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Getting Gideon Right

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REPORT

Getting *Gideon* Right

Eligibility for Appointed Counsel
in Texas Misdemeanor Cases

FROM THE DIRECTOR

In the landmark case of *Gideon v. Wainwright*, the United States Supreme Court guaranteed that the Sixth Amendment right to counsel would protect every person accused of a crime—rich and poor. But nearly sixty years later, *Gideon's* promise remains unfulfilled.

Every year, thousands of people in Texas are charged with misdemeanor crimes. If convicted, they can be jailed, fined, placed on probation, fired from their jobs, or separated from their families. If they cannot afford a lawyer, the Constitution guarantees them a court-appointed defense attorney.

But is Texas honoring that promise? *Getting Gideon Right* is the first in a series of reports that will tackle this critical question.

Deason Center researchers conducted a groundbreaking assessment of indigent defense plans in Texas' 254 counties. Drawing on that data, *Getting Gideon Right* investigates the financial standards that determine an accused person's eligibility for appointed counsel in Texas county courts. The report reveals a patchwork of county court policies that are both complex and severe.

In almost every Texas county, eligibility standards are unrelated to the true costs of living, much less the high costs of hiring a lawyer. People who cannot afford basic necessities must prove that they are entitled to court-appointed counsel. And they must make that case before they can begin to defend themselves.

Although they are presumed innocent, people who cannot assemble the requisite proof of indigence, or who fail to satisfy strict local eligibility standards, must make harrowing choices: Will they represent themselves in court with a jail sentence at stake? Or will they deplete their savings, raid their retirement accounts, sell their only car, or skip their next rent payment to hire a lawyer who will fight for their freedom?

Getting Gideon Right does more than simply expose this injustice. The report provides Texas policymakers with actionable recommendations for honoring *Gideon's* promise and vindicating the right to counsel in county court misdemeanors.

We look forward to working with concerned Texans across the state. Together, we can give new life to the Sixth Amendment in Texas.

Sincerely,

Pamela R. Metzger
Director, Deason Criminal Justice Reform Center
SMU Dedman School of Law

Shortchanging *Gideon's* Promise in Texas

Almost 60 years ago, the United States Supreme Court recognized that a lawyer's assistance is essential for a fair criminal trial. In *Gideon v. Wainwright*, the Court held that the government must provide a criminal defense lawyer for any accused person who cannot afford one.

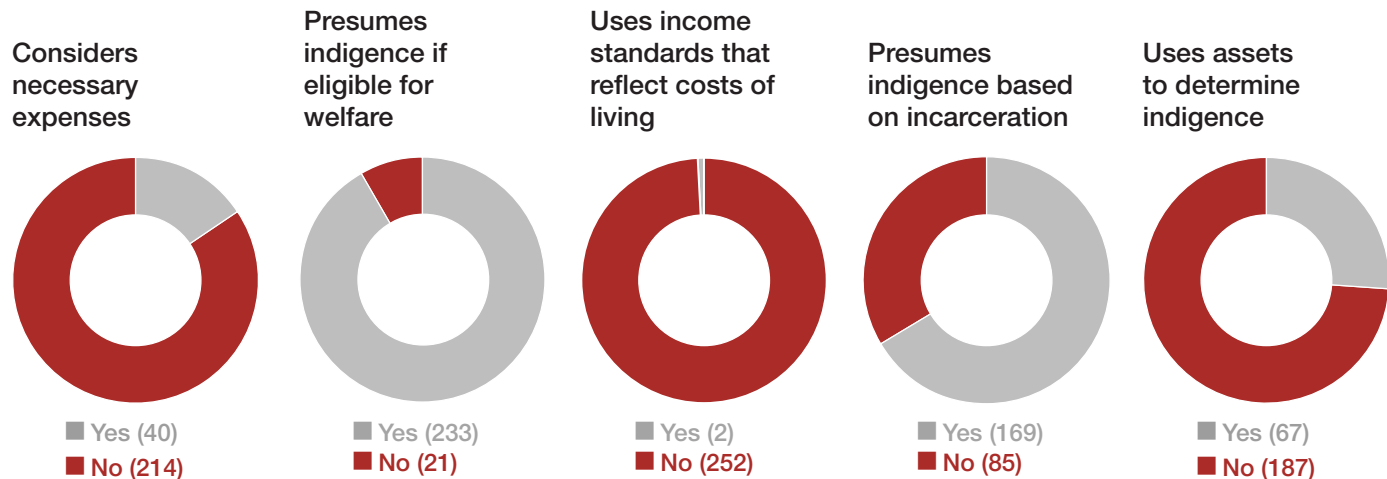
This constitutional protection applies to any person who is at risk of losing their liberty. But for too many people, *Gideon's* promise is unfulfilled.

In Texas there are no statewide guidelines about who is entitled to a court-appointed lawyer. Instead, counties create their own rules.

In 2019, Texas' 254 counties used 181 different indigent defense plans for providing appointed counsel in misdemeanor cases.¹

In most Texas counties, these eligibility standards create serious gaps in constitutional protection. It is far too easy for Texans to fall through those cracks.

Factors Used to Determine Indigence Vary Across Texas



Policies across Texas' 254 Counties

Recommendations

No person should stand in criminal court without a lawyer by their side. Fortunately, there are practical steps that Texas policymakers can take to get *Gideon* right. The Texas Indigent Defense Commission can set minimum standards that both honor *Gideon's* promise and respect local governance. Properly implemented, these recommendations would help ensure that no Texan has to choose between feeding their family and fighting for their freedom.

To deliver *Gideon's* promise, policymakers in Texas should:



Establish statewide minimum standards for determining indigence.



Presume that people who are incarcerated and people who qualify for welfare are entitled to a court-appointed attorney.



Use more accurate measures of indigence.



Protect an accused person's essential assets.



Holistically assess a person's income, assets, and expenses, including the high cost of a defense lawyer.

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INTRODUCTION

The Sixth Amendment's Promise

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.²

Gideon v. Wainwright

In 1963, in *Gideon v. Wainwright*, the Supreme Court promised that every accused person would have a lawyer to defend them—even if they could not afford to pay for one. By requiring the government to provide them with a court-appointed lawyer, the Court hoped to level the courtroom playing field and guarantee all people—rich and poor—a fair fight for their freedom.

In theory, *Gideon* means that no one should have to stand alone in a criminal court and defend themselves without a lawyer's help. And no one should have to sell everything they own, or spend their last dollar, just to hire a lawyer to represent them.³

But for people charged with misdemeanors in Texas, *Gideon's* reality can be very different.



Misdemeanors and the Right to Counsel in Texas










Whenever the government threatens someone’s freedom, *Gideon* promises that person a fair fight. Whether the state threatens them with a long jail sentence or a short one, every Texan has the right to a lawyer who will defend their liberty.

In Texas, there are three classes of misdemeanors. Class A misdemeanors carry a maximum punishment of one year in jail and a fine of up to \$4,000.⁴ Class B misdemeanors carry a maximum punishment of six months in jail and a fine of up to \$2,000.⁵ Class C misdemeanors, however, cannot be punished with a jail sentence. Instead, the maximum sentence is a \$500 fine.⁶

This means that criminal defendants in Texas have a constitutional right to counsel in Class A and B misdemeanor cases, but not in Class C cases.

DATA SNAPSHOT

The right to counsel applies whenever a person’s liberty is at risk

	Maximum Jail Sentence	Maximum Fine	Constitutional Right to Appointed Counsel
Class A	1 year 	Up to \$4,000 	Yes 
Class B	6 months 	Up to \$2,000 	Yes 
Class C	N/A 	Up to \$500 	None 

The Serious Consequences of Misdemeanor Convictions

In Texas, most criminal prosecutions are for misdemeanor offenses.⁷ In each month of 2019, there were approximately 6,770 people in Texas jails on misdemeanor cases.⁸ Thousands more lived under the burdens of court supervision. In 2019, 135,273 Texans answered to a pretrial or probation officer after their arrests, convictions, and sentences.⁹

After a misdemeanor sentence ends, there may be collateral consequences that impose new punishments. Some people convicted of a misdemeanor cannot hold elected office¹⁰ or serve on a jury.¹¹ Other people cannot own a gun for five years after their convictions, even to hunt for food.¹²

Misdemeanor convictions can also shatter lives.¹³ Family and Protective Services can take a convicted person's child away, without even giving them notice.¹⁴ And a foreign citizen with a U.S. visa might be deported, no matter how strong their ties to Texas.¹⁵

A misdemeanor conviction can also devastate a person's employment prospects.¹⁶ They can be denied trade licenses or banned from certain professions.

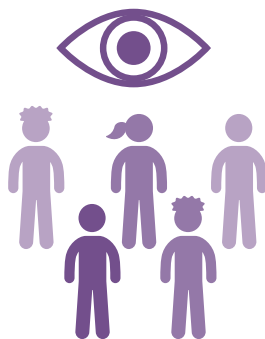
Anyone facing these serious consequences should have a lawyer to defend them.

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6,770

Average number of Texans incarcerated per month on misdemeanor cases



135,273

Number of Texans under supervision related to misdemeanor offenses

Gideon's Bleak Reality in Texas



In *Gideon*, the Supreme Court neither defined who was entitled to a court-appointed attorney nor created any funding to pay for the lawyers it had promised. In effect, *Gideon* was an unfunded mandate. While it gave state and local governments the power to implement *Gideon's* promise, it also made them responsible for footing *Gideon's* bill.

In Texas, the result has been a patchwork of standards that can be both punishingly strict and overwhelmingly complex. Texans who cannot afford a lawyer may find themselves trapped in a regulatory maze. If they cannot successfully navigate these regulations, they face terrible choices: Will they forego necessities like food and shelter? Or will they face a hostile legal system alone and undefended?



The Texas Patchwork

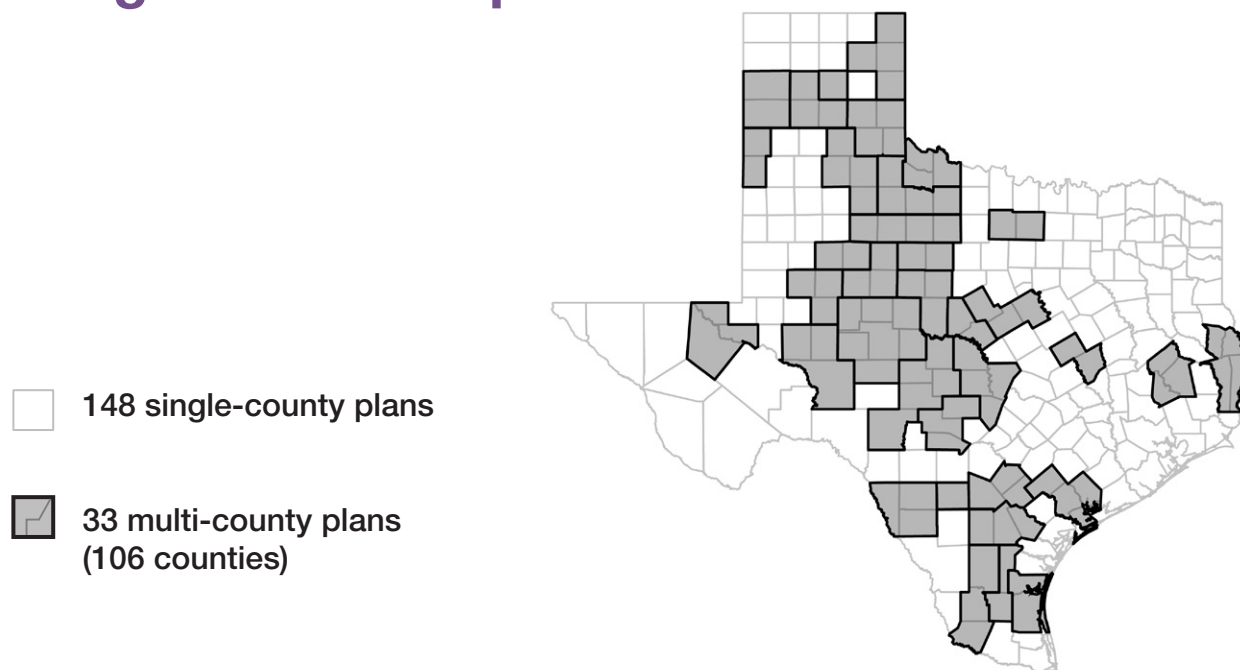
Since 2002, the Texas Fair Defense Act (TFDA) has been the primary source of laws about the right to counsel in Texas.¹⁷ Under the TFDA, the Texas Indigent Defense Commission (TIDC) has the power to develop policies and standards about delivering the right to counsel.¹⁸ But each county makes its own decisions about how to implement those policies and standards.

While TIDC could set statewide indigence standards about who qualifies for court-appointed counsel, it has not done so.¹⁹ As a result, Texas counties set their own indigence standards, which local judges are bound to follow.

In 2019, some Texas counties had their own indigent defense plans, while other counties collaborated to create multi-county regional plans. In total, there were 181 different plans for providing appointed counsel in county court misdemeanor cases.

DATA SNAPSHOT

Texas has single-county and multi-county indigent defense plans



The Challenges of County Control

This system of county control over indigence standards can create conflicts of interest.²⁰ On the one hand, county governments must provide their communities with the constitutional right to counsel and pay for the associated costs. On the other hand, county governments also must pay for essential community needs, like roads, hospitals, and schools.

