Data and Accountability in Indigent Defense

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Abstract

There is increasing momentum behind the push from researchers, policymakers, and practitioners to broaden and deepen data production and analysis in indigent defense. One important force driving that momentum is the widespread belief that improving the dismal state of indigent defense requires shoring up accountability in the field, and that a data-rich environment will be an accountability-rich environment. This essay interrogates and problematizes the data-accountability connection in indigent defense. Identifying the multiple and layered accountability relationships and types that can and do exist in indigent defense, and considering the varieties of data production and usage that could be taken up by defenders, reveals that the premise of a direct, positive relationship between the two is misguided. Indeed, there are risks of perverse consequences for accountability from data-driven indigent defense decision-making, particularly to the extent that quantitative capacity might empower accounters that lack incentive to maximize defense quality. Ultimately, the essay aims not to undermine the data project or its accountability aspects, but to encourage attention to these risks in research and in institutional design.

I. INTRODUCTION

There is no shortage of ailments afflicting the provision of indigent defense in the United States. The system, if the national "patchwork" of mechanisms for providing counsel to poor criminal defendants can be called that,[1] is widely understood to be underfunded, overburdened, and undervalued by the public and the lawmakers with the power to change the status quo.[2] What's more, the

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1 Alissa Pollitz Worden et al., *A Patchwork of Policies: Justice, Due Process, and Public Defense Across American States*, 74 ALB. L. REV. 1423 (2010).

2 *See, e.g.*, Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2606 (2013) (describing consensus).

conditions generating these critiques have a depressingly long lineage. As Sara Mayeux's recent historical treatment illuminates, "[c]haracteristics now identified as symptoms of crisis—such as inadequate funding, ever-expanding caseloads, and triage advocacy oriented around pleas instead of trials—first appeared as lawyers began to implement the transition to large-scale indigent defense that they thought *Gideon* required."[3]

But amidst the old news about the woes of indigent defense is some (comparatively) new news about the roots of these problems—namely, deficits in *accountability* and *data*. Piggybacking on broader contemporary trends in governance and public administration (among other fields),[4] the need to enhance "accountability" for the provision of indigent defense services is persistently identified as a top priority for mending the system. An array of taskforces and commissions have reached this conclusion in reviewing beleaguered state or local systems from Las Vegas to Louisiana and points in between.[5] Calls for "accountability" for the provision of indigent defense are increasingly heard from both reform advocates and actors within the system.[6] As the director of the federal

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[3] Sara Mayeux, *What* Gideon *Did*, 116 COLUM. L. REV. 15, 24 (2016).

[4] *See, e.g.*, Mark Bovens et al., *Public Accountability*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 1, 3–6 (Mark Bovens et al. eds., 2014); Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES (Michael W. Dowdle ed., 2006); Wendy Nelson Espeland & Berit Irene Vannebo, *Accountability, Quantification, and Law*, 3 ANN. REV. L. & SOC. SCI. 21, 23 (2007).

[5] *See, e.g.*, SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES (2015), http://sixthamendment.org/6ac/6AC_utahreport.pdf [https://perma.cc/LM3S-FX2X] (discussing lack of accountability as central failure of Utah's indigent defense system); COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2006), http://nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf [https://perma.cc/H7BG-ENPA] (same in New York); NAT'L LEGAL AID & DEF. ASS'N, EVALUATION OF THE PUBLIC DEFENDER'S OFFICE: CLARK COUNTY, NEVADA (2003), http://docplayer.net/794104-Evaluation-of-the-public-defender-office-clark-county-nevada-march-2003.html [https://perma.cc/N59W-35WN] (same for Clark County); REPORT OF THE GEORGIA SUPREME COURT INDIGENT DEFENSE COMMISSION 3–5 (2000), https://www.schr.org/files/post/media/Blue%20Ribbon%20Commission%20Report.pdf [https://perma.cc/6T8Y-UTEZ] (same for Georgia); AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 4, 39 (2004) (including as one of nine main findings of national review that "[i]ndigent defense systems frequently lack basic oversight and accountability, impairing the provision of uniform, quality services.").

[6] *See, e.g.*, Tim Evans, *Gideon's Promise Often Broken*, INDIANAPOLIS STAR, Mar. 18, 2013, at A6 (quoting head of Indiana Public Defense Council who stated that "[t]he most significant issues facing indigent defense services in Indiana are the lack of adequate funding and the lack of oversight and accountability for the quality of services provided"); SMART ON CRIME COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE ADMINISTRATION AND CONGRESS (2011), http://www.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime_Complete.pdf [https://perma.cc/4MGC-Z72L]; N.C. OFFICE OF INDIGENT DEF. SERVS., THE CHALLENGE: EVALUATING INDIGENT DEFENSE (2007), http://www.ncids.org/Systems%20Evaluation%20Project/News_Updates_Products/RoundTableReport_06_08.pdf [https://perma.cc/7UPF-98MZ]; ACLU OF WASH., *The Unfulfilled Promise of* Gideon 1,

Office for Access to Justice put the matter at a recent celebration of Texas's indigent defense reform legislation, "[s]tatewide standards, state funding, transparency, [and] accountability . . . are the necessary prerequisites for an indigent defense system that lives up to *Gideon*'s promise of equal justice for all regardless of one's economic station in life."[7] If accountability is currently a "fashionable concept" in law and public administration,[8] the field of indigent defense is more stylish than ever.

Coinciding with, and both fueling and fueled by accountability-speak, is a broad-based push to render the provision and management of indigent defense a more data-driven enterprise.[9] Indeed, it is fair to say that the field has been, until quite recently, a veritable data desert: Seemingly basic information like how many cases a state-provided attorney is carrying, how many hours the attorney has worked on a given case, and what outcomes the attorney achieved, is unknown or nigh impossible to know in many jurisdictions.[10] And so, in its more modest manifestations, the trend toward data is exemplified by the increased push by

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5, 13 (2004), https://aclu-wa.org/sites/default/files/media-legacy/attachments/Unfulfilled%20Promise%20of%20Gideon.pdf [https://perma.cc/2E4N-APWV]; TEX. APPLESEED FAIR DEF. PROJECT, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS (2000), https://www.texasappleseed.org/sites/default/files/184-FairDefenseAct-AppleseedAnalysisReport.pdf [https://perma.cc/SS4K-K7GE] (same in Texas).

[7] Lisa Foster, Director, Office for Access to Justice Delivers, Remarks at the Texas Fair Defense Act 15th Anniversary Symposium Celebration (May 6, 2016), https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-texas-fair-defense-act-15th [https://perma.cc/6TEF-KCGE].

[8] Rubin, *supra* note 4, at 52.

[9] I use the term "data" in what I take to be its most capacious sense—simply information that is susceptible to analysis in some form. *See, e.g.*, *Data*, MERRIAM-WEBSTER DICTIONARY ("factual information (as measurements or statistics) used as a basis for reasoning, discussion, or calculation"). My terminology encompasses both quantitative and qualitative data, though the relative value of each is a contentious matter among researchers. *Cf.* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 264–67 (1996) (discussing necessity for cost-benefit analysis to include both quantitative and qualitative data, and difficulty of identifying quality qualitative information). Additionally, bucking strict grammar rules in favor of common usage, I will treat the word "data" as a singular noun regardless of whether I refer to one "datum" or many.

[10] *See* Jennifer E. Laurin, Gideon *by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325, 334–35 (2015); Class Action Complaint for Declaratory Relief at 5, Remick v. Utah, No. 160903921 (June 21, 2016) [hereinafter Remick Complaint] (alleging that in Utah "there is no practical way for an independent observer to efficiently determine crucial facts such as: the number of cases assigned to a particular public defender; the available resources for public defenders; or the number of trials or contested motions or hearings involving indigent defendants"); Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief at 18, Phillips v. California, No. 15 CE CG 02201 (July 14, 2015), https://www.aclu.org/sites/default/files/field_document/file_stamped_phillips_v_state_of_california_complaint.pdf [https://perma.cc/P8VT-WQ89] (alleging that "in response to Public Records Act requests the County maintains that it does not have records that accurately reflect individual public defenders' caseloads"; public defender office records permit only an estimate).

indigent defense advocates, including both reformers as well as, to some extent, defenders themselves, to collect and analyze information about case assignments, lawyer time, case outcomes, and other basic attorney—and organization-level performance measures.[11] The aim is simply to render the defender environment more knowable and known. For reformers, such as lawyers who have sued for improved defender systems in New York, Idaho, and elsewhere, data in hand converts anecdotes about an over-burdened system into a statistical account of caseload stress, and suboptimal work output.[12] For defenders themselves, hard facts about caseloads, work performed, and results achieved facilitate quality improvement and management decisions, and might aid in perennial funding requests.[13]

More ambitiously, the trend is seen in the call by thought leaders in the field, as well as the federal government, to subject attorney performance and case outcomes to more rigorous statistical analysis, permitting granular assessment of the links (or lack thereof) between individual and systemic inputs and outputs.[14] Taking a page from the playbooks of other professions, and other sectors of the criminal justice system, the aim among these proponents is to achieve "evidence-based practice" in the field of indigent defense, permitting development of

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[11] *See, e.g.*, UTAH CODE ANN. §§ 77-32-803 & 804 (codifying law passed in 2016 creating new Utah indigent defense commissions, and requiring data collection and staffing with a data analyst); IDAHO CODE ANN. § 19-850 (requiring that the Idaho public defense commission promulgate rules on data collection); MICH. COMP. LAWS ANN. §§ 780.989(1)(g) & 780.993(1) (authorizing, as of 2013, Michigan Indigent Defense Commission to collect data on operation of indigent defense statewide); *see* N.Y. EXEC. L. §§ 832–33 (creating indigent defense board with data collection mandate); MAREA BEEMAN, NAT'L LEGAL AID & DEF. ASS'N, BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK: A TOOLKIT FOR DEFENDER LEADERS 5–7 (2014), http://www.nlada.org/sites/default/files/pictures/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf [https://perma.cc/WL93-6LGY].

