

## EDITOR'S INTRODUCTION

### HOW DO WE "DO DATA" IN PUBLIC DEFENSE?

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#### ABSTRACT

This essay introduces the six articles that follow in this collection and assesses what they say about the contemporary state of research in public defense generally. The history of the present burgeoning of interest in this issue is explained by reference to recent concerns to improve data collection within the defense profession and the novel availability of federal funds to do so. Four functional themes are identified from among the present articles, speaking to the implicit purpose of the work: documenting inequity, evaluating policy options, system monitoring, and pursuing a scientific agenda. This diversity of functions that the research seems to perform speaks to the diversity of the defender research community itself and the uses it has for research and data—a diversity which I conclude is important to recognize and preserve even as we emerge from this formative phase into a time where specific research agendas begin to crystallize.

#### I. INTRODUCTION: A BENIGN CONFLUENCE

A watershed moment in how public defenders think about data arrived in the summer of 2012. In late July, the Missouri Supreme Court decided that the Missouri State Public Defender (MSPD) had the right to refuse to represent defendants in order to avoid case overload.<sup>1</sup> This ruling, coming after years of protests and reports

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<sup>1</sup> See *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012). I owe a debt of thanks to Cat Kelly, Missouri State Public Defender, and Steve Hanlon, both of whom reviewed my recounting of this story on very short notice. Of course, errors that remain are my own.

that the system was badly underfunded,<sup>2</sup> was a historic win, purportedly allowing MSPD to regulate its own workload and assure quality representation.

This changed rapidly in October when the state auditor (himself a Harvard-educated lawyer)<sup>3</sup> issued a report declaring not only that the caseload limits MSPD had set for itself lacked any “support or basis,” but also that since “MSPD does not track staff time spent by case type, . . . MSPD lacks detailed information to estimate staff hours per caseload,” and that the agency was therefore “unable to accurately determine the resources needed to manage caseloads.”<sup>4</sup> The Missouri Association of Prosecuting Attorneys announced MSPD’s “unsupported claim of a ‘constitutional caseload crisis’” was “a myth that has been manufactured by misleading caseload statistics.”<sup>5</sup>

The auditor’s conclusions seriously undermined MSPD’s ability to advocate for more resources in the state budget—resources which it nevertheless claimed were badly needed. MSPD quickly recognized that its response to the auditor’s report had to be the immediate requirement that all of its lawyers track all time spent on each case. Working with the American Bar Association (ABA) and RubinBrown, an accounting and professional consulting firm, a report was produced in June 2014 that immediately represented one of the most sophisticated, data-driven analyses of defender workloads to date.<sup>6</sup> Moreover, it validated MSPD’s original position that it was badly overloaded and in serious need of additional resources. Based on the RubinBrown report, the Missouri legislature passed the largest increase in MSPD’s budget in fifteen years,<sup>7</sup> and when the governor vetoed that bill (and many others),

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<sup>2</sup> See, e.g., ROBERT L. SPANGENBERG ET AL., THE SPANGENBERG GROUP, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM: FINAL REPORT 15 (2005), available at <http://sixthamendment.org/wp-content/uploads/2012/08/spangenberg-MO-2005-report.pdf>.

<sup>3</sup> *Schweich to Seek Auditor Post*, SPRINGFIELD NEWS-LEADER (Springfield, Mo.), July 8, 2009, at A3.

<sup>4</sup> THOMAS A. SCHWEICH, MISSOURI STATE AUDITOR’S OFFICE, MISSOURI STATE PUBLIC DEFENDER i (2012), available at <http://auditor.mo.gov/repository/press/2012-129.pdf>.

<sup>5</sup> Press Release, Eric Zahnd, President, Mo. Ass’n of Prosecuting Attorneys, Prosecutors Respond to Audit of the Public Defender System (Oct. 10, 2012), [http://mops.mo.gov/MAPA\\_docs/MAPA%20Statement%20on%20Public%20Defender%20Audit.pdf](http://mops.mo.gov/MAPA_docs/MAPA%20Statement%20on%20Public%20Defender%20Audit.pdf).