Lacking guidance from TIDC, Texas counties have muddled along as best they can. Some counties have tried to honor *Gideon's* promise by developing financial guidelines that fairly and accurately determine who needs appointed counsel.

Other counties have tried to contain *Gideon's* costs. Some have drafted complex applications that discourage people from requesting a lawyer.²¹ Others have adopted restrictive eligibility standards that disqualify most people from receiving court-appointed counsel.²²

The result has been staggeringly unfair.

IN FOCUS

*Effective screening methods and the resulting accuracy in indigence determinations **ensure compliance with the constitutional right to counsel** and may **provide cost-savings for counties.***

If under-inclusive, counties run the risk of infringing on indigent defendants' right to counsel, possibly resulting in uncounseled plea deals. If over-inclusive, defendants with the ability to retain an attorney may be provided with appointed counsel and may further strain overextended county resources.²³

Texas Indigent Defense Commission

Considerations for Determining Indigence

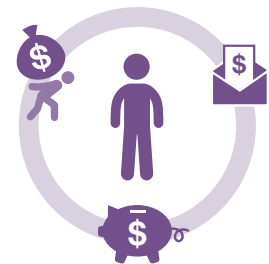
Texas law defines indigence broadly and allows counties to draft plans that consider a wide range of factors. Without a statewide indigence standard, there are few guidelines for counties to follow.

All Texas indigent defense plans rely on presumptions as their primary means of determining indigence. Presumptions instruct a judge to assume that a person is indigent if they meet specific criteria. For example, a plan might presume that a person who receives welfare is entitled to appointed counsel.

Most plans also allow a judge to conclude that a person is indigent, even if no presumptions apply to them. To make that finding, a judge must evaluate the factors that the county says are relevant and conclude that hiring an attorney would be a substantial hardship for the defendant or their families.

IN FOCUS

Texas law defines a person as indigent if they are 'not financially able to employ counsel'²⁴



IN FOCUS

County plans can use many factors to determine indigence²⁵

Texas law allows consideration of:



Income



Financial obligations



Dependents



Source of income



Property



Spousal income



Assets



Necessary expenses

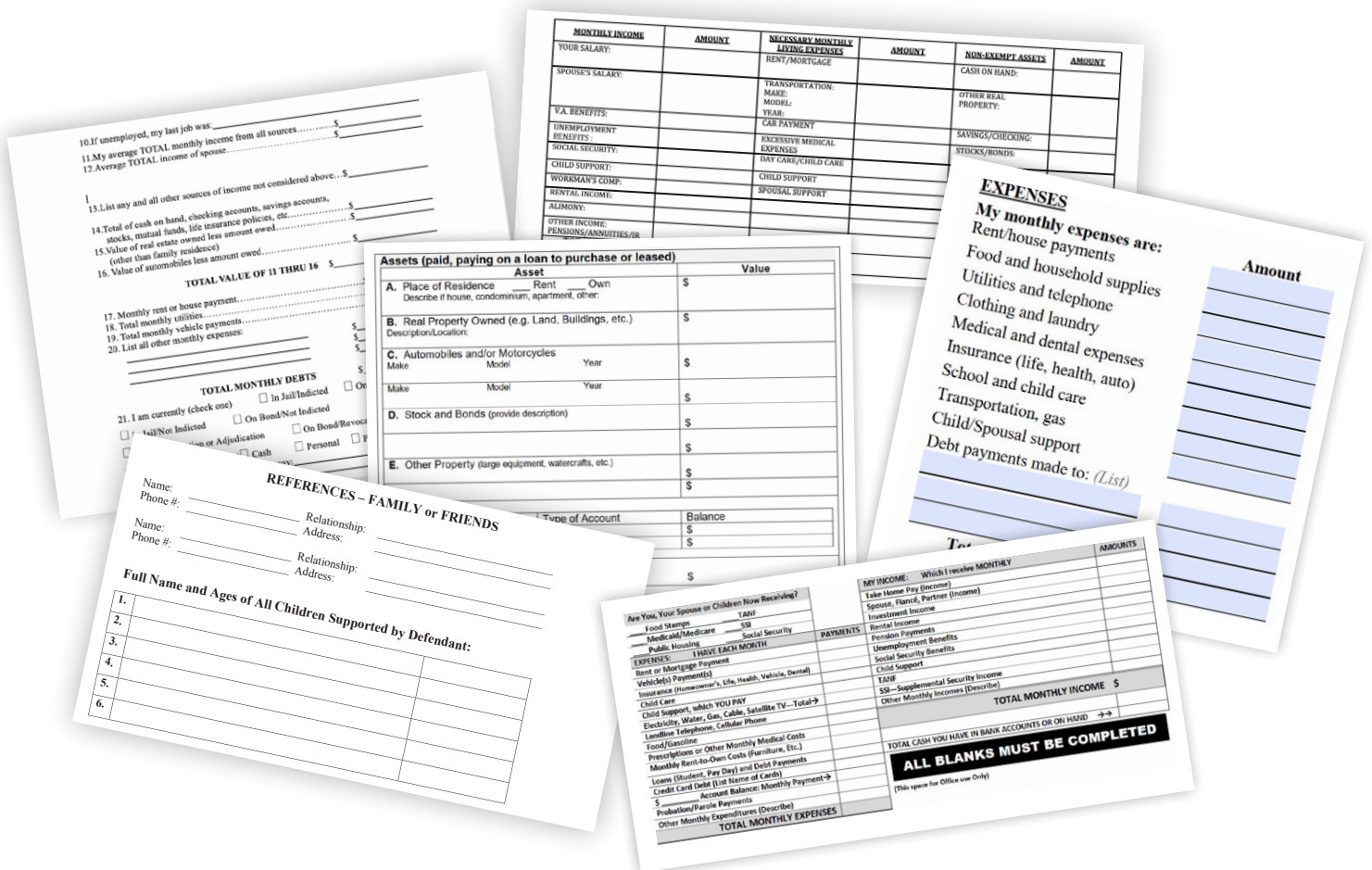
Collecting Information to Determine Indigence

When a person requests appointed counsel, many counties require that person to fill out complicated forms. These forms may ask very specific financial questions or require a person to produce detailed documentation such as receipts, bills, bank statements, and tax forms.

Some counties also require a signed affidavit, made under penalty of perjury, in which the accused person swears that the information they have provided is true, accurate, and complete.

IN FOCUS

Affidavits of indigence from several Texas counties



Complex Indigence Standards

Most plans use several different presumptions of indigence. If a person is not presumed indigent under one standard, they can still be presumed indigent under another.

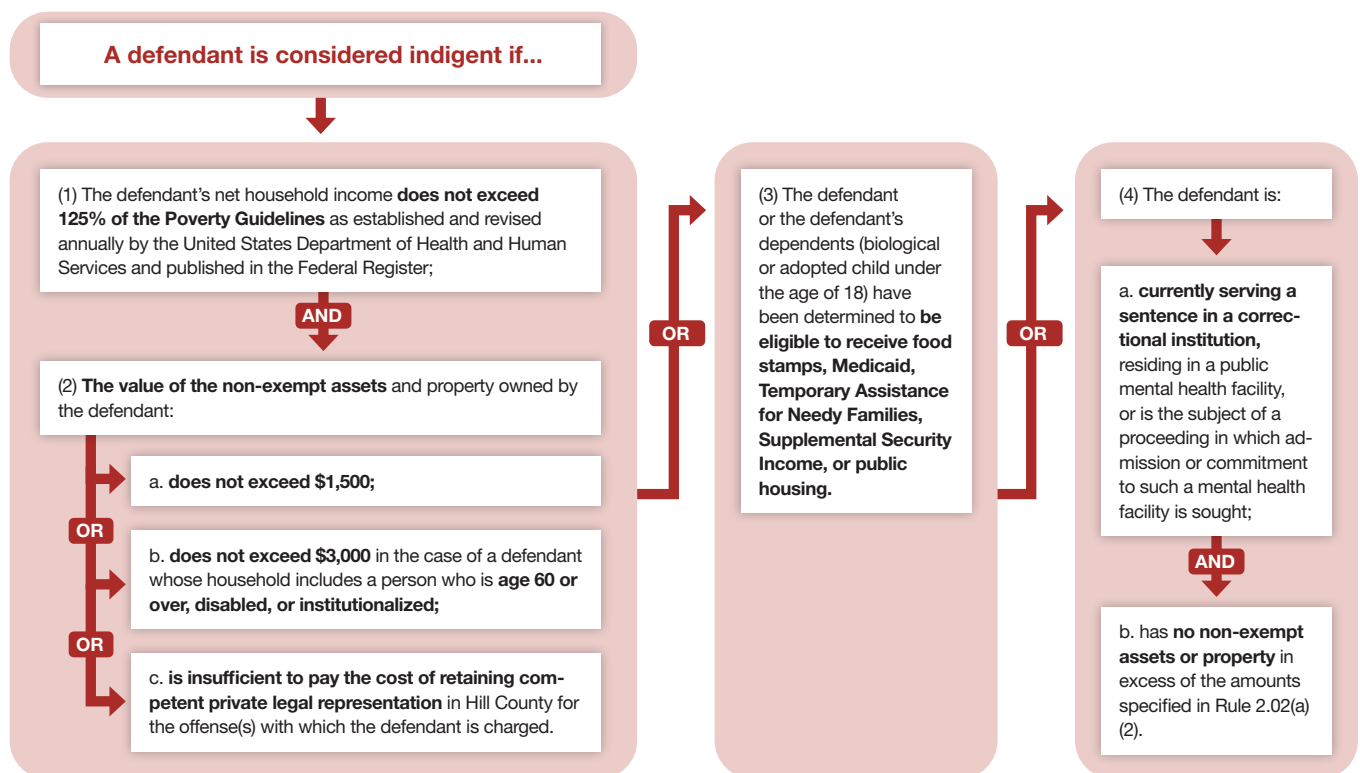
For example, a single plan might have two different presumptions of indigence. Under such a plan, a person would be presumed indigent if they were incarcerated, *or* they made less than a certain amount of money each year.

Or a plan might presume indigence based on a combination of factors. For example, a person might be only presumed indigent if they were incarcerated *and* had less than \$2,500 in assets.

Combined with the burden of proving their financial circumstances, these complex standards can further isolate vulnerable people from the constitutional protections they deserve.

IN FOCUS

Hill County's complex indigence standards



A Broken System



Indigent defense policies across Texas are in serious need of repair.

The Supreme Court was clear in *Gideon*: The government should provide a court-appointed attorney to anyone who cannot afford a lawyer.

Yet, most Texas counties use indigence presumptions that exclude people who clearly cannot afford a lawyer. They ask some of their poorest residents—people who own little and have a hard time making ends meet—to hire their own lawyers. Those who cannot must stand alone in criminal court, fighting for their liberty without a lawyer’s help.

This is a far cry from *Gideon’s* promise.



Incarceration, Welfare, and Presumptions of Indigence

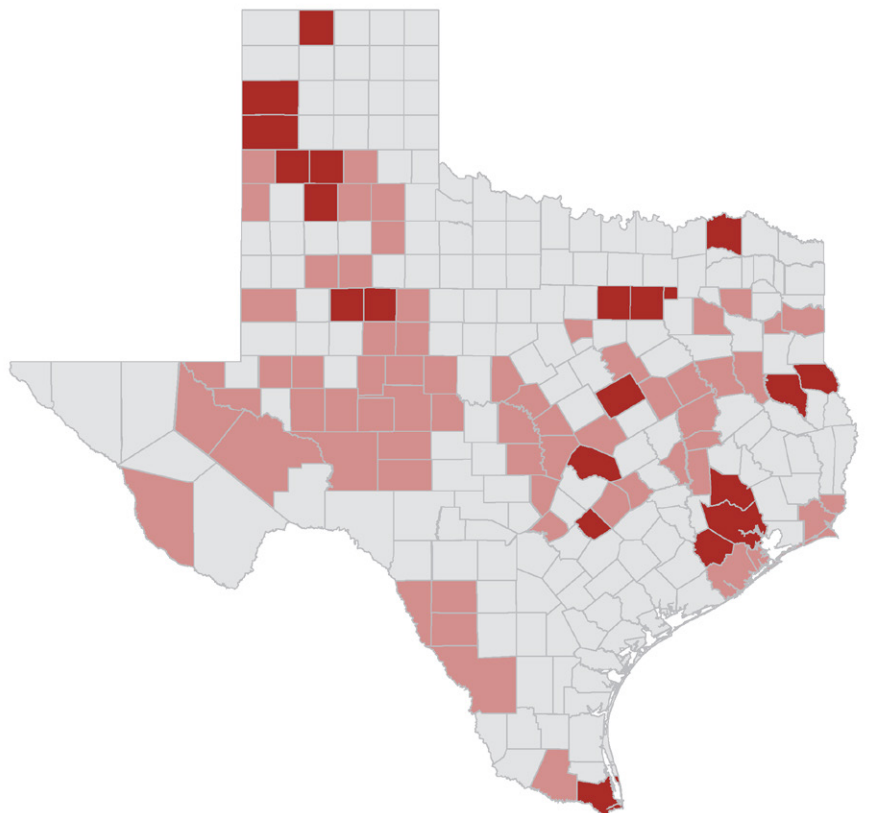
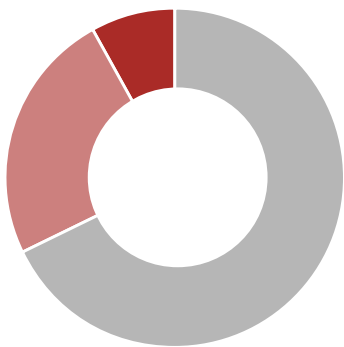
Some people’s circumstances strongly suggest that they cannot afford an attorney. For example, someone who is incarcerated cannot work and therefore might be unable to hire defense counsel. But only 169 Texas counties presume that a person who is already in jail needs an appointed lawyer to defend them.

