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PROTECTING DUE PROCESS IN A PUNITIVE ERA: AN ANALYSIS OF CHANGES IN PROVIDING COUNSEL TO THE POOR

Alissa Pollitz Worden and Andrew Lucas Blaize Davies

ABSTRACT

Most criminal justice scholars agree that the past three decades have witnessed a punitive shift in criminal justice policy, public opinion, and political rhetoric. Have these political trends also left their mark on policy approaches to due process rights? The provision of counsel to indigent defendants is a signature issue in debates over due process rights. The Supreme Court expanded dramatically the circumstances under which states were required to provide counsel in the 1960s and 1970s, though decisions about the implementation of this mandate were left to individual states. We examine the evolution of indigent defense policy, at the state and local level, over the past three decades, and ask two questions: First, did policies evolve in the directions expected by reform advocates? Second, to the extent that policies developed differently across states, how can we account for those differences? We find that reformers’ optimistic projections about structure and funding have not been realized, and that adoption of progressive policies has been uneven across states. Most importantly, we find evidence that the politics of ideology and racial
conflict have played a significant role in states’ indigent defense policy over the past three decades.

INTRODUCTION

The past two decades have seen considerable attention paid to what David Garland has called “the punitive turn” (Garland, 2001): a pattern of criminal justice policy development beginning in the 1970s characterized by dramatic shifts toward aggressive enforcement and punitive sentencing by criminal justice systems. While the “punitive turn” description is intended to be a general account of criminal justice policies, the evidence adduced has generally come from observations of punishment policies and their consequences. But criminal justice policy encompasses more than punishment. In this paper we examine changes in policy approaches to due process rights during the period of the punitive turn, using state-level policies on indigent defense as a case study. We seek both to shed light upon the development of this understudied policy area, and to expand understanding of the punitive turn itself by evaluating its generalizability across policy areas within criminal justice.

During the 1960s and 1970s, the Supreme Court held that the Sixth Amendment of the United States Constitution implied all indigent criminal defendants facing the possibility of incarceration were entitled to state-provided counsel. Because as many as 80% of felony defendants are unable to afford counsel (Bureau of Justice Statistics, 2001), the form and substance of indigent defense policy defines the quality and character of justice itself in an adversarial system (Scheingold, 1974; Feeley, 1983). The implementation of this mandate, however, was left to the discretion of states, leaving the development of indigent defense programs and policies open to influence from state political environments.

The critical importance of counsel for criminal defendants is uncontested; indeed, Malcolm Feeley maintained, after the conclusion of the “due process revolution,” that the development of the Sixth Amendment right was transformative:

Perhaps the single greatest change in the operations of the criminal courts in the past half century has been the expansion of the right to counsel. Not only has it done the obvious – provided protections for the accused – it has led to improvements in the quality of the work of police, prosecutors, and judges (1983, p. 206).

But for poor people accused of crimes, the right to legal counsel has not always ensured the right to effective representation. Inconsistencies and
inadequacies in service provision to indigent defendants across and within states have drawn the attention of advocates, professional groups, and policymakers, who have argued that the standards of service provided to indigent defendants are unacceptably low (Benner & Lynch, 1973; Bureau of Justice Statistics, 2001; American Bar Association, 2004). Indigent defense programming across the United States has been described as chronically underfunded, staffed by lawyers who lack oversight, training, or professionalism. Meanwhile, these programs impose significant (and sometimes unpredictable) burdens upon state and local budgets, and they compete for scarce resources with other policies and programs related to crime and punishment. As a result, indigent defense policy raises questions about the cost, fairness, and accountability of criminal courts in providing representation to the poor.

This paper charts the development of indigent defense during the era of the punitive turn. We begin with a brief review of the scholarship on the punitive turn, paying particular attention to theoretical accounts of its causes and to discussions in that literature of the impact of these changes on due process policies. We then examine the legal, political, and programmatic context of indigent defense policy in the 1960s and 1970s, noting the optimistic expectations and predictions of reform advocates during that era. Drawing on data spanning three decades, we assess how much progress has been made toward realization of the reform agenda at the national level. Lastly, we draw upon existing research into the political forces within states which have driven punitive policies, and assess the influence of those forces on indigent defense policies at three points in time during that era. Hence, our research addresses two questions. First, did the emergence of consensus on better models for representing the poor presage steady improvements and equality in legal services over time, or did the broader social turn toward harsher treatment of suspects and offenders derail policy changes? Second, did variability in states’ political climates explain the indigent defense policies at the outset of the period under investigation, and does that variability account for stability or changes in policies throughout the era?

THE EVOLUTION OF CRIME POLICY: THE PUNITIVE TURN

Garland characterizes criminal justice policy prior to the 1970s as a hybrid “penal-welfare” model (Garland, 1985; Garland, 2001; see also
Duffee, 1990). Criminal justice policy and practice, Garland argues, was largely in the hands of scientists, professionals, and a “liberal elite” who were trusted with the authority to diagnose and treat the social problem of crime, and the individual problems of offenders. The state’s responsibility was not only to sanction wrongdoers, but also to create social conditions that improved public welfare. In such a context, crime did not preoccupy the public, nor did it dominate public discourse about social problems.

By the 1970s, however, crime rates had begun to rise, and over the next two decades politicians increasingly questioned the criminal justice system’s ability to counteract the trend.1 Debates about the most effective responses to crime moved from the professional to the political realm (Scheingold, 1984; Beckett, 1997; Lyons & Scheingold, 2000; Tonry, 2006), and a cascade of state and federal legislation increased the scope of criminalized behavior, the harshness of punishments, and the costs of criminal justice (Hughes, 2006). Following the passage of *Gregg v Georgia* in 1976, most states reinstated capital punishment, and the number of executions per year rose steadily from 0 to a peak of 98 in 1999 (Death Penalty Information Center, 2007). At the same time, grassroots movements emerged around specific crime policy issues such as registration for sex offenders and increased punishments for habitual offenders. Crime victims and survivors became active political agents, promoting legislative changes in criminal codes and processes (McCoy, 1993).

What accounts for this significant historical shift? Most experts reject the simplest explanation, that increases in incarceration were a direct response to rising crime rates and (indirectly) to public outcries about crime (Scheingold, 1984; Beckett, 1997; Garland, 2001; Tonry, 2006; Zimring & Johnson, 2006). They note that analysis of public polls on crime offer no convincing support for this account, and, further, the markers of the punitive turn continued to escalate long after crime rates leveled off. Garland (2001) offers instead a more complex account. The increase in punitiveness, he argues, was one manifestation of changes among larger economic and social forces that themselves contributed to increasing crime, including the failure of capitalist production to ensure prosperity, increasing levels of social disorganization within both families and neighborhoods, widening gaps between consumers’ resources and incomes and their expectations, growing disparity in levels of economic well-being across races and classes, and the emergence of an identifiable welfare class.

Beckett and Sasson (2004, Chapter 4) carry this thesis one step further, suggesting that the shift toward punitiveness also had roots in public (and particularly Southern) reactions to the 1950s civil rights movement,
and politicians’ strategic manipulations of these reactions. The successes of the civil rights movement rendered overtly racist political platforms untenable, requiring some conservative politicians to find other ways of voicing their opposition. One such approach was to characterize the movement as permissive and lawless. By doing so, it became possible to voice opposition to desegregation and to the extension of civil rights to African Americans through the ostensibly deracinated language of crime. Racial fears could be reconstructed and recoded into respectable-sounding concerns about criminality, drugs, urban riots, and welfare dependency (Mendelberg, 2001).

Crime was introduced as a national campaign issue by Barry Goldwater in 1964, but its prominence skyrocketed under presidents Nixon and, later, Reagan, both of whom combined rhetoric about crime, drugs, and traditional values into campaign platforms aimed at white working- and middle-class voters (Jacobs & Helms, 1996; Jacobs & Tope, 2007; but see Tonry, 2006). Democratic politicians quickly learned to keep pace with the crime crackdown rhetoric, as evidenced by the Clinton administration’s Crime Control Act, which expanded federal criminal law, and created financial incentives for states to criminalize and punish more offenses and offenders. These strategies proved successful, at least for the purposes of launching campaigns and winning elections. They also proved contagious; in many state legislatures and in Congress, politicians competed to claim credit for increasingly tough punishment policies.

Garland (2001) and others have cataloged the consequences of this turn. Garland noted the decline of rehabilitative policies and programming, along with reduced confidence in the professionals who had been responsible for implementing them; the emergence of emotional, public, and punitive discourses on crime; and a “new criminology” grounded in assumptions about individual choice and criminal behavior. The concrete results include higher rates of incarceration and larger numbers of people under supervision; vast increases in the criminal justice infrastructure, including prisons; and the commercialization and privatization of criminal justice functions (Garland, 2001). Beckett and Sasson (2004) emphasized, as well, the reconstructed role for the crime victim, manifested in compensation programs for victimization losses, newly legislated victim rights, and a sympathetic identity for victims in public narratives about crime.

Zimring observed that public discourse about crime policy was increasingly grounded in a zero-sum fallacy, in which “all a citizen must do to choose a punishment policy is decide whether she prefers victims or offenders” (2001, p. 147).

In short, scholars have suggested that the policy shifts of the punitive turn were experienced across many domains of criminal justice policy, and they
have often included due process rights in the catalog of consequences. For example, Garland (2001, pp. 12, 98) has argued that it resulted in the "relaxation of civil liberties offered suspects, and rights of prisoners" and attempts to "reverse the 'rights revolution'". Beckett and Sasson argue that the victims' rights movement successfully promoted the interpretation that new protections of defendant rights "had unfairly tipped the balance in favor of criminals," to the detriment of victims (Beckett & Sasson, 2004, p. 141). However, the assertion that state policies defining due process protections were affected by the upswing in punitive policy-making has yet to be empirically tested. The examination of the recent history and politics of indigent defense policy in this paper is an effort to contribute to this underexamined question.

