

# Indigent Defense Caseloads in Texas: Assessing the Extent of High-Volume Practice<sup>\*</sup>

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**ABSTRACT** – There is a pervasive belief that public defenders in America are saddled with too many cases and that clients suffer as a result. Yet, in a historically bone-dry data climate, many states have failed to fully grasp the status of caseload volume across their broader indigent defense systems. Here, we assemble a unique dataset of more than 37,000 attorney-level observations to understand indigent defense caseloads in Texas. Analyzing this dataset leads to three important discoveries: (1) on average, indigent defense caseloads are modest; (2) yet, because a nontrivial number of Texas indigent defense attorneys exceed recommended caseload guidelines, roughly 40 percent of indigent defense cases in Texas are represented by attorneys with excessive caseloads; and (3) overwhelmingly, attorneys with excessive caseloads are unaware that their caseloads exceed recommended full-time equivalences (FTEs). We conclude by recommending a series of policies that might work to educate and compel attorneys to consider whether their practices meet constitutional and ethical requirements.

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## INTRODUCTION

In the United States, persons accused of crimes at the state and local levels are endowed with the right to receive legal counsel, irrespective of their ability to pay for it.<sup>1</sup> Yet, the guarantee of an attorney is no salve for accused persons if their legal counsel is overburdened professionally. Indeed, past research notes that, while attorney experience is an important predictor of trial outcomes, caseload volume functions as a serious constraint on the ability of attorneys to provide adequate legal representation.<sup>2</sup> As nationwide attention toward equal constitutional and ethical representation in criminal cases has increased, excessive indigent defense caseloads are considered to be one of the most pernicious stumbling blocks to achieving representational parity for the poor.<sup>3</sup> Simply put, effective counsel requires time. If an indigent person is assigned to an attorney representing hundreds or thousands of such cases per year, however, then the likelihood that their attorney will possess the professional resources necessary to adequately represent their interests is severely jeopardized.<sup>4,5</sup>

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<sup>1</sup> In *Powell v. Alabama*, 287 U.S. 45 (1932), the United States Supreme Court held that the Sixth Amendment requires that indigent defendants in state court capital cases must be provided the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963) applied the right to counsel to felonies; however, the Supreme Court later extended this right to misdemeanor and juvenile cases in *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) and *In re Gault*, 387 U.S. 1 (1967), respectively.

<sup>2</sup> Radha Iyengar, An Analysis of the Performance of Federal Indigent Defense Counsel, National Bureau of Economic Research (2007) <http://www.nber.org/papers/w13187.pdf>. See Norman Lefstein, AM. BAR ASS'N, Securing Reasonable Caseloads: Ethics and Law in Public Defense, 12 (2011).

<sup>3</sup> Geoffrey T. Burkhardt, How to Leverage Public Defense Workload Studies, 14 OSJ of Crim. Law 403, 403 (2017).

<sup>4</sup> 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 are the primary problem public defenders face in attempting to provide ethically competent, zealous representation to their clients.”); 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.”).

<sup>5</sup> See, e.g., 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

Curiously, while some 80% of felony defendants are represented by indigent defense counsel annually,<sup>6,7</sup> the precise scope of problematic caseload volumes remains elusive. It is relatively easy to count indigent defense caseloads, for instance, in states like Missouri, Colorado, or Kentucky, where unified state public defender offices exist. Outside of these types of centralized bureaucracies, American public defense is provided largely at the county level – not by public defender offices, but through assigned counsel systems, where private attorneys represent indigent defendants for state-sponsored fees.<sup>8</sup> Within these decentralized systems, accounting for the behavior of attorneys is only as good as the reporting mechanisms supported and run by local agencies. Thus, it can be extraordinarily difficult to account for whether or not attorneys in given jurisdictions are overburdened given the non-standardized reporting requirements that are often characteristic of county-level systems of indigent defense, coupled with budgetary constraints that limit efforts to track such data.

With 254 counties that mostly employ assigned counsel systems of indigent defense, Texas is the institutional antithesis of states like Colorado regarding both the management and assignment of its indigent cases. This renders Texas a daunting data climate to assess because the responsibility for setting indigent determination standards and assigning indigent cases to attorneys falls within the county jurisdictions. Fortuitously, however, a statutory mandate passed in 2014 energized a system-wide audit of cases paid to attorneys representing indigent clients. Leveraging this unique dataset collected by the joint efforts of the Texas Indigent Defense Commission (TIDC) and a large, public research institute in the southern United States, we assemble a unique dataset of over 37,000 attorney-level observations to understand how caseloads have evolved over time, how caseloads differ among types of counsel, and where attorney caseloads exceed reasonable thresholds throughout Texas – features that are an important barometer of the health of any indigent defense system.

