

How to Leverage Public Defense Workload Studies

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I. INTRODUCTION

Crushing caseloads are perhaps the most vexing problem facing American public defense.¹ Attorneys saddled with hundreds or thousands of cases per year must jettison core legal tasks—client communication, investigation, legal research—in violation of constitutional and ethical duties.² As a result, clients, who have a right to effective, ethical counsel, receive only nominal representation. Workload studies have risen as a forceful tool in fighting excessive workloads. The American Bar Association’s (ABA) Missouri Project paved the way for legislation to provide the first sizable funding increase in that state in many years.³ Other studies are now underway in Colorado, Louisiana, Rhode Island, and Tennessee, with more on the horizon. The studies provide data that can be wielded to shape public defense through education, legislation, and litigation. While these studies signal a great advance, more can be done. By pairing statistics with stories, building national workload standards, and varying litigation strategies, public defenders may yet realize reasonable workloads.

This Article explores public defense workload studies and how to leverage them. Part II shows how excessive workloads prevent attorneys from meeting their ethical and constitutional duties. Part III discusses past attempts to address

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¹ See Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 791 (2010) (“[E]xcessive caseloads is the primary problem public defenders face in attempting to provide ethically competent, zealous representation to their clients.”).

² Lauren Sudeall Lucas, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1731 (2005) (“Today’s public defenders are underfunded and overburdened. Their caseloads and workloads have risen to crushing levels in recent years, and caps on funding both for individual cases and for overall compensation levels have effectively rendered many lawyers ineffective.”).

³ Kurt Erickson, *Missouri Budget Could Help Ease Pressure on Public Defender System*, ST. LOUIS POST-DISPATCH (June 6, 2016), http://www.stltoday.com/news/local/govt-and-politics/missouri-budget-could-help-ease-pressure-on-public-defender-system/article_42e616c3-6f92-5981-a7f2-14bd37f993dc.html [https://perma.cc/4BYX-X69V]; but see Alex Johnson, *Missouri Governor, Who Vetoed Relief for Public Defenders, Appointed as Public Defender*, NBC NEWS (Aug. 4, 2016), <http://www.nbcnews.com/news/us-news/missouri-governor-who-vetoed-relief-public-defenders-appointed-public-defender-n623326> [https://perma.cc/PE4U-LLSK].

excessive workloads. Part IV examines the new breed of workload studies. Part V shows ways to leverage these studies for greater effect.⁴

II. OVERBURDENED ATTORNEYS CANNOT MEET THEIR ETHICAL AND CONSTITUTIONAL DUTIES

To understand the problem's magnitude, as well as our incommensurate response to it, we must go back more than half a century.⁵ In this Part, I examine how excessive workloads prevent attorneys from meeting their ethical and constitutional duties. Section A shows how *Gideon v. Wainwright*⁶ left many states scrambling to provide public defense. Section B lays out defenders' constitutional and ethical duties in the post-*Gideon* era. Section C demonstrates that public defenders cannot meet these duties while saddled with excessive workloads.

A. *Gideon Left Many States Scrambling to Provide Public Defense*

To understand the severity of crushing caseloads, we must understand the gap between lawyers' ethical and constitutional duties on the one hand, and the reality of public defense on the other. Although the roots of public defense date back much further,⁷ modern public defense—both the constitutional duty and the gritty

⁴ I use the term *public defender* to denote all public defense providers, including public defenders, contract counsel, and assigned counsel.

⁵ NORMAN LEFSTEIN, AM. BAR ASS'N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12 (2011) ("There is abundant evidence that those who furnish public defense services across the country have far too many cases, and this reality impacts the quality of their representation, often severely eroding the Sixth Amendment's guarantee of the right to counsel. The problem, moreover, has existed for decades . . ."); see also Heidi Reamer Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 421 (2012) ("Excessive caseloads due to the underfunding of public defenders have been the status quo for decades . . ."); Heidi Reamer Anderson, *Qualitative Assessments of Effective Assistance of Counsel*, 51 WASHBURN L.J. 571, 571 (2012) ("Public defenders have labored under excessive caseloads for decades."); Heather Baxter, *Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 348 (2010) ("The indigent defense system has practically been in crisis since it began."); Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1312 (2013) ("Scholars and practitioners have documented extensively the ongoing crisis in indigent defense services over the last five decades."); Anthony C. Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 723 (2013) ("Since *Gideon* was decided, at least one major independent report has been issued every five years to document the severe deficiencies in indigent defense services, leading some scholars to describe indigent defense as being in 'a permanent state of crisis.'").

⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁷ See, e.g., Geoff Burkhardt, *Public Defense: The New York Story*, 30 CRIM. JUST. 22, 23 (2015) ("New York has a viable claim to inventing public defense in America. Since New York achieved state-hood in 1788, its courts have had the power to assign counsel to indigent criminal

reality—can be traced to the Supreme Court’s decision in *Gideon v. Wainwright*, which mandated representation for persons who cannot afford counsel in felony cases.⁸

In part, *Gideon* was a great success, triggering a “right to counsel revolution.”⁹ Today, over 80% of felony defendants are represented by a public defender.¹⁰ But the revolution was half-baked.¹¹ First, the Supreme Court created an affirmative right, but has been virtually silent on how public defense should be structured or funded.¹² Absent guidance, many states scrambled to meet *Gideon*’s unfunded mandate, patching together public defender, contract, and assigned counsel systems.¹³ Many abdicated responsibility, pushing oversight, funding, and

defendants. (People *ex rel.* Acritelli v. Grout, 84 N.Y.S. 97, 98 (App. Div. 1903) (recounting the history of New York public defense).”); see also Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849, 850 (1991) (“[I]t was a woman who had first conceived and promoted the idea of a public defender for indigents accused of crime” in the early 1900s.).

⁸ 372 U.S. at 335.

⁹ Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 836 (2004); Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2678 (2013) (“The fiftieth anniversary of *Gideon v. Wainwright* deserves celebration. *Gideon*’s assurance of counsel to all facing a prison sentence undoubtedly has meant that many who otherwise would have been convicted and imprisoned, some wrongly, were able to be free.” (footnote omitted)); Lisa C. Wood, Daniel T. Goyette & Geoffrey T. Burkhart, *Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads*, 42 LITIGATION 20, 21 (2016); Malia Brink, *Interview with Professor Norman Lefstein—2005 Champion of Indigent Defense Award Winner*, CHAMPION, Jan.-Feb. 2006, at 38 (“When you reflect on the matter, you realize that the U.S. has taken gigantic strides in extending the right to counsel in what is a relatively short period of time in our nation’s history.”).

¹⁰ CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES I (2000); Joy, *supra* note 1, at 774.

¹¹ Chemerinsky, *supra* note 9, at 2679 (“Yet while *Gideon* is celebrated, the reality of its implementation must be lamented, too.”).

¹² See Lefstein, *supra* note 9, at 842 (“Neither in *Gideon* nor in any of its other right to counsel decisions has the U.S. Supreme Court discussed the way in which defense services for the indigent should be structured nor the unit of government responsible for paying lawyers.”); see also Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 885 (2010) (“A key difficulty has been that *Gideon*, while surely deserving of landmark status for its recognition that ‘lawyers in criminal courts are necessities, not luxuries,’ failed to provide any guidance on how states should afford such assistance.” (footnote omitted)); Chemerinsky, *supra* note 9, at 2685–86 (“*Gideon* . . . creates an affirmative constitutional duty for the government to provide something to individuals: counsel in criminal cases where there is a possible prison sentence, if necessary at the government’s expense. The Court, however, imposed this duty without providing a funding source. It was left to each state, and in many instances each county, to provide funds for attorneys for indigent criminal defendants.”).