THE EVOLUTION OF INDIGENT DEFENSE POLICIES

The political environment of the 1950s and 1960s provided little warning of the looming changes in crime and criminal justice policy. Instead, the growing interest in criminal justice reform among policymakers and professionals (as well as among academics) focused as much on rehabilitation, equitable treatment, and due process as on punishment. In 1967, the Presidential Commission painted a troubling picture of criminal courts, featuring disadvantaged and uninformed defendants, overtaxed lawyers, rushed proceedings, pervasive plea bargaining, and inequitable sentencing. By the 1960s, social scientists were discovering what courthouse regulars had long known – that many criminal justice agencies routinely operated outside the boundaries of formal law, developed their own sets of informal norms that governed decision making, and did not always behave as procedural and substantive law prescribed. By the 1970s, trial courts were no longer the sole province of legal scholars; they had become the subject of social science researchers’ inquiries into processes including plea bargaining, bail setting, and sentencing (Sudnow, 1965; Newman, 1966; Levin, 1972; Frankel, 1973; Clarke & Kurtz, 1983).

At about the same time, the civil rights movement and a series of Supreme Court rulings in defendants’ rights cases raised expectations about achieving policy reform through litigation, and reformers turned to the courts, rather than legislatures, to advance the interests and rights of disadvantaged groups (Scheingold, 1974; Handler, 1978; Cavanaugh & Sarat, 1980). Lawyers were recast as advocates not just for individuals but also for groups, causes, and principles, particularly when the issues involved poor
people, racial minorities, prisoners, or other voiceless and repressed groups (Bohne, 1978; Jacobs, 1980; see also Feeley, 1983; Sarat & Scheingold, 1998).

By the late 1960s, these concerns and expectations had converged around the relatively newly established right to counsel for indigent people accused of crimes. By the early 1970s a loose coalition of professionals, policymakers, and advocates reached agreement on the general contours of a “best practices” model for indigent defense. In this section we briefly review the circumstances that led to that consensus, and take stock of indigent defense policies across the states at that early point in time.

The Right to Counsel and the Evolution of a Reform Agenda

The institutionalization of a right to counsel in state prosecutions began in 1932, when the Supreme Court declared a right to counsel in capital cases (Powell v. Alabama, 1932). Historical records confirm that judges in some jurisdictions had made a practice of assigning lawyers pro bono to poor defendants long before this (Special Committee, 1959; Brownell, 1961; McDonald, 1983; Albert-Goldberg & Hartman, 1983), and that by the turn of the century lawyers in ethnic communities had organized programs for providing legal help to new immigrants (Special Committee, 1959). However, Powell marked the first time the Court had agreed that when a citizen was haled before a state court, legal representation was a necessity rather than a luxury. In 1963, the right was extended to defendants accused of any felony (Gideon v. Wainwright, 1963), and, in 1972, many misdemeanors (Argersinger v. Hamlin, 1972). After Argersinger, however, the attention of the Court waned. Although it had specified in some detail the circumstances under which indigent defendants were eligible for representation, the Court had not provided instructions about the implementation of this mandate.\textsuperscript{5}

An important consequence of the Court’s post-Argersinger silence was considerable variability in state and local approaches to the implementation of indigent defense provision.\textsuperscript{6} The primary responsibility for screening defendants, assigning lawyers and assuring their quality remained largely a local courthouse obligation. Policies on matters such as eligibility, the compensation of lawyers, or the provision of representation in matters not covered by the Supreme Court rulings, to mention but a few, varied across jurisdictions. Early research emphasized the negative consequences of these inconsistencies: many lawyers working in criminal courts, particularly those assigned to indigent defendants, were overworked, burned out, and poorly
compensated at best. At worst, they were incompetent and duplicitous (Blumberg, 1967; Sudnow, 1965; Casper, 1972). Subsequent research has called these stereotypes into question (Snellenberg, 1985; Emmelman, 1993; Weiss, 2004), but has continued to underscore the difficult working conditions faced by defense lawyers for the poor.

In the context of the boon offered to defendant rights by the Supreme Court rulings on the Sixth Amendment, however, reformers were optimistic and quickly began advocating for higher quality indigent defense services and programs. Even before Gideon, advocates, professional groups, and policymakers had begun to articulate standards for indigent defense services. By 1956, the National Legal Aid Association (previously concerned primarily with civil legal matters) had established a “Defender Section”; two years later it changed its name to the National Legal Aid and Defender Association (NLADA). In 1959, the NLADA published Equal Justice for the Accused in partnership with the Bar of the City of New York, setting out some of the earliest standards for the provision of representation to criminal defendants (Special Committee, 1959). The NLADA also filed amicus briefs in cases such as In re Gault (1967) and Furman v. Georgia (1972), and published the first Guidelines for Legal Defense Systems in 1976 as part of the work of the National Study Commission on Defense Services (National Legal Aid and Defender Association, 1976). In August 1964, the American Bar Association’s Standing Committee on Legal Aid Work became the Standing Committee on Legal Aid and Indigent Defendants, and in 1978 the ABA included indigent defense in its compendium of standards for criminal justice (American Bar Association, 1978).

Interest in improving legal representation for poor people also existed within government itself. As early as 1967 the President’s Commission called for better services and more funding for criminal defense programs (President’s Commission on Law Enforcement and the Administration of Justice, 1967). In 1974, meanwhile, Congress established the Legal Services Corporation to provide counsel and advocacy on civil legal issues, which soon expanded its caseload to include impact litigation on matters of prisoners’ rights (Katz, 1982).

The standards promulgated by the NLADA in 1976 and by the American Bar Association in 1978 recommended a variety of approaches to assure quality representation for clients including (but not limited to) reducing defender workload, insuring the political independence of defense providers, mandating attorney training, providing adequate support services, and introducing systems of oversight and monitoring. Subsequent recommendations have closely mirrored these original formulations (e.g., American Bar
Association, 2002, 2004), though some have focused on specific areas such as the attorney–client relationship (Steinberg & Feige, 2002; New York State Defenders Association, 2005) or other issues which have arisen since the 1970s, such as the increasing reliance on contracting for defender services (Spangenberg Group, 2000).

Since the 1960s, the messages from advocacy groups have retained striking consistencies – perhaps signaling that changes have been less swift in coming than had been hoped. First, advocates have called repeatedly for indigent defense services to be delivered primarily through institutionalized public defender offices, staffed by full-time salaried attorneys and overseen by state agencies or commissions (National Legal Aid and Defender Association, 1976; American Bar Association, 1978, 2002, 2004; Fabelo, 2001). Second, advocates have argued that responsibility for funding defender services should not be left to local governments, which are not all equally well situated to provide resources. The NLADA took this position in 1976. The American Bar Association went even further, arguing in both 1978 and 2004 that the federal government should provide assistance.8 Third, all parties have long agreed that indigent defense services are underfunded (President’s Commission, 1967; see also Moran, 1982; Harvard Law Review, 2005). In 1967 the President’s Commission on Law Enforcement and Administration of Justice recommended that attorneys be paid fees “comparable to that which an average lawyer would receive from a paying client” (President’s Commission, 1967, p. 61). Twenty-five years later, the organization expressed its concerns more urgently, arguing that indigent defense in the United States was “in a state of crisis” and that funding was “shamefully inadequate” (American Bar Association, 2004, p. v).

To summarize: by the 1970s, when the Supreme Court completed its key rulings on the right to counsel in state courts, reformers from advocacy, professional, and government sectors had agreed on the core components of a “best practices” model for indigent defense. This model included extensive use of public defender systems to deliver legal services, state-level organization and funding of indigent defense programs, and significantly higher funding levels overall. Reformers were optimistic about the direction of change. However, with no explicit directions from the Court on how to organize and implement programs, state and local governments were left to their own devices. As a result, indigent defense in the early 1970s presented a patchwork of approaches to implementation and funding, with only some jurisdictions adopting the models favored by reformers. We turn now to a description of the diversity of arrangements that were in place by the early
1970s, and an investigation of the evolution of state policies and practices over the subsequent three decades.

**Indigent Defense in the 1970s**

No reliable data appear to exist on the prevalence of public defender programs in the 1960s or 1970s. According to an early report, before *Gideon*, 16 states did not provide for attorney compensation at all (Special Committee, 1959). In states that did pay lawyers, it appears that appointment was generally by ad hoc assignment, and that courts typically relied on local, not state, tax revenues to fund defense services (Brownell, 1961). The earliest inventory of state policies known to the present authors reported that in 1972, sixteen states had “statewide” programs, though the details of the delivery systems used were not described (Benner & Lynch, 1973). We therefore cannot conclude that these states had adopted public defender models. We note that most of them were small, New England and Atlantic coast states with few jurisdictional divisions in their governments and justice systems.

Regarding funding centralization, more data are available. By 1975, according to records published in the *Sourcebook for Criminal Justice Statistics* (1977), state governments funded an average of 41% of indigent defense costs statewide, the remainder being funded by local authorities (see Table 1). States varied a great deal on this dimension, however: 14 appropriated no funds at all and a further 13 provided less than 25% of statewide costs. Seventeen states covered over 75% of costs, leaving just 6 sharing responsibility for funding between state and local governments at intermediate levels.

Funding levels themselves also varied considerably across states, and did so independently of the level of state support for the system. In 1975 the average state spent $3.13 per capita on indigent defense (adjusted to 2005 dollars) from both state and local sources. One in 3 states spent less than half that amount ($1.50 per capita or less), while 13 states spent $4.50 or more. The full range spanned $0.14–$14.56, a difference of a 100-fold.