Similarly, a person who is eligible for public assistance often cannot afford necessities, like food, shelter, and clothing. Yet, in 21 Texas counties, a person who is eligible for welfare still must prove that they need a court-appointed lawyer.

DATA SNAPSHOT

Incarceration or welfare can create a presumption of indigence

- Both welfare and incarceration presumption (169)
- Welfare presumption, no incarceration presumption (64)
- Neither presumption (21)



Using Assets to Presume Indigence

In 67 counties, a judge can consider a person's assets to determine whether they are indigent.

Some indigent defense plans set aside certain assets that cannot be considered when a judge evaluates eligibility for appointed counsel. For example, Bell County presumes a person is indigent if they possess less than \$5,000 in "marketable" assets. However, the county also protects a person's home and one car. In other words, in Bell County a person is presumed indigent if, after excluding their home and a car, their personal property is worth less than \$5,000.

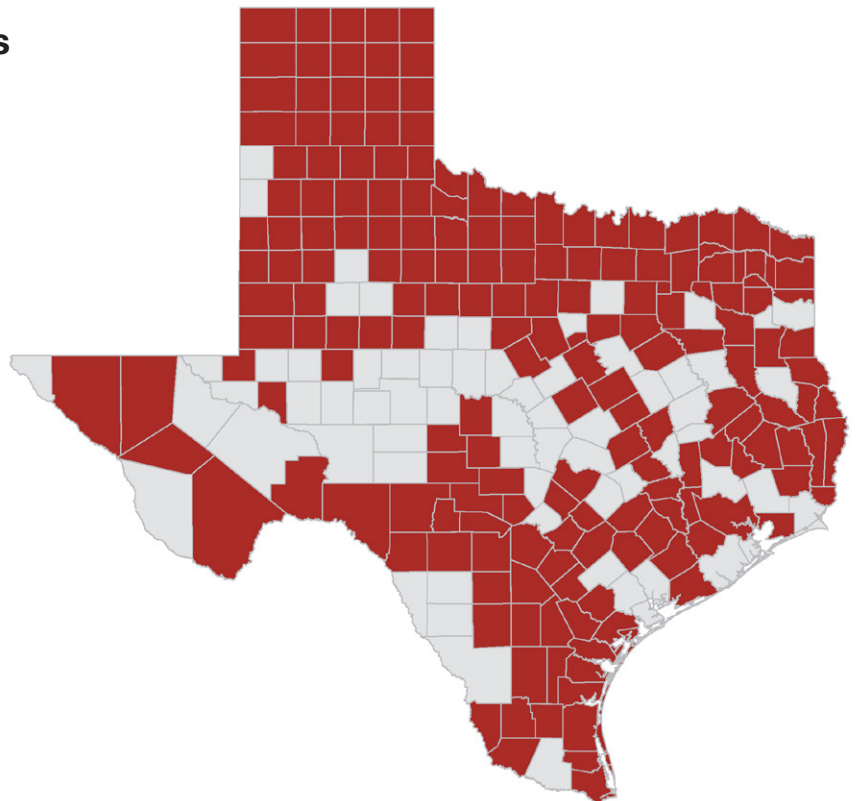
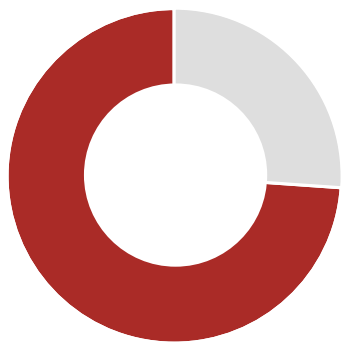
Other counties do not exclude any assets from the assessment of indigence.

DATA SNAPSHOT

Some county plans use assets to presume indigence

County plan considers assets

■ Yes (67) ■ No (187)



CASE STUDY

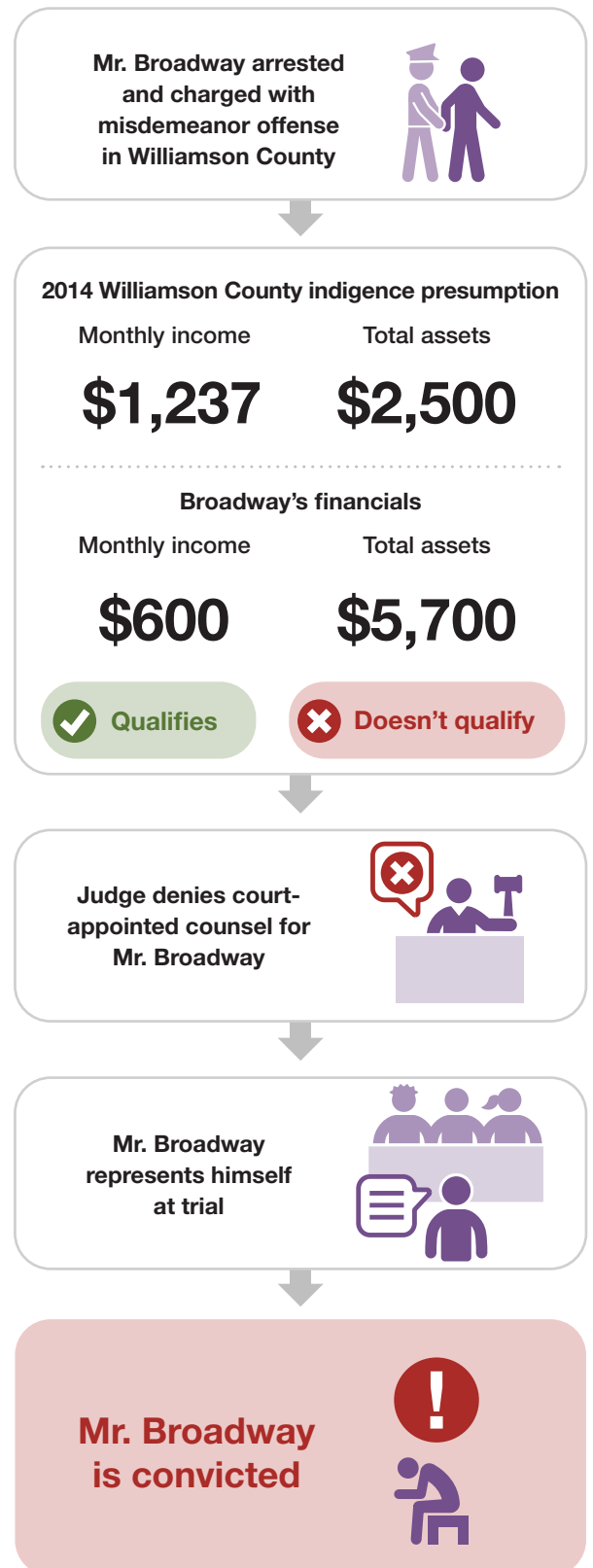
Mark Broadway's Story²⁶

Mark Broadway was arrested in Williamson County and charged with the misdemeanor offense of driving while intoxicated. The day after his arrest, Mr. Broadway told the court that he could not afford a lawyer and asked the court to appoint a lawyer to defend him.

Mr. Broadway was self-employed, working odd jobs to make money. While Mr. Broadway had “liquid assets” worth \$5,700, his monthly income was only \$600, and he was behind on his bills. Under the county indigent defense plan, Mr. Broadway's income qualified him for appointed counsel, but his assets were higher than the plan's poverty guidelines.²⁷

The judge denied Mr. Broadway's request for an attorney. There was no written explanation of this decision. The court order did not discuss Mr. Broadway's living expenses, the cost of hiring a lawyer, or how Mr. Broadway would live if he hired one.

At trial, Mr. Broadway represented himself. He was convicted, and the judge sentenced him to 90 days in jail and a \$2,000 fine.²⁸



Restrictive Income-Based Presumptions

Almost all Texas counties use the Federal Poverty Line (FPL), either alone or in conjunction with some other measure, to determine who is presumptively entitled to a court-appointed attorney. But the FPL is an outdated metric. Developed in 1965, the FPL was set at three times the cost of an “economy food plan” for “emergency use” that “relied heavily on dry beans and peas, potatoes, and grain products.”²⁹ While it has been adjusted annually to reflect consumer price changes, the FPL has not kept pace with the rising cost of living, does not account for local cost-of-living differences, and is based on flawed assumptions about family finances.³⁰

IN FOCUS

The Federal Poverty Line (FPL) was set in 1965 at three times the costs of an “emergency use” food plan.



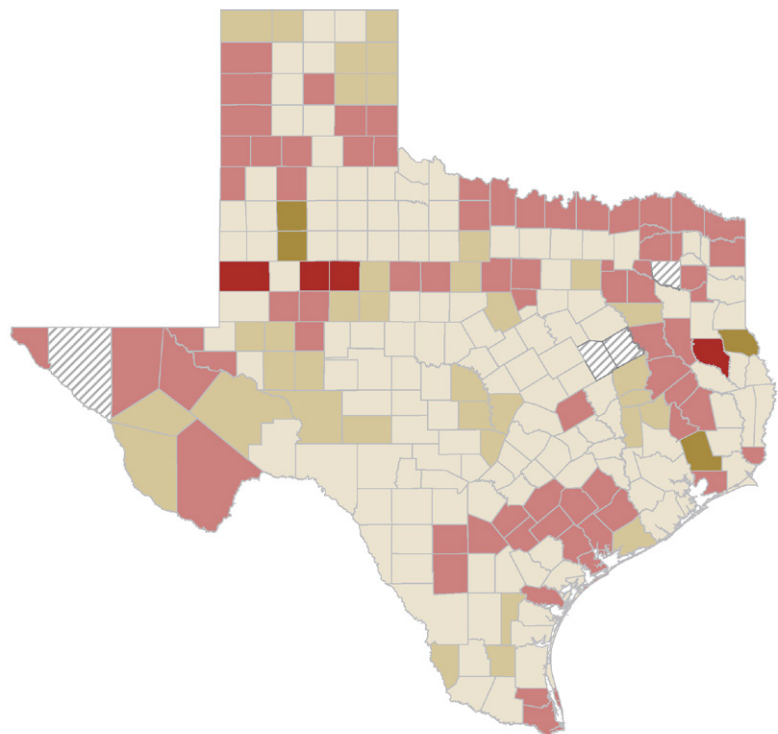
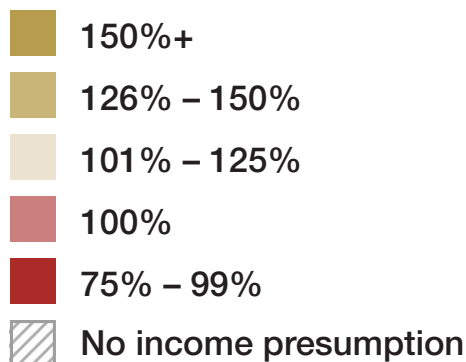
\$12,490

2019 Federal Poverty Line

DATA SNAPSHOT

Income-based presumptions of indigence vary widely across Texas

FPL percentage used to presume indigence, 2019



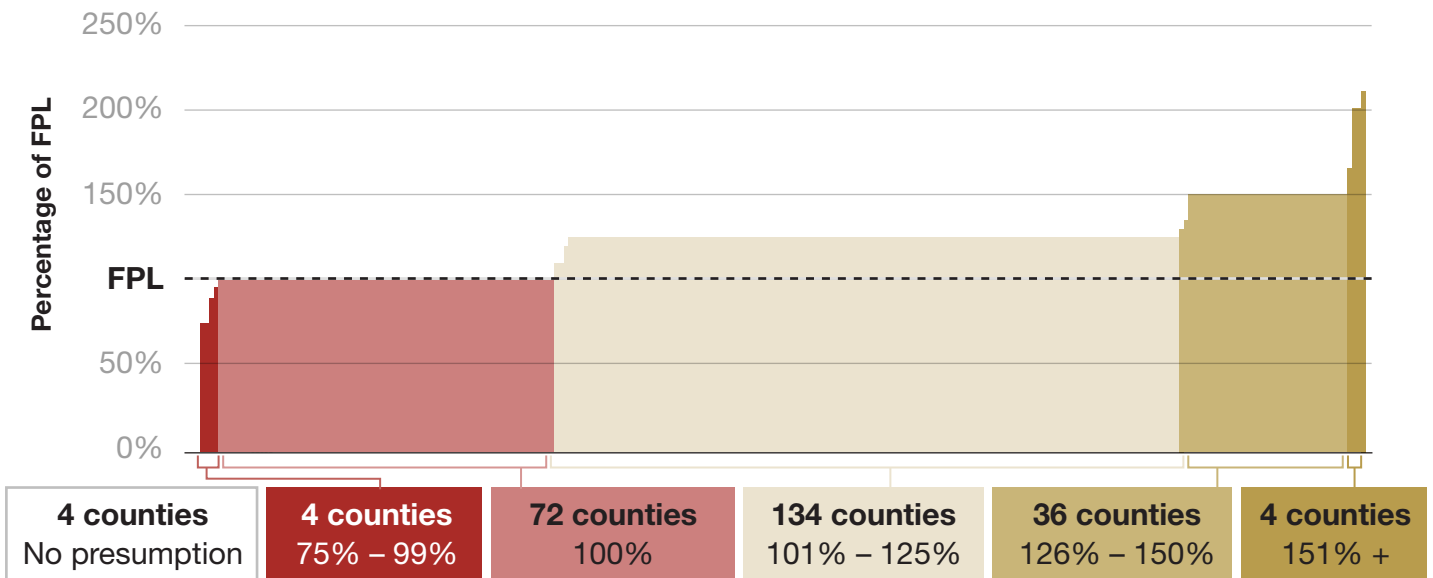
In 2019, for a single person with no dependents, an income of \$12,490 was the FPL's financial dividing line, separating those who were poor from those who were not.³¹ That year, 76 Texas counties restricted presumptive income-based eligibility for court-appointed misdemeanor counsel to people whose incomes were at—or even lower than—the FPL.

