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Epiphenomenal Indigent Defense

Darryl K. Brown*

I. INTRODUCTION

There are some much-studied, recurring social events and behaviors that, although centrally important to public policy and social life, have proven intractable to explanation and prediction. As currently salient examples, consider stock market crashes and recessions. Economists cannot consistently see them coming nor explain them after the fact in consistent detail.¹ Another example is crime rates, which rise, and in recent decades fall, without any discernable strong causal link to familiar variables such as employment or imprisonment rates.² This Article describes why we can add state funding for indigent defense counsel to that list and what this conclusion means for indigent defense funding policy.

States are required to provide indigent defense in a specific set of cases – including felonies, misdemeanors for which defendants are sentenced to incarceration, and appeals³ – and the minimum quality of that representation is nominally constitutionally guaranteed as well.⁴ Those mandates should lock indigent defense systems, and, at least roughly, indigent defense budgets, into a fairly stable and direct relationship with other components of criminal

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1. GEORGE AKERLOF AND ROBERT SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM 131-32 (2009); John Cassidy, *After the Blow Up*, NEW YORKER, Jan. 11, 2010, at 28, 30 (quoting economist Eugene Fama, who said that explaining the causes of recessions is “where economics has always broken down. . . . We don’t know what causes recessions.”); *id.* at 32 (quoting economist Richard Thaler in saying, “It’s not that we can predict bubbles – if we could, we would be rich.”).

2. For an overview of theories of crime with some criticism and attention to limitations, see THE EXPLANATION OF CRIME: CONTEXT, MECHANISMS AND DEVELOPMENT (Per-Olof H. Wikström & Robert J. Sampson eds. 2006).

3. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in felony prosecutions); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel in misdemeanor prosecutions if defendant will receive an incarceration sentence); *Alabama v. Shelton*, 535 U.S. 654 (2002) (right to counsel even if punishment includes only a suspended sentence of incarceration); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel for appeal as of right).

4. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defining standard of review for quality of counsel).

justice – particularly prosecutor staffing, courts' criminal caseloads, and prison populations. Yet they do not.

Two features of indigent defense stand out. First, indigent defense is perennially underfunded in many jurisdictions. Second, and more interestingly, indigent defense systems vary greatly over time and space. Budgets rise and fall from year to year within a state, and the budgets and designs of indigent defense systems vary greatly across states and even among jurisdictions within the same state. It is that perpetual variation and instability that puts American indigent defense policy in the category of the unpredictable. Indigent defense provision does not function under the few identifiable variables that usually characterize strong, specific, well-enforced constitutional mandates. Rather, its history, nearly forty years after *Gideon*, rests on myriad influences, events, and variations in government.

Indigent defense is epiphenomenal: it is a secondary effect of these political events and variations, rather than a stable function of constitutional and statutory mandates that closely tie it to the criminal justice systems' other components. Until that status changes – and there are nascent signs that it could – indigent defense policy will continue to have long periods of inadequate service with systemic crises that are periodically interrupted by reform efforts typically prompted by litigation or intervention of influential groups, such as state bar associations and state judiciaries. The remainder of this Article develops this description of the political instability of defense funding and points to some promising state approaches to indigent defense that hold potential for moving defense provision into a more stable, less volatile relationship with the criminal justice systems of which it is a part.

II. INDIGENT DEFENSE AND INCARCERATION RATES

First, consider indigent defense in relation to a related component of criminal justice systems: incarceration rates. While the overall American incarceration rate is several times higher than that of any other industrialized democracy,⁵ state sentencing practices nonetheless vary substantially. The two states with the lowest incarceration rates, Maine and Minnesota, have rates that are less than a quarter of those found in the highest-incarceration American state, Louisiana.⁶ All U.S. states have high incarceration rates by European standards.⁷

5. For comparative national figures on incarceration, see INT'L CTR. FOR PRISON STUDIES, KING'S COLLEGE OF LONDON, WORLD PRISON BRIEF – HIGHEST TO LOWEST RATES, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited June 23, 2010) [hereinafter WORLD PRISON BRIEF]; ROY WALMSLEY, WORLD PRISON POPULATION LIST (8th ed. 2008), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf (listing incarceration rates in several countries worldwide).

6. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.29.2007, available at <http://www.albany.edu/>

Indigent defense systems vary tremendously among states, though in ways that are difficult to measure quantitatively and to rank ordinally. Despite a trend toward common models – such as more state, rather than local, funding of indigent defense and more supervision by state boards or agencies – states still use a wide array of models for providing indigent defense. Because of the diversity of those models, the resources available for counsel, as well as the quality of representation provided by counsel, are difficult to measure. As noted below, many states fund only part of their indigent defense services from state budgets and leave the remainder to localities;⁸ as a result, reliable figures on statewide expenditures are not available for some states. Nonetheless, we have enough data on states' overall funding of indigent defense to allow for some plausible estimates and observations of relative defense resources.

Prisons and indigent defense are big ticket items in state criminal justice budgets. Prison budgets are much bigger and more prone to steady growth than indigent defense budgets. Nonetheless, states perennially find it difficult to sufficiently fund defense attorneys, especially given the political nature of the expenditure. States spent about \$3.5 billion on indigent defense in 2005;⁹ that same year, states also spent about \$38.2 billion on corrections,¹⁰ with approximately 88%, or about \$33.6 billion, going to prisons.¹¹ Put differently, on average, corrections account for 6.8% of states' general fund spending.¹² Indigent defense funding amounts to roughly a tenth of that.

sourcebook/pdf/t6292007.pdf [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS] (noting Maine's incarceration rate in 2007 was 159 per 100,000 and Minnesota's was 181 per 100,000; by contrast, Texas' rate was 669 per 100,000 and Louisiana's was 865 per 100,000).

7. See WORLD PRISON BRIEF, *supra* note 5; WALMSLEY, *supra* note 5 (table 2 has figures of the United States; table 4 has figures for European countries).

8. See source cited *infra* notes 29-31 and accompanying text.

9. THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005 37 (2006), available at http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf [hereinafter STATE AND COUNTY EXPENDITURES].

10. PEW CENTER FOR THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 41 tbl.A-2 (2009), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=49382 [hereinafter ONE IN 31]. Corrections are the fastest-growing state expenditure category after Medicaid. *Id.* at 1.

11. *Id.* at 11, 41, tbl.A-2. The remainder of corrections budgets went mostly to community supervision, such as probation and parole. See BUREAU OF JUSTICE STATISTICS, STATE PRISON EXPENDITURES, 2001 1 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf> [hereinafter STATE PRISON EXPENDITURES] (states spent \$29.5 billion for adult prisons in 2001).

12. PEW CENTER FOR THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 30, tbl.A-2 (2008), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=35904 [hereinafter ONE IN 100] (fiscal year 2007 data).

On the theory that there ought to be a direct correlation between incarceration rates and indigent defense funding, it is plausible to suspect that defense funding would rise with prison funding. The relation of incarceration rates to prison funding is more complicated, as noted below. States with higher incarceration rates have to spend more on prisons, although spending on prisons per prisoner varies notably among states.¹³ Because counsel is constitutionally required for sentences resulting in incarceration¹⁴ and because only a small portion of defendants waive counsel or hire private attorneys,¹⁵ demand for appointed defense counsel (and thus funding for them) should roughly rise and fall in direct correlation with incarceration rates.¹⁶ Thus, an increase in the number of defendants facing incarceration suggests a need for more counsel to represent them, and most of that counsel would be publicly funded.¹⁷ Conversely, lower incarceration rates should correlate with lower funding for appointed defense counsel. There is a strong normative argument for maintaining that correlation as well because rising numbers of defendants without increased funding for their attorneys means, on average, less adequate representation.