By the early 1970s, reformers had predicted that states would move toward fully funded, centralized public defender models. Were those predictions
correct? To begin to answer this question, we must rely on data from several sources, collected at different points in time. The Spangenberg Group published comprehensive studies of state and local indigent defense programs for 1986, 2002, and 2005 (and has continued to gather data on program funding and features since then; Spangenberg, 1988; Spangenberg Group, 2002a, 2002b, 2004, 2006). We rely on these studies to chart the prevalence of public defender models by contrasting data from 1986 and 2002. We do so cautiously, however, noting that data on public defender models may not be directly comparable across these two points in time, insofar as some state and local officials have used the term “public defender” more expansively to cover delivery systems other than those which accord with the organized model recommended by reformers. We also rely on these reports to describe state and local expenditure data for 1986 and 2005 which we compare with the 1975 figures provided above (Sourcebook, 1977).

Table 1 reveals that states’ subsidy of indigent defense, as measured by the percentage of total expenditures borne by state rather than local budgets, varied at all three time points from 0 to 100%, but state subsidy of indigent defense has not been static over time. The most important observation to be had from these data is that reformers correctly predicted at least the trend in the balance of state–local funding for indigent defense, which is in the direction of states taking on more responsibility for expenses, rather than further devolution of those costs to localities. However, this shift has not

<table>
<thead>
<tr>
<th>Funding</th>
<th>1975</th>
<th>1986</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>State support: % expenditures provided by state</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>41.5</td>
<td>54.5</td>
<td>67.0</td>
</tr>
<tr>
<td>Minimum</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0</td>
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<tr>
<td>Maximum</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
<tr>
<td>Total expenditures per capita (state and local) in 2005 dollars</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mean</td>
<td>3.13</td>
<td>6.26</td>
<td>11.43</td>
</tr>
<tr>
<td>Minimum</td>
<td>0.14</td>
<td>1.23</td>
<td>4.00</td>
</tr>
<tr>
<td>Maximum</td>
<td>14.56</td>
<td>22.97</td>
<td>40.96</td>
</tr>
<tr>
<td>Primary program type</td>
<td>1986</td>
<td>2002</td>
<td></td>
</tr>
<tr>
<td>Public defender</td>
<td>29</td>
<td>30</td>
<td></td>
</tr>
<tr>
<td>Assigned counsel</td>
<td>16</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Contract</td>
<td>0</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Mixed</td>
<td>5</td>
<td>11</td>
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</tbody>
</table>

**Table 1.** Characteristics of Indigent Defense Policies in the States.
been dramatic over the past three decades. Table 2 categorizes states based on the level of change or stability in state subsidy of indigent defense between 1975 and 2005, by coding states, for each year, as low state support (25% or less), moderate state support (25–75%), or high state support (more than 75%). Twenty states have assumed full (or nearly full) responsibility for indigent defense throughout this time period. However, 13 states have always left funding entirely up to local governments. Fifteen states have shifted toward higher state subsidies – from minimal or moderate funding, toward moderate or high funding. States that have consistently relied on local revenues to pay for indigent defense include most far western states, and rustbelt states. Most southern states and New England states have either always generously subsidized indigent defense, or have come to do so over time.

Table 1 also reports expenditures per capita (from both state and local sources) in 1975, 1986, and 2005. These figures suggest that (in constant 2005 dollars) expenditures per capita for indigent defense have increased

### Table 2. The Evolution of Indigent Defense Policy.

<table>
<thead>
<tr>
<th>Change in Ranking of Total Expenditures per Capita, 1975–2005</th>
<th>Change in Percentage of Expenditures Borne by State, 1975–2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consistently top third</td>
<td>Consistent low state support (less than 25%)</td>
</tr>
<tr>
<td>Consistently middle third</td>
<td>IL, PA</td>
</tr>
<tr>
<td>Consistently lowest third</td>
<td>NV, ID, MI</td>
</tr>
</tbody>
</table>

Notes: Fonts indicate stability or change in dominant public defender model between 1986 and 2002. Plain font represents no adoption of public defender as primary program type, italics indicates movement away from public defenders; bold face italics indicate movement toward public defenders, and bold face indicates presence of public defenders as primary program type throughout these two decades.
substantially – by about 300% in the last 30 years – although the cost to taxpayers of indigent defense remains small in comparison with most other criminal justice outlays. Furthermore, almost every state increased expenditures, although not always in a steady fashion. Over this 30-year period, the average across states for per capita expenditures on indigent defense had risen from $3.13 to $11.43 in constant dollars. Variation across states was still considerable, however. The most extreme values still showed a 10-fold difference (from $4 and over $40 per capita). However, we argue caution in interpreting these changes as significant increases in program quality, since during this period the number of defendants arrested, and deemed eligible for indigent defense, increased substantially (but by unknown degrees); and incarceration rates increased by over 400% during this era (Sourcebook of Criminal Justice Statistics Online, 2006).

We categorized states by coding their comparative increases in indigent defense spending, distinguishing among states that, between 1975 and 2005, were (1) consistently in the lowest tertile, (2) fell from the middle or highest, (3) consistently in the middle tertile, (4) rose from the lowest or middle, or (5) consistently in the highest tertile. These categories are also presented in Table 2. Most states (31) remained relatively stable, 9 fell from one category to the next, and 10 earned a place in a higher category. Most southern and rustbelt states remained in the lowest category, or declined in their rankings. Most states that advanced in the ranking are in the upper midwest.

Next, we take a cautious look at states’ utilization of public defender models. The Spangenberg Group conducted national studies in 1986, and in 2002, that estimated the prevalence of service delivery models in the states. We note that many states used a mix of models, and further, that state statutes that specified the use of public defenders might have used that term in different ways. That said, the Spangenberg data suggests that 22 states relied primarily on public defender models throughout those two decades. Eight states replaced other systems with public defenders during this time, while seven replaced public defenders with other program types. Thirteen states maintained assigned counsel or contract programs throughout this period.

A look at the specific states that moved toward public defender systems suggests a geographic trend: Tennessee, Virginia, West Virginia, Kentucky, Arkansas, and Missouri are contiguous rural border states. Lacking more detailed information on the histories of these states’ policies, we cannot say whether this commonality is significant. It resembles the kind of geographically based diffusion of innovation first described by Walker (1969; see also Berry & Berry, 1999; Daley & Garand, 2005) – although this still
begs the question of how the process of policy change began. There is less commonality among those states that moved away from public defender models. In these states public defender models were replaced by a mix of program types across jurisdictions, usually involving the adoption of at least some contract programs.\textsuperscript{15}

Lastly, we observe that despite reformers’ recommendations, there is little evidence that states adopted their reforms as a package. A few states score high on all these dimensions, and have for decades; likewise, a few states are characterized by locally funded, minimally funded assigned counsel or contract programs. But almost every other combination of these three dimensions is represented in Table 2, suggesting that states’ policies remain as heterogeneous now as 30 years ago.

What might we conclude from these data? From the reformers’ point of view, there is good news and bad news. First, indigent defense expenditures now represent a greater share of state budgets. While one in four states the funding of indigent defense remains largely a local problem, 15 states have significantly increased their share of state funding, 20 states continue to take on most of the financial responsibility, and no state has significantly shifted more of the burden back to local governments. Second, but more ambiguously, expenditures for indigent defense have risen significantly, in real dollars, although not at the same rate in all states. It might be premature to conclude that this increase results primarily from more generosity on local and state legislators’ parts, however. During this time, although crime rates peaked and then dropped, incarceration rates rose dramatically, suggesting that indigent defense dollars, while being drawn at an increasingly higher per capita rate from public coffers (and increasingly more from state than local funds), were probably being distributed across a much larger group of clients. Third, it appears that states are no more likely to rely predominantly on public defender programs now than they were 20 years ago. We do not have data on the populations of the jurisdictions served by various program types within states, however, and in many of states mixtures and hybrids of systems are in place, with the result that we cannot tell whether higher or lower numbers of defendants themselves are represented by public defenders now than previously. However, it is certainly not the case that since 1982 most assigned counsel and contract states shifted to public defender programs. Finally, despite reformers’ hopes that the “best practices” model would be adopted wholesale, data on changes in state policy suggest that these three dimensions – program type, state subsidy, and expenditure levels – were, and remain, largely independent.
STATE POLITICS AND INDIGENT DEFENSE POLICIES: 1975–2005

Our theoretical point of departure for this study is Garland’s account of the punitive turn, which attributes the increase in punitive and repressive crime and justice policies to social, economic, and political forces that have galvanized conservative politics since the late 1960s and early 1970s. By this account, sharp and sustained increases in incarceration, correctional spending, and the use of capital punishment, along with the decline of the rehabilitative ethic, were accompanied by challenges to civil liberties and due process rights. But these national trends mask state-level variation. Our exploration of state policies from 1975 to 2005 suggests that, overall, indigent defense policies have not progressed as expected by early reformers—an outcome that is consistent with the prediction that punitive politics would take a toll on due process as well as sentencing policies. However, we also observe that there has been considerable variability across states in the evolution of indigent defense policy, especially expenditures and state support. Some states have advanced considerably on one or both of these dimensions, while others have not. Subsequent analyses concern only these two dimensions, due to the unavailability of sufficient reliable data on public defender program mandates.

The punitive turn thesis is useful because it directs our attention toward three explanations for policy shifts that are relevant not only to change over time, but to variation across place as well: the ideology of political leadership; public anxiety and tension over race; and states’ relative punitivity. We extrapolate from national-level accounts of policy change, note empirical evidence on the influence of these state political characteristics on punishment policy, and develop hypotheses about state variation in indigent defense policy, across states, during this era.

Garland (2001) writes that, at the national level, conservative political leadership increasingly and successfully capitalized on crime issues to retain the support of an alarmed public. During this period, the White House and Congress declared wars on both drugs and crime, increased the scope of federal penal codes, and subsidized both state law enforcement and the development of punitive sentencing codes. Most recently, the Bush administration has continued aggressive enforcement of immigration laws, and has supported legislation that redefines and restricts historical standards of citizens. There is also some evidence that more punitive crime policies are the work of more conservative legislatures at the state level (e.g., Culver, 1999). We hypothesize that the political ideology of state elites is likely to
have shaped the development of due process policies including indigent defense policy.