[12] *See generally* Amended Class Action Complaint, Hurrell-Harring v. New York, No. 8866-07 (Apr. 28, 2008), http://www.nyclu.org/files/Amended%20Class%20Action%20Complaint.pdf [https://perma.cc/G6YC-ENZR]; Class Action Complaint for Injunctive and Declaratory Relief, Tucker v. Idaho, No. CV-2015-10240, https://www.aclu.org/sites/default/files/field_document/aclu idahopubdefensecomplaintfilestamp-sm.pdf [https://perma.cc/PNZ9-ZZLX].

[13] *See* BEEMAN, *supra* note 11, at 5.

[14] *See About the Initiative: Turning Principles into Practice*, SMART DEFENSE, http://smartdefenseinitiative.org [https://perma.cc/CWH7-EBAR] ("The Smart Defense Initiative is part of the Bureau of Justice Assistance (BJA) Smart Suite of criminal justice programs that include Smart Pretrial, Smart Policing, Smart Supervision, and Smart Prosecution. The Smart Suite supports criminal justice professionals in building evidence-based, data-driven criminal justice strategies that combine the expertise of researchers and practitioners for maximum, sustained, and measurable impact."); MARGARET A. GRESSENS & DARYL V. ATKINSON, THE CHALLENGE: EVALUATING INDIGENT DEFENSE: NORTH CAROLINA SYSTEMS EVALUATION PROJECT PERFORMANCE MEASURES GUIDE (2012), http://www.ncids.org/systems%20evaluation%20project/performancemeasures/PM_guide.pdf [https://perma.cc/L864-4RRW].

empirically rather than intuitively derived practice standards, and rigorous program evaluation and cost-effectiveness calculations.[15]

Moreover, and again sharing features in common with the broader evidence-based movement and other sectors of the criminal justice system,[16] the call for expanded indigent defense data is frequently—though not always, and certainly not exclusively—bound up in the above-described quest for enhanced accountability.[17] "Accountability" is frequently cited as a good that is diminished by the widespread absence or non-use of data, and concomitantly, enhanced data gathering and analysis is cited as a necessary condition for attaining that elusive good.[18] Separately, scholars and leaders within the field tout increased

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[15] *See* Laurie O. Robinson & Thomas Abt, *Evidence-Informed Criminal Justice Policy*, *in* ADVANCING CRIMINOLOGY & CRIMINAL JUSTICE POLICY (Thomas G. Blomberg et al. eds., 2016); *Smart Suite*, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/Programs/CRPPE/smartsuite.html [https://perma.cc/G9WH-Q6PD] (last visited Jan. 27, 2017) (announcing BJA initiative, of which focus on "Smart Defense" is one part, "re-examines every aspect of the criminal justice system to identify what is working in the field to reduce crime and recidivism and make our communities safer"); MAREA BEEMAN, JUSTICE MGMT. INST., USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 14 (2012), http://texaswcl.tamu.edu/reports/2012_JMI_Using_Data_in_Public_Defense.pdf [https://perma.cc/5VYR-VAG9]; NORMAN LEFSTEIN, AM. BAR ASS'N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 44–45 (2011) (observing that prevailing caseload standards have no empirical foundation), http://texaswcl.tamu.edu/reports/2011_Lefstein_Securing_Reasonable_Caseloads.pdf [https://perma.cc/NX3B-DE5A].

[16] *See* NAT'L RES. COUNCIL, USING SCIENCE AS EVIDENCE IN PUBLIC POLICY 21 (Kenneth Prewitt et al. eds., 2012) ("Using science in public policy is on the nation's agenda. One reason is the growing demand for performance measures and enhanced accountability in federal agencies and not-for-profit organizations. Another is the call for evidence-based policy and practice, part of a broader focus on data-driven decision making across government agencies."); Daniel P. Mears & J.C. Barnes, *Toward a Systematic Foundation for Identifying Evidence-based Criminal Justice Sanctions and Their Relative Effectiveness*, 38 J. OF CRIM. JUST. 702, 702 (2010) (observing that in recent decades "the mantra of accountability and evidence-based policy or practice surfaced in nearly all areas of government, not least criminal justice" (internal citations omitted)); Espeland & Vannebo, *supra* note 4, at 22 (describing increasing tendency for accountability to be quantitatively conceived); PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING (2015), http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/9CDX-79ES] (urging greater data collection to enhance police accountability); Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2014) (linking increased data with increased law enforcement accountability); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (arguing that more transparent policing data enhances accountability); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983 (2009) (considering how to give the public, defendants, prosecutorial bureaucrats, and others more information to aid "accountability").

[17] To be sure, some leading voices in the field have heralded the "diversity of functions" that emergent data regimes can serve in the indigent defense field, generating capacity not only for calling the system or its actors to account, but also for problem diagnosis, policy formulation, and research for its own sake. *See, e.g.*, Andrew L. B. Davies, *How Do We "Do Data" in Public Defense?*, 78 ALB. L. REV. 1179, 1185–91 (2015).

[18] *See, e.g.*, Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1072 (2015) (emphasizing need to "create an accountability mechanism to reduce

"accountability" as a rationale for why defender organizations should take up the task of developing data collection and analysis regimes.[19] And among those who urge a deeper strategic shift to evidence-based policymaking in the field, "accountability" is one oft-cited advantage of generating and rooting decision-making in data rather than some (less "accountable") combination of intuition, personal and shared experience, and professional judgment.[20]

But in fact, once one moves beyond the basic intuition that no "accounting" can occur if nothing is available to be counted,[21] the relationship between data and accountability becomes less direct than is frequently advanced. In part, this is a consequence of the fact that both terms are too often underspecified. That is to say, accountability can and does encompass a variety of actors, relationships, mechanisms, and values in the field of indigent defense. And defense-related data is of many types, generated through different mechanisms, at a range of costs, and with variable salience to different audiences. Once one bears down on the multiplicity of accountability types and specifies the varieties of data that might facilitate (or inhibit) those accountabilities, the relationship between these two concepts of interest emerges as complex and potentially negative.

This essay aims to illuminate that complexity and potential risks posed by data to an indigent defense accountability project. Specifying the range of data that might be generated, and then bearing down on the three basic variables of any accountability equation—*to whom*, *by what means*, and *for what*—the essay generates four cautionary insights about data and accountability.

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practitioner error" and linking data to that goal); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626, 2645 (2013) ("Offices should also institute accountability mechanisms. . . . [O]ffices should collect data about attorneys' decisions. This data will not only inform attorneys and offices about trends, but will also give offices the ability to monitor their attorneys' judgments."); SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS 1 (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_state_indigentdefense_feb07.authcheckdam.pdf [https://perma.cc/Q6ZT-WDZQ] [hereinafter SPANGENBERG COMMISSIONS REPORT]; REPORT OF THE MICHIGAN ADVISORY COMMISSION ON INDIGENT DEFENSE 7 (June 22, 2012), http://www.michigan.gov/documents/snyder/Indigent_Defense_Advisory_Comm_Rpt_390212_7.pdf [https://perma.cc/PLT9-ABZ6]; Remick Complaint, *supra* note 10, at 16 (alleging that state has left localities to their "own devices in providing indigent defense with no obligation to report on . . . activities" and thereby "to operate without any accountability or governance").

[19] *See, e.g.*, BEEMAN, *supra* note 15, at 6, 10; Metzger & Ferguson, *supra* note 18.

[20] GRESSENS & ATKINSON, *supra* note 14, at 6; TEX. TASK FORCE ON INDIGENT DEF., STRATEGIC PLAN 2010–2015: A STRATEGIC PLAN FOR IMPROVING INDIGENT DEFENSE SYSTEMS 1, 3–5, http://www.tidc.texas.gov/media/966/strategicplanfinal.pdf [https://perma.cc/2DYU-PUYY].

[21] Public administration scholar Mark Bovens makes the point (drawing on the research of Melvin Dubnick) that the etymological roots of accountability is rooted in accounting and, literally, book-keeping, as in the Domesday Books decreed by William I in order to render *a count* of everything in the king's realm. *See* Mark A. Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 W. EUR. POL. 946, 950–51 (2010).

First, there is a risk of a *data-accountability trade-off*. Here, I am concerned that increasing the capacity for quantitative accountability will not inevitably increase, and might decrease, the *quality* of that accountability, if what is sought is improved performance in the field of indigent defense. This is so in part because conditions in the field are ripe for the so-called "accountability paradox" to take hold: the likelihood that accountability processes themselves trade off, from a resources standpoint, with quality process. So, for example, a time-pressed public defender administrator tasked with monitoring data on defender performance might do that in lieu of court monitoring or other time-consuming in-person supervision.

Second, we must confront *data-accountability normativity* in indigent defense. Advocates or policymakers armed with data about defender activities—bail results, suppression motion statistics, plea deals, acquittals, sentences, and so forth—will still need to resolve tough questions about which activities are valuable, and to what degree. Having in mind, for example, the premise that defender organizations armed with statistics might gain leverage with otherwise reluctant funders, the normativity of that information should give some pause about the magnitude of that leverage. Simply put, data doesn't resolve the essentially value-laden questions of what makes for a good defense, and *how* good a defense is warranted.

Third, the essay considers the issue of *differential accountability*. Not all data will invariably enhance all types of accountability. For example, granular information about the performance of attorneys would enable robust supervisory review of defense services, but might be far less interesting or valuable to a legislature that holds a public defender to account in budgetary processes. More troubling, it might be that actors will be differently responsive, and systematically so, to particular accountability relationships, thereby privileging not only that accountability type but also the particular data of greatest salience to it. Consider, for example, that a public defender administrator might be more responsive to the accountability she owes to the legislature for running a cost-effective program, than she is to the accountability she can generate among her staff. If this is so, granular data collection and analysis might be shortchanged, both to free up time and resources to "do" the legislature's data, and because the more granular analysis might reveal trends—say, rigorous motion practice, or routine requests for expert assistance—that could become ammunition for political actors hostile to defense funding.