Some support for this hypothesis comes from a doctrine and remedy recently employed in several states in order to enforce minimally sufficient funding for indigent defense. In many states over the past two decades, attorneys for indigent defendants have filed motions or brought class actions alleging that funding levels for publicly funded counsel are insufficient to provide representation that meets the constitutional standard of effectiveness. Alabama, Arizona, Connecticut, Florida, Illinois, Kentucky, Massachusetts, Michigan, Louisiana, Massachusetts, New Mexico, New York, Pennsylvania,

13. See ONE IN 31, *supra* note 10, at 13 (noting states' average daily cost for prisons per offender was \$78.95 in 2008, but expenditures varied among states from \$35.69 to \$130.16).

14. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979).

15. See Erica Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 442 (2007) (estimating that less than 0.5% of defendants represent themselves instead of accepting representation by a lawyer).

16. Appointed counsel includes attorneys in public defender offices and those hired on contract by a locality, or appointed by judges, to provide indigent defense.

17. This general observation overlooks some details that should not undermine it. For example, while most inmates entering prison have received new sentences, just over one-third (36.2% in 2008) of inmates entering state prisons annually do so as a result of parole revocations, at a hearing for which they may not have had counsel. See BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2008 34 tbl.12 (Dec. 2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>. Therefore, a defense lawyer does not correlate with every new inmate. The direct correlation between inmates and counsel still holds, but it is closer to a 3:2 correlation, not a 1:1 correlation.

Tennessee, Washington, and West Virginia have all seen various forms of this litigation in recent years, sometimes repeatedly.¹⁸

The common argument is that, in a given local jurisdiction, caseloads have risen beyond the capacity of public defender offices to handle all defendants' cases effectively. Put differently, increases in state felony prosecutions, which have pushed incarceration rates upward, have outpaced funding for defense counsel. The remedy granted in several states is to relieve defense attorneys from representing existing clients or to impose a ban on those lawyers taking on additional clients, sometimes through a presumption of ineffective assistance that attorneys with full caseloads can invoke by filing a

18. *See, e.g.*, *State v. Peart*, 621 So. 2d 780, 783 (La. 1993); *State v. Citizen*, 898 So. 2d 325, 327 (La. 2005); *N.Y. County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 400 (Sup. 2003) (No. 23535-7); *United States ex rel. Green v. Washington*, 917 F.Supp. 1238, 1270-71 (N.D. Ill. 1996) (denying inmates counsel for appeals is a due process violation); *State v. Young*, 172 P.3d 138, 141 (N.M. 2007) (defense counsel prevails; capital prosecution stayed due to defense resource constraints); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1134 (Fla. 1990) (granting relief to public defenders with excessive caseloads); *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 901 (Mass. 2004); *Rivera v. Rowland*, No. CV-95-0545629S, 1996 Conn. Super. LEXIS 2800, at *3-4 (Oct. 22, 1996) (class action on behalf of indigent defendants settled with consent decree); *see also* *Arnold v. Kemp*, 813 S.W.2d 770, 774-75 (Ark. 1991) (recognizing due process or taking claims for attorneys whose fees as appointed counsel are excessively low); *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W.Va. 1989) (same); *State v. Lynch*, 796 P.2d 1150, 1164 (Okla. 1990) (overriding statute and imposing a fairer system of compensation to attorneys representing indigent defendants). *Cf.* *Kennedy v. Carlson*, 544 N.W.2d 1, 8 (Minn. 1996) (rejecting claim by public defender that limited resources cause deprivation of counsel). Additionally, THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 104-46 (2009) describes the following four unreported cases, whose pleadings and settlement documents are not available in public databases: *Carter v. Chambers County*, No. 88-T-1196E, (M.D. Ala. 1989) (a class action alleging that indigent defendants were deprived of due process rights when the county government did not provide counsel to those in pretrial detention and was resolved with consent decree); *Stinson v. Fulton County Bd. of Comm'rs*, No. 1:94-CV-75 GET (No. Dist. Ga. 1994) (class action alleging unconstitutional denial of counsel before arraignment or indictment; resolved by consent order, *Stinson v. Fulton County Bd. of Comm'rs*, No. 1:94-CV-240-GET (No. Dist. Ga. 1999)); *In re the Matter of Continued Indigent Representation by the Dist. Pub. Defender's Office in Knox County General Sessions Court (General Sessions Court, Knox County, Tenn. 1991)*; *Petition for Declaratory Judgment for the Plaintiffs at 3-5, Lewis v. Hollenbach*, 08-C1-1094 (Franklin Cir. Ct. 2008) (challenging denial of counsel due to public defenders' excessive caseloads and under-funding), available at <http://www.clearinghouse.net>. *See generally* AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE STATE OF CRIMINAL JUSTICE 2009 152-53 (2009); AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE STATE OF CRIMINAL JUSTICE 2007-2008 96-100 (2008) (summarizing cases).

motion when appointed to represent a new client.¹⁹ Those sorts of remedies pressure legislatures to provide more funding for indigent defense because some prosecutions cannot move forward without defense attorneys – a result that legislatures will not likely abide for long.

In theory, these remedies push incarceration rates to more closely accord with minimally adequate defense funding; imprisonment will only rise when defense funding does. Through such orders, courts limit policymakers' abilities to increase prison populations and, to some degree, funding and capacity of other parts of criminal justice infrastructure such as prosecution offices and courts, without proportionate increases in indigent defense funding.

This straightforward account nonetheless will strike knowledgeable observers as implausible because it takes no account of spending discretion by policymakers for indigent defense or for prisons. States in practice have much flexibility in the degree to which they fund defense counsel, and, to varying lesser degrees, prisons, courts, and prosecutors. Systemic funding for indigent defense, the level of attorneys' pay for indigent representation, and the quality of representation that defendants receive are constitutionally regulated only at the far extremes.²⁰ Within that broad range of discretion, states fund indigent defense in accord with their policy preferences and competing budget priorities.²¹ Data bear out this variation.

States vary widely with regard to funding levels, funding structures, and stability for indigent defense. Hourly rates for appointed counsel vary widely. For example, the rate is \$40 per hour in Oregon, Kentucky, and Wisconsin; \$50 an hour in Vermont and Tennessee; \$60 an hour in South Carolina, Ohio, Oklahoma, New Hampshire, and New Jersey; \$90 an hour in Hawaii, Virginia, and California (for some felonies in certain localities); and \$100 an hour in Nevada and Massachusetts (for homicide cases).²²

19. See, e.g., *State v. Peart*, 621 So. 2d 780, 791-92 (La. 1993); *State v. Citizen*, 898 So. 2d 325, 327, 338-39 (La. 2005).

20. *Strickland v. Washington*, 466 U.S. 668, 687 (1984), defines the standard for adequacy of defense counsel and often for actions challenging funding and pay levels as well. Lower courts' application of *Strickland* is notorious for finding that counsel met the standard of effective assistance despite minimal effort, failures to present claims or evidence, and inattention during trial. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

21. Legislatures' internal procedural rules and institutional designs affect how well policy decisions express majority views. See generally Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 720-21 (2005) (describing special legislative procedures that make certain policy outcomes more likely); CASS SUNSTEIN, *REPUBLIC.COM* 38-39 (2001) (discussing institutional design as a means of cooling popular deliberation).

22. THE SPANGENBERG GROUP, *RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW* app.1-9 (2007) [hereinafter *RATES OF COMPENSATION*].