¹³ See Chemerinsky, *supra* note 9, at 2685 (“[T]he Supreme Court imposed an unfunded mandate on state and local governments with the only realistic enforcement mechanism being the finding of ineffective assistance of counsel in individual cases.”); Burkhart, *supra* note 7 (explaining New York’s attempts in 1965 to meet *Gideon*’s mandate under section 18-B); Logan, *supra* note 12,

training to their counties.¹⁴ Indeed, only about half of our states have a statewide public defense system, while the remainder have county- or district-based systems.¹⁵ The result is a patchwork of provisions with inadequate funding.¹⁶ Second, though a “watershed” decision,¹⁷ *Gideon* guaranteed counsel’s appointment, not counsel’s effectiveness.¹⁸ One means little without the other, and effectiveness cases have been a parade of disappointments.¹⁹

B. Public Defenders Have Substantial Constitutional and Ethical Duties

In the decades after *Gideon*, the Supreme Court elaborated on this Sixth Amendment right to counsel, creating a line of cases regarding counsel’s effective assistance. Meanwhile, the ABA and several states developed and refined counsel’s ethical duties. This combination has created substantial duties for defense counsel. But these duties are undercut by a near-absolute lack of enforcement.

1. Public Defenders Shoulder Substantial Constitutional Duties

In 1984, more than two decades after it had decided *Gideon v. Wainwright*, the Supreme Court squarely addressed the right to the effective assistance of counsel in two cases: *Strickland v. Washington*²⁰ and *United States v. Cronin*.²¹ In

at 887 (explaining Florida’s attempts to meet *Gideon*’s mandate in creating the Office of the Public Defender in 1963).

¹⁴ See David Rudovsky, *Gideon and the Effective Assistance of Counsel: The Rhetoric and the Reality*, 32 LAW & INEQ. 371, 373 (2014); see also Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST. 24, 25 (2011) (“Most indigent defense systems are organized and funded at the county level.”); Chemerinsky, *supra* note 9, at 2685–86 (noting that, in many instances, counties, not states, fund public defense).

¹⁵ See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 37 (1995) (“More than half of the states have organized some form of a statewide indigent defense program.”).

¹⁶ Wood, Goyette & Burkahrt, *supra* note 9, at 22 (“Data can be hard to come by in America’s patchwork of public defense systems.”).

¹⁷ See *Whorton v. Bockting*, 549 U.S. 406, 418–19 (2007) (referring to *Gideon* as a watershed rule of criminal procedure).

¹⁸ Chemerinsky, *supra* note 9, at 2686–87 (“*Gideon* must mean more than just a right to a lawyer: to have any meaning, it must be that there is a right to competent counsel.”); Joy, *supra* note 1, at 774 (“While *Gideon* established that an indigent person has the right to appointed counsel, the key question that has emerged is what will be the quality of representation that appointed counsel provides to the poor?”).

¹⁹ Chemerinsky, *supra* note 9, at 2692 (“But the right is meaningless without an assurance of effective counsel.”).

²⁰ *Strickland v. Washington*, 466 U.S. 668 (1984).

²¹ *United States v. Cronin*, 466 U.S. 648 (1984).

Strickland, to determine when counsel is ineffective, the Supreme Court embraced a retrospective two-prong test.²² Under the “performance” prong, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness” based on “prevailing professional norms.”²³ Under the prejudice prong, the defendant must show that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”²⁴ In addition, the reviewing court “must be highly deferential” to defense counsel.²⁵

Given its retrospective application and the burden of proving prejudice, few defendants succeed on *Strickland* claims. As one lawyer famously quipped, under *Strickland*, “an attorney will be found to be adequate so long as a mirror put in front of him or her at trial would have shown a breath.”²⁶ *Cronic* carved out a limited exception to the requirement that defendants must prove prejudice where there is an “actual breakdown of the adversarial process.”²⁷ Yet successful *Cronic* claims are rarer still.²⁸

The Supreme Court has often relied on ABA standards to help determine ineffectiveness:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in [ABA] standards and the like, *e.g.*, *ABA Standards for Criminal Justice* 4-1.1 to 4-8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides.²⁹

Under the standards, defense lawyers must, among other things, investigate the facts (Standard 4-4.1), research the law (Standard 4-4.6), communicate with clients (Standards 4-3.1, 4-3.3, 4-3.9, 4-5.1), negotiate with prosecutors (Standards 4-6.1, 4-6.2, 4-6.3), file appropriate motions (Standards 4-5.2, 4-7.11, 4-8.1), and prepare

²² See *Strickland*, 466 U.S. at 687.

²³ *Id.* at 688.

²⁴ *Id.* at 694.

²⁵ *Id.* at 689.

²⁶ Chemerinsky, *supra* note 9, at 2689 (“My former colleague, Professor Dennis Curtis, has said that under *Strickland* an attorney will be found to be adequate so long as a mirror put in front of him or her at trial would have shown a breath. Professor Curtis overstates, but not by much.”).

²⁷ See *Cronic*, 466 U.S. at 657.

²⁸ *State v. Adams*, 304 P.3d 311, 315 (Kan. 2013) (“Errors evaluated under *Cronic* are rare, and most alleged deficiencies are properly evaluated under *Strickland* rather than *Cronic*.”).

²⁹ *Strickland*, 466 U.S. at 688. See also *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (reaffirming that ABA Standards are “valuable measures of the prevailing professional norms of effective representation”).

for court (Standard 4-4.6).³⁰ Attorneys must complete each of these tasks regardless of workload or the defendant's desire to plead guilty.³¹ This last requirement is especially important, given that, as the Supreme Court has recognized, "ninety-four percent of state convictions are the result of guilty pleas."³²

The ABA Standards also address excessive workloads. Under ABA Defense Function Standard 4-1.8(a), criminal defense lawyers "should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations."³³ The standards thus create a substantial duty with a constitutional dimension, but they are undercut by *Strickland's* prejudice prong.

2. Public Defenders Shoulder Substantial Ethical Duties

Public defenders' duties have an ethical dimension as well. Although the ABA Model Rules of Professional Conduct apply to public defenders just as they apply to other attorneys,³⁴ several are of special concern to public defense, particularly in light of excessive workloads.³⁵ Model Rules 1.1 and 1.3 require competent and diligent representation, respectively.³⁶ Specifically, Comment 2 to Rule 1.3 requires that a lawyer's "work load . . . be controlled so that each matter can be handled competently."³⁷ Further, under Rule 1.16, "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct"³⁸

³⁰ AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION (4th ed. 2015).

³¹ See *id.* §§ 4-4.1, 4-6.1(b).

³² *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

³³ AM. BAR ASS'N, *supra* note 30, § 4-1.8(a).

³⁴ Joy, *supra* note 1, at 779 ("[P]revailing ethics rules impose the same obligations on public defenders and privately retained defense lawyers.").

³⁵ Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED. SENT'G. REP. 91, 92 (2012) ("Although all of the Model Rules of Professional Conduct apply to public defenders, there are several that stand out as more difficult to follow when one is burdened with an excessive caseload.").

³⁶ See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2015) ("A lawyer shall provide competent representation to a client [, which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* at r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

³⁷ *Id.* at r. 1.3 cmt. 2.

³⁸ *Id.* at r. 1.16(a)(1).

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility (ABA Ethics Committee) issued Formal Opinion 06-441, which concluded that ABA Model Rules 1.1 and 1.3 apply equally to public defenders.³⁹ The opinion is critical to battling excessive workloads. As Dean Norman Lefstein wrote, “The most influential ethics body in the United States has now told criminal defense lawyers that having an excessive number of cases can never be an excuse for failing to provide ‘competent’ and ‘diligent’ representation to their clients.”⁴⁰ Like all lawyers, public defense attorneys must therefore deliver effective, ethical representation. And they must do so regardless of their workloads. Yet the clarity of these rules contrasts starkly with the reality of public defense.

C. Public Defenders Saddled with Excessive Workloads Cannot Meet Their Constitutional and Ethical Duties

There are gnawing tensions in public defense. On the one hand (as shown in Part II.A.), states with little guidance on structure or funding must provide counsel to all those who cannot afford it. On the other hand (as shown in Part II.B.), public defenders have a duty to provide effective and ethical representation, but face few repercussions when those duties are breached. The result has been devastating and sadly predictable: cash-strapped states spend as little as possible on public defense, loading public defenders with cases like a team of overworked pack mules.⁴¹ This has been exacerbated by years of tough-on-crime policies, which privileged policing and prosecution above public defense.⁴²

Constitutional and ethical duties—the very things that should have fortified the right to counsel—have, through their lack of enforceability, rendered *Gideon* impotent.⁴³ As Professor Peter Joy has explained, because *Strickland*’s prejudice

³⁹ ABA, Comm’n on Ethics & Prof’l Responsibility, Formal Op. 06-441 (2006) (discussing the ethical obligations of lawyers when excessive caseloads interfere with their ability to competently and diligently represent indigent criminal defendants).