<sup>6</sup> See RUBINBROWN, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 5, available at [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/lis\\_sclaid\\_5c\\_the\\_missouri\\_project\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lis_sclaid_5c_the_missouri_project_report.authcheckdam.pdf).

<sup>7</sup> Cassa Niedringhaus, *Legislature Gives, Governor Takes Away Public Defender System Increase*, COLUMBIA MISSOURIAN (June 29, 2014), <http://www.columbiamissourian.com/a/172494/legislature-gives-governor-takes-away-public-defender-system-increase/>.

the legislature overrode his veto.<sup>8</sup> The point that these funds were badly needed had been made.

The Missouri situation made several things clear to defenders across the nation. On the one hand, the broad message seemed to be that we were entering into a new era in which valid, persuasive data and analysis were increasingly going to be expected or required of defenders if they hoped to compete in policy and budget arenas. More narrowly, though perhaps more profoundly, there was also an implication that the data and numerical standards that defenders had relied on for a generation or more would not hold up if subjected to close scrutiny.<sup>9</sup> The entire episode opened a question few had really thought about much before: Do the data and analysis we have really allow us to understand and defend what we do, or are they just not good enough?

Public defenders have always been hungry for data—especially when it comes to budget time—and in some cases they have had it.<sup>10</sup> But after 2012, some in the defender community began to think about “doing data” in a much more concerted way. National defender groups including the National Legal Aid and Defender Association (NLADA), the National Association of Criminal Defense Lawyers (NACDL), and the National Association for Public Defense (NAPD) all touched on the issue in various ways.<sup>11</sup> The NLADA in particular took systematic steps in establishing several initiatives

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<sup>8</sup> Allyssa D. Dudley, *Legislature Overrides Veto of Public Defender Funding*, MO. LAWYERS MEDIA, Sept. 10, 2014, available at 2014 WLNR 25591498.

<sup>9</sup> For a review and thorough critique of the tradition of establishing “caseload standards” in public defense, see NORMAN LEFSTEIN, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE* (2011).

<sup>10</sup> The North Carolina Office of Indigent Defense Services appointed its first director of research in the early 2000s and was for a lengthy period the only defender office with any institutionalized research capacity (to this author's knowledge). Of more widespread significance for at least a generation, however, was the vast output of the Spangenberg Group, a consulting firm which became the default choice for jurisdictions that needed to assess the functioning of their defender program. Their reports were holistic in approach—frequently relying partly on systematic data collection and supplementing it with other approaches—but their role in the story of reform in several states cannot be denied. See Alissa Pollitz Worden, Andrew Lucas Blaize Davies, & Elizabeth K. Brown, *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423, 1459 (2010/2011). The New York State Defenders Association—a statewide professional association of defense lawyers but not a state agency—has had a research capacity intermittently going back at least to the 1980s.

<sup>11</sup> The NACDL undertook the Gideon at 50 Project, a series of three reports—of which two have been released to date—reviewing, respectively, the rates paid to assigned counsel and the rules determining eligibility for assigned counsel nationwide. See *Gideon at 50 Project*, NACDL, <https://www.nacdl.org/gideonat50/> (last visited June 2, 2015). For the work of the NLADA and the NAPD, see *infra* notes 12–13 and accompanying text.

focused specifically on improving defender research capacity.<sup>12</sup> The NAPD issued its Workload Position Paper, “the first national statement on workloads that requires permanent timekeeping as a condition of meaningful workload evaluation and litigation.”<sup>13</sup> Meanwhile, several states, including Texas (and Travis County in particular), New York, and (very recently) Michigan, joined North Carolina by institutionalizing a research capacity in their defender oversight agencies, creating full-time positions (such as the one I occupy) for personnel whose time would be devoted to inquiry into public defense.<sup>14</sup>

At the same time, the Department of Justice’s (DOJ) research and funding arms each began to focus on studying public defense under the leadership of United States Attorney General Eric Holder.<sup>15</sup>