Two counties—Borden and Scurry—set the limit at 75% of the FPL. In those counties, a single parent of three children who made more than \$19,314 per year might qualify for SNAP and WIC assistance but a judge could not use either their income or the fact they qualify for those programs alone to presume that they needed court-appointed counsel.

DATA SNAPSHOT

Presumptions of indigence based on income vary widely across Texas

Texas counties, arranged by FPL percentage used to presume indigence, 2019



In 76 counties, income-based presumptions of indigence are set at, or below, the FPL

Turning a Blind Eye to Expenses

Income and assets alone are not sufficient measures of whether a person needs a court-appointed lawyer. Whether a person can truly afford an attorney also depends on their expenses: can that person hire an attorney and still pay for necessities, like food, housing, transportation, childcare, medical bills, utilities, and insurance?

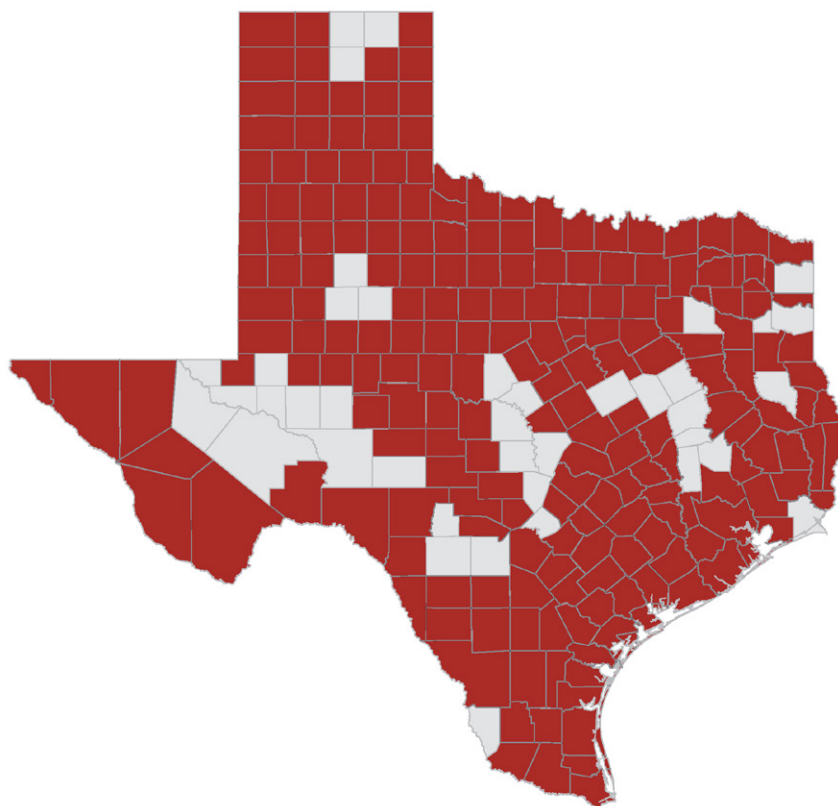
But in 214 Texas counties, a necessary expenses assessment—a comparison of a person’s income and assets to their necessary expenses—is not part of the calculus that assigns a presumption of indigence.

DATA SNAPSHOT

Few county plans consider necessary expenses when making presumptions of indigence

County plan considers necessary expenses

■ Yes (40) ■ No (214)



Immediately after an arrest, it is hard to predict how much a vigorous defense will cost. And until a lawyer has met the defendant, investigated the facts, reviewed the evidence, and interviewed any witnesses, no one knows whether a case will also require professional investigators, forensic analysts, psychiatric consultations, or other expert services.

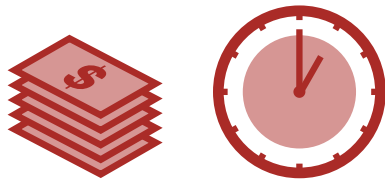
Certainly, a good defense is not cheap. In 2020, the average Texas lawyer charged more than \$250 per hour.³² People who already struggle to cover their basic living expenses may not have enough left over to hire an attorney and fully fund a zealous defense.

DATA SNAPSHOT

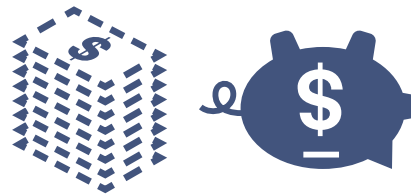
Many people have too little money in the bank to afford a lawyer

In 2020, the average Texas lawyer charged more than **\$250 an hour.**³³

Meanwhile, **35% of adults in the U.S. cannot cover \$400 in emergency costs.**³⁴



\$250+



\$400

Cruel Realities in a Time of Crisis

In the aftermath of an arrest, a person may feel shocked, dismayed, ashamed, scared, or confused. If they cannot afford a lawyer, and they want the legal help that *Gideon* promises, they must prove that they qualify for a court-appointed attorney. But applications can be overwhelming. Often, they require a person to complete complex financial forms and produce detailed records.

Texas law requires that local courts provide people with assistance in completing their applications for appointed counsel. However, in some counties, that assistance is not available.³⁵ In other counties, the promised help is too little or too late.³⁶ Yet an incomplete application can doom a request for appointed counsel.

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Homeless, Disabled, and Denied the Assistance of Counsel

“A defendant who was arrested for criminal trespass submitted two requests that stated that he was homeless and receiving public benefits from the MHMR [which supports people with mental and developmental disabilities]. His application was denied twice as incomplete.”

Texas Indigent Defense Commission³⁷

Deterring People from Seeking *Gideon's* Promise

In the daunting process of applying for a court-appointed attorney, some counties may require an arrested person to take extraordinary steps. For example, one 2018 application for appointed counsel required an accused person to submit cost quotes from as many as 12 private attorneys.³⁸

In another county, an application ominously warns that if the requested financial records are “not furnished by the date shown below, you are subject to be remanded to jail.”³⁹ There, people who are eligible for a court-appointed lawyer may be too intimidated to even apply. If they can go to jail for an incomplete application, will they even ask for the help that *Gideon* promised?

IN FOCUS

Financial Affidavit, Jefferson County, 2020⁴⁰

OFFICIAL NOTIFICATION
FINANCIAL AFFIDAVIT

IN ORDER TO COMPLETE THE APPLICATION FOR A COURT APPOINTED ATTORNEY
THE FOLLOWING INFORMATION MUST BE FURNISHED WITH NO EXCEPTIONS:

*** PICTURE ID ***	_____
Rent or mortgage receipts	_____
Assets	_____
Current credit card balance(s)	_____
Medical bills	_____
Other personal bills owed	_____
Defendant employment	_____
Spouse employment	_____
W-2 forms for last two years	_____
Current check stub	_____
Checking/Saving acct balance	_____
Dependents	_____
Food Stamps/TANF	_____
Child Support	_____
Unemployment Benefits	_____

IF THE ABOVE INFORMATION IS NOT FURNISHED BY THE DATE SHOWN BELOW,
YOU ARE SUBJECT TO BE REMANDED TO JAIL.

IF THE ABOVE INFORMATION IS NOT FURNISHED BY THE DATE SHOWN BELOW,
YOU ARE SUBJECT TO BE REMANDED TO JAIL.

Tough Decisions for Local Judges

If a person does not presumptively qualify as indigent, most county court judges can still appoint counsel if they decide that hiring an attorney would create ‘substantial hardship’ for the accused and their dependents.

This judicial discretion is a critically important safety net that can keep working Texans from being forced into poverty. Only five Texas counties—Castro, Fort Bend, Hale, Sherman, and Swisher—omit this important opportunity for judicial discretion.⁴¹

In interviews with Deason researchers, Texas judges expressed their commitment to honoring *Gideon*’s promise. They want to provide a court-appointed lawyer to every accused person who needed one. But doing that constitutional math is not always easy.

IN FOCUS

Texas Judges Struggle to Determine Who Has the Right to Court-Appointed Attorney

“ I have experimented with different applications.... I haven’t found a good one yet I always end up asking more questions to get more information than what’s there. [The] one we’re using[,] I really don’t like it. I think I created it myself so I really have no one to blame.”

Anonymous Texas County Court Judge

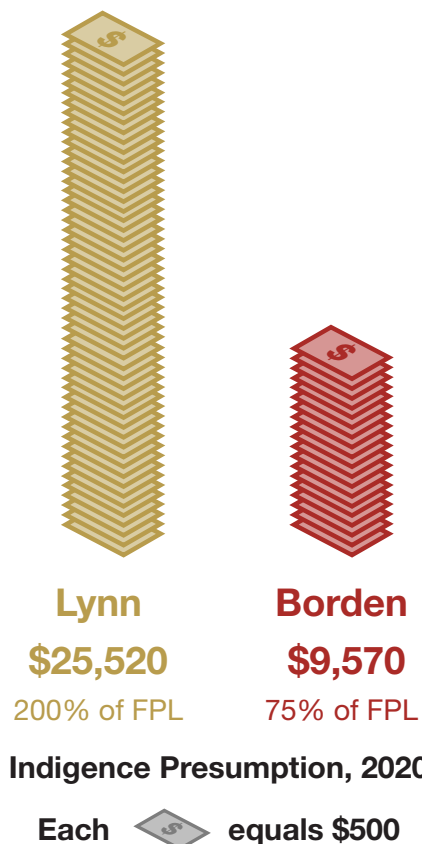
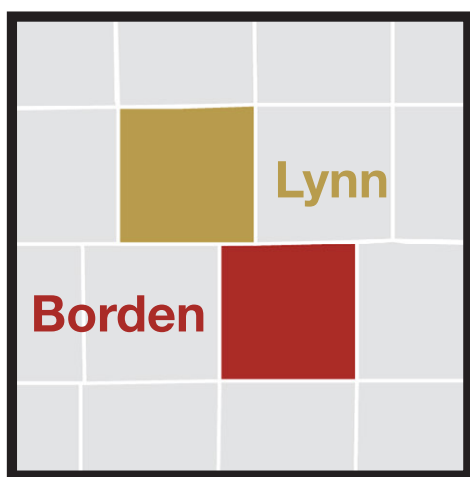
Justice by Geography

Texas' patchwork of policies for appointed counsel creates vast disparities in county eligibility standards. A person might be presumed indigent in one county, but not in another. Indeed, in some regions of Texas, income-based eligibility standards vary so widely that a few miles might make the difference between the presumptive right of a court-appointed lawyer and total denial of *Gideon's* promise.

For example, Borden and Lynn counties share a border, yet their eligibility standards for appointed counsel are miles apart.

DATA SNAPSHOT

Neighboring counties can have very different presumptions of indigence



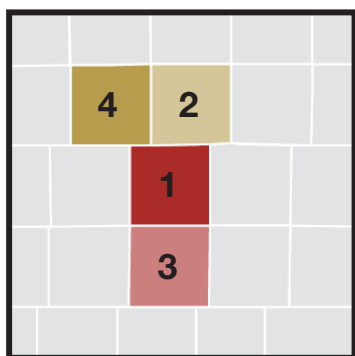
Small Distances, Big Differences

These variations in presumptive indigence standards cannot simply be explained by local economic differences.

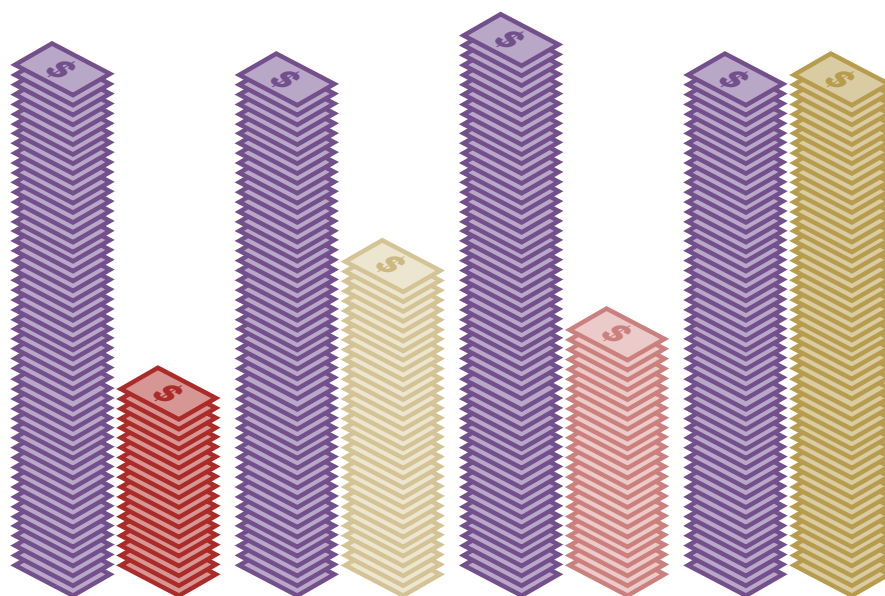
For example, four counties in the Texas panhandle use four different income levels to determine presumptive eligibility for appointed counsel. But there is no correlation between the counties' indigence standards and their respective costs of living.

