus, relative to the rest of the community, and particularly relative to the rest of the bar, criminal defense attorneys were thought to be carrying an unfair share of the costs associated with the communities' responsibility for defending indigents charged with criminal offense. To evaluate this issue, defense attorneys were asked to provide us with an evaluation of their costs and other economic factors of their practice, prosecutors were asked to provide their perception of the level of compensation, and judges were asked to report how much they pay for certain services. Judges were also asked to provide information on how much political pressure they feel from county commissioners as it relates to their budget.

Fourth, the survey asked several questions that required the respondent to evaluate the quality of representation provided by retained and court appointed counsel. Specific questions focused on possible differential disposition trends, plea offers, and treatment by judges. Defense attorneys were asked to compare their own efforts at representing retained and appointed defendants while prosecutors and judges were asked if they observed differences in the behavior of individual attorneys who represented both retained and appointed counsel.

Finally, 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.

The Samples and Survey Administration

Defense Attorneys. To gather the opinions from defense lawyers, prosecutors, and judges, three different mailing lists were developed. The Research Division of the State Bar of Texas was asked to help identify a sampling frame for criminal defense attorneys. These lawyers were identified from the following sources: (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. After removing duplicate names and the names of all prosecutors and judges, these sources yielded a population of roughly 6,000 criminal defense lawyers. Using this list, 3,000 names were randomly selected to compose our sample.

The response rate for the survey was 46 percent (n=1,376) reaching attorneys in 88 percent of Texas' 254 counties. The five most populace counties were adequately represented (Harris [Houston] n=249, Dallas n=155, Bexar [San Antonio] n=149, Tarrant [Fort Worth] n=109], and Travis [Austin] n=65]. Male respondents constituted 83.5 percent of the sample. Over 80 percent of the respondents were white (81 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.[4] The typical respondent had been practicing criminal defense law for 12 years. Nearly a majority of the sample (48 percent) reported that the number of court-appointed cases they handle each year has declined as their careers progressed. This finding would seem to support conventional wisdom that court appointments are used by young attorneys to gain experience and as a source of income in the early stages of their careers. Perhaps more importantly, this finding suggests that a large percentage of indigent criminal cases are handled by young, less experienced members of the bar.

Prosecutors. To gauge the opinions of prosecutors our Committee sought the cooperation of the Texas District and County Attorneys Association (TDCAA) and sent a survey to every criminal prosecutors in the state. A total of 1,942 surveys were mailed and 1,113 were completed and returned for a response rate of 57 percent. Over 85 percent of the respondents were white (86.1 percent); the rest of the sample was comprised of 9.6 percent Hispanic, 2.8 percent black, 0.7 percent Native American, and 0.5 percent Pacific Islander. The typical respondent had practiced law for 10.3 years and been a prosecutor for 7.3 years. Twenty-eight percent of the respondents indicated that they are permitted under statute to engage in the private practice of law and these respondents devote an average of 20 percent of their time to their

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[4] These numbers are just slightly different than those reported by Cynthia L. Spanhel and Leah V. Shimatsu in "A Profile of Minority Lawyers In Texas" (Texas Bar Journal, October 1996). Spanhel and Shimatsu examine the entire bar, both civil and criminal, and report that the Texas Bar is composed of 4.8 percent Hispanic/Latinos, 3.2 percent Africa-Americans, and 0.2 percent Native-Americans.

private practice. Sixty-seven percent of the respondents attend continuing criminal legal education (CLE) courses sponsored by the State Bar of Texas while nearly all (90 percent) report attending TCDAA CLE courses. Finally, roughly a quarter (27.5 percent) of the respondents subscribe to the *Criminal Law Digest* and only 6.6 percent of the prosecutors responding are Board certified in criminal law.

Judges. In the coming days our final survey will be mailed to every county and district judge with criminal jurisdiction. We should be able to report our response rate by the end of September 1998 and have preliminary findings by early November.

