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# Critical Issues and New Empirical Research in Public Defense: An Introduction

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# Critical Issues and New Empirical Research in Public Defense: An Introduction

Andrew L. B. Davies\* & Janet Moore\*\*

## I. INTRODUCTION

When we co-founded the Indigent Defense Research Association (IDRA) in 2015, we wanted to create a meeting place for people who share the sense that empirical research has something to contribute to the field of public defense. With over 150 members and counting, IDRA has become a vibrant community of practitioners and researchers who engage via an active listserv, topical monthly conference calls, and the production of white papers and webinars. In addition, IDRA members present papers at conferences of the American Society of Criminology (ASC). Many of the papers in this volume were first presented at the November 2015 ASC conference in Washington D.C. We are immensely grateful to our authors for contributing to this symposium, and are honored to present this collection in the *Ohio State Journal of Criminal Law*.

For this symposium, we identified three areas in which empirical work on public defense is both of critical importance and yet is also underdeveloped. The first focus area is the research field itself. Interest in empirical study of the defense function has grown in recent years, raising questions about how research agendas are formed and about the potential benefits and risks of implementing those agendas. The opening papers in this volume explore these questions with the aim of providing a framework for the studies that follow. The second focus area involves the experiences of people who need public defense representation. Those experiences can shape perceptions of justice systems in ways that may have profound implications for future behavior and success in life, yet we know very little about these experiences and still less about what defense attorneys can do to influence them. The third focus area is policy change and reform. Calls for policy changes to shore up the right to counsel are frequently heard, but again we know very little about what can lead to success or failure when we design and try to implement those changes.

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## II. THE GROWTH OF DATA AND RESEARCH

This symposium begins with three papers that investigate public defense research as a newly emerging field of empirical scholarship. The first paper suggests that we would do well to check whether our priorities align with the empirical concerns of those who live and work in the field, and reports the findings of new research which seeks to uncover those priorities. The second and third papers investigate the potential and pitfalls of this wave of interest in data collection—one problematizing the idea of using data to hold defense “accountable” and another calling for a raft of studies to advocate for more resources.

Our own paper kicks off the discussion by encouraging the newly-emerging and diverse field of public defense research toward greater reflexivity about the formation of research questions and agendas.<sup>1</sup> The drive for data and research in the defense field has undoubtedly been propelled by federal government funds and state legislation demanding oversight.<sup>2</sup> We saw these developments as opening an opportunity to investigate which research questions really matter, to whom, and why. We began exploring these issues by using a modified group-level assessment process with 71 defenders who were invited to generate their top-priority research questions and themes. Their responses comprise a rich panoply of questions ranging in focus from the formation of individual attorney-client relationships all the way to the fairness and efficiency of systems at large. While both of those themes are explored in this symposium, our own paper identifies an implicit but clear desire on the part of these defenders to do better work—to relate to clients more effectively and get better outcomes for them—and also to throw light on bias and unfairness wherever they were to be found. We do not propose that researchers must ask such questions. We do claim that a wider conversation about the focus of our field is healthy and stimulating, and that our findings show the strength of interest in research that defenders themselves possess, as well as their capability for direct engagement with researchers and the research field.

Jennifer Laurin<sup>3</sup> offers a critically important counterpoint by challenging some key assumptions underlying empirical research on public defense. Specifically, Laurin problematizes the concept of using data to hold defense

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<sup>1</sup> Janet Moore & Andrew L. B. Davies, *Knowing Defense*, 14 OHIO ST. J. CRIM. L. 345 (2017).

<sup>2</sup> See, e.g., LA. STAT. ANN. § 15:156.B(2) (2016) (requiring information technology and management officer to ensure data be maintained, “including public defender workload, dispositions, frequency of client contact, duration of time from arrest to disposition, and other data points”); MICH. COMP. LAWS § 780.989(1)(f) (2016) (requiring collection of data on indigent defense services); N.Y. EXEC. LAW § 832.3(b)(i)–(ix) (2016) (requiring data gathering on local defense service provision); N.C. GEN. STAT. § 7A-498.1(4) (2016) (stating legislative purpose to “[g]enerate reliable statistical information in order to evaluate the services provided and funds expended”).

<sup>3</sup> Jennifer E. Laurin, *Data and Accountability in Indigent Defense*, 14 OHIO ST. J. CRIM. L. 373 (2017).

systems “accountable.” Accountability to whom, she asks, by what means, and for what purpose? Digging below the rhetoric about data being good for transparency, she unpacks a plausible scenario. The rush to discover data may be inflected—if not driven—by political and administrative relationships that prioritize certain data and certain accountants over others, ultimately raising questions over whether data collection might impugn the independence of the defense function itself. Accountability might be a good thing, she says, but collecting data is expensive, and if forced to choose between the fiscal data a legislative body requires and monitoring staff performance or gathering feedback from the client community, what will an administrator prioritize? And which, if any, of those usages of data is more likely to tend to the improvement of services? Laurin leaves us aware that the drive for accountability in defense is a more complex proposition than it first appears, and that the rise of data and analytics may have unintended or unpredictable consequences for the development of defense services themselves.