Analyzing this dataset leads to three important discoveries: (1) on average, indigent defense caseloads are modest in Texas; (2) yet, because a nontrivial number of attorneys taking indigent cases

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Crisis, 2010 Michigan St. Law Review, 341, 348 (2010) (“The indigent defense system has practically been in crisis since it began.”).

<sup>6</sup> Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dept. of Justice, NCJ. 179023, Defense Counsel in Criminal Cases, 1 (2000); Joy, *supra* note 4, at 774.

<sup>7</sup> See 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 . . .”).

<sup>8</sup> See Holly Stevens, Colleen Sheppard, Robert Spangenberg, Aimee Wickman, Jon Gould, State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008 (2010). See <http://gideonat50.org/in-your-state/#delivery-model>

exceed statewide caseload guidelines, roughly 40 percent of cases involving indigent defendants are represented by attorneys with excessive caseloads; and (3) overwhelmingly attorneys with excessive caseloads are unaware that their caseloads are excessive. This article proceeds as follows. Part I explores the history of and problems pertaining to excessive indigent defense caseloads in the United States. Part II reviews the indigent defense system within our Texas case study. Part III explains the research design and dataset. In Part IV, we analyze Texas' attorneys' indigent caseloads to ascertain the extent to which individuals are not only "objectively" overburdened, but subjectively recognize such problems exist. Part V reviews these findings and offers insights into how this data might inform policymaking in Texas, and, more broadly, other states' efforts to deliver quality legal representation to the poor.

# I. BACKGROUND: THE ORIGINS OF EXCESSIVE INDIGENT CASELOADS

The issue of excessive indigent defense caseloads in America may – somewhat ironically – be traced back to the Supreme Court's decision in *Gideon v. Wainwright*.<sup>9</sup> Prior to *Gideon*, prevailing case law did not explicitly require states to appoint counsel for a defendant accused of a felony in a state court.<sup>10</sup> In the case of Clarence Gideon, however, the Supreme Court ruled that the Sixth Amendment's guarantee of legal counsel was essential to the right to a fair trial, overturning the conclusion reached by the court in *Betts v. Brady*. Drawing on the Due Process Clause's protections against arbitrary denial of liberty, the Court ruled that access to an attorney was a fundamental right of individuals accused of a crime – irrespective of their ability to pay for such legal counsel.<sup>11</sup>

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<sup>9</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963). While *Gideon* is a convenient point of departure, as it mandated that states provide indigent defense in felony cases, the concept of indigent defense, and, indeed, excessive caseloads, predates *Gideon*. 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 (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.).

<sup>10</sup> See: *Betts v. Brady*, 316 U.S. 455 (1942)

<sup>11</sup> 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. Burkhardt, 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, Jan.-Feb. 2006, at 38 ("When you reflect on the

The *Gideon* decision was a significant step in restoring constitutional rights to the accused, yet it ultimately saddled states with an unfunded mandate and little guidance regarding implementation.<sup>12</sup> While Justice Black wrote that “reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,” the Court neglected to comment further on two important implications of this opinion. It neither explained how indigent defense should be funded within state and local jurisdictions, nor had the foresight to consider whether resource constraints at the state level would lead to caseload volume problems that would, in turn, undercut fair representation.<sup>13</sup> The unintended result was an underfunded and understaffed system of indigent defense across the United States, which did not resemble many of the lofty ideals that formed the backbone of the Court’s reasoning in the *Gideon* decision.<sup>14</sup> Without sufficient resources, local jurisdictions are often faced with an unenviable series of tradeoffs, bartering attorney compensation against support staff, investigators, and other administrators needed to navigate complex legal systems.<sup>15</sup> For example, attorneys representing indigent clients often do not have the excess time needed to find and interview witnesses, obtain, much less analyze witness testimony, consult with experts, dig into extant case law, or even keep in close contact with clients.<sup>16</sup> Simply put, as the number of cases increase, the amount of time with which an attorney has to perform the necessary features of their job dwindles markedly. The end result is that an overburdened attorney effectively neglects some cases at the expense of prioritizing others.<sup>17</sup>

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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.”).