The most visible manifestation of the punitive turn, of course, has been the tremendous increase in incarceration, an expression of punitiveness that resulted from changes in correctional policy and criminal justice administration, as well as public tolerance of the mounting costs of these policies (McGarrell & Duffee, 2007). Not all states have equally punitive appetites, however. In 1975, states’ incarceration rates varied from 27 to 210 persons per 100,000 citizens. Although all states’ incarceration rates increased during the subsequent 30 years, the sizes of the increases varied dramatically; some states merely doubled their incarceration rates, while others multiplied by a factor of 10 or more. It is true, of course, that incarceration rates (and other measures of punitivity) are influenced by a state’s volume of crime, especially serious crime. But scholars have also attributed variation in regimes’ use of incarceration to their social and political cultures, and have begun to try to account for why states vary in their appetite for punishment at national as well as state levels (Newman, 1978; Wilkins, 1991; Barker, 2006). We hypothesize that states whose publics have tolerated (or embraced) the sorts of sentencing policies and practices that create high incarceration rates will be less likely to pursue progressive due process policies, such as indigent defense, which increase the costs of criminal adjudication and create potential value conflicts with punishment goals.

Beckett and Sasson (2004) observe that the acceleration of punishment might not have taken place in the absence of the civil rights movement, which, they argue, stirred racial intolerance and permitted the subtle recoding of racism into the “politics of law and order” in state and national politics. The entanglement of racial animosities and disparities with criminal justice policy is nothing new, of course. After Reconstruction, unauthorized executions – lynchings – were intended to remind African Americans of their vulnerability (Phillips, 1986). In the early 1900s, the jailing of black (and poor white) men served the economic needs for cheap labor in some southern states (Myers, 1993). In the 1800s the disenfranchisement of felons was explicitly justified as a means of neutralizing the “menace of Negro domination” in elections (Behrens, Uggen, & Manza, 2003). Common to these historical observations, as well as Beckett and Sasson’s thesis, is the “racial threat” hypothesis, which posits that dominant groups that feel more, or increasingly, threatened by minority groups will adjust their social control of those groups accordingly (Blumer, 1958; Blalock, 1967; Turk, 1969).

The racial threat hypothesis has many variants, and it has been employed to account for changes in policy over time (in response to changes in
perceived threat), as well as across places that vary in racial composition. Whites may perceive large minority populations as a political threat, with the potential to shape elections (Eitle, D’Alessio, & Stolzenberg, 2002; Behrens et al., 2003), or as economic competition, especially in tight times (Jacobs & Helms, 1996; Eitle et al., 2002). Whites may also respond fearfully to the specter of black-on-white crime (Liska & Chamblin, 1984; Eitle et al., 2002). In most of these formulations, the potential “threat” has been measured in terms of black population, and empirical support for this thesis has been found in several domains of criminal justice policy.\(^\text{16}\) It has been most commonly tested in studies of sentencing, incarceration, and correctional policy (Barlow, Barlow, & Johnson, 1996; McGarrell & Castellano, 1991; McGarrell & Duffee, 2007; Percival, 2007; Myers & Talarico, 1986; Ulmer & Johnson, 2004; Kramer & Ulmer, 2002; Sorenson & Stemen, 2004; see also Jacobs & Helms, 1999; Beckett & Western, 2001; Jackson, 1989; but see Britt, 2000).\(^\text{17}\) We hypothesize, therefore, that states with larger African American populations will have begun the punitive era with less progressive indigent defense policies, and will retain such policies throughout the era.

However, the racial threat hypothesis posits a structural effect of racial composition on policy outcomes, leaving implied and unmeasured the mechanism by which racial heterogeneity begets more racially charged attitudes. Further, this thesis suggests a linear relationship between black population and whites’ reaction, such that, up to some tipping point, every additional increment of minority population generates proportionately more social control. In studies at the state level, where no state has a black population as high as 40%, one might expect the dynamics of race-motivated policies to have more to do with perceptions than census figures. Hence we also test a slightly different version of the racial threat hypothesis: states where public opinion is more hostile to racial diversity are less likely to adopt progressive criminal justice policies, specifically, stronger indigent defense policies, since such policies might appear to work largely to the benefit of disadvantaged minority citizens (for similar reasoning, see Johnson, 2001; Percival, 2007).

Lastly, we recognize that states vary both in their needs for criminal court representation – the number of eligible recipients – and in their capacities to provide it. Indigent defense is a matter of due process rights, but it is also a policy that redistributes public resources to means-tested disadvantaged clients. Of course, indigent defense differs from many federal mandates regarding redistribution policies insofar as local and state authorities may decide who is (and is not) eligible for counsel, and how much (if at all) to pay lawyers to represent those clients, so we might expect demand and
resources to play limiting but not determinative roles in setting indigent defense budgets. It is impossible to accurately estimate demand for legal services, historically or in the present, since most states do not keep records of assigned counsel. However, it is reasonable to expect that the number of people entitled to free representation is a function of both reported crime and poverty; hence we control for both these variables in estimating the effects of political variables on funding policy. We hypothesize that higher demand for services produces higher levels of expenditures. We also hypothesize that higher demand produces greater pressures on state governments to provide relief to localities (Soss, Schram, Vartanian, & O’Brien, 2001; Kelleher & Yackee, 2004).

We also control for states’ capacity to provide services, by including a measure of state wealth. All else equal, states with more resources tend to spend more on redistributive programs (Tweedie, 1994; Koven & Mausoloff, 2002). There is some evidence that wealthier states are also more likely to adopt innovative policies and experiment with reform agendas (Mohr, 1969; Walker, 1969; Berry & Berry, 1999). Therefore, we hypothesize that, all else equal, states with greater economic capacity—wealthier states—spend more on indigent defense.

We predict that the division of costs between state and local governments is also shaped by demand, and that it may influence expenditures. Research on welfare policy suggests that where caseloads are high, states may feel obliged to assume more of the financial burden to relieve overtaxed local governments (Soss et al., 2001; Kelleher & Yackee, 2004). Hence we hypothesize that states facing higher demand for services will accept a higher percentage of expenditures for legal services, relying less on local resources. Finally, because localities compete for valued resources—taxpayers, businesses, employment opportunities—they have little incentive to invest more than the minimum to subsidize needy residents who draw down public support (Peterson, 1981). States have somewhat more elasticity in their budgets (Worden & Worden, 1989). We hypothesize that where state legislatures assume more responsibility for funding programs, overall expenditures will be higher.

To summarize: we hypothesize that indigent defense policy, specifically decisions about the level of state support and total levels of expenditures, are shaped at the state level by the ideology of political leadership, and by a state’s punitiveness, and by the climate of racial tolerance or threat. We further hypothesize that a state’s level of demand for defense services, and its economic capacity, will influence these policy outcomes. While some of these variables have remained relatively constant at the state level over the course of the punitive turn, others have not. We test these hypotheses...
at three points in time (for which comparable data on program funding are available): 1975, 1986, and 2005. Our approach to these analyses is exploratory, albeit guided by the theories discussed above. Adequate data do not exist to permit a rigorous time-series analysis and formal test of our hypotheses about changes over time; instead, we are seeking patterns and comparisons, which may permit us cautiously to draw inferences about the dynamics of indigent defense policy.

DATA, MEASURES, AND ANALYSIS PLAN

We tested hypotheses about political and economic influences on two of the variables presented in Table 3: the proportion of a state’s indigent defense expenditures that are covered by state funds, and how much was spent (by state and local governments) per capita on indigent defense overall. Consumer Price Index data were also obtained to render the expenditure figures in constant (2005) dollars (Bureau of Labor Statistics, 2007). We drew on data from multiple sources to operationalize the independent variables, making every attempt to ensure comparable measures for the three points in time. We measured states’ economic well-being (capacity) with two estimates of tax capacity per capita: the first, estimated by the ACIR during the 1970s and 1980s, and the second, a parallel measure estimated periodically by the US Treasury. Data on states’ poverty rates were taken from the US Census, matching available yearly rates as closely as possible to the dates for which indigent defense data were available. Crime was measured using the Uniform Crime Reports rates for serious violent and property crime. We use these measures as proxies for demand.

We measure elite ideology with a variable constructed by Berry, Ringquist, Fording, and Hanson (1998, 2001) a weighted combination of ideological scores for five key actors in each state’s government (the governor, and the two party leaders for each legislative chamber). We reverse the original coding of this index so that higher values represent more conservative ideology. We operationalized a state’s punitiveness as its propensity to incarcerate offenders, or the rate of incarceration per capita. When crime rate is controlled in multivariate analyses, incarceration per capita reflects states’ relative willingness to use prison as punishment (McGarrell & Duffee, 2007; see also Newman, 1978; Wilkins, 1991).

We included two measures in the models to test the racial threat hypothesis. The first is the proportion of a state’s population who self-identified as black or African American in census data most proximate to years for
which indigent defense data were available. The second is a measure of public values, which we label “public illiberality.” There are no readily available contemporary state-level measures of public racial animosity or distrust. However, two sets of state-level opinion measures have been developed by Norrander (2001) and Brace, Sims-Butler, Arceneaux, and Johnson (2002). These items, extracted respectively from the National Elections Studies and the General Social Survey, were aggregated to the state level over a series of years from 1974 to 1998. The authors of these studies observed that the measures were “remarkably stable” over time (see Brace et al., 2002, p. 181), inasmuch as state values at one year were extremely powerful predictors of values in subsequent years.21 These measures also predicted policy outcomes at the state level more powerfully than more general measures of ideology or partisanship.