Finally, and relatedly, there is the specter of *perverse accountability*. The concern here is that the data push is likely not to shore up "accountability" in all forms, but rather will elevate certain forms of accountability over others. Indeed, there might be a systematic enhancement of the power of certain accounters—and perhaps not those that all data advocates have in mind. To be sure, advocates might well, as they have done to date, successfully wield data to employ the machinery of legal accountability that is otherwise unavailable without evidence of systemic practices. On the other hand, data might increase the profile and

importance of bureaucratic and political accountability relationships, but less likely to shore up accountability roles that might be played by the public generally, by clients, or by the defense profession.

The essay develops these arguments as follows. Part II drills down on the concepts of data and accountability in indigent defense. It first lays out the types and characteristics of information that advocates of more data-driven defense policy and practices aim to generate. It then breaks down the monolithic notion of "accountability" in indigent defense. Part III interrogates the interplays among those accountabilities and data. Part IV discusses implications for these reflections on the design of data and accountability regimes.

II. DATA AND ACCOUNTABILITIES IN INDIGENT DEFENSE

Calls for increased gathering, analysis, and use of data in indigent defense cut across the extreme heterogeneity of jurisdictions, service delivery systems, and challenges that characterize indigent defense in the United States.[22] In a sense, it appears the push for data is the one constant in this highly fragmented sector of the criminal justice system.[23] Perhaps equally prevalent is the linkage of data uptick with the enhancement of "accountability" in indigent defense. But both concepts, and the relationship between them, are underspecified. This part lays descriptive groundwork for understanding the varieties of data and accountabilities at play, enabling us in Part III to take up questions of interplay.

A. *Data*

In distilling the types of data that are desired from and for the indigent defense system, it is well to begin with what information we have well in hand, which until recently has been limited to fairly high-level snapshots of national practices. Studies by private researchers and government entities such as the Bureau of Justice Statistics have, for the past four decades, provided a fairly reliable but extremely high-level view of national indigent defense practices. We know the range of service provision types—public defender versus assigned counsel in various forms—and their distribution among states and localities.[24] And we know the system's total volume and gross outcomes—total defense expenditures, total number of cases handled, and basic dispositions—and

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[22] *See supra* notes 11 and 12.

[23] BEEMAN, *supra* note 15, at 1 (quoting participant in recent ABA Indigent Defense Summit as saying that the "key takeaway" from the summit was "the critical importance data plays to improve indigent defense").

[24] *See, e.g.*, Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32–47 (1995).

variations in the volume and outcomes by jurisdiction.[25] It's a portrait that permits large-scale comparison, but with little understanding about the meaning of that comparison—what, for example, are public defenders or assigned lawyers *doing* in their cases? Furthermore, the view is at far too high an altitude to reveal meaningful information about what goes on in the thousands of individual local jurisdictions with autonomy over indigent defense service provision.[26]

But as one zooms in from this aerial view, the data landscape that comes into focus is fairly barren. The previous paragraph described information that essentially can be gleaned from the sort of basic tracking of cases through the criminal justice system that is required of court administrators—though even on this score, there is a paucity of resources and a significant lack of sophisticated infrastructure.[27] But dedicated accounting for indigent defense services, much less making use of that information in system design or service provision is spotty at best. To be sure, as I have detailed elsewhere, there is a small number of jurisdictions in the vanguard of a push toward data-driven practice—jurisdictions like New York, North Carolina, Texas, and Michigan with organizational infrastructure for data gathering and monitoring, and indigent defense administrators who are data evangelists in the field.[28] But the influence of these jurisdictions, while significant among thought leaders, has yet to be widely realized in the field.[29]

So what more might we want to know? Consider first a more robust understanding of what is happening in individual representation of indigent defendants—not just when an attorney begins and ends working on a case, but also the tasks performed in representation, the time spent on those tasks, tasks attempted but not attained (for example, an unsuccessful request for funds for expert assistance). At bottom, we're looking here for the data that would facilitate a fuller understanding of what went into the defense product, information that is necessary to assess the actual quality of defense services provided (or, in different

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[25] *See, e.g.*, Nadine Frederique et al., *What is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research*, 78 ALB. L. REV. 1317 (2015); ERINN HERBERMAN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008–2012 – UPDATED (2015), http://www.bjs.gov/content/pub/pdf/sgide0812.pdf [https://perma.cc/U3R6-NMXD]; DONALD J. FAROLE & LYNN LANGTON, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 (2010), http://www.bjs.gov/content/pub/pdf/clpdo07.pdf [https://perma.cc/D242-2U7M].

[26] *See, e.g.*, SPANGENBERG COMMISSIONS REPORT, *supra* note 18 (discussing many states that permit counties autonomy over administration of indigent defense).

[27] *See* Ronald F. Wright & Ralph A. Peeples, *Criminal Defense Lawyer Moneyball: A Demonstration Project*, 70 WASH. & LEE L. REV. 1221 (2013).

[28] *See* Laurin, *supra* note 10.

[29] *See, e.g.*, Metzger & Ferguson, *supra* note 18, at 1067–69 (discussing dearth of data in the field); Wright & Peeples, *supra* note 27, at 1225–32 (discussing lack of data and evaluation of defense performance "by guesswork").

terms, to understand what the funders of indigent defense are getting for their money).

But note that to say that we want to know *more* about the work going into individual representations does not resolve the question of how *much* more knowledge is required. And given the paucity of the status quo, a wide spectrum of commitment to this data project could be fathomed. At the lowest end of the spectrum, simply tracking open cases and dispositions for all attorneys representing indigent defendants would enhance contemporaneous data collection, and permit real-time monitoring of caseloads. At the highest end of the spectrum, information on all case activities and time spent performing them would fully enable a public defender supervisor to know whether attorneys were performing tasks commensurate with quality representation—client meetings, investigation, and motion practice, for example. More systemically, workload studies, such as those recently carried out in Missouri and Texas, leverage detailed information about the tasks actually performed and the time actually required to perform those tasks in order to generate empirically grounded standards for attorney case capacity.[30]

By comparison to the aerial first described view, obtaining this ground-level information entails devoting more and dearer resources to data generation. Critically, even at the lowest end of commitment to this data project, the defense lawyer herself will certainly need to be a participant in reporting a detailed account of her work. Attainment of this will in most settings require not only a fundamental shift of practice and mindset, but also the siphoning of at least some (already pressed) time away from casework in order to create a reliable real-time record.[31] Some monitoring entity—for example an organizational supervisor, or an external entity overseeing the performance of assigned counsel—will likely have to ensure the regularity and reliability of attorneys' reporting, not to mention (if the project is to have any purpose) review the data itself. The resources involved in instantiating and maintaining this shift toward a data culture cannot be under-estimated. Institutional defenders who have implemented time-tracking programs consistently characterize them as a "radical cultural shift" in that realm. Criminal defense practice celebrates the maverick, lacks a bureaucratic tradition of monitoring individual work product, and indeed typically resists bureaucratic

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[30] *See* DOTTIE CARMICHAEL ET AL., PUB. POLICY RESEARCH INST., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION 6, 18–20 (2015), http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf [https://perma.cc/7HPT-WUH9] (explaining importance of granular timekeeping for workload studies); AM. BAR ASS'N, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf [https://perma.cc/NP8B-BMUV].

[31] *See* Metzger & Ferguson, *supra* note 18, at 1076; BEEMAN, *supra* note 15, at 15 (reporting "41%[] of respondents to our chief defender survey reported that their attorneys track their time").

incursions that could in any way compromise the independent judgment of the zealous advocate.[32] The challenge is all the greater among the substantial ranks of solo or small-firm defense lawyers serving as court-appointed counsel in criminal cases around the country, where capacity for this type of management, to say nothing of the appetite for it, is largely lacking.[33] Such tasks will compete with a host of other obligations, including (optimistically) other modes of supervision, or (more likely) other bureaucratic organizational responsibilities.

To be sure, the work of both attorney and monitor can be greatly facilitated by sophisticated case management software (particular when paired with resources like laptops for mobile case tracking from court, jails, or investigations in the field). But this is a level of information technology still beyond the grasp of the average marginally resourced defender organization (not to mention non-public-defender appointed counsel); attaining it will require convincing some funding source to pony up the cash, and realistically will require prioritizing software over something else (another attorney position, funding for training, and so forth).[34] Moreover, technological capacity does not entail technological usage, in the face of the above-described resource and cultural barriers to learning and using data gathering and monitoring systems. In Knox County, Tennessee, for example, the public defender's office invested in case management software with time tracking capacity, but went years without using that capacity, ultimately achieving widespread attorney compliance with a time-tracking mandate only through significant planning, auditing, and messaging by organizational leadership, along with additional capital investment.[35]

But in all events, building truly "evidence-based practice," as leading voices encourage, would require yet another category of data than all this describes. The promise of evidence-based indigent defense is that policy questions—say, about whether to assign counsel from public defender offices or lists of unaffiliated attorneys, or whether to require the presence of counsel at initial bail determinations (to name just two of many sub-constitutional design decisions

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[32] *See, e.g.*, Gabriel J. Chin, *Agenda Setting as a Tactic in Institutional Criminal Defense*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 29, 31–32 (2015) (discussing culture of minimal supervision in indigent defense); Metzger & Ferguson, *supra* note 18, at 1078 (arguing that criminal defense "attracts rule-benders, iconoclasts, and revolutionary spirits, all of whom generally resist being beholden to a data-driven order."); Lorelei Laird, *The Gideon Revolution*, 100 ABA J. 45, 50 (Jan. 2017), http://www.abajournal.com/magazine/article/the_gideon_revolution [https://perma.cc/78BC-TM48] (quoting data advocate as reporting that a public defender "'about fell off the table' when he suggested that her office would start tracking attorneys' time permanently").

[33] Spangenberg & Beeman, *supra* note 24, at 32–34.

[34] *See* Metzger & Ferguson, *supra* note 18, at 1076–77.

