

A PATCHWORK OF POLICIES: JUSTICE, DUE PROCESS, AND
PUBLIC DEFENSE ACROSS AMERICAN STATES

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I. INTRODUCTION

“In the end, a good lawyer is the best defense against wrongful convictions.”¹

Adversarial systems are intended to discover the truth of an accusation through skilled combat over facts, evidence, and law. What adversarial procedures cannot guarantee, however, is that the truth will emerge from even the most balanced of competitions. In principle, the Constitution and procedural law are understood to err on the side of innocence—to establish the rules of the game in the adversary competition that favor defendants’ fates over the state’s interests in public safety and prosecution. Since the due process revolution of the 1950s and 1960s, this system bias was made more explicit through a series of rulings that clarified the procedural protections in the Bill of Rights. This movement turned a critical corner in 1963, when the Supreme Court asserted that “[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”² The right to legal counsel was widely regarded as the pivotal element in maintaining individuals’ security against potentially coercive or careless authorities. While in 1949 Jerome

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¹ Janet Reno, Remarks at the 2000 National Symposium on Indigent Defense (2000), *in* INDIGENT DEFENSE, Oct./Nov. 2000, *available at* http://www.sado.org/fees/reno_competent.pdf.

² *Gideon v. Wainwright*, 372 U.S. 335, 334 (1963).

Frank might have been accurate when he asserted that “facts are guesses,” it seemed clear a few years later that the Court preferred that those “guesses” err on the side of defendants’ claims of innocence.³

The Supreme Court’s establishment of a right to counsel was quickly followed by the development of model policies, best practices guides, and a growing consensus among legal professionals and advocates that the most accurate expression of the Court’s intent would entail establishment of state-level (and state-funded) public defender offices, politically independent of both legislatures and local politicians.⁴ However, having established the general right to counsel, the Court had rather little to say about how to deliver it, leaving states and local governments to devise systems that met budgetary constraints, and that were politically palatable in their own legislative and political environments.⁵ Further, in the intervening decades, while the rules of criminal adjudication have become more complex, public opinion about crime and punishment has grown more cynical and alarmed, and the economic and social disparities often associated with involvement in the criminal justice system have become wider.⁶

As a result, public defense remains a low-visibility, decentralized, and highly variable element of state court operations. While in all states systems have been put in place to ensure at least nominal representation in criminal prosecutions, the structure, funding, quality, and breadth of the right to counsel varies dramatically across states and localities. If counsel is critical to a principled and effective defense, then we must hypothesize that substantial variability in the characteristics of public defense systems produces substantial variation in the risk and the reality of erroneous convictions. We add that most studies suggest that at least eighty percent of criminal defendants are, by conventionally used criteria,

³ Jerome Frank, *Facts Are Guesses*, in CRIME LAW AND SOCIETY 121 (Abraham S. Goldstein & Joseph Goldstein eds., 1971).

⁴ See, e.g., NAT’L LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976); AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE 5.5 (2d ed. 1986).

⁵ See generally *Gideon*, 372 U.S. at 335.

⁶ See MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 3–4 (2004); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 10 (2001); STUART A. SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION 16–18 (1991); see generally KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA (2000) (discussing the past thirty years of crime, politics, and culture in the United States).

determined to be indigent at the point of arrest,⁷ so the systems established for the representation of the poor are, in effect, the systems that define and delimit due process for the nation at large.

Hence, we argue that the structure of public defense policy has potentially significant implications for the quality of justice. We recognize the inherent problem in measuring the possibility of injustice: after all, if a state system routinely discourages active defense, is based on financial incentives, and produces outcomes that are difficult to appeal, we cannot document and quantify those miscarriages of justice. We can estimate their likely existence, however, just as we can estimate lives lost to higher speed limits, educations foregone due to more restrictive student loan policies, or homes foreclosed due to more exploitative lending policies. We premise this article on the argument that more professionalized, consistent, well-funded, and politically independent representation will tend toward more just outcomes. We acknowledge that is a premise worthy of empirical investigation in its own right.

In this article we examine state policies on three key stages at which the right to counsel may be critical: bail hearings (that may set bail or establish charges); pretrial, plea, and trial hearings; and appeals of convictions. It is not our intention to provide an analysis of the legal reasoning that establishes the right to counsel (and explores its constitutional limits)—that has been done, and done well, elsewhere.⁸ Our purpose is to examine the structure of state programs from a social scientific perspective to help better inform legal and policy debate on the topic. We shall first describe the dimensions on which public defense programs vary. We then outline the legal and logical arguments, and summarize the available empirical evidence about the value of legal counsel under varying economic incentives and structures, with specific attention to research that aims to explain how variation in right to counsel provisions affects case outcomes. Next, we consider the social science literature that suggests that political, cultural, and economic factors systematically shape the character of criminal justice policy, and specifically due process policy. We then turn to

⁷ See CATHERINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000).

⁸ See, e.g., Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005); Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1.

an inventory of state law and policy on the provision of counsel at these points, and we conduct an exploratory examination of the political and structural factors that may be associated with variation in state policies. Finally, we turn to a discussion of the varying sources of authority in the creation of policy in this critical area of due process, with some reflections on the prospects for reform.

II. THE DIMENSIONS OF PUBLIC DEFENSE POLICY

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.⁹

In court, the only person with a professional obligation to serve the best interests of the defendant is his or her attorney. Wrongful convictions, meanwhile, are often attributed to the commission of avoidable errors—mistaken eyewitnesses, coerced confessions, mendacious perjurers, or poor work by defense attorneys.¹⁰ Inasmuch as defense attorneys may be assumed to play a role in avoiding such errors, it is not unreasonable to ask how it is possible to assure that poor defendants are represented effectively.

Public defense in the United States varies on several dimensions that advocates have suggested are critically related to the quality of services provided. Most interested commentators contend that

⁹ Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

¹⁰ See, e.g., Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2004); N.Y. ST. B. ASS'N TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 7 (2009).

public defense is in a state of perpetual crisis due to a lack of funding, a lack of the proper economic incentives for defenders, failures of states to oversee public defense systems or assure quality, and systemic failure to provide any representation at certain key stages of criminal processing.¹¹ Low funding levels, they argue, result in high caseloads and insufficient attention to individual cases. Improper funding models (such as those that pay attorneys per case) give attorneys an incentive to conclude cases as quickly as possible, and omit proper investigation.¹² A lack of oversight from the state permits the development of a patchwork of defense service providers across the state, each of whom may provide service of different qualities. And systemic failures at certain stages—particularly pre-trial stages, where representation is not strictly required, and appeal, where specialized skills may be needed—may prevent defenders from serving their clients as effectively as possible.

Defender systems also vary in terms of the locus of political responsibility for the making of key policy decisions. Historical records indicate that prior to *Gideon*, some communities had adopted the practice of providing legal assistance for poor defendants facing serious charges as early as the 1940s.¹³ Rarely, state legislatures established a right to counsel; by 1948, Kentucky had legally mandated counsel to poor defendants. Almost invariably that assistance was provided by local lawyers, assigned (typically pro bono) by trial judges.¹⁴ As the right to counsel was firmly established by the United States Supreme Court, these ad hoc models were the most familiar and least disruptive service delivery model, and hence became the default setting against which advocates compared more progressive alternatives.¹⁵ Thus, the

¹¹ See NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 49–102 (2009); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) [hereinafter TEN PRINCIPLES].

¹² See SPANGENBERG GROUP, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 2 (2000); NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 4, at 4 (establishing guidelines to limit workloads for contracted private defender organizations); Alissa Pollitz Worden, *Privatizing Due Process: Issues in the Comparison of Assigned Counsel, Public Defender, and Contracted Indigent Defense Systems*, 14 JUST. SYS. J. 390, 405 (1991).

¹³ SPECIAL COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & NAT'L LEGAL AID & DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 43–44 (1959) [hereinafter EQUAL JUSTICE]; Nancy Albert-Goldberg & Marshall J. Hartman, *The Public Defender in America, in THE DEFENSE COUNSEL* 78–79 (William F. McDonald ed., 1983).

¹⁴ See EQUAL JUSTICE, *supra* note 13, at 48.

¹⁵ See Albert-Goldberg & Hartman, *supra* note 13, at 79.

state of affairs that prevails to this day: states are not only permitted broad discretion in key policy decisions, such as how much they pay for defender services, but they may also choose to devolve responsibility for such decisions—and, indeed, for the provision of defender services themselves—to the local and county level. In other words, states not only vary *among* themselves; they may also, at their discretion, permit further variation *within* themselves.

Key dimensions to consider when describing state variation in public defense systems, then, include both financing and organizational characteristics. Financing includes the general level of funding and the degree to which states assume responsibility for funding public defense. Organizational or system characteristics, on the other hand, include the mandated presence (or absence) of counsel at pre-trial hearings, the provision of counsel by salaried attorneys (as opposed to those retained under other arrangements), and the extent of uniformity statewide in defender services, as reflected both by the centralized organization of those services, and/or the presence of a statewide oversight body charged with monitoring the quality of those services. We collected data from published sources on each of these dimensions. We note here that there is no national system for collecting and compiling information on the characteristics of public defense; hence, we present information collected from several sources published during the years 2002 to 2009. These data are summarized in Table 1.