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<sup>12</sup> In 2012, the NLADA, in collaboration with the North Carolina Office of Indigent Defense Services, formed a Research and Data Analysis Committee to address the perceived need to improve defender research capacity. The committee produced two “toolkits” designed to assist defender agencies interested in developing their research capacity. See MAREA BEEMAN, NAT’L LEGAL AID & DEFENDER ASS’N, BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK: A TOOLKIT FOR DEFENDER LEADERS (2014), available at <http://www.nlada100years.org/sites/default/files/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf>; NAT’L LEGAL AID & DEFENDER ASS’N, TOOLKIT: BUILDING IN-HOUSE RESEARCH CAPACITY (2013), available at <http://www.nlada100years.org/sites/default/files/NLADA%20Toolkit%20-%20Research%20Capacity.pdf>. More recently, the NLADA has begun a Defender Data Exchange Project to develop curricula, bringing social science graduate students into defender offices in collaboration with John Jay College of Criminal Justice, and the NLADA is developing an online library of research in defense.

<sup>13</sup> NAT’L ASS’N FOR PUB. DEF., STRONGER TOGETHER: NATIONAL ASSOCIATION FOR PUBLIC DEFENSE 2014 ANNUAL REPORT 13 (2014), available at [http://www.publicdefenders.us/sites/default/files/NAPD\\_annual\\_report\\_2014.pdf](http://www.publicdefenders.us/sites/default/files/NAPD_annual_report_2014.pdf). As well as the Workload Position Paper, the NAPD was responsible in part for a vigorous, organized response to the publication in 2014 of inaccurate spending figures for public defense around the nation, resulting in the revision of those numbers. *Id.* at 25.

<sup>14</sup> For an excellent, and critical, overview of these recent developments, see Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. (forthcoming 2015). This is not really a complete list of individuals doing research work in government agencies in public defense, but rather a list of those whose job description was created with that explicit goal. Erik Stilling at the Louisiana Public Defender Board also has a similar role, for example, and began working in that position in 2008. See *LPDB Staff*, LA. PUB. DEFENDER BOARD, <http://lpdb.la.gov/Board%20%20Staff/Staff.php> (last visited June 2, 2015).

<sup>15</sup> For more details on the history of the DOJ’s commitment to funding research and innovation in indigent defense through its research arm, the National Institute of Justice, see Nadine Frederique, Patricia Joseph & R. Christopher C. Hild, *What Is the State of Empirical Research on Indigent Defense Research Nationwide?: A Brief Overview and Suggestions for Future Research*, 78 ALB. L. REV. 1317 (2014/2015). In 2013, Attorney General Holder announced \$6.7 million in grants for public defense research and programmatic reform. Press Release, Office of Pub. Affairs, Dep’t of Justice, *Attorney General Holder Announces \$6.7 Million to Improve Legal Defense Services for the Poor* (Oct. 20, 2013), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-67-million-improve-legal-defense-services-poor>. This funding, which has since grown, has been distributed toward a series of projects funded variously by the NIJ, including but not limited to its 2012 solicitation for research in the field

This injection of funding created inevitable interest in public defender research in academia. Research universities including American University,<sup>16</sup> Georgetown,<sup>17</sup> and the State University of New York at Albany,<sup>18</sup> as well as research organizations including the Vera Institute of Justice, the Rand Corporation, and the National Center for State Courts,<sup>19</sup> have (among others) all been granted funding to lead projects that promise to break new ground in the empirical understanding of defense.

The results of all of these research-related activities has been the development in very short order of a new community of social scientists, legal scholars, practicing defenders, government employees, and others, all of whom are dedicated to research and data in the arena of public defense. In November 2014, several of us met for the first time at the annual meeting of the American Society of Criminology in San Francisco to present projects we were working on and to share ideas. The panels represented, to my knowledge, the first national meeting devoted solely to research on public defense. Several of the papers in this issue, which is also, to my knowledge, the first ever of its kind devoted solely to the publication of research on public defense, were originally presented at that meeting.<sup>20</sup>

## II. WAYS OF “DOING DATA”

I use the term “doing data” to describe what is going on in public

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of indigent defense and the Bureau of Justice Assistance’s Answering Gideon’s Call initiative. These funding initiatives have been complimented by new research and publications by the Bureau of Justice Statistics examining funding for public defense around the nation and other issues. See, e.g., STEPHEN D. OWENS ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 246683, INDIGENT DEFENSE SERVICES IN THE UNITED STATES, FY 2008–2012—UPDATED (2015).