### Table 3. Descriptive Statistics.

<table>
<thead>
<tr>
<th>Measure</th>
<th>Minimum</th>
<th>Maximum</th>
<th>Mean</th>
<th>SD</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual poverty rate, 1979</td>
<td>7.83</td>
<td>23.42</td>
<td>12.31</td>
<td>3.43</td>
<td>Census Bureau: Historical poverty tables</td>
</tr>
<tr>
<td>Individual poverty rate, 1986</td>
<td>3.70</td>
<td>26.60</td>
<td>13.89</td>
<td>4.56</td>
<td>State Politics and povertypotential</td>
</tr>
<tr>
<td>Individual poverty rate, 2002</td>
<td>5.80</td>
<td>19.80</td>
<td>11.69</td>
<td>3.13</td>
<td>Policy Quality Data Resource</td>
</tr>
<tr>
<td>Percent African American, 1975</td>
<td>0.16</td>
<td>34.70</td>
<td>8.90</td>
<td>9.09</td>
<td>Norrander (2001)</td>
</tr>
<tr>
<td>Percent African American, 2000</td>
<td>0.26</td>
<td>36.33</td>
<td>9.94</td>
<td>9.62</td>
<td>Berry and Berry (1999) and Berry et al. (2001)</td>
</tr>
<tr>
<td>Political liberalism index, 1972</td>
<td>0</td>
<td>86</td>
<td>40.25</td>
<td>21.22</td>
<td>Sourcebooks for Criminal Justice Statistics</td>
</tr>
<tr>
<td>Political liberalism index, 1984</td>
<td>13</td>
<td>90</td>
<td>53.81</td>
<td>19.40</td>
<td></td>
</tr>
<tr>
<td>Political liberalism index, 2000</td>
<td>0</td>
<td>91</td>
<td>38.80</td>
<td>26.20</td>
<td></td>
</tr>
<tr>
<td>Incarceration rate, 1972 (per 100,000)</td>
<td>29</td>
<td>174</td>
<td>76.00</td>
<td>35.70</td>
<td></td>
</tr>
<tr>
<td>Incarceration rate, 1986 (per 100,000)</td>
<td>53</td>
<td>447</td>
<td>183.29</td>
<td>82.21</td>
<td></td>
</tr>
<tr>
<td>Incarceration rate, 2004 (per 100,000)</td>
<td>141</td>
<td>794</td>
<td>391.12</td>
<td>151.08</td>
<td></td>
</tr>
<tr>
<td>Index crime rate, 1972</td>
<td>1436.50</td>
<td>6413.11</td>
<td>3582.30</td>
<td>1202.76</td>
<td>Federal Bureau of Investigation</td>
</tr>
<tr>
<td>Index crime rate, 1986</td>
<td>2316.68</td>
<td>8228.39</td>
<td>4928.55</td>
<td>1384.14</td>
<td></td>
</tr>
<tr>
<td>Index crime rate, 2005</td>
<td>1928.40</td>
<td>5351.20</td>
<td>3741.34</td>
<td>948.56</td>
<td></td>
</tr>
<tr>
<td>Taxable resources per capita, indexed, 1975</td>
<td>70.00</td>
<td>153.70</td>
<td>98.97</td>
<td>14.89</td>
<td>Advisory Commission on Intergovernmental Relations</td>
</tr>
<tr>
<td>Taxable resources per capita, indexed, 1986</td>
<td>65.00</td>
<td>151.00</td>
<td>97.63</td>
<td>18.30</td>
<td></td>
</tr>
<tr>
<td>Taxable resources per capita, indexed, 2004</td>
<td>67.693</td>
<td>159.615</td>
<td>97.823</td>
<td>17.86</td>
<td>US Treasury</td>
</tr>
</tbody>
</table>
We draw upon these scholars’ work to construct a measure of public illiberality, which we hypothesize is negatively associated with progressive indigent defense policies. We conducted a factor analysis of 10 items that were plausibly related to views on race, equality, tolerance, crime, and justice. Five of these produced a single strong dimension that includes attitudes about racial equality, attitudes about affirmative action, tolerance of diverse viewpoints, rating on a liberal-conservative scale, and religiosity. Together, these items produce an alpha of 0.77. We use as our measure of public illiberality the factor scale score comprised of these five items. Higher scores on this measure indicate more conservative, less tolerant values.

Finally, we note that although racial composition and public illiberality are correlated \( r = 0.412 \), the former is by no means determinative of the latter. Interestingly, while deep South states score predictably high on the scale, other states with large African American populations do not (such as Maryland and Michigan), and some states with negligible minority populations have very illiberal publics (e.g., Idaho). Hence we are persuaded that both measures merit inclusion, and we return to the implications of using them both in our discussion and conclusions.

Some of the independent variables vary a good deal over time, and across states (such as tax capacity and incarceration rates); and some vary little over time (such as minority population). Some of these measures also covary, and present potential problems of multicollinearity. To assess those potential problems we (1) ran series of models, beginning with a simple equation including only our control variables measuring state demand and capacity before adding political variables, (2) ran collinearity diagnostics on all models, and (3) also re-estimated models after deleting variables with negligible coefficients, to ensure that the results were stable.

The following sections report, for each of these points in time, the results of multivariate models predicting state subsidy of indigent defense expenditures, and total levels of spending (per capita) on indigent defense programs.

**FINDINGS**

*State Subsidy of Indigent Defense*

We hypothesized that elite conservatism, state punitiveness, public illiberality, and racial composition would inhibit states’ willingness to assume
centralized funding for indigent defense programming, leading them to leave those costs to local governments. We also hypothesized that state support for indigent defense would be associated with higher capacity and demand: states with more resources, as well as those with heavier caseloads, might relieve communities of this burden. Table 4 presents the results of these analyses, for 1975, 1986, and 2005. This table includes information on the statistical significance of coefficients, as an intuitive guide to assessing substantive significance. We note, however, that our data constitutes a universe, not a sample, and by necessity has a small \( n \); and therefore reliance on measures of statistical significance for evaluating hypotheses is inadequate (and likely to result in unjustified rejection of hypotheses; see Wright, 2003; Cohen, 1994).

The first column reports the results of ordinary least squares regression for the two dependent variables for 1975. The results suggest that, as of 1975, states’ wealth, poverty, and crime made little difference in their

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<tr>
<td>Constant</td>
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<tr>
<td>State tax capacity</td>
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<tr>
<td>Crime rate</td>
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<tr>
<td>Poverty rate</td>
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<tr>
<td>Elite conservatism score</td>
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<tr>
<td>Public illiberality</td>
</tr>
<tr>
<td>% African American</td>
</tr>
<tr>
<td>Incarceration rate</td>
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<tr>
<td>( R^2 )</td>
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Note: Entries are OLS regression coefficients. We include indicators of statistical significance: **0.01, *0.05, *0.10.
willingness to take the financial burden of indigent defense off localities. Likewise, the hypotheses about political variables receive little support. States with more conservative legislatures assumed less state-level responsibility for funding, but this association is very weak. The same is true for one of our hypotheses about racial threat and public illiberality: states whose publics scored higher on the illiberality scale tend to keep indigent defense funding at the local level, although again this association is very slight. Somewhat surprisingly, in 1975, states with higher proportions of African Americans contributed higher percentages to indigent defense, relying less on local governments. Incarceration rates, in turn, had no effect on the likelihood of states taking responsibility for indigent defense funding. Overall, the model explains little variance across states.

The results for the 1986 analysis paint a somewhat different picture. By 1986, crime and incarceration rates had doubled from 1975, and any criminal justice policy may have become more subject to the influences of economics and politics than previously. State economic capacity significantly influenced legislative funding: wealthier states contributed more to indigent defense while poorer states relied more heavily on local budgets. Further, states with higher crime rates left communities to pay for a higher proportion of indigent defense, in contradiction to our prediction that states with higher demand for indigent defense would pick up more of the tab for these programs. States with more conservative political elites continued to contribute less to indigent defense costs; and the positive association between the proportion of African Americans and state subsidy carries over from 1975. However, our measure of public illiberality plays no role in this policy outcome by 1986. Importantly, at this key point in the acceleration of incarceration, more punitive states (those with higher incarceration rates) invested less in indigent defense, suggesting that where the punitive turn took strongest hold, defendants’ right to counsel became a low priority in statehouses.

By 2005, state wealth remained a significant influence on state subsidy of indigent defense, although our proxy variables for demand for services played a negligible role. States with conservative elites continued to leave a greater share of funding to local governments. States with fewer African American residents did likewise, in contrast with the predictions of the racial threat hypothesis; and by 2005, in contrast with our predictions, states with more illiberal publics took on more responsibility for centralized indigent defense funding.

In short, the models accounted for more variance in state subsidy of indigent defense in the 1980s and recently (compared with 1975). Of course,
indigent defense had emerged as a permanent, and growing, budget item for states and local governments by the 1980s, perhaps catalyzing a different set of political concerns that those that shaped policy in the earlier years. State wealth became a more reliable predictor of state subsidy; it was a modest influence on centralized funding by the 1980s, and remained so 20 years later. Our proxy measures for demand failed to exert any sustained effect, in contrast with the findings of welfare politics studies. Liberal governing institutions appear to be responsible for movement in the direction of greater state funding, a finding consistent with our theoretical prediction. The racial threat hypothesis, however, finds support (albeit mixed) in these analyses only long after indigent defense had become institutionalized as a policy issue: in 1986, our measures of racial heterogeneity and public illiberality played no role in the model, but by 2005 higher proportions of African Americans were associated with lower levels of state support. However, contrary to our predictions, states that scored high on illiberality spent proportionately more state than local resources on this policy issue. Finally, there is no evidence that states’ punitiveness, as measured by incarceration rates, is associated with state support for indigent defense.

In order to further interpret these findings, we attempt to identify the variables that accounted for shifts in support between 1975 and 2005. We recollect that states’ values on this variable varied greatly in 1975, although our political and economic hypotheses failed to explain much variance at that early point. Subsequently, on the matter of state support for indigent defense, states either stayed in place (continuing to contribute a low, or high proportion of total funds), or else advanced their subsidy of programs-no state backslid on this variable over this period. Therefore, we analyze 2005 data again, including a control for 1975 state support. The last column (Model II) presents this analysis. States that shifted their funding toward state, away from local, sources over this time period, therefore, are those denoted by variables that appeared significant in 2005 (Model I).