2010/2011]

A Patchwork of Policies

1429

TABLE 1. CHARACTERISTICS OF STATE PUBLIC DEFENSE POLICY

	Centralized State Public Defense	State Funds Over 75% of Defense Costs	Spending on Public Defense Above Median	Right To Counsel at Bail Hearing	State Level Appellate Defense
	2009	2005	2005	2002	2005
Alabama		X			
Alaska	X	X	X	X	X
Arizona			X	X	
Arkansas	XX			X	
California			X	XX	
Colorado	XX	X		X	X
Connecticut	XX	X	X	XX	X
Delaware	X	X	X	XX	X
Florida		X	X	XX	
Georgia			X	X	
Hawaii	XX	X		X	X
Idaho					X
Illinois				X	X
Indiana					
Iowa	X	X	X	X	X
Kansas				X	X
Kentucky	XX			X	X
Louisiana	XX			X	
Maine		X			
Maryland	XX	X	X	X	X
Massachusetts	XX	X	X	XX	
Michigan					X
Minnesota	XX		X	X	X
Mississippi					
Missouri	XX	X		X	X
Montana	XX	X	X		X
Nebraska			X	X	
Nevada			X		
New Hampshire	XX	X	X	X	X
New Jersey	X	X	X	X	X
New Mexico	X	X	X		X
New York			X	X	
North Carolina	XX	X			

North Dakota	XX	X		XX	
Ohio				X	
Oklahoma					X
Oregon	XX	X	X	X	
Pennsylvania				X	
Rhode Island	X	X			X
South Carolina	XX				X
South Dakota			X	X	
Tennessee					
Texas					
Utah					
Vermont	X	X	X	X	X
Virginia	XX	X	X	X	
Washington			X	X	
West Virginia	XX	X	X	XX	
Wisconsin	XX	X	X	XX	X
Wyoming	X		X	X	X

- State provides counsel through defender system ($N = 27$) and state system has oversight commission ($N = 19$) (“XX” denotes statewide defender system is overseen by a commission; “X” denotes system has no oversight).¹⁶
- State provides at least seventy-five percent of funding for public defense ($N = 24$).¹⁷
- Total per capita spending on public defense above median (\$10.13).¹⁸
- State guarantee of representation at bail hearing ($N = 8$) and partial (limited jurisdiction) guarantee of representation at bail hearing ($N = 26$) (“XX” denotes right to counsel at bail proceedings is protected statewide; “X” denotes right is protected in some counties only).¹⁹
- State provides appellate defense services in central state office ($N = 24$).

¹⁶ NAT’L RIGHT TO COUNSEL COMM., *supra* note 11.

¹⁷ SPANGENBERG GROUP, STATE & COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005 (2006) [hereinafter SPANGENBERG GROUP, STATE & COUNTY EXPENDITURES].

¹⁸ *Id.*

¹⁹ Douglas L. Colbert, Ray Paternoster, & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002).

A. Organization

Advocates argue that states should take responsibility for public defense services; that such services should be delivered through offices staffed with salaried attorneys employed by the government; that such systems should be subjected to oversight and scrutiny to ensure quality; and that these oversight bodies, where they exist, should have full control of their own budgets and appointment decisions to ensure their political independence.²⁰ Recent research suggests that these standards have been adopted only in a patchwork fashion.

In 2009, twenty-seven states organized public defender services at the state level; the others left counties to determine their preferred organizational structure.²¹ Of these twenty-seven, nineteen had established a statewide oversight commission, while the other eight oversaw public defense through the establishment of state-level agencies and the appointment of state-level officials who are personally responsible for overseeing statewide systems.²² The appointment of state public defenders is often made by state governors, and is thus implicitly less insulated from political influence than a commission.²³

Statewide organization does not always imply that public defense is provided by government-employed, salaried attorneys, however. Many states retain the traditional practice of assigning private attorneys on a case-by-case basis (an “assigned counsel” system), or through attorneys or firms contracted to take a set number of cases, generally for a flat fee (a “contract” system). Although attorneys employed in all three arrangements may be referred to as “public defenders,” the convention followed here is that of using the term to refer only to government-employed, salaried employees.²⁴ In 2005, twenty-three states were “public defender” states in that they either provided public defense services at the state level through such a system, or mandated that such services be provided in this way in a

²⁰ See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 4, at 3–4, 7–8; TEN PRINCIPLES, *supra* note 11, at 2–3; ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* vi (2004) [hereinafter *GIDEON'S BROKEN PROMISE*].

²¹ See NAT'L RIGHT TO COUNSEL COMM., *supra* note 11, at 166.

²² See *id.*

²³ See *id.* at 158–59.

²⁴ See CAROL J. DEFRAnces & MARIKA F. X. LITRAS, BUREAU OF JUSTICE STATISTICS, *INDIGENT DEFENSE SERVICES IN LARGE COUNTRIES 1999 2* (2000).

majority of their counties.²⁵ The remaining states either did not provide defender services at the state level or, if they did, did not provide them using government-employed, salaried attorneys.

B. Funding

States vary both in how much they pay for public defense and in whether the money comes from state coffers or local and county sources. In 2005, total expenditures on public defense across the states ranged from \$2,549,663 in North Dakota to \$572,877,808 in California—a variation that obviously reflects differences in state populations.²⁶ Calculating per capita rates of spending reveals a more telling picture of ten-fold variation in spending on public defender services across the states: North Dakota spent \$4.00 per capita on public defense, while Alaska spent \$40.96.²⁷

Along with funding levels, states also vary in the extent to which public defense is funded from state coffers. In 2005, twenty-four states entirely funded defender services, with an additional six paying over seventy-five percent of associated costs, leaving counties and localities to pay the remainder.²⁸ At the opposite extreme, fourteen states paid less than twenty-five percent of public defense costs, leaving counties to shoulder the majority of the funding burden.²⁹ The remaining six states funded public defense at intermediate levels.³⁰

C. Early Intervention of Counsel

Advocates have long argued that early intervention by counsel results in more fair case outcomes for defendants, improved defendant perceptions of the criminal process, and, as we shall report below, the limited research on this question tends to support that assertion.³¹ Despite the strong presumption in cases dating

²⁵ See SPANGENBERG GROUP, STATEWIDE INDIGENT DEFENSE SYSTEMS 2 (2006) (stating that nineteen states have statewide public defender programs); SPANGENBERG GROUP, STATE & COUNTY EXPENDITURES, *supra* note 17, at 5, 6, 11, 27 (stating that four states have statutes mandating public defenders in the majority of counties).

²⁶ See SPANGENBERG GROUP, STATE & COUNTY EXPENDITURES, *supra* note 17, at 35–36.

²⁷ See *id.*

²⁸ See *id.* at 35–37.

²⁹ See *supra* Table 1.

³⁰ *Id.*

³¹ See, e.g., SPANGENBERG GROUP, TIME OF ENTRY OF COUNSEL IN INDIGENT DEFENSE CASES 3 (2002) [hereinafter SPANGENBERG GROUP, TIME OF ENTRY]; Colbert, Paternoster & Bushway, *supra* note 19, at 1720; Stevens H. Clarke & Susan T. Kurtz, *The Importance of*

back to *Powell*,³² and lately restated in *Brewer*³³ and *Rothgery*,³⁴ that early representation by an attorney is always desirable and often required, states continue to vary on when and in what circumstances counsel is provided at pre-trial hearings. Among the most significant of these stages is bail hearings.

Empirically speaking, bail decisions are both important mediators of sentencing outcomes and a vulnerable stage at which biased decisionmaking is alleged to enter the criminal justice system.³⁵ Moreover, for the purposes of the present study, early intervention by defenders to secure pretrial release is presumed by advocates to be essential to the preparation of an effective defense, ensuring prompt access to witnesses, and reducing the incentive on defendants to plead guilty simply to get out of jail.³⁶ Surprisingly, however, the Supreme Court has never held that bail hearings are a “critical stage” at which the presence of counsel is required; indeed, the suggestion in *Gerstein*³⁷ that courts might determine bail during uncounseled probable cause hearings has led many to assume that counsel is not required at bail hearings either.³⁸

As of 2002, the most recent census of state laws on the matter, eight states guaranteed the right to counsel at bail hearings.³⁹ In another twenty-six states, that right was protected in only certain counties—mostly by local judicial practices.⁴⁰ The remaining sixteen states provided no assurance of the presence of counsel at bail hearings.⁴¹

D. Appellate Counsel Delivery Systems

Douglas v. California,⁴² a companion case to *Gideon* decided on the same day, required that an attorney be provided to assist a defendant with his first appeal as a matter of right. As with

Interim Decisions to Felony Trial Court Dispositions, 74 J. CRIM. L. & CRIMINOLOGY 476, 476 (1983).

³² *Powell v. Alabama*, 287 U.S. 71, 73 (1932).

³³ *Brewer v. Warden*, 430 U.S. 387, 405 (1977).

³⁴ *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 211–12 (2008).

³⁵ See Marvin Free, *Race and Presenting Decisions in the United States*, 27 CRIM. J. REV. 203, 206–07 (2002).

³⁶ See NAT'L RIGHT TO COUNSEL COMM., *supra* note 11, at 44.

³⁷ *Gerstein v. Pugh*, 420 U.S. 103 (1975).

³⁸ See Colbert, Paternoster & Bushway, *supra* note 19, at 1723.

³⁹ See *id.* at 1724.

⁴⁰ See *id.* at 1724 n.7.

⁴¹ See *id.* at 1724 n.6.

⁴² *Douglas v. California*, 372 U.S. 353, 357–58, 365 (1963).

Gideon, however, the system for providing counsel at this stage varies among states, with some taking direct responsibility through the provision of defender services under the direct auspices of the state, while others delegate the responsibility to counties.⁴³ In 2005, twenty-six states delegated appellate defender services to county jurisdictions, while twenty-four provided them at the state level.⁴⁴ Adding nuance, of the twenty-four states providing appellate services, eighteen provided them in conjunction with trial-level defender services through existing statewide defender programs.⁴⁵ The remaining six delegated the responsibility for trial-level defense to counties, but had established special offices at the state level to provide appellate defense only.⁴⁶

III. EMPIRICAL RESEARCH ON SYSTEM CHARACTERISTICS AND CASE OUTCOMES

*There is an existing issue in New York as to whether there is, in fact, any type of quality control as to the qualifications and performance of non-public defender assigned counsel. There is ample basis for concluding that current assigned counsel plans do not have such controls in place.*⁴⁷

Legal scholars' arguments on the importance of counsel to effective defense rest on logical and philosophical grounds. Social scientists and policy advocates have attempted to identify and quantify the impact of legal representation on criminal case outcomes. They have addressed two questions: first, how does publicly provided counsel compare with privately retained representation? Second, do different systems of public defense produce different results for clients? These questions have been addressed primarily, although not exclusively, at pretrial, trial, and

⁴³ See SPANGENBERG GROUP, STATE & COUNTY EXPENDITURES, *supra* note 17, at 1.