⁴⁰ Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, CHAMPION, Dec. 2006, at 10.

⁴¹ Chemerinsky, *supra* note 9, at 2686 (“In the decades following *Gideon*, this burden increased tremendously as a result of an enormous increase in criminalization, prosecution, and incarceration. Nationally, five times more prisoners are incarcerated today than just a few decades ago.”).

⁴² NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/79RS-BWAK>] (discussing the effects of tough-on-crime policies upon public defense).

⁴³ Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1308 (“The Court establishes a right, then promptly ensures its weak enforceability—often with high-flown language and self-congratulations. *Gideon v. Wainwright* and *Strickland* form an illustrative pair in the right to counsel context.” (footnotes omitted)).

prong makes reversal on an ineffectiveness claim nearly impossible, it has become easy to pile cases on without fear of consequence:

Because poor lawyering will not lead to a new trial unless the client is able to demonstrate that the lawyer's poor performance adversely affected the outcome of the case, the criminal justice system functions in a way that accepts excessive caseloads that lead to poor lawyering. In effect, the criminal justice system operates in the shadow of a lie where judges, prosecutors, and defense lawyers collectively pretend that indigent defendants have the same constitutional rights as defendants able to retain effective private counsel.⁴⁴

Defenders have long realized that excessive workloads prevent them from performing their ethical and constitutional duties.⁴⁵ As an appeals court in Florida wrote more than two decades ago, "an inundated attorney may be only a little better than no attorney at all."⁴⁶ A decade later, an ABA report found that when lack of funding for indigent defense led to overwhelming workloads, the result was "routine violations of the Sixth Amendment obligation to provide effective assistance of counsel."⁴⁷

⁴⁴ Joy, *supra* note 1, at 777.

⁴⁵ *In re Edward S.*, 173 Cal. App. 4th 387, 399 (2009) (attorney complaining that his "excessive caseload" made it impossible to "thoroughly review and litigate each and every case" he was then litigating); Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104, 106–07 (2009) ("[Excessive caseloads] will actually or likely cause attorneys to provide substandard representation that violates constitutional, ethical and other professional norms so that what should be done cannot be done."); Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 46 n.250 (1998) ("While I may have attempted, and at times publicly claimed, to give one hundred percent of the effort possible to every case, the reality of juggling thirty-five or more active cases simply did not permit such an allotment of time or effort.") (quoting a defender Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L. REV. 2419, 2433 (1996)); Stephanie L. McAlister, Note, *Between South Beach and A Hard Place: The Underfunding of the Miami-Dade Public Defender's Office and the Resulting Ethical Double Standard*, 64 U. MIAMI L. REV. 1317, 1336 (2010) ("Assistant Public Defender Amy Weber testified that she does not have time to visit crime scenes or to 'fully prepare' for depositions, and that she does 'very little' investigation into her clients' cases herself."); Anderson, *Funding Gideon's Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, *supra* note 5, at 421–23 (suggesting that excessive caseloads often prevent the affected lawyers from providing effective assistance of counsel to their indigent clients).

⁴⁶ Order on Motions to Withdraw Filed by Tenth Circuit Pub. Def., 622 So. 2d 2, 3 (Fla. Dist. Ct. App. 1993), order approved *sub nom. In re Certification of Conflict in Motions to Withdraw* Filed by Pub. Def. of Tenth Judicial Circuit, 636 So. 2d 18 (Fla. 1994); see also Brummer, *supra* note 45, at 106 (quoting the court).

⁴⁷ AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 38 (2004).

Evidence of excessive workloads is now overwhelming. Public defense attorneys violate their constitutional and ethical obligations daily and *en masse*.⁴⁸ Excessive workloads have been such a pressing problem for public defenders that, in 2009, the ABA adopted the *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*.⁴⁹ The Eight Guidelines are a “detailed action plan” for public defense programs and their attorneys “when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules.”⁵⁰ And in 2011, the ABA published a book devoted to the issue of excessive workloads, Norman Lefstein’s *Securing Reasonable Caseloads: Ethics and Law in Public Defense*.⁵¹ In addition to documenting instances of excessive workloads, it planted the seeds for a new breed of public defender workload studies, which eventually led to the ABA’s current series of studies. Before turning to this new breed of workload studies, it is helpful to review past attempts at remedying excessive workloads.

III. PAST EFFORTS TO REMEDY EXCESSIVE WORKLOADS LACKED RIGOR

For many years, public defense data was scant.⁵² Increased focus on data, generally, and workload studies, in particular, has been a step forward for public defense.⁵³ Two past efforts warrant examination here. Section A examines the “NAC Standards”; Section B takes a look at previous workload studies.

⁴⁸ Joy, *supra* note 1, at 786 (“[T]here is an extraordinary high turnover of line public defenders who seek other work rather than violate their professional obligations to clients on a daily basis.”).

⁴⁹ AM. BAR. ASS’N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf [https://perma.cc/H9ES-QV98] [hereinafter ABA EIGHT GUIDELINES].

⁵⁰ *Id.* at 2–3; *see also* AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002) (“Defense counsel’s workload is controlled to permit the rendering of quality representation.”).

⁵¹ LEFSTEIN, *supra* note 5.

⁵² *See* Drinan, *supra* note 5, at 1322 (“Historically, in many pockets of the country, defenders operated below the ‘data radar.’”).

⁵³ *Id.* (“One of the more recent and most promising accomplishments within the defense community, however, is its movement toward data-driven analysis and advocacy.”).

A. *We Should Abandon the NAC Standards*

In 1973—just ten years after *Gideon*—excessive workloads were already a problem. That year, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) suggested public defense caseload limits:⁵⁴

Table 1. NAC Standards

Case Type	Max. Caseload
Felony	150 cases
Misdemeanor	400 cases
Juvenile	200 cases
Mental Health	200 cases
Appeals	25 cases

Opinions about the NAC Standards vary. Some see them as a useful, if imperfect, maximum caseload level.⁵⁵ Others spit out the word *NAC* as if a bug had flown into their mouth. Today, there is near-universal agreement that the NAC Standards are inadequate.⁵⁶ In *Securing Reasonable Caseloads*, Norman Lefstein makes a compelling case for abandoning the NAC Standards, which I summarize here:⁵⁷

⁵⁴ NAT'L ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS: CORRECTIONS 276 (1973). See generally LEFSTEIN, *supra* note 5, at 43 (“The NAC’s recommendations have had—and continue to have—significant influence in the field of public defense respecting annual caseloads of public defenders.”); Anderson, *Funding Gideon’s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, *supra* note 5, at 426 (“Perhaps the most commonly used and cited numerical caseload standards are those initially established by the National Advisory Commission (‘NAC’) on Criminal Justice Standards and Goals in 1973.”); Wood, Goyette & Burkahrt, *supra* note 9 (discussing these numerical limits).

⁵⁵ See, e.g., Benner, *supra* note 14, at 27 (“[T]he national standards are a reliable barometer of caseload pressure.”).

⁵⁶ Wood, Goyette & Burkahrt, *supra* note 9, at 5. Indeed, fewer than ten states have adopted the NAC Standards. Anderson, *Funding Gideon’s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, *supra* note 5, at 427 (“Fewer than ten states have adopted the NAC limits or other similarly objective standards to define what is ‘excessive.’”). For a decent chart showing the adoption of NAC Standards at the state and county levels, see SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE’S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES, app. K (2006), <https://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf> [https://perma.cc/9CQ2-B95S].

⁵⁷ LEFSTEIN, *supra* note 5, at 43–45; see also Steve Hanlon, *Needed: A Cultural Revolution*, ABA: HUM. RTS. (2013), http://www.americanbar.org/publications/human_rights_magazine_home/

- 1) The NAC Standards are more than 40 years old and are not reflective of contemporary public defense, including the need to research collateral consequences;⁵⁸
- 2) The NAC Standards are not evidence-based;⁵⁹
- 3) Experientially, 150 felony cases per attorney per year, for instance, is too high to provide quality representation; and
- 4) The NAC Standards' origins are murky.