The most striking result is revealed by the variance explained: simply by controlling for state subsidy from 30 years previous, Model II more than doubles the explained variance over Model I. This suggests great stability over three decades, despite the fact that the policy in question is one that had scarcely been fully established in 1975, and has been the subject of considerable debate ever since. However, the results also suggest that the impact of public illiberality and minority population remained distinctive in 2005, three decades after policies first started to settle on this issue – but not completely the way theory predicts. More illiberal states subsidized indigent defense more, although states with larger minority populations remained
regressive on this issue (or, to put it another way, more liberal publics stayed in place, while largely white states invested more, centrally, in indigent defense).

These findings are partially compatible with our predictions, although they suggest more complex dynamics than we are able to explore with these data. At the risk of oversimplifying, we might cautiously conclude the following: First, shortly after indigent defense became a visible policy issue, the division of funding between state and local governments was only weakly associated with economic and political variables—perhaps in part because the politics of indigent defense were in their infancy in statehouses. As caseloads rose, however, states’ willingness to take on financial responsibility (and perhaps local governments’ demands that they do so) became a matter of political debate but also of economic necessity. Once established, these patterns remained in place for decades. However, shifts toward state subsidy since then are significantly associated with variables related to race.

The mystery remaining is this: why did states with illiberal publics increase their centralized funding for indigent defense, while states whose publics scored lower on this scale stand still? We recollect the earlier findings about the adoption of public defender programs, which occurred, during the era covered by our study, in border states. Setting aside the quantified results of hypothesis testing, we observe that some of the shifts toward state funding occurred in the same states: Kentucky, Tennessee, Arkansas, Missouri, West Virginia. (Adjacent states—Indiana, Ohio, Iowa, Oklahoma—add to this pattern.) It is possible that the adoption of public defenders is linked with increases in state support. Perhaps these trends track together. We cannot explain, however, why this pattern is at least in part attributable to border states, and can only conclude that a clearer understanding of this must await a more nuanced analysis of state legislative histories.26

Indigent Defense Expenditures

Table 5 presents results of analyses of indigent defense expenditures. In 1975, a state’s economic capacity, crime rate, and poverty rate explained a substantial amount of variance.27 As predicted, states with more resources, and potentially higher indigent caseloads, spent comparatively more on indigent defense. These effects remain substantial and steady with the addition of political variables. Elite ideology played a minimal role in setting expenditures. However, there is some support here for the racial threat
hypothesis: illiberal states spent less on indigent defense per capita, as did states with more African American residents (although this association is quite modest). As predicted, where state governments took on a greater share of costs, expenditures were higher.

Similar patterns hold in 1986: wealth, crime, and poverty exert positive effects on overall spending, although the latter two factors have diminished considerably. Cost sharing between state and local governments exerts a negligible effect on total expenditures, counter to our expectations. States that relied less on local funding sources also spent more, although the association is very small. However, although elite ideology remains inconsequential for predicting expenditures, the roles of race-related variables become more substantial: states with more illiberal citizens, and with more black citizens, spent less.


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<tbody>
<tr>
<td></td>
<td>$b$ (SE)</td>
<td>$\beta$</td>
<td>$b$ (SE)</td>
<td>$\beta$</td>
</tr>
<tr>
<td>Constant</td>
<td>$-12.226$</td>
<td>$-7.130$</td>
<td>$-9.495$</td>
<td>$1.242$</td>
</tr>
<tr>
<td>State tax capacity</td>
<td>$0.083$</td>
<td>$0.067$</td>
<td>$0.109$</td>
<td>$0.032$</td>
</tr>
<tr>
<td></td>
<td>$(0.017)$</td>
<td>$(0.030)$</td>
<td>$(0.065)$</td>
<td>$(0.053)$</td>
</tr>
<tr>
<td>Crime rate</td>
<td>$0.001$</td>
<td>$0.001$</td>
<td>$0.001$</td>
<td>$-0.001$</td>
</tr>
<tr>
<td></td>
<td>$(0.000)$</td>
<td>$(0.000)$</td>
<td>$(0.001)$</td>
<td>$(0.001)$</td>
</tr>
<tr>
<td>Poverty rate</td>
<td>$0.331$</td>
<td>$0.191$</td>
<td>$0.509$</td>
<td>$0.366$</td>
</tr>
<tr>
<td></td>
<td>$(0.105)$</td>
<td>$(0.130)$</td>
<td>$(0.375)$</td>
<td>$(0.295)$</td>
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<tr>
<td>Elite conservatism score</td>
<td>$-0.015$</td>
<td>$-0.001$</td>
<td>$0.010$</td>
<td>$0.007$</td>
</tr>
<tr>
<td></td>
<td>$(0.012)$</td>
<td>$(0.023)$</td>
<td>$(0.036)$</td>
<td>$(0.028)$</td>
</tr>
<tr>
<td>Public illiberality</td>
<td>$-0.642$</td>
<td>$-1.596$</td>
<td>$-2.328$</td>
<td>$-0.689$</td>
</tr>
<tr>
<td></td>
<td>$(0.359)$</td>
<td>$(0.626)$</td>
<td>$(1.102)$</td>
<td>$(0.919)$</td>
</tr>
<tr>
<td>% African American</td>
<td>$-0.045$</td>
<td>$-0.123$</td>
<td>$-0.131$</td>
<td>$-0.048$</td>
</tr>
<tr>
<td></td>
<td>$(0.043)$</td>
<td>$(0.065)$</td>
<td>$(0.119)$</td>
<td>$(0.095)$</td>
</tr>
<tr>
<td>Incarceration rate</td>
<td>$0.008$</td>
<td>$0.013$</td>
<td>$0.002$</td>
<td>$-0.003$</td>
</tr>
<tr>
<td></td>
<td>$(0.009)$</td>
<td>$(0.009)$</td>
<td>$(0.007)$</td>
<td>$(0.005)$</td>
</tr>
<tr>
<td>State subsidy (current year)</td>
<td>$0.012$</td>
<td>$0.005$</td>
<td>$0.025$</td>
<td>$0.024$</td>
</tr>
<tr>
<td></td>
<td>$(0.005)$</td>
<td>$(0.011)$</td>
<td>$(0.021)$</td>
<td>$(0.017)$</td>
</tr>
<tr>
<td>State subsidy 1975</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>$R^2$</td>
<td>$0.690$</td>
<td>$0.594$</td>
<td>$0.333$</td>
<td>$0.601$</td>
</tr>
</tbody>
</table>
In 1986, states that incarcerated at a higher rate also spent more per capita, a finding contrary to our prediction that more punitive states would give short shrift to indigent defense. However, given the fact that incarceration rates had doubled between 1975 and 1986 in many states, it is possible that this variable is simply capturing differences in levels of demand for indigent defense services. Our original measure of demand, reported crimes, may not approximate actual caseload levels within states as well as incarceration rates themselves – the latter having originally been proposed as a measure of state punitiveness. To the extent that states imprisoned more people, net of crime rate, than they had in the past, they may have experienced greater obligations to provide counsel for felony prosecutions.

In 2005, the pattern is again similar (Model I). Resources (and to a lesser extent, the poverty rate) drove expenditures, as we expected. The ideological atmosphere of the statehouse played no significant role. The racial threat theory again receives support, particularly from our measure of public illiberality. Although incarceration rates had continued to rise, the rate of growth was less exponential during the intervening 20 years than it had been in the preceding 10. However, it is noteworthy that while these patterns remain fairly stable across decades, the 2005 model explains only half the amount of variance accounted for by the 1975 model.

To summarize, throughout the punitive turn, total expenditures on indigent defense were shaped by resources and demand (tax capacity, crime rate, and poverty rate). As we hypothesized, however, states that relied less on local government funding spent slightly more money per capita on indigent defense. Although the ideology of political elites played a negligible role in shaping expenditures, the politics of race is important. The results suggest that both racial composition and public illiberality are associated with lower rates of spending on indigent defense, all else equal.28

Again, we consider the possibility that the dynamics of indigent defense funding changed during this era. The last column of Table 5 models indigent defense expenditures per capita in 2005, controlling for expenditures in 1975. This model explains a good deal of variance in 2005, but requires little more than one variable to do so: levels of expenditures 30 years before, in 1975. (The correlation between 1975 and 2005 figures is 0.715.) The magnitudes of the economic and political coefficients dwindle accordingly. We can only conclude from these findings that while in the early years of the punitive turn the politics of indigent defense funding was the politics of race and public illiberality – a fairly durable sort of politics – at present the politics of indigent defense funding is the politics of incrementalism rather than innovation.
We are cautious in drawing conclusions about the implications of these findings for understanding the punitive turn and its effects, at the state level, on indigent defense policy. The most conservative inferences to be made are (1) that states’ economic capacity and demand for services predictably shaped expenditures shortly after indigent defense was institutionalized as a federalist policy problem for state and local governments; (2) that by the 1980s, the politics of indigent defense was infused with the politics of race and public values, and (3) that these patterns persist to the present.

DISCUSSION AND CONCLUSIONS

We interpret our findings with the caution that should accompany any research that relies on archived data. First, our measures of some key variables are limited. For example, our measures of demand for defense services include crime rate and poverty rate, which are at best proxies for caseload. An ideal measure of caseload would incorporate not merely numbers of clients, but adjustments for case difficulty, appeals, and the like. Further, it remains the case that while crime first rose, and then declined throughout the time period we studied, arrests and prosecutions for some crimes, particularly drug crimes, have increased, so the number of arrestees eligible for defense services is unknown.29

In particular, our findings suggest that public opinion about race may be important, and proxies may be suboptimal substitutes in testing theories about racial politics. We allow for the possibility that the same may be true in estimating the influence of public punitiveness – an attitudinal construct – by relying on measures of system practices – incarceration rates – although a thorough discussion of this issue is beyond the scope of this paper. In keeping with the tendency in extant literature, we measured punitive orientation using incarceration rates while simultaneously controlling for crime rates. Yet, contrary to our predictions, incarceration rates did not prove strongly predictive of low investment in indigent defense, suggesting either that state punitiveness and due process orientation are unrelated, or else that incarceration rates are not a satisfactory measure of punitive orientation. The latter possibility appears particularly likely in the context of this study given the inclusion of a measure of public illiberality in our model. Although originally included as a proxy measure for racial intolerance, it could be that public illiberality is a finer measure of punitive policy direction than the incarceration rate itself. If this is so, it would seem to suggest both that, in the present study, the incarceration rate should be
interpreted as a measure of demand for indigent defense services, but also more broadly, that scholars should in the future consider the importance of attitudinal measures in approaches to state-level punitiveness.

