The Court is in Recession: On the Implications of the COVID-19 Pandemic for Indigent Defense Spending

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ABSTRACT
What is the likely effect of the recession brought on by the COVID-19 pandemic on indigent defense budgets in the United States? To look forward, we look backward. We examine data on county-level spending on indigent defense in Texas during the Great Recession of 2007–2009. Redistributive policies—those which use taxpayer funds to support individuals who themselves pay little or no tax—are particularly susceptible to cuts during times of fiscal stress. Yet our analysis shows indigent defense policy, measured in terms of spending and access to counsel rates, was generally stable through the Great Recession years, even in counties hit hardest. We attribute this apparent stability to two general explanations. First, certain factors made Texas unique: expenditures on indigent defense were already relatively low prior to 2007 and legal changes in the state shored up the mandate to supply representation. And second, the characterization of indigent defense itself as redistributive seems faulty. Indigent defense policy is also, in an important sense, a set of mutually-beneficial transactions between lawyers and judges, occurring with comparatively little oversight. The resilience of indigent defense services during times of scarcity suggests it is not only a policy which allocates funds to help the poor, but also is a policy which allocates funds in support of another clientele—the lawyers.

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I. INTRODUCTION

In September 2020, County Judge Bob Hurley was speaking at the Atacosa County budget hearing in Journdatown, Texas, and he had a concern. Our cuts have reached the point where [all] we . . . have left is cutting county services. The county funds your EMS ambulance service, your jail, law enforcement, and your courts. We pay for court security, court staff, court record maintenance, indigent defense, staff for elections, juvenile justice, indigent health care, road and bridge maintenance, deed and records maintenance, health, environmental, sanitation, animal control, and emergency management. Which one do we cut?\(^1\)

By the time Hurley was speaking, the National Bureau of Economic Research (NBER) had long since declared that the economy of the United States had entered a recession.\(^2\) State and local governments—generally expected or required to maintain balanced budgets—must make tough choices as a consequence. There are a few predictable options: raise revenue through new taxation or fees, await aid from state or federal authorities, spend ‘rainy-day’ reserve funds, or reduce spending.\(^3\)

As state and county governments around the country prepare for the financial impact of the COVID-19 pandemic, spending on indigent defense services is a target for possible cuts. Plans for dozens of new public defender positions in Virginia have been abandoned.\(^4\) The public defender in Louisiana’s fifteenth district cut his budget by $250,000 when courts closed and the court fees supporting his office abruptly ceased.\(^5\) In Georgia, Governor Brian Kemp requested all state agencies and departments, including its Indigent Defense Commission, to propose budgets which would cut spending by 14%.\(^6\)


What will be the impact of the COVID-19 recession on indigent defense? For insight into future possibilities, we turn to the past. Using data on defense services for each of Texas’ 254 counties across the years before and after the Great Recession of 2007–2009, we examine trends in two critical metrics. First, we look at patterns in overall expenditures on defense by counties across the period 2005–2011. Second, using ‘access to counsel’ data produced by the Texas Indigent Defense Commission (TIDC), we examine whether the rate at which defendants actually utilized indigent defense services changed in the state during this period. As such, we are able to look for changes both in the resources devoted to indigent defense services, and the extent of those services themselves, across the Great Recession.

We also examine whether counties increased their reliance on new revenue sources to support indigent defense services during the period. Texas counties were almost entirely responsible for indigent defense during the Great Recession—and remain so to this day. But revenue options were available to all counties to offset that liability. First, counties could employ reimbursement fees charged to defendants for their ‘free’ lawyer as a way of generating revenues. Second, state and federal aid mitigated the impact of the Great Recession on county revenues generally, so we examine whether state aid for indigent defense played any role in alleviating county fiscal stress.

What we find may at first seem surprising. Spending on defense across the Great Recession showed few signs of slowing in Texas but grew incrementally throughout the period. The same is true for access to counsel rates. We go on to analyze differences between counties—attempting to identify whether certain types of counties were more likely than others to cut spending—but we find little sign of movement even when examining a wide variety of subgroups. Most counties simply maintained indigent defense spending and services at levels equivalent to pre-recession levels. Furthermore, while revenues from defendant reimbursement and state grants in aid to localities both grew in proportion to overall spending through this period, that growth does not fully account for expenditure increases. In short, even after adjusting for inflation, the effect of reimbursement receipts, and state grants, trends in indigent defense spending remained steady or increased throughout the period. Our findings force a reconsideration of the impact of the Great Recession.

govt--politics/georgia-agencies-told-plan-billions-spending-cuts-due-pandemic/tLrAiX29jBWzIizTLzX8wN/.


10 Gordon, supra note 3.
and our assumptions about how indigent defense policy decisions are made. They also serve to structure predictions about the likely impact of the COVID-19 crisis.

We next turn to a description and comparison of the Great Recession with the COVID-19 recession in order to ascertain how useful the first is as a model for understanding the likely impact of the second. We review how recessions are measured, what is known about the depth of the Great Recession’s impact, and the varying effects experienced on the county and state levels in Texas. Following that, we describe indigent defense policy in Texas at the moment the Great Recession hit. We stress not only the county-administered structure of defense but also several important events in the legal system which coincided with the onset of the recession. Third, we consult empirical research from public administration literature on the dynamics that underlie local government spending decisions to develop informed hypotheses about what likely happened in 2007–2009. Prior studies on how local governments make decisions both about spending, and about spending cuts, hint at the considerations likely to have been in play during the period we investigate. Fourth, we review data on spending and access to counsel across Texas counties and present trends in each across the period. We also examine trends in revenue from indigent defense reimbursement fees and state aid to localities. And fifth, we conclude with a discussion of what we learned from our analysis and its implications for preparing for the COVID-19 pandemic’s economic fall-out.