<sup>16</sup> See BUREAU OF JUSTICE ASSISTANCE CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT AT AM. UNIV., PUBLIC DEFENSE REFORM SINCE GIDEON: IMPROVING THE ADMINISTRATION OF JUSTICE BY BUILDING ON OUR SUCCESSES AND LEARNING FROM OUR FAILURES (2008), available at [https://www.bja.gov/Publications/NLADA\\_PubDefLeadership.pdf](https://www.bja.gov/Publications/NLADA_PubDefLeadership.pdf).

<sup>17</sup> *Indigent Defense Research*, NAT’L INST. JUSTICE, <http://www.nij.gov/topics/courts/indigent-defense/Pages/research.aspx> (last visited June 2, 2015).

<sup>18</sup> Press Release, Univ. at Albany, State Univ. of N.Y., UAlbany, New York Office of Indigent Legal Services Partner to Improve Legal Counsel for the Underserved (Oct. 2, 2014), <http://www.albany.edu/news/54018.php>.

<sup>19</sup> *Indigent Defense Research*, *supra* note 17.

<sup>20</sup> For a full program of the event, see *Panels on Research and Data in Legal Services for the Indigent*, N.Y. ST. OFF. INDIGENT LEGAL SERVICES (Nov. 21, 2014), <https://www.ils.ny.gov/files/flier.pdf>; see also Andrew Davies, *ILS Organizes National Convening of Indigent Defense Researchers*, N.Y. ST. OFF. INDIGENT LEGAL SERVICES (Jan. 2, 2015), <https://www.ils.ny.gov/content/ils-organizes-national-convening-indigent-defense-researchers> (listing panel presentations).

defense for two reasons. First, it does not evoke the scientific elitism that words like “research,” “analysis,” or even “data collection” do. And second, it captures the pragmatic aspect of so much of the research and data collection that actually do go on in public defense. Within the defender community, data collection and research have often been driven by specific informational needs rather than broad policy concerns or—still less—theoretical issues. Often these informational needs come about as the result of crises, as in Missouri. They can also come about in less acute situations, where defenders realize they face problems which are systemic and require broad, careful information gathering of some kind. Either way, it is not uncommon for defenders to find themselves in a position where the need for data is clear, and when this happens their response is often pragmatic. If data are needed to prove a point, and defenders have the time, then defenders “do data.”<sup>21</sup>

All research, and not just that in public defense, typically exists to perform some function. The functions it performs depend heavily on who is doing it and why. Whereas defenders might be driven, for example, by the hope that their work will prove the basis of litigation or media exposure, professional researchers might be driven by other objectives such as testing scientific theories, expanding knowledge, or simply getting publications (like this one).

The fact that this new generation of work in public defense is the result of a benign confluence of both defender interest and federal funding, however, suggests that the number of reasons and opportunities to “do data” in defense have multiplied (as, certainly, has the number of people engaged in it). If that is so, is it also

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<sup>21</sup> See, e.g., THE BRONX DEFENDERS, NO DAY IN COURT: MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS (2013), available at <http://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf> (examining court delay in the Bronx and the resultant pressure to plead guilty on defendants who cannot afford to repeatedly come to court only to have their cases adjourned); Gary King, *A Study of Criminal Cases and Indigent Defense in Four New York Counties* (Sept. 23, 2014) (unpublished report) (on file with author) (reporting the results of a study of administrative data conducted in association with the *Hurrell-Harring* litigation in New York); Leon Neyfakh, *The Bad Cop Database: A Radical New Idea for Keeping Tabs on Police Misconduct*, SLATE.COM (Feb. 13, 2015), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/02/bad\\_cops\\_a\\_new\\_database\\_collects\\_information\\_about\\_cop\\_misconduct\\_and\\_provides.html](http://www.slate.com/articles/news_and_politics/crime/2015/02/bad_cops_a_new_database_collects_information_about_cop_misconduct_and_provides.html) (describing data collection by the New York City Legal Aid Society intended to track police misconduct against their defendant clients); Holly Quan, *San Francisco Public Defender Begins Study of ‘Unconscious Bias’ in Arrests, Judgments for Minorities*, CBS SF BAY AREA (Sept. 23, 2014), <http://sanfrancisco.cbslocal.com/2014/09/23/san-francisco-public-defender-begins-study-of-unconscious-bias-in-arrests-judgments-for-minorities/> (describing data collection done by the San Francisco Public Defender to study racism in the justice system generally).