Survey Method. Each survey instrument was administered by the Research Division of the State Bar of Texas employing a variation of the Total Design Method (Dillman 1978). In each case the process began by sending a letter to the respondent notifying them of their selection to participate, the importance of the subject, and encouraging the respondent to complete and return the survey. Our Committee was fortunate to have the initial letter to the defense attorneys and prosecutors signed by Judge Michael McCormick, the Presiding Judge of the Court of Criminal Appeals. The letter announcing the survey to the judges has been signed by both Judge McCormick and Judge Thomas Phillips, the Chief Justice of the Texas Supreme Court. Roughly one week after the announcement letter was mailed, the survey was mailed to the respondent along with a cover letter[5] and a postcard asking if they would like a summary of the results.[6] In all cases the respondent is assured that their survey will remain confidential. One week after the survey has been mailed a postcard reminding the respondent of the survey and thanking them for their reply was mailed. Finally, about a month after the initial mailing of the questionnaire, a follow-up letter and survey was sent to those in the sample who had not yet responded. In each case this letter has been signed by the Allan Butcher, Co-Chair of the State Bar of Texas Committee on the Provision of Legal Services to the Poor in Criminal Matters.

Some Preliminary Findings From Defense Attorneys and Prosecutors

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[5] For defense attorneys and judges the cover letter was signed by the President of the State Bar of Texas. For prosecutors, the cover letter was signed by the Executive Director of the Texas District and County Attorneys Association.

[6] The postcard contains the respondents name and is returned separately from the survey. This procedure allows those administering the survey to determine who has responded without permitting them to attribute a particular survey to an individual respondent. This procedure also prevents the respondent from receiving follow-up notices about the questionnaire.

To characterize the opinions of the State's prosecutors as starkly different from those of the defense bar would, perhaps, overstate the case, however, it is clear that substantial differences exist between the two groups. Generally speaking, members of the criminal defense bar believe the following:

* In most circumstances the judge unilaterally makes the appointment of counsel and politics (e.g., reelections concerns, the need for the appearance of a fiscally sound budget, etc.) unduly influence the process.

* Court-appointed counsel are hampered in their efforts to represent indigents because they are denied access to the requisite special services (e.g., criminalist, investigator, DNA expert, etc.). Moreover, the denial of these services adversely affects the quality of representation provided to the State's poor

* The level of compensation paid to court appointed counsel is so low as to deter the best attorneys from accepting appointments and discourages those that do take cases from vigorously pursuing them.

* Indigent clients are treated despairingly during various stages of the judicial process. Specifically, indigent clients are believed to have less experienced and less prepared attorneys, to be given different plea offers from prosecutors, to be treated differently by judges and to receive harsher sentences.

In addition to the daily hardships of being poor, this picture painted by the defense bar is not a pleasant one for the State's indigent's accused of crimes.

Standing in contrast to the opinions of the criminal defense bar, prosecutors are far less alarmed by the current system of provision of legal services to the State's poor. In most cases, prosecutors do not believe that indigents receive substantially different levels of representation than defendants who retain private counsel. And where prosecutors concede the system may be somewhat dysfunctional, they do not believe its shortcomings translate into injustices levied against indigent defendants.

While each of the findings and conclusions from our surveys of criminal defense attorneys and prosecutors are too numerous to detail here, we would like to report some of the findings in each of the major areas of the study.

Appointment Method.

In appointing counsel, the court must first determine whether the defendant is indigent. The process of determining indigence is quite varied across the counties and presents the court with a difficult decision. As stewards of the county's money, the court has a responsibility to provide counsel only to defendants who are truly indigent. At the same time, the court has a

responsibility to ensure that everyone so entitled receives appropriate legal representation. Texas law does not provide criteria to be used in determining indigence, instead leaving the decision to each jurisdiction. The result is a system that appears to require, for most defendants, that the defendant remain in jail in order to qualify for court-appointed counsel. A clear majority of our respondents (64.8 percent) report that if the defendant is in jail and unable to make bail, the court considers them indigent and eligible for court appointed counsel. The criteria used in various jurisdictions for determining indigence are presented in Table 1.