[35] *See* NAPD Steering Committee, *Member Feature: Time Tracking at the Knox County Public Defender's Community Law Office*, NAT'L ASS'N FOR PUB. DEF. (Sept. 7, 2015), http://www.publicdefenders.us/blog_home.asp?display=29 [https://perma.cc/YR6Y-HZ99].

susceptible of empirical testing)[36]—will be answered on the basis of data, rather than intuition, about "what works."[37] It is a two-fold aim: to correlate inputs and outputs in indigent defense practice, and to put those correlations to prospective use in adopting or rejecting practices.[38] Thus, for example, a defender organization contemplating whether to devote resources to counsel at first appearance will want to know more than simply whether attorneys are or are not present at bail hearings, but also whether that presence causes better client outcomes across an array of potential measures—release, bail amount, dismissal of charges, acquittal, favorable sentencing, and so forth.[39]

To accomplish this, data about practice at the most granular level is a necessary condition—to assess the significance of any one input into the representation, controlling for all other inputs of potential significance is required—but it is not a sufficient one. Also required are robust data about other sectors of the criminal justice system that contribute to defendant outcomes, and human and technical resources to do sophisticated statistical analysis.[40] As the leaders of a pioneering foray into evidence-based practice piloted by the North Carolina Office of Indigent Defense Services (IDS) conceded in the final report on their decade-long project to develop and deploy evidence-based outcome measures in four indigent defense programs nationwide, "these prerequisites [are] in fact

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[36] *See generally* TONY FABELO ET AL., COUNCIL OF STATE GOV'T JUSTICE CTR., IMPROVING INDIGENT DEFENSE: EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER (2013), https://www.prisonlegalnews.org/media/publications/Evaluation%20of%20Harris%20County%20TX%20Pub.%20Defender%20Justice%20Center%202013.pdf [https://perma.cc/N4KU-LF6Z] (comparing cost effectiveness of public defender and assigned counsel); *UAlbany, New York Office of Indigent Legal Services Partner to Improve Legal Counsel for the Underserved*, UNIV. AT ALBANY, STATE UNIV. OF N.Y. (Oct. 2, 2014), http://www.albany.edu/news/54018.php [https://perma.cc/BKW7-83TW] (last visited Jan. 27, 2017) (detailing grant to study impact of providing counsel at first appearance).

[37] I borrow the phrase from the National Institute of Justice's optimistically named Internet portal, crimesolutions.gov. *About CrimeSolutions.gov*, NAT'L INST. OF JUSTICE, http://www.crimesolutions.gov/about.aspx [https://perma.cc/RME6-L5PU] (last visited Jan. 27, 2017) (promising to inform as to "what works, what doesn't, and what's promising in criminal justice").

[38] *See, e.g.*, Laurin, *supra* note 10 (distinguishing granular descriptive statistics from the aspirations of evidence-based researchers); *North Carolina Systems Evaluation Project (NCSEP)*, N.C. OFFICE OF INDIGENT DEF. SERVS., http://www.ncids.org/Systems%20Evaluation%20Project/SEP%20HomePage.html?c=Research%20%20and%20%20Reports,%20Systems%20Evaluation%20Project [https://perma.cc/3UG7-XT5B] (last visited Jan. 27, 2017) ("We need what other large scale systems have: the ability to collect and analyze indicators that measure system performance. What are our outcomes? How well do we meet the needs of our clients? If an agency initiates a new practice or policy, was the policy successful? These are questions every indigent defense agency should have the tools to answer.").

[39] *See* N.C. OFFICE OF INDIGENT DEF. SERVS., NORTH CAROLINA SYSTEMS EVALUATION PROJECT (NCSEP): OPEN SOCIETY FINAL GRANT REPORT 2–14 (2014), http://www.ncids.org/Systems%20Evaluation%20Project/News_Updates_Products/Final.OSF.GrantReport.pdf.

[40] *See id.*

unobtainable for most indigent defense agencies" today.[41] Indeed, the North Carolina experience demonstrates the magnitude of the challenges faced in developing this type of data even in comparatively well-resourced endeavors. Among the four agencies that North Carolina IDS shepherded through its Systems Evaluation Project, two were (to date) unable to complete the pilot due to barriers to data access and compatibility within their own jurisdictions.[42] The remaining two jurisdictions implemented a robust framework for assessing linkages between indigent defense service design or attorney performance and client outcomes, but completion of the effort consumed more than two years, even with dedicated researchers devoting exclusive resources to the project.[43] Replication of these efforts for other jurisdictions would carry an estimated financial cost of $174,000 a year on the low end, or the cost of three new entry-level attorneys.[44]

B. *Accountabilities*

In considering here the varieties of meaning that accountability does—or could—have in the field of indigent defense, the initial step is, predictably, to cabin the project. Accountability is a notoriously diffuse concept as a general intellectual matter,[45] full interrogation of which would require diving deeply into philosophy and sociology (consider the range of underpinnings for why an accounting is permitted or required[46]), law and political science (consider the varied goods or values that could be accounted for[47]), and the various disciplines

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[41] *Id.* at 19.

[42] *Id.* at 19.

[43] *Id.* at 19.

[44] The assertion is based on a combination of totaling low-end figures contained in a sample budget for building an in-house research department, assuming the hiring of a dedicated information technology director, *see* NAT'L LEGAL AID & DEF. ASS'N & N.C. OFFICE OF INDIGENT DEF. SERVS., TOOLKIT FOR BUILDING IN-HOUSE RESEARCH CAPACITY (2013), http://www.nlada100years.org/sites/default/files/NLADA%20Toolkit%20-%20Research%20Capacity.pdf [https://perma.cc/UUQ7-G83F], and the median starting salary for public defenders in 2014 reported by the National Association for Legal Placement, *see NALP's Public Sector & Public Interest Salary Report Turns Ten!*, NAT'L ASS'N FOR LAW PLACEMENT (July 2014), http://www.nalp.org/july14research [https://perma.cc/34NR-6JYB] (reporting roughly $50,000 median starting salary for public defenders).

[45] *See* Jonathan GS Koppell, *Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder,"* 65 PUB. ADMIN. REV. 94, 94 (1995) ("The lack of clarity regarding the meaning of accountability is particularly striking in contemporary popular use. President George W. Bush, for example, has said that both elementary schools and countries that support terrorism must be held accountable." (internal citation omitted)).

[46] *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 6.7 (2000).

[47] *See* Bovens, *supra* note 21, at 954–56.

that examine institutional design (consider the range of institutional forms that could operationalize accountability[48]), among other fields.

But even without developing a robust and textured account of the nature and meaning of accountability in indigent defense, some work can be done to problematize a totalizing invocation of the term, to illuminate some of the variation in meaning that the term evokes, and to tease out implications of that variation for the data project (and vice versa). Scholars of accountability seem to agree (at least) that accountability is, at bottom, "the ability of one actor to demand an explanation or justification of another actor for its actions, and to reward or punish that second actor on the basis of its performance or its explanation."[49] Jerry Mashaw concludes that accountability can be distilled to "six basic questions": "[W]ho is accountable to whom; about what; through what process; in accordance with what criteria; and with what effects?"[50] In what follows, I distill Mashaw even further, and begin the task of clarifying "accountability" in indigent defense by asking who is accountable to whom, how, and for what.

Take the first, basic relational question of "who is accountable to whom." The Sixth Amendment itself might suggest an obvious starting point: the government is accountable for fulfilling the mandate of the Sixth Amendment—to, among other parties, the defendant as holder of the right to the assistance of counsel.[51] Indeed, critics of indigent defense frequently have in mind the unit of government responsible for *providing* the substance of the Sixth Amendment guarantee when decrying an accountability deficit.[52]

Legal, in particular constitutional, doctrine fills in much of the rest of the accountability picture here. The processes by which defendants can hold the government accountable for this right are internal to the legal system itself: They

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[48] Jerry Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115 (Michael W. Dowdle ed., 2006).

[49] Rubin, *supra* note 4, at 52; *accord* Bovens et al., *supra* note 4, at 2 ("Accounting always has a dual meaning: it is about listing and counting important 'things'—possessions, debts, agreements, promises—and about providing an account concerning this count. Thus it implies telling a story, based on some obligation and with some consequence in view."); Jonathan Fox, *The Uncertain Relationship Between Transparency and Accountability*, 17 DEV. IN PRAC. 663, 664 (2007).

[50] Mashaw, *supra* note 48, at 152.

[51] U.S. CONST. amend. VI.

[52] *See, e.g.*, REPORT OF THE GEORGIA SUPREME COURT INDIGENT DEFENSE COMMISSION, *supra* note 5, at 48 ("The State of Georgia lacks a statewide system of accountability and oversight to provide constitutionally adequate assistance of counsel for indigent defendants."); ACLU OF WASH., *supra* note 6, at 5 ("Today, . . . a majority of counties are not held accountable for the quality of trial court indigent defense services."); SMART ON CRIME COAL., *supra* note 6, at 81 (calling for "[a]ccountability for [v]iolations of [i]ndividual [l]iberty by [s]tate and [l]ocal [g]overnment"); TEX. APPLESEED FAIR DEF. PROJECT, *supra* note 6, at 43 (criticizing lack of county accountability for quality of indigent defense).

can assert the right as a defense to prosecution where the government's obligation is breached, and they can (with considerably more difficulty inhering in constitutional doctrine and justiciability requirements) affirmatively litigate the right in a civil action.[53] As for the criteria against which the government will be judged, federal constitutional law sets a minimum threshold—counsel must be provided in all felonies and misdemeanors for which imprisonment is imposed, and counsel must be "effective" as *Strickland v. Washington* and its progeny define the term.[54] State law sometimes exceeds this lower bound, but as with federal law it provides substantive guidance that is both highly general and relatively minimal.[55] As a result, the "effect" of this type of accountability will typically be circumscribed: If a lawyer has been erroneously denied, one can be provided, or a conviction can be reversed, or some combination thereof.