On each count, Dean Lefstein is correct. Other criticisms have been leveled against the standards. The Missouri State Auditor noted that the NAC Standards do not distinguish between types of felony offenses, nor do they address capital, probation violation, or postconviction cases common in many states.⁶⁰

Additionally, the NAC noted that jurisdictions often define *cases* differently, making numerical comparisons from county to county especially difficult, and any given case type (burglary, for instance) may take more or less work depending on the jurisdiction.⁶¹ As Dean Lefstein explains, prosecutors once attempted to develop national caseload standards, but abandoned the project, noting that “it was impossible for such standards to be developed” because of the difficulty of “attempting to control for the effects of various external, and internal, and individual case factors on the overall workload.”⁶² Dean Lefstein concludes that this difficulty “applies with equal force to public defense.”⁶³

It is true that national standards, by their very nature, cannot account for regional variation. And it is true that regional variation exists, though the extent to this variation is unknown. Still, as I explain in Part V, there is a need for both state-specific workload studies and national standards—just not the NAC Standards.

If, as most agree, the NAC Standards are deeply flawed, what accounts for their popularity? In part, it is because there is a need for national caseload

2013_vol_39/vol_30_no_4_gideon/needed_a_cultural_revolution.html [https://perma.cc/EQ5J-X7BB] (“These ‘standards’ are concededly not evidence based, and thus do not account for changes in either technology or complexity.”).

⁵⁸ See also NAT’L RIGHT TO COUNSEL COMM., *supra* note 42, at 66 (“[S]ince the NAC’s report was published, the practice of criminal and juvenile law has become far more complicated and time-consuming . . .”).

⁵⁹ See also *id.* (“Because the NAC standards are 35 years old and were never empirically based, they should be viewed with considerable caution.”).

⁶⁰ THOMAS A. SCHWEICH, MISSOURI STATE AUDITOR, MISSOURI STATE PUBLIC DEFENDER, REPORT NO. 2012-129, app. D at 65–68 (2012).

⁶¹ NAT’L ADVISORY COMM., *supra* note 54.

⁶² LEFSTEIN, *supra* note 5, at 49 (quoting AMERICAN PROSECUTORS RESEARCH INSTITUTE, HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 27 (2002)).

⁶³ *Id.*

standards, and they are virtually the only national caseload standards.⁶⁴ Their popularity is also due to their adoption by the ABA. Two sets of influential ABA standards cite the NAC Standards: *ABA Providing Defense Services* and *ABA Ten Principles*.⁶⁵ While *Providing Defense Services* calls the NAC Standards “resilient,” the *Ten Principles* goes a step further, stating in the commentary to Principle 5 that “[n]ational caseload standards should in no event be exceeded.”⁶⁶ The corresponding footnote states that “[n]umerical caseload limits are specified in NAC Standard 13.12.”⁶⁷

Perhaps because lawyers and laypersons alike are more familiar with the ABA than the 1973 National Advisory Commission on Criminal Justice Standards and Goals, the NAC Standards are cited as “ABA caseload standards” at least once a month.⁶⁸ From tiny outlets in Delaware and Idaho to news giants like *The Atlantic*

⁶⁴ *Id.* at 43.

⁶⁵ ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 72 (3d ed. 1992); AM. BAR ASS’N, *supra* note 50, at Principle 5 cmt.; LEFSTEIN, *supra* note 5, at 45 (discussing the ABA’s reliance on the NAC Standards).

⁶⁶ ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, *supra* note 65, at 72; AM. BAR ASS’N, *supra* note 50, at Principle 5 cmt.

⁶⁷ AM. BAR ASS’N, *supra* note 50, at 5 n.19.

⁶⁸ See, e.g., Stacey Barchenger, *How Can Public Defenders Refuse Cases?*, TENNESSEAN (May 12, 2016), <http://www.tennessean.com/story/news/local/williamson/2016/05/11/how-can-public-defenders-refuse-cases/84190022/> [<https://perma.cc/W5RX-8BKH>] (“The exact number of cases at which a lawyer is overworked has been debated, Carroll said, adding that the American Bar Association sets the number at 150 felonies annually.”); Matt Bittle, *O’Neill: Kent County Public Defenders are Overworked*, DEL. ST. NEWS (Feb. 3, 2016), <http://delawarestatenews.net/government/oneill-kent-county-public-defenders-are-overworked/> [<https://perma.cc/K7F8-RPM3>] (“In Kent, it’s even more magnified—a lawyer deals with 1,014 CCP cases, up from the state average of 682 and the American Bar Association recommendation of 400.”); Ed Brayton, *Why We Need Federal Funding for Indigent Defense*, PATHEOS (May 2, 2016), <http://www.patheos.com/blogs/dispatches/2016/05/02/why-we-need-federal-funding-for-indigent-defense/> [<https://perma.cc/JEX8-7XDR>] (“As I reported several years ago, Detroit is probably the best example of this. They have a grand total of five public defenders, all of them part time, and they handle an average of 2400 cases a year. The ABA recommendation is no more than 400 cases, and even that is far too many.”); Derwyn Bunton, *When the Public Defender Says, ‘I Can’t Help,’* N.Y. TIMES (Feb. 19, 2016), http://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?_r=1 [<https://perma.cc/N6P4-2RU7>] (“In fact, our workload is now twice the standard recommended by the American Bar Association.”); Matt Ford, *A Near-Epiphany at the Supreme Court*, ATLANTIC (Mar. 30, 2016), <http://www.theatlantic.com/politics/archive/2016/03/a-near-epiphany-at-the-supreme-court/476037/> [<https://perma.cc/PGK8-2JHA>] (“Virtually all of Kentucky’s public defenders exceeded the American Bar Association’s recommended caseload in 2015. Minnesota’s public defenders took on almost double the ABA standard in 2010—170,000 cases for fewer than 400 lawyers—and spent only an average of 12 minutes on each case outside the courtroom.”); Nick Gier, *Idaho Progresses on Standards and Funding for Public Defenders*, IDAHO ST. J. (Apr. 3, 2016), http://www.idahostatejournal.com/opinion/columns/idaho-progresses-on-standards-and-funding-for-public-defenders/article_183f1d67-abe6-5eb9-bce6-64d2492a1fb0.html [<https://perma.cc/C528-2D7M>] (“The work load of Idaho’s public defenders was on average twice that of what the American Bar Association recommends.”); Will Isenberg & Tom Emswiler, *Federally Fund Public Defenders*, BOSTON GLOBE (June 19, 2016),

and *The New York Times*, media agents cite “ABA caseload standards,” much to the chagrin of ABA members and staff, who know that no such standards exist. Earlier this year, the United States Supreme Court refrained from citing “ABA caseload standards,” stating simply that “only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards.”⁶⁹ The Court cited a report by the Bureau of Justice Statistics report, which, in turn, cited the NAC Standards.⁷⁰

In sum, most public defense systems have a severe caseload problem. This is evident from experience (despite a level of ethical blindness, most defenders have a sense that they represent far too many clients), by comparison to private practice (outside of criminal law, it is extremely rare to see caseloads in the hundreds or