II. COMPARING THE GREAT RECESSION TO THE COVID-19 RECESSION

How useful is the Great Recession as a model for the COVID-19 recession? The question is complicated by the fact that recessions are not defined by a precise formula in the United States, but instead are identified through the deliberations of the Business Cycle Dating Committee of the National Bureau of Economic Research (Committee). An eight-member body populated by economists at the nation’s top universities, the Committee defines a recession as “a significant decline in economic activity that is spread across the economy and that lasts more than a few months.” Lawyers and economists alike detect the ghost of Potter Stewart in NBER’s approach.  

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11 The NBER’s Business Cycle Dating Committee, Nat’l Bureau of Econ. Research http://www.nber.org/cycles/recession.html (last visited Sept. 18, 2020). While a common lay understanding holds that recessions are defined as two or more consecutive quarters of negative economic growth, the Committee describes its analysis as broader and deeper than just this one indicator. There is at least one advantage to their holistic approach—the ‘two quarter’ metric implies that recessions cannot be identified until they are at least six months old, before which time one would not have two quarters of data on which to make a judgment.


13 Edward Leamer, who compares NBER’s recession dating approach to Stewart’s take on pornography—“I know it when I see it”—is one of several economists who have developed algorithms
In narrative terms, the history of each event is relatively well known. The Great Recession in the United States refers to a period of financial contraction dating between December 2007 and June 2009. 14 Low interest rates after the 2001 recession fueled a housing boom in the mid-2000s, enabled in part by lenders offering subprime, adjustable-rate mortgages to prospective homeowners. 15 Rising interest rates after the middle of the decade resulted in a wave of defaults and foreclosures, eventually creating a crisis where borrowers—many of whom had not been led to expect such radical changes in rates—were unable to continue to afford their loans. 16 These defaults led to the collapse of several major banks in 2008—banks which themselves have been assigned culpability in failing to foresee the crisis—as part of a recession which would eventually spread to other parts of the economy, to Europe, and to the Southern Hemisphere. 17 A period of growth followed, culminating in the February 2020 peak. 18 The COVID-19 recession, meanwhile, was of course precipitated by the COVID-19 pandemic itself, announced by the World Health Organization on March 11, 2020, and the associated ‘economic shutdown’. 19

Thankfully, certain metrics do allow for direct comparison of the 2007–2009 and 2020 recessions in apples-to-apples terms. For all its vagueness on its dating decisions, NBER is explicit about some of the statistical metrics reviewed in its deliberative process. It highlights four in particular: employment, income, industrial production, and sales in the manufacturing and wholesale-retail sectors. 20 By comparing the trajectories of those metrics across the two periods, we can arrive at some conclusions about the relative depth and speed-of-onset of each crisis.


16 *Id.* at 402.

17 *Id.* at 401.


Such an examination suggests two key conclusions: that the COVID-19 recession is at least as deep as the Great Recession, but also that its onset has been much more rapid. Unemployment peaked in April 2020 at 14.7%, up from 3.5% just two months earlier. By comparison, unemployment peaked at 10% in October 2009—a level lower than the peak during the COVID-19 recession, but also obtained much more gradually, coming in the aftermath of the Great Recession rather than, as during COVID-19, at its onset.

Monthly real personal income, meanwhile, dropped by around 6.5% across the period of the Great Recession—from a peak in December, 2007 to a trough in June, 2009. In 2020, the same metric dropped over 8% between February and April alone. Monthly industrial production rates dropped 17.3% between December 2007 and June 2009; the drop between February and April 2020 was 16.7%. Last, monthly sales in manufacturing, retail and wholesale dropped 19.2% between the Great Recession’s peak in January 2008 and April 2009, its nadir. By comparison, the same metric dropped an almost identical amount—18.8%—between February and April of 2020.

While the Great Recession may not be a perfectly comparable event to the COVID-19 recession, these statistics at least allow us to contextualize our broad assertion that the two events are similar. They also raise another question, however. If recessions are quantified and identified primarily by trends in employment, income, production, and sales, what is the relationship between those trends and county government spending? Do crises in these four metrics implicate county revenues straightforwardly, or is the relationship more complex? A brief exploration of the nature of county government finances is necessary.

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22 Id.


24 Id.


27 Id.
III. THE EFFECTS OF THE GREAT RECESSION ON TEXAS COUNTIES

In the years immediately following the Great Recession, Texas was held up as an example of a state which had endured the crisis well.\textsuperscript{28} Its increase in unemployment ranked 35\textsuperscript{th} in the nation, not as devastating a blow as in other states, but still substantial.\textsuperscript{29} Han and Goetz, using employment trends to rate the ‘resilience’ of counties across the nation, rated just one-fifth of Texas counties ‘low’ resilience, and 72% ‘high’ or ‘medium’.\textsuperscript{30}

Certain factors proved protective for the state. Texas’ rural areas were an important asset.\textsuperscript{31} Northeast Texas relies heavily on livestock farming, while industry in the far west is focused on mining.\textsuperscript{32} Rural and agricultural areas fared better in the Great Recession nationally, as demand for agricultural goods was not as badly affected as demand in other sectors. The farming industry was also the direct recipient of direct federal government aid.\textsuperscript{33} Across the nation, unemployment rates tended to rise less dramatically in rural areas even as job creation slowed.\textsuperscript{34} A thriving oil and gas industry also played a major part in sustaining an overall pattern of job growth in the state through the first half of 2008, effectively delaying the onset of the recession; though that protection evaporated as oil and gas prices tumbled in the later part of that year.\textsuperscript{35}

The impact of the Great Recession on county government revenues and spending was distinct from its impact on unemployment, however. Whereas state government revenues are typically tied to income or (as in Texas) sales taxes, local and county government revenues depend far more heavily on property taxation and

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  \item \textsuperscript{28} Paul Krugman, \textit{The Texas Omen}, N.Y. TIMES (Jan. 6, 2011), https://www.nytimes.com/2011/01/07/opinion/07krugman.html. We note, however, that the strategies used by the state to cover the shortfall may have resulted in longer-term deficits. See Shi, supra note 3.
  