Table 1
Criteria Used For Determining Indigence Status

Method	Percent
In Jail/Unable to Make Bail	64.8
Ability to Pay Determined	13.3
Formal Evaluation	9.4
Judge Decides	5.2
Defendant Requests Counsel	4.8
Other	1.4
Food Stamp Eligibility	1.2
(n = 1192)	

If the defendant is judged to be indigent, arguably the most critical decision in the representation of indigent defendants is the act of appointing counsel. While almost all jurisdictions in Texas use a court-appointed system, a variety of methods of appointing counsel exist. The marginals from the question which asked respondents to describe the appointment process in their jurisdiction are presented in Table 2.

Table 2
Methods of Appointing Counsel in Indigent Cases in Texas

Method	Percent
Judge appoints	53.2
Clerk or court personnel appoints	29.3
Judge appoints and/or volunteer	12.7
Other	2.5
Affirmatively volunteer	1.5
Rotating list of attorneys	0.6
District Attorney appoints	0.1
(n=1,333)	

Two findings are worthy of special attention. First, a majority of respondents report that

the judge makes the appointment decision. This is particularly important given that judges in Texas are elected on partisan ballots. In open-ended answers, respondents noted that politics frequently influence the appointment process.[7] Second, two respondents report that the district attorneys in their jurisdictions make the appointments which are then confirmed by the judges. While the number of respondents making this observation is small, these responses are very troubling since it appears that the prosecution is selecting the attorneys, and thereby the quality of defense, they wish to argue against.

The process of appointing defense counsel seems to vary little by the type of case. Only 22.4 percent of the respondents indicate that special procedures exist for selecting counsel in difficult or complex cases (e.g., mentally ill, death penalty).

Level of Support and "Effective Rate." As noted above, the Committee had reason to believe that in many cases the criminal defense bar was not adequately supported by the court and was, in effect, subsidizing the legal expenses of indigent defendants. The picture painted by respondents is quite clear. Consider the following:

- 63.7 percent of the respondents report that they are either somewhat or very dissatisfied with the current system of compensation.

- 72.8 percent of the respondents report that they have spent their own money on indigent related litigation expenses.

- 76.4 percent of the respondents indicate that current compensation rates are not sufficient to attract and retain qualified private counsel.

- 39.4 percent of the respondents report that support staff (e.g., investigator, criminalist) frequently or always receive higher levels of compensation than court-appointed counsel.

- Respondents report that the level of compensation provided by the court is, on average, 27.5 percent of their normal fee.

Quality of Representation. Given these responses, it should not be surprising that nearly three-quarters of all respondents (74.5 percent) report that retained counsel usually or always provide better representation than court-appointed counsel. Specifically, 39.5 percent of the respondents indicate that plea offers are better for clients with retained counsel and 26.2 percent report that clients with retained counsel usually or always receive more favorable sentencing decisions. Surprisingly, in response to a query that asked respondents to evaluate their *own* effort in representing indigent clients, 39.2 percent report that they spend less time on their court-

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[7] The "politics" influencing the process were quite varied. Some respondents indicated that friends of the judge and political allies were rewarded with court appointments. These appointments might be understood as "positive politics." At times, however, appointments may be seen as a punitive action. Some respondents report that judges give difficult and problematic cases to attorneys they dislike. These appointments might be understood as "negative politics."

appointed clients relative to their retained clients and 25.6 percent concede that their retained clients usually or always receive better representation.