bostonglobe.com/ideas/2016/06/18/defenders/I8SmrqiickUVXo3PmYztcN/story.html [https://perma.cc/G3JE-KRRW] (“The American Bar Association and the President’s National Advisory Commission on Criminal Justice Standards agree that the maximum annual caseload for public defenders should be 150 felony cases or 400 misdemeanors on the docket of a full-time attorney.”); Jed Lipinski, *The Trials and Travails of a New Orleans Public Defender*, TIMES-PICAYUNE (Mar. 30, 2016), http://www.nola.com/crime/index.ssf/2016/03/new_orleans_public_defender_trials_and_travails.html [https://perma.cc/YU8U-J4VA] (“Young felony defenders like Anderson have found themselves juggling 300 or more cases at once, twice the number recommended by the American Bar Association.”); Bill Quigley, *Public Defender Meltdown in Louisiana*, COUNTERPUNCH (Feb. 26, 2016), <http://www.counterpunch.org/2016/02/26/public-defender-meltdown-in-louisiana/> [https://perma.cc/B9NQ-AVN4] (“One public defender wrote in the *Washington Post* that brand new lawyers have to handle cases with life sentences, carry double the number of cases that the American Bar Association recommends, do not have the time to even see their clients and are forced to plead people out to felony convictions on the day they meet them.”); Grant Scott-Goforth, *The Defender*, N. COAST J. OF PEOPLE, POLITICS & ART (May 19, 2016), <http://www.northcoastjournal.com/humboldt/the-defender/Content?oid=3759430> [https://perma.cc/EQZ2-B7BT] (“The Humboldt County public defender’s office handles an ongoing caseload of about 2,800. According to approximate 2014 numbers, public defenders handled an average of more than 200 felony cases a year, well above American Bar Association standards of 150.”); John Sowell, *Most of Canyon County’s Criminal Defendants are Poor*, IDAHO STATESMAN (Mar. 22, 2016), <http://www.idahostatesman.com/news/local/crime/article67657802.html> [https://perma.cc/F3EJ-2BGY] (“The American Bar Association recommends that public defenders handling felony cases should have a maximum caseload of 150 cases. Last year, Canyon County public defenders were each saddled with about 250 cases.”); Editorial Board, *A Waiting List for Justice in New Orleans*, N.Y. TIMES (Jan. 22, 2016), <http://www.nytimes.com/2016/01/23/opinion/a-waiting-list-for-justice-in-new-orleans.html> [https://perma.cc/HZ9B-D7GL] (“Currently, the office’s lawyers handle an average of 350 felony cases each year, more than twice the American Bar Association’s guideline of 150.”). The National Center for State Courts has also called them “ABA Standards.” See DANIEL J. HALL, NAT’L CTR. FOR STATE COURTS, A WORKLOAD ASSESSMENT STUDY FOR THE NEW MEXICO TRIAL COURT JUDICIARY, NEW MEXICO DISTRICT ATTORNEYS’ OFFICES, AND THE NEW MEXICO PUBLIC DEFENDER DEPARTMENT 80, 87 (2007), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1084> [https://perma.cc/ZXK4-9LB3].

⁶⁹ *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016).

⁷⁰ DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 8 (2010) (“The National Advisory Commission (NAC) guidelines recommend a caseload for each public defender’s office, not necessarily each attorney in the office.”).

thousands per year), and through comparison to the NAC Standards. Of these three, only the NAC Standards are quantitative. Yet the NAC Standards are deeply flawed. What's a defender to do?

B. Prior Workload Studies Were Poorly Designed and Failed to Consider Attorneys' Constitutional and Ethical Duties

One alternative to the NAC Standards is public defender workload studies. When compared with the NAC Standards, these studies have several benefits: (1) they are data-driven; (2) they are state or county-specific; and (3) they sometimes produce caseload limits that more closely resemble lawyers' ethical and constitutional duties.

The now-defunct Spangenberg Group conducted the majority of past public defense workload studies, including projects in Colorado, Maricopa County, and King County.⁷¹ The National Center for State Courts (NCSC) also conducted studies, including projects in Maryland, New Mexico, and Virginia.⁷² These organizations' methods were not meaningfully different.⁷³ Generally, they employed three phases. During the first, public defenders—either an entire state or county public defender population or a sample of that population—track time for somewhere between 6 and 12 weeks.⁷⁴ Time is tracked by case type.⁷⁵ For example, researchers may separate cases into violent felonies, nonviolent felonies, misdemeanors, juvenile, and appeals. At the end of this time-tracking period, the

⁷¹ See LEFSTEIN, *supra* note 5, at 140 (“Historically, the vast majority of weighted caseload studies of indigent defense programs were conducted by The Spangenberg Group”); NAT’L RIGHT TO COUNSEL COMM., *supra* note 42, at 67 n.106 (discussing Spangenberg Group workload studies); see also *Publications: Indigent Defense Studies*, SPANGENBERG GROUP, http://www.spangenberggroup.com/pub_list.html [<https://perma.cc/U97U-28KC>] (last visited Mar. 14, 2016) (discussing weighted caseload studies performed by The Spangenberg Group); SPANGENBERG GROUP, U.S. DEP’T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 11–12 (2001), <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf> [<https://perma.cc/L6B4-MACE>] (collecting results of Spangenberg Group workload studies). During his five-decade career, Bob Spangenberg worked in all 50 states and in several other nations. He died on June 22, 2016, shortly after receiving a Lifetime Achievement Award from the ABA Standing Committee on Legal Aid and Indigent Defendants. His work has had a tremendous effect, directly and indirectly, on thousands of public defenders and countless public defense clients. See *Remembering Bob Spangenberg*, NAT’L LEGAL AID & DEF. ASS’N, <http://www.nlada.org/remembering-bob-spangenberg> [<https://perma.cc/RJM7-RS23>] (last visited Mar. 14, 2017). Several Spangenberg workload studies are available online. See, e.g., SPANGENBERG GROUP, WEIGHTED CASELOAD STUDY FOR THE STATE OF MINNESOTA BOARD OF PUBLIC DEFENSE (1991), http://texaswcl.tamu.edu/statestudies/Spangenberg_MN_1991.pdf [<https://perma.cc/554Y-DZW9>] (draft).

⁷² LEFSTEIN, *supra* note 5, at 140–41.

⁷³ *Id.* at 146 (“The Spangenberg Group used methodology similar to that of the NCSC in conducting its numerous weighted caseload studies.”).

⁷⁴ *Id.* at 142–51.

⁷⁵ *Id.* at 143.

research team would have a picture of how much (or, more accurately, how little) time attorneys spend on each case type.⁷⁶

During the second phase, the research team would conduct a time sufficiency survey, during which defenders were asked if they had sufficient time to perform a series of case tasks (*e.g.*, client contact or legal research in a homicide case).⁷⁷

During the third phase, the research team would present the phase one and two results to an expert panel.⁷⁸ Based on their review and their experience, the panel would determine whether to make “quality adjustments.”⁷⁹ For instance, if a time study showed that attorneys spent 187 minutes on pretrial preparation in a driving while intoxicated case, and there was some indication, whether by the time sufficiency survey or simply through the experts’ experience, that this was an insufficient amount of time for that task, the expert panel may increase that time to 225 minutes.⁸⁰

In New Mexico, for example, the NCSC presented 90 tasks to its expert panel.⁸¹ The panel made quality adjustments to 21 of these.⁸² According to the panel, some tasks required more time, while others required less.⁸³ Ultimately, using these results and the number of working days in a year, the NCSC assessed how many cases each defender should handle.⁸⁴ In the case of New Mexico, the NCSC determined that defenders, who, on average, represented clients in 175 felonies per attorney per year, should represent no more than 144 clients in felonies (slightly less than the 150 felonies prescribed by the NAC Standards).⁸⁵ The NCSC recommended no more than 414 misdemeanors per attorney per year, down from the 550 found in the time study (both numbers higher than the NAC Standards’ 400 number).⁸⁶ And NCSC recommended no more than 251 juvenile cases per attorney per year, down from 296 found in the time study (both higher than the NAC Standards’ 200 figure).⁸⁷

There are three major problems with these studies. First, a 6- or 12-week time study is insufficient. Many defenders have never tracked time and lack familiarity

⁷⁶ *Id.* at 144.

⁷⁷ *Id.*

⁷⁸ *Id.* at 145.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ HALL, *supra* note 68, at 85; *see also* LEFSTEIN, *supra* note 5, at 145 (summarizing these findings).

⁸² HALL, *supra* note 68, at 85.

⁸³ *Id.* at 86.

⁸⁴ *Id.* at 87.

⁸⁵ *Id.* at 81, 87.

⁸⁶ *Id.* at 87.

⁸⁷ *Id.*

not only with time-tracking software, but also with the practice of divvying one's day into predesignated categories. Additionally, after the Spangenberg and NCSC studies were complete, the attorneys immediately abandoned time-tracking. It was a temporary inconvenience used only to feed an expert panel's calculations.