⁴⁴ See *id.* at 5–34.

⁴⁵ See *supra* Table 1.

⁴⁶ See THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS 2 (2006). In some cases, these offices provided appellate defense only in a specific subset of cases, such as capital cases. States were coded X if they had statewide systems providing appellate representation across a broad range of cases for at least part of the state's caseload. In a handful of states, appellate provisions covered capital cases only (e.g., Mississippi); these were not coded as statewide appellate systems. In addition, some states' appellate systems covered only some counties (e.g., Oklahoma), or some case types (e.g., Idaho, Kansas, and Michigan), or established limits on the caseload that the office would take (e.g., Michigan). See *supra* Table 1.

⁴⁷ N.Y. STATE BAR ASS'N TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 10, at 122.

plea proceedings; much less attention has been directly focused on early (post-arrest and arraignment) and post-conviction representation.

These researchers faced challenges. Measuring quality or effectiveness of counsel is conceptually and practically difficult. The general thesis is straightforward—involved, attentive, skilled attorneys establish rapport and trust, follow all leads to build a strong defense argument, and challenge prosecution claims and evidence, thereby maximizing the opportunity for acquittal or a favorable plea agreement (by raising the credible threat of reasonable doubt).⁴⁸ Corollary benefits to high quality counsel include increasing defendants' perceptions of the fairness of the legal process,⁴⁹ increasing the odds of a rehabilitative or therapeutic diversion or sentence,⁵⁰ building and preserving credible grounds for appeals when appropriate, and raising expectations for the performance and integrity of prosecutors and other court actors.⁵¹ Further, this thesis highlights the importance of strong representation at all phases of the legal process, from arrest to acquittal or appeal. However, subjective constructs such as rapport, effort, and perceptions do not lend themselves easily to quantification, and even data on proxy measures, such as time or resources expended per case, are seldom available.

What can be measured reliably, of course, are case outcomes—guilty plea or trial, conviction charges, and sentence types and duration—so researchers have most commonly used those dispositional variables as indicators of quality of representation. Since there is reason to believe those variables are also correlated to characteristics of offenders and cases—for example, minority and

⁴⁸ See Debra S. Emmelman, *Organizational Conditions that Facilitate an Ethical Defense Posture Among Attorneys for the Poor: Observations of a Private Nonprofit Corporation*, 18 CRIM. JUST. REV. 221, 224–226 (1993).

⁴⁹ Colbert, Paternoster & Bushway, *supra* note 19, at 1720; see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 64, 65 (1988).

⁵⁰ See Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, PUBLIC DEFENSE: PAPERS FROM THE EXECUTIVE SESSION OF PUBLIC DEFENSE (John F. Kennedy School of Gov't, Cambridge, Mass.), Aug. 2002, at 3, available at <http://www.ncjrs.gov/pdffiles1/bja/193773.pdf>.

⁵¹ See LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 29 (1987); Tony Fabelo, *What Policymakers Need to Know to Improve Public Defense Systems*, PUBLIC DEFENSE: PAPERS FROM THE EXECUTIVE SESSION ON PUBLIC DEFENSE (John F. Kennedy School of Gov't, Cambridge, Mass.), Dec. 2001, at 2, available at <http://www.ncjrs.gov/pdffiles1/bja/190725.pdf>; MICHAEL SCOTT WEISS, *PUBLIC DEFENDERS: PRAGMATIC AND POLITICAL MOTIVATIONS TO REPRESENT THE INDIGENT* 11, 13 (2005); Sidney C. Snellenburg, *The Normative Case for Indigent Defense Systems*, 10 AM. J. CRIM. JUST. 22, 30 (1985).

indigent defendants are more likely to be arrested for more serious and violent offenses, and are also less likely to retain private counsel than are whites—researchers have tried to control for those spurious relationships statistically. We summarize that research here.

A. *Comparing Outcomes: Private Counsel and Public Defense Programs*

Early research on public defense focused primarily on a deceptively simple question: did defense lawyers funded by state and local governments perform as well as privately retained attorneys? The cynicism expressed by Casper's often-quoted interviewee—"Did you have a lawyer? No, I had a public defender"⁵²—summarized the low expectations that many expressed about public defenders' performance. But empirical studies conducted in diverse jurisdictions at different points in time produced little evidence that, all else equal, public defenders performed neither better nor worse than privately retained lawyers. In studies that examined interstitial decisions, such as pretrial release,⁵³ as well as those that investigated sentence severity,⁵⁴ no meaningful differences emerged between the performance of privately retained and publicly paid defense lawyers.⁵⁵ One of the few studies that uncovered marginal differences involved federal courts; that investigation concluded that federal public defenders spend less time on cases and secure slightly less favorable sentencing outcomes, but this finding held only for very complex cases. In simple cases, federal defenders secured better sentencing outcomes for their clients.⁵⁶

⁵² Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, YALE REV. L. & SOC. ACTION, Spring 1971, at 4, 6.

⁵³ Richard D. Hartley, Holly Ventura Miller, & Cassia Spohn, *Do You Get What You Pay For? Type of Counsel and Its Effect on Criminal Court Outcomes*, 38 J. OF CRIM. JUST. 1063, 1065–66 (2010); Richard D. Hartley, *Type of Counsel and Its Effects on Criminal Court Outcomes in a Large Midwestern Jurisdiction: Do You Get What You Pay For?* (2005) (unpublished Ph.D. dissertation, University of Nebraska at Omaha) (on file with author).

⁵⁴ Jimmy J. Williams, *Predicting Decisions Rendered in Criminal Appeals*, 19 J. CRIM. JUST. 463, 466 (1991); Hartley, Miller & Spohn, *supra* note 53; K.R. Fernsler, *Evaluating Public Defense Services for Criminal Cases: An Examination of Data from Montana* (1979) (unpublished Ph.D. dissertation, University of Montana) (on file with author).

⁵⁵ See Hartley, Miller & Spohn, *supra* note 53, at 1067.

⁵⁶ Hossein A. Abbasi, *Essays on the Economics of Judicial Independence and the Effectiveness of Criminal Defense* (Jan. 6, 2010) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with author).

B. Comparing Outcomes: Public Defenders, Assigned Counsel, and Contract Systems

By the 1980s, following the publication of Lefstein's national study on public defense delivery,⁵⁷ professionals and researchers turned their attention to comparing the performance of lawyers representing defendants under different organizational and funding arrangements: traditional assigned counsel, public defenders, and attorneys under various contract arrangements. Again, commonsense might suggest that the incentive systems inherent in these different structures would influence attorney effort and case outcomes, but mapping these incentives is not straightforward. In principle, public defenders (and many contract lawyers) carry large and unpredictable caseloads, especially if they serve as the only public counsel in their jurisdictions. Assigned counsel may be reimbursed on an hourly basis (although seldom at rates that compare with private practice), or they may be limited to flat fees attached to case types. Contractors who (as is typical) continue private practice alongside their contract commitments have a financial incentive to minimize effort on the latter, especially where contracts are awarded on a low-bid basis.⁵⁸

Fender and Brooking⁵⁹ compared several of these dimensions simultaneously, evaluating the associations between (1) fixed fee and hourly fee arrangements for assigned counsel, and (2) full-time and part-time (contractor) public defenders. In a multijurisdictional analysis in Mississippi, they found that among assigned counsel, payment systems made no difference in the duration of pretrial detention, and although full-time public defenders were associated with slightly longer detention, it is quite possible that the correlation is an artifact of the presence of full time offices in urbanized, higher crime communities.⁶⁰ In federal courts, where indigent clients are represented either by salaried public defenders

⁵⁷ NORMAN LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING* (1982).

⁵⁸ Worden, *supra* note 12, at 405. Contract systems have come under close scrutiny in some jurisdictions. Recently, a defendant in Washington state made headlines by winning a \$3 million malpractice settlement (and his erstwhile lawyer was disbarred) when the court concluded that not only did the attorney fail to adequately represent his client's interests, but that in fact he had a financial incentive not to. WASH. POST, Jan. 31, 2009.

⁵⁹ Blakely Fox Fender & Carl Brooking, *A Profile of Indigent Defense and Presentencing Jail Time in Mississippi*, 25 JUST. SYS. J. 209, 210–12 (2004).

⁶⁰ *Id.* at 220.

or by certified attorneys in private practice, there is some evidence that public defenders obtained lower conviction rates and sentence lengths, independent of case and offender characteristics.⁶¹

C. Comparing Outcomes: The Importance of Early Representation

The argument for early representation—that availability of counsel at arraignment and bail hearings shapes the client’s short- and medium-run wellbeing, allows for a stronger defense case to be presented, and ultimately results in fairer outcomes—has been expressed for forty years,⁶² but has seldom been subjected to direct examination. At the earliest court appearances, unrepresented defendants are psychologically and practically poorly positioned to communicate rationales for pretrial release, or to understand the gravity and strength of the cases against them. In the absence of advice and support, defendants who are detained pretrial may conclude that a fast guilty plea is the safest choice.⁶³ Delays in appointing counsel may result in inadequate investigation, missed opportunities to contact and interview witnesses, and foregone negotiations with prosecutors over charges or diversion.⁶⁴

Such arguments notwithstanding, writing in 1998, Douglas Colbert observed that “it is an exceptional jurisdiction which guarantees counsel when bail is set,” and he noted that while the federal system guarantees appointment of counsel at initial court appearances, few states do.⁶⁵ Many jurisdictions, including many urban court systems, did not routinely provide for counsel at these appearances.⁶⁶ While research on the impact of counsel assignment at bail hearings is limited, two studies have analyzed the impact on intermediate outcomes, such as pretrial release and subjective impressions of the legal process in an unusually rigorous fashion, by using truly experimental designs that randomly assign defenders to some, but not all, defendants.⁶⁷

⁶¹ See generally Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat’l Bureau of Econ. Research, Working Paper No. W13187, 2007), available at http://people.rwj.harvard.edu/~riyengar/indigent_defense.pdf (discussing other characteristics, such as wage experience, educational experience, and plea bargaining).