Caps on total fees vary greatly as well. For appointed counsel, Virginia limits fees to \$600 per case for less serious felonies and \$1,235 per case for more serious felonies (although courts can grant increases up to \$2,085).²³ West Virginia has no maximum fee on life-incarceration felonies and a \$3,000 limit on all others.²⁴ Vermont's limits are \$25,000 for life felonies, \$5,000 for other major felonies, and \$2,000 for lesser ones.²⁵ Nevada's fees are \$20,000 for life-without-parole felonies and \$2,500 for all others.²⁶ Mississippi's fees are capped at \$1,000, plus overhead reimbursement at \$25 an hour.²⁷ Several states have no per-case fee cap.²⁸

Sources of funding and the structure of service provision vary as well. Forty-two states now have some form of state-level commission to oversee indigent defense statewide, but only eleven also fund indigent defense entirely from state coffers.²⁹ Twenty-eight states overall, however, provide for their entire public defense systems at the state level.³⁰ Of the remaining twenty-two, nineteen require local governments to fund most (or, in two states, all) of the costs of indigent defense.³¹

Funding defense services entirely from the state level is associated with better overall quality of defense services and more uniform quality across localities. However, much depends on the level of funding and the ability of agencies to monitor key aspects of defense provision, such as attorney case-loads.³² Virginia is an example of a jurisdiction that pays indigent defense costs from state rather than local revenues, yet its per-case fees for appointed counsel, as well as its overall levels of funding, are exceptionally low.³³ Massachusetts had a similar structure and record for its appointed counsel system until litigation eventually prompted the legislature to increase overall funding, hourly rates, and per-case limits in 2005.³⁴

23. *Id.* at app.9.

24. *Id.*

25. *Id.* at app.8.

26. *Id.* at app.6.

27. *Id.* at app.5.

28. *Id.* at app.1-9. States with no maximum per-case fee include Arkansas, Georgia, Connecticut, Massachusetts, Missouri, Minnesota, Montana, New Jersey, North Carolina, Oregon, and Wyoming. *Id.*

29. THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS i (2006).

30. *Id.* at i, 3.

31. *Id.* at 4-5.

32. *Id.* at 5-6.

33. A Spangenberg Group study notes that the 2006 fee cap for misdemeanor cases was \$125. There have been some recent very modest improvements, however. *Id.* at 12-13 (noting that the Virginia legislature agreed to "slightly raise the extremely low assigned counsel fee caps" and to create 32 new public defender positions in the next fiscal year – along with 134 new prosecutor positions).

34. *Id.* at 14.

The same variation is evident in funding for corrections. States vary widely in their prison expenditures.³⁵ Budget comparisons are imprecise because states vary in how they aggregate or segregate funding for prisons, parole, probation, and juvenile detention, but approximations are available. On average, states spent \$78.95 per prisoner, per day in 2007, but states varied greatly in their funding levels from a low of \$35.69 to a high of \$130.16.³⁶ That variation occurs for many reasons, some unrelated to criminal justice policy choices, such as prevailing wage rates; staff costs make up more than half of typical prison budgets.³⁷

Some variation, however, does reflect policy choices. Lower-spending jurisdictions tend to have higher inmate-to-staff ratios, while the inverse is true in higher-spending jurisdictions. Similarly, medical and food costs for inmates vary by more than a factor of four among states, reflecting local price variations, policy choices about how to provide such services (for example, some prisons reduce food costs through use of inmate farms and food processing), and the quality of those services.³⁸ Costs also tend to be lower in states that gain economies of scale from running large prisons rather than small ones.³⁹

This level of policy and funding variety suggests the need for an explanation other than a direct correlation between number of felony cases, incarceration rates, and defense funding. The social science literature contains efforts to identify influences on various aspects of criminal justice policy, particularly on sentencing, and, to a much lesser degree, defense funding.⁴⁰ One strain of the research explores how closely criminal justice policies, especially sentencing, correlate with a jurisdiction's welfare policies: there is some evidence that more generous social welfare policies correlate with moderate sentencing policy.⁴¹ Other work examines the effects of party control of state houses and the levels of democratic and civic participation as it affects

35. See ONE IN 31, *supra* note 10, at 13 (noting states' average daily cost for prisons per offender was \$78.95 in 2008, but expenditures varied among states from \$35.69 to \$130.16).

36. *Id.* See also STATE PRISON EXPENDITURES, *supra* note 11, at 1 (finding \$62 average state funding level in 2001).

37. STATE PRISON EXPENDITURES, *supra* note 11, at 5.

38. *Id.* at 6-7.

39. *Id.* at 5.

40. See, e.g., Andrew Lucas Blaize Davies & Allissa Pollitz Worden, *State Politics and the Right to Counsel: A Comparative Analysis*, 43 L. & SOC'Y REV. 187, 192-93, 195-96 (2009).

41. See, e.g., Thomas D. Stucky et al., *A Bigger Piece of the Pie? State Corrections Spending and the Politics of Social Order*, 44 J. RES. IN CRIME & DELINQ. 91, 112 (2007); Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC'Y 43, 44 (2001).

state governmental policy.⁴² Some researchers also posit a “racial threat hypothesis,” according to which jurisdictions adopt harsher criminal justice policies when racial majorities feel threatened by a sufficiently large minority population.⁴³

I largely set those accounts aside here, in part to leave for others the formidable task of parsing their influence through quantitative analyses (at which even the best scholarship has been so far only partially successful) but also in order to suggest an ideological explanation for the unstable relationship between defense funding and imprisonment that is compatible with many of those theories. For instance, analyses of the effects of political parties employ parties as a proxy for ideological preferences, and the civic participation thesis suggests that greater or lesser democratic participation helps shape preferences. Similarly, the racial threat hypothesis implies a largely unconscious (or perhaps unarticulated) sentiment that shapes policy choice. I will focus instead on two other rubrics for explaining policy outcomes on these critical criminal justice components. Primarily, I will explore some possibilities for common ideological preferences regarding defense funding, as well as incarceration rates. Secondly, and more briefly, I will note the role that the structure of policymaking and processes may have on the substantive content of these funding decisions. The conclusion speculates on what this account means for the prospects of improving and stabilizing indigent defense funding in the United States. I join the common view that those prospects are not good.

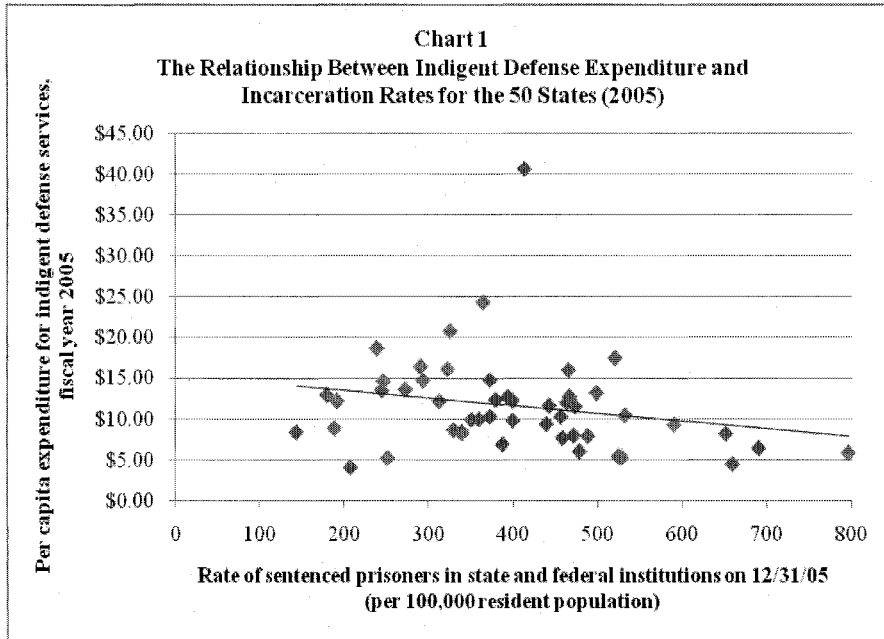
III. WHY DEFENSE FUNDING IS UNCONNECTED TO INCARCERATION RATES

A simple pairing of data on indigent defense spending and incarceration rates by state, as depicted in the scatter plot graph below, confirms that the straightforward hypothesis of a direct relationship between those two factors was too good to be true. Incarceration rates are described in the standard measure of inmates per 100,000 people. State defense funding is described on a per capita (that is, per state resident) basis, a less satisfactory measure that I assess against alternative measures below. As the following scatter plot depicts, the data reveal no meaningful general correlation.⁴⁴