<sup>12</sup> See Chemerinsky, 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.”);

<sup>13</sup> *Supra* note 9.

<sup>14</sup> The Spangenberg Group, State Indigent Defense Commissions (2006).

<sup>15</sup> 2. The Constitution Project, Nat’l Right to Counsel Comm., Justice Denied: American’s Continuing Neglect of our Constitutional Right to Counsel, 50 (2009), available at <http://www.constitutionproject.org/manage/file/139.pdf>. The scope of the funding problem has been a perennial problem. As far back as 2009, the predicament has been labelled a “funding emergency” (59-60). See also William Glaberson, Cuts Could Stall Sluggish Courts at Every Turn, N.Y. TIMES, May 16, 2011, at A1 (which noted that “29 state court systems are experiencing budget reductions this year, with at least five – Georgia, Maine, Nevada, Oklahoma and Oregon-seeing reductions of 10 percent or more”).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

These resource constraints bedevil the quality of both public defender and private assigned counsel representation. While the former face institutional resource barriers that handcuff their effectiveness, the latter are forced to reckon with compensation rates that are often egregiously low.<sup>18</sup> Not only has this lead to some counsel refusing to accept court appointments – which could systematically bias against the assignment of experienced and talented attorneys – but it decreases the likelihood that attorneys who are assigned to indigent cases will perform work beyond the number of hours that correspond to the fixed wages they earn.<sup>19</sup> Perhaps worse, it incentivizes, if not normalizes, attorneys to take on more cases than they could be reasonably expected to defend to meet their bottom line.<sup>20</sup>

Remedying this problem has not been easy. In 1973, the federal government created the National Advisory Commission on Criminal Justice Standards and Goals (NAC), which set recommendations advocating for annual maximum caseloads. Yet, as noted both in the commentary accompanying the NAC's report and first-hand accounts of those meetings, those "standards" hardly represented empirically-guided recommendations. As one observer alleged, the "committee arrived at its caseload numbers during conversation, not as the result of empirical study of any sort."<sup>21</sup> Given some of these shortcomings, workload studies have increasingly been used to understand the staffing needs of public defender offices and to combat excessive caseloads.<sup>22</sup> By leveraging defense attorney estimates of the time spent on casework, policymakers are able to construct informed recommendations regarding the effort requirements associated with different types of cases.<sup>23</sup> For example, the Delphi method, which involves multiple rounds of experts estimating reasonable caseload sizes and blind evaluation of those assessments, has been used to establish more analytically appropriate

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<sup>18</sup> *Id.*

<sup>19</sup> *Supra* note 14.

<sup>20</sup> *Supra* note 7 and 14.

<sup>21</sup> Dottie Carmichael, Austin Clemens, Heather Caspers, Miner Marchbanks, III, Steve Wood, Guidelines for Indigent Defense Caseloads. A Report for the Texas Indigent Defense Commission, (2015).

<sup>22</sup> At least 16 states have completed such studies. One exemplary example includes the Missouri project; ABA, The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards (2014).

<sup>23</sup> Of course, the downside to such projects is that this captures the time spent on casework rather than the time that *should be spent* on such activities. It also does not grapple with the pervasive biases that color how individual attorneys conceptualize effort, which we return to below.

recommendations that address some of the problems with self-reported assessments characteristic of workload studies.<sup>24</sup>

It is important to note, however, that these studies' recommendations are largely just that: well-intentioned guidelines with no formal legal bite. In fact, while the Supreme Court later established a template for adjudicating ineffective counsel in *Strickland v. Washington*<sup>25</sup> – 1) a defendant must show how an attorney's performance is deficient, and 2) that the performance prejudiced the defendant's outcome – it neglected to codify formal caseload standards, leaving the issue to the states to determine. Further, as noted elsewhere, this focus on attorney performance neglected to address the underlying, institutional problems that exist within the indigent defense systems that employ such attorneys. As Lucas writes "If the attorney's performance is ultimately found objectively unreasonable, the level of resources made available to that lawyer is irrelevant."<sup>26</sup>

Thus, while the aforementioned efforts to set best-practice standards are laudable, there exists a dearth of analysis that actually evaluates the *scope* of the caseload problem. Anecdotal stories certainly exist. Spangenberg and Schwartz describe one defense attorney in New Orleans who represented 400+ clients through a half-year period of time<sup>27</sup>; likewise, in our data, we found multiple attorneys carrying many hundreds of felonies for which no single attorney could reasonably or responsibly defend. Yet, systematic data collection efforts to study attorney caseloads across state systems of indigent defense are rare, in part because the staffing and monetary resources to track such data are intense. What is missing in states without centralized systems of public defense, then, is a comprehensive analysis of the behavior of attorneys to assess the extent to which overburdened attorneys constitute a threat to indigent defendants' constitutional rights.