⁶² See, e.g., Lewis R. Katz, *Gideon’s Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523, 551 (1970) (discussing the need for early representation).

⁶³ Colbert, *supra* note 8, at 13–14.

⁶⁴ See SPANGENBERG GROUP, *TIME OF ENTRY*, *supra* note 31, at 1.

⁶⁵ See Colbert, *supra* note 8, at 7.

⁶⁶ *Id.*

⁶⁷ See Colbert, Paternoster & Bushway, *supra* note 19, at 1746–47. Random assignment of the independent variable—in this case, the benefit of legal representation—is the keystone of

The authors of an early three-state study that randomly assigned public defenders to a subset of felony defendants within twenty-four hours of arrest (and prior to a first appearance) found that defendants with lawyers fared better: they were released earlier and were more likely to be released on their own recognizance.⁶⁸ More recently, Colbert, Paternoster, and Bushway⁶⁹ concluded, based on surveys with defendants and case files in a Maryland jurisdiction that permitted random assignment of lawyers to arrestees, that counseled defendants were more likely to be released on recognizance and, even if detained, were likely to be detained for a shorter duration than those who were without representation. Further, this study also examined some of the corollary benefits of early representation. Among the defendants provided with counsel, these scholars measured higher levels of satisfaction with the pretrial process, with treatment by legal authorities (including, but not limited to, their attorneys at the conclusion of their cases), and even a higher level of commitment to comply with legal conditions following their hearings.⁷⁰

D. Comparing Outcomes: Representation in Appellate Proceedings

As a general matter, of course, defendants are entitled to a first appeal of a criminal conviction, and are also entitled to some level of legal counsel for that appeal. Appeals are rare, however, and do not lend themselves readily to conventional social science evaluation methods. And one might argue that the quality of counsel at the trial stage may significantly affect not only the credibility, but also the possibility of appeal—seldom an option in the ninety percent of cases that are resolved by guilty pleas.⁷¹ As is the case with

genuinely experimental research, insofar as it nearly guarantees that results are not attributable to an unknown third (or fourth) factor that happens to be closely associated with the independent variable. For instance, if a judge's habit were to assign counsel in cases involving non-violent charges, but not in cases with violent charges, and we were to find that the counseled group fared better in bail hearings, we could not say with confidence whether it was the nature of the charges that reasonably produced more lenient outcomes for non-violent defendants, or the presence of lawyers in their hearings, or even some combination of the two. By randomly assigning lawyers to some defendants, and not to others, we can feel much more confident that any result—either the result we expect, or one we did not—cannot be chalked up to something else.

⁶⁸ Fernsler, *supra* note 54.

⁶⁹ Colbert, Paternoster & Bushway, *supra* note 19, at 1747–48.

⁷⁰ *Id.* at 1758–61.

⁷¹ *But see* Brian Clary, *Defendants Convicted by Plea Are Entitled to Court Appointed Appellate Counsel for First-Tier Appellate Review*, 28 U. ARK. LITTLE ROCK L. REV. 654, 654–55 (2006).

pretrial, trial, and plea proceedings, most appellants are indigent and therefore entitled to counsel. Indeed, having been convicted and probably incarcerated, these defendants are even less likely to be able to afford counsel than they were at the point of arrest and arraignment.⁷²

As is the case with trial representation, there are few rules to guide or restrict states' policies and practices on providing appeal.⁷³ States may elect to leave appellate representation in the hands of the local authorities who organize trial representation, they may construct independent state organizations with the express purpose of providing lawyers in appeals (particularly capital cases, where a single appeal could easily consume a community's entire public defense budget), or they may create state appellate resource offices that provide technical assistance to local attorneys. As is the case with trial counsel's compensation, funding of appellate counsel for indigents varies not only at the level of government organization, but also by compensation standards (per case, per hour, and the like).

Attempts to analyze the causal relationships among public defense systems and outcomes are scarce, but, mirroring the findings of trial representation, Priehs's analysis⁷⁴ of Michigan compensation practices for appellate lawyers reports that the rate or method of compensation bore no relationship to the amount of time attorneys invested in appeals cases.⁷⁵ Williams more directly examined outcomes in criminal appeals in Florida, finding that the type of legal representation (public or privately retained) did not influence decisions once other case factors were taken into account.⁷⁶

⁷² See *id.*

⁷³ See SPANGENBERG GROUP, SUMMARY OF FINDINGS FROM THE SPANGENBERG GROUP'S APPELLATE DEFENDER SURVEY: TIMING REQUIREMENTS FOR FILING APPEALS 3-6 (2005).

⁷⁴ Richard E. Priehs, *Appointed Counsel for Indigent Criminal Appellants: Does Compensation Influence Effort?*, 21 JUST. SYS. J. 57, 60-61 (1999).

⁷⁵ *Id.* at 67-69.

⁷⁶ Jimmy J. Williams, *Predicting Decisions Rendered in Criminal Appeals*, 19 J. CRIM. JUST. 463, 466-67 (1991).

IV. POLITICAL AND STRUCTURAL INFLUENCES ON INDIGENT DEFENSE SYSTEMS

“The fundamental right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.”⁷⁷

As we noted previously, public defense policies and practices vary across multiple dimensions, at both state and local levels. While a handful of cities and states had established systems for indigent representation before the Supreme Court’s mandates, for most, arranging for public defense was not a welcome obligation. In the early 1980s, most states continued to leave that obligation to local courts (and local budgets). The twenty states that provided at least seventy-five percent of public counsel funding in the mid-1970s were subsequently joined by eleven additional states that increased support levels to the same level by 2005, but the remaining states stalled at either very low or quite moderate levels of state support.⁷⁸

Political scientists and political sociologists have devoted considerable attention to studying the political, cultural, and economic underpinnings of criminal justice policies. Not surprisingly, most of their inquiry has addressed punitive policies, such as capital punishment,⁷⁹ and incarceration rates, which not only vary across states, but have varied dramatically over the past three decades.⁸⁰ While scholars have sometimes assumed that the same factors that account for state level variation in punitive policies would also explain states’ willingness to, or resistance to, adopt progressive due process policies in domains such as public

⁷⁷ *GIDEON’S BROKEN PROMISE*, *supra* note 20, at iv.

⁷⁸ Alissa Pollitz Worden & Andrew Lucas Blaize Davies, *Protecting Due Process Policies in a Punitive Era: An Analysis of Changes in Providing Counsel to the Poor*, 47 *STUD. L. POL. & SOC’Y* 71, 80–84 (2009).

⁷⁹ *See, e.g.*, John H. Culver, *Capital Punishment Politics and Policies in the States, 1977–1997*, 32 *CRIME L. & SOC. CHANGE* 287, 288 (1999).

⁸⁰ *See* Vanessa Barker, *The Politics of Punishing: Building a State Governance Theory of American Imprisonment Variation*, 8 *PUNISHMENT & SOC’Y* 5, 5 (2006); Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 *PUNISHMENT & SOC’Y* 43, 43 (2001); David F. Greenberg & Valerie West, *State Prison Populations and Their Growth, 1971–1991*, 39 *CRIMINOLOGY* 615, 615–16 (2001); David Jacobs & Ronald E. Helms, *Toward a Political Model of Incarceration: A Time-Series Examination of Multiple Explanations for Prison Admission Rates*, 102 *AM. J. SOC.* 323, 324–25 (1996); David Jacobs & Jason T. Carmichael, *The Politics of Punishment Across Time and Space: A Pooled Time-Series Analysis of Imprisonment Rates*, 80 *SOC. FORCES* 61, 62 (2001).

defense,⁸¹ there has been much less empirical study and hence less substantiation of that hypothesis.

States' levels of punitiveness appear to be influenced by their political and cultural climates, but these associations are not easily reduced to "red state-blue state" dichotomies. States with more progressive welfare policies and climates imprison fewer offenders;⁸² states with more hotly contested legislative elections imprison more.⁸³ These examples illustrate what may seem an obvious truth: political culture shapes states' resolutions of social problems involving impoverished populations and concerns about crime. While public defense policy is not, strictly speaking, a crime control issue, it is unmistakably a signature issue in the expression of due process rights, so it is reasonable to hypothesize that punitive regimes will subscribe to minimal standards for public defense. Earlier research on trial-level public defense programs—the most costly component of public defense—suggests that states' cultural values and political climates constrain key characteristics of public defense policy,⁸⁴ and that these patterns have deep historical roots.⁸⁵ We very briefly summarize those findings here, and then assess their generalizability to earlier and later phases of the right to counsel.

A. *Systemic and Financial Characteristics of Public Defense Systems*

Since the 1970s, the national reform agenda for public defense has been premised on the importance of shifting responsibility from local to state governments.⁸⁶ Local (typically, county) governments have little incentive or capacity to invest more than minimally in public defense, inasmuch as it is a service provided to a

⁸¹ See GARLAND, *supra* note 6, at 12, 60–61; TONRY, *supra* note 6, at 136–37; STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY 9–11 (1984); BECKETT & SASSON, *supra* note 6; WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2006 2 (2007); NILS CHRISTIE, CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE 106–07 (3d ed. 2000).

⁸² Joshua Guetzkow, Presentation at the Annual Meeting of the American Sociological Association: *Bars vs. Butter: The Prison-Welfare Tradeoff in the U.S., 1970–1996* (2004).

⁸³ Thomas D. Stucky, Karen Heimer & Joseph B. Lang, *Partisan Politics, Electoral Competition and Imprisonment: An Analysis of States over Time*, 43 CRIMINOLOGY 211, 232 (2005).

⁸⁴ Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *State Politics and the Right to Counsel: A Comparative Analysis*, 43 LAW & SOC'Y REV. 187, 213 (2009).

⁸⁵ Worden & Davies, *supra* note 78.