But while constitutional doctrine has been highly consequential in setting basic policy priorities in indigent defense—creating what some have dubbed "unfunded mandates" to supply counsel in a judicially specified category of cases—this form of accountability does little to dictate the details of lawyers are provided to the poor, or even, for that matter, to catch instances where defendants receive less than their constitutional entitlement.[56] On the other hand, it is clear that the threat of being held to legal account is a stick to which at least some governmental units are responsive, as when the specter of reversed criminal convictions or civil liability extracts funding concessions from otherwise reluctant legislatures.[57] And increasingly, legal accountability in the form of structural

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[53] *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 680–85 (2007). This limitation holds at least insofar as we treat defendants as a distinct category of accounters. Defendants qua citizens can wield other tools, including in particular political, *i.e.*, electoral, responses. *See, e.g.*, Mashaw, *supra* note 48, at 121.

[54] Alabama v. Shelton, 535 U.S. 654 (2002); Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainwright, 372 U.S. 335 (1963).

[55] *See, e.g.*, Jan Lucas, *A Cumulative Approach to Ineffective Assistance: New York's Requirement That Counsel's Cumulative Efforts Amount to Meaningful Representation*, 28 TOURO L. REV. 1073, 1086 (2012) (listing states that depart from *Strickland*).

[56] *See, e.g.*, Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L. J. 2676, 2685 (2013) (arguing that "the promise of *Gideon* [has] been so poorly realized" due to "interrelated phenomena" of Supreme Court's imposition of "unfunded mandate on state and local governments with the only realistic enforcement mechanism being the finding of ineffective assistance of counsel in individual cases," and the Court's creation of ineffectiveness test "that makes it very difficult for a convicted individual to get relief, even when counsel's performance is quite deficient"); Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1714–15 (2016) (citing "wide agreement" that the Court's ineffective assistance of counsel doctrine itself "contributes to the indigent defense crisis with abysmally low constitutional standards for defense attorney performance").

[57] *See, e.g.*, Kurt Erickson, *Missouri Budget Could Help Ease Pressure on Public Defender System*, ST. LOUIS POST-DISPATCH (June 6, 2016), http://www.stltoday.com/news/local/govt-and-politics/missouri-budget-could-help-ease-pressure-on-public-defender-system/article_42e616c3-

reform litigation is shifting the playing field in jurisdictions where widespread, structural deficiencies in the provision of competent defense counsel render the Sixth Amendment guarantee utterly illusory. To connect this to our other variable of interest, data has played a critical role here, permitting plaintiffs to demonstrate statistically the pervasiveness of deficiencies as well as the likelihood of counsel's ineffectiveness given caseloads and other burdens, and thereby to overcome significant hurdles to creating class actions, proving constitutional violations, and obtaining injunctive relief.[58]

Defendants, however, are not the only actors in the indigent defense realm with an accountability relationship to the government, and legal mechanisms of enforcing that relationship are not the only type. So even sticking with the state as the "who" in the accountability relationship, other "to whom" candidates might be posited—say, the public generally, which has a democratically grounded interest in holding government "accountable" for its performance obligations, constitutional and otherwise.[59] Indeed, the oft-made connection between the tenuous political foothold for indigent defense and perennial under-resourcing of the field essentially depicts a deficit in this form of accountability.[60] And if an

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6f92-5981-a7f2-14bd37f993dc.html [https://perma.cc/BD7R-XAF6] (quoting legislator and former prosecutor concerned that without funding increase convictions will be thrown out); Eli Hagar, *Why Getting Sued Could Be the Best Thing to Happen to New Orleans' Public Defenders*, MARSHALL PROJECT (Jan. 28, 2016), https://www.themarshallproject.org/2016/01/28/why-getting-sued-could-be-the-best-thing-to-happen-to-new-orleans-public-defenders#.fWTNOi7uB [https://perma.cc/Q45Q-JLNT] (speculating that threat of civil liability will spur action).

[58] *See, e.g.*, Drinan, *supra* note 53, at 432; BEEMAN, *supra* note 11, at 22; Stipulation and Order of Settlement, Hurrell-Harring v. State of New York, No. 8866-07, at 5–14 (Oct. 21, 2014), https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf [https://perma.cc/68FL-ZNJR] (memorializing agreement to settle indigent defense suit in exchange for counsel at arraignment, caseload standards, monitoring, and other improvements to provision of counsel in New York); Kuren v. Luzerne Cty., 146 A.3d 715, 718, 720–25 (Pa. 2016) (holding that "a cause of action exists entitling a class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel due to underfunding, and to seek and obtain an injunction forcing a county to provide adequate funding to a public defender's office" and relying on data documenting caseloads and staffing).

[59] There are yet other accounters here, of course. For example, units of government directly responsible for providing indigent defense—say, a public defender office—could hold (and have held) the funding jurisdiction accountable for resource decisions by refusing to accept more cases. *See, e.g.*, Melvin J. Dubnick, *Accountability and Ethics: Reconsidering the Relationship*, 6 INT'L J. ORG. THEORY & BEHAV. 405, 410–11 (2003); Ben Meyers, *Orleans Public Defender's Office to Begin Refusing Serious Felony Cases Tuesday*, TIMES-PICAYUNE (Jan. 11, 2016), http://www.nola.com/crime/index.ssf/2016/01/orleans_public_defenders_to_be.html [https://perma.cc/YFD6-TVW5]; Erik Eckholm, *Public Defenders Push Back Against Budget Cuts*, S.F. GATE (Nov. 9, 2008), http://www.sfgate.com/news/article/Public-defenders-push-back-against-budget-cuts-3186194.php [https://perma.cc/856F-W69X].

[60] *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1091 (1993); Michael Barrett, *Using Caseload Standards, Time Logs, and Other Tools to Get Public Defender Funding*, NAT'L ASS'N FOR PUB. DEF.: BLOG (June 3, 2016), http://www.

accountability deficit does exist on this score, its sources could be several, depending upon (among other factors) the answers to Mashaw's questions here. For example, the break-down might be that the mechanism of accountability is an electoral one, but the people apt to vote on the issue of indigent defense are either too small in total number or too marginalized from the democratic process to broadcast that preference. It could be that criteria by which the public assesses lawmakers' job performance in this arena are not what they should be, for example if the voters' bottom line (or what lawmakers' think is the voters' bottom line) is cost over system performance. Or it could be that the voters are poorly informed about how official decision-making is affecting the provision of counsel to the poor.

These various potential sources of deficiency in this accountability type have obviously distinct implications for solutions, including but not limited to the potential for data to be ameliorative. For example, advocates for improvements to indigent defense typically envision that data will empower their efforts by enhancing the political pressure on intransigent funders faced, in a data-rich world, with incontrovertible evidence that budgetary levels make the provision of competent counsel to all indigent defendants practically impossible.[61] Unquestionably, this is one potential way in which data will intervene in these political accountability relationships, but, as Part III will explore, it is not the only one.

Accountability for indigent defense might aim closer to the ground, though, in the sense of oversight of what indigent defense services are being provided. In the individual case, other actors in the adversary system might themselves play roles as accounters. This is exemplified by an accountability relationship that is all-too-common in states and, indeed, in the federal system, wherein defense lawyers are selected and appointed by the judges before whom they practice. As David Patton describes in a call for greater independence for appointed counsel in federal criminal cases, judges routinely hold defenders accountable for responsible use of public funds by, for example, rationing resources for processing discovery or obtaining case experts.[62] It is an arrangement that raises serious concerns about defender independence; it arguably provides the wrong answers to Mashaw's six

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publicdefenders.us/blog_home.asp?display=19 [https://perma.cc/P87G-5RKC]. Thoughtful scholars have persuasively made the case, though, that assessing political support for defense funding is probably more complicated than other areas of criminal law legislation. *See* Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 923–24 (2010) (exploring political preferences that might generate varying, commonly low, popular support for indigent defense funding); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 259–62 (2004).

[61] *See* BEEMAN, *supra* note 15, at 5; Laurin, *supra* note 10, at 361.

[62] David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 368–72 (2017).

questions; but those concerns do not lessen the extent to which *an* accountability dynamic is at work.

More robust accountability might emerge various bureaucratic regimes that exist in indigent defense. Thus, an individual lawyer in a public defender office is in some way and in varying degrees accountable to supervisors within the office. The office might, in turn, be accountable to some an outside oversight entity. Or, a bureaucratic oversight entity might have the capacity to hold accountable institutional and individual defenders alike, as in a state like Michigan that lacks a statewide public defender but has created a statewide indigent defense commission to "ensure the state's public defense system is fair, cost-effective and constitutional while simultaneously protecting public safety and accountability."[63] The American Bar Association's standards for defense practice envision that accountability of this sort will exist, calling for defense lawyers to be "supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards."[64] And it is a deficit in this type of accountability that is frequently invoked in criticisms of the fragmented nature of indigent defense, provision of which is sometimes the responsibility of an organizational entity, but frequently carried out by autonomous assigned counsel with little monitoring.[65]

Mashaw's "six basic questions" might be, and are, answered in various additional ways. There are political accountability levers, as where legislatures directly monitor the functioning of a statewide public defender, typically through the appropriations process.[66] Still another potential accounter is, of course, the client him- or herself, though both constitutional doctrine and design choices in indigent defense limit the avenues for individuals to evaluate counsel.[67] Indeed,

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[63] MICH. INDIGENT DEF. COMM'N, http://michiganidc.gov [https://perma.cc/G5KN-CU46] (last visited Mar. 16, 2017).

[64] AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [https://perma.cc/SD9D-KNFD].

[65] *See, e.g.*, Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1799–1800 (2015) (bemoaning lack of oversight of lawyers); Metzger & Ferguson, *supra* note 18, at 1072 (emphasizing need to "create an accountability mechanism to reduce practitioner error"); NAT'L LEGAL AID & DEF. ASS'N, A STRATEGIC PLAN TO ENSURE ACCOUNTABILITY & PROTECT FAIRNESS IN LOUISIANA'S CRIMINAL COURTS (2006), http://www.nlada.net/sites/default/files/la_strategicplantoensureaccountabilityjseri09-2006_report.pdf [https://perma.cc/75U5-6TNT] (urging adoption of standards and compliance program); TEX. APPLESEED FAIR DEF. PROJECT, *supra* note 6, at 43; COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 34 (2006), http://nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf [https://perma.cc/27Z5-8NYP].