  \item \textsuperscript{29} \textsc{TOM HERTZ ET AL., RURAL EMPLOY. TRENDS IN RECESSION AND RECOVERY} (U.S. Dep't of Agric., 2014).
  
  \item \textsuperscript{30} Yicheol Han & Stephan Goetz, \textit{The Economic Resilience of U.S. Counties During the Great Recession}, 45 REV. REG'L STUD. 131–149 (June 2015).
  
  
  
  \item \textsuperscript{33} Hertz et al., supra note 24; Mallory Rahe et al., \textit{Income Inequality and County Economic Resistance to Job Loss During the Great Recession}, 49 Rev. Regional Stud. 129–47 (Jan. 2019); Note also that thirty-six of the forty counties rated ‘high resilience’ by Han and Goetz in the state were rural. Among the least resilient Texas counties, most tended to be metropolitan. Han and Goetz, supra note 25.
  
  \item \textsuperscript{34} Hertz et al., supra note 24 at 11.
  
  \item \textsuperscript{35} Keith R Phillips & Jesus Cañas, \textit{Recession Arrives in Texas: A Rougher Ride in 2009}, SOUTHWEST ECON. (2009); Hertz et al., supra note 24.
\end{itemize}
intergovernmental transfers of funds from state to local governments.\textsuperscript{36} Therefore, even as unemployment spiked around the country, the impact on county revenues was not immediate. Instead, county revenues tended to decline two to three years after the recession’s onset, as property tax rolls adjusted to the change in home prices.\textsuperscript{37} Beginning in 2009, state and federal aid was stepped up to fill some—though not all—of the gaps in local government budgets.\textsuperscript{38} In later years, as such aid receded, raising revenue through increased taxes and fees became a common solution to shortfalls.\textsuperscript{39}

Across the Great Recession, county budgets in Texas generally grew overall.\textsuperscript{40} Comparing 2007 to 2008, county budgets actually increased an average of 9\%, though 47 counties (close to a fourth of those for which data are available) reduced their budgets across those years.\textsuperscript{41} Comparing 2007 to 2010, budgets increased an average of 23\%, though again 40 counties (or one fifth) were still budgeting less in 2010 than they had in 2007.\textsuperscript{42}

But this tells us little about whether tailored cuts were being made in specific areas. Not only was the impact of the recession on county spending time-lagged by tax cycles and cushioned by state aid, but it was also sector specific. Across the country, spending cuts were concentrated in areas such as healthcare, elderly care, and education.\textsuperscript{43} Some counties may have been able to wait the recession out but understanding its likely impact on indigent defense requires a clearer understanding of that policy. We turn to that next.

IV. THE PROVISION OF INDIGENT DEFENSE SERVICES IN TEXAS

In Texas, as in about half the states in the country, indigent defense is administered directly by county governments.\textsuperscript{44} This delegation of administrative

\textsuperscript{36} Gordon, supra note 3.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Shi, supra note 3.
\textsuperscript{40} Data supplied by the Texas Association of Counties and on file with authors. Response rates to TAC’s surveys in 2007 2008 and 2010 were as follows: 227 of Texas’ 254 counties responded in 2007 (89\%), rising to 232 in 2008 (91\%) and again to 241 in 2010 (95\%). Taking all three years together, we had complete data for 203 counties. We removed an additional five counties for what we classified as obvious errors in the data for a final total of 198 counties with data suitable for analysis. We considered any year-on-year change of budgets in excess of 500\% to be an error (as, for example, where a budget in year one is $10 million, followed by a budget in year two of $50 million). Most year-on-year changes were far below this threshold. Analyses in this paragraph are therefore based on assessment of budgets in 198 of Texas’ 254 counties (78\%).
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Gordon, supra note 3.
\textsuperscript{44} SUZANNE M. STRONG, U.S. DEPT. OF JUSTICE, NCJ 250249, SPECIAL REPORT: STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 (2016); THE NAT’L RIGHT TO COUNSEL COMM.,
authority belies what is an ostensibly stringent demand made by the U.S. Supreme Court that criminal defendants must be provided counsel if facing the possibility of incarceration. In fact, implementation of that right by state and county governments permits the development of a patchwork of policies across the country.

Discretion on how to deliver indigent defense includes a wide variety of administrative, financial and other matters. States and counties must choose whether to supply indigent defense through public defender offices with staff attorneys, contracts with law firms, or private attorney practitioners hired by the hour. Individual judges are key decision-makers too, exercising power over how much to pay attorneys—or, indeed, whether to pay them at all. They may decide to levy fees on recipients of indigent defense services. And they must distinguish between who is ‘too poor’ to hire a lawyer, and who is not. There are many available choices across these dimensions, each of which may have profound consequences for the availability and quality of counsel to indigent defendants.

As a state, Texas was positioned as among the lowest spenders on indigent defense prior to the Great Recession. National surveys showed the state ranked 45th of the 50 states in spending per-capita terms in 2005. By 2008 it had fallen to 48th. But at the same time, two changes occurred in Texas which ought to have increased access to counsel and spending levels in the state. First, in 2008 the U. S. Supreme Court in

Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel (Constitution Project, 2009); Texas Association of Counties, supra note 8.


51 Andrew Davies & Alyssa Clark, Gideon in the Desert: An Empirical Study of Providing Counsel to Criminal Defendants in Rural Places, 71 Me. L. REV. 245, 245–72 (2019), showing that access to counsel in counties ranges from universal to non-existent.

