

***Gideon* by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense**

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A widespread consensus understands Gideon's promise to be largely,¹ sadly, unfulfilled. Yet in truth, we possess precious little hard evidence about the state of indigent defense nationally or the actual impact of indigent defense policies on the quality of representation received. A burgeoning but little-noted trend in the field could alter that state of affairs: the push toward adoption of evidence-based practice. Put most simply, evidence-based practice is a paradigm that aims to tether decision-making to empirical, rather than intuitive or experiential, evaluations of practice or policy options. Originating in medicine and already taking hold in isolated sectors of criminal justice policy, evidence-based practice is sprouting in the indigent defense field, spurred on by legislative reform, shifts in federal funding priorities, and the concerted energy of thought leaders in a number of states. The Essay shines a light on this trend through close examination of three states—North Carolina, Texas, and New York—in which indigent defense oversight commissions have placed the development of evidence-based practice at the front and center of their missions. Critically assessing the prospects for evidence-based indigent defense policymaking, the Essay shares in some of the enthusiasm evinced by evidence-based practice's promoters, but also enumerates significant barriers to a full flowering of the paradigm, and cautions that an expanded evidence base might, ironically, pose barriers to furthering Gideon's promise of equal access to counsel for the indigent.

INTRODUCTION

The Supreme Court's decision in *Gideon v. Wainwright*, which established a constitutional right to the provision of counsel to indigent defendants charged with felonies in state courts, is an emblem of romantic, rights-protective jurisprudence. The storied facts of an indigent, *pro se* defendant's determined triumph over an

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¹ See generally ANTHONY LEWIS, *GIDEON'S TRUMPET* (1989).

intransigent legal system,² the soaring rhetoric of the opinion,³ the synergy between the decision and the oft-heralded American adversary system of adjudication⁴—all these factors combine to preserve *Gideon*'s place of privilege in the criminal procedure pantheon.⁵

Fifty years hence, a grittier reality serves as backdrop to the right to counsel. This is true not only because of the oft-noted disconnect between *Gideon*'s promise of equal access to counsel and the continued, pervasive failure to secure quality legal representation (or in a shocking number of cases *any* legal representation) for indigent criminal defendants.⁶ *Gideon*'s legacy is also a realist one in that the important debates today hinge not on further elaboration of the decision's grand principles, but rather on negotiating the practical, institutional, political reality of designing systems to deliver the services it promised. This is in large part because *Gideon* and its progeny have left the details to the devil, as it were: In failing to specify how counsel must be funded or provided, or in any meaningful sense at what level or quality, the courts in the area have almost fully ceded implementation to the technocrats and politicians.⁷ The resulting terrain of indigent defense policy and services across the country is a radically varied patchwork. While a majority of states have assumed the funding burden from their own coffers, a significant percentage still rely partly or solely on local government

² See *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963) (reporting Earl Gideon's famous reply to the trial court's refusal to appoint counsel: "The United States Supreme Court says I am entitled to be represented by Counsel.") (internal quotations omitted); see generally LEWIS, *supra* note 1.

³ See *Gideon*, 372 U.S. at 342–45.

⁴ See *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Indeed, the right to counsel is the foundation for our adversary system."); *Gideon*, 372 U.S. at 344 ("[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

⁵ See, e.g., Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2485–87 (2013) (making case that *Gideon* and right to counsel are treated as first among equals in constitutional criminal procedure).

⁶ See, e.g., NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 6–8 (2009), available at <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> (summarizing "persist[ent]," "countless problems" in indigent defense); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152 (2013) ("Every day in thousands of courtrooms across the nation, from top-tier trial courts that handle felony cases to municipal courts that serve as cash cows for their communities, the right to counsel is violated."); Anthony Lewis, *Competent Counsel With Adequate Resources*, CHAMPION, Feb. 2003, at 20, 21 ("[W]e have to take a less romantic view of what was accomplished in [*Gideon*]. . . . Competence is far from assured today in the lawyers appointed to represent indigent defendants.").

⁷ See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 54 (1997).

to shoulder *Gideon*'s price.⁸ Across states, models of service delivery vary from public defender offices, to contracts negotiated with private counsel for a given volume of cases, to *ad hoc* assigned counsel systems—and of course also feature variations on these themes.⁹ Even within many states, the provision of counsel frequently takes different forms, and just as frequently displays varying quality, across or even within localities.¹⁰

But beyond those broad-brush characterizations, painfully little is known about the details of indigent defense in the United States. Although the decades since *Gideon* have seen scores of task forces, blue ribbon commissions, *ad hoc* assessments, and academic reviews assessing the provision of indigent defense, there is still relatively little data, and even less data analysis, that provides insight into how systems operate and the quality of outcomes they achieve.¹¹ Like much of the criminal justice system, indigent defense systems have been operated in what Michael Tonry has called an “evidence-free zone.”¹² But a new trend may change this state of affairs: the increasing adoption of “evidence-based practices” (“EBP”) in indigent defense policy.

Originating in medicine and already influential in other isolated corners of criminal justice policy, EBP is, most simply put, decision-making that rests upon the best available data supporting a given course of action.¹³ Yet the simple allure of this premise belies the conceptual innovation represented by EBP. Evidence-based decision-making in health care ran head on into traditions in medical education and practice that privileged the individual experience of doctors over research in determining courses of treatment, and its adoption has required not only the overcoming of professional resistance but also the creation of supportive institutional structures for medical education, research, and practice.¹⁴ Proponents of EBP in the criminal justice field face equal if not higher cultural and practical hurdles.

And yet, due largely to the innovative efforts of a handful of EBP missionaries, the approach is taking root in the indigent defense field. This Essay shines a descriptive and critical light on this little-noticed area of EBP's flowering.¹⁵ Critically, the story of EBP is inextricably bound up with another

⁸ NAT'L RIGHT TO COUNSEL COMM., *supra* note 6, at 53–57.

⁹ *Id.* at 53.

¹⁰ See THE SPANGENBERG GROUP, STATEWIDE INDIGENT DEFENSE COMMISSIONS 1 (2006) [hereinafter SPANGENBERG GROUP REPORT], available at <http://www.michigancampaignforjustice.org/docs/Spangenberg%20Group%20Feb%202007.pdf>.

¹¹ See *infra* Part I.A.

¹² Michael Tonry, *Evidence, Ideology, and Politics in the Making of American Criminal Justice Policy*, 42 CRIME & JUST. 1 (2013).

¹³ See *infra* Part I.

¹⁴ See *infra* Part I.

¹⁵ Little attention has been given to this trend in the academic literature. Recent work by Cara Drinan has described in enthusiastic terms the contribution that increased data collection has made in the indigent defense field. See Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of*

critical but under-examined development in indigent defense policy, namely the emergence of dedicated state-level oversight commissions. At least forty-three states have some form of office or agency charged with indigent defense oversight, but the form of these entities varies tremendously—from statewide public defender offices that manage their own personnel, to state indigent defense commissions that monitor services designed and provided by autonomous local systems, to variations thereon.¹⁶ In a small handful of states that are recent adopters of the oversight commission structure, these entities have provided the impetus, energy, expertise, and institutional structure to take on the mission of developing evidence-based practices in their respective states' indigent defense policymaking.

To be sure, the promise of evidence-based policy in indigent defense remains far, very far, from being fully realized. But it is high time to take stock of the premise of EBP's feasibility and desirability in the field. As the Essay will explore, states are increasingly tasking indigent defense service providers and oversight bodies with data-gathering and research, the federal government and other grant funders are prioritizing resources for developing an indigent defense evidence base, and indigent defense advocates are increasingly trying to leverage available evidence to attract greater political support and funding. In a world of finite resources for the field, what is the push toward evidence-based policy buying, and is it worth the cost? This Essay takes only a preliminary pass at those questions, evaluating potential contributions that EBP might make to the quality of indigent defense policies, political support for them, and the ability to achieve gains through Sixth Amendment litigation. The Essay's bottom line is perhaps best characterized as cautious support for pushing forward with EBP in the field, but with pragmatic mindfulness of the paradigm's limits as well as its potential to introduce new vulnerabilities into the technical, political, and legal calculus of indigent defense reform.

The Essay proceeds as follows: Part I traces the origins of evidence-based practice in the medical field and its spotty migration to the domain of criminal justice, and sets forth the leading arguments in favor of evidence-based criminal justice practices and significant points of skepticism. Part II turns to the comparatively recent attention to developing evidence-based indigent defense

Enforcing the Right to Counsel, 70 WASH. & LEE L. REV. 1309, 1322–25 (2013). In a forthcoming article, Pamela Metzger and Andrew Ferguson offer a theoretical framework for and propose a number of concrete programs by which defender organizations could better integrate data into management of defense services. See Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. (forthcoming 2015), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2279203. Importantly, as this Essay will explore, data collection alone is a necessary but far from sufficient condition to generate evidence-based practice. Ron Wright and Ralph Peeples recently proposed an intriguing evidence-based framework of their own design to rate individual defense attorneys. See generally Ronald F. Wright & Ralph A. Peeples, *Criminal Defense Lawyer Moneyball: A Demonstration Project*, 70 WASH. & LEE L. REV. 1221, 1232–33 (2013). These important and innovative proposals have not, however, given sustained descriptive or critical attention to the sort of systemic evidence-based practice toward which the commissions highlighted in the Essay are working.

¹⁶ See *infra* notes 63–65.

policy. It focuses on the three state commissions that are arguably in the vanguard of the trend in North Carolina, Texas, and New York. The account highlights the origins, design, and contributions of the three commissions in relation to EBP, aiming not only to describe the work of each entity but also to permit some comparison among them, as well as to develop a basis for the analysis that follows in Part III. Part III offers what in the limits of this space can be only highly provisional critical analysis of the EBP trend. It assesses a posited best case for the pursuit of EBP in indigent defense—its potential to reveal higher quality practices, to garner greater political support for the field, and to productively fuel Sixth Amendment litigation—and considers a number of potential risks and pitfalls that EBP—especially in a (realistically) incomplete, incremental form—might introduce to the field. In closing, the Essay reflects on potential tensions between EBP’s empirical quality assessments and the constitutional commitment that *Gideon* embodies.

I. THE ALLURE OF EVIDENCE

Some two decades ago, a handful of upstarts in the medical field began peddling a radical notion: that medical care should reflect the “conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients.”¹⁷ Dubbing this paradigm “evidence-based medicine,” proponents aimed to enhance the quality, uniformity, and cost-effectiveness of health care by integrating the experiential knowledge base of doctors with the empirical findings of published studies and other sources of high quality medical data.¹⁸ The shift was more radical than those outside the medical profession might initially appreciate. Despite the field’s scientific foundations, medical decision-making, both at the level of patient care and as to the design of service delivery structures, has traditionally been done in isolation from research; by some surveys a mere fifteen percent of treatment decisions are evidence-based, meaning based on experimentally derived information about effectiveness (“Clinical trials demonstrated improvement in half of patients.”) rather than sheer anecdote (“In my twenty years of experience my patients have all felt better with this”).¹⁹ Traditionally operating with “the ‘physician-as-expert’ model of care [which] relies on an individual physician’s extensive knowledge, experience, and memory,” the medical profession met evidence-based medicine movement with

¹⁷ David L. Sackett et al., *Evidence Based Medicine: What It Is and What It Isn’t*, 312 BRIT. MED. J. 71, 71 (1996).

¹⁸ See, e.g., Lucian L. Leape et al., *What Practices Will Most Improve Safety?*, 288 J. AM. MED. ASS’N 501, 501 (2002); Sackett et al., *supra* note 17; MARK B. McCLELLAN ET AL., EVIDENCE-BASED MEDICINE AND THE CHANGING NATURE OF HEALTHCARE: 2007 INSTITUTE OF MEDICINE MEETING SUMMARY 1–2 (2008), available at <http://www.amcp.org/WorkArea/DownloadAsset.aspx?id=12470>.

¹⁹ See Jeffrey Pfeffer & Robert I. Sutton, *Evidence-Based Management*, HARV. BUS. REV. Jan. 2006, at 62, 64; see also McCLELLAN ET AL., *supra* note 18, at 35–38.

significant skepticism.²⁰ Practically, the autonomous physician-as-expert simply lacks capacity to digest the massive array of research filling the pages of medical journals. Moreover, despite a vast number of professional journals and a long history of medical research, good evidence is in fact hard to come by in the field. For example, clinicians often must extrapolate from data on dissimilar populations, and rarely have access to analyses of the comparative effectiveness of treatments.²¹ Normatively, medical professionals were skeptical of the valuing of clinical research over acquired experience, and the looming threat of cost concerns overriding clinical judgment.²² Nevertheless, evidence-based medicine appears here to stay, especially as recent health care reform laws have made significant investments in medical data gathering and usage.²³

The barriers to evidence-based practice in the criminal justice system are arguably more significant than in medicine. Ask the average police chief why her officers patrol by car rather than by foot, or the average probation officer why he recommended a particular sentence on a given set of facts, and the answer would most likely be some version of, “That’s the way we’ve always done it.”²⁴ The professional inclination is in part a result of the still-thin research base supporting the field, which has emerged to a still-limited extent only in the last three to four decades since the formation of the Law Enforcement Assistance Administration in 1967, and, to a much greater extent, its successor entities the National Institute of Justice and the Bureau of Justice Assistance.²⁵ But producing research that would provide an evidence base to guide criminal justice decision-making is challenged by a diffuse and inadequate data infrastructure: thousands of administratively distinct agencies spread among federal, state, and local governments with, for the

²⁰ MCCLELLAN ET AL., *supra* note 18, at 47–48.

²¹ *See id.* at 35–38.

²² *See* Evidence-Based Practice Working Group, *Evidence-Based Medicine: A New Approach to Teaching the Practice of Medicine*, 268 J. AM. MED. ASS’N 2420, 2423–24 (1992).

²³ *See* Richard S. Saver, *Health Care Reform’s Wild Card: The Uncertain Effectiveness of Comparative Effectiveness Research*, 159 U. PA. L. REV. 2147, 2150–51 (2011).

²⁴ *See, e.g.*, Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, 42 CRIME & JUST. 377, 378–79 (2013); Michael Tonry, *Evidence, Ideology, and Politics in the Making of American Criminal Justice Policy*, 42 CRIME & JUST. 1 (2013).

²⁵ *See* Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 294–95 (2013) (recounting the history of the creation of the NIJ); Lawrence W. Sherman, *Research and Policing: The Infrastructure and Political Economy of Federal Funding*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 156, 163–65 (2004) (discussing transition from LEAA to NIJ); *Research Agenda and Goals*, NAT’L INST. OF JUST., <http://www.nij.gov/about/Pages/research-agenda.aspx> (last visited Mar. 7, 2015); *Justice Assistance Grant (JAG) Program*, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=59#horizontalTab1 (last visited Mar. 7, 2015).

most part, insufficiently detailed internal data and surprisingly low levels of automation.²⁶

Nevertheless, the winds of change are blowing. Evidence-based practice has emerged as the leading edge of reform in isolated pockets of the criminal justice system—particularly policing and sentencing.²⁷ For example, police departments around the country have adopted some version of the COMPSTAT initiative pioneered by the New York City Police Department in the mid-1990s, which enabled the gathering and analysis of a multitude of data on crime and police staffing in order to guide decision-making on where and how to prioritize police resources.²⁸ In the realm of corrections, EBP has led an increasing number of jurisdictions to adopt sentencing regimes under which the appropriate length of incarceration is dictated by an offender’s numerical recidivism risk assessment, calculated on the basis of variables (such as demographic characteristics and criminal history) empirically shown to correlate with re-offending.²⁹ Other examples are not legion, but numerous enough to constitute a trend.³⁰ The shift has a number of interactive causes, most prominent among them (1) the cumulative effect of recent decades of federal grant money, which has over time permitted initial and follow-up research evaluating criminal justice propositions and programs, especially in policing and corrections;³¹ (2) increasing adoption of automated data collection technologies, often thanks to federal grant funding;³² (3) evangelism of key EBP enthusiasts in the field, such as past and current NYPD Commissioner William Bratton, who championed COMPSTAT;³³ (4) rising costs and shrinking state and local budgets sparking a push for cost analysis and

²⁶ See, e.g., Cecelia Klingele, Michael S. Scott & Walter J. Dickey, *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 996–97 (2010) (noting that few criminal justice agencies “collect and track data in a way that facilitates analysis”); Ronald F. Wright, *Fragmented Users of Crime Predictions*, 52 ARIZ. L. REV. 91, 92–93 (2010) (discussing late and spotty adoption of data-gathering and analysis technology); see also Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 36–37 (2005) (discussing limitation of too-general data in tracking death sentencing process); Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 CRIME & JUST. 55, 75–76 (2010) (discussing limitation of too-general data for researching policing).