DATA SNAPSHOT

There is no correlation between county income standards and the local cost of living



Each  equals \$500



	1. Borden	2. Garza	3. Howard	4. Lynn
Cost of Living, 2020	\$25,944	\$25,665	\$27,534	\$25,428
Indigence Presumption, 2020	\$9,570	\$15,950	\$12,760	\$25,520
	75% of FPL	125% of FPL	100% of FPL	200% of FPL

Using Better Methods to Deliver on *Gideon's* Promise



For many people, it would be a struggle to hire a criminal defense lawyer. For some Texans, it is out of the question.

Every accused person is presumed innocent. No Texan should be pushed into poverty simply to defend that presumption. The state's unproven allegations should not force any person to choose between feeding their family and fighting for their freedom.

Fortunately, policymakers can improve Texas' indigent defense plans and bring them closer to honoring *Gideon's* promise.



More Accurate Measures than the Federal Poverty Line

There are more accurate measures of poverty than the Federal Poverty Line.

Tools such as the Self-Sufficiency Standard⁴² or the Living Wage Calculator (LWC)⁴³, offer a local estimate of the true costs of living. For example, the LWC's assessment of costs includes "a family's likely minimum food, childcare, health insurance, housing, transportation, and other basic necessities (e.g., clothing, personal care items, etc.)."⁴⁴ Using those costs, the LWC gives local estimates of how much income a person needs to live.

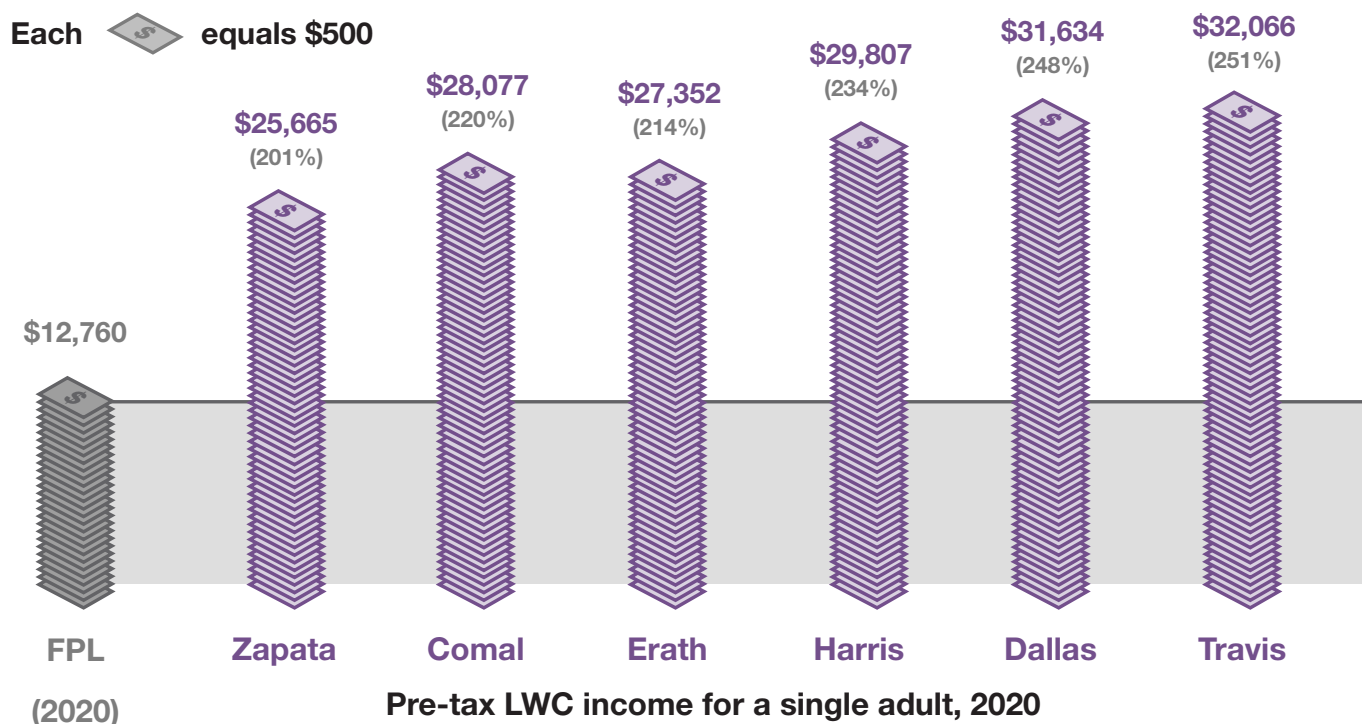
IN FOCUS

Modern measures like the **Living Wage Calculator (LWC)** are more accurate measures of the cost of living.



DATA SNAPSHOT

Living Wage Calculator versus Federal Poverty Line



Comparing the Living Wage Calculator to the Federal Poverty Line

The Federal Poverty Line falls far below the Living Wage Calculator's estimated cost of living for every Texas county.⁴⁵ Depending upon the percentage of FPL that a county uses to set its indigence presumption, the difference between the real cost of living and the county's income-based indigence presumption can be as great as \$18,874.

DATA SNAPSHOT

LWC far exceeds FPL in every Texas county



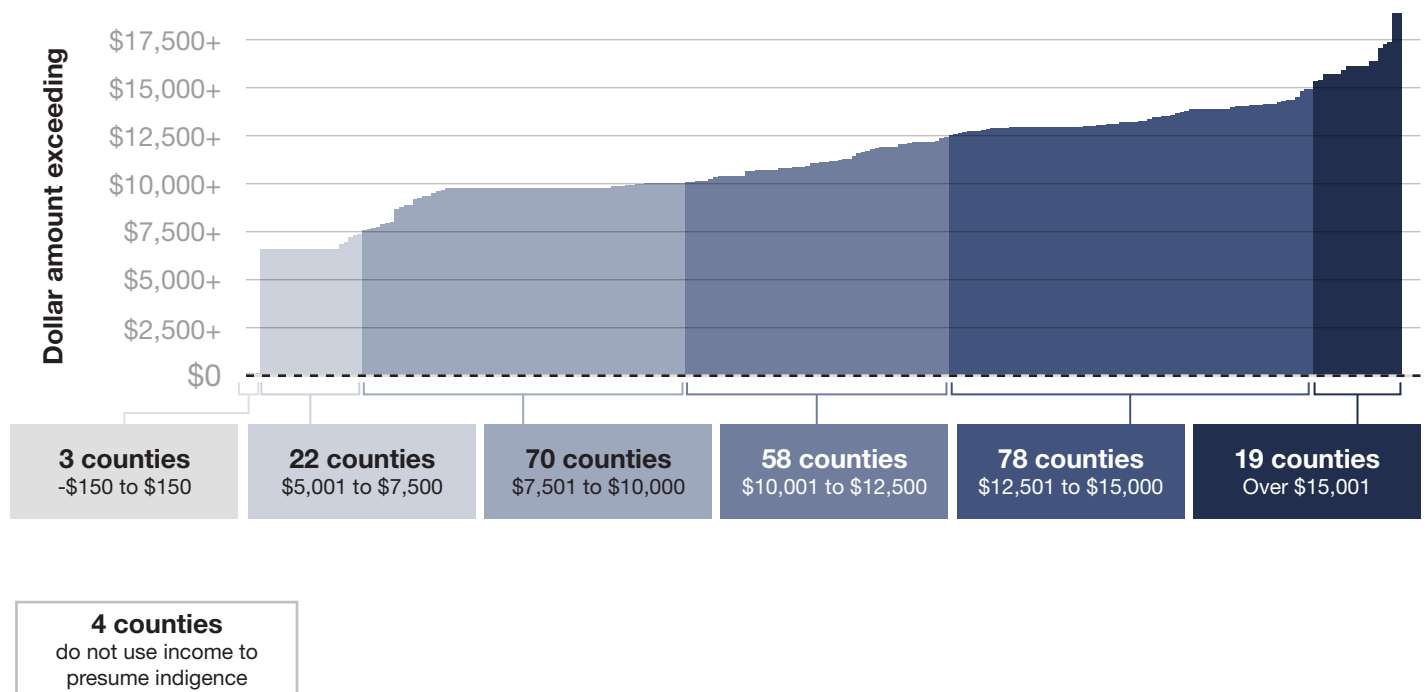
Comparing the Living Wage Calculator to Income-Based Indigence Standards

In 2020, only two Texas counties—Lynn and Lubbock—used income standards that met or exceeded the LWC estimate for their county.⁴⁶ In every other county, people who did not earn enough to afford basic living expenses might have had to prove to a judge that they could not afford a lawyer.

DATA SNAPSHOT

The FPL-based income standards fall far below an LWC income in almost all Texas counties

Texas counties, arranged by the amount the county's LWC exceeds its income indigence presumption, 2020



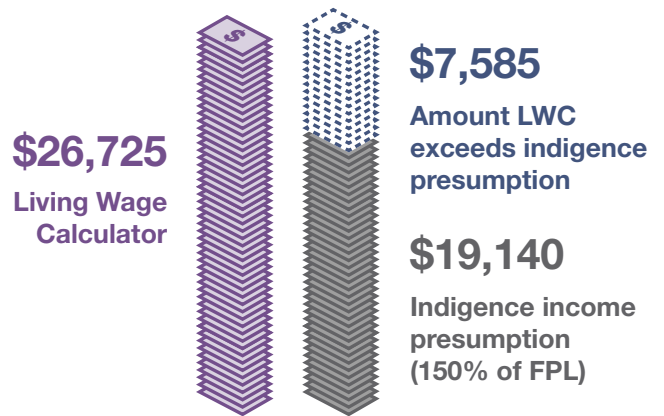
DATA SNAPSHOT

In 2020, in most Texas counties, income-based indigence standards fell far below the cost of living

In Chambers County, a single person with an income over the FPL of **\$12,760** was not presumed to be indigent. But according to the LWC, they needed **\$29,807**—more than double the FPL—just to make ends meet.



In Matagorda County, a single person earning more than 150% of the FPL—**\$19,140**—was not presumed to be indigent. But according to the LWC, they needed **\$26,725** to make ends meet.



In 2020, two Texas counties set income eligibility standards that were comparable to the cost of living

Lubbock County used the Living Wage Calculator to set its indigence income presumption.



Lynn County set a FPL indigence income presumption that slightly exceeded the LWC's calculation of a basic living wage.



Holistic Assessments of the Ability to Hire an Attorney

Determining whether a person qualifies for a court-appointed lawyer is an extremely important decision. It could be the difference in whether a person maintains their freedom or goes to jail. Judges should consider multiple factors when making such a consequential ruling.

Standing alone, more accurate measures of the cost of living are not enough to fully assess a person's eligibility for appointed counsel. And a list of their assets cannot fully capture their ability to pay for their living expenses, much less the cost of a lawyer.

Indigent defense plans should require that a judge compare a person's assets and income to their essential living expenses and the cost of a lawyer. Yet, in 2020, only 40 Texas counties required judges to conduct a necessary expenses analysis.

When judges evaluate a person's finances, certain assets should be protected. But in most Texas counties, there are no limits to the assets that a judge can consider.

Without such a policy, people with limited assets may face a cruel choice: Will they sacrifice everything that they own—selling the car they drive to work or emptying their retirement savings—simply to hire a lawyer? Or will they confront a hostile legal system without anyone to represent them?

IN FOCUS

Judges should consider more than income when determining indigence



Recommendations

To deliver *Gideon's* promise, policymakers in Texas should:



Establish statewide minimum standards for determining indigence.

Statewide minimum standards would guarantee that no Texan stands alone in court because they are too poor to afford a defense attorney. The statewide standards should require counties to use financial metrics that accurately calculate the cost of living and the high cost of hiring a lawyer.



Presume that people who are incarcerated and people who qualify for welfare are entitled to a court-appointed attorney.

Incarcerated people cannot earn a meaningful income and people who qualify for welfare are already unable to meet their basic needs. There should be a rebuttable presumption that these people are entitled to court-appointed counsel.



Use more accurate measures of indigence.

The Federal Poverty Line is an outdated and inadequate measure. Counties should use measurement tools like the Living Wage Calculator—tools that are up-to-date and better estimate local costs of living.



Protect an accused person's essential assets.

Eligibility standards for appointed counsel should protect assets that are necessities of life. For example, courts should not consider a person's sole means of transportation or their emergency savings as assets that can be weighed against their need for appointed counsel.



Holistically assess a person's income, assets, and expenses, including the high cost of a defense lawyer.