52 Jennifer M. Sauberman & Robert L. Spangenberg, State and County Expenditures for Indigent Defense Services in Fiscal Year 2005 (The Spangenberg Grp., 2006). Texas spent $6.33 per capita on indigent defense in 2005. The state spending the most was Alaska at $40.96 per capita, and the state spending the least was North Dakota at $4.00. States averaged $11.51 per capita. Analysis on file with authors.

53 Holly R. Stevens et al., State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008 (Am. Bar Assn, 2010).
Court decided the case *Rothgery vs. Gillespie County*, a Texas case securing defendants’ right to appointment of counsel early in criminal proceedings.⁵⁴ Decided on June 28, 2008, the Court held that defendants had a right to assignment of counsel at their first appearance before a “judicial officer.”⁵⁵ In Texas, this implied that counsel must be assigned by local magistrate judges during “magistration” hearings—the very earliest stage at which defendants face the possibility of pretrial incarceration.⁵⁶ Although there is evidence from subsequent litigation that counties did not necessarily respond to *Rothgery* by immediately expanding access to counsel, it is at least reasonable to speculate counties might have decided to bolster their services in compliance with the new stricter standard for assignment.⁵⁷ Further, evidence from other studies suggests that earlier assignment of counsel may increase the proportion of defendants opting to use indigent defense services.⁵⁸

Second, changes to Article 1.051 of the Texas Code of Criminal Procedure—the provision dealing with the right of representation by counsel—became effective in 2007, requiring that defendants to be told of the procedures for requesting counsel prior to any waiver of counsel.⁵⁹ Addressing a concern that prosecuting attorneys might entice defendants with attractive plea offers before they had met with an attorney, the change enjoined prosecutors and judges from efforts to “attempt” to obtain from a defendant who is not represented by counsel a waiver of the right to counsel.⁶⁰ Although defendants could still choose to plead guilty, they could only do so after either being afforded the opportunity to obtain counsel, or after having had counsel assigned.⁶¹

V. COUNTY POLICY MAKING AND INDIGENT DEFENSE: THEORY AND HYPOTHESES

So how do counties actually make decisions about indigent defense policy, especially when money is tight? Paul Peterson’s seminal 1981 book *City Limits*, in which he argued for the proposition that local government spending can be

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⁵⁴ Rothgery v. Gillespie Cty, 554 U.S. 191 (2008). Notably, while the case required assignment of counsel, it did not require that counsel appear at magistration hearings in person.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ The settlement of a subsequent lawsuit against Williamson County, TX, where early access to counsel was still functionally denied to defendants, suggests some limits on the impact of the *Rothgery* decision. Jon Mosher, *Williamson County TX Settles "No Counsel Court" Lawsuit*, SIXTH AMENDMENT CENTER (Jan. 24, 2013), http://sixthamendment.org/williamson-county-tx-settles-no-counsel-court-lawsuit/. Nevertheless, evidence from other states includes instances of local actors choosing to expand access to counsel in advance of what they expect will be more stringent mandates in future. See, e.g., Alissa Pollitz Worden et al., *Court Reform: Why Simple Solutions Might Not Fail: A Case Study of Implementation of Counsel at First Appearance*, 14 OHIO ST. J. CRIM. L. 521 (2017).

⁵⁸ Worden et al., supra note 57.

⁵⁹ TEX. CRIM. PROC. CODE ANN. § 1.051 (F1–F2) (West 2007).

⁶⁰ Id.

⁶¹ Id.
understood fundamentally as a matter of “competitiveness,” is our starting point.62 Local governments, Peterson argues, fundamentally see themselves as in competition with one another for tax-paying residents, and will always spend more on policies which increase their competitiveness with one another in the race to attract new, tax-paying residents.63 To understand how much a local government will decide to spend in a policy area, it follows, one must understand whether local decision-makers believe the spending will increase the locality’s competitiveness.

To that end, Peterson proposes a straightforward typology of policies ranked by their attractiveness to local governments. The most attractive, categorized as “developmental,” are policies which attract new tax-paying residents to the locality and thereby support the development of the local economy.64 Building new roads or commercial retail spaces are often developmental policy choices.65 Less attractive but still important are “allocational” policies, also sometimes called “housekeeping” policies, which sustain and preserve a locality’s attractiveness without making it clearly more competitive for residents.66 Street cleaning, garbage collection, and maintenance of public parks and roadways are classic examples.67 Least attractive in terms of increasing competitiveness are ‘redistributive’ policies—those which take resources from taxpayers to fund services for those who pay little or no tax.68 While the need for certain kinds of redistributive spending during times of fiscal stress may be great—as, for example, where many persons are arrested and in need of lawyers—that need does not necessarily translate into demand, where demand is understood as a desire among taxpayers and county decision-makers to pay for those services.

If Peterson is right, changes to indigent defense spending will depend critically on its categorization in his typology. Faced with tough choices, counties will double down on developmental policies (which may actually pay for themselves in the long run) and allocational ones which sustain their competitiveness.69 Redistributive spending, meanwhile, which not only serves non-tax-paying residents but also offers no obvious prospect of improving a locality’s competitiveness, will tend to drop precipitously.70 Yet indigent defense’s status among the typology is ambiguous. As a policy which benefits the poor at the expense of taxpayers, it fits a redistributive

62 See Paul E. Peterson, City Limits (1981); see also Sang Ok Choi et al., County Limits: Policy Types and Expenditure Priorities, 40 Am. Rev. Pub. Admin. 29–45 (2010).
63 See Peterson, supra note 62.
64 See Id. at 41–43.
65 Id.
66 See Id. at 44–46.
67 Id.
68 See Id. 43–44.
69 Id. at 48 tbl. 3.2.
70 See, e.g., Choi et al., supra note 62 (showing property values increase allocational spending, but not redistributive spending.).
archetype. But other policies in the general area of public safety—courts, police, fire services, and so forth—are generally thought of as allocational in nature; sustaining, if not necessarily enhancing, a community’s competitiveness by preserving its character, safety, and security. Indigent defense sustains local court institutions, protects basic constitutional rights from violation and (no less importantly in some contexts) provides steady income to a network of local lawyers. As such, it also has many of the characteristics of allocational spending.