²⁷ See Tonry, *supra* note 24, at 3–5, 12.

²⁸ See, e.g., Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking*, 42 CRIME & JUST. 377, 378–79 (2013).

²⁹ See, e.g., Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809–14 (2014).

³⁰ See, e.g., Jon B. Gould, *Overwhelming Evidence*, 95 JUDICATURE 61, 61 (2011); Tonry, *supra* note 24, at 3–5.

³¹ See, e.g., Alfred Blumstein & Joan Petersilia, *NIJ and Its Research Program, in THE NAT’L INST. OF JUST., TWENTY-FIVE YEARS OF CRIMINAL JUSTICE RESEARCH* 9, 11–33 (1994), available at <https://www.ncjrs.gov/pdffiles1/nij/151287.pdf>.

³² Wright, *supra* note 26, at 91, 93.

³³ Sherman, *supra* note 28, at 381.

programmatic accountability by criminal justice agencies;³⁴ and (5) the emergence of previously unimagined political coalitions, loosely grouped under the “Smart on Crime” banner, that have united liberals and conservatives, pro-defense and pro-law enforcement interests in support of progressive criminal justice reforms (including alternatives to incarceration and deprioritizing prosecution of low-level offenses) that are cost-effective and evidence-based.³⁵

To most observers, the arrival of evidence-based practice in criminal justice has been cause for celebration. Empirical data, say proponents, is virtually guaranteed to make decision makers’ assessments of prospective outcomes more accurate, more standardized, and more amenable to assessment.³⁶ Evidence-based practice is also held out as enhancing the quality of decision-making in a more foundational sense: Many advocates of EBP reason that data will garner support for progressive policy options that might otherwise be reflexively opposed, particularly where documentation of potential cost savings can cut through otherwise politically polarized debates. As Sonia Starr has explained in the sentencing context, advocates of EBP “frame it as a strategy for reducing incarceration and the resulting budgetary costs and social harms,” and “suggest that, absent scientific information about risk, judges probably err on the side of longer sentences.”³⁷ Empirical evidence on this account provides political cover and enables coalition-building—such as the smart-on-crime movement—for reforms that might otherwise be perceived as anti-law-enforcement, pro-defense, or otherwise politically unpalatable.³⁸

But there is cause for skepticism. From a practical standpoint, the push for evidence-based decision-making in criminal justice faces arguably larger hurdles than the fields from which the paradigm has migrated. Quality data, as discussed

³⁴ See, e.g., Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 429 (2012); Matthew J. Parlow, *The Great Recession and Its Implications for Community Policing*, 28 GA. ST. U. L. REV. 1193, 1218 (2012).

³⁵ Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL’Y 597, 610 (2011); DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (2013), available at <http://www.justice.gov/ag/smart-on-crime.pdf>.

³⁶ See Starr, *supra* note 29, at 815; Gould, *supra* note 30, at 62.

³⁷ See Starr, *supra* note 29, at 816; see also Klingele, *supra* note 34, at 444–45.

³⁸ See, e.g., Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 639–40 (2012) (“Telling the public that rehabilitation can work, and providing data on how the shared interest in safety and reform is served, is more effective in building coalitions to facilitate progress than preaching from a particular normative world view. The powerful potential of rehabilitation pragmatism is demonstrated by the very recent call among conservatives for bipartisan examination of rehabilitative programs as an alternative to the crippling fiscal and human costs of maintaining high rates of incarceration.”). But see Klingele, *supra* note 34, at 448 (“While the use of risk assessment instruments (blunt as they often are, in both design and execution) has helped increase the willingness of parole boards in places like Mississippi to release more individuals labeled as low risk, experience suggests that attention to risk provides little protection against public backlash.”).

above, is notoriously difficult to come by, as is research that displays the empirical rigor that EBP touts; controlled experiments, for example, are difficult to carry out for questions of interest to criminal justice policymaking.³⁹ Assuming access to data, the difficulty of arriving at consensus-generating metrics for measuring programmatic quality will at times suppress the potential for “evidence” to cut through political divides.⁴⁰ For example, determining whether the best measure of the quality of a stop-and-frisk program the number of arrests, the number of charges brought, the amount of contraband recovered, the sense of satisfaction of members of the community, or some other measure is far from a value-neutral process.⁴¹ The often morally and ideologically fraught nature of criminal justice policy is apt to create a kind of confirmation bias that either amplifies or diminishes the salience of research depending on whether it confirms or disconfirms prior beliefs.⁴²

Beyond the possibility that EBP cannot achieve what it promises in criminal justice lies the risk that the paradigm could do harm. The fact that legislators and criminal justice professionals frequently lack quantitative training and comfort with empirical research creates significant potential for data to be put to inappropriate use.⁴³ For example, one of the several grounds on which Sonia Starr criticizes reliance on recidivism risk scores to dictate sentencing outcomes is that the evidence, such as it is, does not predict the thing that judges need to know: how the sentencing will affect a defendant’s recidivism risk. Instead, judges only know “how ‘risky’ [an offender] is in the abstract,” and “[t]here is no particular reason to believe that groups that recidivate at higher rates are also more responsive to incarceration.”⁴⁴ There is, separately, the difficulty of applying evidence to a new context, as when a policymaker concludes that a successful program in jurisdiction X will work in jurisdiction Y: Assessing the accuracy of that conclusion requires a nuanced examination of whether the causal features of the first success are in place in the new context, an examination that policymakers may not be inclined or able

³⁹ See *supra* notes 24–26 and accompanying text; see also Greg Berman, Aubrey Fox, *Why Good Programs Go Bad Learning from Failure*, 26 CRIM. JUST., Summer 2011, at 45, 49 (discussing difficulty of experimental research). Occasionally, opportunities for “natural experiments” arise and are exploited by researchers. 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, 156, 159 (2012).

⁴⁰ Cf. MCCLELLAN ET AL., *supra* note 18, at 169–71 (discussing analytical challenges in measuring outcomes in healthcare).

⁴¹ This debate featured prominently in the New York stop and frisk litigation. See *Floyd v. City of New York*, 910 F. Supp. 2d 506, 515 (S.D.N.Y. 2012) (describing dueling expert analyses).

⁴² See, e.g., Tonry, *supra* note 12, at 4, 7, 9. On the phenomenon of confirmation bias, see generally Matthew Rabin & Joel L. Schrag, *First Impressions Matter: A Model of Confirmatory Bias*, 114 Q. J. ECON. 37 (1999).

⁴³ See, e.g., Gould, *supra* note 30, at 62, 66.

⁴⁴ Starr, *supra* note 29, at 855–57.

to undertake.⁴⁵ And some have voiced concern that the push to justify programs with research might have the perverse effect of suppressing innovation, both because untested programs may struggle to garner support or funding, and because programs that “fail” once are unlikely to be tried again under conditions that might enhance their prospects for success.⁴⁶

Finally, there is a more foundational concern that EBP may be in tension with core values underlying our criminal justice system. Exemplary is Bernard Harcourt’s critique of COMPSTAT-style policing programs, evidence-based sentencing, and similar criminal justice initiatives that premise crime and punishment policy on the likelihood that individuals will commit offenses in the future.⁴⁷ Harcourt argues that such policies run counter to a retributive-based punishment theory, which ties punishment to (and only to) the extent of moral breach constituted by the subject offense.⁴⁸ Additionally, Sonia Starr’s work has illuminated the extent to which evidence-based sentencing, in relying on factors such as sex, race, and income to increase offenders’ terms of incarceration, may be contrary to constitutional obligations and in tension with the broader ideological commitment of fair and equal treatment.⁴⁹ Such criticisms do not, of course, suggest that criminal justice decision-making should not be informed by data and research, but rather urge attentiveness to particular contexts in which going where the evidence leads might take one over a line drawn by non-scientific precommitments.

II. EVIDENCE-BASED PRACTICE MEETS INDIGENT DEFENSE REFORM

Despite fifty years of work to fulfill *Gideon*’s promise, there exists surprisingly little of what counts as “evidence” guiding decision-making in the indigent defense field.⁵⁰ Researchers have assembled some information, usually sobering, about system attributes such as defender caseloads or rates of pay.⁵¹ But such studies are typically ad hoc, crisis-driven reports rather than the result of

⁴⁵ See, e.g., GREG BERMAN & EMILY GOLD, FROM CHICAGO TO BROOKLYN: A CASE STUDY IN PROGRAM REPLICATION 6–8 (2011), available at http://www.courtinnovation.org/sites/default/files/documents/Chicago_Brooklyn.pdf; David Dannels & Heather Smith, *Implementation Challenges of Intelligence Led Policing in a Quasi-Rural County*, 24 J. CRIME & JUST. 103 (2001). See generally NANCY CARTWRIGHT & JEREMY HARDIE, EVIDENCE-BASED POLICY: A PRACTICAL GUIDE TO DOING IT BETTER 3–13 (2012).

⁴⁷ See generally BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007); see also *supra* notes 28–29 and accompanying text (discussing COMPSTAT and evidence-based sentencing).

⁴⁸ See generally HARCOURT, *supra* note 47.

⁴⁹ See Starr, *supra* note 29, at 821–38.

⁵⁰ See, e.g., NAT’L RIGHT TO COUNSEL COMM., *supra* note 6, at 190, 199; THE SPANGENBERG GROUP REPORT, *supra* note 10, at 10, 20–21; Norman Reimer, *A Call to Action in Support of the Right to Counsel: Federal Right—Federal Responsibility*, CHAMPION, June 2009, at 7, 7–8.

⁵¹ See *supra* note 6.

ongoing data-gathering and analysis that would permit tracking and comparison over time, or systematic program evaluation that could serve as an affirmative guide to action.⁵² Moreover, the available data to support meaningful research in the field has traditionally been woefully inadequate. Few of the thousands of governmental and private indigent defense providers gather data of any granular interest—for example, reporting what tasks are actually performed by an attorney in an individual case as opposed to aggregate disbursements to investigators or experts; what minimal data is gathered is rarely subject to ongoing monitoring or analysis; and comparison among jurisdictions (or even within jurisdictions, such as assessing parity in defense attorney and prosecutor caseloads or pay) is confounded by the lack of uniformity in basic definitions such as what constitutes a “case.”⁵³

But the gap between current practice and EBP is even more fundamental, and arguably more substantial than in other criminal justice arenas. Imagine a research environment in which criminologists not only disagreed on whether arrests prevented crime, but also on whether crime prevention was a proper quality metric for policing, or one in which not only was the link between incarceration and non-recidivism unknown, but the value of non-recidivism disputed.⁵⁴ This approximates the research environment for indigent defense, in that the field lacks

⁵² Exemplary are the many reports assembled by the Spangenberg Group, one of the most authoritative sources of indigent defense research in the country, but which is typically called in to produce one-off assessments of state systems in crisis, or nationwide surveys that provide only a very high-level sketch of indigent defense trends. See *Indigent Defense Studies*, THE SPANGENBERG GROUP, http://www.spangenberggroup.com/work_indig.html (last visited Mar. 7, 2015).

⁵³ See, e.g., Joel M. Schumm, *Conference Report: Padilla and the Future of the Defense Function*, 39 FORDHAM URB. L.J. 3, 24–25 (2011) (discussing widespread absence of basic data about defense work, including time records); Wright & Peebles, *supra* note 15, at 1232–33 (“The quality of data available for any given criminal case is shallow and appalling, even though the sheer number of cases is impressive.”); David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 L. & INEQUALITY 371, 380 (2014) (“There is not good data with respect to the hours spent by defenders on their work.”); NATIONAL RIGHT TO COUNSEL COMM., *supra* note 6, at 97–98, 199 (describing lack of data and stating priority need for uniform case reporting); MAREA BEEMAN, USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 6, 10 (2012), available at http://texaswcl.tamu.edu/reports/2012_JMI_Using_Data_in_Public_Defense.pdf (summarizing data wish list). To a large extent, the data limitations in this field are a symptom of the broader lack of coordination of or attention to data in the criminal justice system. Information from courts, prosecutors’ offices, police departments, and other agencies is often relevant to tracking and evaluating case inputs and outcomes, but is often nonexistent, difficult to access, difficult to coordinate with other system data, or otherwise unusable. See *supra* notes 23–25 and accompanying text.

⁵⁴ This is not to suggest that crime reduction or non-recidivism are exclusive or non-controversial measures of quality in policing or sentencing, but rather to posit that these goals are widely acknowledged as important, at the top of a relatively short list of potential instrumental programmatic goals. See, e.g., Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing*, 17 PSYCHOL. PUB. POL’Y & L. 419, 419–20. (2011); Dena M. Gromet & John M. Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*, 43 LAW & SOC’Y REV. 1, 14 (2009).

any systematic understanding of how system inputs—attorney practices, client characteristics, compensation or hours spent—relate to desired outcomes, as well as any agreed-upon framework for stating and measuring what the desired outcomes *are*. Whether quality defense representation is evidenced by acquittals, favorable sentencing outcomes, charge reductions, pretrial release, protecting constitutional rights, sheer client satisfaction, or some mix of the above is a matter on which no consensus exists.⁵⁵ Thus, while the provision of defense services is guided by an array of influential professional standards for practice,⁵⁶ little of that guidance could accurately be called evidence-based as opposed to the product of collective experience and observation.⁵⁷ And while indigent defense is universally viewed as underfunded, the truth is the field lacks an objective means of quantifying how much money its services do or should cost, or what a reduction in the ability to provide particular services means from the standpoint of quality.⁵⁸

An incipient effort to change this state of affairs is afoot, however, among independent researchers and in a small handful of jurisdictions that are aiming at broader national influence. The trend is prompted in part by the same factors driving EBP in criminal justice generally,⁵⁹ though indigent defense is far later to the data game than even other sectors of the system. An important reason for this lag is almost certainly the near-total neglect of defense services by federal grant

⁵⁵ See Tony Fabelo, *What Policy-Makers Need to Know to Improve Indigent Defense Systems*, 29 N.Y.U. REV. L. & SOC. CHANGE 135, 150 (2004); MARGARET A. GRESSENS & DARYL V. ATKINSON, THE CHALLENGE: EVALUATING INDIGENT DEFENSE: NORTH CAROLINA SYSTEMS EVALUATION PROJECT PERFORMANCE MEASURES GUIDE 1–2 (2012), available at http://www.ncids.org/systems%20evaluation%20project/performance%20measures/PM_guide.pdf.