⁸⁶ Davies & Worden, *supra* note 84, at 190.

community's most marginalized residents.⁸⁷ Particularly in small or rural jurisdictions, caseloads are unpredictable and budgeting is risky.⁸⁸ The political and professional connections among judges and the lawyers who practice before them may curtail zealous advocacy of indigent clients when those lawyers operate as both private practitioners and public counsel. Moreover, there is little cause for local politicians to argue for anything beyond minimal, case-by-case service delivery, and local defenders are not well positioned to argue for greater resources to do a better job. Hence, many reformers have roughed out a trajectory of progress that begins with the establishment of statewide public defense organizations, ideally governed by politically independent oversight commissions, accompanied (or followed) by increasing centralization of funding from state, not local, budgets.⁸⁹ This centralization, it is hoped, will lead to the institutionalization of advocacy for more comprehensive and consistent policies that provide high quality representation throughout all stages of the adjudication process.⁹⁰

We were interested in learning whether, and if so how, characteristics of public defense systems are interrelated. Specifically, do public defense arrangements suggest that this reform sequence has indeed occurred in some states? Are systems structured in different ways also funded at different levels? Which defender systems are most likely to protect the right to counsel of defendants at pre-trial stages, and to have established centralized appellate defense programs? In our first round of analyses we examined these questions by looking for empirical relationships among descriptive data on public defender systems.

B. The State of Public Defense: A Snapshot of the States

In Table 1, we presented descriptive information on the state of public defense policy at the state level, recognizing that in many states, responsibility for program design, administration, and funding is delegated to local authorities. Here we examine the consistency of progressive policies across the several dimensions we have identified—pretrial, trial and plea, and appellate service

⁸⁷ Alissa Pollitz Worden & Robert E. Worden, *Local Politics and the Provision of Indigent Defense Counsel*, 11 LAW & POL'Y 401, 414 (1989). See generally PAUL E. PETERSON, CITY LIMITS (1981).

⁸⁸ Davies & Worden, *supra* note 84, at 190.

⁸⁹ See *id.*; Worden & Worden, *supra* note 87, at 416.

⁹⁰ See *id.*

provision—within states. We ask this question: are states typically progressive across all these dimensions, or is due process reform unevenly distributed across these dimensions? How commonly have states reformed their policies along the trajectory projected by advocates? We then turn to our political and structural questions: to what extent, if any, can we account for variation in state policies in terms of states' political cultures and political structures?

We offer the data in Table 1 with some important caveats. First, for purposes of presentation, we have reduced information to simple levels. For example, in the third column we report whether a state's total expenditures are above the national median, not specific figures. Second, we acknowledge that programs may be described in statute, administrative regulations, or elsewhere in terms that might be quite different from actual day-to-day operations. For this reason, we do not include information on whether a state formally requires public defenders to provide counsel. While most model policies call for public defender offices, in some states any attorney representing the poor on public money is called a "public defender," even if she is assigned by the court or holds a contract with her county. Third, we present the data in such a way that states that "score" on the dimensions mentioned are those with policies that most closely accord with the recommendations of advocates regarding best practices in this policy area. However, as previously discussed, the empirical discussion about the impact of any of these policies or practices on outcomes, and hence their contributions to strong due process, remains open.

It should be noted that the information presented here represents data which, in some cases, are not from identical years. In addition, examining data on public defender programs across states may fail to take into account important differences among states, which are material for driving spending or other policy decisions on those programs, such as the cost of living, among many other possibilities. Thus, the following analysis of relationships among variables in Table 1 should be regarded as descriptive only. Conclusions about the relationships between variables and causal inferences among the variables described should be drawn only with utmost caution.

C. Congruence Across Dimensions of Public Defense

1. Organization and Funding

Advocates generally regard state-level organization and funding of public defense as the first step in the process of increasing funding for, and implicitly the quality of, public defense services themselves. In states that do not administer public defense in this way, advocates frequently argue that improvements to low quality or geographically inconsistent service cannot be implemented without state takeover.⁹¹ State-level funding, meanwhile, is thought to counter the problems of inequitable distribution of service quality across states, and to prevent individual counties from facing tough economic choices when confronted, for example, with expensive capital cases, increasing caseloads, or other factors beyond their control.⁹² Table 1 therefore presents data relevant to this question, juxtaposing data on state-level organization and funding of public defense with expenditure information.

As noted previously, twenty-seven states had taken the step of centralizing public defense services through the creation of statewide agencies by 2009, and nineteen had also established oversight commissions to insulate the provision of public defense from political influence.⁹³ Do states that organize public defense centrally also provide funding from state coffers? Table 1 suggests so, though the relationship is not perfect. Only twenty-one states both organize public defense services at the state level *and* provide more than seventy-five percent of funding for those services.⁹⁴ In the remaining six of the twenty-seven states (Arkansas, Kentucky, Louisiana, Minnesota, South Carolina and Wyoming) that organize public defense at the state level, counties still share a significant responsibility for the funding of those programs.⁹⁵ Additionally, three of the twenty-four states (Alabama, Florida, and Maine) that fund public defense from state coffers leave responsibility for the organization and delivery of defense services up to counties.⁹⁶ This leaves twenty states that neither fund nor organize public defense at the state level, retaining instead a traditional model that obliges

⁹¹ See NAT'L RIGHT TO COUNSEL COMM., *supra* note 11, at 182.

⁹² See *id.* at 188.

⁹³ *Id.* at 166–67.

⁹⁴ See *supra* Table 1.

⁹⁵ *Id.*

⁹⁶ *Id.*

county authorities and trial court judges to organize and deliver defense services, and to shoulder much or all of the responsibility of funding them.⁹⁷

Do states that organize and fund defense centrally fund those services at higher levels? The data in Table 1 suggest a modest relationship. Of the twenty-one states that do so, fourteen fund public defense services at above the median level of \$10.13 per capita of state population.⁹⁸ Of the remaining eleven states (Arizona, Arkansas, Georgia, Nebraska, Nevada, New York, Tennessee, and Washington) that fund public defense services at above average rates, eight have neither statewide organization nor state-level funding of public defense services.⁹⁹ The remaining three (Florida, Minnesota, and Wyoming) have one or the other.¹⁰⁰ Thus, the relationship between state-level organization and funding of public defense services, and funding levels themselves, is only modest.

One might tentatively conclude, therefore, that fourteen states have all the hallmarks of a model trial defense system at the organizational level—state administration, an oversight commission, and primary state funding—though only eight of these fund public defense at above national median levels.¹⁰¹ Meanwhile, twelve states do not register on any of these measures, and instead have locally organized systems without state oversight, funded substantially from local sources at below-median levels.¹⁰² Figure 1 displays these states in a map.

⁹⁷ *Id.*

⁹⁸ *Id.*

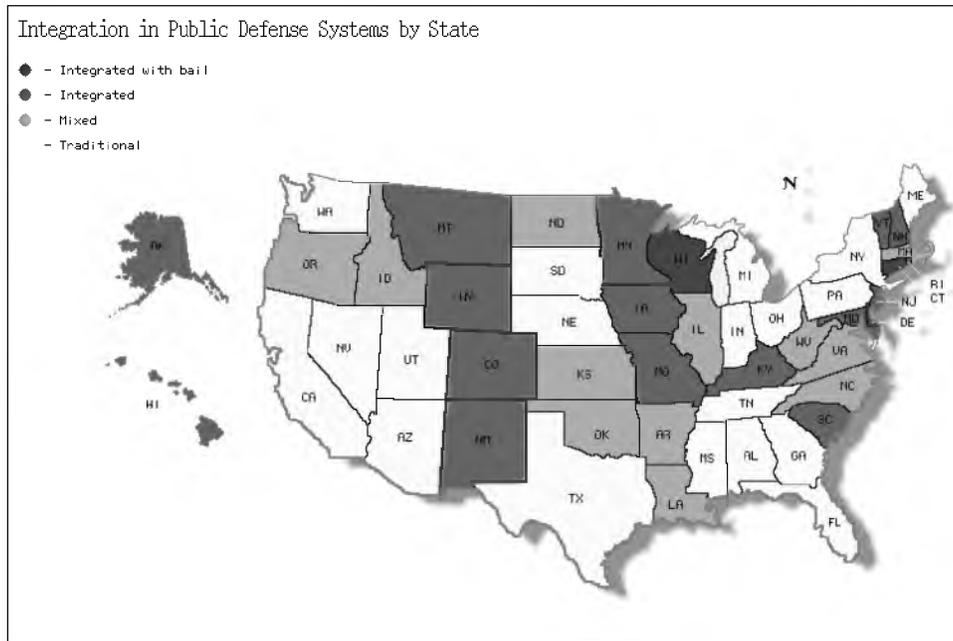
⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

FIGURE 1. PUBLIC DEFENSE POLICY INTEGRATION IN THE STATES



2. Pre-Trial and Appellate Defense

Most measurable characteristics of public defense policy capture elements of trial-level practices. We turn now to the bookends of this policy issue: provision of counsel at early (bail) hearings and on appeal. In 2002, only eight states had established a clear right to legal representation at bail hearings: California, Connecticut, Delaware, Florida, Massachusetts, North Dakota, West Virginia, and Wisconsin.¹⁰³ An additional twenty-seven states had policies in place that provided counsel at bail hearings in some, but by no means in all, jurisdictions (typically large urban jurisdictions).¹⁰⁴ Six of the eight guarantees of representation at this stage are found in states with state-organized programs for defense at the trial stage.¹⁰⁵ Of the twenty-seven states with state-level organization of trial representation in 2009, all but five states had either full or

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

partial (local) representation at bail.¹⁰⁶

In all states, defendants convicted at trial have a right to appeal that conviction, and it is generally established that they are also entitled to some level of legal counsel at that stage. Traditionally, that counsel has been provided in the same fashion as trial representation, but many states have systematized the appellate representation function. Criminal appellate work is a specialized area of legal practice, and criminal appeals are rare, so this centralization facilitates the aggregation of resources and expertise. As noted above, twenty-four states have created appellate representation programs at the state level; two-thirds of those are integrated into state organizations that administer counsel at the trial level as well, and the remainder are free-standing appellate offices in states with no central administration (with the exception of South Carolina, which has both).