possible that the functions that research is intended to perform have multiplied as well? And what might that say about the field of public defense research itself? What kinds of distinctive work are being produced by this diversified community of scholars and practitioners, and do we see a single cumulative body of knowledge emerging, or several distinct strands of inquiry driven by different needs? This issue, which brings together six pieces of such research, seems to be an ideal opportunity to think about those questions.

What I hope to do in the remainder of this essay is to introduce the six articles that follow, and to reflect on what can be gleaned from the diversity of functions the research they contain appears to serve. I identify four specific functions among the six pieces that follow, namely: documenting inequity, evaluating policy options, system monitoring, and pursuing a scientific agenda. These are each defined in greater detail, and with reference to the articles in question, below.

The purpose here is not to suggest that any one function for research is more or less valid than any other, of course. Far from it, the validity of each piece is best assessed against the usual set of questions about whether the research methods are sound. Rather, the intent is to learn something about what researchers in the field of public defense are trying to accomplish, and thereafter to learn what this variety of purposes tells us about this burgeoning field of public defense research itself.

### III. THE SIX ARTICLES IN THIS COLLECTION

#### A. *Function 1: Documenting Inequity*

A great deal of research past and present in the field of public defense seeks to document inequities in the provision of defense services and the criminal justice system at large. Caroline Cooper's article, the first in this collection, examines the degree to which public defense providers perceive their offices comport with the basic criteria laid out in the *ABA Ten Principles of a Public Defense Delivery System* (Ten Principles).<sup>22</sup> She reports the results of a

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<sup>22</sup> Caroline S. Cooper, *The ABA "Ten Principles of a Public Defense Delivery System": How Close Are We to Being Able to Put Them into Practice?*, 78 ALB. L. REV. 1193 (2014/2015); see also AM. BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) (listing the Ten Principles).

national survey of public defense providers working in a range of environments and “systems” for providing defense services, which suggest that few such providers feel their offices comport with the Ten Principles. Many defenders indicated they were unfamiliar with the principles themselves until they received the survey. Although some reported that their offices operated in compliance with at least some of the principles, the limited degree to which they also reported their offices were able to achieve the operational benchmarks associated with each principle suggests that even those instances of compliance may only be partial. While over fifty percent report that they operate with “political independence,” for example, fewer than fifty percent report that they are governed by the oversight boards of the type which actually protect such independence. One is left with a clear sense of the patchwork of service provision that exists around the country, its inconsistency, and its chronic and all-too-common failings. Cooper concludes with a call for a specific focus on achieving “independence” in particular, as well as improved education of policy makers and public defense service providers as to what adherence to the Ten Principles actually entails and systematic data collection to support efforts to then apply the Ten Principles nationwide.

A great deal of defender research has the primary function of documenting inequity, and Cooper’s piece fits neatly into this genre. The recent work by the NACDL on how states determine financial eligibility for counsel and compensate attorneys are cases in point;<sup>23</sup> the Spangenberg Group’s slightly older efforts to document differences in spending on defender services across the United States are others.<sup>24</sup> All of this work recognizes that there is an acute deficit of basic descriptive information on the state of public defender services around the United States and seeks to fill that gap. This information thus becomes available to anyone interested in understanding the discrepancies that exist,<sup>25</sup> but even in the absence of such understanding its intrinsic function is in its ability to shed light on inequities that are otherwise obscured from view. There is much work still to be done in this area, and given the

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<sup>23</sup> See *supra* note 11.