⁵⁶ See, e.g., STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 2–15 (2009), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf; STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1–3 (2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf; AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT'L ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS, Ch. 13, *The Defense* (1973), available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense; see also Drinan, *supra* note 15 (hailing standards as key step enhancing quality of indigent defense).

⁵⁷ See NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 43–49 (2011) (describing influence of National Advisory Commission standards despite widely perceived inadequacies and lack of evidence base); see generally Martin Marcus, *The Making of the ABA Criminal Justice Standards Forty Years of Excellence*, 23 CRIM. JUST., Winter 2009, at 10 (describing emphasis on consensus among stakeholders and drawing on collective experience in drafting of ABA standards); NAT'L RIGHT TO COUNSEL COMM., *supra* note 6, at 66 (noting lack of empirical basis for caseload standards). Cf. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring in judgment) (cautioning reliance on ABA standards in ineffective assistance case law as “such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice”).

⁵⁸ See Fabelo, *supra* note 55, at 150.

⁵⁹ See *supra* notes 30–34 and accompanying text.

programs as compared to policing and other sectors.⁶⁰ This circumstance has begun to be modestly ameliorated by the Department of Justice's recent efforts to prioritize and promote funding of indigent defense research and innovation, coming in part under the umbrella of the 2010-created Access to Justice program.⁶¹ Consistent with the approach of NIJ and BJA to the criminal justice field more broadly, grant funding aimed at the indigent defense field efforts has expressly prioritized the development and promotion of an evidence base, especially in support of cost-efficient programming.⁶² And the federal commitment has begun, slowly, to contribute to the development of an evidence base concerning indigent defense practices, with NIJ funds having supported several significant studies comparing defendant outcomes based on attorney type since 2010.⁶³

An equally if not more critical change in the landscape of indigent defense that is fueling the evidence-based trend, however, is the relatively recent creation of dedicated structures for EBP in the form of state indigent defense oversight commissions. The move toward institutionalizing oversight for indigent defense services has been one critical response to the interconnected ills of decentralization, low funding, and poor quality that have plagued the field for virtually all fifty years of *Gideon*'s influence. First seen in the 1970s in the form of statewide public defender offices, and later taking more varied forms—as independent state commissions with full control over defense services, specialized state-wide defense organizations, agencies with limited authority to set standards or monitor quality, and other models⁶⁴—formal indigent defense oversight now exists in forty-four states plus the District of Columbia.⁶⁵ The most recent wave of commission formation, which occurred since 2000, has seen the formation of eleven new oversight bodies, mostly taking the form of independent state

⁶⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, INDIGENT DEFENSE: DOJ COULD INCREASE AWARENESS OF ELIGIBLE FUNDING AND BETTER DETERMINE THE EXTENT TO WHICH FUNDS HELP SUPPORT THIS PURPOSE (2012), available at <http://www.gao.gov/assets/600/590736.pdf> (showing miniscule devotion of Edward Byrne Memorial Justice Assistance Grants, BJA's major grant program for state programs, to indigent defense).

⁶¹ See Eric H. Holder, Jr., *Gideon—A Watershed Moment*, CHAMPION, June 2012, at 56, 56 (discussing launch of Access to Justice program and related grant money).

⁶² See *The Access to Justice Initiative*, U.S. DEP'T. OF JUSTICE, <http://www.justice.gov/atj> (last visited Mar. 7, 2015); U.S. DEP'T. OF JUSTICE, EXPERT WORKING GROUP REPORT: INTERNATIONAL PERSPECTIVES ON INDIGENT DEFENSE 1, 9, 41 (2011), available at <https://ncjrs.gov/pdffiles1/nij/236022.pdf>.

⁶³ See *Indigent Defense Publications*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atj/idp> (last visited Mar. 7, 2015).

⁶⁴ See SPANGENBERG GROUP REPORT, *supra* note 10, at 16–31 (discussing various models).

⁶⁵ See *Id.* at 3 (showing table of forty-two commissions and year of creation); *Quality Enhancement Distributions*, NYS OFFICE OF INDIGENT LEGAL SERVICES, <https://www.ils.ny.gov> (last visited Nov. 30, 2014) (showing creation of New York commission in 2011 subsequent to Spangenberg study). Michigan created an indigent defense commission in 2013, to replace a minimal form of statewide oversight that had existed in the form of its appellate defender office. See MICH. COMP. LAWS § 780 (2013).

commissions, and many with data-collection and analysis as part of their formal legislative charges.⁶⁶ Statewide public defender offices, too, have begun to attend to the creation of systems for ongoing data collection, such as tracking caseloads and (to a lesser extent) attorney time on particular matters.⁶⁷

Some oversight bodies have gone farther, beyond mere data collection to the pursuit of evidence-based policymaking. This Part highlights the work of three commissions that are leading the EBP push—in North Carolina, Texas, and New York. These three commissions are not the only state oversight bodies that are engaged in data gathering and evaluation,⁶⁸ but they are certainly the key movers and shakers promoting the development of evidence-based policy in the field; to describe their work is to describe the vanguard of the trend. The discussion aims to describe and compare each commission's genesis, structure, and contributions in relation to evidence-based practices,⁶⁹ highlighting features of the commissions and their work that will provide the grist for Part III's assessment of EBP in indigent defense.

A. North Carolina

The North Carolina Indigent Defense Services Commission was born in 2000 as the central recommendation of a legislative task force formed to grapple with the state's evident indigent defense crisis.⁷⁰ At the time, North Carolina was one of twenty-two states that had already assumed full responsibility for indigent defense funding,⁷¹ but the management of the provision of services, from the selection of a delivery method to the hiring and compensation of attorneys, was largely controlled by the state's one-hundred counties. While the state's Administrative Office of the Courts had the nominal duty to manage the state's investment, it had “no control over the fees that judges award . . . no staff to dedicate to financial or policy management of programs, and lack[ed] adequate resources for an automation system for the collection . . . of good data.”⁷² As

⁶⁶ See U.S. DEP'T. OF JUSTICE, *supra* note 62; Norman Lefstein, *The Movement Towards Indigent Defense Reform: Louisiana and Other States*, 9 LOY. J. PUB. INT. L. 125, 126–27 (2008) (noting recent commissions in North Carolina, Oregon, Virginia, North Dakota, Montana, South Carolina, and Louisiana); see also MICH. COMP. LAWS § 780.989(f) (2013); MONT. CODE ANN. § 47-1-105(f) (2013); N.D. CENT. CODE §54-61-04(1)(d) (2014).

⁶⁷ See, e.g., Drinan, *supra* note 15, at 1333–35 (discussing efforts by Missouri and Miami-Dade County public defenders to track cases in connection with litigation).

⁶⁸ See *supra* note 66 (noting examples of Michigan, Montana, and North Dakota featuring statutory data mandates).

⁶⁹ Developing an indigent defense evidence base is of course only one small component of the charge of all three commissions. This essay does not take on the task of fully describing or evaluating the oversight work of these entities.

⁷⁰ INDIGENT DEFENSE STUDY COMM'N, REPORT AND RECOMMENDATIONS 1, 2, 8 (2000), available at <http://www.ncids.org/home/ids%20study%20commission%20report.pdf>.

⁷¹ *Id.* at 4.

⁷² *Id.* at 7.

expenditures spiraled, the state lacked any effective mechanism of even accounting for, much less controlling, either the cost or quality of defense services; indeed, the task force reported that its own work was significantly hampered by the data vacuum.⁷³ Consequently, the task force identified as the highest reform priority the establishment of an entity charged with centralized management of the provision of indigent defense across the state.⁷⁴

The legislature responded with the Indigent Defense Services Act of 2000, which created an independent agency within the judicial branch, the Office of Indigent Defense Services (“IDS Office”), and a thirteen-member Commission to govern its work.⁷⁵ The Act clearly reflects the trifecta of quality, cost, and control concerns: The purpose of the Office and Commission’s work is the enhancement of oversight, quality, and uniformity in defense services; the production of “reliable statistical information in order to evaluate the services provided and funds expended;” and the delivery of “services in the most efficient and cost-effective manner without sacrificing quality representation.”⁷⁶ The IDS Office and Commission’s core responsibilities are, first, standard-setting for indigent defense provision throughout the state on quality-related matters such as attorney qualifications and caseload levels, and second, to select the method of indigent defense service delivery and the manner and rate of compensation for attorneys in each county or district.⁷⁷ As a matter of statute the Commission’s authority to set a services delivery regime is constrained by an obligation to consult with the bench and bar in each district.⁷⁸ In point of fact, in the initial selection process after enactment of the Indigent Services Act, the Commission essentially acceded to the existing service plans submitted by each locality, which typically were the same assigned counsel systems that the counties had in place before the Act was adopted.⁷⁹ Although the Commission could in theory have used its authority and its consultation mandate to urge adoption of different models, the political tenuousness of its position as a new oversight entity militated against such boldness.⁸⁰

The creation of the IDS Office and Commission (collectively, “IDS”) launched North Carolina into the vanguard of evidence-based practice in indigent defense. IDS was among the first—if not the first—state oversight entity statutorily charged with a data-driven mission,⁸¹ and the first to institutionalize data collection and analysis by devoting one of only five initial full-time staff

⁷³ *Id.* at 1.

⁷⁴ *Id.* at 2.

⁷⁵ N.C. GEN. STAT. ANN. §§ 7A-498.2–.5 (West 2014).

⁷⁶ N.C. GEN. STAT. ANN. § 7A-498.1 (West 2014).

⁷⁷ N.C. GEN. STAT. ANN. §§ 7A-498.5(d) – (f) (West 2014).

⁷⁸ N.C. GEN. STAT. ANN. § 7A-498.2(e) (West 2014).

⁷⁹ See Interview with Thomas Maher, Sept. 4, 2014 (notes on file with author) [hereinafter Maher Interview].

⁸⁰ See *id.*

⁸¹ See N.C. GEN. STAT. ANN. § 7A-498.1 (West 2014).

positions to a dedicated researcher.⁸² (The Office now has three research staff positions, one of which is vacant, and a total office staff of twenty-five.)⁸³ The Office's research team—led by a seasoned quantitative researcher with substantial program monitoring experience outside the criminal justice context—has both direct access to data through its monitoring functions—for example, direct reporting of case numbers and outcomes by the state's public defender offices⁸⁴—as well as data from other state agencies such as the Administrative Office of Courts.⁸⁵ The Office has worked since its founding to facilitate expanded data collection by other agencies—persuading, for example, the Administrative Office of Courts to collect more detailed information about the types of cases in which indigent defendants are represented, so that caseload data reveals more information about the seriousness and time-intensiveness of an attorney's workload.⁸⁶ Equally significantly, the Office successfully expanded North Carolina's use of technology to gather and track data, establishing in-house databases, persuading public defender offices to use time tracking and case management software, and adopting a data integration program that enables automated data sharing among various court information systems and the Office, enhancing the Office's ability to analyze and report.⁸⁷

The Office's systematic data analysis efforts had early concrete benefits to its quality-enhancement mission. For example, the Office conducted a series of studies comparing the costs of the state's public defender offices and privately appointed counsel—the latter still constituting the majority of indigent defense provision in North Carolina. Those studies were able to demonstrate that public defenders were by and large more economical than privately appointed counsel, and also that public defenders achieved comparatively superior outcomes for clients along several measures, and have contributed to legislative support for the expansion of public defender offices.⁸⁸ The ability to track expenses and caseloads on a continuous basis has also insulated the Office (and defense services statewide)

⁸² See Interview with Margaret Gressens, Sept. 15, 2014 [hereinafter Gressens Interview] (notes on file with author).

⁸³ See *IDS Central Office*, N.C. OFFICE OF INDIGENT SERVICES, http://www.ncids.org/IDS%20Office/IDS_Staff.htm (last visited Mar. 7, 2015).

⁸⁴ See N.C. COMM'N ON INDIGENT DEFENSE SERVICES, REPORT OF THE COMM'N ON INDIGENT DEFENSE SERVICES 10 (2014), available at <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2014.pdf> [hereinafter 2014 IDS REPORT].

⁸⁵ See 2014 IDS Report, *supra* note 84, at 28; Gressens Interview, *supra* note 82.

⁸⁶ N.C. COMM'N ON INDIGENT DEFENSE SERVICES, REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 18 (2005), available at <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/Legislature%20Report%202005.pdf> [hereinafter 2005 IDS REPORT].

⁸⁷ 2014 IDS REPORT, *supra* note 84, at 28; 2005 IDS REPORT, *supra* note 86, at 4, 18.

⁸⁸ See, e.g., N.C. OFFICE OF INDIGENT DEFENSE SERVICES, FY 07 NORTH CAROLINA PUBLIC DEFENDER AND PRIVATE ASSIGNED COUNSEL COST ANALYSIS 2–3 (2008), available at <http://www.ncids.org/Reports%20&%20Data/Prior%20Publications/fy07%20pd%20pac%20coba%20final%20report.pdf> (reporting cost comparisons and noting prior studies since 2002); see also Gressens Interview, *supra* note 82 (discussing legislative support for public defenders).

against potential legislative criticism. Indigent defense expenditures began to grow after operations commenced, with the data demonstrating that per case costs were actually lower but that the volume of cases handled by appointed counsel and public defenders had grown.⁸⁹

While these early data-driven efforts were groundbreaking, they were themselves limited. The IDS Office could develop a wide range of statistical information describing what was occurring in the provision of indigent defense. What the Office lacked, however, was any mechanism of quantifying the quality of outcomes from those efforts, and thereby measuring the relative value of various possible policies.⁹⁰ This disabled the Office from carrying out one of its core statutory missions, namely, engagement in cost-*effectiveness* analysis, whereby the lowest cost option of achieving a given value or quality level is identified.⁹¹ Thus, for example, if public defender offices cost more than private assigned counsel but produce superior outcomes, cost-effectiveness analysis might conclude that the public defender route is the superior option. But such analysis requires some means of measuring the quality of outcomes; where the only concretely quantifiable outcome is cost, the risk is that simply the cheapest option will be selected.⁹²

The goal of overcoming this significant hurdle to the full adoption of EBP fueled the launch of the Systems Evaluation Project (“SEP”) in 2005.⁹³ The SEP represents the first dedicated effort to approximate the medical model of EBP in the indigent defense context by enumerating outcomes sought and developing a set of indicators to empirically measure achievement of those outcomes.⁹⁴ After some seven years of research, consultation with stakeholders, and canvassing of the literature, the SEP produced an ambitious document and related materials outlining a process for evaluation that identifies overarching system goals (such as protecting the right to counsel and preventing conviction of the innocent), eleven concrete objectives of quality representation (such as pretrial release, protection of constitutional rights, and client satisfaction), twenty-six measures to determine the extent to which objectives are being met (consisting of various system inputs such as number of bond reduction motions or motions to suppress are filed), and a variety of measurable effects (such as cost savings resulting from reduction in jail populations or a decrease in public benefits payouts) to state in quantifiable terms the value of objectives being achieved.⁹⁵ If successfully implemented, the

⁸⁹ See, e.g., 2005 IDS REPORT, *supra* note 86, at 4; see also Gressens Interview, *supra* note 82 (discussing legislative support for public defenders).

⁹⁰ See MARGARET A. GRESSENS & DARYL V. ATKINSON, THE CHALLENGE: EVALUATING INDIGENT DEFENSE: NORTH CAROLINA SYSTEMS EVALUATION PROJECT PERFORMANCE MEASURES GUIDE 1–2 (2012), available at http://www.ncids.org/Systems%20Evaluation%20Project/performanceasures/PM_guide.pdf.