Second, asking public defense attorneys whether they have sufficient time to perform any given tasks is misplaced.⁸⁸ "Ethical blindness," a concept first introduced in the public defense arena by Professor Tigran Eldred, suggests that public defense attorneys may have "a false experience of meeting professional duties, even in the face of clear evidence to the contrary."⁸⁹ Lawyers, like other humans, are often "unaware of the how their desire for quick case dispositions influences their reasoning."⁹⁰ In addition, many lawyers begin with the presumption that their clients are guilty, thus justifying quick processing through the system, including meet-and-plead practices.⁹¹ Attorneys may even convince themselves that additional investigation, research, or client communication may only uncover additional incriminating evidence.⁹² Add confirmation bias, in which an attorney who believes his or her client to be guilty unconsciously seeks out evidence confirming that guilt, and you have a sense of what ethical blindness can do.⁹³

That brings us to the third problem with the Spangenberg and NCSC studies: they were not standards-based. The studies grew out of experience, including the experience of young and inexperienced attorneys. They were not tethered to constitutional or ethical duties, such as those discussed in Part II. For example, ABA Standards provide that an attorney must, among other things, communicate with clients, investigate the facts, and research the law before disposing of a case.⁹⁴ This is true regardless of whether the case proceeds by way of trial or guilty plea.⁹⁵ An attorney with hundreds or thousands of cases per year, especially a younger attorney, may never have heard of the ABA or comparable standards. Even in the final phase of the Spangenberg and NCSC studies, the expert panel was armed not with standards, but with time-tracking data.

Just as a public defender's opinion will be tainted by ethical blindness, so too will an expert panel's opinion be tainted by the results of a time study and time sufficiency survey. They take as their starting point *what is*, not *what should be*. It is unimaginable, for instance, that an attorney could meet his or her constitutional

⁸⁸ Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333 (2012).

⁸⁹ *Id.* at 369.

⁹⁰ *Id.* at 370.

⁹¹ *Id.* at 371.

⁹² *Id.* at 371-72.

⁹³ *Id.* at 372.

⁹⁴ See AM. BAR ASS'N, *supra* note 30, §§ 4-4.1, 4-6.1(b).

⁹⁵ *Id.*

and ethical duties (as described in Section II) in each case when he or she carries 414 cases per year, as was the result in New Mexico. For these reasons, the Spangenberg and NCSC studies fell short.

IV. THE NEW BREED OF WORKLOAD STUDIES: A VAST IMPROVEMENT

The Missouri Project has been called “one of the most sophisticated, data-driven analyses of defender workloads to date.”⁹⁶ Norman Lefstein’s book, *Securing Reasonable Caseloads*, planted the seeds for a new kind of public defender workload study.⁹⁷ Stephen Hanlon, founder and Partner in Charge of Holland & Knight’s Community Services Team for 23 years and now General Counsel to the National Association for Public Defense, seized on Dean Lefstein’s words, seeing a great opportunity to improve public defender workload studies. The workload team turned its attention to the Missouri Public Defender, a statewide system that had long suffered from excessive workloads. The study rested on several principles, including the following: (1) rejection of the NAC Standards, (2) permanent time-keeping, and (3) reliance on the Delphi Method and ABA standards to establish workload standards.

A. *The Missouri Project Rejected the NAC Standards*

Prior to the Missouri Project, Missouri had relied on the NAC Standards to establish public defender workloads. The ABA Missouri Project expressly rejected the NAC Standards:

[T]he NAC Standards were not based upon empirical study and [the Missouri Public Defender’s (MSPD)] recent application of the NAC Standards has been criticized by the Missouri State Auditor and the National Center for State Courts (“NCSC”). . . . These critiques were at the forefront of the analysis to establish new workload standards for the MSPD. This study does not rely upon the 1973 NAC Standards.⁹⁸

Rejection of the NAC Standards wiped the slate clean. The Missouri team then built a new method in its place.

⁹⁶ Andrew L. B. Davies, *How Do We “Do Data” in Public Defense?*, 78 ALB. L. REV. 1179, 1180 (2015).

⁹⁷ LEFSTEIN, *supra* note 5, at 148–56.

⁹⁸ AM. BAR ASS’N, *THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS* 5 (2014) [hereinafter *THE MISSOURI PROJECT*].

B. *The Missouri Project Used Permanent Time-Tracking Data to Show “What Is”*

The Spangenberg and NCSC workload studies relied on 6 to 12 weeks of time-tracking data. That short amount of time hardly gave defenders a chance to learn the software, much less enough time to make time-tracking a habit among scores of attorneys. Nor was it sufficient time for researchers to ensure attorneys were tracking tasks uniformly (*e.g.*, ensuring that all attorneys were assigning the same tasks to the same categories).

The Missouri Project took three related steps to ensure more rigorous time-tracking. First, it instituted permanent time-tracking at the Missouri State Public Defender’s Office:

Permanent time keeping is a critical component to the implementation, ongoing study, and refinement of attorney workload standards. In addition, it can be an invaluable management and analysis tool for a public defender system independent of the need for workload standards.⁹⁹

Like most attorneys in the private sector, the attorneys in that office will track time for the rest of their professional careers. Second, researchers allowed the public defender’s office several months to learn time-tracking software.¹⁰⁰ This period also allowed the research team to refine case type and case task categories to ensure accurate time-keeping. Third, instead of using 6 or 12 weeks of time data, the Missouri team extracted 25 weeks¹⁰¹ of time-tracking data, none of which overlapped with the learning period.¹⁰²

The time study quantifies how attorneys are actually spending their time. Specifically, it shows how much time attorneys spend on a given case task (*e.g.*, legal research) for each case type (*e.g.*, homicide). It does not, however, show how much time attorneys *should* spend on a given case task for a particular case type.

C. *The Missouri Project Used the Delphi Method and ABA Standards to Show “What Should Be”*

In the public defense context, the Delphi method allows researchers to leverage the experience of criminal defense experts to provide a consensus of the amount of time attorneys should expect to spend on a given case task for a

⁹⁹ *Id.* at 44 app. 13.

¹⁰⁰ *Id.*

¹⁰¹ Twenty-five weeks may not capture the full life cycle of any one case; the amount of time necessary can be inferred from the average life of a case as captured in the case management and time-keeping systems.

¹⁰² THE MISSOURI PROJECT, *supra* note 98, at 15.

particular case type to provide competent representation and deliver reasonably effective assistance of counsel.

In practice, a panel, often comprising 20 to 50 experts from that state, is given a survey of case types and case tasks.¹⁰³ For example, one of the questions asked in the Missouri Project pertained to in-person client communication (case task) for C and D class felonies (case type):¹⁰⁴

Below, you will be asked to provide your estimate of the amount of time that is reasonably required to perform the respective task with reasonable effectiveness. Please enter your response in minutes.

CLIENT COMMUNICATION – IN PERSON – Time for privileged client interviews and consultations conducted face-to-face.

How much time, on average, is reasonably required to perform this task with reasonable effectiveness?

Minutes: _____

(Optional) Please provide an explanation of your time estimate.

In Missouri, there were 14 case tasks¹⁰⁵ and 8 case types,¹⁰⁶ and thus, 112 case type-case task combinations (14 x 8), for which the Delphi panel had to provide answers.

After the Delphi panel answered these 112 questions, an accounting firm summarized the data.¹⁰⁷ For the second round, the research team asked the Delphi panel the same questions, but armed them with the summary data from the first round.¹⁰⁸ Following the second survey, the firm again summarized the data.¹⁰⁹ Finally, for the third round, the Delphi panel met in-person to discuss the summary data from the second round and to establish final workload standards.¹¹⁰

There are two important points about the Delphi method as it was applied in Missouri. First, unlike many Spangenberg and NCSC workload studies,

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at 18.

¹⁰⁵ The 14 case tasks are as follows: client communication (in-person, telephone, written); family/other communication; discovery; records and transcripts; depositions and interviews; experts and technical research; legal research; drafting and writing; plea negotiation; court preparation; case management; and alternative sentencing research. *Id.* at 14.

¹⁰⁶ The 8 case types are as follows: murder/homicide; A/B felony; C/D felony; sex felony; misdemeanor; juvenile; appellate/post-conviction relief; and probation violation. *Id.* at 13.