<sup>24</sup> See, e.g., HOLLY R. STEVENS, THE SPANGENBERG PROJECT STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES: FISCAL YEAR 2008 (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_scla\\_id\\_def\\_expenditures\\_fy08.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_scla_id_def_expenditures_fy08.authcheckdam.pdf).

<sup>25</sup> For an example employing Spangenberg’s spending data, see Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *State Politics and the Right to Counsel: A Comparative Analysis*, 43 LAW & SOC’Y REV. 187 (2009).

highly federated nature of defender services around the nation developing a full, national portrait of those services on almost any dimension is very challenging indeed.

*B. Function 2: Evaluating Policy Options*

Public defense researchers are also acutely interested in understanding which approach to doing defense actually results in the best outcomes. Two of the pieces in this collection seek to fulfil this function. The first, by Cynthia Lee, Brian Ostrom, and Matthew Kleiman, describes how “holistic defense”—an approach to representation that goes beyond addressing only the client’s instant criminal case—could be evaluated systematically for its purported benefits.<sup>26</sup> The authors begin from the stated principles of holistic defense in the words of its devisors and go on to develop a “program theory” describing hypothetical links between the observable features of holistic programs—such as their focus on the collateral consequences of conviction—and case and client outcomes. It is a remarkable intellectual feat to transform the principles behind defender programs in this developing professional area into a set of propositions about their impact that could be tested empirically. Several teams across the country are presently undertaking projects on the impact of holistic defense. All involved would be remiss if they did not review Lee, Ostrom, and Kleiman’s work first.

Erin York Cornwell’s piece also addresses the impact of defender services on case outcomes, though in her article she compares privately retained and publicly funded lawyers on the results they obtain for their clients at jury trials.<sup>27</sup> Unlike much prior work, which has focused largely on cases resolved by plea and has tended to be quite equivocal on the matter of whether private or public defenders obtain better outcomes, her results suggest defendants represented by public defenders were about twice as likely to be convicted by a jury as those represented by privately retained counsel. When judges in the study were asked whether they thought defendants were guilty, however, they showed no such favoritism and instead (in a remarkable picture of judicial sagacity) seem to have been swayed almost entirely by the evidence presented. York Cornwell wonders whether there are differences

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<sup>26</sup> Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215 (2014/2015).

<sup>27</sup> Erin York Cornwell, *The Trials of Indigent Defense: Type of Counsel and Case Outcomes in Felony Jury Trials*, 78 ALB. L. REV. 1239 (2014/2015).

between the ways these attorneys present their case, their relationships with others in the courtroom, or residual differences in the kinds of cases they receive for which she could not account. She cannot resolve all of these questions, but the disparity she uncovers is so startling, and her work so unprecedented, that continued investigation into its nature and meaning are clearly warranted.

Researchers seeking to evaluate policy options aspire to generate evidence that provides direct advice to policy makers and defender managers on how they should organize public defense to obtain the best possible results. York Cornwell's article in particular evokes (and nimbly reviews) a lengthy pedigree of examinations of the relative benefits of public and private counsel, and how public counsel is organized in a variety of ways. In fact, this work generally has not met the lofty aims to which it aspires partly because comparisons of program designs often do not directly address the ways that those programs act to provide quality representation (or otherwise). In that light, Lee, Ostrom, and Kleiman's focus on the services attorneys actually perform and the ways they do their work is heartening, and York Cornwell's remarkable data on the attorneys' level of skill, the evidence they presented, and their motion practice among other matters is both valuable and unusual. More work is yet needed to clarify the evidence in favor of particular institutional arrangements in defense: one awaits it with anticipation.