County plans should require an *individualized* assessment of need, weighing a person's income and assets against their necessary expenses, like food, rent, and large medical bills. And because hiring a lawyer can completely change a person's financial status, county plans must make that cost an essential part of a judge's decision.

Conclusion

With common sense and compassion, Texas can honor the Sixth Amendment and keep *Gideon's* promise.

The Texas Indigent Defense Commission should establish fair standards and policies for determining an accused person's eligibility for court-appointed counsel. By adopting statewide guidelines, TIDC can minimize the disparities in county indigent defense policies. And with smart policy decisions, TIDC can guarantee that Texas counties honor *Gideon's* promise of a fair fight for every accused person—rich or poor.



ENDNOTES

1. This report only addresses representation by counsel in misdemeanor cases heard in Texas county courts.
2. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)
3. *Alabama v. Shelton*, 535 U.S. 654, 660 (2002)
4. Tex. Penal Code Ann. § 12.21 (2019)
5. Tex. Penal Code Ann. § 12.22 (2019)
6. Tex. Penal Code Ann. § 12.23 (2019)
7. See Annual Statistical Report for the Texas Judiciary, Fiscal Year 2020, at 14.
8. When counting both pre-trial detainees and people serving sentences, Texas jails incarcerated an average of 6,770 people per month on misdemeanor charges. Data on file with the Deason Center retrieved from <https://www.tcjs.state.tx.us/historical-population-reports/#157070419432399-28247976-1a5b>.
9. 2019 Statistical Report, at 6, *Texas Dep't of Criminal Justice*
10. TX LOCAL GOVT § 87.031
11. TX GOVT § 62.102
12. TX PENAL § 46.04
13. See generally, The National Inventory of Collateral Consequences of Conviction.
14. TX FAMILY § 262.1095
15. 8 USC 1227(2)
16. Relation of crimes to specific licenses, *Texas Dep't of Licensing and Regulation*
17. Texas Fair Defense Acts 2001, 77th Leg. p. 1800, ch. 906.
18. TX GOVT § 79.034
19. Plans on file at the Deason Center
20. EFFECTIVE INDIGENCE SCREENING, *Texas Indigent Defense Commission* at 1 (Sept. 2015); Chemerinsky, E., Lessons From Gideon, 122 *Yale L.J.* 2676, (2013); Spangenberg, R. L., Wilson, R. J., Smith, P. A., & Lee, N.W., Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures, U.S. Department of Justice (Sept. 1986); Backus, M. S. & Marcus, P., The Right to Counsel in Criminal Cases, a National Crisis, 57 *Hastings L.J.* 1031 (2006); Fabelo, T., What Policymakers Need to Know to Improve Public Defense Systems at 7, *Harvard University John F. Kennedy School of Government* (2001); Gross, J. P., Gideon at 50: A Three-Part Examination of Indigent Defense in America, *National Association of Criminal Defense Lawyers* (2014); Eligible for Justice: Guidelines for Appointing Defense Counsel, *Brennan Center for Justice* (Sept. 2008). ABCs
21. *Id.*
22. *Id.*
23. EFFECTIVE INDIGENCE SCREENING, *Texas Indigent Defense Commission* (Sept. 2015), at 1
24. TX CRIM PRO Art. 1.051
25. TX CRIM PRO Art. 26.04
26. *Broadway v. State*, 2018 WL 1770567, at 1 (Tex.App.-Austin, 2018)
27. Guidelines on file at the Deason Center

28. Ultimately, Mr. Broadway served 18 months of “community supervision.” *Broadaway v. State*, 2018 WL 1770567, at *1 (Tex.App.-Austin, 2018)
29. Cofer, E., Grossman, E., & Clark, F., *Family Food Plans and Food Costs*, *United States Department of Agriculture* (1962)
30. Gross, J., *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 2 *WASH & LEE L. REV.* 70 (2013): 1173; Fisher, G., *Basic Needs Budgets in Policy and Practice*, in *Minimum Income Standards and Reference Budgets: International and Comparative Policy Perspectives*, ed. Deeming, C. (Policy Press, 2020); Fisher, G., *The Development and History of the Poverty Thresholds*, *Social Security Bulletin* 55, no. 4 (1992): 3–14.
31. *2019 Poverty Guidelines*, *U.S. Dep’t of Health and Human Services*. The FPL increased by \$4,420 for every additional person in a household in 2019.
32. *2020 Legal Trends Report*, Clio. (Appendix A.)
33. *Id.*
34. *Report on the Economic Well-Being of U.S. Households in 2020*, *Board of Governors of the Federal Reserve System*
35. TX CRIM PRO Art. 15.17
36. EFFECTIVE INDIGENCE SCREENING, *Texas Indigent Defense Commission* (Sept. 2015), at 2;.
37. *Second Follow-up Policy Monitoring Review of Deaf Smith County’s Indigent Defense Systems July 2020*, *Texas Indigent Defense Commission*
38. *Follow-up Review of Smith County’s Indigent Defense Systems*, *Texas Indigent Defense Commission* (2018) at 8-9
39. *Id.*, at Appendix B.
40. *Id.*
41. In 249 counties, a judge can use the ‘substantial hardship’ test to find that a person is utterly unable to afford appointed in counsel. In Hill County, a judge can use the ‘substantial hardship’ test to find a person “partially indigent.”
42. See <https://selfsufficiencystandard.org/the-standard/overview/>. The Self-Sufficiency Index was developed by the Center for Women’s Welfare, at the University of Washington’s School of Social Work and “defines the income working families need to meet their basic necessities without public or private assistance” and includes “housing, child care, food, transportation, health care, miscellaneous expenses (clothing, telephone, household items), and taxes (minus federal and state tax credits) plus an additional calculation for emergency savings” in its calculations.
43. Glasmeier, A., *About the Living Wage Calculator*, *Massachusetts Institute of Technology*.
44. *Id.*
45. *Id.* “The living wage model generates a cost of living estimate that exceeds the federal poverty thresholds.”
46. In 2020, Tarrant County used the LWC to set indigence standards only in District court, and not in County Court.

RESEARCH METHODS

To prepare this report, we analyzed plans for determining eligibility for appointed misdemeanor counsel in each of Texas' 254 counties. The data in this report refer only to plans for representation in county courts, which handle misdemeanor cases. We also gathered Living Wage Calculator (LWC) data for each county from livingwage.mit.edu. Quotations attributed to judges in this report are from the transcripts of forty-six interviews conducted with local officials in twenty-three rural Texas counties in 2020 and 2021.

We reviewed county plans for representation as they stood on December 31, 2019. In our review, we coded what those plans said about 'presumptions' of indigence—that is, the conditions under which a person would be presumed to be indigent and therefore entitled to appointed counsel. We focused on presumptions related to a person's incarceration status, their welfare status, the assets they owned, and their income. We also collected information on whether plans included provisions that considered 'necessary expenses,' and/or 'substantial hardship'. Plans that indicated that they operated across several counties were coded as 'multi-county' regional plans (n=33).

Our coding scheme deemed plans to contain an 'incarceration presumption' if they stated that a person would be entitled to appointment of counsel if currently incarcerated, and that their incarceration status was sufficient standing alone (n=169). Plans stating (for example) that an incarcerated person would be entitled to appointment of counsel *only if they owned assets less than a specific amount* would *not* have been coded as containing an incarceration presumption. Similarly, plans were coded as containing a 'welfare presumption' if they stated that a person eligible for or receiving welfare benefits would be presumed entitled to appointment of counsel, and that their welfare status was sufficient standing alone (n=233).

We defined plans as considering defendants' assets if they used a person's assets in any part of their presumption of indigence (n=67). Such plans typically either stated that a person's assets could only be considered if they exceed a certain dollar amount, or that a person should be presumed indigent if their assets were below such an amount.

We identified income presumptions in 250 counties. Just four county plans did not mention income as a method for determining indigence (Freestone, Hudspeth, Limestone, and Wood). Most plans stated that any person with an income below some multiple of the Federal Poverty Line (FPL, e.g. 125%) would be presumptively entitled to counsel. Where plans used a dollar amount instead of a percentage of FPL as an income presumption (for example, \$1,000/month), we translated this into a percentage of the FPL as follows: \$1,000/month is equivalent to \$12,000/year, which was equal to approximately 96% of the FPL in 2019 (\$12,490). In Tarrant and Lubbock counties, the 2019 income presumption standards were set at the level of the Living Wage Calculator (LWC), but we could not find the dollar amount for that standard in that year. Accordingly, we substituted 2020 data in our 2019 analyses for Tarrant and Lubbock counties only.

We also gathered income presumption data for December 31, 2020. Between 2019 and 2020, some counties changed their income presumptions. Cameron County increased its presumption from 100% of FPL to 125% of FPL. Tarrant County, which used the LWC in 2019, switched to a 125% of FPL standard in 2020. Counties using specific dollar amounts generally adjusted them annually, though in two counties—Gaines and Nacogdoches—the plans did not

adjust the amount between 2019 and 2020. Because the dollar threshold used by these counties remained the same while the Federal Poverty Line increased, the income standard in these counties went down very slightly when calculated as a percentage of the FPL.

We defined a plan as considering ‘necessary expenses’ if it contained language stating that a person would be eligible for appointment of counsel if the difference between their income and ‘necessary expenses’ was less than a certain amount (n=40). We defined plans as considering ‘substantial hardship’ if the plan contained language that would allow judges to appoint counsel at their discretion if they determined that retaining an attorney would impose such a hardship. Though not all plans used the term ‘substantial hardship’ precisely, we included any plan which allowed judges to depart from the written rules of the plan to make discretionary assignments in this category (n=249).

Plans were coded multiple times to assure data quality. First, two coders independently reviewed each plan and collected data according to the definitions above, producing two identically structured datasets. A third coder compared the datasets produced by the first two, identifying points of agreement and disagreement between them. After verifying a sample of plans where the first two coders agreed, the third coder would examine those where they disagreed more deeply and would make recommendations on how to resolve the disagreements. A fourth coder (the lead author) then did a final complete review of all coding, including making final decisions on resolutions to disagreements identified at previous stages.

We compared our 2020 income presumption data to data gathered from the Living Wage Calculator (LWC) website (which latter data also referred to 2020). The LWC aggregates county-level information on average costs for food, childcare, medical care, housing, transportation, and other expenses, to calculate annual totals for the basic expenses a person needs to live. To compute the total amount of gross income a person would need to cover such expenses, the LWC also accounts for taxation.

ACKNOWLEDGMENTS

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<https://doi.org/10.25172/dc.8>

Authors: Andrew L.B. Davies, Blane Skiles, Pamela R. Metzger, Janelle Gursoy, and Alex Romo

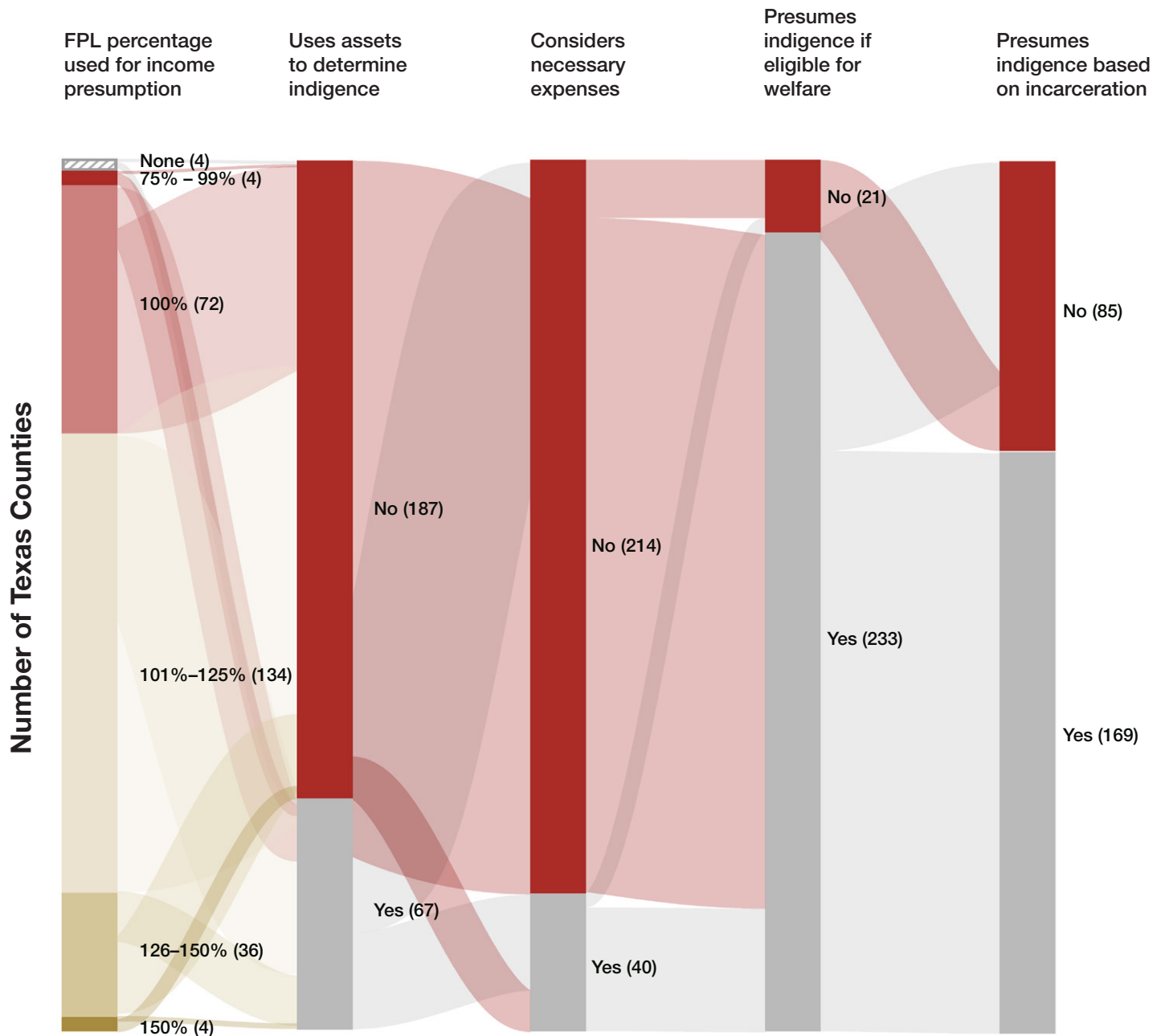
Research Assistance: Gregory Guggenmos, Ainslee Johnson, Valeria Liu, Heather McKinney, Sasha Mohammed, Ashley Nandras, Andrew Neumann, Shelby Peck, Victoria Smiegocki, Sandhya Srinivasa-Narasimhan, Melany Vargas, Jiacheng Yu