¹⁰⁷ *See id.* at 19.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 20.

researchers did not show the expert panel the results from a time study or time sufficiency survey.¹¹¹ Thus, the results were not tainted by “what is” or by the ethical blindness or socialization of overworked public defenders. Second, the expert panel was armed with ABA standards and told to “apply prevailing professional norms.”¹¹²

The results of the Missouri Project were compelling. For every case type, there was a substantial gap between the time study and Delphi panel results:¹¹³

Table 2. Comparison of Time Study and Delphi Panel Results

	Time Study Results	Delphi Panel Results
Murder/Homicide	84.5	106.6
A/B Felony	8.7	47.6
C/D Felony	4.4	25.0
Sex Felony	25.6	63.8
Misdemeanor	2.3	11.7
Juvenile	4.6	19.5
Appellate/PCR	30.3	96.5
Probation Violation	1.4	9.8

Given the Missouri Project’s success, the methods were replicated in Texas¹¹⁴ and in studies now underway in Rhode Island, Tennessee, Colorado, and Louisiana.¹¹⁵ The Texas study showed a substantial difference between the NAC standards and state-specific Delphi panel recommendations:¹¹⁶

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 21.

¹¹⁴ See DOTTIE CARMICHAEL ET AL., PUB. POLICY RESEARCH INST., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION vi (2015), http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf [<https://perma.cc/7LN7-N5JZ>].

¹¹⁵ See *Indigent Defense*, AM. BAR ASS’N, www.indigentdefense.org (last visited Mar. 14, 2017), for more information.

¹¹⁶ CARMICHAEL ET AL., *supra* note 114, at 31 (table reprinted and adapted with permission). Note: Unlike the Missouri studies and the studies underway in Tennessee, Rhode Island, Colorado, and Louisiana, the Texas study *did* use a time sufficiency survey. However, those results were not shared with the Delphi panel.

Figure 2. Comparison of Annual Caseload Recommendations from All Sources Available to the Study



V. WE SHOULD BETTER LEVERAGE ABA WORKLOAD STUDIES TO IMPROVE PUBLIC DEFENSE

ABA workload studies are a vast improvement over the NAC Standards and previous workload studies. Now that we have a more rigorous tool for data collection, how can we better leverage the results to improve public defense? I suggest three approaches: (1) pairing statistics and stories, (2) aiming for evidence-based national standards, and (3) pursuing a variety of litigation strategies.

A. We Should Pair Statistics and Stories

Numbers, well crunched, can provide a fuller picture of a system. But data can also obscure. In the case of public defender workloads, we can get lost in time studies, Delphi panels, case types, and case tasks. Always at the forefront should be the awareness that these studies affect people: defenders and, more importantly, clients. Unlike workload studies in the private sphere, our aim is not simply to maximize efficiency, but also to ensure constitutional, ethical representation. Indeed, these studies are necessary because we have, for too long, prized efficiency over effectiveness, punishing clients in the process. Stories are a constant reminder why we conduct these studies. We need to win the hearts (with stories) and minds (with statistics) of defenders, researchers, and legislators.

Workload studies should be paired with qualitative research and stories.¹¹⁷ A personal narrative can be compelling. What is life like for an attorney with

¹¹⁷ Anderson, *Qualitative Assessments of Effective Assistance of Counsel*, *supra* note 5, at 587 (“Although quantitative, numbers-based ineffective assistance arguments remain important, I believe

hundreds or thousands of cases per year? What kind of representation have they provided? What kind of attorney-client contact have they had?

Ethnographies, such as Nicole Gonzalez Van Cleve's *Crook County: Racism and Injustice in America's Largest Criminal Court*, paint compelling pictures of the individuals—clients, lawyers, judges, and sheriffs—wrapped up in our criminal justice systems:

Once I switched to clerking for the public defender, I noticed that entering the lockup unleashed a fury of desperation from defendants. They would rush to the bulletproof barrier, yell questions at the glass, beg to send messages to their public defender, or ask for help on excruciating matters: *The police beat me. They won't give me my meds. Tell the judge I want a 402 and TASC.* The rush of bodies and desperate faces, the struggle to be heard, the fight of the less-aggressive defendants to make it to the front of the crowd. This was the mad rush of starving people in want of human decency, leniency, answers, protection, and even basic medical treatment. The image of these people pushing toward the glass reminded me that not all lives could be saved. How would defense attorneys choose whom to save and fight for as a zealous advocate? Most important, which of the defendants would be sacrificed for another more worthy, more “respectable” defendant?¹¹⁸

As part of, or parallel to, workload studies, researchers should conduct court observation, interviews, focus groups, or textual analysis to arm themselves with public defense stories.

Marshall Ganz at Harvard's Kennedy School of Government has explained that a public story, one that will inspire us to act, should have three elements:¹¹⁹

- 1) A story of self;
- 2) A story of us;
- 3) A story of now.

The “story of self” tells an individual story, perhaps why someone was called to do a certain type of work.¹²⁰ The “story of us” expands on the story of self, painting a

that the status of the problem as a conflict of interest justifies a complimentary, more qualitative approach.”).

¹¹⁸ NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT* 157 (2016).

¹¹⁹ MARSHALL GANZ, *TELLING YOUR PUBLIC STORY: SELF, US, NOW* (2007), <http://www.welcomingrefugees.org/sites/default/files/documents/resources/Public%20Story%20Worksheet07Ganz.pdf> [<https://perma.cc/RKE4-ZRHE>].

¹²⁰ *Id.*

broader picture for the listener or reader about a community's shared purposes or goals.¹²¹ Finally, the “story of now” shows the challenges that group now faces and includes a call to action.¹²²

A public story about public defense using the Marshall Ganz format would, as they say, nearly write itself:

- 1) Story of self: a named individual client suffers greatly because his attorney, laboring under an excessive workload, is unable to meet her ethical and constitutional duties to investigate, research, and communicate;
- 2) Story of us: this story is repeated again and again across the United States, as demonstrated by public defense workload studies;
- 3) Story of now: we must educate, legislate, and litigate using those workload studies to secure reasonable public defense workloads.

Both statistics and stories are necessary, but, standing alone, neither is sufficient. If we are to change the hearts and minds of defenders, researchers, and legislators, we must couple statistics and stories.

B. We Should Create Evidence-Based National Standards

The new breed of workload studies are an indispensable tool for determining reasonable public defense workloads.¹²³ Yet it is unlikely that uniform replication of the Delphi process will be possible in all of the more than 3,000 counties across the country.¹²⁴ Additionally, despite the rigor of this new breed of workload studies, there may be instances in which, like older studies, their recommended workload limits are exceeded.¹²⁵ There is a clear need for national standards to complement workload studies. Indeed, these national standards should be *derived* from workload studies. If public defense workload studies begin to show a pattern—that is, a recurrence of recommended workload standards for similar case types—a national organization can use that knowledge to draft national workload standards. If, however, no pattern emerges—that is, no recurrence of recommended workload standards for similar case types—this concept should be reconsidered.

New national workload standards would address nearly all of the complaints leveled against the NAC Standards:

¹²¹ *Id.*

¹²² *Id.*

¹²³ See THE MISSOURI PROJECT, *supra* note 98.

¹²⁴ And many more if we consider public defense at the municipal level.

¹²⁵ See NAT'L RIGHT TO COUNSEL COMM., *supra* note 42, at 67 (“Even those that have caseload standards, often determined through weighted caseload studies, frequently exceed them.”).

Table 3. How National Standards Could Address Concerns about the NAC Standards

	Concern	Remedy
(1)	The NAC Standards are more than 40 years old and are not reflective of contemporary public defense, including the need to research collateral consequences. ¹²⁶	National standards based on this new breed of workload studies would reflect contemporary practice, including modern forensics and the need to research collateral consequences.
(2)	The NAC Standards are not evidence-based. ¹²⁷	National standards could be based on workload studies, giving them a strong underpinning.
(3)	Experientially, 150 felony cases per attorney per year, for instance, is too high to provide quality representation.	The NAC Standards' numerical values would be abandoned in favor of standards based on this new breed of workload studies.
(4)	The NAC Standards' origins are murky. ¹²⁸	The new breed of workload studies are transparent, and national standards based on them should be as well.
(5)	The NAC Standards do not distinguish between types of felony offenses, weighting low-level drug offenses the same as homicides. ¹²⁹	The new breed of workload studies distinguishes between different felony levels and so could national standards.