As valuable as Peterson’s competition-based typological approach has proven to public administration theorists, it has been critiqued for its deliberate downplaying of non-economic factors in policy-making. Studies specifically targeted at the question of how governments make cuts to spending—a field known as “cutback management”—have revealed importance of such factors. When making cuts to services, research has shown the importance popular political ideology, bureaucratic institutionalization, and organized advocacy in determining which areas are most prone. In county criminal justice policy decisions, and certainly indigent defense, local institutions like bar associations and leaders like public defender office executives can have a critical influence on spending and policy. A broader view of spending on indigent defense considers not only its role in local economic competitiveness, but also recognizes the interest that local judges and lawyers may have in the operation of that system. In addition, it notes the decentralized and largely unregulated nature of the bureaucracy of indigent defense, in which individual judges and lawyers have considerable discretion and little oversight.

Analysis of change in indigent defense across the period of the Great Recession therefore has the potential to reveal new insights into the nature of the policy itself. Does it behave more like a redistributive policy, shrinking in proportion to available resources, or is it more resilient? If resilient, what forces sustain it? With those considerations in mind, we turn to our analysis.

VI. DATA AND METHODS

We examine trends in data on indigent defense policy using information from each of Texas’ 254 counties for the period 2005–2011. This span allows us to establish a clear picture both of indigent defense policy pre-recession, and of the

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73 See id.
impacts, including possibly-delayed impacts, of the Great Recession itself. Our final dataset includes records for each Texas county across each of the seven years under study for a total of 1,778 records.

We examine data on two key indicators of indigent defense policy. First, we look at expenditures per weighted case, seeking to understand whether the recession resulted in cuts to spending. Second, we examine rates of access to counsel. Texas is unusual in that it collects and publishes metrics showing the proportion of defendants which actually make use of indigent defense in each county by year.\footnote{See Indigent Defense Data for Texas, supra note 8.}

We use these metrics to examine whether that proportion grew or shrank across the period as a way to assess whether rates of utilization of indigent defense services expanded or contracted.\footnote{For an extended discussion of these data, see Davies & Clark, supra note 51.}

Having examined spending, we also address the other side of the budgeting equation: revenue sources. First, we examine the trend in reimbursement charges for indigent defense specifically. Second, we examine changes in state government assistance to counties—a modest but potentially important source of revenue at times of shortage.

Most of our data come from the archives of the Texas Indigent Defense Commission (TIDC), to which we were generously given access. To examine expenditures per weighted case, we divide total county expenditures (from all sources) by a weighted total of indigent defense cases, adjusted to 2011 dollars.\footnote{Adjustment to 2011 dollars were made by inflating expenditure data using the Consumer Price Index (CPI) for each year as reported by the U.S. Bureau of Labor Statistics at https://www.bls.gov/cpi/. Accounting for inflation in this way allows us to calculate the change in ‘real’ expenditures on defense per head of population in the county and allows us to account for the fact that inflation will generally cause such services to cost more over time. Where counties contributed to the cost of regional (multi-county) indigent defense service providers, case expenditures resulting from regional representation were attributed to the county in which the case originated.}

Caseload totals are determined using a weighting scheme established by Standard 13.12 of the National Advisory Commission on Criminal Justice Standards and Goals.\footnote{National Advisory Commission on Criminal Justice Standards and Goals, The Defense (Black Letter), Nat'l Legal Aid & Def. Ass'n, http://www.nlada.org/defender-standards/national-advisory-commission/black-letter (last visited Sept. 20, 2020).} Those standards weight felony cases to be equal to 2.67 misdemeanors, appeals to 16 misdemeanors, and juvenile cases to 2 misdemeanors.\footnote{Id.}

By standardizing expenditures using caseloads in this way, we implicitly control for changes in caseload across the period. Indeed, we note that felony and misdemeanor court filings in Texas rose early in our period, peaked in 2007, and fell thereafter.\footnote{Texas Judicial Branch, Judicial Data, https://www.txcourts.gov/judicial-data/ (last visited March 10, 2020). Felony and misdemeanor filings peaked at 940,600 statewide in 2007. The figure is driven principally by misdemeanor filings, of course: felony filings, when broken out separately,
Recession might have increased both crime rates (the economic disruption driving more criminality—a hypothesized effect which in fact largely failed to materialize)\textsuperscript{82} and also heightened demand for services by increasing the number of defendants who were indigent by reason of poverty. Any examination of overall expenditure levels which does not standardize by caseloads would fail to account for these simple changes in demand for services and the predictable impacts on expenditures they would cause.\textsuperscript{83}

Access to counsel rates are calculated by dividing the numbers of cases handled by indigent defense providers by the total number of case filings in local courts each year. We included all cases in this calculation—whether felony or misdemeanor charges against adult defendants, juvenile court cases, or appellate cases. This metric, although a good indicator of access to counsel rates generally, has a couple of limitations. First, counsel is sometimes assigned in cases where no court filing results, meaning access to counsel rates are occasionally over 100\%.\textsuperscript{84} Second, payment of costs of counsel occurs at the conclusion of cases, whereas filing of cases occurs at the outset, meaning that the numerator and denominator are inevitably from different sets of cases. If attorneys delay billing for their work until long after cases are concluded, or bill for large numbers of cases in batches, the measure won’t be a perfectly precise reflection of the access to counsel rate in a given year. Nevertheless, we regard TIDC’s access to counsel metric as a valid, if not always perfectly reliable, measure of access to counsel.\textsuperscript{85}