[66] *See, e.g.*, COLO. STATE PUB. DEF., FISCAL YEAR 2016–17 BUDGET REQUEST (2015), http://www.coloradodefenders.us/wp-content/uploads/2016/05/fy17-ospd-budget-submission.pdf [https://perma.cc/PE5R-96VJ] (reporting office performance in connection with budget submission to legislature).

[67] *See* Janet Moore et. al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1287 (2015); JONATHAN E. GRADESS, PUBLIC

one push in indigent defense reform has been to invigorate this form of accountability through market mechanisms, as seen in the indigent defense voucher initiative pushed by scholars including Stephen Schulhofer, and recently piloted in Comal County, Texas.[68] Finally, more radically horizontal accountability might be generated *among* defense lawyers. Eve Brensike Primus has written recently of the great need for public defender offices to shore up their "group structure" as a way of improving defense culture, and mechanisms for doing so include group strategy sessions and other avenues for peer feedback.[69]

As the preceding discussion intimated, in addition to variety in the parties to and mechanisms of an accountability relationship, the criteria by which a provider of indigent defense services might be held to account will also be varied. Those criteria will likely vary depending on, among other circumstances, the identity of the accounter, its institutional incentives, and its normative outlook.[70] Among critics of the field, the presumptively appropriate criterion is typically quality of representation, defined by reference to standards of practice and the like. But a legislative body or other funding gatekeeper is likely to have additional (or alternative) criteria in mind, including the types of cost and public safety implications that are more widely shared across the electorate. Thus, for example, the North Carolina legislature in 2013 enacted requirements that the state's indigent defense commission, in awarding contracts for defense services, "consider the cost-effectiveness of the proposed contract."[71] A public defender bureaucrat, by contrast, might be expected by virtue of professional affinity and ethical obligation to channel a more single-minded focus on representation quality in an accountability relationship, though the centrality of that priority can certainly be mediated by pressure created through other accountability relationships, *e.g.*, between the organization and the legislature or other external oversight agency.[72] It is presumably this sort of mediation that legislatures are aiming for when they discipline public defense administrators for prioritizing advocacy over cost—as when the Legal Aid Society of Onondaga County, New York lost its indigent defense contract after a legislative committee questioned its volume of motion

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DEFENSE AT THE CROSSROADS: LISTENING TO THE VOICE OF CLIENTS (2003), http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=49278 [https://perma.cc/3M2X-7KFH].

[68] *See* Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 508–10 (2015); *see also* Moore, *supra* note 56, at 1729.

[69] Primus, *supra* note 65, at 1792–93.

[70] *See* Mashaw, *supra* note 48, at 155–56 (discussing normative concerns in accountability design); MICH. INDIGENT DEF. COMM'N, *supra* note 63.

[71] *See Introduction to Requests for Proposals and Contracts*, N.C. OFFICE OF INDIGENT DEF. SERVS., http://ncids.org/RFP [https://perma.cc/J5U6-K3LV] (last updated Aug. 31, 2016).

[72] Lorelei Laird, *When Public Defenders Become Plaintiffs*, ABA J. (Jan. 1, 2017), http://www.abajournal.com/magazine/article/when_public_defenders_become_plaintiffs [https://perma.cc/42RA-6QMJ] (noting that public defenders are disinclined to take legal action to obtain more funding because "they're exposed to politically motivated firings, budget cuts, and more").

practice and discovery requests.[73] Indeed, the oft-cited need for defender *independence* can be understood as a mirror image of the accountability deficit, a problem of misplaced or *over*-accountability.[74]

Again, the account here is gestural rather than exhaustive. But it suffices to make the central point, which is that in indigent defense, as elsewhere, accountability is multi-faceted and multiple.[75] And with that understanding, we are far better positioned to assess the impact that data in its many varieties might have on the accountability landscape, and vice versa. It is to that task that the next part of this essay turns.

III. THE DATA-ACCOUNTABILITY INTERPLAY

There are a number of reasons why it might be a good idea to "do data" in indigent defense.[76] We might think that data-driven decision-making is typically going to yield higher quality policies than reasoning from experience or intuition. We might believe that with a literal accounting of what defenders do (or don't do), advocates for indigent defense can make the case for more funding or for legal liability to legislatures and courts, respectively. We might think that indigent defense providers in a democracy have an obligation to be transparent in their operations. But whatever the premise about the value of enhanced data capacity in the field, the very logic of embracing data calls for careful scrutiny of claims in its favor. As an increasing number of states and the Department of Justice's grant-making infrastructure climb aboard the data train, it is well to ask more critical questions about what those efforts are likely to yield.[77] Particularly ripe for questioning are unqualified assertions that data will "bring accountability . . . to the defense function."[78] This part names and explores four perverse dynamics that

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[73] *See* Primus, *supra* note 65, at 1790–91; *see also* Flora v. Cty. of Luzerne, 776 F.3d 169, 173 (3d Cir. 2015) (reinstating lawsuit alleging county fired public defender in retaliation for efforts to obtain more funding); Julie Bykowicz & Tricia Bishop, *Top Maryland Public Defender is Fired*, BALT. SUN (Aug. 22, 2009), http://articles.baltimoresun.com/2009-08-22/news/0908210179_1_forster-public-defender-outsource [https://perma.cc/CVB5-734P] (detailing firing of chief public defender in aftermath of request that agency growth rate be curbed).

[74] *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1069 (2006); NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 80–84 (2009), http://www.constitutionproject.org/manage/file/139.pdf [https://perma.cc/G67S-RLB6]; *cf.* Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 203 (2014).

[75] *Cf.* Koppell, *supra* note 45, at 99.

[76] *See generally* Davies, *supra* note 17.

[77] *See supra* notes 11 & 12 and accompanying text.

[78] *See* Dawn Deaner, *2014 in Review: Ending Excessive Workloads*, NAT'L ASS'N FOR PUB. DEF. (Apr. 9, 2015), http://96.5.71.27/?q=node/756 [https://perma.cc/EW9R-63PY]; TEX. FAIR DEF. PROJECT, BENEFITS OF A PUBLIC DEFENDER OFFICE: INCREASING ACCOUNTABILITY AND COST

might emerge in the data-accountability relationship. The part concludes with thoughts about how, with eyes open, these risks might be mitigated.

A. *The Data-Accountability Trade-off*

Consider first the possibility that more tools in the arsenal of an accountability relationship will not actually enhance the quality of its accounting, if the task is understood to be aimed at *improving* the provision of indigent defense. In part, the concern rests on the fact that conditions in the indigent defense field are ripe for the so-called "accountability paradox" to arise: There is an almost inevitable trade-off between accountability and performance, since "reporting, mitigating, and reframing demand attention and consume the energy and time of the account giver—thereby using resources that would otherwise be devoted to the more desired forms of performance."[79] In the resource-constrained world of indigent defense, triage is virtually always the order of the day; tracking time, or reviewing the fruits of that tracking, is virtually guaranteed either to siphon resources from other tasks, or to tax the capacity of over-extended actors.[80]

Without fully exploring potential manifestations of the trade-off problem, we can gain purchase on the concern by reconsidering the impact of expanding granular, case-level knowledge about what defense services are being provided on *lawyer* accountability. There is an obvious accountability function for such information, vis-à-vis individual defenders. A public defender organization with real-time data about the work being done by its attorneys has the ability to continuously monitor workloads and the quality of representation by tracking the indicators created by the lawyers themselves.[81] But will these expanded tools truly enhance the accountability of those lawyers in the sense of identifying and ameliorating low-quality representation? It almost certainly will if the alternative is next-to-zero monitoring and evaluation—a condition of unfortunate prevalence.[82] But the answer is less clear if data-driven supervision trades off with

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EFFECTIVENESS IN HARRIS COUNTY'S INDIGENT DEFENSE SYSTEM 1 (2009), http://www.fairdefense.org/wp-content/uploads/media/TFDP-Harris-County-PD-White-Paper.pdf [https://perma.cc/N6SK-ZX9A] (arguing that public defender and concomitant data capacity will achieve better accountability of defenders as well as the system to the taxpayers); *see also* BEEMAN, *supra* note 11, at 18–23 (suggesting that identical data will enhance internal bureaucratic accountability, political accountability, and legal accountability, among other types).

[79] Melvin Dubnick, *Accountability and the Promise of Performance: In Search of the Mechanisms*, 28 PUB. PERFORMANCE & MGMT. REV. 376, 396 (2005).

[80] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) ("[D]efense lawyers' most important job is triage: deciding which (few) cases to contest somewhat, which (very few) cases to contest seriously, and which ones not to contest at all."); Barrett, *supra* note 60.

[81] *See, e.g.*, BEEMAN, *supra* note 15, at 3–4; Metzger & Ferguson, *supra* note 18, at 1097–98.

[82] *See* Primus, *supra* note 65, at 1775.

other forms that supervision might take—review of hearing and trial transcripts, court visits, shadowing, and so forth.[83] Perhaps ideally, supervisors would want a multi-textured portrait of lawyer performance, gleaned both from quantitative data about performance indicators like motions filed, investigative hours logged, and dismissals won, as well as a qualitative indicia. But in a world of limited resources, it is more likely to be zero sum.[84] The trade-off risk is exacerbated by the possibility that data-driven supervision will be more appealing than the alternatives. Reviewing case management reports can be done at any time, remotely, and relatively quickly, in contrast to file checks, transcript review, and other more labor intensive techniques.