42. See Vanessa Barker, *The Politics of Punishing: Building a State Governance Theory of American Imprisonment Variation*, 8 PUNISHMENT & SOC'Y 5, 6 (2006).

43. See Davies & Worden, *supra* note 40, at 194-95 and sources cited therein.

44. Indigent defense funding data in chart 1 is from STATE AND COUNTY EXPENDITURES, *supra* note 9, cross-referenced with U.S. Census state population data for July 1, 2005, Population Estimates, http://www.census.gov/popest/archives/2000s/vintage_2005 (last visited Oct. 21, 2010). State incarceration rate data is from SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 6.



If we divide states into two groups for each policy – those above the median incarceration rate or defense funding level and those below it – we have four possibilities for correlations, or four quadrants in the graph. This table describes the same data, divided into four groups based in the data correlations:

	Above-Median Defense Spending	Below-Median Defense Spending
Above-Median Prison Rate	10 states High incarceration rate <i>and</i> High defense funding	14 states High incarceration rate <i>and</i> Low defense funding
Below-Median Prison Rate	15 states Lower incarceration rate <i>and</i> Higher defense funding	11 states Lower incarceration rate <i>and</i> Lower defense funding

Between ten and fifteen states fall into each of the four possible pairings, which suggests no relationship between these two data. Ten states have imprisonment rates and defense funding above the median; eleven states are below the median in both categories; fourteen states have high incarceration rates but below-median defense funding; and fifteen have the inverse – below-median incarceration and above-median defense funding. The relation between incarceration rates and defense funding appears roughly equally distributed across the possibilities.

Of the twenty-five states in the top half of per capita expenditures on defense funding, the following ten are also in the top half of incarceration rates: Alaska, Arizona, California, Florida, Delaware, Georgia, Maryland, Nevada, South Dakota, and Virginia.⁴⁵ These states represent the high end of the preferable correlation: they have harsh incarceration policies but also ensure that the adjudication process leading to imprisonment is relatively fair by providing above-average funding of defense. Yet the states involved also reveal the limits of the data underlying this correlation. Although Virginia's total indigent defense budget is above the median, its per-case fee limitations and per-hour rates for appointed counsel are among the lowest in the nation,⁴⁶ and a study of Virginia's system a few years ago found those low fees resulted in seriously inadequate defense services.⁴⁷ At least in some cases, per capita measures of indigent defense spending apparently tell us little about the sufficiency of fees paid to appointed counsel.

On the other hand, the remaining fifteen states in the top half of defense funding have below-average incarceration rates, which raises the odds that defense funding levels are at least adequate, if not unusually generous. For individual states, some of the policy juxtapositions are especially noteworthy. A notable state in this category includes Massachusetts, which has the third highest defense funding but ranks forty-third among the fifty states with regard to incarceration rates.⁴⁸ Five other states in the bottom ten of prison rates turn up in the top half of per capita defense spending: Vermont, Washington, Nebraska, Minnesota, and New Hampshire.⁴⁹

Again, the insight to be drawn from this correlation is limited. Massachusetts' figures, like Virginia's, might be misleading, and thereby highlight the weakness of this measure of defense funding. Through 2004, Massachusetts set fees for appointed counsel so low that the state faced a critical shortage of attorneys willing to take on indigent cases, and the state's system of

45. Alaska is an outlier in terms of defense spending: its per capita rate is \$40.66 – the next highest state rate is Oregon's, at \$24.33. New York is third at \$20.81, and all other states are below \$19.00 per capita. Alaska ranks relatively high on a cost-of-living index, and it ranked fourth in median household income and fifteenth in per capita personal income in 2007. *See supra* note 44 (noting these figures come from STATE AND COUNTY EXPENDITURES, *supra* note 9, cross-referenced with U.S. Census state population data for July 1, 2005). That might explain part of its high defense expenditure, but it would not seem to explain all of it.

46. *See supra* notes 22-23 and accompanying text; *see also* RATES OF COMPENSATION, *supra* note 22, at app.9.

47. *See* THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA iii (2004) (documenting deficiencies in Virginia's indigent defense system, including statutory fee caps for appointed counsel that were the lowest in the country in 2004).

48. STATE AND COUNTY EXPENDITURES, *supra* note 9, at 35; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 6.

49. STATE AND COUNTY EXPENDITURES, *supra* note 9, at 35; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 6.

indigent defense was found in part to be unconstitutional.⁵⁰ That ruling prompted the legislature to increase fees and funding in 2004 and 2005.⁵¹ But Massachusetts' total funding levels were nonetheless high, in part because Massachusetts provides counsel in a set of minor misdemeanors for which an incarceration punishment is authorized, even though judges rarely impose jail time for those offenses.⁵² Other states do not provide counsel (or even authorize incarceration) for those petty offenses.⁵³ A 2005 study estimated that those petty offenses alone cost about \$2.1 million a year in appointed counsel fees.⁵⁴

In the bottom half of defense funding, the following fourteen states have above-the-median incarceration rates: Colorado, Ohio, Tennessee, Alabama, Oklahoma, Idaho, Michigan, Kentucky, Texas, Arkansas, Louisiana, South Carolina, Missouri, and Mississippi. The remaining eleven states have both relatively low incarceration rates and defense funding. The correlations for these states, like the ten states who measure in the high range of both parameters, suggest the possibility of an appealing relationship between these two policies: perhaps defense funding is lower in these states because they are prosecuting fewer felons and putting fewer in prison, rather than because they

50. *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004).

51. *Id.* at 912 (holding inadequate funding in Springfield deprived defendants of right to counsel). For background on similar litigation, see THE SPANGENBERG GROUP, INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM 3, 6-7 (2005) [hereinafter HISTORY OF REFORM], available at <http://www.sado.org/fees/MAindigdefreform2005.pdf> (describing *Arianna S. et al. v. Massachusetts*, SJ-2004-0282 (filed June 28, 2004), as an action alleging same violation statewide; action stayed and eventually dismissed in light of legislature's increased appropriations and fee scale for appointed counsel).

52. Such misdemeanors include operation of a vehicle with a suspended license, disorderly person or disturbing the peace, trespassing, and larceny by check. See REPORT OF THE COMMISSION TO STUDY THE PROVISION OF COUNSEL TO INDIGENT PERSONS IN MASSACHUSETTS 16-17 (2005), available at <http://www.publiccounsel.net/Administration/pdf/Rogers%20Commission%20Report.pdf>.