Reimbursement rates are also calculated using TIDC data on amounts received from defendants in each county for each year—except for 2005, for which reimbursement data were not available. We divide the amount reimbursed by the amount expended for each year in the period 2006–2011, creating a metric which captures the percentage of a county’s expenditures on indigent defense that were reimbursed by clients. In this way, we are able to establish that reimbursement averaged around 9\% of the total expended on defense across the years we examine (see Table 1).
Examining expenditures per weighted case across our period, we see no signs that the Great Recession caused a reduction in spending on indigent defense in Texas counties (see Figure 1). During the pre-recession ‘baseline’ period of 2005–2007, inflation-adjusted expenditures per weighted case averaged around $245, remaining almost perfectly steady at that level in 2008. Every year thereafter, they were higher than the pre-recession period, ending at $333 in 2011. Not only did spending levels remain constant in the early years of the period we examine, but by its end they had increased over 30% in real terms.
Rates of access to counsel, meanwhile—the proportion of defendants making use of indigent defense services—increased persistently across the period 2005–2011. The trend plotted in Figure 2 shows incremental increases almost every year, including across the Great Recession years. Pre-recession rates of access to counsel were relatively stable around 30%, but increased steadily thereafter, finishing a third higher (at 40%) in 2011.
Juxtaposed, the results shown in Figures 1 and 2 imply not only that spending per case increased through Great Recession years, but also that the proportion of defendants utilizing indigent defense services grew as well. The combined effect of both increased caseloads and increased spending on each case meant that instead of cutting indigent defense spending during the Great Recession, counties actually steadily increased their investment in the service. Indeed, total expenditures on indigent defense across all counties increased from approximately $161.6 million to $197.8 million in real dollars across the period.

Recognizing that not all counties fared equally well during the Great Recession, we also examined differences in trends in both spending and access to counsel for groups of counties distinguished by certain characteristics. We compared counties based on popular political attitudes (measured using the 2008 presidential election

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86 Although, as previously noted, the numbers of court filings dropped after 2009. Because the “access to counsel” metric is a simple fraction dividing the number of indigent defense cases handled by the total number of filings, the reduction in the total number of filings would tend to push access rates up if assignment numbers stayed constant. However, assignment rates were also rising across this period, indigent defense systems supplied representation in around 339,000 cases in 2005 compared to over 410,000 in 2011. (Data on file with authors.) Texas Indigent Defense Commission, https://tidc.tamu.edu/ (last visited Feb. 9, 2021).
returns), racial composition (measured as the proportion of county population identified as African-American in the 2010 census), and county rurality (measured by the 2013 Rural-Urban Continuum Codes). We also compared trends for counties with institutionalized public defender offices to those in counties without them. Comparing the trends in both spending and access to counsel across counties did not reveal any statistically significant differences or divergences in the trajectories of counties in any of the groups we defined; regardless of whether conservative or liberal, heavily white or racially mixed, deeply rural or urban, institutionalized defender office or not.

To examine whether there were any differences among counties that the Great Recession hit particularly hard, we also compared counties based on a range of indicators of fiscal stress. We settled on two common metrics in fiscal stress literature: the ‘operating ratio’, comparing county revenues to county expenditures to identify surpluses and deficits, and tax capacity, dividing total revenues from taxation by county population to deduce revenues per head of population. Each metric is calculated using the 2007 Annual Survey of State and Local Government Finances conducted by the Census Bureau and population data as appropriate. We also compared counties using Bureau of Labor Statistics data on 2007 unemployment rates in an attempt to distinguish places with high unemployment.

90 We used ANOVA tests to identify group-level differences in percentage changes in expenditures per weighted case and access to counsel metrics at the county level between 2007 and 2008. With few exceptions, none of the differences between these groups were significant at the p<0.05 level. To the extent we did find statistically significant differences among the groups using the tests we ran, those findings were neither consistent nor coherent. We conclude our analysis produced no clear evidence that county differences in changes in spending and access to counsel levels can be meaningfully explained by straightforward categorical differences among counties of the kinds we examined.
92 Annual Survey of State and Local Government Finances, United States Census Bureau, https://www.census.gov/programs-surveys/gov-finances.html (last visited Sept. 20, 2020). In computing total revenues, we summed: intergovernmental revenue (from federal and local government), taxes, general revenue, liquor store revenue, utility revenue, and social insurance trust revenue. In computing expenditures, we summed: current operations expenditures, interest on debt, assistance and subsidies, insurance benefits and repayment, capital outlays, and intergovernmental expenditures. For more details on the coding of county government finances, see https://www2.census.gov/govs/pubs/classification/methodology_for_summary_tabulations.pdf.
prior to the recession from those with lower unemployment. And finally, we exploit a set of metrics developed by Han and Goetz in their study of county "resilience", measuring both the depth of the Great Recession and the ability of counties to bounce back from impacts suffered.

Despite these efforts to identify counties that were in some way badly prepared for the Great Recession, we failed to produce findings indicating statistically significant differences between groups in spending or access to counsel patterns. Even when comparing counties that experienced fiscal stress prior to or during the Great Recession to those that did not, spending and access to counsel patterns were not significantly different.

B. Revenues

How might counties have sustained, and even expanded, spending during the Great Recession? We have the data to examine two key possibilities: changes in reimbursement fees charged for services, and changes in intra-governmental transfers of funds from state government to counties. Either could offset county liabilities, potentially explaining the overall trend toward increased spending. Accordingly, we examine these revenue sources for signs of increase.