Furthermore, there are reasons to think that the trade-off, if it occurred, would be deleterious. It seems likely that at least some attorneys can "improve their numbers" without actually improving performance.[85] Even assuming no shirking, here are attributes of good lawyering that data indicators are unlikely to capture—a lawyer's rapport with clients or their families, a lawyer's skill in jury selection. And there are arguably psychological (and, as a result, performance-related) gains from the act of non-data-driven supervision itself. In a profession in which a surfeit of autonomy and a deficit of collaborative work habits is widely thought to contribute to poor performance and burn-out, refashioning workplace accountability through mechanisms that require less rather than more interpersonal engagement risks exacerbating toxicity within the work environment.[86]

I hasten to admit that there might seem something too banal to the observation that tasks take resources, that actors must find those resources, and that if new resources aren't created old ones will be consumed to get the job done. But indigent defense, like few other operations—to say nothing of other *constitutionally protected* operations—is a perennially resource-strapped field.[87] Calls for enhancing the data profile of indigent defense in order to, among other ends, increase quality and secure greater and more stable funding must confront the (however obvious) chicken-and-egg problem that flows from adding to defenders' to-do lists.

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[83] *See* Primus, *supra* note 65, at 1816–17.

[84] *See* Metzger & Ferguson, *supra* note 18, at 1072; *cf.* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1430 (2011) ("The main benefit of such research activities is that additional information may lead to better decisions. Research, however, is costly: It requires a decisionmaker (or her staff) to devote time, resources, and mental effort to studying a particular issue rather than to something else. . . . For these reasons, there is a limit both to how much research is socially desirable and to how much research one can expect a public decisionmaker to undertake.").

[85] *Cf.* Arie Halachmi, *Accountability Overloads*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 560 (Mark Bovens et al. eds., 2014).

[86] *See* Primus, *supra* note 65.

[87] *See* Brown, *supra* note 60, at 908; Mayeux, *supra* note 3, at 24.

B. *Data-Accountability Normativity*

Data doesn't speak for itself—at least not when pressed into use in context, much less the politically contested context of indigent defense.[88] As the previous part observed, the criteria by which anyone should be held to "account" in the context of indigent defense is normatively contestable—even among defenders themselves. Thus, to evaluate the quality of a public defender's work, one must determine, among other things, what to value, and how to rank a range of outcomes. How, for example, does a case in which a client was incarcerated pretrial and ultimately entered a plea for a lower-than-market prison term compare to a case in which a client obtained pretrial release and was convicted at trial but won a pretrial suppression motion? The permutations of that question are nearly endless, and certainly not unanswerable, but they are highly contestable. Moreover, they point to the risk that data (at least as currently conceived) might not capture characteristics for which defenders should be held accountable: How, for example, should client satisfaction, or the client's family's satisfaction, be measured and factored into the quality equation? Again, this is not an intractable problem, but it is one that can be missed if decisionmaking starts with data rather than with values.

Shifting the focus to the normative perspective of external actors only heightens the normative conflict, and points to a different set of stakes. Constitutional law sets a low bar for indigent defense quality, and commits to the political process decisions about the extent to which a system will exceed that bar.[89] Data can depict how a system is performing, but cannot resolve the question of whether that performance is good enough.

Consider in this light the accountability dynamics between funding entities and indigent defense providers. Proponents of more data-driven defense commonly argue that defender organizations that rigorously track how attorneys spend their time and what outcomes they achieve will be better armed to insulate defense programs against legislative cost-cutting tendencies. As the head of Missouri's statewide public defender described in touting the advantages of robust time tracking in his own office,

> No longer do I have to speculate or use anecdote to describe to legislators how many hours a public defender spends waiting in court because judges give private attorneys priority, or the percentage of an attorney's time spent opening and closing files. Ask a fiscally conscientious legislator if they think taxpayers should pay an attorney to

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[88] *See generally* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165 (1999).

[89] *See* Stuntz, *supra* note 80, at 70.

> sit in court for hours and then end their day performing ministerial tasks that support staff can do for less?[90]

The argument is, in essence, that data will create more functional accountability processes by demonstrating the affirmative link between certain expenditures and objective measures of defense services quality. Undoubtedly, that is one possible outcome, and anecdotal accounts bear out the possibility; the Missouri public defender, armed with an elaborate, first-of-its-kind empirically based caseload study, convinced the legislature to extend the "largest increase in appropriations for the Missouri State Public Defender Commission in 15 years."[91] But significant counter-examples exist: North Carolina's unusually rigorous program of data collection and analysis has not spared indigent defense from the legislature's budgetary hatchet.[92] Indeed, the Missouri victory was short-lived. The state's democratic governor vetoed the funding bill, and the public defender has remained severely hobbled and locked in a pitched political battle ever since.[93]

This is unsurprising. Data, even high quality data demonstrating, for example, precisely how many new attorney positions are required to spend adequate time defending cases, cannot by its own force cut through the essentially normative concerns about how much to value lawyers for poor defendants, and how to rank lawyers for poor defendants in the list of priorities a legislature necessarily has. Ideally, data would permit a defense organization to demonstrate convincingly that requested budget levels are a win-win. Advocates have argued that empirical studies demonstrating the benefits of providing counsel at bail hearings are of precisely this character, documenting liberty gains to represented defendants and cost savings to counties through reduced jail populations.[94] But

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[90] Barrett, *supra* note 60; *see also* NAPD Steering Committee, *supra* note 35 ("When the time comes to go to the Legislature or, failing there, to the courts, [time tracking] data will prove to be invaluable."); BEEMAN, *supra* note 11, at 5 ("There are many applications of data for program advocacy, chief among them budget and resource justifications. Whether making a convincing case that you serve your clients well or that you are overloaded and need more resources, you can substantiate your argument with data.").

[91] Laird, *supra* note 32, at 51; *see also* David Carroll, *Montana Caseload Challenge Results in a Significant Increase in Resources*, NAT'L ASS'N FOR PUB. DEF. (Apr. 17, 2014), http://www.publicdefenders.us/blog_home.asp?display=381 [https://perma.cc/B342-Z5CN] (attributing Montana legislature action to supplement public defender funding to time tracking by defenders).

[92] *See* N.C. COMM'N ON INDIGENT DEF. SERVS., REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 16–19 (Mar. 1, 2016), http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2016.pdf [https://perma.cc/N435-KC3J] (reporting $10.5 million cut in 2011, forcing reduction of attorney pay).

[93] Tony Messenger, *GOP Senator Sticks Up for Head of Missouri Public Defender System*, ST. LOUIS POST-DISPATCH (Aug. 29, 2016), http://www.stltoday.com/news/local/columns/tony-messenger/messenger-gop-senator-sticks-up-for-head-of-missouri-public/article_7f9d1477-d633-5b0b-b48b-2481f88ddeda.html [https://perma.cc/N2CT-2DDE].

[94] *See* NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, DON'T I NEED A LAWYER?: PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 32–34

frequently the case is likely to be mixed: Defense programs need more than what the legislature would authorize if unconstrained by Sixth Amendment obligations, and whether what's purchased is an adequate defense or an excessive defense will be in the eye of the beholder.[95] Indeed, accountability conflicts will only be made more vivid, rather than resolved, by the data. Imagine a legislature armed with data concerning the precise menu of programs or services defenders can offer under given budget conditions, now more able to weigh in with its own views about the relative priorities of those offerings.

C. *Differential Accountability*

A distinct concern arises from the range of accountability types that seem less likely to be enhanced, and perhaps even likely diminished, by centering the production and analysis of indigent defense data. By way of example, consider government's accountability to the general public for fulfillment of the legal obligation to provide adequately for indigent defense; lawyers' accountability to their indigent clients for the provision of adequate (indeed zealous) advocacy; and defenders' mutual accountability to their colleagues for adequate professional performance. These three types are noteworthy in three respects. First, it is fair to say that all three are currently weak (and in some cases non-existent) accountability mechanisms in the field: lack of public interest in and support for defenders, marginalization and alienation of indigent clients, and widespread absence of supportive professional environments are all cited as pervasive characteristics of indigent defense practice.[96] Second, stakeholders within and observers of the field have made repeated and compelling arguments that shoring up these accountability relationships would meaningfully enhance the quality of indigent defense.[97] And third, these are accountability types in which enhancement of the indigent defense data profile is likely to have low impact.

To make the last point is not to argue that more robust and contextualized information about the quantity and quality of indigent defense is theoretically irrelevant to the public, or to clients, or to colleagues. One could imagine a world in which the public directly, or through the work of knowledge brokers like non-

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(2015), http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf [https://perma.cc/4H3Z-NQVK].

[95] *See* Primus *supra* note 65, at 1790–91 (discussing conflict over public defender resource allocations); *cf.* Halachmi, *supra* note 85, at 562–63 (discussing how institutional context affects perceptions and understanding and hence impacts accountability dynamic).

[96] *See, e.g.*, Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 87 (1995); Primus, *supra* note 65, at 1772–78.

[97] *See* Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L 177, 205 (2008); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 126 (2004); Primus, *supra* note 65, at 1806–21.

profits or the media, consumed vastly more detailed information about the work that their taxpayer dollars funded. A project funded by a Department of Justice grant to develop a publicly accessible portal for the enormous volume of county-level data maintained by the Texas Indigent Defense Commission has this among other aspirations.[98] Or, in Comal County, Texas, where indigent defendants are now voting with their feet about the quality of lawyers by choosing where to spend county-provided defense vouchers, we can suppose that real-time public data about lawyers' caseloads would meaningfully inform prospective client decision-making.[99]

But it is not too cynical to suggest that the above hypothetical scenarios are not the most likely. This is not simply about making the demonstrably true point that individuals who lack special incentive and expertise to consume indigent defense data are unlikely to endeavor to do so.[100] At a minimum, bringing data to stakeholders outside the inner circle of attorneys, administrators, and governmental funders will require additional effort—in publicity, in development of data presentation infrastructure, in contextualization of raw data—above and beyond what would be necessary to render the data operative in other accountability relationships.[101] In other words, public, client, and professional accountabilities will have to be independently prioritized and valued *over and above* the likely more immediate pull of supervisory and legislative accountability.[102]

But more to the point, more detailed, more robust, information about what defenders do and the effect of that work on client outcomes seems, actually, not to be the most important missing ingredient in these now neglected accountability relationships. The public's dim view of the value of work done by lawyers for indigent defendants is a product of a clash of values, the fact that an indigent defendant client's interest in zealous advocacy can have negative externalities (if, for example, the defendant is guilty), and simple prejudice at least as much as a misunderstanding about the nature and impact of the work. For clients to be able to hold lawyers accountable, they need meaningful opportunities to collaboratively communicate within the representation relationship, and to express feedback outside that relationship, not more information about their lawyer's work. More robust horizontal professional accountability will be achieved through

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[98] *See Texas*, SMART DEF., http://smartdefenseinitiative.org/initiative-site/texas [https://perma.cc/WDJ4-BB3Q] (last visited Jan. 27, 2017) (detailing grant-funded project to "develop a data driven communication strategy to inform policy decisions" as well as "[p]rovide educational information for stakeholders who are not necessarily experts in indigent defense").

