

The Problem with Ignoring the National Public Defense Workload Study

By Kawan Clinton, Deputy Attorney in Charge of the Manhattan trial office of The Legal Aid Society. Co-chair of the NAPD Workloads Committee.

This blog is in response to Professor John P. Gross: <https://publicdefenders.us/blogs/the-problems-with-the-national-public-defense-workload-study/>.¹

The problem with the National Public Defense Workload Study (NPDWS) is simple. It is long overdue and lands in a political landscape that makes one of our own doubt its validity. He is more concerned about speculating whether the current Supreme Court will uphold the right to counsel sometime in the future than fighting now to change the poorly kept secret that public defenders have been forced to carry grossly excessive caseloads for decades.

Excessive caseloads can and do lead to innocent people being convicted. The doubters of that proposition are a distinct minority; they most certainly are not the front-line attorneys practicing day in and day out in America's many courtrooms.

The United States has the highest incarceration rate of any country in the world. <https://www.prisonpolicy.org/global/2024.html>. Mass incarceration is the bread and butter of our criminal legal system. The states – and the federal government -- must sufficiently invest in state public defense systems so that public defenders will have workloads that ensure competent and effective representation for all of their clients. This has not been the case in public defense for the last half century. Now we finally have a national workload study that reliably establishes just how bad the situation is today. We must heed the data and conclusions provided in the NPDWS.

When you are used to having less, when you finally get what is needed, it feels like abundance. For many decades we have been forced to do so much with so little. It has become the norm. The NPDWS feels like someone finally spoke up, nationally, about an issue that has been swept under the rug for over a half century. Excessive caseloads have been breaking public defender offices and our practice as a whole.

¹ This blog will address only the law and standards, and practice issues addressed in Professor Gross' blog; his criticism of the research methodology used in the NPDWS will not be addressed here. Suffice it to say here that each of the issues raised by those criticisms is specifically identified and fully addressed by the experts in quantitative and qualitative research methods who authored the NPDWS study, including Nicholas Pace (RAND), Cynthia Lee (National Center for State Courts) and Malia Brink (American Bar Association Standing Committee on Legal Aid and Indigent Defendants).

I have never witnessed a prosecutor, nor any police officer ever indicate they are requesting too much. Take a look at California's investment disparity between public defense and prosecution. According to budgeted allocations, counties in California fund the prosecution at much higher levels than they do public defense. For fiscal year 2022- 23, counties allocated almost \$2.2 billion in total funding to local district attorney offices and nearly one billion dollars less in funding for public defense. https://www.ospd.ca.gov/wp-content/uploads/2025/05/Unequal-Scales_Californias-Investment-Disparity-between-Prosecution-and-Public-Defense.pdf. We can live with unpopular opinions Professor Gross, but inaccurate ones must be addressed.

Public Defenders are Criminal Defense Lawyers

Many of our clients view us as public pretenders because of the thoughts outlined by Professor Gross. "The problem is that by using what amounts to a set of best practices for criminal defense lawyers, the standard that is set becomes aspirational for public defenders".

<https://publicdefenders.us/blogs/the-problems-with-the-national-public-defense-workload-study/> Does it? I argue it does not. These standards are not merely aspirational; they are standards that criminal defense attorneys must fight for and uphold. It's unacceptable to have a set of standards for public defenders that is less than the standards for other criminal defense attorneys. The public view of public defense is based on excessive caseloads and triaging that has become the norm. The idea is we pretend to care, pretend to uphold standards of professional responsibility, but all the while we are working with the district attorney against our clients. Professor Gross' views merely confirm this perception. We know this is far from true, but when you are unable to prepare properly due to excessive caseloads, triaging leads to a lack of trust – by our clients and by the public.

If the legislature that funds public defense does not want representation that meets the standards required by the ABA Defense Function Standards, then we will have to educate them on the havoc wreaked on too many Black and Brown communities by our inability to adhere to those standards. The money wasted on mass incarceration, according to the American Constitutional Society could be better spent on public defense which ultimately reduces the cost of running the Criminal Justice System. When one part of the system is improperly funded, the entire system functions inefficiently. <https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Gross%20and%20Cox%20-%20Cost%20of%20Representation.pdf>. Professor Gross, you are well aware of the cost of representation in comparison to the cost of incarceration. Adequately resourced public defenders would mean the end of excessive public defender caseloads.

A Justice Policy Institute report entitled System Overload: The Costs of Under Resourcing Public Defense identified five ways in which the poor quality of public defense can increase incarceration costs: (1) more pretrial detention for people who do not need it; (2) increased pressure to plead guilty; (3) wrongful convictions and other errors; (4) excessive and inappropriate sentences; and (5) increased barriers to re-entry. The choice for policymakers is a simple one — either spend the money necessary to ensure that every defendant has an adequate defense or continue to pay the costs associated with a criminal legal system that incarcerates one

out of every 100 adults in the country. <https://justicepolicy.org/research/system-overload-the-costs-of-under-resourcing-public-defense/>

We can never be obligated or motivated by what the people who pay us want. As attorneys, we are obligated by the Rules of Professional Conduct and ABA's Defense Function Standards. That is the place we should operate from. If we are motivated to act based on anything else, then we can be certain change will never come.