With few exceptions, there is little evidence that states which feature any of these practices or policies are highly likely to feature others. As we shall discuss in the next section, there are many reasons a state might have a patchwork of policies, rather than a consistently progressive, or consistently atomized, public defense policy. Any departure from the conditions that prevailed in most states in the 1960s and 1970s—assigned counsel systems that were locally administered and funded by judges and court clerks—might be the result of carefully planned change, attempts at cost reductions, litigation, or legislative policy. Hence, we first take a look not at states that have systems with mixed reform characteristics, but rather at those that seem to largely fit the best practices models, and then at those that appear not to have adopted those innovations. We focus our attention on a subset of variables: state administration, state funding, state appellate offices, and the state guarantee of counsel at bail hearings.

Figure 1 illustrates a simple classification scheme for states' public defense policies. Eighteen states retain conventional practices for providing public defense: both trial and appellate counsel are the administrative, and largely financial, responsibility of local courts and governments. These "traditional" states, as a rule, do not have provisions for early appointment of counsel. At the other end of the spectrum, nineteen states operate systems that include administration, financing, and appellate provisions—we label these states' policies as "integrated." Three of these—

¹⁰⁶ *Id.*

Connecticut, Delaware, and Wisconsin—also have state provisions for early representation for indigent defendants; this handful of states scores on all the reform criteria that we measured for this study. The remaining thirteen states have “mixed” policies, characterized by state-level defense provision at some, but not all, stages of adjudication.

V. POLITICAL CORRELATES OF INTEGRATED AND TRADITIONAL PUBLIC DEFENSE POLICIES

A legislative committee member asked me . . . isn't it true that the legal aid society has a policy of not disposing of cases at arraignment? I answered that that was in fact our policy because we were never given adequate resources to be able to meet our clients in jail before arraignment or to have staff present to discuss cases with them before arraignment. Therefore, it would be a violation of an ethical [obligation] to our clients to do so. . . . My response then and my response [now] is, one person's delay is another person's due process.¹⁰⁷

Accounts for why some states would have moved from the traditional local model of the 1970s to fully integrated systems might involve economic as well as political and cultural variables. Figure 1, displaying states' current policies geographically, on its face offers few obvious explanations. First, the three states with the most fully integrated and progressive systems (as measured here) are two New England states and Wisconsin—states regarded as politically liberal, but hardly the only such states with that designation. While one might suppose that New England and upper Midwestern states, generally considered to be politically progressive, would present the most advanced public defense programs, in fact that trend, while present, is not pronounced. Importantly, some of the integrated states are in the far west: Colorado, Montana, New Mexico, and Wyoming join Iowa, Kentucky, Minnesota, and Missouri as “integrated” systems.

Notably, some populous northeastern states have traditional arrangements—Indiana, Maine, New York, Ohio, and Pennsylvania. At the same time, many southern and most

¹⁰⁷ SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY OF CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 42 (2006) (statement of Susan Horn, Director, Hiscock Legal Aid Society) [hereinafter SPANGENBERG GROUP, CHIEF JUDGE KAYE'S COMMISSION].

southwestern states are squarely in the traditional column: Arizona, California, Nevada, and Utah join Alabama, Florida, Georgia, Mississippi, Tennessee, and Texas in this category.

This suggests that conventional regional explanations for criminal justice policy, and more generally social policy, are of limited use in accounting for due process policies. We recognize that there may be multiple factors in play in any account of states' reform histories on this topic. Hence, we suggest five discrete hypotheses to account for variation in states' adoption of progressive policies.

A. *Demand and Resources*

The more voluminous the need for representation, the more the pressure for states to assume responsibility for, and relieve local governments of, organizing and funding public defense. Hence, we expect to find that states with larger poverty populations and higher crime rates have moved toward integrated systems. We measured poverty using federal poverty population rates, and crime rate using Uniform Crime Report statistics collected by the FBI.¹⁰⁸

The smaller the resource base (the level of taxes that can be collected), the more likely is a state to retain a traditional system that leaves the problems of organizing and funding defense to local governments. We measure state wealth as total taxable revenue per capita in thousands of United States dollars.¹⁰⁹

¹⁰⁸ See *infra* Table 2.

¹⁰⁹ *Id.* Others have measured state wealth using proxies, such as citizen wealth (median household income), Steven G. Koven & Christopher Mausolf, *The Influence of Political Culture on State Budgets: Another Look at Elazar's Formulation*, 32 AM. REV. PUB. ADMIN. 66 (2002), but that is not as proximate to the notion of available or slack resources as state tax revenues. See David Duffee & Edward R. Maguire, *Correctional Resources and the Structure of the Institutionalized Environment: A Cross-Sectional Study of the States*, in CRIMINAL JUSTICE THEORY: EXPLAINING THE NATURE AND BEHAVIOR OF CRIMINAL JUSTICE (David Duffee & Edward R. Maguire eds., 2007); Joshua Guetzkow, *Bars vs. Butter: The Prison-Welfare Tradeoff in the U.S., 1970–1996*, Paper Presented at the Annual Meeting of the American Sociological Association, San Francisco (2004); Tweedie, Jack, *Resources Rather Than Needs: A State-Centered Model of Welfare Policymaking*, 38 AM. J. POL. SCI. 651 (1994).

B. State Policy Culture Regarding Vulnerable and Marginalized Populations

Public defense is essentially a redistributive and means-tested policy; it provides an essential service to people who cannot afford it. As such, it has much in common with welfare policies, which similarly vary significantly across states on dimensions including level of benefits, consistency of services, and restrictions and sanctions (such as work requirements). We hypothesize that states with more liberal and generous welfare policies will also adopt integrated public defense policies. We measure the tone of state welfare policy using a multi-item scale based on several dimensions of state policies enacted following the Temporary Assistance for Needy Families (“TANF”) reforms of 1996: rate of welfare assistance among the state’s households; welfare expenditures per capita; maximum benefit levels allowed; and a three-point scale capturing severity of sanctions of noncompliance with TANF rules.¹¹⁰

A large body of research documents the variability in states’ punishment practices, most commonly expressed as incarceration rates. Many scholars attribute this variation to differences in states’ political cultures and public values, augmented by political mobilization and policy choices that support incarceration for larger groups of offenders, and for longer periods of time.¹¹¹ Scholars have proposed that these punitive perspectives are linked to critical attitudes toward due process protections and civil liberties, as well as skepticism about rehabilitation.¹¹² We hypothesize that states with high rates of incarceration are less likely to have adopted progressive public defense policies. We measure punishment culture with incarceration rates.¹¹³

¹¹⁰ See *infra* Table 2. See also U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: STATE SANCTION POLICIES AND NUMBER OF FAMILIES AFFECTED 3, 4 (2000) (discussing T rules regarding sanctions). This scale is based on a factor analysis of these four variables that produced a single factor with an Eigen value of 2.36. More detailed information on this scale is available upon request from the authors.

¹¹¹ See, e.g., Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225 (2010) (discussing imprisonment rates and reasons for differences throughout the United States).

¹¹² See James D. Unnever & Francis T. Cullen, *The Social Sources of Americans’ Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 99, 105–07 (2010).

¹¹³ See *supra* Table 2.

C. Partisan Politics

Since the 1970s, national party platforms and elections have featured planks on crime issues. The Republican Party has consistently staked out a strong “crime fighting” position during an era when crime routinely made it to the “top three” lists of public policy concerns.¹¹⁴ As recently as 2008, when crime had receded behind terrorism and the economy as a critical national problem, the Republican Party platform declared a firm and punitive anti-crime message, while the Democratic Party platform implied, at least, concerns about due process and rehabilitation.¹¹⁵ At the state level, where most crime policy is actually made, we hypothesize that statehouses dominated by Republicans will be less likely to have adopted comprehensive and integrated public defense policies. We measure partisan politics as the distribution of power across legislative branches in statehouses, distinguishing between states with two houses controlled by Republicans, a split in control between the two parties, and two houses controlled by Democrats.

¹¹⁴ See John T. Woolley & Gerhard Peters, *Political Party Platforms*, AMERICAN PRESIDENCY PROJECT (Aug. 21, 1972), <http://www.presidency.ucsb.edu/ws/index.php?pid=25842>.

¹¹⁵ *Compare 2008 Republican Platform*, GOP, <http://www.gop.com/2008platform/Crime.htm> (last visited June 13, 2011), with *2008 Democratic National Platform: Renewing America's Promise*, DEMOCRATS: CHANGE THAT MATTERS, http://www.democrats.org/about/party_platform (last visited June 13, 2011).

2010/2011]

A Patchwork of Policies

1453

TABLE 2. CORRELATES OF PUBLIC DEFENSE POLICIES AT THE STATE LEVEL

Variable	Mean	Standard Deviation	Minimum	Maximum
Poverty Level: Percentage of Population Under Federal Poverty Level	11.69	3.13	5.80	19.80
Crime Rate: Uniform Crime Reports per 100,000 Population	3751	941	1928	5351
State Wealth: Tax Revenue per Capita in Thousands	4.83	1.83	3.18	13.69
Inclusive Welfare Policy: High Values Indicate Liberal Policies	0.00	1.00	-1.31	2.80
Punishment Culture: Incarceration Rate per 100,000 Population	428.50	163.80	154.04	835.83
Republican Statehouse: Higher Scores Indicate Republican Control	1.00	0.90	0.00	2.00
Public Defense Policy:				
Traditional	36%			
Mixed	26%			
Integrated	38%			

Table 2 presents descriptive statistics for the variables used to operationalize these hypotheses; data for these variables were collected from the mid-2000s. States vary significantly across all these dimensions. States scoring highest on poverty, revenue per capita, crime rate, and incarceration varied by rates of three or more times the levels of states with low values on these variables. In 2005, twenty states had both legislative houses dominated by Republicans, twenty had both dominated by Democrats, and ten had one house dominated by each party.