Geoff Burkhart<sup>4</sup> takes a very different stance by arguing for a particular analytic strategy—a workload study—as a reliable method for supporting arguments that the defense function should receive new resources. He argues that a new approach developed in the public defense context by the American Bar Association (ABA) promises to provide the soundest basis yet to support advocacy for needed funding. These studies are based on ABA standards for the quality of representation that attorneys should provide to their clients. They tap the perspectives of defense lawyers who are viewed in their communities as highly qualified to assess the time required to meet those performance standards. Finally, the studies cross-check those assessments with real-time evaluations of time actually spent by practicing lawyers in the same types of cases. Burkhart contends that the ABA workload studies improve on prior approaches, giving them unprecedented credibility and that, with time and expansion across jurisdictions, such studies can support new, empirically-verifiable national standards for public defense workloads. Burkhart further suggests that these developments can drive reform, particularly when the “stats” are partnered with “stories” on the impact of crushing defender workloads and with litigation as needed to complement policy advocacy.

### III. CLIENT EXPERIENCES

In recent years—beginning in empirical scholarship on criminal courts, but now extending beyond it—research has revealed that when defendants experience their relationships with police, courts and correctional agencies as procedurally

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<sup>4</sup> Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 OHIO ST. J. CRIM. L. 403 (2017).

just, improvements occur.<sup>5</sup> The perceived legitimacy of systems increases, and re-arrest rates drop. Yet it is remarkable how infrequently researchers, when presented with evidence that changing the experience of defendants may have good effects, have addressed the question of how those experiences are formed. Still less frequently have researchers examined the role defense representation may play in forming those experiences. The next three papers in this collection address this deficiency directly, and each highlights the critical role of effective communication in the defendant experience of the client-attorney relationship.

Sandys and Pruss<sup>6</sup> ask a fundamental question: what distinguishes clients who say they are satisfied with the representation they received from those who say they are not? These authors remind us that being an effective lawyer goes hand in hand with creating a relationship with clients that allows them to be candid, helpful, and forthcoming and puts the attorney in a better position to do his or her job. Drawing on a survey of 120 defendants, they report that satisfied clients are those who say they saw their attorneys do three things: communicate (talk to their clients), investigate (look into the case), and advocate (fight in court). By showing clients they are doing these things, these authors urge, client experiences—and specifically client satisfaction levels—can be improved. The failure to train lawyers in communication skills at law school, they note, is particularly regrettable; their evidence clearly shows the role such skills can play in sustaining client satisfaction.

New research by Davis, Delany-Brumsey, and Parsons<sup>7</sup> adds an important point: clients and their attorneys may have different priorities, and in order to understand their relationships, we need to ask both about what they experienced during an individual case. Do clients and attorneys remember things the same way? Drawing on interviews with clients and lawyers in 200 cases where the client had been identified as having a mental disorder, they examine perceptions and judgments involving the question of whether to raise the client's mental health status in court. When the cases began, 78% of clients said they would accept a sentence of mandated treatment, but we learn defenders are more trepidatious, concerned that such sentences become a gateway to harsher treatment. The authors' data underscore other differences: only 65% of attorneys thought raising mental health was beneficial, compared to 91% of clients. Changing client

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<sup>5</sup> See, e.g., Tom Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26 (2007); Lyn Hinds & Kristina Murphy, *Public Satisfaction With Police: Using Procedural Justice to Improve Police Legitimacy*, 40 AUSTL. & N.Z. J. CRIMINOLOGY 27 (2007); Eric G. Lambert et al., *The Impact of Distributive and Procedural Justice on Correctional Staff Job Stress, Job Satisfaction, and Organizational Commitment*, 35 J. CRIM. JUST. 644, 645 (2007).

<sup>6</sup> Marla Sandys & Heather Pruss, *Correlates of Satisfaction Among Clients of a Public Defender Agency*, 14 OHIO ST. J. CRIM. L. 431 (2017).

<sup>7</sup> Chelsea Davis, Ayesha Delany-Brumsey & Jim Parsons, *"It's the Hardest Decision I Have": Clients and Defenders on the Role of Mental Health in Case Strategy*, 14 OHIO ST. J. CRIM. L. 463 (2017).

experiences, we learn, is about more than just doing good work. It is also about clear communication and creating sufficient trust that strategic advice will be heard, heeded, and understood—all issues that can raise distinctive challenges when defendants are dealing with mental health issues.