### *C. Function 3: System Monitoring*

Defenders' primary responsibility is to their individual clients, but professional standards also dictate that they should act as guardians of the criminal justice system as a whole.<sup>28</sup> When

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<sup>28</sup> For example, among the standards published by the National Advisory Commission on Criminal Justice Standards and Goals, Standard #13.9 states: "The public defender should be prepared to take positive action, when invited to do so, to assist the police and other law enforcement components in understanding and developing their proper roles in the criminal justice system, and to assist them in developing their own professionalism." NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS (1976). Standard #13.13 states: "The public defender should be sensitive to all of the problems of his client community." *Id.*; see also NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976) ("The defense system's Director should educate the community about the purpose and function of the defense system."); ROBERTA ROVNER-PIECZENIK ET AL., NAT'L LEGAL AID & DEFENDER ASS'N, EVALUATION DESIGN FOR THE OFFICES OF THE PUBLIC DEFENDER, x (1976) ("Defenders should seek to improve the criminal justice system and other components therein.").

adopting that role, the need to collect sizeable amounts of data often becomes pressing, and so some considerable effort is directed toward research dedicated to the function of monitoring the criminal justice system. Two of the articles in this collection reflect some aspect of this need to collect data as a check on system performance.

The first, Pamela Metzger's piece, describes the story of Mr. Jones, a client of the Orleans Parish Public Defender wrongfully incarcerated in 2005 for violating the terms of a probation sentence which had, in fact, expired.<sup>29</sup> When Hurricane Katrina made landfall in New Orleans and the criminal justice infrastructure of the city all but collapsed, Mr. Jones was evacuated, leaving Metzger's team to rebuild his case file and those of hundreds of other clients from secondary sources. In doing so they revealed, more or less accidentally it would seem, that the system that should have been in place to report the arrest of probation violators had ceased to operate, allowing Mr. Jones and many others to be incarcerated for extended periods without anyone in the justice system knowing about them or checking on the status of their sentences. Especially remarkable, or perhaps not given the circumstances, was Metzger's ability to communicate her discovery to the sheriff's department and have it quietly resolved, thus saving untold numbers of future defendants from the same fate. The implication is startling: advocacy that focuses on monitoring the system as a whole as well as on responding to the vagaries of individual cases can expose patterns of "catastrophic outcome[s]"<sup>30</sup> (as she aptly calls them) that would otherwise go entirely unnoticed.

Janet Moore, Marla Sandys, and Raj Jayadev's piece, on the other hand, introduces "participatory defense," which they describe as a "new reform model" for public defense.<sup>31</sup> The program aims to empower clients to participate fully in their own criminal defense by informing them of their rights, supporting them throughout their cases, and then gathering data on their satisfaction with the process afterwards to feed back into the program itself. The stories are not only compelling, they are also grist to the mill of the authors' legal analysis that suggests clear grounds for the elevation of client voices as a means of improving the quality of representation, and ultimately the quality of law itself. The mechanism here is different

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<sup>29</sup> Pamela R. Metzger, *Me and Mr. Jones: A Systems-Based Analysis of a Catastrophic Defense Outcome*, 78 ALB. L. REV. 1261 (2014/2015).

<sup>30</sup> *Id.* at 1269.

<sup>31</sup> Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1285 (2014/2015).

to Metzger's, therefore, in that the object is not to detect catastrophic failure so much as to equalize the client's voice in the relationship with his or her attorney. But the intended function is the same: gather important information from large numbers of people in order to drive the system toward not only higher-quality representation but also higher-quality institutions and higher-quality community outcomes.

When lawyers begin to take what Metzger calls a "systems approach"<sup>32</sup> and concern themselves with the welfare of communities of clients and the fair functioning of systems rather than (or in addition to) the fair disposition of individual cases, the need to gather data quickly arises. The utility of those data in achieving reform or bringing notice to underappreciated issues is an area where both of these pieces report success, perhaps partly because the data collection itself was credible, institutionalized, and widespread. These kinds of efforts look a little like accountability mechanisms, but really they are rather more than that: they actually amount to the institutionalization of data collection as a legitimate, necessary, and effective check on system functioning. At the same time as bringing light to problems, they show the solution to those problems and the improvements that result. One can think of hardly a more compelling mixture of strong data collection and the lived concerns of professional defenders than these.