TABLE 3. RESULTS OF MULTINOMIAL LOGISTIC REGRESSION
ANALYSIS OF PUBLIC DEFENSE POLICY

	Predictors of Traditional Policy			Predictors of Integrated Policy		
	B	SE	Exp(B)	B	SE	Exp(B)
Poverty Score	-0.091	0.192	0.913	-0.549	0.212	0.577*
Crime Rate	0.001	0.001	1.001	0.000	0.001	1.000
State Wealth	-1.771	0.834	0.170*	0.310	0.388	1.364
Welfare Policy	1.999	0.798	7.380**	0.962	0.702	2.617
Punishment Culture	0.001	0.004	1.001	0.006	0.004	1.006
Republican Statehouse	0.551	0.606	1.734	-0.557	0.615	0.573
<i>Reference Category: Mixed Systems</i> <i>Statistical Significance:</i> <i>* Indicates Significant at the 0.05 Level</i> <i>** Indicates Significant at the 0.01 Level</i>						

We classified states as (1) traditional; (2) mixed; or (3) integrated. Table 3 reports the results of multinomial logistic regression, a statistical modeling technique that permits testing of hypotheses about categorical dependent variables. The first set of columns reports the comparisons of mixed-policy states with states that have retained traditional arrangements. These results suggest that poverty and crime rate do not help explain differences between states that have traditional versus mixed public defense policy; neither do incarceration rates or political party power distribution in statehouses, although the latter coefficient approaches conventional levels of statistical significance in the predicted direction. However, states that have lower tax revenues are more likely to have remained in traditional, county-based and funded public defense practices. Interestingly, states with more liberal post-TANF welfare policies are more likely to have moved away from traditional local public defense systems.

The second set of columns depicts the contributions of these variables to distinguishing between mixed systems, and those that we have identified as integrated or reformed. These results suggest that states with high rates of poverty are less likely to have moved toward integrated policies, but the remaining variables do not reach

conventional levels of statistical significance. Consistent with our expectations, states with higher tax revenues and Democratic party control of legislatures are marginally more likely to have integrated systems. Further, more liberal welfare policies are also very slightly associated with integrated policies, offering suggestive, but not conclusive, evidence that restrictive welfare policies are more likely to be found with mixed public defense policies.

Together, these results suggest the following associations: states with low poverty rates are most likely to adopt integrated public defense policies, but neither crime rates nor incarceration rates, which might also be interpreted as a proxy for demand or need for defense services, seem to influence state policy. States with lower revenues, and therefore fewer slack resources, were predictably less likely to relieve localities from responsibility for providing services. Interestingly, it appears that states with the most liberal welfare policies are very slightly more likely to have either traditional or fully integrated systems, not mixed policies, although this association does not reach conventional levels of statistical significance. While party control of state government breaks in the predicted directions, the effects are very modest.

This leaves us to conclude that, to the extent that cross-sectional multivariate analysis may shed some light on the reform trajectories that states do or do not take, economic explanations are more telling than political ones. We recognize this economic logic: wealthy states with fewer poor people can better afford to provide services that meet higher professional standards, at least on the limited dimensions measured here.

VI. ALTERNATIVE EXPLANATIONS: THE POLITICAL DYNAMICS OF REFORM

Perhaps the single greatest change in the operations of the criminal courts in the past half century has been the expansion of the right to counsel. Not only has it done the obvious—provided protection for the accused—it has led to improvements in the quality of the work of police, prosecutors, and judges.¹¹⁶

¹¹⁶ MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 206 (1983).

While it is conventional among some social scientists to seek patterned explanations for variation in outcomes (e.g., policies) in static characteristics of populations, economies, or polities, we consider another potentially productive line of inquiry, albeit one that is only speculative at this point. Independent of very general patterns of associations that may nudge or constrain states as they choose to retain or reform existing policies, the political dynamics of state policy processes may provide some clues. This perspective would direct us to think about political, economic, and cultural conditions as background variables that might inhibit or promote reform, but reform itself may only result from the initiative and persistence of motivated parties.¹¹⁷ On the other hand, of course, reform may be stymied by motivated actors who use positions of power or prestige to retain the status quo. Below, we sketch out some preliminary observations about these propositions. We suggest that six agents and processes, present and active at varying levels and in varying ways, merit close scrutiny in future efforts to understand why and how public defense policy evolves. These observations are distilled from historical reviews of public defense reform since the 1970s in five diverse states—Alabama, Georgia, Kentucky, Massachusetts, New York and Nevada.¹¹⁸ These agents and processes include policy advocates, institutionalized state defenders, litigation that challenges traditional systems, state judges (in both reactive and proactive roles), retained consultants, “blue ribbon” commissions charged with evaluating and improving public defense, and media.

A. *Advocates*

Public defense is a cause that attracts a core of committed activists and advocates who maintain a drumbeat of pressure on legislatures to reform public defense. Organized into professional associations of defense lawyers, or institutionalized as defense service providers themselves, advocates may point to a familiar repertoire of problems: insufficient funding; high defender caseloads; low levels of attention to individual cases; low client satisfaction; high plea rates; the lack of state oversight; and so

¹¹⁷ Edmund F. McGarrell & Thomas C. Castellano, *An Integrative Conflict Model of the Criminal Law Formation Process*, 28 J. RES. CRIME & DELINQ. 174, 182–90 (1991).

¹¹⁸ Alissa Pollitz Worden, Andrew Lucas Blaize Davies & Elizabeth K. Brown, *The Politics of Public Defense: Adaptation of an Integrated Conflict Perspective*, Presentation at the Annual Meeting of the American Society of Criminology (2010).

forth.¹¹⁹ Advocates press their concerns through lobbying, the publication of reports and “best practice” standards, and the mobilization of their membership, but generally not through broad public campaigns.¹²⁰ Meanwhile, advocates against public defense reform may emerge. This has occurred in both New York and Nevada where those states’ Associations of Counties both remain actively involved in opposing public defense reforms thought to impose additional financial burdens on counties.¹²¹

B. Statewide Defender Offices

The existence of a statewide public defender office can itself form a locus of policy advocacy on preserving defendant rights. The creation in 1972 of the Kentucky Department of Public Advocacy (“DPA”)—an early example of statewide oversight of public defense—has had the long-term result of institutionalizing a representative for public defense interests within the infrastructure of the state.¹²² The DPA has commissioned reports on its activities, participated in experimental programs involving social work professionals to improve services, initiated litigation to reduce caseloads, and, in 2008, made a unilateral policy announcement that it would refuse certain cases in response to a 6.4% budget cut.¹²³ In a further illustration of the distinctions among the interests of public defenders in a statewide defender system and

¹¹⁹ *Indigent Defense Reform*, BRENNAN CENTER FOR JUSTICE, http://www.brennancenter.org/content/section/category/indigent_defense_reform; NAT’L RIGHT TO COUNSEL COMM., *supra* note 11, at 2–3.

¹²⁰ N.Y. State Defenders Ass’n, *Defender News*, 25 PUB. DEF. BACKUP CENTER REPORT 1 (June–Sept. 2010), *available at* http://www.nysda.org/html/the_report.html; BRENNAN CENTER FOR JUSTICE, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL 2 (2008), *available at* http://www.brennancenter.org/content/resource/eligible_for_justice (identifying “best practices for determining financial eligibility for free counsel”).

¹²¹ N.Y. Ass’n of Cntys., 2009 Fall Seminar Standing Committee on Public Safety Resolution #04 (describing the public defenders system as an unfunded mandate born by the counties); Nev. Ass’n of Cntys., Rural Subcommittee Submits Report on Indigent Defense to Supreme Court, 6 NACO E-BRIEF 1, 2 (Jan. 26, 2009) (introducing a bill that “would require that the state fully fund indigent defense”).

¹²² KY. DEPT OF PUB. ADVOCACY, <http://dpa.ky.gov> (last visited June 13, 2011).

¹²³ *Id.*; Press Release, Dep’t of Pub. Advocacy, The Department of Public Advocacy Notifies Local Judges of Service Reduction (May 28, 2008) (explaining that funding reductions required decreased caseloads because attorneys would otherwise be unethical in representing clients due to excessive workloads); Memorandum at 1, *Hill v. Commonwealth*, CV No. 5:08-330-JMH (E.D. Ky. 2008) (preemptive challenge to reduced caseloads by public defenders in response to budget cuts); Gideon, *Kentucky*, PUBLIC DEFENDER STUFF (2008), <http://pdstuff.apublicdefender.com/category/kentucky> (citing the executive branch’s plea for injunctive relief from state public advocates refusal to take on certain cases because of budgets cuts).

private “assigned counsel” attorneys, professional groups representing each group have been at odds over funding and pay issues in Massachusetts.¹²⁴ While not inevitable, the existence of a statewide public defender can in itself provide public defenders and their clients with a constituency from which to lobby.

C. Litigation

Class-action lawsuits on behalf of both defendants and defense attorneys have been filed in attempts to improve standards of public defense delivery. In states as diverse as Alabama and Massachusetts, attorneys have litigated to adjust caps on attorney fees, and to establish the principle that insufficient funding effectively results in the denial of adequate defense to indigent clients as a class.¹²⁵ The courts have been ambivalent in accepting these broad judgments, although in some cases have granted relief.¹²⁶ Litigation has not been a consistently effective method of changing policy, but we should expect increased activity in this area as state and local budgets tighten, and as elected legislators are constrained from granting funds to assist defendants in criminal courts.

D. The Judiciary

Judges themselves can be among the most effective advocates for reform either directly, as in New York where the Chief Judge has spoken annually on the defects of public defense in the State of the Judiciary address, or indirectly, through rulings that precipitate or require legislative responses.¹²⁷ Frequently, jurists are inclined to defer to legislatures on questions regarding the systemic failings or underfunding of public defender systems. State courts have at

¹²⁴ David Carroll, *Gideon Alert: MA Prosecutors Argue for Parity with Public Defense Providers*, NAT'L LEGAL AID & DEFENDER ASS'N (Oct. 19, 2010), <http://www.nlada.net/jscri/blog/gideon-alert-ma-prosecutors-argue-parity-public-defense-providers>.

¹²⁵ *Commonwealth v. Lockley*, 408 N.E.2d 834, 838–39 (Mass. 1980) (holding that a reasonableness standard applies in determining if fees associated with indigent defense are covered); *Powell v. Alabama*, 287 U.S. 45, 59 (1932) (holding that defendants must have sufficient time to consult counsel for effective representation “in the calm spirit of regulated justice [as opposed to] the haste of the mob”).