53. Massachusetts goes beyond its federal constitutional obligation in providing counsel in such cases. See MASS. GEN. LAWS. ANN. ch. 211D, § 2A (West 2010). The Sixth and Fourteenth Amendments do not require appointment of counsel if a defendant will not be sentenced to jail time or a suspended jail sentence. See *Scott v. Illinois*, 440 U.S. 367, 380 (1979); *Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (counsel required for imposition of a suspended jail sentence).

54. HISTORY OF REFORM, *supra* note 51, at 4; H.B. 4287, 2005 General Court, 1st Ann. Sess. (Mass. 2005) (raising hourly rates for appointed counsel); WILLIAM J. LEAHY, 2010 REPORT TO THE LEGISLATURE ON COMMITTEE FOR PUBLIC COUNSEL SERVICES 7-8 (2010), available at <http://www.publiccounsel.net/News/PDF/2010%20Report%20to%20Legislature.pdf> (describing some progress on and savings from reclassifying misdemeanors); *Lavallee*, 812 N.E.2d at 904-05, 910 (holding "that the petitioners' constitutional right to the assistance of counsel is not being honored" and under-funding counsel created "an unconstitutional state of affairs").

are under-funding defense lawyers. North Dakota and Utah, for instance, ranked fiftieth and forty-eighth, respectively, in funding levels for indigent defense in 2005, and also ranked forty-sixth and forty-second, respectively, in incarceration rates.⁵⁵ Rhode Island and Maine, ranked thirty-third and thirty-sixth in defense funding, respectively, and forty-eighth and fiftieth in imprisonment.⁵⁶

Finally, among the final set, the fourteen high-incarceration/low-defense funding states, a few stand out. Mississippi has the second *lowest* per capita defense funding in the nation but the third *highest* incarceration rate. Even in light of Mississippi's ranking of fiftieth in both median household income and per capita personal income, which may indicate a lower cost of living and thus a lower cost of professional services such as indigent defense, the contrast is extreme. Similarly, Louisiana and Texas, which ranked first and second for incarceration rates, are near the bottom, at forty-third and forty-fifth, respectively, in per capita defense funding (even though Texas made notable improvements in its indigent system and funding levels starting in 2003).⁵⁷ Another pair of fairly extreme correlations is found in Oklahoma and Alabama, which ranked fourth and fifth by prison rates and were thirty-eighth and thirty-second in defense funding.⁵⁸ The following table summarizes the same data as the previous table, again divided into four groups, this time with state names added.

	Above-Median Defense Spending	Below-Median Defense Spending
Above-Median Prison Rate	10 states Alaska, Arizona, California, Delaware, Florida, Georgia, Maryland, South Dakota, Nevada, and Virginia.	14 states Alabama, Arkansas, Colorado, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Ohio, Oklahoma, Tennessee, Texas, and South Carolina.
Below-Median Prison Rate	15 states Iowa, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.	11 states Connecticut, Hawaii, Illinois, Indiana, Kansas, Maine, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Utah.

55. STATE AND COUNTY EXPENDITURES, *supra* note 9, at 36; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 6.

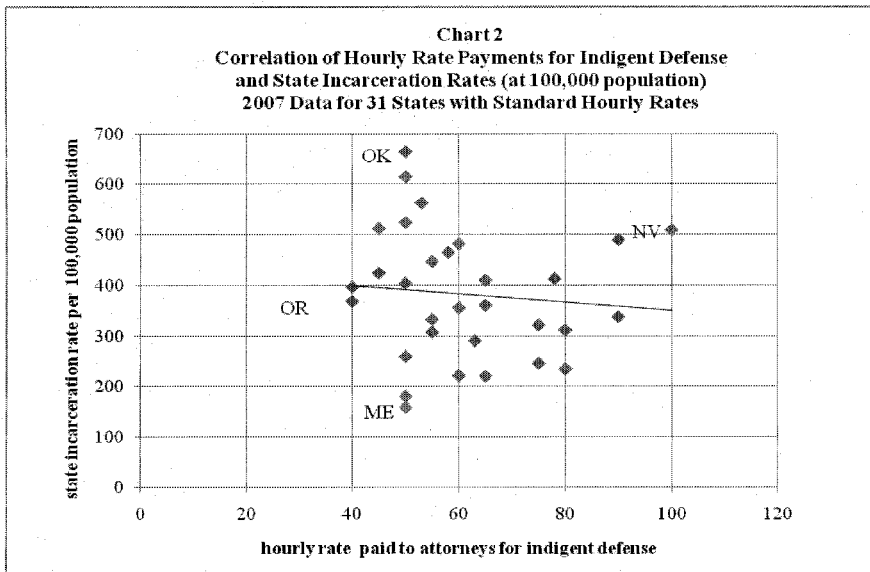
56. STATE AND COUNTY EXPENDITURES, *supra* note 9, at 35-36; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 6.

57. AM. BAR ASS'N, THE STATE OF CRIMINAL DEFENSE 149-58 (2009) (summarizing Texas indigent defense reform legislation).

58. STATE AND COUNTY EXPENDITURES, *supra* note 9, at 35-36; SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 6.

In sum, the correlation of these two data sets gives little confidence in an inference that the two factors are even meaningfully related, or, specifically, that one can infer much causal effect on indigent defense spending from rising incarceration rates.⁵⁹

Finally, I noted above that per capita measures of state defense funding are likely a poor measure of the sufficiency of fees paid to appointed counsel.⁶⁰ Yet the same impression arises if we juxtapose incarceration rates with a different measure of indigent defense funding – the hourly rates that states pay to defense attorneys rather than a state’s per capita defense expenditures. Only thirty-one states specify non-variable hourly rates by statute, but the following chart correlates the rates in those thirty-one states with each state’s incarceration rate.⁶¹ Again, we see no trend or correlation.



59. Note that funding data do not account for cost of living differences among jurisdictions. As for incarceration rates, I completely hold aside assessment of those rates in light of jurisdictional crime rates or other variables such as racial demographics.

60. See *supra* text accompanying notes 45-47.

61. Hourly rate figures are from RATES OF COMPENSATION, *supra* note 22, at app.1-9. Incarceration figures are from SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 6, at tbl.6.29.2007. In the graph, the two outlier states on each parameter are identified by the state’s abbreviation: Maine, Oklahoma, Oregon, and Nevada.

IV. IDEOLOGICAL EXPLANATIONS FOR DEFENSE FUNDING AND INCARCERATION

What might we infer from this lack of correlation between incarceration rates and defense funding? Again, the comparison suggests little causal link between the proportionate size of prison populations and proportionate spending for indigent defense. That alone is interesting, since some link is plausible and perhaps intuitive; more inmates should mean more defendants needing appointed counsel. Defense counsel *ought* to be, at least roughly, a dependent variable of incarceration rates assuming, as seems likely, that the percentage of defendants qualifying for appointed counsel does not change much as incarceration rates rise or fall. Yet the two policies seem to be independent. The measure here, of course, is only comparative across states. It could be that some states link these policies in ways obscured by the comparison. Further, the account here does not include data over time, which might show that any single state maintains a steady correlation between prison populations and defense spending, even if most do not. On the other hand, it is also possible, from the limited data here, that most states *do* maintain a direct correlation between these two policy measures but that they do so at very different levels of funding per felon. That seems unlikely, however, given that incarceration budgets clearly have grown steadily in the last two decades, as noted earlier,⁶² while the data on indigent defense funding, although weaker overall, suggests such funding has been much more volatile over that time.⁶³

None of the data here reveals anything directly about the sufficiency of indigent defense funding. Appropriations might be too low for lawyers to be consistently effective even in states with above-average funding and below-average incarceration rates. Nonetheless, one can make plausible inferences about insufficiency at least in states at the low end of funding and high range of imprisonment, such as Mississippi or Texas.