The sole remaining, oft-repeated critique of the NAC Standards is that national standards should not be attempted, because there is too much variation from jurisdiction to jurisdiction.¹³⁰ It is true that national standards, by their very nature, cannot account for regional variation. And it is true that regional variation exists, though the extent to this variation is unknown. However, organizations like the ABA do this in other contexts every day. The ABA *Model Rules of Professional Conduct*, the ABA *Criminal Justice Standards*, the ABA *Ten*

¹²⁶ *Id.* at 66 (“[S]ince the NAC’s report was published, the practice of criminal and juvenile law has become far more complicated and time-consuming . . .”).

¹²⁷ *Id.* (“Because the NAC standards are 35 years old and were never empirically based, they should be viewed with considerable caution.”).

¹²⁸ LEFSTEIN, *supra* note 5, at 43–45; *see also* Hanlon, *supra* note 57 (“These ‘standards’ are concededly not evidence based, and thus do not account for changes in either technology or complexity.”).

¹²⁹ SCHWEICH, *supra* note 60, at 67.

¹³⁰ LEFSTEIN, *supra* note 5, at 44.

Principles of a Public Defense Delivery System, and the ABA *Eight Guidelines of Public Defense Related to Excessive Workloads* are all national standards applied to criminal justice systems that are nearly all state or county-based—the same states and counties that have excessive public defense workloads and could benefit from both workload studies and national standards. There are countless instances where the reality of practicing criminal justice in one or more states conflicts with these standards. But that does not diminish the need for these standards.

Perhaps one way to approach the issue of jurisdictional variation is to create standards that offer a numerical range.¹³¹ While there is bound to be some variation from jurisdiction to jurisdiction, there are certainly upper and lower limits, beyond which workloads become unreasonable. For example, the workload limit for an unmixed felony caseload might be 50 to 75 cases per year.¹³² Likewise, the range for an unmixed misdemeanor caseload might be 100 to 150 per attorney per year. In some jurisdictions—especially those with long courtroom waits or extended “windshield time,” in which attorneys travel long distances to meet with clients and appear in court—the lower end of these ranges may be more appropriate.

Though inexact, on balance, national standards are highly desirable and could help improve public defense across the United States, providing a tool to be wielded in education, lobbying, and litigation to secure reasonable caseloads. The need for national standards, as shown by their weekly and monthly citation by media and courts alike, is clear.

C. We Should Pursue a Variety of Litigation Strategies

When all other options fail, public defenders should litigate excessive workloads.¹³³ Much previous litigation has taken the form of large and lengthy class action lawsuits.¹³⁴ *Hurrell-Harring v. New York*,¹³⁵ for instance, brought great changes to five counties in upstate New York.¹³⁶ But it took eight years and millions of dollars in *pro bono* support to achieve.¹³⁷ This type of litigation is but one tool.

¹³¹ Dean Emeritus Norman Lefstein suggested the idea of a range to me during a telephone conference. The credit for this idea belongs to him. I endorse it wholeheartedly.

¹³² These figures are not evidence-based. I offer them merely as illustration.

¹³³ ABA EIGHT GUIDELINES, *supra* note 49.

¹³⁴ LEFSTEIN, *supra* note 5, at 182–87.

¹³⁵ *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010).

¹³⁶ Stipulation and Order of Settlement at 1, *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07), <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf> [<https://perma.cc/ESJ4-52YF>].

¹³⁷ See *Settlement Begins Historic Reformation of Public Defense in New York State*, N.Y. CIVIL LIBERTIES UNION (Oct. 21, 2014), <http://www.nyclu.org/news/settlement-begins-historic-reformation-of-public-defense-new-york-state> [<https://perma.cc/Y2CH-NCUU>].

As Dean Lefstein has suggested, attorneys should also move to avoid appointment or to withdraw from a case:

If caseloads are deemed excessive, I propose that the heads of public defense programs and some or all of the program's lawyers do exactly what is required of them by rules of professional conduct. Thus, with each new assignment or group of assignments, the chief public defender or an assistant public defender, as may be appropriate, would make a suitable record, stating that the acceptance of the new case or cases will result in a violation of the rules of professional conduct and asking that the new assignment(s) not be made. And, just to be clear about the matter, I am suggesting that such motions be filed routinely until such time as relief is obtained¹³⁸

Though followed by an American Civil Liberties Union lawsuit, this was essentially the approach by the Orleans Public Defenders in November 2015.¹³⁹

National organizations, such as the National Legal Aid & Defender Association,¹⁴⁰ the National Association of Criminal Defense Lawyers,¹⁴¹ or the National Association for Public Defense,¹⁴² are well-suited to drafting model motions that can be adapted to almost any jurisdiction. Covering the nation's criminal courts in motions to avoid appointment will take tremendous buy-in from public defense providers nationwide, but through these national organizations, we are nearing a point where that buy-in can become a reality.

And workload studies can serve as a base for that litigation. Paired with qualitative studies or stories, workload studies can provide sound data capable of persuading judges that excessive workloads are not mere public defender bellyaching, but a genuine, measurable problem of constitutional and ethical dimensions.

The goals of this litigation should be threefold: (1) secure a reasonable caseload in the short term; (2) create precedent for case refusal so that reasonable caseloads can be secured long-term; and (3) find a path to the United States Supreme Court. The last goal is particularly important. Unlike most decisions, which establish negative liberties—that is, proscriptions regarding what a government may do—*Gideon* created an affirmative right.¹⁴³ It described

¹³⁸ LEFSTEIN, *supra* note 5, at 251.

¹³⁹ See Della Hasselle, *New Orleans Public Defenders to Judge: Stop Assigning Us New Cases*, AL JAZEERA AM. (Nov. 24, 2015), <http://america.aljazeera.com/articles/2015/11/24/new-orleans-public-defenders-to-judge-stop-assigning-us-new-cases.html> [<https://perma.cc/Q9RA-6DM4>].

¹⁴⁰ NAT'L LEGAL AID & DEF. ASS'N, www.nlada.org (last visited Mar. 14, 2017).

¹⁴¹ NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, www.nacdl.org (last visited Mar. 14, 2017).

¹⁴² NAT'L ASS'N FOR PUB. DEF., www.publicdefenders.us (last visited Mar. 14, 2017).

¹⁴³ Chemerinsky, *supra* note 9, at 2685.

something state governments *must* do, but never explained *how* it should be done.¹⁴⁴ As explained in Part II above, this unfunded mandate led to our current mess.¹⁴⁵

It is time for the United State Supreme Court to address public defense structure and funding. Two hurdles stand in our way. First, several procedural doctrines—abstention, standing, and ripeness—could make federal litigation difficult.¹⁴⁶ But these are not impenetrable barriers.¹⁴⁷ The bigger challenge is convincing the Supreme Court that it should again wade into the waters of affirmative rights. While the Court may be hesitant, addressing public defense structure and funding is one of the most pressing problems in criminal justice today. The Court should finish the business it started in *Gideon*.

VI. CONCLUSION

The new breed of workload studies is more rigorous than its predecessors. But these studies cannot sit on a shelf. They should be leveraged—by pairing them with stories and using them as a base for national standards and precise litigation—to improve public defense in the United States. The tide is turning. Public defense is receiving more attention than at almost any time in the past half century. If we do not seize this moment, many more decades could pass without substantial change.

¹⁴⁴ *Id.*

¹⁴⁵ While *Strickland* and *Cronic* fleshed out what that representation may look like, they did so without creating much consequence for ineffectiveness. More importantly, they never touched upon the structural and funding issues left open by *Gideon*.

¹⁴⁶ Chemerinsky, *supra* note 9, at 2692–93.

¹⁴⁷ Savvy litigators have increasingly learned to navigate these waters. For a good example, see the work of Equal Justice Under Law regarding bail reform and debtors' prisons. Tim Summers, Jr., *Verbatim: Settlement Ends "Debtors' Prison" System in Jackson, Mississippi*, JACKSON FREE PRESS (June 21, 2016), <http://www.jacksonfreepress.com/weblogs/jackblog/2016/jun/21/settlement-ends-debtors-prison-system-in-jackson-m/> [<https://perma.cc/QC4U-6KPE>].