Second, we are obliged to draw inferences about decisions, and decision processes – moreover, at multiple levels of government – from outcomes data. The vast majority of jurisdictions initially experienced *Gideon* and its aftermath as a local courthouse and budgetary problem, not as a state responsibility, and adapted in various ways. Some states took on varying levels and types of responsibility for consolidating the provision of counsel, but we cannot know from our data exactly what political processes produced these shifts. We can document that they occurred sometimes, but not always, and in some states, not others; and we can offer observations about the general economic and political conditions that did (or did not) seem to matter. A next line of research (and one that would more completely fulfill the expectations for a genealogical study) would be case studies of state and local policy changes.30

Third, we cannot test an implicit and important assumption of the reformers’ “best practices” model: that the model in fact would produce better outcomes for defendants. The past 40 years of research have produced many attempts to compare the relative merits of publicly paid and privately retained counsel, as well as attempts to evaluate the relative efficiency and effectiveness of service delivery models for indigent defense.31 These studies have produced no conclusive answers, however, in part because of the difficulty of measuring effectiveness of counsel, and, within states, the limited variability across jurisdictions (particularly regarding funding rates). The findings, therefore, tell us more about the politics of indigent defense reform than about measured changes in quality of services for defendants.

With these caveats in mind, we review our findings, with the dual objectives of understanding the politics of indigent defense policy, and making a contribution, albeit a modest one, to the literature on the punitive turn. We observe that, at the aggregate level, indigent defense programs have not advanced very much from their origins, and certainly not as much as early reform architects had hoped. To the extent we could map changes in the use of public defender models, we found little evidence that states have moved in that direction. The balance of state versus local support for indigent defense budgets has shifted to the former, as reformers recommended; but while that shift has alleviated the uncertainty of some local governments, it has not resulted in better funding for programs overall. And while total expenditures have indeed increased, it is not at all clear that
this increase is net of increases in caseload and case complexity. Indigent
defense policies may not have backslidden during the punitive turn, but
neither have they evolved in the directions recommended by reform
advocates.

At the state level, we noted evidence that the pace of the punitive turn
varied, and we proposed that the purported causes of the turn at the national
level would play out differently at the state level, resulting in different patterns
of policy evolution. Specifically, we hypothesized that conservative law-
makers, illiberal publics, racially divided publics, and punitive regimes would
maintain minimalist defense programs; liberal lawmakers, publics relatively
free of racial tension, and less punitive regimes would be more likely to follow
the reform path laid out in the 1960s and 1970s. We find some evidence
to support the expectation that some states’ political climates may have
insulated them from punitive national rhetoric and recommendations.

Wealthy states (those with higher tax bases) adopted elements of the
reform agenda at an earlier point in time, a finding consistent with welfare
policy literature that reports more state assistance for the poor in states with
more slack resources. Predictably, expenditures are a function of poverty
and crime, as well. As caseloads rose in the 1980s, liberal lawmakers were
more likely than their conservative brethren to increase the proportion of
state monies to cover expenses, although they were no more likely to
contribute to meaningful increases in total expenditures (nor did greater
state subsidies result in bigger total budgets). We speculate that the 1980s
move toward devolution, from federal to state and from state to local
governments, was quite compatible with conservative lawmakers’ views
about who should pay for legal services, but liberal lawmakers resisted
this trend as indigent defense placed greater strains on county budgets.
We find little evidence of a direct tradeoff between punishment practices
and due process at the state level in these findings, however, our measure of
punitiveness plays a negligible role in these analyses.

The most important observation to make, however, involves indigent
defense expenditures and race. Our test of the racial threat hypothesis entails
two measures, proportion of the population that is African American and a
scale of public illiberality. Both are stable over time. As hypothesized, states
with larger minority populations spent less on defendants’ legal services
throughout this era. States whose residents are less tolerant of diversity,
including but not limited to racial diversity, likewise spent less. This suggests
that the recoding of race issues into crime issues from the 1970s to the
present may have had far-reaching effects on public thinking about criminal
justice, particularly since the effect of this variable increases somewhat over
time. Our data do not permit us to search for a direct link between public attitudes and budget making, but at the margins, increases in expenditures may be possible only in political climates that are not suffused with racial distrust and animosity. Elsewhere, perhaps, the best that can be hoped for is that expenditures will remain constant and not decline.

In conclusion, we offer three observations and suggestions for future research. First, while scholars analyzing the punitive turn reasonably have tended to pay attention to variation in punishment policies and practices, we ought also to look for evidence in other domains of criminal justice, such as due process, rehabilitation, and restorative justice, where the turn historically collided with reformers’ optimism about improving justice systems through closer attention to defendants’ rights and offenders’ reintegration. One might expect that evidence of the turn, in these domains, would appear not in the form of dramatic legislation or sharp turnabouts in policy and practice, but rather, in the more subtle and dispiriting stalling out of promising innovations.

Second, our exploration of the political climates associated with indigent defense policy offers enough evidence of state-level variation to invite more intensive study of the politics of due process policies more generally. It appears, at least for determining expenditures, that public values matter. We cannot explain precisely why, particularly when elite ideology seems to play little role. Interest groups, professional advocacy organizations, and organized agency interests may be responsible for pushing forward a reform agenda. Their absence from a political stage may ensure that little progress is made, but when present, their success may hinge on the political climate. Further, significant changes in programs may result not from legislative action but rather, from judicial decisions at the state level. There is enough evidence in these results to justify a closer inquiry into states’ political narratives.

Finally, social scientists ought to be mindful of the potential for policy shifts in any direction other than that to which they have become accustomed in the last three decades. Over 20 years ago, Scheingold suggested that the meteoric rise in incarceration might be near a peak:

... the law-and-order tide may be turning, but for pragmatic rather than principled reasons. It certainly would be unrealistic, at least in the short run, to expect any changes in the punitive policy preference of the general public. If, however, it becomes increasingly less attractive, even for fiscal reasons, to campaign on get-tough anticrime platforms, the political climate may cool significantly. The ensuing depoliticization of crime will put policy back in the hands of the criminal process professionals. Without the intense public scrutiny that has characterized the last twenty years, the professionals can be expected to lead a retreat from the punitive drift of recent years. (Scheingold, 1984, p. 231)
At the time of this writing, executions have dropped, and many states are revisiting their capital punishment statutes; incarceration rates are stabilizing; and some of the harsher manifestations of the punitive turn, such as juvenile waivers to adult court, are being called into question. Tools that were created to combat crime, such as DNA analysis, are being used to exonerate the falsely convicted. While Scheingold may have misjudged the timing, he may have been correct in suggesting that public policy might return to more moderate positions after its immersion in punitiveness, or might take on a new set of priorities altogether. If the politics of due process, like the politics of punishment, are the politics of public values, contemporary scholars would do well to develop the theoretical linkages that might help predict progressive as well as regressive shifts in public policy.

NOTES

1. Criticism of 1970s policies came from diverse sources. Among some academics, support for the rehabilitative ideal fell away (Martinson, 1974), as its natural liberal allies began to question the legitimacy of the indeterminate sentencing which the treatment model required (Greenberg & Humphries, 1980). Two alternative models emerged, often in conflict: just deserts advocates favored carefully measured retribution in the hope that by emphasizing the question of desert, the excesses of rehabilitation could be avoided (von Hirsch, 1976; von Hirsch & Ashworth, 1992), while conservative critics argued for harsh sanctions to deter and control dangerous and deviant behavior (Wilson, 1975; Van den Haag, 1975).

2. This conflating of race, disorder, and crime was an important piece of the “southern strategy” that resulted, ultimately, in the partisan realignment that cracked the post-war Democratic coalition of union members, southerners, and northern liberals; within two decades much of the universally Democratic south was governed by conservative Republicans at state, and eventually local, levels, and southern voters reliably supported Republican Presidential candidates.

3. Examples include: expansion of the applicability of the federal death penalty, creation of 50 new federal offenses including gang membership, enhanced protections for rape victims, providing grant money for more aggressive local and state prosecutions of domestic violence charges, authorization for hiring 100,000 local police officers, and licensing the use of boot camps for delinquent minors.

4. Garland’s account has been criticized on several points (see Brown, 2006; Matthews, 2005; Zedner, 2002), and it is not the only account of the changes in criminal justice systems in the 1980s. Though some have cautioned against “dystopian” discussions of penal punitiveness, and others have dismissed the phenomenon altogether, neither such counter-argument seems to have had much effect on the prevailing opinion of increasing harshness (Matthews, 2005; Zedner, 2002). For example, Feeley and Simon (1992) emphasize internal and institutional
forces, such as the displacement of rehabilitative goals with managerial goals in corrections, to explain these changes. The fact remains, however, that all indicators point to a sharp increase in the use of the criminal justice apparatus as a reaction to social problems.

5. The partial exception to this characterization of the Court’s follow-up is *Strickland v. Washington* (1984) in which a two-part test was specified to assess whether the representation provided to defendants had been “effective,” and not merely token.

6. An important and, to the authors’ knowledge, largely unexamined question is why the Court had so little to offer states regarding the form and funding of counsel. That question is beyond the scope of this paper. However, Scheingold (1974, Chapter 8) offers some thoughtful hindsight into this general problem, observing that, by definition, if a right was established through litigation it probably faced entrenched resistance, which was unlikely to abate following a ruling; and that courts were ill-suited to oversee compliance with rights rulings.