Fountain and Woolard<sup>8</sup> remind us that no relationship exists in a vacuum, and that defense representation of juveniles is enmeshed with the experience of family life. These authors reveal that, even before juveniles are haled into court, they are often saddled with misunderstandings about how lawyers and courts work, by intrinsic developmental limits on comprehension, and—most salient of all—by the presence of some very concerned, sometimes very disappointed, parents. As this paper indicates, parents can and do sometimes act as gatekeepers to their children, complicating the work of attorneys seeking to represent juvenile clients. The authors analyze videotapes of conversations between parents and children deciding whether the child should speak to their attorney alone, revealing what might be three archetypes. One parent overawes the child and gains admission to the meeting; another insists on *not* being present and urges the child to be candid; a third distrusts both the lawyer and her child based on prior bad experiences. Whether these interactions are considered legally appropriate or not, they are shaping children's experiences with defense representation. Transforming those experiences, these authors tell us, requires communicating clearly with both parent and child.

These papers reveal new evidence that the experiences clients have with their representation are deeply consequential. What attorneys do may be important—but client perceptions of those actions may be equally or even more so. When clients come to relationships with prior bad experiences, or see their attorneys doing things they don't like, trust can be hard to build. Of course, this is not an argument for stressing appearance over substance, but it is an argument for understanding that efficacy is not merely a property of an attorney's substantive work on a case. Effective defense also comprises a relationship with a client to whom an attorney owes a duty of clear, effective communication. If trusting relationships are the foundation for zealous advocacy, then it is of utmost importance that we understand how to build those relationships.

#### IV. POLICY REFORM

Calls for injections of new resources are public defense mantras, yet research on how reform actually happens in public defense, and on the impact of reform when it does happen, is very rare indeed.<sup>9</sup> The next set of papers in this symposium

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<sup>8</sup> Erika Fountain & Jennifer Woolard, *The Capacity for Effective Relationships Among Attorneys, Juvenile Clients, and Parents*, 14 OHIO ST. J. CRIM. L. 493 (2017).

<sup>9</sup> This is not to say that the failings of defense policy have not been comprehensively documented, or that strategies for reform have not been outlined. See, e.g., NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF

delve into the complications of policy reform and reveal huge numbers of practical decision points and opportunities for success and failure, some of which exist quite independent of the resources available to reformers. These authors explore how reform in public defense is produced, how it happens in practice, and what differences it makes.

Worden, Davies, Shteynberg, and Morgan<sup>10</sup> chart the implementation of reform in five upstate New York counties to provide representation to people appearing in court for the first time. Evoking failures of past court reform efforts, they note that early signs for success in implementation of these programs were not good. New York's proliferation of local courts and its arcane rules about swift arraignment after arrest create a considerable logistical challenge, even before other problems kick in: non-cooperation from essential partners, political blow-back from opponents, and residual resource shortages, to name a few. Yet, the picture this article paints is ultimately one of success. All five programs, funded with state grants, were implemented successfully and with reasonable fidelity. Treating the programs as case studies, these authors conclude that the critical ingredients of success were hard to quantify; local defenders, respected in their roles, commanded attention, tailored solutions, built working alliances, adapted to change, and withstood opposition. Beyond simply recommending more resources, these authors offer specific insights into how the process of reform itself can succeed, as they note the critical impact of the structuring role played by funding agencies, the importance of local allies for implementation, and the possibilities for slow but sure culture change over time.

Benjamin Schwall<sup>11</sup> examines a reform of a different kind—and one with far more worrying implications. His study of attorney time before and after the introduction of flat fee payments for representation shows that the average number of hours spent by attorneys on each case dropped precipitously—by more than half—after the new payment system was introduced. Concerned that his findings may be affected by poor reporting practices, inflation of unobservable out-of-court tasks, or just a sudden influx of easy cases, Schwall searches for alternative explanations. He finds none. His conclusion is that systems which provide no incentive for additional work on a case will lead to reduced amounts of time spent

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OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), <http://www.constitutionproject.org/pdf/139.pdf> [<http://perma.cc/3NGS-3EPM>]. Rather it is to say that scientific examination of public defense policy—its diversity, determinants, and processes of change—which could illuminate systematically the causes behind reform itself, scarcely exists. *But see* Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *State Politics and the Right to Counsel: A Comparative Analysis*, 43 LAW & SOC'Y REV. 187 (2009).