⁹¹ See *supra* note 38 and accompanying text (discussing cost-effectiveness analysis).

⁹² See Maher Interview, *supra* note 79.

⁹³ See Gressens Interview, *supra* note 82.

⁹⁴ See GRESSENS & ATKINSON, *supra* note 90, at 1–2.

⁹⁵ *Id.* at 4–7.

evaluation framework would facilitate analysis that would exceed current analytical capacity in a number of respects: The framework could objectively demonstrate that quality goals had been achieved by pointing to measurements; it could quantify the value of system goals being achieved; and it would enable predictions about effects on quality from altering particular inputs (such as increasing lawyer caseloads).

The Project is now operationalizing the SEP evaluation framework in North Carolina and three additional jurisdictions in Connecticut, Tennessee, and Texas.⁹⁶ Development of these four pilot sites has in itself been a significant accomplishment by the SEP, as each test jurisdiction has begun to collect case-level data using uniform and comparable units of measurement (such as uniform definitions of a “case” unit), generating a data set that includes millions of individual cases and data including a range of case outcomes, cost, length of time to accomplish initial attorney contact, pretrial outcomes, defendant demographics, and so forth.⁹⁷ Thus, regardless of the success of the SEP evaluation framework, the piloting efforts represent a significant infusion of defense-related data.

Aside from its work within North Carolina, the IDS Office has concertedly undertaken to facilitate the spread of EBP in the indigent defense community. The stated goal of the SEP is to generate a replicable framework for EBP that could be adopted by any office or jurisdiction, and IDS Office staff has engaged in significant outreach to engage the indigent defense community with its mission.⁹⁸ Additionally, the IDS Office partnered with the National Association of Criminal Defense Lawyers to develop and obtain grant funding for the Justice Standards, Evaluation and Research Initiative (“JSERI”), to facilitate adoption of evidence-based practices by indigent defense service providers themselves—independently from state oversight boards.⁹⁹ Significantly, however, JSERI was a grant-funded effort for which funding has now concluded. So too was the SEP formed (and “branded”) as an independent project of the IDS Office in part to attract grant funding for its efforts; little has been in the offing, however, which has contributed to the extremely protracted timeline of the project.¹⁰⁰

⁹⁶ *Id.*

⁹⁷ N.C. Systems Evaluation Project, *NCSEP Pilot Site Project*, N.C. OFFICE OF INDIGENT SERVICES, <http://www.ncids.org/Systems%20Evaluation%20Project/Projects/PilotSite.pdf> (last visited Mar. 7, 2015) [hereinafter, *NCSEP Pilot Site Project*]; Gressens Interview, *supra* note 82.

⁹⁸ N.C. Systems Evaluation Project, *Welcome to the North Carolina Systems Evaluation Project*, N.C. OFFICE OF INDIGENT SERVICES <http://www.ncids.org/Systems%20Evaluation%20Project/SEP%20HomePage.html?c=Research%20%20and%20%20Reports,%20Systems%20Evaluation%20Project> (last visited Nov. 30, 2014).

⁹⁹ *About JSERI*, NAT’L LEGAL AID AND DEFENDER ASS’N, <http://www.nlada.net/jsери/about> (last visited Mar. 7, 2015); *NCIDS and the JSERI Project*, N.C. OFFICE OF INDIGENT DEFENSE SERVICES, <http://www.ncids.org/Systems%20Evaluation%20Project/Projects/JSERI.pdf> (last visited Mar. 7, 2015); NLADA & NCIDS, *TOOLKIT FOR BUILDING IN-HOUSE RESEARCH CAPACITY* (2013), available at <http://www.nlada100years.org/sites/default/files/NLADA%20Toolkit%20-%20Research%20Capacity.pdf>.

¹⁰⁰ Gressens Interview, *supra* note 82.

B. Texas

By the year 2001, as the North Carolina IDS was getting off the ground, the state of indigent defense services in Texas had reached a boiling point. Texas's indigent defense "system," such as it was, was nothing more than an agglomeration of practices that lay entirely in the discretion of each of the state's 254 counties—indeed, within the discretion of each of the more than 800 trial courts within those counties.¹⁰¹ In the vast majority of courts, an assigned counsel mechanism was used to appoint lawyers, commonly with the judges before whom defense attorneys were practicing having sole and standardless discretion over which lawyers received appointments and what they would be paid.¹⁰² Moreover, localities had not only exclusive authority over the design of defense services, but also exclusive responsibility for the cost. Perhaps predictably—given restricted local budgets as compared to the state, particularly in Texas's many rural counties—Texas ranked near the very bottom of all states in total indigent defense expenditures.¹⁰³ This was so despite its status as the second most populous state,¹⁰⁴ and more disturbingly, despite its accompanying status as the leading practitioner of capital punishment.¹⁰⁵ Perhaps equally predictably in light of this mixture of radical decentralization and chronic underfunding, Texas in the year 2000 was being lambasted (as its then-governor ran for president) as an exemplar of the nation's indigent defense crisis.¹⁰⁶ And yet, as even the state's staunchest critics noted, allegations of systemic failure in Texas's provision of counsel were largely anecdotal and speculative, given the complete absence of any mechanism of

¹⁰¹ See Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 600–01 (2001); TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 22–23 (2000), available at http://www.texasappleseed.net/pdf/projects_fairDefense_fairref.pdf.

¹⁰² Greene Burnett et al., *supra* note 101, at 610–12; TEX. APPLESEED FAIR DEFENSE PROJECT, *supra* note 101, at 12.

¹⁰³ Greene Burnett et al., *supra* note 101, at 600–01; TEX. APPLESEED FAIR DEFENSE PROJECT, *supra* note 101, at 14. Of Texas's 254 counties, only 77 are classified as metropolitan areas, leaving 177 rural, and mostly shrinking, counties. See Tex. Comptroller of Pub. Accounts, *Texas Forecast: Widely Scattered Growth*, THE TEXAS ECONOMY, http://www.thetexaseconomy.org/people-places/population/articles/article.php?name=scattered_growth (last visited Mar. 7, 2015).

¹⁰⁴ See *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2013*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2013_PEPANNRES&prodType=table.

¹⁰⁵ Richard C. Dieter, *1999 Year End Report: Executions Reach Record High, But Concern Also Grows*, DEATH PENALTY INFORMATION CTR., <http://www.deathpenaltyinfo.org/1999-year-end-report-executions-reach-record-high-concern-also-grows> (last visited Mar. 7, 2015) (showing Texas as leading execution state in 1999).

¹⁰⁶ See, e.g., Kate Jones, *Indigent Defense*, CHAMPION, July 2001, at 33, 33; TEX. APPLESEED FAIR DEFENSE PROJECT, *supra* note 101 (summarizing Texas's notorious status).

tracking or monitoring what occurred within the state's hundreds of indigent defense micro-systems.¹⁰⁷

Against this backdrop, in 2001 the Texas legislature enacted the Texas Fair Defense Act. The Act for the first time provided state funding to assist counties in covering the cost of indigent defense, and provided a mechanism for holding county indigent defense provision accountable to statewide standards relating to attorney qualification, caseloads, and other measures of quality.¹⁰⁸ Of central significance in the legislative scheme was the creation of a statewide Task Force on Indigent Defense (later renamed the Texas Indigent Defense Commission, and referred to herein as "TIDC"). The TIDC is accountable to a thirteen-member board that includes at least seven judicial members, and its full-time work is carried out by a ten-person professional staff (an increase from its initial five-member staff).¹⁰⁹ TIDC and its Board are administratively located within the Texas judiciary, under the auspices of the Office of Court Administration.¹¹⁰ The TIDC's charge, broadly construed, is to implement and monitor compliance with the Fair Defense Act: developing standards for the provision and practice of defense services; monitoring county compliance with those standards; distributing state funds to counties and monitoring use of those funds; and a range of additional quality-enhancing functions.¹¹¹ At the same time, however, the Fair Defense Act formally preserved significant county autonomy. Individual counties retained the authority to select their own system for providing defense counsel, so long as that system was reported to TIDC in the form of county plans and otherwise met TIDC-promulgated standards.¹¹² Concomitantly, counties continued to shoulder a significant majority of indigent defense costs, with the state's contributions amounting (in the most recent budget) to only approximately thirteen percent of total costs.¹¹³

In contrast to North Carolina's statutory commitment to evidence-based practice (including the mandate of developing statistical information and generating cost-effectiveness analyses), evidence-based practice is a more understated element of the TIDC's legislative charge. The TIDC was expressly charged with a variety of information-gathering and monitoring functions, but was largely left to determine for itself how and to what extent it would make use of

¹⁰⁷ See TEX. APPLESEED FAIR DEFENSE PROJECT, *supra* note 101, at 3, 53.

¹⁰⁸ See TEX. GOV'T CODE ANN. §§ 79.034 & 79.037 (West 2013); Rodney Ellis & Hannah Liebman Dershowitz, *Gideon's Promise: The Texas Story*, CHAMPION, Apr. 2003, at 61, 62.

¹⁰⁹ TEX. GOV'T CODE ANN. §§ 79.002, 79.011, 79.013 & 79.014 (West 2013); TEXAS INDIGENT DEFENSE COMMISSION, ANNUAL REPORT FISCAL YEAR 2014 ii (2014), available at <http://tidc.texas.gov/media/30757/fy14annual-report141229.pdf>.

¹¹⁰ See TEX. GOV'T CODE ANN. § 79.033 (West 2013).

¹¹¹ See TEX. GOV'T CODE ANN. §§ 79.034–.036 (West 2013); see also Green Burnett et al., *supra* note 101, at 666–67 (highlighting significance of centralized data collection).

¹¹² See TEX. GOV'T CODE ANN. §§ 79.035–.036 (West 2013).

¹¹³ TEX. INDIGENT DEFENSE COMMISSION, ANNUAL AND EXPENDITURE REPORT 2013 10 (2014), available at <http://tidc.texas.gov/media/18588/fy13annualreport.pdf>.

data on indigent defense that would be generated by the counties. Collection and reporting on total county expenditures were the only clear data-driven mandates of the Fair Defense Act, and standing alone this information is insufficiently detailed to make meaningful judgments about the quality or comparative benefits of various county approaches.¹¹⁴

Nevertheless, the TIDC determined at the outset that it would aim to develop a research base and attempt to adopt evidence-based practices. The TIDC's first strategic plan, published three years into its existence, stated that one of the organization's three core goals was using "evidence-based practices" to "promote local compliance and accountability with the requirements of the" Fair Defense Act.¹¹⁵ The TIDC described the hallmarks of its evidence-based approach as collection and analysis of data to measure compliance with the quality standards contained within the Fair Defense Act (such as prompt initial appearance and advisement of the right to counsel, timely appointment, and fair selection of attorneys from lists of qualified counsel),¹¹⁶ ongoing monitoring and evaluation of indigent defense services by the localities themselves, and evaluation of innovations undertaken by individual localities.¹¹⁷ Beginning the following year, the TIDC's commitment to evidence-based practice would feature prominently in the Commission's annual reports to the legislature, which highlight EBP as central to the TIDC's work in empowering and supporting localities and achieving a cost-effective indigent defense system.¹¹⁸ The Commission's staff has now expanded to include two dedicated policy analysts whose job responsibilities expressly include development and deployment of evidence-based practices.¹¹⁹

The TIDC's choice to pursue and advertise its pursuit of EBP was prompted by a number of factors. First, the key players in the formation of the TIDC were keenly aware of the North Carolina example and its innovation in evidence-based reform. The TIDC's first and still-serving executive director, a lawyer by training who at the time of his appointment in 2001 was a relative newcomer to criminal justice politics, relied substantially on the advice of colleagues with longer

¹¹⁴ See TEX. GOV'T CODE ANN. § 79.036(e) (West 2013). An additional data collection requirement was added in the 2013 legislative session, mandating county reporting of the distribution of appointments among attorneys on assigned counsel lists. TEX. GOV'T CODE ANN. § 79.036(a-1) (West 2013).

¹¹⁵ See TEX. INDIGENT DEFENSE COMM'N, A STRATEGIC PLAN FOR IMPROVING TEXAS INDIGENT DEFENSE CRIMINAL JUSTICE SYSTEMS 2005–2010 9 (2005).

¹¹⁶ See TEX. CRIM. PROC. CODE ANN. art. 26.04–.05 (West 2009).

¹¹⁷ TEXAS INDIGENT DEFENSE COMM'N, *supra* note 115, at 9–12.

¹¹⁸ See TEX. INDIGENT DEFENSE COMM'N, TEXAS TASK FORCE ON INDIGENT DEFENSE, 2006 ANNUAL REPORT AND EXPENDITURE REPORT 1 (Feb. 22, 2007), <http://tidc.texas.gov/media/18593/fy06annualreport.pdf> (highlighting and explicating EBP in cover letter).

¹¹⁹ See *Jamie Dickon* (member profile), TEX. INDIGENT DEFENSE COMM'N, <http://www.tidc.texas.gov/commission/staff/jamie-dickson.aspx> (last visited Mar. 19, 2015); *Joel Lieurance* (member profile), TEX. INDIGENT DEFENSE COMM'N, <http://www.tidc.texas.gov/commission/staff/joel-lieurance.aspx> (last visited Mar. 19, 2015).

experience in criminal defense and criminal justice oversight.¹²⁰ TIDC personnel shaped the agency's course based in part on advice from IDS Office personnel, including its first director, who was highly supportive of adopting evidence-based practices. Other individuals guiding the early work of the TIDC in Texas were also evidence-based-practice evangelists, including members of the Texas Criminal Justice Policy Council ("CJPC"), a now-defunct state agency that had a dedicated mission to amass and analyze state criminal justice data in order to advise policymakers.¹²¹ CJPC staff, including in particular its director, encouraged the Commission to leverage its authority under the Fair Defense Act to gather and report fine-grained information about individual county indigent defense practices.¹²² Second, the practical challenges posed by overseeing 254 separate systems in Texas's diverse counties forced the TIDC to think systematically about how it could carry out its monitoring functions; data, as well as instantiating continuous self-monitoring by localities, were critical pieces of that strategy.¹²³ Third, developing an evidence base for indigent defense policies and practices was viewed as politically critical to enable the TIDC to pursue its mission in a state with a long history of inadequate indigent defense funding and resistance to centralized oversight and decision-making. The Commission would need hard numbers—"black and white" evidence,¹²⁴ in Director Jim Bethke's words—to persuade the state to continue to fund its work and counties to comply with the standards it was promulgating. Persuading localities to opt into better practices of their own accord—on the strength of the data rather than at the insistence of the Commission—was particularly important for the TIDC to avoid the appearance of acting as a top-down vehicle for state control. Hence, the Commission frequently and prominently touts EBP as a tool to enhance local control that "places the knowledge in the hands of those responsible for providing [defense] services" and "provide local and state officials solid information to make informed decisions about indigent defense practices."¹²⁵

The TIDC's steps toward EBP have been facilitated by several features of its structure and statutory mandate. First, the TIDC's data-gathering capacity is enhanced by its administrative attachment to the Office of Court Administration, which is the state clearinghouse for case-level data on system inputs and outcomes, and which pursuant to statutory mandate has provided the TIDC with access to its

¹²⁰ See Interview with Jim Bethke, Executive Director, Texas Indigent Defense Commission (Sept. 2, 2014) [hereinafter Bethke Interview] (notes on file with author).