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<sup>24</sup> Supra note 19 (\*). See also: Gene Rowe & George Wright, "The Delphi Technique As a Forecasting Tool: Issues and Analysis," 15 Int'l J. of Forecasting, 351, 353–375 (1999).

<sup>25</sup> 466 U.S. 668 (1984). See also *United States v. Cronin*, 466 U.S. 648(1984). In *United States v. Cronin* (a companion case to *Strickland*), the Supreme Court emphasized that defense lawyers must provide zealous and meaningful opposition to the prosecution's case, and the accused should have 'counsel acting in the role of advocate.'

<sup>26</sup> Lauren Sudeall Lucas, Reclaiming Equality to Reframe Indigent Defense Reform, Minn. L. Rev. 1197 (2013).

<sup>27</sup> See Robert Spangenberg, Tessa Schwartz, The Indigent Defense Crisis is Chronic: Balanced Allocation of resources is needed to end the constitutional crisis 9 Crim. Just. 13 (1994). The attorney represented 418 clients and had 70 cases pending trial in seven months.

## II. DATA COLLECTION WITHIN TEXAS' INDIGENT DEFENSE SYSTEM

Absent post-*Gideon* guidance, many cash-strapped states turned to their counties to provide funding and oversight for indigent clients' legal counsel.<sup>28</sup> In these cases, counties allocate monies for indigent defense, create individualized guidelines that determine whether a defendant is classified as indigent, and provide legal services to those persons who qualify. This method of attorney assignment has characterized Texas historically, where counties have borne the brunt of indigent defense costs.<sup>29</sup>

In this regard, Texas is no different from New York, California, Florida, or a number of other populous states that have delegated such authority to their counties. Yet Texas is exceptional in three ways that make it an interesting case to study. First, it has the highest number of counties among the 50 states: 254 – which is 95 more counties than the runner-up, Georgia, 150 more than Illinois or Ohio, and almost 200 more than Florida, California, or New York. Not only does the scale of its indigent defense apparatus bedevil efficient communication among primary system actors, but, within counties, local jurisdictions often employ multiple indigent systems. The city of Austin, the seat of Travis County and the state's capital, for example, contains a traditional public defender's office, a managed assigned counsel program (private assigned counsel), and a special mental health public defender's office, among others. This variation in services, coupled with the size of the system as a whole, means that there are far more indigent defense systems in Texas than any other state.

Second, Texas' counties vary tremendously across a variety of socio-demographic and economic features. Counties runs the gamut from Harris County – the nation's third largest – to Loving County, where the population hovers around 100 persons and oil wells outnumber local residents ten to one.<sup>30</sup> While Harris County sees levels of criminal activity characteristic of average urban metros, crime in Loving County is nearly nonexistent. Elsewhere, Texas' shared border with Mexico adds complications not experienced by other peer-states, while its economy's reliance on the oil industry creates pockets of vast wealth in places that would not generally be characteristic of targeted economic development. These features combine to generate differentiated service populations, which, in turns, means that

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<sup>28</sup> Geoffrey T. Burkhardt, How to Leverage Public Defense Workload Studies, 14 OSJ of Crim. Law 404, 405-06 (2017).

<sup>29</sup> For example, in Travis County, indigency is based on a series of qualifications, including the requirement that a defendant's household monthly income should not exceed more than 125% of federal poverty guidelines. For one person, this equates to about \$1,257/month; for two people, \$1,692. These qualifications are specified in the county's Indigent Defense Plan, which the Texas Legislature mandates counties to submit to the Texas Indigent Defense Commission.