Finally, with an eye toward reforming the current system, respondents were asked to evaluate a variety of proposals ranging from no changes whatsoever to increasing compensation levels for the court-appointed system to developing a statewide public defender system. The option preferred by a clear majority of the respondents (62.5 percent) was to retain the current court-appointed system while increasing attorney fees. The second most popular reform was the implementation of a centrally coordinated and regulated assigned-counsel system to replace the judge-appointed system. Little support for either a county-based or statewide public defender system was found among the respondents. In fact, more respondents indicated their preference for "no changes necessary" than for either form of a public defender system.

The View from the Other Side: Defense Attorney and Prosecutor Opinions Compared

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System Satisfaction and Experience of Appointed Counsel. Overall, there is only moderate difference between the attitudes of defense attorneys and prosecutors as it pertains to the process of appointed counsel. Over 70 percent of respondents to both surveys indicate that judges make the appointment in their jurisdiction. As the data in Table 1 indicates, the defense bar is somewhat more dissatisfied with this process of appointment (37.3 percent responded “somewhat dissatisfied” or “very dissatisfied”) than prosecutors (20.7 percent responded with similar levels of satisfaction). While the two sides of the courtroom do not hold widely different views about the appointment process, they do believe very different types of attorneys are being appointed. For members of the defense bar, the attorney that is typically appointed is seen as less

TABLE 1
OVERALL SATISFACTION WITH APPOINTMENT PROCESS AND WHO GETS APPOINTED

How satisfied are you with the current method of appointing counsel in indigent criminal cases in your jurisdiction?

	Very Satisfied	Somewhat Satisfied	Neither	Somewhat	Very Dissatisfied	Dissatisfied
Defense Bar (n=1330)	14.7%	32.0%	15.7%	22.5%	15.2%	
Prosecutors (n=1079)	22.3	31.0	26.0	16.3		4.4

When thinking of the criminal defense attorneys in your jurisdiction, are the attorneys who provide court appointed representation generally more experienced or less experienced than the typical criminal defense attorney?

	Court Appoint. Always More Experienced	Court Appoint. Usually More Experienced	Equally Experienced	Retained Usually More Experienced	Retained Always More Experienced	
Defense Bar (n=1288)	0.7%	8.0%	37.3%	50.2%		3.7%
Prosecutors (n=1084)	0.9	17.1	54.4	25.4	2.2	

experienced than retained counsel in similar cases (53.9 percent responded that retained counsel were "usually" or "always" more experienced). By contrast, a majority of prosecutors perceive the experience levels of the count-appointed and retained counsel are nearly equal.

Finally, based on comments from several members of the defense bar, prosecutors were asked to evaluate what factors they believed were likely to influence the appointment process. As the data in Table 2 reveals, substantial numbers of prosecutors believe that personal relations with the judge, political connections, and the ability to move the case off the docket (with or without concern for the quality of the defense) play a part in the appointment process. Given the responses to this question, it is somewhat surprising that more prosecutors did not express higher levels of dissatisfaction with the appointment process. It may simply be that many prosecutors have come to accept these factors as part-and-parcel of a system that allows elected, partisan judges to make the appointments.

TABLE 2
FACTORS THAT INFLUENCE THE APPOINTMENT DECISION

What influence does each of the following have in the appointment decision?

	None	Some	Moderate	Substantial
Attorneys reputation for moving cases, but consistent with a quality defense	10.7%	17.9%	27.7%	43.7% (n=1054)
Being friends with the judge	26.5	25.9	23.8	23.7 (n=1029)
Being a political supporter of the judge	37.4	25.3	19.5	17.9 (n=1012)
Being a campaign contributor	45.4	25.1	16.8	12.7 (n=977)
Attorneys reputation for moving cases, regardless of the quality of defense	37.5	39.0	17.5	5.9 (n=1009)

Compensation and Effective Representation. One of the largest concerns raised by members of the defense bar was the perceived lack of sufficient compensation. As charcterizered by the defense bar, the frequent failure of the court to approve appropriate support services resulted in sub-par legal representation of the State's indigents. Additionally, the low levels of pay discourage some of the State's most qualified attorneys from taking indigent cases[8] and create such finiancial hardships that some attorneys provide a less than vigorous legal defense of their indigent client.