These two sets of data confirm that states have substantial discretion to design and fund various components of their criminal justice systems, and they can make funding decisions about the various component parts of those systems separately. Defense funding can be cut even though criminal case-loads and prison populations grow and despite the constitutional mandates of

62. See ONE IN 31, *supra* note 10, at 11 & 41 tbl.A-2.

63. That volatility is evident, for instance, in legislative responses to litigation that has successfully challenged inadequate funding. See, e.g., cases cited *supra* note 18; see also Marc L. Miller, *Wise Masters*, 51 STAN L. REV. 1751, 1795 (1999) (reviewing MALCOM M. FEELY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998)) (describing legislative funding responses after *Peart* decision in Louisiana); MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION* 79 (3d ed. 2007) (describing additional history of the same).

*Gideon*⁶⁴ and *Strickland*⁶⁵ that imply defense funding should grow in tandem with felony prosecutions. The scope of discretion implies room for the range of familiar variables that affect government decision-making, such as ideological views on various policies, the power of entrenched bureaucracies or interest groups to affect legislative outcomes, and rules that limit or shape legislatures' options, such as statutes that require salary parity between defense attorneys and prosecutors.

No single ideological or policy view that encompasses both incarceration and indigent defense policies can explain the collective picture of state policies presented by the data here, but that does not mean there is no ideological linkage between them. It may mean there are alternate and competing ideologies, with some prevailing in certain jurisdictions and others predominating elsewhere. Dan Kahan and Donald Braman have described a process of "cultural cognition," whereby individuals' policy preferences and understanding of facts that relate to them are affected by their basic cultural worldviews, such as whether they are disposed toward hierarchical or egalitarian society, and toward individualist or communitarian social order.⁶⁶ In a series of papers, they found that people's views on criminal justice and other policy issues strongly correlate with their worldviews as described by these parameters.⁶⁷

I make no claim about how Kahan and Braman's cultural categories map onto views about incarceration or indigent defense policy. But the general findings of their survey work suggest an ideological variation among Americans that varies across demographic and geographic groups. Given that, a few plausible ideological models might explain relationships between defense funding and incarceration policies if one of those models accurately

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

65. *Strickland v. Washington*, 466 U.S. 668 (1984). *Gideon* and *Strickland* say nothing explicitly about the funding of effective defense counsel that they together require for defendants charged with felonies, but there is no dispute that low funding levels for defense attorneys undermines the capacity of and incentives for appointed attorneys to provide adequate representation. Courts have recognized that in decisions such as *State v. Peart*, 621 So.2d 780, 792 (La. 1993), *State v. Citizen*, 898 So.2d 325, 335 (La. 2005), *State v. Young*, 172 P.3d 138, 144 (N.M. 2007) (defense counsel prevails, capital prosecution stayed due to defense resource constraints), and *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 900 (Mass. 2004).

66. See Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006).

67. See, e.g., Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010); Dan M. Kahan et al., *Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Investigation of the Mechanisms of Cultural Cognition*, L. & HUMAN BEHAV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1160654.

characterizes the dominant political sentiment of voters and legislators in a particular jurisdiction.

First, a preference for high incarceration policies can simply reflect a strong “tough on crime” approach to criminal justice that includes a view that defense counsel hinder law enforcement by impeding justified convictions and driving down sentences through aggressive lawyering and bargaining. A general trust in law enforcement to arrest and charge the right suspects is compatible with this orientation. On that view, defense attorneys and adversarial litigation are not important to accuracy in criminal law administration, and states could facilitate higher incarceration rates not only by charging more defendants and increasing sentences but also by cutting back on indigent defense funding to reduce impediments to conviction. This set of views would contribute to policies of lower funding for indigent defense coupled with high incarceration rates,⁶⁸ and it would help explain why those two policies do not seem directly correlated when measured against other states’ policies.⁶⁹ This view maps well onto descriptions of contemporary American conservative politics and accords with political science literature on the role of party ideology in state legislatures as an important influence on state policy outcomes.⁷⁰

A second ideological model favors moderate incarceration terms and better funding for defense counsel arising from a priority for fairness and dignitary concerns. Moderate incarceration may seem, to many, to accord with offenders’ “just deserts” better than the long sentences common for many crimes in many states.⁷¹ Adequate defense counsel can be part of the same respect for fairness of process and offenders’ dignitary interests, as well

68. Without an agreed normative baseline for adequate defense funding per case, it is impossible to tell whether some states adopt this view by setting funding too low; the data here is limited to *comparative* incarceration rates and defense budgets.

69. Again, because the main data here is a snapshot in time of one year, not data over time, this ideological view does not mean defense funding gets lower as incarceration rates become higher. It means, rather, that defense funding is set low relative to other states when incarceration rates are high relative to other states.

70. Republican political strength in state legislatures has, over time, correlated with higher incarceration rates. See Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43 (2001); David Greenberg & Valerie West, *State Prison Populations and Their Growth, 1971–1991*, 39 CRIMINOLOGY 615 (2001); 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 (2001); David Jacobs & Ronald Helms, *Toward a Political Model of Incarceration: A Time-Series Examination of Multiple Explanations for Prison Admission Rates*, 102 AM. J. SOC. 323 (1996). For a survey of this literature, see Davies & Worden, *supra* note 40, at 192–94.

71. Moderate incarceration terms can also be desirable for other reasons, including budget constraints on prison funding and the belief that moderate terms fulfill deterrent or other instrumental goals.

as counsel's perceived positive contribution to adjudicative accuracy. This mix of preferences may seem less intuitively linked but probably describes, at least roughly, some versions of contemporary liberal or progressive political views.⁷²

Of course, there are other policy positions that could create a distinctive link between prison policy and defense funding. A jurisdiction with high incarceration rates might also have high defense funding if constitutional or statutory law strictly regulated provision and quality of counsel. But the same pair of policies can arise if legislators simply favor long prison terms for familiar "tough on crime" reasons and yet also value defense counsel's role in adjudication for reasons compatible with this harsh punishment view. One might believe, for example, that defense counsel reduce wrongful convictions, check law enforcement officials in productive ways, or legitimize adjudication, all values one can hold while also preferring long sentences for offenders who are (accurately) determined to be guilty.

As a final possibility, a jurisdiction's voters and legislators might opt for relatively low incarceration rates and low defense funding out of a strong general preference for low public spending, minimal government intervention in people's lives, and a high value for personal liberty, a view that might moderate punishment sentiment even for those who merit some incarceration. This view roughly tracks a different variant of contemporary conservative politics, one with a stronger libertarian tilt.⁷³

72. This view is probably not a very accurate depiction of congressional Democrats' positions on criminal justice topics since the mid-1980s. See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (describing Congressional politics behind enactment of severe sentencing policies for drug crimes, including substantial leadership and support from Democrats and, in particular, members of the Congressional Black Caucus); KENNETH J. MEIER, *THE POLITICS OF SIN: DRUGS, ALCOHOL, AND PUBLIC POLICY* 97 (1994) (describing quantitative analysis as showing that "Congressional Democrats are associated with more personnel assigned to drug enforcement and more federal drug arrests.").

73. As is true with the other ideological possibilities sketched here, we might see this low-incarceration/low-defense funding outcome in states without it necessarily being the product of this policy preference. The outcome might be mostly attributable to a state's low crime rate, because of which there are fewer offenders to incarcerate and thus a need for fewer defense counsel. The political positions sketched here are only possible influences on policy because their influence cannot be inferred from policy outcomes alone.