NPDWS is not aspirational

The notion that public defenders do not need the kind of workload relief provided by the NPDWS simply flies in the face of reality. Come down to 100 Centre Street in New York City and talk with some public defenders in the courthouse. Attorneys spend hours a day going to the jail at Rikers Island, reviewing discovery, often appearing in multiple court parts a day. The landscape of public defense work has changed tremendously since 1973. There has been a drastic increase in the amount of discovery in many cases in part due to the sheer rise in digital evidence that must be reviewed -- including body worn cameras, DNA, cell phones, and social media. The science and technology involved demand far more time from attorneys to review and investigate cases.

It does not matter how much time we are spending on current cases; any front-line attorney can tell you in the majority of their cases, it is simply not enough time to provide what our clients need and deserve. Triage has become the norm, the accepted way to manage criminal cases. We cannot ignore that racism, a broken criminal legal system and over policing in BIPOC communities were the driving factor in creating and now sustaining this broken system. The NPDWS is a call to action. We can no longer ignore, pretend, or bypass what we have all known for way too long.

The right to legal representation is not, as Professor Gross maintains, the right to "the bare minimum;" we have ethical standards we must follow as public defenders – The Rules of Professional Conduct. Moreover, the ABA's Defense Function Standards (developed over decades by experienced prosecutors, judges, defenders and academics) are the professional norms that the Supreme Court in *Strickland* identified as what reasonably effective counsel means.

It is no secret that most public defender offices are in direct violation of those rules and those standards solely because of their grossly excessive workloads. Our clients have been harmed for too long. Talk to the people doing the work. Regardless of whether a case goes to trial, you have to prepare the case. The only way you can defend a case is to work on it, investigate the case, not just triage or doing the "bare minimum". You need the resources, but most importantly you need time to prepare, to investigate, to humanize your client. The more cases you have, the less time you have per case.

Educating the Public and Legislature

The public savings from having a public defender with the resources and time necessary to competently represent the client are vast. Working Paper: How Much Difference Does the

Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes.

http://www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR870.pdf

The RAND Philadelphia study found that public defenders reduce their clients' murder conviction rate by 19%, lower the probability that their clients receive a life sentence by 62%, and reduce overall expected time served in prison by 24%. In this study appointed counsel had fewer resources and spent significantly less time on murder cases, leading to worse outcomes when compared to public defender outcomes.

Public trust

We are in the middle of a crisis where clients are sitting in jail with no preliminary hearings, days, or weeks without meeting their assigned defense counsel, or only meeting an attorney for a few minutes in arraignments, all due to an overwhelming number of case assignments. We also see clients who do not have sufficient time with their attorney to help prepare their cases because they are incarcerated. Excessive caseloads mean that attorneys do not have enough time for essential client visits and for preparing their cases, thus eroding the trust of the communities we serve. This invariably creates increased workload for prosecutors and judges, as cases take longer to resolve. Clients benefit, the public benefits and even victims benefit from reasonable workloads and caseloads in public defense. Client representation must be reasonably effective in order to satisfy the demands of the Constitution.

The way forward

We need to see new partnerships formed with law schools to encourage law students to join public defense offices. Offer incentives, paid internships, reduced or free tuition with a required commitment to public defense. We must raise salaries and benefits such as pensions, to match what prosecutors are receiving.

Many local areas will not have the funding to undertake a comprehensive workload study. The NPDWS is available for use in all these locations as a replacement for the NAC standards, which we have known for decades are outdated and flawed. The NAC standards did not consider defense function standards, or any rules of professional responsibility.

There is no exception to the Rules of Professional Conduct for public defenders. In 2006, the ABA standing Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion 06-441 which states: "All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If the workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will

be able to competently and diligently represent the defendant”.

<https://www.in.gov/ccaa/files/ABA.Ethics06-441.pdf> Guideline 6 of the ABA’s Eight Guidelines of Public Defense Related to Excessive Workloads provides that in this situation, the public defender should move to dismiss their client’s case for failure of the state to provide a lawyer who can be competent and effective.

This is not about abandoning clients or a work stoppage. This about compliance with the Rules of Professional Responsibility and the ABA Defense Function Standards that have been trampled on for far too long, causing great harm to our clients. The most important pre-trial right that our clients have is the right to a lawyer with enough time and resources to provide them reasonably effective representation pursuant to prevailing professional norms. Our most important duty, therefore, is to ensure that that right is protected.

What happens if the NPDWS is ignored?