Patterns in reimbursement fees across Texas counties are diagrammed in Figure 3. Shown as a percentage of overall expenditures, the trend is very slightly upward. Prior to the recession, in the two years for which we have data, counties required defendants to reimburse 8.4–8.6% of the amount they ultimately expended on indigent defense services. In 2008 the proportion jumped to 9.5%, before decreasing slightly, and peaking in 2011 at 10%. While it is possible that some counties did try to offset increasing indigent defense costs by raising the amounts collected through reimbursement, the actual increase was far too small to support the large increases in expenditure overall. Total collections in 2011 were around $11.8 million, up from $9.4 million in real dollars in 2006, hardly enough to support the $36 million jump in overall spending noted above.

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94 Han & Goetz, supra note 30.
Last, we examine state funding to counties for indigent defense in Texas across the period in Figure 4. In real terms, this aid grew substantially, from $15.6 million in 2005 to $33.7 million in 2011. That increase was substantial enough to change significantly the balance in state and county responsibility for funding indigent defense in Texas, as shown in Figure 4. Whereas in 2007, directly before the Great Recession, the state covered approximately 10.5% of total spending statewide on indigent defense, by 2011 the figure was 17%.
Figure 4: State and County Contributions to Indigent Defense Expenditures in Texas Counties, 2005–2011

While the ‘net county contribution’ on indigent defense in Texas shrank as a proportion of indigent defense spending during the Great Recession, the raw amount of that contribution still grew in real terms through the period 2005–2011 from approximately $146 million to $164 million. Even after accounting for the small increase in defendant reimbursements that counties levied (see Figure 3), the overall conclusion is clear: counties themselves not only continued to shoulder the burden of indigent defense expenditures, but they also played a critical part in driving the real-dollar increases in spending and access that we see in the data by spending more from local sources. While they may have made limited use of other strategies to raise revenue, those strategies were not by themselves so substantial as to sustain the increased levels of spending and access to counsel that we see across the period.

VIII. DISCUSSION

A. Changing our Understanding of Indigent Defense Policy

Our findings present a conundrum to the popular stereotype of how governments fund indigent defense services. From the *Gideon* decision to present day, a drumbeat of reportage has decried the failures of governments to commit
needed resources in the area. The causes of that failure are a familiar litany: defendants are unpopular and disenfranchised, governments instinctually side with law enforcement in budgeting, and no oversight or quality control mechanisms exist. The recitation of consequences is also predictable: resources for defense are not only inadequate, they are disproportionately so, as defenders face the double disapproval of representing people who are not only poor and downtrodden but are also stigmatized by the status of defendant. Such themes, in fact, have echoed through our own writing earlier in this article, albeit expressed in different terms.

How, then, is it possible to reconcile the story that is so often told of indigent defense with the one we uncovered in our analysis? In Texas during the Great Recession, expenditures on indigent defense, and actual uptake of indigent defense services themselves, both expanded steadily through the period of fiscal crisis. Far from being first on the chopping block as a long-begrudged and unpopular spending decision, indigent defense spending and delivery were sustained at prior levels with scarcely a quaver. Even when we examined counties facing precarious financial situations prior to the Great Recession we still found little to distinguish them. The story was the same everywhere: sustained funding and expanded access to counsel.

The unique context of indigent defense in Texas might be important to understanding indigent defense’s apparent resilience. As a relatively low-spending state undergoing legal challenges to compel the production of bare-bones advocacy, it is possible there was very little fat that could feasibly have been cut from the indigent defense system in response to fiscal restrictions. While indigent defense is generally replete with opportunities for creative spending cuts, it could be that indigent defense services in Texas counties were already so emaciated that reductions would have endangered the counties to litigation or other undesirable consequences.

But we are not convinced this explanation is enough. We doubt that, in an ironic version of a commitment to maintaining quality services, indigent defense in Texas finally hit the bottom of the barrel and found it had nowhere to go but up. For one thing, we doubt the bottom of the barrel was truly hit: indigent defense administrators nationally have an enervating history of self-destructive spending cuts in the most unlikely of circumstances.

Rather, we see greater promise for understanding indigent defense policy’s resilience through examination of the decentralized nature of decision-making around spending and access to services, and the incentives that attend those decisions. The delivery of defense services is a remarkably straightforward affair generally requiring the involvement of only two parties—the court, which assigns the attorney, and the attorney, which accepts the assignment. With only limited

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95 See Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice (American Bar Association, 2004); Constitution Project, supra note 44.
96 See Marsh, supra note 48.
exceptions in select jurisdictions, no oversight is involved beyond, perhaps, some straightforward auditing. Few counties in Texas have centrally administered defender service providers of any kind. And while written plans for how services will be provided exist, these too generally allow considerable discretion to judges.\(^{98}\)

As a rule, therefore, attorneys and judges are free to negotiate among themselves whom will be assigned to represent defendants, and what the attorneys will be paid for their work.\(^{99}\). The outcome of those negotiations comprises in a very real sense the full sum and substance of indigent defense policy in a county, directly determining whether and how much indigent defense will be provided, and what it will cost.

And will fiscal crises have the power to change lawyer and judge decisions? Perhaps, for some.\(^{100}\) But in general, the incentives seem to suggest not. For some attorneys, indigent defense services are an important source of income.\(^{101}\) Reputationally, judges may feel presiding over a court without counsel present is dishonorable.\(^{102}\) More insidiously, evidence exists in certain places that networks of reciprocal transactions exist between judges and lawyers who trade—implicitly at least—lucrative case assignments for election campaign donations.\(^{103}\) Of course, sustaining spending on indigent defense during a crisis even for these reasons might be justifiable. We make no judgment either way. What is most important to observe is that these institutionalized financial relationships between judges and attorneys in indigent defense systems are likely to resist change, even at times of financial stress.

B. Looking Forward to the COVID-19 Recession

What are we to expect from the COVID-19 recession? To advocates for indigent defense services our analysis might be strangely reassuring. Perhaps indigent defense policy is more resilient than we thought, even immune from the

\(^{98}\) Neel Sukhatme & Jay Jenkins, Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment’s Right to Counsel, 70 DUKEL. J. 775 (2020).