V. THE LIMITS OF CONSTITUTIONAL LAW AND PROSPECTS FOR FUNDING STABILITY

The variation across states in the correlated data on incarceration rates and defense funding suggests that there is wide latitude for policy choice to determine both incarceration rates and defense resources, and that there is no necessary link between choices regarding the two policies. That flexibility is interesting for two reasons.

The first and more familiar reason is that policy flexibility confirms the weakness of constitutional constraints on defense funding. More stringent legal regulation would make the policy options and funding levels less discretionary, analogous to social entitlement programs with specific benefit commitments that bind legislatures to specific long-term funding levels. Those constraints are quite weak despite the *Gideon/Argersinger* mandate for indigent defense counsel,⁷⁴ the *Strickland* doctrine to regulate the minimum quality of that counsel,⁷⁵ and the bold application of those doctrines in a number of jurisdictions that were forced by courts to choose between increasing defense funding and incurring substantial limits on the number of prosecutions they could pursue.⁷⁶ Unless factors, such as cost-of-living differences or efficiencies of scale, explain most of the variation between the two policies,⁷⁷ the absence of a consistent relationship reinforces the conclusion that the *Gideon* and *Strickland* doctrines (despite some aggressive judicial applications of those doctrines by lower courts directed at funding shortages) do little to regulate indigent defense funding.

The second reason is more significant. The variation across states with respect to political decisions on punishment and defense funding reveals that some states are relatively able both to moderate incarceration and to increase defense funding. Since some discretionary government programs are more stable and less volatile in their funding levels across time than are others, those that achieve relative stability seem to have a combination of sustainable political support and structural protection from budget reductions.

74. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in felony prosecutions); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

75. *Strickland v. Washington*, 466 U.S. 668 (1984).

76. See cases cited *supra* note 18.

77. Another alternative explanation could be differences in provision of counsel in low-level misdemeanors; states that provide counsel more widely in such cases would have higher per capita expenditures on defense without necessarily funding defense attorneys well on a per case basis. Massachusetts may be an example. See HISTORY OF REFORM, *supra* note 51, at 4; WILLIAM J. LEAHY, 2010 REPORT TO THE LEGISLATURE ON COMMITTEE FOR PUBLIC COUNSEL SERVICES 7-8 (2010), available at <http://www.publiccounsel.net/New-s/PDF/2010%20Report%20to%20Legislature.pdf> (describing some progress on and savings from reclassifying misdemeanors).

Structural protections can take several forms. Some states have statutory pre-commitments that restrict methods of cutting indigent defense disproportionately to other components of criminal justice, such as mandatory parity between public defender and prosecutor salaries.⁷⁸ Georgia's system, reformed in 2003, provides state-employed public defenders for most counties under an independent state indigent defense council,⁷⁹ requires creation of a public defender position along with every new superior court judgeship,⁸⁰ and provides a dedicated revenue source for indigent defense.⁸¹ Texas made similarly dramatic reforms starting in 2001, creating a state council, mandating

78. See, e.g., TENN. CODE ANN. § 8-14-207 (2010) (setting public defender salary at 88% of district attorney salary); ARIZ. REV. STAT. § 41-4301(E) (2010) ("The salary of the state capital postconviction public defender shall equal the annual salary of the chief counsel of the capital litigation section in the office of the attorney general"); ARIZ. REV. STAT. § 11-582 (2010) (requiring a county public defender's salary to be at least 70% of a county attorney's salary); MASS. GEN. LAWS ANN. ch. 211D, § 13 (West 2010) ("chief counsel" of public defender office "shall be paid a salary comparable to a district attorney"); THE SPANGENBERG GROUP, DELAWARE PUBLIC DEFENDER REVIEW 2004 4 & n.5 (2004), available at <http://publicdefender.delaware.gov/Docs/Spangenberg.pdf> (noting Delaware, Connecticut, and Massachusetts as examples of states with statutes setting parity in prosecutor and defender salaries); see also N.C. GEN. STAT. ANN. § 7A-498.7 (2010) (setting automatic pay increases for public defenders based on years of service). One example is the use of bipartisan commissions or other procedures to make a given legislative outcome more likely. See, e.g., ONE IN 100, *supra* note 12, at 19 (summarizing Kansas' use of bipartisan commission for sentencing reform); *Changing Direction: A Bipartisan Team Paves a New Path for Sentencing and Corrections in Texas*, PUBLIC SAFETY PERFORMANCE PROJECT (Pew Ctr. for the States), Jan. 2008, available at <http://www.pewcenteronthestates.org/uploadedFiles/Whitmire%20Madden%20QA.pdf> [hereinafter *Changing Direction*].

79. The Georgia Indigent Defense Act of 2003, GA. CODE ANN. § 17-12-1 (2010) ("The Georgia Public Defender Standards Council shall be an independent agency within the executive branch of state government.").

80. *Id.* § 17-12-27(a).

81. *Id.* §§ 15-21-73, 15-21-74, 15-21A-6 (fees on civil actions, criminal fines, and waivable user fees for indigent defendants). Georgia also removed an arbitrary limit on indigent defense funding that capped appropriations at the level of revenue generated from court fees designated to fund indigent defense. Compare GA. CODE ANN. § 17-12-26 (2003) with GA. CODE ANN. § 17-12-26 (2010) (revised by H.B. 1245, 2008 Reg. Sess. (Ga. 2008), which was effective July 1, 2008, available at http://www.gpdsc.com/docs/legislation-HB1245_%20As_Passed.pdf). The reforms have not solved all problems, however. Some counties continue to have severe funding shortages for defense counsel. See Verified Complaint, *Cantwell v. Crawford* (Elbert County Super. Ct. Apr. 7, 2009) (alleging lack of counsel for felony detainees in Northern Judicial Circuit of northeast Georgia). For a description of the litigation, see Press Release, Southern Center for Human Rights, Lawsuit Filed on Behalf of Hundreds of Poor People Without Lawyers (Apr. 7, 2009), available at <http://www.schr.org/action/resources/northerncircuit>.

services, and providing the first ever state (rather than local) funding for indigent defense.⁸²

An increasing majority of states has created state-level councils or agencies for indigent defense, which can more effectively protect and lobby defense funding in the same manner that established agencies commonly seek to justify their budgets and authority.⁸³ More generally, variations in states' legislative procedures can make certain outcomes easier to achieve in some settings than in others.⁸⁴ Some legislative processes, for instance, make it easier for a small number of political players to control legislative outcomes. In one study, Andrew Davies and Allissa Worden concluded that a prior legislative commitment to centralize funding in a state public defender model, rather than to leave funding to localities, influences later legislative decisions on funding regardless of other factors that affect those later decisions, such as political party dominance.⁸⁵ In contrast, local judges who are accustomed to controlling dispensation of indigent defense funds, and local bar members, who are accustomed to appointed counsel fees for income, may impede efforts to move to a different funding model.⁸⁶

82. For an overview of the Texas Fair Defense Act of 2001, codified in various parts of the Texas Code of Criminal Procedure, see Texas Legislature Online, Senate Bill 7 of 2001, <http://www.legis.state.tx.us/billlookup/Text.aspx?LegSess=77R&Bill=SB7#> (last visited June 28, 2010). State indigent defense funding went from \$0 in 2001 to \$30 million in 2009, according to Texas State Senator Rodney Ellis, who was a leader of the reform. See Press Release, The Texas State Senate, Senator Ellis Participates in U.S. DOJ National Symposium on Indigent Defense (Feb. 18, 2010), available at <http://www.ellis.senate.state.tx.us/pr10/p021810a.htm>.