¹²¹ See Scott Henson, *Lawmakers Want to Revive TX Criminal Justice Policy Council*, GRITS FOR BREAKFAST (Jun. 8, 2006, 9:03 P.M.), <http://gritsforbreakfast.blogspot.com/2006/06/lawmakers-want-to-revive-tx-criminal.html> (discussing history of CJPC); Bethke Interview, *supra* note 120.

¹²² See Bethke Interview, *supra* note 120.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See TEX. INDIGENT DEFENSE COMM'N, TASK FORCE ON INDIGENT DEFENSE, 2008 ANNUAL REPORT (2009), <http://tidc.texas.gov/media/18591/fy08annualreport.pdf>.

databases and their contents.¹²⁶ Second and perhaps more critically, the TIDC's opportunity to produce indigent defense evidence and to leverage that evidence with policymakers is enabled by its twin authority to distribute state funding via grants to counties and to monitor county performance after receipt of grant funds.¹²⁷ Thus, the TIDC's routine grant monitoring rules allow it to capture not only total county expenditures but also more discrete data such as the time that it takes to appoint counsel, the number and cost of authorizations for experts and investigators, and the identity of attorneys appointed (permitting assessment of whether appointments are evenly distributed on the list of available counsel).¹²⁸ Also crucial on this score was the TIDC's decision to award a portion of the state-funded grants on a competitive basis to counties proposing innovative indigent defense service programs, thereby propagating a number of pilot programs across the state.¹²⁹ Such funds went, for example, to the establishment of several local and regional public defender offices, a county program to pilot a voucher-funded, client-selected attorney appointment system, and, as Stephen Schulhofer details in this issue, a first-of-its-kind client-choice program.¹³⁰ Significantly, these grants were disbursed with express conditions providing for extensive data gathering and analysis by the Commission or its designees.¹³¹ The TIDC, typically aided by outside research partners and grant money, has in turn conducted a number of large-scale evaluations of these programs – studies which in turn have been important in encouraging other localities to innovate. The TIDC's 2012 study of the Wichita County Public Defender, for example, analyzed a multi-year data set and a range of records to compare case processing and outcomes in cases handled by private assigned counsel versus those handled by public defenders; among other conclusions, the study demonstrated that public defenders provided more services to clients and obtained more case dismissals at a lower per-case cost than private assigned counsel in comparable cases.¹³² The Wichita County Public Defender study, among others, has been instrumental in prompting other jurisdictions to replace judge-assigned counsel programs (maintained by the vast majority of

¹²⁶ See TEX. GOV'T CODE ANN. § 79.033 (West 2013); *Office of Court Administration*, TEX. JUDICIAL BRANCH, <http://www.txcourts.gov/oca.aspx> (last visited Mar. 7, 2015).

¹²⁷ See 1 TEX. ADMIN. CODE § 174.28 (2010).

¹²⁸ See *Fiscal Monitor Checklist*, TEX. INDIGENT DEFENSE COMM'N, <http://tidc.texas.gov/media/13441/140714FiscalMonitorchecklist.pdf>; TEX. ADMIN. CODE § 174.28(c) (2009).

¹²⁹ See *Discretionary*, TEX. INDIGENT DEFENSE COMM'N, <http://tidc.texas.gov/grants-reporting/discretionary.aspx> (last visited Mar. 7, 2015) (describing discretionary grant process); see also 1 TEX. ADMIN. CODE §§ 173.101–.109 (2012) (describing monitoring authority).

¹³⁰ See Stephen Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505 (2015).

¹³¹ See, e.g., TEX. INDIGENT DEFENSE COMM'N, ANNUAL AND EXPENDITURE REPORT 2012 4–5 (2013) (describing Harris County grant and conditions).

¹³² DOTTIE CARMICHAEL & MINER P. BARCHMANKS III, WICHITA COUNTY PUBLIC DEFENDER OFFICE: AN EVALUATION OF CASE PROCESSING, CLIENT OUTCOMES, AND COSTS iii–iv (2012), available at <http://tidc.texas.gov/media/18620/wichitapdstudy101212.pdf>.

Texas's counties) with public defender offices or other more independent methods of staffing indigent defense.¹³³

As the TIDC's internal commitment to EBP has increased, external actors have begun to look to the agency as a source of evidence-based guidance, and have in turn enhanced the agency's formal mandate to develop an indigent defense evidence base. For example, in a response to concern that some defense attorneys carried unmanageable caseloads that compromised the quality of representation, the legislature in 2013 enacted a requirement that attorneys authorized to accept indigent defense appointments track and report to the TIDC all time spent on appointed cases.¹³⁴ The bill further required that the TIDC conduct a study to establish an evidence-based caseload standard for indigent defense providers.¹³⁵ The study was completed and published at the start of 2015, and represents the first effort in Texas not only to document (within a sample of jurisdictions) actual attorney caseloads and time spent on discrete case tasks, but also to employ a rigorous empirical methodology to assess the amount of time that *should* be spent representing misdemeanor and felony clients.¹³⁶ That study and the now-continuous stream of county-level data about attorney time and caseloads has significant potential to influence future oversight and advocacy. For example, in the most recent legislative session, a bill has been introduced to require judges, in appointing defense counsel, to ensure that the appointment will not cause the attorney to exceed a "maximum allowable caseload" prescribed by the county.¹³⁷ Counties will presumably be under significant pressure to follow the evidence-based recommendations contained within the TIDC's caseload study.

Like North Carolina's commission, the TIDC has also now moved into an EBP evangelist role. The Commission's executive director regularly gives presentations on TIDC's evidence-based initiatives at bar conferences and other venues, and a number of TIDC authored or supported publications are aimed at creating "blueprint[s]" for evidence-based practices by individual government

¹³³ See, e.g., *Fix the System: Public Defender Office Needed for Justice*, HOUSTON CHRON. (Mar. 20, 2008), <http://www.chron.com/opinion/editorials/article/Fix-the-system-Public-defender-office-needed-for-1771537.php> (citing cost studies from other counties to urge formation of Harris County public defender); see also *Publications*, TEX. INDIGENT DEFENSE COMM'N, <http://tidc.texas.gov/resources/publications.aspx?ptype=1413> (last visited Mar. 7, 2015).

¹³⁴ See H.B. 1318, 83d Leg., Reg. Sess., § 1 (Tex. 2013), An Act Relating to the Appointment of Counsel to Represent Certain Youths and Indigent Defendants [hereinafter H.B. 1318]

¹³⁵ *Id.*, at § 8.

¹³⁶ See DOTTIE CARMICHAEL ET AL., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION, *available at* http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf (last visited Mar. 18, 2015).

¹³⁷ See S.B. 260, 84th Leg., Reg. Sess., § 1 (Tex. 2015), An Act Relating to Caseloads for Attorneys who are Appointed to Represent Indigent Defendants in Criminal Cases, *available at* <http://www.legis.state.tx.us/tlodocs/84R/billtext/html/SB00260I.htm>.

units or indigent defense entities.¹³⁸ The TIDC's web site is also an important EBP resource, providing public access to data collected from counties, studies conducted, and research plans for future studies.¹³⁹ But the TIDC's experience is also illustrative of some of the limits of evidence-based practice in shaping indigent policy to enhance the quality of system-wide representation. The expansion of public defender offices as an alternative to the still-prevailing use of judge-assigned private counsel has been touted as one hallmark of the TIDC's enhancement of indigent defense quality in the state. Perhaps nowhere is the potential significance of this trend greater than in Harris County, which until 2010 was the largest court system in the country without a public defender office. In that year, Harris County used TIDC grant funding to open a public defender office and assigned a portion of the County's non-capital cases to the office, over significant opposition from a number of judges, members of the private defense bar, and county officials.¹⁴⁰ Critically, a TIDC-backed study of the office's first three years of performance has not quelled that controversy. The study demonstrated that the public defender achieved better outcomes than private assigned counsel by a number of measures, including a greater proportion of case dismissals and acquittals.¹⁴¹ But beneath that summary, the details were more muddy: Outcomes for a relatively small sample of clients with mental illness represented by public defenders were significantly better than those represented by appointed attorneys, but for non-mentally-ill defendants charged with felonies the comparative gains were slimmer.¹⁴² Moreover, the office operated at significantly higher per-case cost—\$944 per felony, for example, as compared to \$550 for appointed counsel.¹⁴³ Supporters of the public defender model argue, of course, that the appointed counsel cost is too low, that it is suppressed by unsustainable caseloads, and that the quality improvements less susceptible of measurement justify greater spending.¹⁴⁴ And this may be so. But the data does not make that case in “black and white.” There is evidence already that political pressure fueled by the cost data is leading judges—who still have discretion whether to appoint

¹³⁸ See, e.g., *Indigent Defense Data for Texas*, TEX. INDIGENT DEFENSE COMM'N, <http://tidc.tamu.edu/public.net> (last visited Nov. 30, 2014); *Publications*, TEX. INDIGENT DEFENSE COMM'N, <http://tidc.texas.gov/resources/publications.aspx?ptype=1413> (last visited Oct. 28, 2014).

¹³⁹ See, e.g., *Indigent Defense Data for Texas*, TEX. INDIGENT DEFENSE COMM'N, <http://tidc.tamu.edu/public.net> (last visited Nov. 30, 2014).

¹⁴⁰ See Patricia Kilday Hart, *It's hard to keep up with the busy foe of a Public Defender's Office*, HOUSTON CHRON. (Apr. 27, 2012), <http://www.chron.com/news/kilday-hart/article/Hart-It-s-hard-to-keep-up-with-the-busy-foe-of-a-3513591.php>.

¹⁴¹ See TONY FABELO ET AL., IMPROVING INDIGENT DEFENSE: EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER 1–2 (2013), available at <https://www.prisonlegalnews.org/media/publications/Evaluation%20of%20Harris%20County%20TX%20Pub.%20Defender%20Justice%20Center%202013.pdf>.

¹⁴² See *id.* at 30–34.

¹⁴³ See *id.* at 16.

¹⁴⁴ See, e.g., *id.* at 17, 36–39.

counsel from the public defender office or a list of private attorneys—to opt not to use the office.¹⁴⁵

C. New York

New York's indigent defense system resembles Texas's in the extent to which it remains, as it was designed when *Gideon* was decided fifty years ago, a county-by-county pastiche of different service delivery mechanisms that largely lacks state funding or oversight.¹⁴⁶ Experts in the last decade have frequently characterized the system as being in a state of "crisis," with an array of study commissions echoing common areas of concern: attorneys in many of the state's sixty-two counties—particularly those north of New York City—practicing without adequate compensation or resources and crushing caseloads, with no meaningful quality standards, and with insufficient independence from the appointing authorities.¹⁴⁷ The deleterious situation is widely understood to be aggravated by New York's radically decentralized and byzantine court structure, by which more than a thousand village and town courts operate within upstate counties with near-total autonomy, adjudicating petty offenses and misdemeanors (and handling preliminary felony matters) under the authority of largely lay judges.¹⁴⁸ Multiple lawsuits have been brought to challenge the system, including one that recently

¹⁴⁵ See Brian Rogers, *Report: Public Defender System Showing Positive Results*, HOUSTON CHRON. (Oct. 2, 2013), <http://www.chron.com/news/houston-texas/houston/article/Report-Public-defender-system-showing-positive-4861196.php>.

¹⁴⁶ See COMM'N ON THE FUTURE OF INDIGENT DEFENSE SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 6–14 (2006) [hereinafter KAYE COMM'N], available at https://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf (detailing history of New York's indigent defense system). The 2014 settlement of long-standing litigation over the State's indigent defense system has instantiated a partial shift in this paradigm, with the State agreeing to assume responsibility for funding and, through its Office of Indigent Legal Services, oversight of indigent defense in five of its sixty-two counties. See *Hurrell-Harring v. State of New York*, No. 8866-07, Stipulation and Order of Settlement [hereinafter Hurrell-Harring Order of Settlement], available at <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf>; Statement of William J. Leahy, Director, Office of Indigent Legal Services (Oct. 22, 2014) [hereinafter, Statement of William J. Leahy], available at <https://www.ils.ny.gov/files/Hurrell-Harring%20ILS%20Director%20Leahy%20Statement%20102214.pdf>.

¹⁴⁷ See, e.g., Michael McConville & Chester Mirsky, *Criminal Defense of the Poor in New York*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 583 (1986–87); THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK ii–vi, 2 (2006) [hereinafter SPANGENBERG N.Y. REPORT], available at <http://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf>; KAYE COMM'N, *supra* note 146, at 7–9; JONATHAN LIPPMAN & JUANITA BING NEWTON, ASSIGNED COUNSEL COMPENSATION IN NEW YORK: A GROWING CRISIS (2000), available at <http://www.ils.ny.gov/files/Assigned%20Counsel%20Compensation%20Crisis%20-%20NYS%20Unified%20Court%20System,%20January%202000.pdf> (discussing compensation crisis).

¹⁴⁸ See SPANGENBERG N.Y. REPORT, *supra* note 147, at 103–20.

terminated in an historic settlement between plaintiffs and the State, *Hurrell-Harring v. State of New York*.¹⁴⁹

And yet, despite these numerous efforts to assess the state of indigent defense in New York, another constant refrain from observers of the system was the difficulty of gaining a complete and accurate picture of that system due to the absence of systematic collection of indigent defense data at the local level, and the near absence of analysis or monitoring of data by any centralized authority.¹⁵⁰ In 2006, a task force commissioned by the then-chief judge of the New York Court of Appeals issued a report in which the central recommendation was the creation of a centralized statewide defender system consisting of regional and local trial and appellate public defender offices, as well as, critically, a statewide commission charged with standard setting, data gathering, performance monitoring, and additional oversight functions.¹⁵¹

In 2010, the New York legislature responded to the increasingly pitched criticism with only a partial endorsement of the Kaye Commission's recommendations. Indigent defense reform legislation maintained the locality-by-locality service provision approach, but did create a statewide oversight commission in the form of the New York State Office of Indigent Defense Services, an executive-branch agency overseen by a nine-member Indigent Legal Services Board and staffed initially with ten employees.¹⁵² The Office and the Board assumed responsibility for disbursing an already-extant state fund to assist localities with a portion of the cost of defense services, promulgating service provision standards, monitoring local compliance, and, critically, assembling and analyzing available evidence concerning indigent defense services and their outcomes.¹⁵³

On this last point, and far more than in Texas or North Carolina, the foundations of an evidence-based mission were built into the New York Office's legislative design. Its authorizing statute mandated that the Office collect and analyze an array of data regarding, for example, attorney qualifications and compensation, caseloads, local expenditures, and case dispositions, and for many categories mandated comparison with comparable figures on prosecution

¹⁴⁹ See, e.g., *Hurrell-Harring v. State*, 15 N.Y.3d 8 (2010); *New York Cnty. Lawyers' Ass'n v. State*, 294 A.D.2d 69 (N.Y. Sup. Ct. 2002). *Hurrell-Harring* concluded after seven years of litigation with a settlement agreement signed on October 21, 2014. See *Hurrell-Harring Order of Settlement*, *supra* note 146. The settlement was pathbreaking both in the State of New York's acceptance of financial responsibility—for the first time—for indigent defense in several of its counties, and for the lodging of responsibility for implementing the settlement in a dedicated indigent defense oversight entity. See Statement of William J. Leahy, *supra*, note 146. The latter point is discussed further at *supra* note 146, and *infra* notes 169, and 204, and accompanying text.

¹⁵⁰ See KAYE COMM'N, *supra* note 146, at 9, 26; SPANGENBERG N.Y. REPORT, *supra* note 147, at ii, 32–36.

¹⁵¹ KAYE COMM'N, *supra* note 146, at 27–32.