#### *D. Function 4: Pursuing a Scientific Agenda*

Lastly, Nadine Frederique, Patricia Joseph, and R. Christopher C. Hild's piece on the National Institute of Justice's (NIJ) research agenda in public defense is a fine example of a research agenda in a distinctly scientific mold.<sup>33</sup> The article recounts the history of NIJ involvement in sponsoring research on defense stretching back to the 1970s, and goes on to review the results of both the work that funding generated, and also the state of scientific knowledge in three areas—the relative merits of different public defender system types, the apparent *negative* impact that lawyers in juvenile court may have on their clients' case outcomes, and new work assessing holistic defense programs. The authors come to sensible conclusions about the strengths and weaknesses of the literature particularly as it relates to its potential to guide policy decisions. Moreover, they

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<sup>32</sup> Metzger, *supra* note 29, at 1269.

<sup>33</sup> Frederique, Joseph & Hild, *supra* note 15.

signal clearly the need for more work of specific types in each area, driven by the need to provide greater clarity and understanding of both the theoretical and policy issues at stake.

Scientific work in defense is still comparatively rare; a scientific research agenda vanishingly so. It is heartening that the NIJ is thinking clearly and systematically about the agenda its funding will seek to promote. Clearly, the potential for new and improved work to be done which can subsequently generate usable advice and push policy in this field forward is real. Examining the literature in this systematic way provides the authors with insights and suggestions from which we can all learn.

#### IV. CONCLUSION: MAINTAINING A DELICATE BALANCE IN THE FUTURE

In the field of public defense, people do data for different reasons. Some arrive at it out of necessity. Others do it to understand things better. Still others do it because that is how they are trained to make sense of the world. And there is at least one additional function that data and research perform on a daily basis in public defense which is not represented in the present collection: defender management. Data are used all the time in defender agencies to measure performance, allocate resources, and track the work of attorneys.<sup>34</sup> If research and data can function to improve the quality of representation by streamlining office functions, putting more information in the hands of attorneys, and providing real-time feedback on the work that is being done, then we should explore it to the utmost.

The field of public defense research is in a dynamic phase of growth. There is a lot about this that is exciting: the people working in it are a professionally diverse group spurred by good intentions, a great deal of intellectual energy, a hunger for information on real policy challenges, and new financial resources. There is also at least one consequence of this which may be unnerving, however: the field does not have a sense of central purpose. Rather, individuals in the field at present are doing

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<sup>34</sup> See MAREA BEEMAN, AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 3–4 (2012), available at [http://texaswcl.tamu.edu/reports/2012\\_JMI\\_Using\\_Data\\_in\\_Public\\_Defense.pdf](http://texaswcl.tamu.edu/reports/2012_JMI_Using_Data_in_Public_Defense.pdf); see also Andrew Davies & Angela Olivia Burton, *Why Gather Data on Parent Representation? The Pros, Cons, Promise and Pitfalls*, 34 CHILD L. PRAC., 49, 54–56 (2015) (explaining how and why parent representation providers can collect data).

research which fulfils distinct functions, each of which ultimately relates back to the professional necessities that defenders, researchers, or defender-researchers face in their work.

The lack of central purpose that the field has at present represents a challenge. On the one hand, one can only applaud efforts by the NIJ and others to begin to consider what a “national research agenda” for public defense might look like. There is a real danger that the field would otherwise remain fragmented to the point that the knowledge it generates would not be cumulative in nature. If we do not pursue issues of common interest and learn from one another, then research is not fulfilling its potential to add insight and information that is useful and informative to all.

On the other hand, there is danger in the possibility that the field becomes too monolithic: dominated by a single research focus, methodology, or professional group. As we seek to plot a way forward and define this research field, it is to be hoped that the vitality that comes from the full and equal involvement of defender concerns alongside federally funded scientific research agendas will not be lost. Rather, public defender research should continue to perform the four (or five) functions specified above at the very least. Any development which tends to favor research that performs a particular function, such as policy evaluation, to the detriment of another, such as system monitoring, will do a disservice to the field as a whole because it will ignore or eliminate work where data are being used in defense to serve other important purposes. All of the scholars engaged in this work are determined to do work that brings objective information to places where at present there is only confusion, bewilderment, or even misinformation. That is the real promise of research in defense in all of its forms: to make us smarter. This issue shows it, and I hope it is the first of many.

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