We know what the landscape has been like for decades in public defense. We all agree that the NAC standards are antiquated, uneducated guesses that have led to attorneys triaging rather than representing their clients in an ethical manner. We know that as long as we continue to defend or turn a blind eye to what has been the status quo, we will never attract attorneys into a landscape that requires you to teeter on the brink of extinction on a daily basis. We spent a considerable amount of time digging this hole that is public defense; we should be willing to collectively rebuild its landscape.

The first thought should not be to attack the NPDWS. Are we really concerned that by implementing caseload standards we would create thousands of unrepresented clients? In reality, we already have many unrepresented clients under the NAC standards by perpetuating excessive caseloads. It makes no sense to have an attorney assigned in name only, who cannot actually spend a reasonable amount of time working on the case. Merely assigning an attorney to a case is not representation. Without public defenders, cases cannot go forward. We have been complicit.

This is not about excellent representation; this is not about the dream team of attorneys or better work life balance. The NPDWS is focused on reasonably effective representation pursuant to prevailing professional norms – the ABA Defense Function Standards -- as guaranteed by the Sixth Amendment. We have gotten so far away from the basics that hearing how bad things are makes us, the very individuals in the field, doubt that it has gotten to this dire place. IT HAS. WE KNOW THIS. Now we have a tool to bring to public defense nationally that is adaptable via mapping to any jurisdiction.

We know our clients are not the ones society values the most, we know that racism is prevalent in the criminal legal system and plays a role in grossly underfunding public defense. The ability to recruit, develop and retain public defenders is directly tied to excessive caseloads. This study presents the data-driven and standards-driven expert consensus that was lacking nationally for a half century. We can use it to educate the public; we can use it to educate the legislature in our local jurisdictions, and we can use it to fight for caseloads that are no longer excessive.

Nothing changes if nothing changes. We can continue to focus on the problem, or we can look to the NPDWS as a promising way forward. The implementation of any workload study should be incremental; there is no expectation that this can be accomplished immediately. Every jurisdiction should develop a localized plan guided by the NPDWS. The study is focused on where we are with caseloads. It doesn't prevent any jurisdiction from formulating a multifaceted, multiyear plan which should include decriminalization, diversion and many other efforts that must be explored to attack the mass incarceration of Black and Brown communities. That is exactly what has been done with the NPDWS in New Mexico (five years), Oregon (six years) and Washington (three years).

Reasonable implementation of the NPDWS

Where do we go from here? We must implement the NPDWS locally. Let the jurisdictions that are familiar with their local caseloads map and utilize the NPDWS, they should speak for themselves. All jurisdictions should assess and where needed update their current caseload standards.

States looking towards implementing the NPDWS are engaging in a phase-in period that is admirable and prudent. For example, the Washington State Bar Association (WSBA) [WSBA Standard 3.O](#) provides that the caseload limits will be phased in over a three-year period. This phase-in period is a far cry from "overnight." The WSBA Standards reflect 50 years of work by national and state experts, practicing attorneys and public defense administrators working collaboratively. That doesn't mean we have to wait 50 years to implement the study.

The Oregon Public Defense Commission instituted a six-year plan to reduce representation deficiencies and implement criminal caseload standards as outlined in the Oregon project. <https://www.oregon.gov/opdc/SiteAssets/Lists/General%20Accordions/Reports/OPDC%206%20Year%20Plan%20Reduce%20the%20Public%20Defender%20Deficit%20Report%2010.23.24.pdf>. A quality phase-in plan can and should be a model for all States in their application of the NPDWS. Both Oregon and Washington can serve as model States in this battle. The use of the NPDWS by public defenders in both Washington and Oregon has also led to long overdue public discussions in both states about not only supply side relief (more funding for public defense) but also demand side relief (diversion of low level felonies and misdemeanors involving non-dangerous defendants –about 38% of the system according to the Brennan Center Report <https://www.brennancenter.org/issues/end-mass-incarceration/prison-and-jail-reform> .

Conclusion

A global pandemic changed the landscape of public defense. We are still suffering from the "Great Resignation" which led to fewer attorneys in a field suffering from excessive caseloads. We have fewer attorneys entering public defense and more exiting the field, and even higher caseloads.

If we genuinely care about the consequences to our clients and the constitutional right to counsel, then we must utilize the NPDWS. There cannot be different standards for criminal defense lawyers whose clients can afford to pay them and public defenders whose clients cannot afford to

pay them. Ending excessive caseloads has the distinct potential to restore integrity to our criminal legal system, so that it may one day deserve the name “criminal justice system.” The NPDWS study tells us what we already know -- caseloads are excessive. But it has also sparked new public discussions about the relationship between changes in the criminal code and increased public defense funding to accommodate those changes; and diversion of many low level felonies and misdemeanors into more effective and less expensive programs than the criminal legal system to engage with our clients who are suffering from the criminalization of poverty, homelessness, addiction and mental illness.