Data Visualization and Layout Design: Randy Krum and Jeremy Yingling, InfoNewt.com

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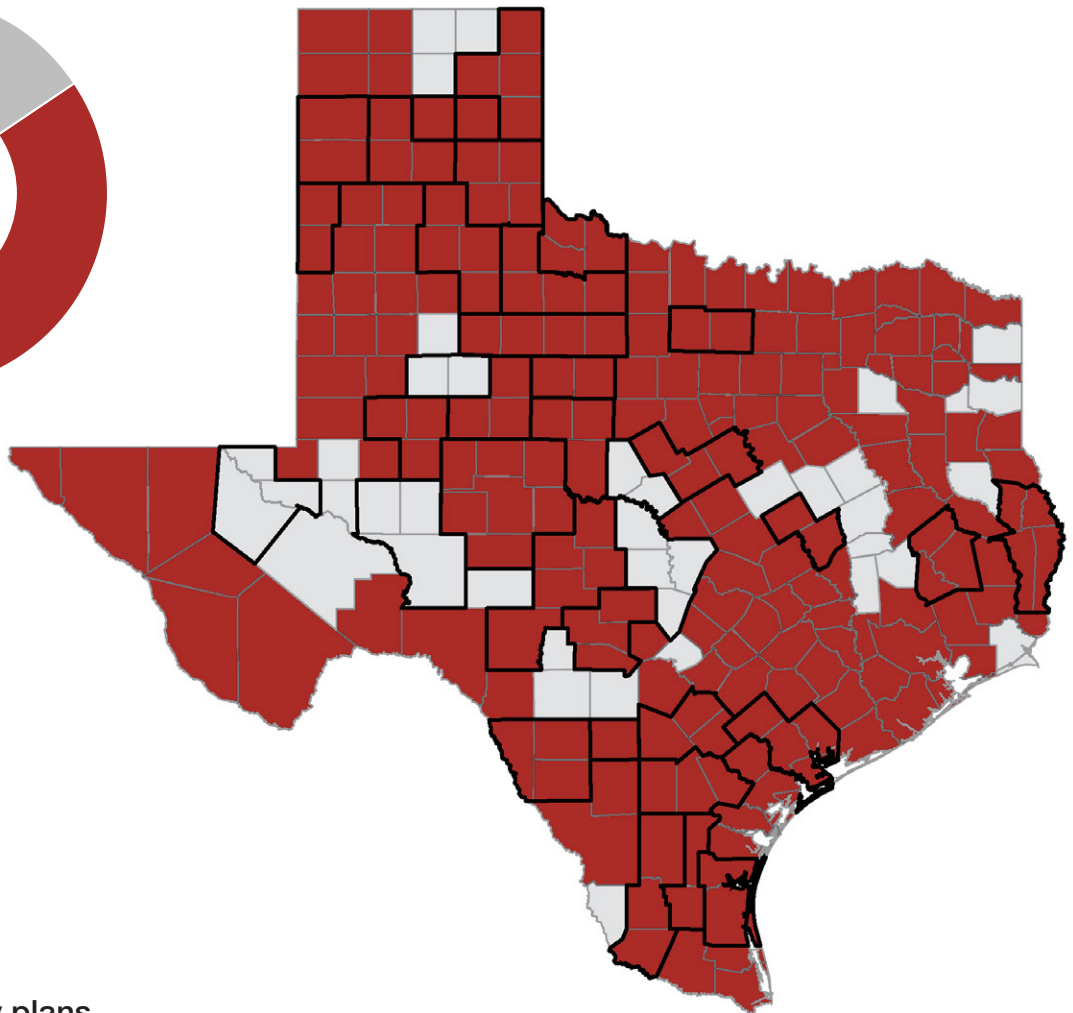
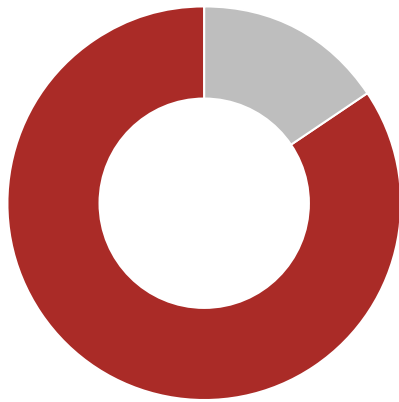
APPENDIX ■ PATCHWORK OF INDIGENCE PRESUMPTIONS



APPENDIX ■ NECESSARY EXPENSES

Does county consider necessary expenses?

■ Yes (40) ■ No (214)



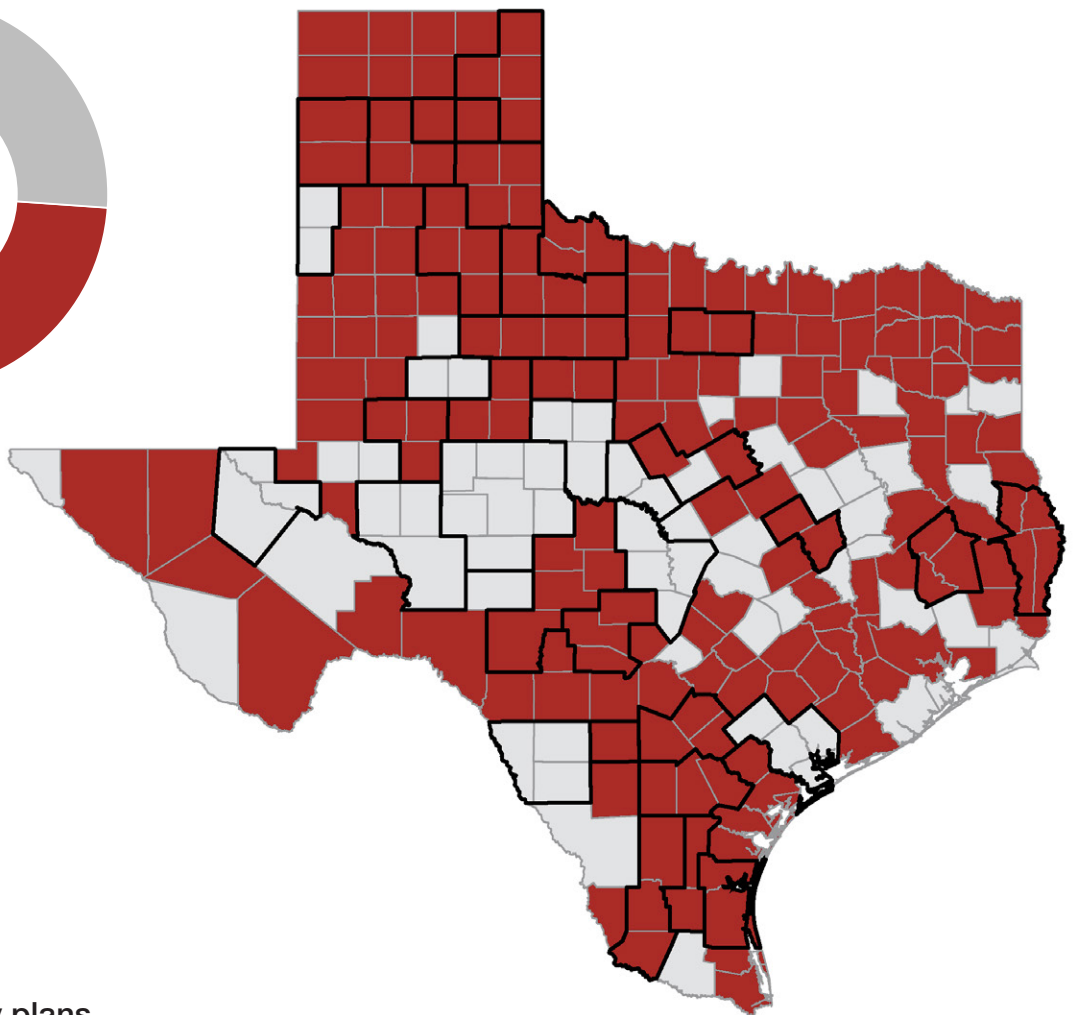
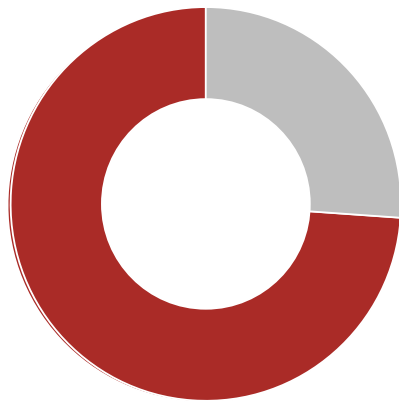
□ Single-county plans

▣ Multi-county plans

APPENDIX ■ ASSETS

Does county use assets to determine indigence?

■ Yes (67) ■ No (187)



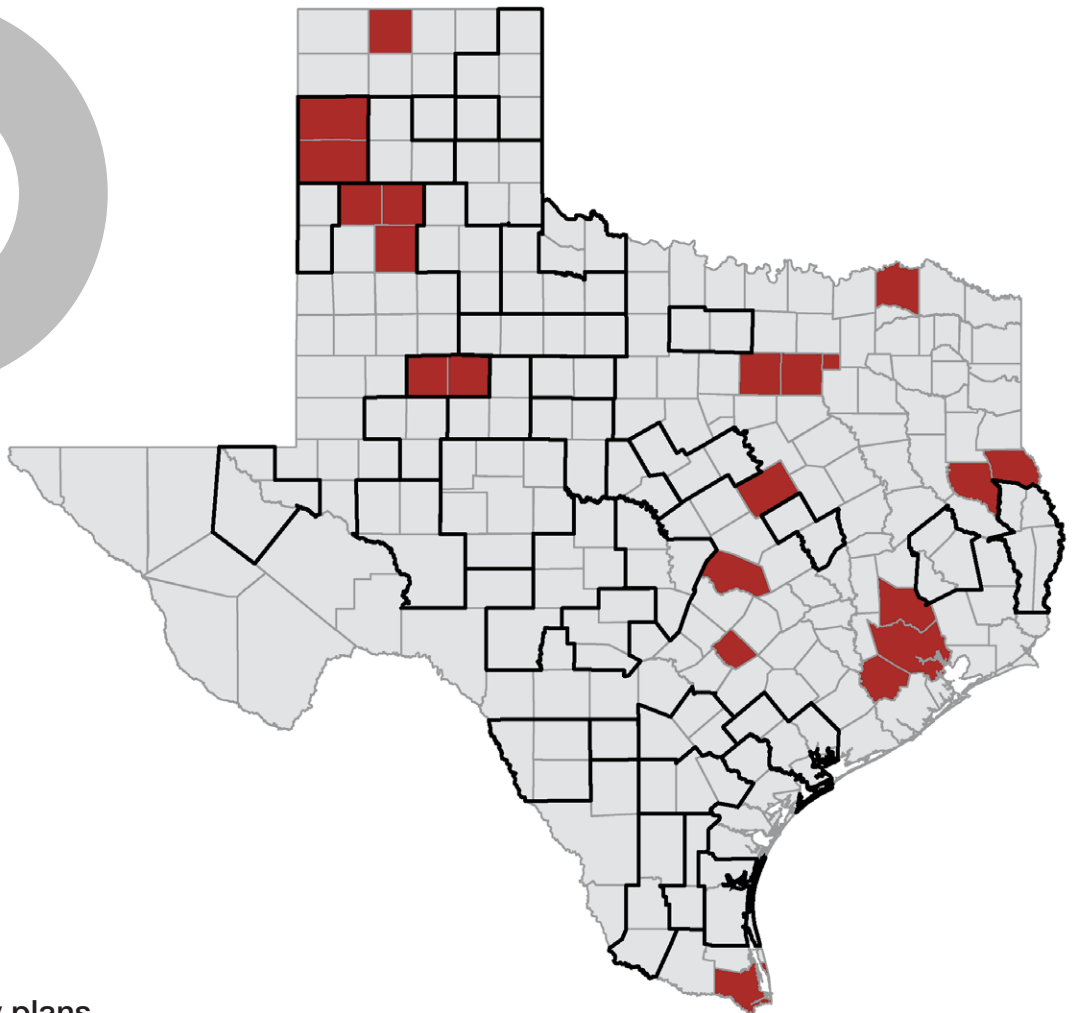
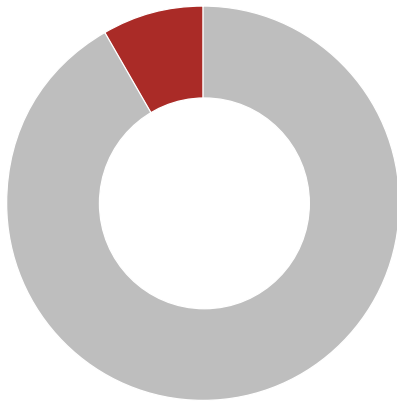
□ Single-county plans

▣ Multi-county plans

APPENDIX ■ WELFARE

Does county presume indigence if eligible for welfare?