\(^{99}\) Id.

\(^{100}\) We recognize that in Texas Constitutional County Court Judges occupy an interesting dual role as both trial court judges and also as county fiscal officers. Future research could examine whether the behavior of such dual-role judges differs from that of judges who have no fiscal responsibilities in government. We are thankful to Nate Fennell, Equal Justice Works fellow at the Texas Fair Defense Project, for bringing this fact to our attention.

\(^{101}\) See Allan K. Butcher & Michael K. Moore, Muting Gideon’s Trumpet: The Crisis in Indigent Criminal Defense in Texas (Comm. on Legal Serv. to the Poor in Criminal Matters, State Bar of Texas, 2000) for examples of judges assigning cases to lawyers because they are concerned that they rely on the income.


\(^{103}\) See Sukhatme & Jenkins, supra note 98; Butcher & Moore, supra note 101.
cuts one might expect at times of fiscal crisis. That reassurance should be shallow, however. While we cannot be sure of the reasons for its resilience, we find it hard to believe that stability in indigent defense policy across the crisis of the Great Recession was the product of a spirited commitment by local governments to sustain service quality—or, that if so, this was the only or primary explanation. At least as plausible, and enjoying at least some empirical support, is that indigent defense is a decentralized system where—provided lawyers and judges are in agreement—funding flows comparatively easily. Those dynamics, for what they are worth, are indeed likely to be unchanged this time around.

Two key contrasts between the Great Recession and the COVID-19 recession strike us as salient indicators that things may not, in fact, work out the same way this time. First, it is clear from our data and from other studies that state and federal government assistance during the Great Recession played critical roles in dampening the impact of the fiscal crisis on county spending, particularly in the short term. The severity and swiftness of the COVID-19 recession, and the relative reticence of the federal government (at the time of writing in October 2020) to allocate stimulus spending to state and local governments, may mean that the impact of this latest crisis on county spending for indigent defense is more noticeable, rapid, direct, and negative. Forced to make tough choices about reducing spending on even popular programs, counties may more quickly find themselves in the position of the jurisdictions noted at the outset of the paper, actively considering the option of cutting indigent defense spending.

Secondly, the COVID-19 recession has at least one critical feature absent from the Great Recession. The COVID-19 pandemic itself has directly impacted the justice system in ways that the Great Recession never did. Courts have suspended business almost entirely. Some jurisdictions have worked to reduce jail populations and dismiss low-level prosecutions out of a concern for public health.\footnote{Caddo Parish, LA, district attorney James Stewart was quoted in April, 2020, that there would be a “tremendous backlog” of cases after the pandemic and that he would be “seeing which ones we can dismiss.” See https://www.kbks.com/news/caddo-da-on-reopening-courts-well-be-ready/article_c7fd620-85a1-11ea-9806-2b07d95ae958.html (last visited March 10, 2021). Sheriff Doug Shuster in Mojave County, AZ, stated in March 2020, “With the cooperation of our local law enforcement agencies, we have been able to reduce our average daily inmate population by a little more than 15%, about 90 inmates. We’d like to lower the population another 10 to 15 percent.” https://resources.mohavecounty.us/File/Sheriff/PressReleasesArchives/2020/03-24-20%20Special%20Release-%20COVID-19%20jail%20update.pdf (last visited March 10, 2021).} Measures such as these very likely also reduced the demand for indigent defense services. Whereas prior recessions have had a ‘double whammy’ effect, reducing funds for certain support services while simultaneously increasing demand for them, the COVID-19 recession might represent a still more complex set of cross-winds.\footnote{Gordon, supra note 3.} Even if the COVID-19 recession does in fact reduce revenues to support indigent defense, in other words, it might also have the unique feature of reducing demand by shuttering parts of the justice system entirely. Cuts to spending on indigent
defense during the COVID-19 recession will have to be read carefully, therefore: did they reduce services, or were they merely reflections of reduced demand for those services to begin with?

IX. CONCLUSION

During the Great Recession in Texas, indigent defense policy did not behave in the ways that 'redistributive' policies usually behave. Fiscal stress causes spending on redistributive policies to shrink.  But indigent defense in the Great Recession in Texas didn’t shrink. It was sustained, even expanded, through the period. What was happening?

We suspect that indigent defense isn’t a typical redistributive policy. Indigent defense may benefit defendants, but it funds attorneys. Spending on attorneys is most directly determined through ad hoc decisions by lawyers and judges operating with little oversight. County governments themselves have few tools to rein in that spending, even when fiscal crisis hits. Meanwhile, lawyers and judges themselves have no clear incentives to voluntarily reduce services and spending. Among other things, the income of the attorneys relies on it.

Even after conducting our analyses, we are left with a sense that we are barely beginning to understand indigent defense policy-making. Our data reveal trends in spending and access to indigent defense, but not the forces that drive those trends. With more data, we could investigate collateral issues—such as whether patterns in indigent defense spending mirrored patterns elsewhere in criminal justice, or whether the stability we see in Texas also occurred in higher-spending states. But above all, it seems to us, this research reveals how little we really know about how and why indigent defense policy happens. How is it controlled, and how do those in control make decisions? To that end, we look forward to beginning to ask those questions directly of those who are in charge.

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106 Indicatively, perhaps, the one empirical investigation of which we are aware which examines directly the correlation between spending on indigent defense programs and spending on social welfare programs found no relationship. See Andrew Lucas Blaize Davies & Alissa Pollitz Worden, State Politics and the Right to Counsel: A Comparative Analysis, 43 L. SOC’Y REV. 187, 187–220 (2009).

107 Sukhatme & Jenkins, supra note 98.