¹⁵² See N.Y. EXEC. L. §§ 832–833 (McKinney 2010).

¹⁵³ See N.Y. EXEC. L. § 832 (McKinney 2010).

services.¹⁵⁴ Relatedly, the Office was directed to establish procedures whereby localities would self-report data “to assist the office in monitoring the quality of indigent legal services.”¹⁵⁵ The statute also effectively directed that the Office’s quality recommendations be evidence-based, by mandating that the Office analyze collected data “to consider and recommend measures to enhance the provision of indigent legal services.”¹⁵⁶ Appropriate to its data-driven mission, the Office’s initial staff complement includes a Director of Research position staffed by a trained social scientist.¹⁵⁷ The Office has also begun to partner with outside research entities, including the School of Criminal Justice at the State University of New York at Albany.¹⁵⁸

On the other hand, while the New York commission’s formal commitment to data collection and evidence-based practice may be comparatively greater than its predecessors, there are early indications that its aspirations are hampered by structural deficiencies in the commission’s design and the state’s criminal justice data infrastructure. Both commission staff and outside researchers report that it is still difficult to obtain comprehensive data even regarding aggregate features of indigent defense practice—funds expended, distribution of cases among particular service providers, and so forth—much less at the case-specific level.¹⁵⁹ This appears partly due to the persistence of poor data coordination between New York’s Office of Court Administration and the countless county, village, and town courts that are under persistently unenforced mandates to report data, as well as limits on the OCA’s own data collection.¹⁶⁰ Additionally, and in contrast to Texas and North Carolina, the New York Office has neither a formal nor informal link to the OCA to facilitate obtaining what data the agency does collect.¹⁶¹ Moreover,

¹⁵⁴ See N.Y. EXEC. L. § 832(b) (McKinney 2010).

¹⁵⁵ See N.Y. EXEC. L. § 833(j) (McKinney 2010).

¹⁵⁶ See N.Y. EXEC. L. § 833(c) (McKinney 2010).

¹⁵⁷ See Andrew Davies, N.Y. STATE OFFICE OF INDIGENT LEGAL SERVICES, <http://www.ils.ny.gov/node/20> (last visited Mar. 7, 2015).

¹⁵⁸ *Research and Data Analysis*, N.Y. STATE OFFICE OF INDIGENT LEGAL SERVICES, <https://www.ils.ny.gov/content/research-and-data-analysis> (last visited Mar. 7, 2015).

¹⁵⁹ See e-mail from Andrew Davies to author (Sept. 30, 2014) (on file with author) [hereinafter Davies Email] (“Until you have data on every case involving every client, you don’t have the ability to look at what makes a difference for those clients. So, notwithstanding the intent to base our defender system on data and evidence, it’s a hollow (or limited) promise if there is no data infrastructure to back it up.”); Interview with Andrew Davies (Sept. 29, 2014) (on file with author) [hereinafter Davies Interview]; Joel Stashenko, *NYCLU Report on Public Defense Provides Fuel for Trial*, N.Y. L.J. (Sept. 18, 2014), <http://www.newyorklawjournal.com/id=1202670426093/NYCLU-Report-on-Public-Defense-Provides-Fuel-for-Trial?slreturn=20140930133258> (noting “difficulty” in gathering data from various entities for purposes of *Hurrell-Harring* litigation).

¹⁶⁰ See SPANGENBERG N.Y. REPORT, *supra* note 147, at 32–36; see also Brief of the New York State Defenders Association as Amicus Curiae Supporting Petitioners, *Hurrell-Harring v. State of New York*, 2010 WL 1775138, at *3 n.2 (noting difficulty of assessing outcome of post-conviction motions because court system did not keep data on filings).

¹⁶¹ See Davies Email, *supra* note 159; see also *supra* notes 70, 83, 108, 128 and accompanying text.

and again in contrast to Texas in particular, the New York Office's implementing legislation did not include a data reporting requirement for counties, and the Office is not empowered (as the TIDC is) to withhold funding based on failure to report adequate data.¹⁶²

The New York Office is still in its infancy, however. The pendency of the *Hurrell-Harring* litigation, which was initially dismissed but reinstated by the New York Court of Appeals shortly before the Office began operations, was a significant external factor affecting the Office's first three years of work.¹⁶³ Multiple office staff members served as witnesses in the case, and the Office devoted significant resources to providing data to plaintiffs' counsel.¹⁶⁴ More atmospherically, the existence of the suit and uncertainty about its outcome likely created a sense of collectively bated breath among indigent defense stakeholders and policymakers, and may have contributed to the persistence of revealed structural flaws in aspects of the Office's mission.¹⁶⁵ Nevertheless, even in its infancy the Office began to leverage its authority to fund competitive grants to expand its access to aggregate data on local indigent defense practices, building data-reporting requirements into the three requests for proposals it has issued since its formation.¹⁶⁶ Over time these discretionary grants will permit greater data monitoring and some program analysis, and may prompt counties to begin to invest in necessary data-collecting technology.¹⁶⁷ The Office has also conducted two studies to demonstrate what additional expenditures would be required for upstate counties to move into compliance with national caseload standards—albeit

¹⁶² Compare N.Y. Exec. L. § 833 (McKinney 2010), with Tex. Gov't Code Ann. §§ 79.034–.036 (West 2011).

¹⁶³ *Hurrell-Harring v. State*, 930 N.E.2d 217, 227–28 (N.Y. 2010).

¹⁶⁴ Stashenko, *supra* note 159, (describing prospective testimony by Bill Leahy); Davies Interview, *supra* note 159.

¹⁶⁵ Cf. Michael Whiteman, *Another Voice: Cuomo Should Settle Class-Action Lawsuit On Public Defense*, BUFFALO NEWS (Dec. 19, 2013, 11:17 PM), <http://www.buffalonews.com/opinion/another-voice/another-voice-cuomo-should-settle-class-action-lawsuit-on-public-defense-20131219> (stating that “the Office of Indigent Legal Services . . . lumbers along underfunded, understaffed, longing for executive fidelity and observing but glacial improvements,” and urging state takeover of system); UJAL SEHGAL, HELEN ZELON & LAUREN ALEXANDER, *STATE OF INJUSTICE: HOW NEW YORK STATE TURNS ITS BACK ON THE RIGHT TO COUNSEL FOR THE POOR* 24 (2014), *available at* http://www.nyclu.org/files/publications/nyclu_hh_report_FINAL.pdf (recommending that Office be transformed into statewide defender).

¹⁶⁶ See, e.g., N.Y. STATE OFFICE OF INDIGENT LEGAL SERVICES, *FUNDING ANNOUNCEMENT: COUNSEL AT FIRST APPEARANCE DEMONSTRATION GRANT 9* (2012), *available at* <https://www.ils.ny.gov/files/RFP%20For%20Counsel%20At%20First%20Appearance%20113012.pdf> (last visited Nov. 30, 2014); N.Y. STATE OFFICE OF INDIGENT LEGAL SERVICES, *FUNDING ANNOUNCEMENT, UPSTATE QUALITY IMPROVEMENT AND CASELOAD REDUCTION GRANT 11*, *available at* <https://www.ils.ny.gov/files/RFP%20For%20Upstate%20Quality%20Improvement%20and%20Caseload%20Reduction%20082213.pdf> (last visited Nov. 30, 2014).

¹⁶⁷ Davies Interview, *supra* note 159.

in reports that only highlighted the incredible difficulties still facing the Office in obtaining data to conduct this sort of basic system analysis.¹⁶⁸

In the aftermath of the *Hurrell-Harring* settlement, the Office is poised to emerge as a far more central player in indigent defense oversight, and is well-positioned to leverage its evidence-based emphasis and expertise in data gathering and analysis. The settlement agreement, to which the Office is a signatory, creates a binding legal obligation upon the Office to oversee achievement of many of the agreed-to benchmarks. The Office will, in the coming months, be required to generate plans to ensure that in the five counties covered by the settlement: (1) all defendants are represented at arraignment, (2) caseload standards and recommendations concerning the resources necessary to comply with them are generated and continuously updated, and (3) a variety of additional quality initiatives are undertaken.¹⁶⁹ Significantly, the settlement also obligates the State to augment the Office's budget to add the staff and other resources necessary to take on these functions.¹⁷⁰

The Office's first foray into developing a true evidence base to evaluate indigent defense practices is still on the horizon, but has recently been kick-started by an NIJ research grant. A significant focus of the Office's programmatic funding to date has been to ensure that indigent defendants in New York are represented at their initial appearance before a judge—a goal that has been far from being realized, especially in upstate counties.¹⁷¹ The Office piloted an evaluation of the impact of two counsel-at-first-appearance programs, in a study for which the data gathering alone required eight weeks of hand-searching court records. That study will now be expanded with the assistance of federal funds through a recently awarded NIJ grant to evaluate the impact of assigning counsel at initial appearances in six counties. Significantly, the prospective study will be among the first in the indigent defense literature to evaluate the process and effect of providing counsel in the context of non-urban counties.¹⁷²

¹⁶⁸ N.Y. STATE OFFICE OF INDIGENT LEGAL SERVICES, AN ESTIMATE OF THE COST OF COMPLIANCE WITH MAXIMUM NATIONAL CASELOAD LIMITS IN UPSTATE NEW YORK 8–10 (2013) (discussing absence of data on case assignments or failure to separate case assignments by type in numerous counties despite legislative reporting mandate), *available at* <https://www.ils.ny.gov/files/Estimate%20of%20Upstate%20Cost%20Of%20Compliance%20Report%20Nov%202013.pdf>.

¹⁶⁹ *Hurrell-Harring Order of Settlement*, *supra* note 146, at 5, 7, 9–10, *available at* <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf>.

¹⁷⁰ *Id.* at 15–16.

¹⁷¹ *See Counsel at First Appearance*, N.Y. STATE OFFICE OF INDIGENT LEGAL SERVICES, <https://www.ils.ny.gov/content/counsel-first-appearance> (last visited Mar. 7, 2015).

¹⁷² *See NIJ Award Detail: Early Intervention by Counsel: A Multi-Site Evaluation of the Presence of Counsel at a Defendant's First Appearance in Court*, NAT'L INST. OF JUST., <http://www.nij.gov/funding/awards/pages/award-detail.aspx?award=2014-IJ-CX-0027> (last visited Mar. 7, 2015).

III. TAKING STOCK

Notwithstanding concerted efforts in North Carolina, Texas, and New York, and more episodic efforts elsewhere,¹⁷³ indigent defense remains decidedly *not* evidence-based. At best, recent years have seen an increase in data that permits gross description and comparison among pockets of the system; a limited number of studies in a small number of areas that can provide empirical evaluation of program effectiveness; and on the horizon a proposed but yet untested framework for making data-driven predictions about cause and effect, inputs, and ultimate quality in the practice and administration of indigent defense. To be sure, these important developments allow policymakers' and administrators' decisions about provision of indigent defense to be better informed. But they do not an evidence base make. Perhaps more critically from the standpoint of benchmarking the development of EBP in the field, indications that the evidence on offer is actually influencing the development of indigent defense policy—that the “practice” *is* evidence-based—are relatively few and far between.¹⁷⁴

But if EBP remains a promissory notion in the indigent defense field, the previous Part demonstrates that it nevertheless has growing ranks of devotees, is garnering at least nominal attention from important funding sources, and appears increasingly to be attracting the interest of policymakers designing systems of indigent defense service provision. None of this is without cost, of course. Time and energy spent leaning on public defenders to gather better data might trade off with time and energy for skills training. Grant funding for program evaluation might trade off with funding to alleviate caseloads or hire defense investigators. Staffing an oversight agency with researchers might trade off with dedicated grant-monitoring personnel. In a world of desperately limited resources for indigent defense, it is well to ask what we are getting, or are likely to get, from investment in developing the field's evidence base. Accordingly, this final Part critically assesses three aspects of EBP's potential in the field: its potential to generate qualitatively better practices, its potential to grease the political wheels for indigent defense funding and policymaking, and its potential contributions to litigation-centered strategies. The analysis echoes some of the assessments of EBP in the criminal justice system generally that Part I enumerated, but demonstrates that the indigent defense context raises a distinctive array of potential benefits and pitfalls. Finally, the analysis closes with some cautionary thoughts on EBP's tension with the constitutional precommitments that *Gideon* embodies.

¹⁷³ See, e.g., AM. BAR ASS'N, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), available at http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf.

¹⁷⁴ See *supra* notes 86, 127, and 128 and accompanying text (describing limited evidence that Texas counties have responded to public defender studies conducted by the TIDC, and anecdotal accounts of the influence of North Carolina IDS Office's work on the legislature).

A. EBP and Quality Practices

First, there is the perhaps too-obvious prospect that EBP will reveal the details of what makes up a high quality system of indigent defense—what level of caseloads are truly sustainable, what types of tasks by defenders yield positive outcomes, what system of staffing indigent defense needs is optimal, and so forth. Such information would be valuable to legislators fashioning state-wide indigent defense structures or making budgetary decisions, as well as (perhaps more likely) to agency-level actors making fashioning policy within individual indigent defense organizations. This is the promise held out by North Carolina's System Evaluation Project, in its ambition to marshal sufficient data within and across jurisdictions and to develop an evaluation framework of sufficient detail and nuance to yield data that permits measurement of whether desired outcomes are being achieved. It is the difference between knowing that jurisdiction X is maintaining 400 felony cases per attorney while jurisdiction Y maintains 300—knowledge that reveals little but even still is currently in low supply—and knowing that in jurisdiction X with caseloads of 400 felonies there are fewer pretrial releases, fewer hours spent on investigation, fewer meetings with clients, and fewer motions filed than in jurisdiction Y.

Achievement of this goal would indeed be groundbreaking, not only in the indigent defense field but in criminal justice policymaking generally. To date, the substantive performance standards that guide defense practice are largely the product of professional experience and, ultimately, guesswork about how inputs relate to outputs.¹⁷⁵ This is largely true even of some of the most ambitious efforts to date toward EBP in standard-setting, such as the Texas weighted caseload study discussed in Part II. The key prescriptive component of that report, outlining what quantity of time *should* be allotted to case tasks (and, derived from that, what maximum caseload is compatible with quality representation), is ultimately derived from the subjective views of practitioners and experts.¹⁷⁶ To be sure, those views were elicited and developed in a structured and systematic manner, consistent with research design borrowed from other fields.¹⁷⁷ But ultimately this is not the sort of data-driven judgment about cause and effect that drives EBP's proponents' predicted linkage between empirical success and future quality.

Moreover, standard-setting in indigent defense almost universally continues to beg the question of precisely what good defense practice is aiming to achieve.¹⁷⁸ Acquittals? Best sentencing outcomes? A performative bulwark against state power? Achieving evidence-based indigent defense would permit policymakers and practitioners to select practices or systems of service provision with

¹⁷⁵ See *supra* notes 54–57.

¹⁷⁶ See Carmichael et al., *supra* note 136, at 7–8.