■ Yes (233) ■ No (21)



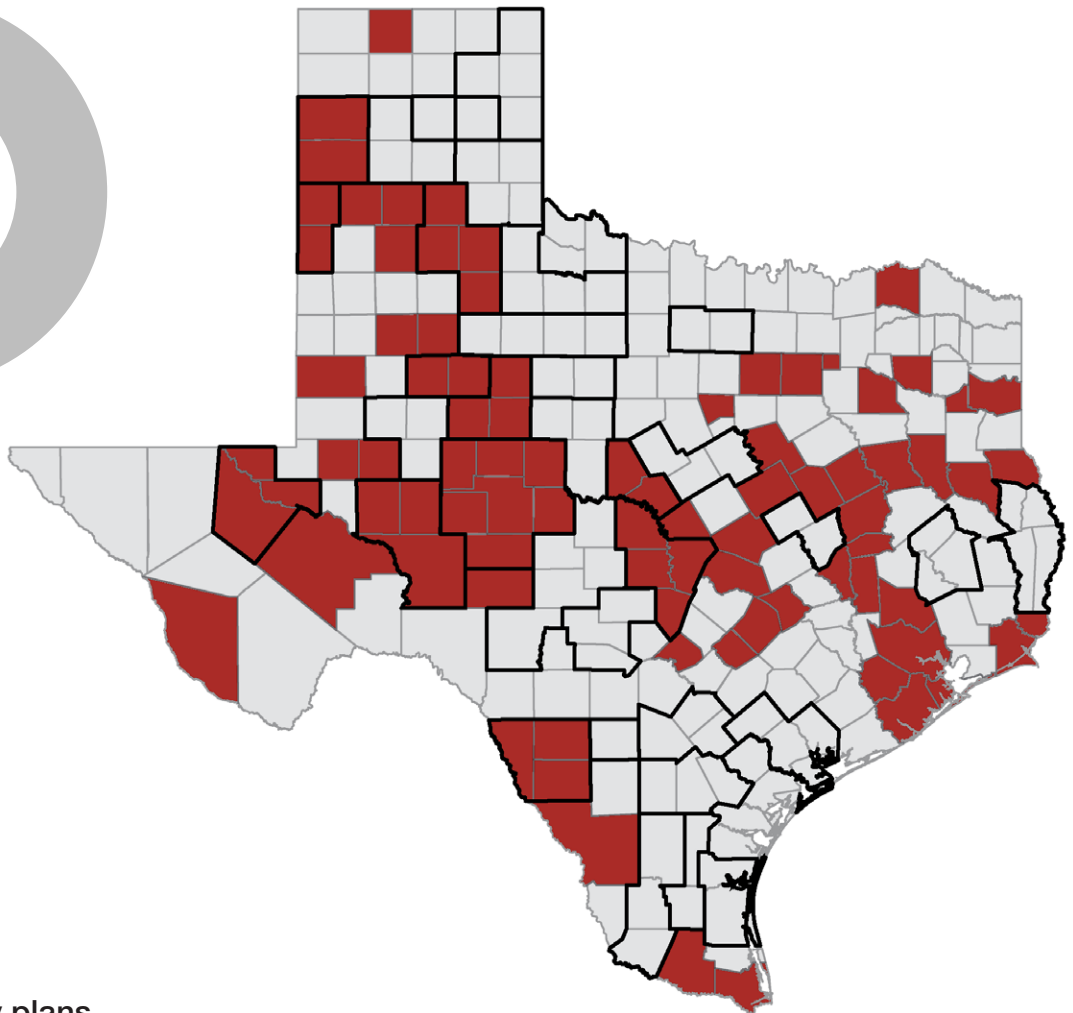
□ Single-county plans

□ Multi-county plans

APPENDIX ■ INCARCERATION

Does county presume indigence based on incarceration?

■ Yes (169) ■ No (85)

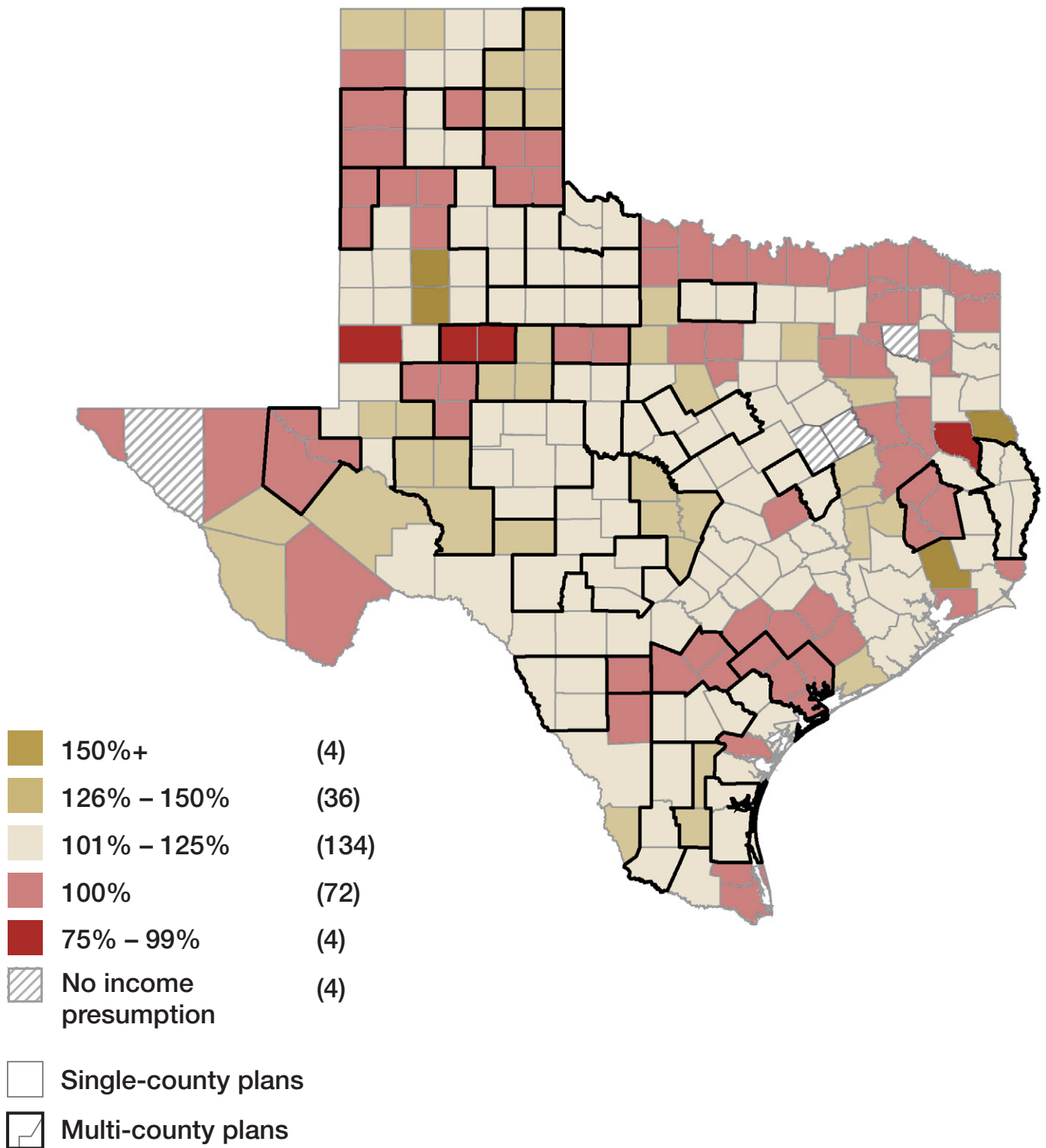


□ Single-county plans

□ Multi-county plans

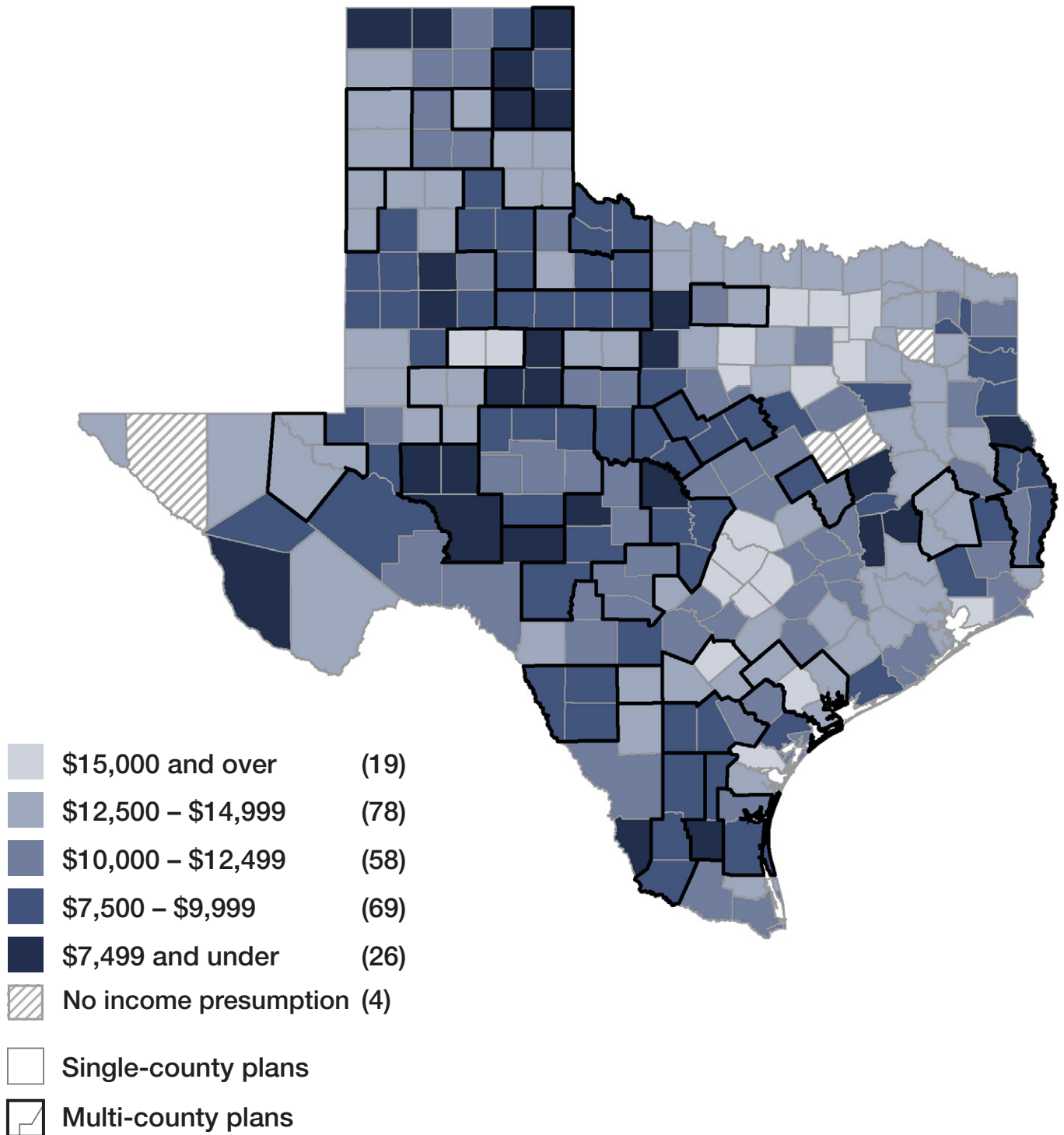
APPENDIX ■ INCOME PRESUMPTION

Federal Poverty Line percentage used to presume indigence, 2019



APPENDIX ■ COST OF LIVING

Amount a county's LWC exceeds in income indigence presumption, 2020



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The Deason Criminal Justice Reform Center takes a Stats and Stories approach to criminal justice reform. The Stats: we collect, analyze, and assess qualitative and quantitative data about our criminal justice system. The Stories: we uncover, recount, and amplify the experiences of people who live and work in that system. Together, these Stats and Stories make a compelling case for compassionate criminal justice reform.

The Sixth Amendment right to counsel is at the heart of the Center's expertise. We study public defense and appointed counsel systems, and advocate for best practices in the delivery of this fundamental right. The Center also studies early-stage criminal process, from a person's first post-arrest court appearance through the prosecutorial decisions associated with screening and charging. These early stages of the criminal process may determine how the case ends. Accordingly, we conduct research and make recommendations about providing accused people with legal help as soon as possible.