7. After decades of crime control rhetoric and policy, it is somewhat difficult to imagine the chipper optimism that accompanied the legal rights movement. As early as the 1950s, Harrison Tweed, then president of the National Legal Aid Association, was of the opinion that “The Legal Aid tide is on the flood….we cannot fail if we put our shoulders to the wheel” (Brownell, 1961, p. 15). A decade later, the President’s Commission had resolutely addressed indigent defense as a practical problem that could be resolved with more data and funding (President’s Commission, 1967).

8. For the most part, this suggestion fell on deaf ears, and federal funds have not been used to subsidize state indigent defense costs. However, the call for federal subsidy of public defender programs was resuscitated in 1998, when a Department of Justice report called for greater “collaboration” between prosecutors, public defenders, and other members of the court, in the development of crime-fighting innovations such as drug court treatment programs and gang suppression strategies. The report went so far as to recommend the use of Byrne grants to public defender offices that agreed to work cooperatively with the criminal justice system (Bureau of Justice Assistance, 1998).

9. These are primarily southern states, but notably also include New York, Massachusetts, Pennsylvania, and New Jersey, as well as Utah.

10. Data on state and local expenditures were originally gathered through “the joint efforts of the Law Enforcement Assistance Administration and the U.S. Bureau of the Census,” based on surveys of all states, all county governments, all municipal governments with populations (1970) of 10,000 or more, and a sample of municipalities with smaller populations; results were weighted to create estimates for all municipalities (Sourcebook for Criminal Justice Statistics, 1977, pp. 42, 48–63).

11. Data from the Spangenberg study cited here were supplemented by some independent research into defense delivery systems across states in 2002. A list of sources is available from the authors.

12. Two states – Georgia and South Carolina – have had inconsistent funding patterns. Georgia moved from funding about 40% of expenses in 1975, to minimal state support through the next three decades, to 40% in 2005. South Carolina’s state funding fluctuated from a high of 67% to a low of 43% in 2005.
13. For example, while on average the price (to taxpayers) of indigent defense per capita was $6.00 in 2002, the per capita cost of welfare programs was $118, and for corrections, $780 (United States Census Bureau, 2000).

14. States that have not legislated a single standard service delivery model exhibit a wide array of mixes. Some prescribe public defender programs in urban areas, but leave smaller jurisdictions to their own choices. Others simply leave the decisions to local governments, which make various choices about program types.

15. We note that six of the seven states that turned away from public defender systems (Oregon, Idaho, Utah, Nebraska, Indiana, Massachusetts) had not been identified by the NLADA 10 years earlier as being state-centralized programs. This suggests the possibility that state-level organization may be associated with the persistence of public defender models over time.

16. An illustrative, but by no means comprehensive, set of examples: police use of force (Chamlin, 1989); arrest rates (Brown & Warner, 1992); disenfranchisement of felons (Behrens et al., 2003).

17. This hypothesis has found some support at the state level in the context of welfare policy: states with more minority citizens provide fewer welfare benefits and more restrictions on eligibility (Soss et al., 2001; Gilens, 1999). Indigent defense is a matter of due process, but it is also a redistributive policy with means testing. Arguably, in the (white) public mind, race is even more linked to criminal behavior than to welfare eligibility, so we speculate that indigent defense policy might be particularly vulnerable to race politics.

18. There are other measures that might have proven useful, were they available. Comparable data on caseloads is not readily available (but see Strickland, 2005). Moreover, because expenditures per case probably do not reflect policy choices about allocations to defendants (especially in states where costs are shared or primarily borne locally), and reflect averages across jurisdictions, it is not the most theoretically useful variable for our purposes here. A second measure might be a proxy version of the first: expenditures per crime. We estimated this measure using UCR data on index crimes; it is correlated at above 0.700 with the variable we did employ, expenditures per capita, for each year. We conducted analyses using both these dependent variables, and they produced substantively similar results (available from authors on request).

19. This measure of capacity directly compares states in each year, by establishing an index value for each state that is the state's proportion of the average for that year, which is set at 1.00 (so, e.g., a state with 120% of the average taxable resources for all states would have an index value of 1.20). Some state policy researchers have relied on proxy measures of citizen wealth to capture capacity, such as median household income (Koven & Mausoloff, 2002) or expenditures (Miller, 1991). However, median values say little about distributions (a state might have many extremely wealthy residents but also many working class residents), and more importantly, states tax many commodities and activities other than personal income. Further, states and localities are obliged almost without exception to produce balanced budgets (National Conference of State Legislatures, 1999), which means that governments at those levels can spend only what they can take in. Therefore, although governments are obliged to provide legal services to indigents, they may (and, we predict, do) adjust their spending depending upon the amount of money available. From a theoretical perspective, therefore, expenditures in any policy
domain or program area (adjusted for state size or population) is a more meaningful measure of a state’s commitment to that policy in the context of the funds available for all policy areas (McGarrell & Duffee, 2007; Guetzkow, 2004); and, for example, research in welfare policy has found that expenditures are more closely related to state wealth than to measures of citizen wealth such as the cost of living or median income (Tweedie, 1994; see also Jacobs & Carmichael, 2001).

20. Berry et al. (2001) also created a measure of citizen ideology, for the 1960s through 2000. This measure is rather highly correlated with their measure of elite ideology in the earlier years of this study (above 0.700), but the correlation diminishes by 2000 (to 0.343). Because our hypotheses emphasize the importance of legislators’ views on due process, on a policy matter that would typically be of very low visibility and salience to the voting public, we elect to use the elite ideology measure for the analyses. For parallel analyses, see Songer (2000) (as cited in Benesh & Martinek, 2002).

21. For additional data on the stability of attitude constructs over time, see McIver, Erikson, and Wright (2001). The virtue of combining data over years comes, of course, from the larger n obtained from each state.

22. The factor analysis produced a primary factor with an eigenvalue of 3.277. Factor loadings for the five most significant variables were (1) racial tolerance: 0.877, (2) general tolerance of diverse or minority viewpoints: 0.928; (3) attitudes toward affirmative action: 0.689; (4) ideological self-placement: 0.847; and (5) religiosity: 0.675. Variables that did not load on this factor, and did not comprise clearly interpretable scales, included items on feminism, welfare, party identification, and two items on capital punishment.

23. The importance of the religiosity variable in our measure of illiberality merits a bit of reflection. The GSS measure of religiosity included one’s assessment of how religious one is, and the frequency with which one prays and attends church. In discussing international variability in incarceration rates and capital punishment, Wilkins observed that historically, many religions have served the dual social purposes of reinforcing beliefs about behavioral norms and simplifying believers’ need to distinguish right from wrong, and hence good from bad people (Wilkins, 1991). The 1980s in particular was a decade in which Republican politicians linked policy views tightly to conservative religious perspectives, and conflated crime with irresponsible, sinful, and irreverent behavior. So we follow the lead of other scholars (Jacobs & Carmichael, 2001; Greenberg & West, 2001; Morgan & Anderson, 1991) who suggest that measures of religious adherence might predict endorsement of repressive criminal justice policies.

24. We considered alternative measures of public values linked to conservatism. Some scholars have employed Berry’s measures of citizen ideology (Berry et al., 1998), but its construction has been criticized as derivative of elite opinion, not public opinion (Norrander, 2001). Those measures are correlated with our illiberality variable at 0.69 (1972), 0.45 (1984), and 0.43 (2000). In preliminary analyses, we also considered Elazar’s classic conceptualization of political culture (Elazar, 1984). Empirically, Berry’s measure of public liberalism is correlated with Elazar’s culture measure at the state level: individualistic states are more liberal than moralistic states, and moralistic more so than traditionalistic states. It is likewise correlated with our measure of public intolerance (in the same pattern). We elect to use the more direct measure of public opinion, given our interest in the racial dimension. We also note that a more specific measure would have estimated the illiberality of white respondents; Percival (2007) has reconstructed one measure of this sort, using
one of the GSS items; unfortunately those data were not available to the authors at the time of this writing.

25. For all analyses, tolerances ranged from 0.32 to 0.74, and variance inflation factors did not exceed 2.9. More significantly, when models were run including only variables that exerted a substantively significant effect in the original equation, coefficients and explained variance were nearly identical.

26. We considered one hypothesis: these border states, motivated to reinstate capital punishment, felt obliged to create reputable defense systems to fend of, or respond to challenges from, appellants in capital cases. However, a cursory analysis offers no support for this hunch: neither the date of reinstitution, nor the date of first execution, sets these states apart from others.

27. Regression analyses including these variables alone for the 1975 data produced an $R^2$ of 0.58.

28. At first this might seem like an untenable finding, since it is often assumed that southern states are both most racially intolerant and most heavily populated with African Americans. However, these are distinct constructs. These data suggest that states in the far west (e.g., Idaho, the Dakotas) and border states have small black populations, but comparatively intolerant publics. On the other hand, some east coast (e.g., Maryland, Connecticut, New Jersey, Delaware) and industrial states (e.g., Illinois, Michigan) have substantial minority populations, but tolerant publics. Of course, one confounding issue in this measure is that to the extent African Americans were respondents in the surveys that provided these measures, they were unlikely to express racially intolerant views. Recently, Garrick Percival has identified and attempted to remedy this problem (Percival, 2007). His data were unavailable for this study. At a minimum, however, this makes the intolerance measure a conservative one.

29. Our confidence in the dual use of crime and poverty as indicators of demand is bolstered by a study of Georgia’s 159 counties, for which caseload data were available; poverty and crime together explained 92% of the variance in caseload in that study (Worden & Worden, 1989).

30. Indeed, some scholars have undertaken this sort of historical study, although typically focusing on specific cities. See, for example, McInytre (1987). More generally, on this point, see Williams (2003), Miller (2004).


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**CASES CITED**