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* note 54.

significantly higher confidence than we (should) have now about what outcomes will flow from those decisions. Particularly against a backdrop of always limited resources, evidence-based evaluations of indigent defense practices and programs permit advocates, lawmakers, and agency leaders to identify the highest quality investment, and to know what consequences for quality might flow from increased or diminished expenditures. Less concretely but no less importantly, the attention that evidence-based practice requires to rigorously identifying the outcomes that are sought for system actors offers the promise of both solidifying professional self-understanding, and also rendering that self-understanding transparent to clients, lawmakers, and taxpayers. Indeed, especially in light of *Gideon*'s democratic underpinnings,¹⁷⁹ the prospect of a more broadly understood and accountable indigent defense system is a valuable, if frequently overlooked, goal in itself.¹⁸⁰

But there are significant barriers to achieving evidence-based practice at the above-described level of sophistication. The most formidable among them may be the most obvious: resources. The North Carolina IDS managed to develop an evaluation framework only after some eight years of work by its research staff. They did so under the auspices of an agency with a dedicated data-development mission, dedicated staff to carry out that mission, and EBP devotees at its helm—unusual features as compared to the national landscape. Even with those advantages, the IDS staff report that they have been continuously on the hunt for additional outside grant funding to add research personnel. Only one such grant has been in the offing (an Open Society Foundation grant that recently ended), a low success rate that IDS staff attribute to the slim availability of funding for government agencies as opposed to non-profit entities.¹⁸¹ To be sure, the evaluation framework developed by the SEP can now be piloted in jurisdictions across the country; the start-up costs for that effort are largely complete. But the task of developing a robust and trustworthy evidence base for indigent defense

¹⁷⁹ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”); Victoria Nourse, *Gideon’s Muted Trumpet*, 58 MD. L. REV. 1417, 1418 (1999) (“[T]he right to counsel does not serve to protect guilty defendants but to ensure equality and democracy for the rest of us. The lawyer is the individual’s guarantor of a “right of opposition,” and, as such, is essential to a process of democratization, a process in which all interests (even the government’s) are subject to competition.”); Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1333 n.22 (1964) (understanding *Gideon* as ameliorating disenfranchisement of the poor).

¹⁸⁰ Cf. Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 558 (2014) (urging enhancement of transparency and other democratic values in the criminal justice system).

¹⁸¹ See Maher Interview, *supra* note 79; Gressens Interview, *supra* note 82.

cannot hinge on the efforts, however rigorous, of a single team of researchers. The SEP's framework must now be not only implemented, but also critiqued and revised; competing frameworks should perhaps be developed. Moreover, implementing the framework of evaluation requires far more than simply flipping a switch on a computer. In any jurisdiction, a multitude of data must be collected from multiple criminal justice agencies, sorted, rendered comparable, and analyzed—tasks that typically require weeks of single-minded effort from multi-person research teams.¹⁸²

Given these conditions, it is unlikely that EBP's full flowering can occur through the sole or primary efforts of already stretched oversight agencies or other entities within the world of indigent defense practice. What might be most needed for evidence-based indigent defense practice to flourish, therefore, is a significant uptick in attention to the phenomenon from the academic research community. Academic researchers can contribute comparatively greater time to push forward with the development of the evidence base, and have comparatively greater access to grants and other funding mechanisms.

Importantly, researchers from outside the agencies that have been advancing the cause to date also might bring a needed additional aura of objectivity to the task. Unquestionably, the state commissions that have been on the forefront of EBP have sought to be honest brokers in their production and analysis of data, and their leadership universally understands that the credibility of the data they present hinges on their efforts being perceived as disinterested and not advocacy-based.¹⁸³ And there is arguably no conflict between an oversight mission to ensure the provision of high quality indigent defense, and a research portfolio held out as providing evidence-based content to that vision. But there might nevertheless be a perception among lawmakers that, given a defendant-protective charge, commission researchers might not be fully inclined to go wherever the evidence leads them. Moreover, to the extent that a portion of the state commissions' research stems from programs that they had a hand in developing and funding, there is indeed a diminished capacity for truly disinterested analysis. Conversely, the imperative of preserving the appearance of objectivity for purposes of their research agendas might create pressure on commissions to forego taking contestable positions in other areas of oversight—encouraging, for example, conservative stances on evaluating local compliance with standards. For these reasons, it will be a boon to the development of EBP for academic researchers to begin to pick up the slack from state commissions.¹⁸⁴

¹⁸² See Davies Interview, *supra* note 159 (describing a small scale example of such effort in New York).

¹⁸³ See Gressens Interview, *supra* note 82; Davies Interview, *supra* note 159; Bethke Interview, *supra* note 120.

¹⁸⁴ Indeed, these concerns about actual or perceived partiality suggest that indigent defense oversight and research might best be administratively separate, or at least segregated, within a single

To the extent government agencies like the North Carolina, Texas, and New York commissions will continue to spearhead data-gathering and analysis, there are structural issues to attend to in their design. These entities must be empowered to generate new data—by, for example, having the ability to force other system actors to track and report activities—and readily access what information might already exist in non-centralized form. Of the three commissions discussed in Part II, the North Carolina IDS is perhaps best-positioned on this score; it enjoys both ready access to information already gathered by the Administrative Office of Courts, as well as the ability to gather data directly from two segments of state indigent defense providers—capital and appellate counsel—over which it has supervisory authority. The New York Office, by contrast, was saddled with the most robust data collection mandate and the most comparatively feeble infrastructure to execute it. The example demonstrates that lawmakers must attend to issues of broader system interconnectedness (or disconnectedness) when aiming for data-driven indigent defense practice. Texas, for its part, may best exemplify an iterative process of a commission fueling policymakers’ demand for an information base, which in turn leads to greater structural empowerment of the oversight agency to collect, analyze, and drive decision-making with further evidence.¹⁸⁵

Also critical to the development of EBP will be continuing to develop the data infrastructure of indigent defense providers, as well as court systems and other criminal justice agencies in possession of relevant data about the progression of criminal cases. These individual agencies need the capacity to efficiently gather and analyze discrete activities and outcomes in criminal cases, through automated case management software, automated time tracking, and other technological solutions that are common place in the private sector and still rare among criminal justice agencies.¹⁸⁶ They also need the ability to share and coordinate data, a condition that is critical to make information susceptible to analysis, but that is frequently thwarted by incompatible data systems.¹⁸⁷ The development of technological capacity has been a priority that has received significant federal grant money in other criminal justice sectors—law enforcement in particular.¹⁸⁸ The NIJ and the BJA should similarly prioritize this incremental but critical goal in the indigent defense context.

Equal in importance to an infusion of resources for data collection, however, is an infusion of enthusiasm for it within the indigent defense community itself. Leaders in North Carolina, Texas, and New York all observed in interviews that

agency. However there is a real question, the answer to which is well beyond the scope of this discussion, whether that administrative gain would be worth the bureaucratic candle.

¹⁸⁵ See *supra* notes 140–44.

¹⁸⁶ See Wright, *supra* note 26, at 92–93.

¹⁸⁷ *Id.* at 93.

¹⁸⁸ See *Law Enforcement Equipment and Technology*, NAT’L INST. OF JUST., <http://www.nij.gov/topics/law-enforcement/technology/Pages/welcome.aspx> (last visited Mar. 7, 2015).

resistance to information gathering and analysis from indigent defense providers, both individual and institutional, had to various extents created barriers to their work.¹⁸⁹ They discussed the need to overcome the defense bar's concern that evidence-based practice meant that attorneys would be negatively judged for adverse outcomes in individual cases—an outcome that frequently even the best representation cannot avoid. Professional opposition to data collection might also flow simply from what is widely understood to be an autonomous, maverick culture to criminal defense, one in which tracking hours spent and tasks performed is likely to be met with resistance.¹⁹⁰ There are indications that defense lawyers are beginning to embrace the data paradigm, but change remains spotty.¹⁹¹ Just as EBP has benefitted from thought leaders, it will likely take concerted leadership within the defense community to continue to shift the culture in the direction of data-driven, or at least data-producing, practice.

Finally, a cautionary note is in order. One might respond to the above enumeration of EBP's barriers to implementation by suggesting that any incremental effort still constitutes progress. To some extent that is true, as elucidation of more *information* about what transpires in the course of providing indigent defense services seems likely to be all for the best. But the same might not confidently be said for incremental efforts at evidence-based evaluation. The concern is that research might converge on studying correlations between system inputs and those outputs that are most readily trackable and, as a matter of data, obtainable: acquittals versus convictions, or perhaps sentencing outcomes, or perhaps any of these outputs vis-à-vis aggregated offense categories—felonies versus misdemeanors—rather than specific offenses. The research to date, however, has indicated that these ultimate outcomes might evince little variation even among types of lawyers and lawyering for which there is reason to suspect qualitative difference.

The Harris County Public Defender study is exemplary in this regard. As Part II.B discussed, the study demonstrated only fairly slight outcome differences between public defenders and assigned counsel when looking at outcomes for aggregated case categories—a finding of particular concern to policymakers given the comparatively dramatic difference in price between the two system options.¹⁹² But given documented differences in the quality of inputs, such as greater investigative resources and attention to client contact by public defenders, one might suspect that more fine-grained analysis might have yielded better results for the public defender. A recent study of the Philadelphia Public Defender bears out

¹⁸⁹ See Gressens Interview, *supra* note 82; Davies Interview, *supra* note 159; Bethke Interview, *supra* note 120.

¹⁹⁰ Cf. Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 191–92 (2008) (discussing defense bar's attachment to bad but habitual practices).

¹⁹¹ See, e.g., Schumm, *supra* note 53, at 24–25.

¹⁹² See *supra* notes 131–36.

this intuition. Analyzing specific offenses as well as aggregate categories, the study found that assigned counsel and the public defenders performed comparably for felonies generally, but isolated a dramatic difference in outcomes—nineteen percent more acquittals, sixty-two percent fewer life sentences—looking only at murders.¹⁹³ The risk is that a flowering of studies that are insufficiently granular might have the perverse effect of failing to validate indigent defense programs that are indeed worthy of support. Researchers must be mindful of these potential limitations, and advocates who will marshal the research must strategize about how to educate decision makers about gaps in the research that might deceptively validate a suboptimal status quo.

B. EBP and the Political Landscape

There is a second possible route to improved quality that EBP might open up, namely the prospect that arming defense advocates with evidence will grease the wheels of political support for better funding or other indicia of support for the system. Leaders in the push for EBP have themselves touted this advantage in a number of forms. Better data alone, it is argued, assists defender agencies in obtaining funding or other legislative dispensations, because it allows them to compete favorably with other budgetary causes that are able to show what legislators are buying with their money—X many roads, Y many hospital beds, Z many police cars, and so forth—and provides legislators with a greater sense of financial accountability.¹⁹⁴ Beyond mere data, empirical evaluation of services and programs—such as the public defender studies conducted in Texas, or the to-be-implemented SEP evaluation framework—will provide objective indicators of “what works” in indigent defense, which will be persuasive to decision makers who might otherwise be skeptical of programmatic claims that appear to emanate from the defense bar or other vested interests.¹⁹⁵ A closely related argument predicting political leverage from EBP contends that research will demonstrate that at least some indigent defense investments enable downsizing of the criminal justice system—by, for example, obtaining dismissals of weak cases or release of low-flight-risk offenders through early representation and investigation—and that such programs will garner broad based support—among lawmakers and voters—as “smart” government-shrinking tactics.¹⁹⁶ Relatedly, there is the possibility that the

¹⁹³ See Anderson & Heaton, *supra* note 39, at 178–87.

¹⁹⁴ See Maher Interview, *supra* note 79; Bethke Interview, *supra* note 120.

¹⁹⁵ See GRESSENS & ATKINSON, *supra* note 90, at 6 (offering hypothetical case of legislative persuasion to adopt best practice based on evidence); Jim Bethke, *National Research Data Initiative*, YOUTUBE (Oct. 28, 2013), https://www.youtube.com/watch?v=F-Y_I2o4d2g (discussing need to provide governing Commission with evidence); Bethke Interview, *supra* note 120.

¹⁹⁶ See, e.g., Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2328 (2013) (“Those who are receptive to the smart-on-crime approach eventually will recognize that the better equipped our indigent defense system is, the less waste and inefficiency our criminal justice system will

sheer increase in transparency achieved by data would make indigent defense a more attractive site for public buy-in, thus building a voting constituency in a field that traditionally lacks one.

Indeed, the point that evidence is more likely than anecdote to influence decision makers is a critical one, because its validity is, to some extent, a necessary condition for EBP's success. That is to say, simply developing an evidence base does not evidence-based *practice* make: Decision makers must utilize rather than ignore the evidence, and must use it well, to achieve the aims of the paradigm.¹⁹⁷

Here again, one may sensibly take the position that more information is better than less, that greater transparency about the operation and quality of defense services can at a minimum do no harm and surely has some marginal positive effect on the willingness of political actors to buy into the cause. Indeed, it may be that the particular oversight structures exemplified by North Carolina, Texas, and New York present one of the strongest cases for this argument. In all three states (and especially in Texas and New York), the indigent defense oversight agency has only very limited direct authority to direct particular improvements in the quality of defense services provided at the local level. In Texas and New York, the enforcement mechanism that is built into the commission's design is perverse at best: Counties that fail to comply with minimal state and commission standards in Texas, or that do not in the New York Office's view merit state funding, may be deprived of funds—a decision that is almost guaranteed to lead to worse outcomes for indigent defendants, at least in the short term, than simply tolerating sub-optimal local practices. Where a state has chosen a relatively weak oversight entity, arming that agency with a robust data-gathering and analysis mission provides a critical tool in the basket of persuasion: Data collection and monitoring mandates mean that at a minimum localities risk the time and interference of commission involvement in their operations if they do not transparently comply with existing standards; localities may be dissuaded from intransigence by the prospect of public reporting of data such as appointment rates or caseloads; and local actors might be affirmatively persuaded to innovate based on evidence demonstrating that other localities had done so successfully.

But there is cause for skepticism about the magnitude of political leverage to be gained from EBP. First, my own armchair judgment is that the political dynamics of criminal justice will for the foreseeable future be driven by appeals to public safety, crime fighting, victim protection, and other interests—however laudable—that are not viewed as vindicated by support for indigent defense funding. Defense services will always be competing for state dollars against entities that serve those interests far more straightforwardly. And the interest

produce.”); *Texas Smart on Crime Legislative Agenda for the 84th Legislative Session*, THE TEXAS SMART ON CRIME COALITION, <http://smartoncrimetexas.com/legislative-agenda/texas-smart-crime-legislative-agenda-84th-legislative-session> (last visited Mar. 7, 2015) (advocating representation at bail to “right-size the Texas criminal justice system”).

¹⁹⁷ See generally CARTWRIGHT & HARDIE, *supra* note 45 (discussing challenges of implementing policy based on evidence).

group base for indigent defense services is relatively small and even more politically disenfranchised. It is difficult to imagine that data alone could move politicians off this cultural baseline—at least in the absence of crisis conditions, threats of legal liability, or other circumstances that are exogenous to the force of evidence per se.

More concretely, I suspect that it will be rare case that providing quality indigent defense will on balance save money—which is probably the most potentially effective lever for attracting support and reframing indigent defense funding in a more politically saleable light.¹⁹⁸ To be sure, a number of empirical studies to date have documented a range of cost savings generated by providing legal representation at bail hearings, including reduced jail populations by obtaining favorable bail decisions, and reduced prison populations by better sentencing outcomes for defendants bailed before trial.¹⁹⁹ This is a particularly salient research finding, as those cost savings will tend to inure to the localities that run jails *and* often are shouldering the cost of indigent defense. Not coincidentally, proposals for accelerating appointment of counsel and other ideas attending to pretrial representation have garnered the support of the emerging criminal justice coalitions that unite progressive reformers with fiscal and small-government conservatives.²⁰⁰ But in general, the job of a defense lawyer—at least as we conceive of it today—is not to make the system more efficient. A defense lawyer doing her job will take time and resources to pursue available investigative avenues, to attempt to suppress evidence, to make all available arguments in appellate and post-conviction proceedings, and more. Our adversarial system simply does not assign an efficiency-generating task to defense lawyers. Perhaps unsurprisingly, then, at least some efforts to wield evidence-based attorney caseload standards in order to increase funding of indigent defense to levels that better assure proper case staffing have met unmoving resistance.²⁰¹

Indeed, there are political risks if indigent defense advocates over-promise the ability of EBP to uncover a linkage between quality and cost savings. The fate of the Harris County Public Defender study, described above, is illustrative. Debate about the desirability of such an office centered significantly on cost, and more

¹⁹⁸ Cf. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 263 (2004) (observing that nuanced understanding of indigent defense politics requires recognizing that legislators act in the interests of unpopular groups where “the debate becomes framed in terms of a popular (or tolerable) abstract principle”).