[8] ______County actually permits attorneys to "buy out" of court appointed service. One can easily invision those attorneys who could attract more business from retained work simply paying the necessary fee to buy out of court appointed work.

On the issue of compensation and representation quality, the view from the other side of the courtroom is dramatically different. Unlike their defense counterparts, a majority (60 percent) of prosecutors believe that defense counsel receive the necessary support services and two-thirds (66.5 percent) believe that denials of requests for special services “rarely” or “never” affect the quality of representation (see Table 3). Prosecutors and defense attorneys also have starkly different views of the consequences of the current levels of compensation paid to court appointed defense counsel. For example, only 15 percent of defense attorneys believe the current rates of compensation are sufficient to attract qualified counsel and two-thirds (67.4 percent) contend the rates of compensation affect the quality of representation. In contrast, nearly a half of the prosecutors (49.3 percent) believe the current rates attract appropiate counsel and just over one-third (38.3 percent) believe the rates are at a level that would affect the quality of representation.

While most prosecutors seem content with the current rates of compensation, six in ten (60.6 percent) prosecutors have observed defense counsel who behave differently depending on the financial means of their client. This finding is particuarly distrubing since it means that the *same attorney* defends his or her retained client in one manner and his or her indigent client in a different manner. Specifically, prosecutors note that court appointed counsel devote less time, are less prepared, and put on a less vigorous defense of their indigent clients. This pattern of behavior runs counter to several of the rationales offered for using the court appointed system instead of the other alternative methods of delivering legal representation to the poor. There are many reasons that defendants, regardless of financial class, should be treated is a similar mannter. First, the legal cannon of ethics requires that lawyers provide the best defense possible. This would seem to suggest that both classes of clients are treated similarly. Second, court appointed counsel have legal private practices to maintain and it is believed that attorneys would work diligently for their indigent clients in hopes of attracting future business. Third, much of the legal business is based on referrals from one attorney to the next. As such, attorneys representing indigent clients would seem to have an incentive to provide quality representation in case other attorneys are watching their efforts and are not aware of the financial means of client. A poor showing could be bad for future business while a strong performance would earn the respect of the attorney’s peers. When further queried as to the motivation for the changed behavior, 73.6 percent of the prosecutors responding (n = 587) noted that money was at the root of the behavior.

Judicial Outcomes Examined.

TABLE 3
COMPENSATION AND EFFECTIVE REPRESENTATION

Do you believe that defense counsel generally receive the support services they need to represent their indigent clients?

	Yes	No	Don't Know
Defense Bar (n=1252)	39.7%	60.3%	0.0%
Prosecutors (n=1087)	60.0	22.4	17.5

Do you believe that current rates of compensation for court appointed counsel are sufficient to attract qualified private counsel for court appointed indigent cases?

	Yes	No	Don't Know
Defense Bar (n=1334)	15.7%	76.4%	7.9%
Prosecutors (n=1082)	49.3	37.4	13.3

Based on your observations, does the level of compensation paid to assigned counsel in any way affect the quality of representation they provide to defendants in your county?

	Yes	No	Don't Know
Defense Bar (n=1338)	67.4%	23.4%	9.2%
Prosecutors (n=1083)	38.3	46.9	14.7

Have you ever observed individual defense counsel who behave differently depending on whether he or she is representing a retained or indigent client? (asked of prosecutor's only)

	Yes	No
Prosecutors (n=1071)	60.6%	39.4%

Thinking of the defense attorneys you have noticed behaving differently depending on the nature of their client...
(asked of prosecutor's only)

	Yes	No
Do attorneys devote less time to their indigent clients?	90.2%	9.7% (n=620)
Are attorneys less prepared to defend their indigent clients?	76.1	23.9 (n=599)
Do these attorneys put on a less vigorous defense of their indigent clients?	65.7	33.9 (n=598)

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.