<sup>30</sup> <https://www.texasmonthly.com/politics/not-so-loving-county/>

indigent defense system requirements vary greatly. As Texans are fond of saying, one size does not fit all.<sup>31</sup>

Third, while most states' failure to fund and oversee indigent defense is often dismissed as an abdication of responsibility, the situation in Texas is more nuanced. Texas has long been ruled by local control, an idea that draws on preferences for limiting the reach of centralized (often federal) government power.<sup>32</sup> Counties, so goes the logic, are better positioned to understand the needs of their residents, whose needs are objectively differentiated across jurisdictions (as discussed in brief above). Given that the state is geographically and demographically diverse, autonomy at the local level has been a valued principle of self-government throughout Texas' history. That ethos, in turn, has underpinned the historic reliance on, if not deference to, counties for bearing the burden of doling out indigent defense resources.

For decades, these attributes – Texas's size, diversity, and focus on local control – have frustrated data collection efforts, making it difficult to assess whether or not Texas' system of indigent defense was meeting its obligations regarding both constitutional and ethnical representation. But there was a belief, fed largely by anecdotal stories from actors within the system, that indigent defense in Texas was among the worst in the nation:

There is a widespread impression that Texas has one of the least fair and least efficient approaches to indigent defense in the nation. While many might contest this view, it is uncontested that the state of Texas does not conduct the kind of oversight, monitoring or systematic data collection which would enable anyone definitively to refute the claim. Indeed this very lack of information and self-assessment is itself a serious flaw in the Texas approach to indigent defense.<sup>33</sup>

This observation from the landmark report issued by the Texas Appleseed Fair Defense Project in 2000 applies equally to caseload data.<sup>34</sup> While there was suspicion that caseloads were excessive, data fields were barren in that no centralized agency collected or dispersed information that could guide assessments of the indigent defense system, much less inform public policy geared toward ensuring that indigent individuals received fair representation.

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<sup>31</sup> Gary Gibson, <http://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article93336372.html> ("We have seen that one-size-fits-all justice policy does not work.")

<sup>32</sup> James Henson, Joshua Blank, The Demise of Local Control, Texas Monthly <https://www.texasmonthly.com/burka-blog/demise-local-control/>

<sup>33</sup> Texas Appleseed Fair Defense Project, The Fair Defense Report: Analysis of Indigent Defense Practices in Texas, 3 (2000).

<sup>34</sup> *Id.*

The Appleseed Report prompted several changes, chief among them, the 2001 Fair Defense Act (FDA).<sup>35</sup> The FDA served as a landmark piece of legislation that created a blueprint that outlined standards for the distribution of indigent defense funding to local governments. It also created the Texas Indigent Defense Commission (TIDC),<sup>36</sup> charging TIDC with providing financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law.<sup>37</sup>

In the intervening years, the TIDC has collected a variety of data related to indigent defense across the state. One can view data for all 254 counties regarding population, total indigent defense costs, formula grants received from TIDC, discretionary grants received from TIDC, and the cases paid in non-capital felony, misdemeanor, juvenile, appellate, and capital cases.<sup>38</sup> However, while these changes greatly improved the quality of oversight regarding indigent defense, they offered few insights into burning questions about concerns regarding fair representation at the level of attorney observations.

### III. RESEARCH DESIGN: CONSTRUCTING A CASELOAD DATABASE

While these data collection efforts increased financial accountability within Texas' indigent defense systems, they did little to address the question of whether or not Texas attorneys were being assigned reasonable or excessive caseloads. Given ongoing litigation in other states over the nature of fair legal representation in relation to caseload volume, the 83<sup>rd</sup> Texas Legislature passed House Bill 1318, mandating that TIDC undertake a workload study to develop caseload guidelines.<sup>39,40</sup>

<sup>35</sup> Tex. S.B. 7, 77<sup>th</sup> Leg., R.S. (2001).

<sup>36</sup> Originally the Task Force on Indigent Defense.

<sup>37</sup> Sec. 79.002.

<sup>38</sup> <http://tidc.tamu.edu/public.net/>

<sup>39</sup> Tex. H.B. 1318, 83<sup>rd</sup> Leg., R.S. (2013).