¹⁹⁹ See, e.g., Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002); MARY T. PHILLIPS, *A DECADE OF BAIL RESEARCH IN NEW YORK CITY* 127 (2012).

²⁰⁰ See, e.g., Maher Interview, *supra* note 79.

²⁰¹ See, e.g., Josh Mitchell, *Public Defender Funding Restricted Despite Caseload Problems Found in Report*, THE MISSOURIAN (Sept. 25, 2014), http://www.emissourian.com/local_news/county/public-defender-funding-restricted-despite-caseload-problems-found-in-report/article_37731865-d0e0-54a2-9390-7bfe5165407c.html (describing the veto of public defender spending increase despite weighted caseload study supporting need).

specifically on the promise of replicating findings in other Texas counties where public defenders generated cost savings over alternative systems of service delivery.²⁰² To be sure, the TDIC itself has been careful to embrace the mantle of cost *effectiveness*, a term of art understood in the regulatory literature to mean that programmatic goals or values are taken as fixed (rather than monetized), and an analysis is undertaken to determine the least costly means of realizing those goals.²⁰³ Cheapness was never on offer, it might be urged; only proposals as to the most economical route to a given level of quality. But, again, the Harris County example shows the risk that policymakers will fail to appreciate the rather nuanced distinction between cost-benefit and cost-effectiveness analysis, will understand a promise of cost-effectiveness as a promise of sheer cheapness, and will revolt when the latter offer is not fulfilled.²⁰⁴ It also shows that there may be downsides to offering a less-than-fully-developed evidence base for indigent defense programs. Authors of the Harris County report argued that public defenders were achieving important objectives that either could not be counted or could not be monetized. Of course, there are ways of quantifying an array of benefits that defense advocacy achieves, and indeed that is precisely the goal of an endeavor like North Carolina's SEP. But fully realizing the promise of the SEP framework is long in coming. Moreover, while the SEP methodology is quantitative, the framework contains a host of normative qualitative judgments that are unlikely to be uncontroversial in application. In evaluating the contributions of a public defender office, for example, how should one weight the lawyers' varying achievements in obtaining pretrial release, filing and litigating suppression motions, obtaining acquittals, or generating client satisfaction? Evidence-based measurement of indigent defense quality, even at its most nuanced, is unlikely ever to be as "black and white" as might be hoped. In the meantime, bare assertions about qualitative value alongside objective cost data are unlikely to persuade the skeptical lawmakers who are the targets of EBP's purported political grease; and indeed it might prospectively diminish lawmakers' perception that program evaluations are being conducted in an objective, data-driven manner.

²⁰² See *supra* notes 131–36 and accompanying text.

²⁰³ See Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 DUKE L.J. 1067, 1069 (2003).

²⁰⁴ Compare Rodney Ellis, *Harris Public Defender Can Save Dollars and Lives*, HOUSTON CHRON. (Nov. 14, 2010), <http://www.chron.com/opinion/outlook/article/Harris-public-defender-can-save-dollars-and-lives-1696520.php> (citing examples of public defender offices proving that public defenders "save taxpayer dollars"), with Rodney Ellis, *Texas Needs Public Defenders*, HOUSTON CHRON. (May 30, 2010), <http://www.chron.com/opinion/outlook/article/Texas-needs-public-defenders-1621574.php> (arguing that public defenders are "cost-effective"). Cf. Jacqueline Fox, *Medicare Should, but Cannot, Consider Cost: Legal Impediments to a Sound Policy*, 53 BUFF. L. REV. 577, 610–12 (2005).

C. EBP in the Courts

Finally, it is worth considering what impact a stronger evidence base for indigent defense might have in the courts. These considerations bring us squarely back to *Gideon* itself, to ask what direct synergy there might be between EBP and the legal framework that governs claims by the indigent to counsel.

Such legal claims are litigated, grossly, in two forms: post-conviction claims brought by individual defendants alleging the absence of inadequacy of counsel in their individual cases;²⁰⁵ and pre-conviction claims alleging denial of the right to counsel based on systemic conditions that presently or prospectively preclude constitutionally adequate representation.²⁰⁶ Relatedly, courts have increasingly entertained suits brought not by clients but by lawyers themselves, asserting federal constitutional rights or state law protections to oppose appointment without adequate compensation, under excessive caseload conditions, or in the face of other circumstances deleterious to the quality of services.²⁰⁷ In the instance of post-conviction litigation, defendants' claims typically fall under the ineffective assistance framework announced in *Strickland v. Washington*, requiring claimants to demonstrate both that an attorney's performance "fell below an objective standard of reasonableness," and that there is a reasonable probability that the attorney's errors affected the result of the proceeding.²⁰⁸ Prospective litigation by clients may sound in a claim of ineffective assistance, or a claim that counsel is being outright denied, but in either instance litigants will typically need to demonstrate the existence of system-wide deficiencies that are likely to preclude adequate representation in their cases.²⁰⁹ Theories of claims brought by lawyers themselves vary more widely, but typically share with prospective actions by clients a claim that a particular systemic condition—such as pay rates or caseloads—is legally deficient.²¹⁰

The potential for enhanced indigent defense data to buttress litigation-based efforts to vindicate *Gideon* has been touted by commenters, who have generally assumed a positive relationship between the elucidation of more evidence about indigent defense provision and the prospects for litigants challenging suboptimal representation in the courts.²¹¹ The recently resolved *Hurrell-Harring* litigation in

²⁰⁵ See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronin*, 466 U.S. 648 (1984).

²⁰⁶ See, e.g., *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2010).

²⁰⁷ See NAT'L RIGHT TO COUNSEL COMM., *supra* note 6, at 104–09 (describing this trend).

²⁰⁸ *Strickland*, 466 U.S. at 688, 694.

²⁰⁹ See, e.g., *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1127 (W.D. Wash. 2013); *Hurrell-Harring*, 15 N.Y.3d at 19–20.

²¹⁰ See, e.g., *State ex rel. Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012).

²¹¹ See, e.g., Drinan, *supra* note 15, at 1325; Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 941 (2013); NAT'L RIGHT TO COUNSEL COMM., *supra* note 6, at 145.

New York points to another positive but less-noted synergy between EBP and systemic litigation, one that arises in the context of remediation rather than claim development. The strength of the settlement agreement as a vehicle for truly enhancing the quality of representation in New York is arguably greatly enhanced by the existence of the Office of Indigent Legal Services *and*, critically, by its capacity to gather, generate, and analyze indigent defense data. Mandates to, for example, develop caseload standards and guidance about the resources needed for counties to comply with them, and to issue a range of other quality-related recommendations,²¹² will be carried out by an agency that is professionally inclined and quantitatively equipped to provide research-based answers to these questions. In other words, development of an infrastructure for evidence-based analysis means that system actors are poised to rise to the occasion when significant reform opportunities arise.

But indigent defense advocates pondering the influence of EBP in Sixth Amendment litigation might have cause for caution as well as enthusiasm. This tempered view hinges in large part on distinguishing between the provision of sheer data, as opposed to research purporting to demonstrate linkages between particular system features and indigent defense outcomes.

Consider first prospective litigation. An exemplary case is the recently decided *Wilbur v. Mount Vernon*, in which a federal district court granted injunctive relief to cure Sixth Amendment violations endemic to two Washington cities' provision of indigent defense.²¹³ The evidence that plaintiffs amassed in support of their claim that the two cities routinely and systemically failed to provide constitutionally adequate counsel included both qualitative depictions of attorneys' failure to meet with clients, investigate cases, and meaningfully explore defensive theories, as well as data revealing that attorneys labored under dramatically excessive caseloads.²¹⁴ The ability to gather and compare caseload statistics was particularly critical, given that the State of Washington had itself legislated a 400-case limit, which the lawyers at issue substantially exceeded.²¹⁵ Recent history provides several counterpoints to the *Wilbur* success, in litigation that has floundered on the failure of the plaintiffs to adduce adequate empirical data to substantiate anecdotal claims of substandard representation.²¹⁶ The case seems clear that the production of data will inure to the benefit of potential litigants in jurisdictions where deficiencies exist. At a minimum, it can do no harm.

But is the same true for the type of research that EBP aims to generate? The answer must be that if we take seriously the prospect of following where the evidence leads, we simply do not know. Consider the caseload issue that was central to the plaintiffs' victory in *Wilbur*. Sophisticated empirical research into

²¹² See Hurrell-Haring Order of Settlement, *supra* note 146, at 5, 7, 9–10.

²¹³ *Wilbur*, 989 F. Supp. 2d at 1134–37.

²¹⁴ *Id.* at 1125–26.

²¹⁵ *Id.*

²¹⁶ Drinan, *supra* note 15, at 443.

the significance of caseloads for attorney performance is just now beginning in earnest.²¹⁷ The research findings might confirm existing standards, but they might well contradict them—indeed, they might even reveal that there are negligible performance differences, at least by certain outcome measures, for higher caseloads than are currently recommended. Of course, if such a finding meant clearly that the quality of representation was adequate then there would be no warrant for litigation, no need to reform a functional system. But the evidence might not mean that. What if, for example, X level of caseloads correlated with identical acquittal rates but lower pretrial release statistics, or worse acquittal rates but better sentencing outcomes, or . . . the list could go on. The point is that adducing evidence along the lines of what EBP's true devotees aim to produce would at a minimum muddy the waters in any context where advocates aim to demonstrate that system features are related to unconstitutional conditions.

An indigent defense evidence base might generate similarly mixed outcomes for retrospective ineffective assistance claims under the *Strickland* framework. In assessing the objective reasonableness of an attorney's performance, courts frequently use existing professional standards as non-binding benchmarks.²¹⁸ Indigent defense research has the clear potential not only to validate those standards, but also potentially to contradict them. Producing a body of research that presents a more complicated picture than the current consensus might have the undesirable effect of making the deficiency prong more difficult to prove. One could equally well imagine that research could either ease *or* complicate efforts to demonstrate prejudice from an attorney's services if, for example, more robust evidence of the impact of various inputs on outcomes were adduced.

D. *Empirics at the Heart of Gideon*

In a sense, the foregoing simply dances around a more fundamental question about what the relationship should be between empirical findings and constitutional doctrine in this arena, questions that drive at the very meaning of *Gideon*. Indeed, at the heart of the *Gideon* decision and the line of doctrine it generated is a raft of relatively untested empirical assumptions, including, critically, that counsel improves the lot of felony and misdemeanor defendants, both at trial and in negotiated resolutions.²¹⁹ Now consider a hypothetical but

²¹⁷ See, e.g., FABELO ET AL., *supra* note 141 (discussing weighted caseload study mandated by Texas legislature); NCSEP *Pilot Site Project*, *supra* note 97, at 2 (describing effort to evaluate significance of caseloads in relation to outcomes); AM. BAR ASS'N, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), available at http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf (describing weighted caseload study).

²¹⁸ See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

²¹⁹ See, e.g., *Hill v. Lockhart*, 474 U.S. 52 (1985); *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (citing “evidence of the prejudice which results to misdemeanor defendants” from proceeding

plausible study demonstrating that appointment of counsel in misdemeanor cases had no positive effect on sentences or conviction rates as compared to defendants who proceeded without counsel.²²⁰ Should that finding prompt reconsideration of *Argersinger v. Hamlin*, extending the right to counsel to misdemeanors?²²¹

The answer must depend in part on what one thinks the Sixth Amendment protects. For those on the Court who view the Sixth Amendment as protecting solely the right to a reliable outcome at trial—and there are some²²²—it is not implausible to imagine such a study persuading a revisiting of settled precedent. Indeed, a vision for contracting *Gideon* enjoys some academic support as well, from those who argue that restricting counsel for at least some misdemeanors is a sensible response to systemic resource constraints.²²³ If on the other hand the right to counsel is at least in part protecting less outcome-driven values like equal status before the law, or more public goods like confidence in the adversary system or projecting the outward appearance of equal status, a study like the one imagined is of less clear relevance in shaping doctrine. The point for present purposes is not to settle the question of whether *Argersinger* should endure, but rather to demonstrate that the research enterprise is open-ended, and that if advocates are to embrace empirics, they must also face down the possibility of retrenchment from *Gideon*'s current contours. And if they are to do that, they must take care not to yield *Gideon*'s non-outcome-driven values in the course of embracing the EBP paradigm.

Moreover, even if *Gideon* and its progeny were in important part aiming to achieve reliability and justness of outcomes, are the implicit empirics of the right to counsel really ripe for testing? Others have explored at length what impact empirical evidence has and should have in constitutional decision-making generally, and doing so in the present context is beyond the scope of the project at hand.²²⁴ But it is worthy of future work by indigent defense scholars and careful consideration by advocates, as the prospect of a flowering of indigent defense

without representation); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide—spread belief that lawyers in criminal courts are necessities, not luxuries.”); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (holding that defendants require “guiding hand of counsel” pretrial).

²²⁰ Such results have been obtained in studies of misdemeanor cases in federal court. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489–91 (2007) (reporting more trials, more acquittals, and better sentences for federal pro se defendants).

²²¹ *Argersinger*, 407 U.S. at 37 (1972).

²²² See, e.g., *Lafler v. Cooper*, 132 S. Ct. 1376, 1393–94 (2012) (Scalia, J., dissenting) (positing narrow view of Sixth Amendment and joined by Justice Thomas and Chief Justice Roberts).

²²³ See, e.g., Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1290 (2013); Hashimoto, *supra* note 220, at 461.

²²⁴ See, e.g., Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 3 (2013); David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 118 (2003).

research is bound to press on the question of whether and to what extent *Gideon* is open to reconsideration if the evidence proves its factual assumptions flimsy.

CONCLUSION

This Essay has aimed to identify and provisionally evaluate an important trend in indigent defense policy: the push toward evidence-based practice. The trend is “important” in several senses: The fruits of evidence-based endeavors could significantly alter indigent defense policymaking and practice; the prioritization of developing an evidence base could be, and to some extent has been, formative of the institutional structures for decision-making and oversight in the field; and the ethos of EBP might well alter professional and legal discourses that have long defined the field. Given the decidedly mixed set of projections about EBP’s fate in and consequences for indigent defense, drawing a firm bottom line of assessment is nigh impossible. But a few big picture observations are possible. First, the legal, institutional, and financial investments that have been devoted to EBP to date give some confidence that the trend is not a passing fancy. Second, EBP’s devotees still face significant barriers to developing an indigent defense research base; equally so to inspiring optimal use of such research in policymaking. Third, and perhaps most critically, advocates who aim to push on *Gideon*’s promise must be cautious and savvy about hitching their wagons to the evidence-based star: The research mission is not and cannot be (to capture the advantages advertised for it) goal-oriented, and the depth of the current evidence void in the field means that one cannot know with confidence what some of the emerging evidence will elucidate. If *Gideon* by the numbers appears different from the idealized vision that has perdured, which should yield—the data or the vision? That is the question that, if EBP is to take hold, may be put to all of us.