¹²⁶ *Hurrell-Harring v. State*, 930 N.E.2d 217, 222, 227 (N.Y. 2010) (identifying general prescriptive relief as well as performance-based relief); *see also Powell*, 287 U.S. at 73 (identifying the right to counsel as fundamental); *Lockley*, 408 N.E.2d at 840 (reversing conviction and granting new trial as relief).

¹²⁷ SPANGENBERG GROUP, CHIEF JUDGE KAYE'S COMMISSION, *supra* note 107, at i, iii.

times lost their patience; for example, in Kentucky in 1972, the court labeled the state of public defense “intolerable,” which directly precipitated the creation of the Department of Public Advocacy.¹²⁸ Generally, jurists position themselves as vocal and credible critics of the state of public defense, and are frequently directly responsible for convening commissions or inviting researchers to report on the state of public defense.

E. Study Commissions and Consultancy Firms

Firms such as Abt Associates and, most conspicuously, the Spangenberg Group, have frequently been brought into states to examine public defense systems and publish reports on their successes and failures.¹²⁹ These reports are often generated under the auspices of study commissions—groups appointed, often by the judiciary, to inquire into the state of public defense. The conclusions of such reports are frequently damning, and have often been issued directly prior to legislative action to remedy the observed defects. Study commissions or reports in Georgia in 2002, Massachusetts in 2003, and Nevada in 2007 were each followed by legislative reforms in subsequent years.¹³⁰ In other cases, such as New York in 2006, no legislative action followed.¹³¹ The direct causative impact of the convention of commissions and writing of reports is unclear. They generally occur as components of larger processes of reform and, depending on the political climate, can be as likely to play a partisan or polarizing role in the debate as an authoritative one. Nevertheless, the development of a credible assessment of the defects of public defense systems appears to be a crucial part of fomenting reform.

¹²⁸ Bradshaw v. Ball, 487 S.W.2d 294, 296 (Ky. 1972).

¹²⁹ See SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 1 (2007) [hereinafter SPANGENBERG GROUP, RATES OF COMPENSATION]; see also SPANGENBERG GROUP, CHIEF JUDGE KAYE’S COMMISSION, *supra* note 107, at i.

¹³⁰ See SPANGENBERG GROUP, RATES OF COMPENSATION, *supra* note 129, at 4–5, 17–19; see also THE SPANGENBERG GROUP, INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM 1 (2005).

¹³¹ See SPANGENBERG GROUP, CHIEF JUDGE KAYE’S COMMISSION, *supra* note 107, at i.

F. Media

The fact that public defense does not have the headline-grabbing character of other criminal justice policies means that it is not often driven by public outcries, “moral panics,” or media attention—though there are exceptions to this. At times, public defense lawyers are vilified in the press as avaricious self-serving lawyers willing to endanger innocents or bankrupt states. In Georgia in 2007, a political backlash resulted after the Georgia Public Defender Standards Council announced that a single capital case—that of Brian Nichols—had drained its entire budget.¹³² In Massachusetts in 2004, attorneys from the Massachusetts Association of Criminal Defense Lawyers refused to take cases on the grounds that they were overworked, resulting in considerable media attention and the widely-reported rebuke from Governor Romney that defenders were on “strike against public safety.”¹³³ In the opposite vein, media criticism of the inadequacy of public defense services has at times coincided with policy changes. Again in Georgia, a series of articles in the *Atlanta Journal-Constitution* by Bill Rankin, documenting the failures of that state’s then-existing patchwork of public defense systems, formed a prelude to the establishment of a statewide system for juvenile and felony cases in 2005.¹³⁴ In New York, meanwhile, criticism of the failure to guarantee counsel to defendants in the state’s lowest courts reported in the *New York Times* was followed by the announcement of an overhaul of that system to retrain justices, record all proceedings, and assure the presence of counsel.

¹³² Brenda Goodman, *Georgia Murder Case’s Cost Saps Public Defense System*, N.Y. TIMES, Mar. 22, 2007, at A16.

¹³³ *Lack of Lawyers “Public Safety Crisis,” Say Officials: Defense Attorneys Say Pay Too Low*, BOSTONCHANNEL.COM (Aug. 11, 2004), available at <http://www.thebostonchannel.com/r/3643296/detail.html>.

¹³⁴ See, e.g., Bill Rankin, *Experts Indict Indigent Defense: Lax Accountability, Oversight Criticized*, ATLANTA J. CONST., Dec. 9, 2002, at A1; Bill Rankin, *Indigent Defense Council Struggles: Members Say They Lack Money, Power*, ATLANTA J. CONST., May 25, 2002, at E1; Bill Rankin, *Indigent Funds at Issue Again: Lawyers Say Reforms Not Made*, ATLANTA J. CONST., Jan. 22, 2004, at C4.

VII. CONCLUSION

Assuming the allegations of the complaint to be true, there is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel in the five subject counties. The severe imbalance in the adversary process that such a state of affairs would produce cannot be doubted. Nor can it be doubted that courts would in consequence of such imbalance become breeding grounds for unreliable judgments. Wrongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases.¹³⁵

The provision of public defense to indigent defendants varies significantly both between and within states. Since *Gideon* was decided in 1963, public defense policies have come to exhibit kaleidoscopic variation. Policies across states vary, for example, in the stage when counsel is provided (pre-trial or post-conviction), and in the organization, funding, and oversight structures of defense systems. Just as the development of variable state-level "tough on crime" punishment policies beginning in the 1970s has been described as ad hoc,¹³⁶ public defense policies have also developed in fits and starts in response to numerous political, economic, and cultural pressures and constraints.

Since the 1970s, a series of national and state commissions and authorities have identified public defense as a signature issue in due process policy. Most have recommended that states play a larger role in organizing, administering, and funding public defense; that attention be given to early and later points in adjudication, such as bail hearing and appeals; and that public defense be insulated as much as possible from state and local politics. Almost all commentators have maintained that public defense is underfunded, both relative to prosecution and absolutely, by the standards necessary to effectively defend clients in contemporary courtrooms.¹³⁷ Despite this growing consensus, many states retain traditional local systems, have not attended to proceedings at which counsel is not constitutionally required (bail hearings), and

¹³⁵ Hurrell-Harring v. New York, 930 N.E.2d 217, 227 (N.Y. 2010).

¹³⁶ See Barker, *supra* note 80, at 14.

¹³⁷ See, e.g., Note, *supra* note 8, at 1734; PRESIDENT'S COMM. ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); Robert D. Raven, *Introduction*, in GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE SPENDING 3 (1982).

have ad hoc arrangements for the specialized function of appellate defense.

This article examined dimensions of public defense variations across and within states and considered factors that may impact structures and processes. While it is difficult to discern clear patterns in policies adopted across states, this research does suggest that wealthier states with low poverty rates are able and inclined to develop more centralized public defense systems, with state funding and oversight, and the provision of counsel at pre-trial and post-conviction stages. Ironically, of course, states with scarce resources typically have many counties with even tighter budgets—so where local needs for state support in public defense are greatest, states may be least able or inclined to share that administrative and financial burden.

We propose that the next step in researching the evolution of public defense policy attend not only to the social and economic conditions that may create outer limits on the types of policies possible, but also to the dynamic processes of reform. We identified some historical evidence suggesting that attempts at improving public defense services may be initiated, supported, or stymied by identifiable stakeholders, so the prospects for reform may be forecast (and possibly manipulated or enhanced) with close attention to, and better information about, state political dynamics.

We have pursued two lines of inquiry in this article: first, an examination of the presence (and absence) of integrated service provision at pretrial, trial, and appellate stages; and second, exploration of the political conditions that might promote or hinder integrated models. We note, however, the many domains of adjudication that require specialized training and experience, and that may fall between the cracks of even well-structured systems. For example, state policies place many young defendants in adult criminal courtrooms; they, as well as youths filtered through the juvenile justice system, arguably have even more to gain or lose from early and effective representation than do adults.¹³⁸ A large majority of states provide for post-incarceration civil confinement of sex offenders, subsequent to various types of hearings to assess recidivism risks, and justice requires that these offenders have expert representation. Immigrants facing deportation, and

¹³⁸ See Barry C. Field & Shelly Schaefer, *The Right to Counsel in Juvenile Court: Law Reform to Deliver Legal Services and Reduce Justice by Geography*, 9 CRIMINOLOGY & PUB. POL'Y 327, 350–51 (2010).

unauthorized residents facing criminal charges, may present cases complicated by families and dependents, language barriers, and public hostility. Cases that involve prosecutorial appeals are rare, but increasing, and the right to counsel for defendants in such filings is not clear.¹³⁹ The increasing use of therapeutic and specialized courts, and in some jurisdictions mediation procedures, raises questions about whether public defense counsel can, and should, modify their adversarial roles. In short, the stereotypical model of public defense representation—that typologized by *Gideon*—may not capture the challenges of representing a more diverse group of defendants, against a wider and more complex range of charges, which will become the increasingly complex responsibility of public defense in the twenty-first century.

We conclude with some reflections on the significance of this inquiry for understanding miscarriages of justice. That term is associated, in the public mind, with “mistakes”—the conviction overturned because evidence was lost or mishandled, or the unjustly imprisoned inmate who was the target of misguided or overzealous prosecution, fallible eyewitnesses, or careless lawyers. When particularly egregious cases such as these come to public attention, they are presented as idiosyncratic narratives, filled with plot details that might (or might not) help us understand why, *in this case*, justice failed. We suggest that this way of framing the issue may distract us from a more systematic way of thinking about justice and due process. While no system is fail-proof, the more structurally sound, consistent, and comprehensive the system, the fewer errors (both detected and overlooked) it is likely to make. Hence, we encourage continued research and policy debate on the dimensions of a better-functioning system, and more attention to the financial, organizational, and distributional arrangements of public defense delivery.

¹³⁹ Brian L. Zavin, *The Right to Appointed Counsel on Prosecution Appeals: Hard Realities and Theoretical Perspectives*, 25 N.Y.U. REV. L. & SOC. CHANGE 271, 272 (1999).