83. For a classic account of the thesis that bureaucrats aim to maximize budgets, see William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293 (1968). For a critical variation on the same theme, see Albert Breton & Ronald Wintrobe, *The Equilibrium Size of a Budget-maximizing Bureau: A Note on Niskanen's Theory of Bureaucracy*, 83 J. POL. ECON. 195 (1975). Georgia's council, in fact, has something close to a statutory mandate to maintain its budget. See Georgia Indigent Defense Act, GA. CODE ANN. § 17-12-1 to -13 (2009) (creating the Georgia Public Defender Standards Council, an independent agency within the executive branch charged with "assuring that adequate and effective legal representation is provided, independently of political considerations"). Few American defense systems are as embedded in government bureaucracies as many European systems for defense counsel are. See British Legal Services Commission, Criminal Defence Service, <http://www.legalservices.gov.uk/criminal.asp> (describing civil service protections for hiring and training of defense attorneys) (last visited June 28, 2010).

84. One example is the use of bipartisan commissions or other procedures to make a given legislative outcome more likely. See ONE IN 100, *supra* note 12, at 29 (summarizing Kansas' use of bipartisan commission for sentencing reform); see also *Changing Direction*, *supra* note 78.

85. See Davies & Worden, *supra* note 40, at 197-98, 207.

86. For an apparent example, see Jared Janes & Jeremy Roebuck, *A Public Option: Little Used County Office One Choice in Curbing Indigent Defense Costs*, THE

Those stabilizing forces for indigent defense funding are still relatively weak, however, compared to forces affecting other discretionary budget choices. The nature of prison funding makes it easier to maintain over time. Prisons are capital-intensive enterprises and have ongoing operational budgets. They can be shut down only at significant cost, which helps reduce volatility in prison budgets. In addition, interest groups, such as prison guard unions and rural communities dependent on prison employment, can influence legislative decisions to sustain funding.⁸⁷ Those aspects of prison funding combine with the dominant ideological view of the last three decades, during which there has been little influential disagreement about the utility of incarceration, with the notable exception of the rise of drug courts.⁸⁸ The particularity of these political process factors – the lack of uniformity in legislative practice, interest group alignment, and statutory funding commitments across states – are likely a large part of the explanation for the divergent and disconnected paths of prison funding and indigent defense funding in state policy making.

VI. CONCLUSION

Indigent defense policy is mostly determined by a range of context-specific factors that defy a unified description or that do not play out consistently across jurisdictions. Minimal constitutional regulation gives states much room to maneuver by setting low hourly rates for attorneys (and even requiring representation from attorneys without payment), adjusting amounts

MONITOR, Dec. 22, 2009, available at <http://www.themonitor.com/articles/county-33764-public-costs.html> (Hildago County, Texas newspaper describing resistance by local judges and private lawyers to public defenders displacing appointed counsel in indigent defense cases). This example notwithstanding, state bar organizations sometimes exert influence to sustain legislative appropriations for indigent defense.

87. Prison funding is largely a function of decisions to increase incarceration, although, as noted earlier, states push down per-inmate funding levels through choices about prison staffing, conditions, and service levels. See *supra* notes 11, 35-37 and accompanying text. States do, when forced by budget pressures, furlough prison employees, cut sentences, and even close prisons. See CHRISTINE S. SCOTT-HAYWARD, THE VERA INSTITUTE OF JUSTICE, THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 4-7 (2009), available at http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf (reporting 26 states reduced corrections budgets for fiscal year 2010 due to lower state revenues, implemented through prison staff and inmate population reductions, among other reforms).

88. For a sweeping account of the rise of harsh incarceration policies since the 1970s, see generally DAVID GARLAND, THE CULTURE OF CONTROL (2001). Yet it was not always so. The American history of prisons is a story of much experimentation and periodic revision of prison purposes and operations. See generally REBECCA M. MCLENNAN, CRISIS OF IMPRISONMENT (2008) (recounting history of rehabilitation and punishment goals of prisons, reform movements, and distinctions in prison operations and internal rules).

of hours reimbursed, imposing per case fee caps, limiting funds for expert assistance,⁸⁹ manipulating definitions for indigence to cut the number of suspects who qualify for appointed counsel,⁹⁰ or allowing inflation to reduce the value of fixed rate and fee schedules. Improvements tend to be prompted by a range of localized events such as litigation challenges to defense funding, public scandals (especially those revealing wrongful convictions), and influential reports issued by state supreme courts or leading bar associations. Each of these events can prompt funding increases and reforms. Familiar shifts in legislative process, such as change of party control or key committee leadership, can also affect the fortunes of discretionary funding programs, including indigent defense. Those shifts are, in fact, an important way by which different ideological preferences come to prevail.⁹¹

In this sense, indigent defense funding is epiphenomenal. It is a dependent variable, not of incarceration levels or felony caseloads, as a rigorous constitutional doctrine would imply, but of a much broader set of causal agents that vary across jurisdictions, making defense provision resistant to stable political consensus and operational implementation. Other examples of federal, state, and local governments' discretionary spending suggest that this volatility is not inevitable. Military justice provides defense counsel from the same Judge Advocates General Corps that employs military prosecutors and civil lawyers.⁹² Programs such as Medicaid stabilize annual funding levels through statutory obligations.⁹³ But those programs are creatures of statutes,

89. See *Ake v. Oklahoma*, 470 U.S. 68, 86-88 (1985) (defining constitutional right to expert assistance of a psychiatrist in a capital murder case defended on grounds on insanity); Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1367-70 (2004) (summarizing and citing lower court cases recognizing right to other kinds of experts in non-capital cases). For federal cases, see also 1964 Criminal Justice Act, 18 U.S.C. § 3006A (2006) (statutory authorization to request expert assistance).

90. See Georgia policy (reducing maximum income to qualify for indigent defense services from 125% to 100% of federal poverty definition), AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *THE STATE OF CRIMINAL JUSTICE 2009* 150 (2009).

91. Texas has been a surprising example in recent years. Without a change of party control in the governor's office or the legislature, Texas substantially expanded and improved its indigent defense system beginning in 2004, adding county public defender offices, increasing statewide supervision of services, and increasing overall funding. See *id.*

92. For a brief description of the Army Judge Advocate General Corps, from which the Army draws its lawyers for prosecution and defense in courts martial as well as for civil law practice, see JAG Corps Attorney, <http://www.goarmy.com/JobDetail.do?id=318> (last visited June 28, 2010). The Army JAG Corps' secure website is JAGCNet Portal, <https://www.jagcnet.army.mil/> (last visited June 28, 2010).

93. The Medicaid statutes, title XIX of the Social Security Act, are codified at 42 U.S.C. § 1396 (2006). For a simple overview, see Elicia Herz et al., *How Medicaid Works: The Program Basics*, CONGRESSIONAL RESEARCH SERV., Mar. 16, 2005,

where legislatures have chosen to commit themselves to specific program structures and the costs they entail. Courts inevitably set a more minimal standard, through constitutional interpretation, in order to leave democratic bodies discretion on core political decisions of taxing and spending.

Some reforms that states have adopted in recent years, modest though they are, suggest that states could achieve more stability in indigent defense through statutory commitments, such as wider use of public defender offices over appointed counsel systems, minimum pay and staffing-level mandates tied to comparable figures for courts and prosecutors, state-level rather than local funding, and strong statewide defense agencies. So far those developments have not proved to be a panacea, and many have not stood the test of time for more than a few years. But the gradual development of such best-practice features seems to hold the most promise for moving indigent defense systems out of their perpetual states of policy volatility and disjunction with other components of criminal justice systems.

available at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL3227703162005.pdf>.