<sup>10</sup> Alissa Pollitz Worden, Andrew L. B. Davies, Reveka V. Shteynberg & Kirstin A. Morgan, *Court Reform: Why Simple Solutions Might Not Fail? A Case Study of Implementation of Counsel at First Appearance*, 14 OHIO ST. J. CRIM. L. 521 (2017).

<sup>11</sup> Benjamin Schwall, *More Bang for Your Buck: How to Improve the Incentive Structure for Indigent Defense Counsel*, 14 OHIO ST. J. CRIM. L. 553 (2017).

per case. Soberingly, he writes that under the new billing system, it is “difficult to imagine a scenario where the attorney is fulfilling the spirit of her constitutional duties.”<sup>12</sup> But he also explores the flipside: insights from economics provide guidance on how incentives and monitoring can improve the quality of representation rather than send it into free-fall.

Siegel, Huessemann, and Van Hoek,<sup>13</sup> for their part, examine the introduction of client-centered lawyering in public appellate defense office. Traditionally implemented at the trial level, client-centered representation entails a commitment to placing clients at the center of case development and advocacy. In theory, introducing client-centered representation at the appellate level simultaneously expands the practice of appellate defense as well as the concept of client-centeredness. Site observation and interviews with staff illustrate that the practical application of client-centeredness varies considerably among the attorneys in the office. As one lawyer puts it, “it’s a matter of *how* you are client-centered.” For some, it is primarily a strategy aimed at gaining a client’s trust and candor, but for others, it entails a broad emphasis on clients’ overall wellbeing. The extent and types of collateral and non-legal assistance being offered by attorneys likely vary accordingly, the authors suggest. Framing their article in terms of the variation that can occur in the translation of institutional policy to direct service decision-making, their account suggests new conceptualizations of appellate defense as well as new considerations for the practice of client-centered representation in public defense offices.

Liana Pennington<sup>14</sup> investigates the initiation of a participatory defense program begun by a public defender office in an unidentified city. Recruiting the family members of persons facing charges, the office borrowed from a community-organizing model successful elsewhere that seeks to “[bring] family members and loved ones of criminal defendants into the legal process.”<sup>15</sup> But Pennington detects obstacles in transitioning this community-run model into an agency-run program, at least during the first few months of activity. Recruiting participants was difficult because of the poor reputation of the defender office. Group conveners sometimes failed to hear or heed participant feedback, and criticism of lawyers, in particular, was met with defensiveness. The meetings themselves focused on education about the law and legal process rather than the more expansive vision of greater involvement by community members in—and transformative change to—that process overall. In the end, the initiation of this program faced serious

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<sup>12</sup> *Id.* at 564.

<sup>13</sup> Jonah A. Siegel, Jeanette M. Hussemann & Dawn Van Hoek, *Client-Centered Lawyering and the Redefining of Professional Roles Among Appellate Public Defenders*, 14 OHIO ST. J. CRIM. L. 579 (2017).

<sup>14</sup> Liana Pennington, *An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office*, 14 OHIO ST. J. CRIM. L. 603 (2017).

<sup>15</sup> *Id.* at 604.

problems as participation dwindled to almost zero, notwithstanding vigorous recruitment efforts. Accordingly, though Pennington's observations should be rightly read as a nuanced commentary on the impact of program structuration in the early phase of development, they also carry cautionary notes regarding factors that can lead to failure.

From the papers in this focus area, we learn that successful reform requires more than good intentions and sufficient funding. It also requires oversight of the process of change that is watchful for lawyers who may struggle to adapt to new approaches as intended. Such processes can be facilitated by an empowered leader who not only understands the problem, but also has at his or her disposal the tools to take responsibility for implementation. Reform must also involve attention not only to its process, but also to its impact, lest something disastrous is produced. Finally, reform may also require a recognition that defenders are not the only, or even the primary, parties with something at stake, and that criticism, including of ourselves, can inure to improvements for all.

#### V. CONCLUSION

We believe that the type of critical reflection that opens this symposium is key to maintaining the diversity and productivity in the field of research on public defense that made this symposium possible. More specifically, this collection of papers expands knowledge in a little-studied field by highlighting the complexity of attorney-client relationships, the varied pathways to reform, and the importance and power of the researcher's role in a landscape where reliable information is in short supply. Yet by advancing scholarship, each paper also invites further response and investigation. To the extent that these projects spark such continued engagement, IDRA's mission—to show and foster the contributions of empirical research on public defense—will have been furthered.

For the opportunity to collaborate in this effort, we thank the symposium authors, scholars who generously assisted with peer review, the editorial team at the *Ohio State Journal of Criminal Law*, and, for excellent research assistance, University of Cincinnati College of Law students Alex Barengo, Kathleen Norris, and Christina Roger.