[99] *See* Schulhofer, *supra* note 68.

[100] *See generally* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011).

[101] *Cf.* Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 119 (2012) (making similar point in the context of administrative agency accountability).

[102] *See supra* text accompanying notes 93–97.

opportunities for collaborative work, outlets for peer brainstorming and feedback, not organization-wide review of performance statistics. Were the pursuit of data-driven accountability to distract or detract from such efforts, indigent defense would miss opportunities to meaningfully improve culture and practice within the field.

D. *Perverse Accountability*

Closely related to concerns about differential accountability is the risk that data might render actors in indigent defense *too* responsive to certain accountability relationships, resulting in a perversion of accountability. Barbara Romzek and Melvin Dubnick discussed a relevant species of this type of problem in their seminal case study of the Challenger disaster, in which they attributed many of the errors that contributed to that accident to "the *inappropriateness* of the political and bureaucratic accountability mechanisms" to the technical decisions NASA faced in relation to the Challenger launch; "if the professional accountability system had been given at least equal weight in the decision-making process, the decision to launch would probably not have been made on that cold January morning."[103] Moreover, and perhaps more tragically, Romzek and Dubnick observed that the outsized responsiveness that NASA exhibited to political and bureaucratic accounters (who pushed for the Challenger launch with ignorance or unsophisticated understanding of the technical risks) was not irrational, but rather a predictable organizational response to budgetary pressures and the need to cultivate ongoing political support for the agency's space shuttle program.[104]

The broader point is that actors in multiple, simultaneous accountability relationships—a quality that characterizes most if not all actors in indigent defense—might not give uniform weight to those roles. Consider the significance of this insight for just one potential accountee, an administrator of indigent defense services, perhaps (as in many but far from all jurisdictions) a chief public defender. A common account of the role that data will play in that actor's accountability relationships is that developing an ongoing, granular understanding of the work of lawyers within the agency will lift all boats, simultaneously enhancing the ability to effectively supervise within the organization, and facilitating answerability to the legislature and other political actors, while also supplying the necessary informational capacity to invoke legal accountability mechanisms—*i.e.*, suit by clients denied the right to counsel—if governmental funders are intransigent.[105] But when one considers the spectrum of data-gathering rigor discussed in Part

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[103] Barbara S. Romzek & Melvin J. Dubnick, *Accountability in the Public Sector: Lessons from the Challenger Tragedy*, 47 PUB. ADMIN. REV. 227, 235–36 (1987).

[104] *Id.* at 231.

[105] *See, e.g.*, Barrett, *supra* note 60.

II.A., as well as the resources that will be required for defense organizations to develop a reliable, robust data program, triage seems a more likely scenario. And the data that is likely to grease the wheels of a budgetary accountability relationship is likely to be higher-level than the information an administrator would need to meaningfully supervise attorney work.

On the flip side, it is possible that pressures of accountability will *suppress* the enthusiasm of indigent defense administrators to collect granular data, if access to and review of that data by accounters who do not prioritize zealous defense would render the organization politically vulnerable.[106] Put differently, there is a risk that the very data that would be valuable to enhance accountability of defenders to supervisors for quality performance, might also be used by judges who have a role in appointing counsel, or legislatures who have a role in funding counsel, to check, control, and ration resources to defenders.

To a large extent, these observations illuminate that accountability in indigent defense has a double-edged quality, to the extent that accountability relationships can impinge upon the independence that is ethically, indeed legally, required of defense counsel.[107] This is a tension that can and must be managed with good institutional design, a matter to which the next part turns. But the point for present purposes is that data can feed into this vulnerability at least as readily as it can ameliorate it.

E. *Reflections on Design*

The previous part sounded largely cautionary notes. The intent is not to reject the aspiration of a more data-rich indigent defense field, but rather to be clear-headed about predictions for the upsides of that turn, and also to put in clear view potential—but not inevitable—downsides. Among other benefits from the endeavor is to permit more deliberate design choices in fashioning both data regimes and accountability structures, to mitigate or avoid such risks. In that vein, there is a distinct advantage to the still-low data profile of the field, in that many design questions are still open, and hence capable of attending to the dynamics discussed above. Without mapping a precise course forward, this part suggests some priorities and frames for those important deliberations.

The first agenda item that flows from the observations of this essay is for practitioners and scholars to attend more than we have to precisely what forms of accountability are ideal and attainable in indigent defense. This is not a conversation that is occurring, at least not explicitly. States' increasing interest in

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[106] *See* Primus, *supra* note 65, at 1790–91.

[107] *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."); AM. BAR ASS'N, *supra* note 64, at 1 (citing "independen[ce]" of public defense function as first principle).

the last decade in creating forms of independent, external oversight of indigent defense has obvious implications for this issue, but has been little studied. Discussions of optimal service design, which typically focus on a false binary choice between public defenders and assigned counsel, tend to center on which designs will generate superior client outcomes, and to a lesser extent on which designs better preserve lawyer independence.[108] These are important but not exhaustive concerns in evaluating potential accountability regimes. Thoughtful evaluation of the empirical and normative concerns here would include asking not only what accountability forms will generate quality, but also what will generate legitimacy—for the public and for users of the system. It would reflect on lesser-discussed ingredients of quality that point toward particular accountability mechanisms, such as defenders' need for a positive professional culture with formal and informal opportunities for attorney mentoring.[109] It would consider the importance (and meaning) of democratic values in the provision of indigent defense.[110] And it would deliberate on the utility and perils of multiple accountability regimes in this arena. Indeed, there are undoubtedly yet more questions that should frame the inquiry. But it is well to take it up in a systematic rather than secondary or accidental manner.

A second and related call, one that has been sounded in other fields that have taken up the data mantle, is to attend to measuring what is valued rather than valuing what is measured.[111] Expanding the role of data in understanding, monitoring, and holding accountable indigent defense practice will have the likely effect of reifying the knowable, of reinforcing and recreating the elements of the field that are evaluated.[112] But there are valuable features of indigent defense practice with important accountability implications that are either less susceptible of measurement than others, or that are less easily identified by the type of real-time task-tracking that is typically associated with high quality data programs—client satisfaction, public legitimacy, and attorney satisfaction, to name just a few discussed in this essay. This suggests either cabining the role of data, or thinking

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[108] *See, e.g.*, James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012); TONY FABELO ET AL., *supra* note 36, at 1–2; Primus, *supra* note 65, at 1806–13 (discussing public defender versus assigned counsel, but also considering variations in each type).

[109] *See, e.g.*, Primus, *supra* note 65, at 1791–1805.

[110] Some have already initiated this thought experiment. *See, e.g.*, Moore, *supra* note 56, at 1720–31 (exploring linkage between indigent defense provision design and democracy enhancement).

[111] *See, e.g.*, ANDY HARGREAVES & HENRY BRAUN, NAT'L EDUC. POLICY CTR., DATA-DRIVEN IMPROVEMENT AND ACCOUNTABILITY (2013), http://nepc.colorado.edu/files/pb-lb-ddia-policy.pdf [https://perma.cc/YZZ6-UN5X] (listing first recommendation for data-driven accountability in education as measuring what is valued).

[112] *Cf.* Sheila Jasanoff, *The Idiom of Co-production*, *in* STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND SOCIAL ORDER 1 (Sheila Jasanoff ed., 2004).

creatively about how to gather this information in a form as readily trackable and comparable as other data. The latter effort was part of the ambitious Systems Evaluation Project spearheaded by the North Carolina Office of Indigent Defense Services, which incorporated client satisfaction into its system measures; similar efforts have been undertaken by other indigent defense programs, but it is fair to say this remains the vanguard.[113] The point here is that measuring such intangibles, if they are indeed valued, should be seen as part of the basic data project, not extra-credit.

A third and final observation to frame the current and future design conversations is that for reasons discussed in this essay, data is likely to make the perpetual concern about independence of the defense function more rather than less acute. Any metric that can be used by a chief public defender or indigent defense commission to ensure attorney performance is high when measured against standards of zealous defense, can also be used by a funding entity aiming to ration defense services, or an appointing entity aiming as much for efficient case process as high quality individual defense. Thus, a jurisdiction that enhances gathering and use of data to monitor attorney performance, but locates that monitoring function at least in part with an entity that is not evaluating exclusively for quality in representation, may well exacerbate rather than ameliorate accountability and independence concerns.

IV. CONCLUSION

Data is here in indigent defense. That is a development that is almost certainly, on balance, for the best. But, the data project might also have unintended consequences, or fall short in some of its promise. This essay has illuminated that when it comes to data as an accountability-generating device, the picture may be more mixed than predictions to date have stated. The answer, of course, is not to abandon the enterprise, but to think systematically about the risks of shortfall and aim to account for those risks in designing data and accountability systems in the field. At bottom, this essay is an invitation for the project to be undertaken in earnest.

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[113] *See* N.C. OFFICE OF INDIGENT DEF. SERVS., *supra* note 6, at 9 (discussing role of client satisfaction surveys); *see also* Christopher Campbell et al., *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 BEHAV. SCI. & L. 751, 756–66 (2015) (describing pioneering study to assess client evaluation of defenders).