<sup>40</sup> See, e.g., Office of the Colo. State Pub. Defender, FY 2013-14 Strategic Plan & Program Evaluation, available at [http://www.colorado.gov/clics/clics2013a/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/bd961d1a895c4dd387257af7007cd76e/\\$FILE/13JtJud0118AttachQ.pdf](http://www.colorado.gov/clics/clics2013a/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/bd961d1a895c4dd387257af7007cd76e/$FILE/13JtJud0118AttachQ.pdf); Nat'l Ctr. for State Courts, Md. Attorney and Staff Workload Assessment (2005), available at [www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Workload%20Assessment/ResWorkLdMDAttyStaffWkLdAs05.ashx](http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Workload%20Assessment/ResWorkLdMDAttyStaffWkLdAs05.ashx); ABA, The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards (2014) [hereinafter The Missouri Project], available at [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/ls\\_scl\\_aid\\_5c\\_the\\_missouri\\_project\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_scl_aid_5c_the_missouri_project_report.authcheckdam.pdf); Elizabeth Neely, Univ. of Neb. Pub. Policy

Fulfilling the obligations outlined in House Bill 1318 required state agencies to assembled unprecedented attorney-level caseload data. Beginning October 15, 2014, attorneys taking court-appointed cases in the preceding fiscal year were required to report the percentage of their practice time dedicated to those cases. Starting November 1, 2014, counties had to report the number of cases assigned and the total amount paid to every attorney taking appointments in each court.

TIDC contracted a large public research institute within Texas to design a web portal where attorneys could report the percentage of their practice time devoted to appointed criminal and juvenile delinquency cases in each county. Counties reported their necessary information in their annual indigent defense expenditure reports, which are tracked by the Texas State Auditor's Office. Since FY 2014, this organization has collected this data from Texas's 254 counties, which includes both the total case volume and compensation of attorneys representing indigent clients. Our analyses leverage this data in its entirety, which include some 37,000 attorney-level observations, for a four-year period ranging from 2014 to 2017.<sup>41</sup>

#### IV. RESULTS: ATTORNEY CASELOADS IN TEXAS

We begin by exploring three facets of the indigent defense system that shape "average" attorney caseloads: the number of indigent cases assigned to attorneys in Texas, the number of attorneys representing indigent clients in a given year, and the inter-county movement of attorneys taking cases. As Table 1 indicates, the reported total case volume has increased from about 470,000 cases in 2014 to roughly 482,000 cases in 2017.<sup>42</sup> This constitutes about a three percent increase in the total number

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Ctr., Lancaster County Public Defender Workload Assessment (2008), available at [lancaster.ne.gov/pdefen/workloadas.pdf](http://lancaster.ne.gov/pdefen/workloadas.pdf).

<sup>41</sup> Unfortunately, while we possess the entire population of attorney-caseload data, Texas does not link case-outcomes to attorneys. Without this additional layer of data, it is not possible for us to analyze whether or not the volume of cases affects "quality," although we point readers interested in this question to other studies like [Michael Roach, Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes, *American Law and Economics Review*, 16 (2014).].

<sup>42</sup> There is some discrepancy between the number of cases reported by TIDC's "IDER" database and the report generated from the State Auditor's office; because the TIDC keeps track of payments to attorneys, their numbers involve cases disposed, whereas the caseload data from the state includes active cases that may be otherwise missing from the IDER given the delay in payment and processing. At any rate, the differences are within one-percent of all cases and do not problematize our descriptive analysis.

of cases assigned to attorneys over this four year period, but is almost 20 percent higher than when aggregate caseload data was first reported in the early 2000s.<sup>43</sup>

While the population of clients served by the indigent system has increased over this period of time, the number of unique attorneys serving indigent defendants has remained fairly static in our caseload data. As Table 1 also shows, the number of attorneys assigned indigent cases statewide peaked in 2015 and has decreased annually in the interim. Bearing in mind that the volume of cases statewide has increased during this same time, this development is troubling insofar as the contraction of the population of attorneys serving indigent clients likely implies that the average caseloads of indigent attorneys has increased as well, as, indeed, Table 1 indicates in the final column. Before turning to changes in average caseloads over time, however, we briefly illustrate one final facet of our attorney-level data that speaks to some of the nuances associated with analyzing attorney caseloads in Texas.

Table 1. Total cases and attorneys serving in the indigent defense system in Texas

	Cases	Attorneys	Avg. Cases/attorney
2014	424,422	5,719	74.21
2015	432,854	5,804	74.58
2016	422,662	5,592	75.58
2017	438,234	5,544	79.05

Notes: Data for total number of cases is available from <http://tidc.tamu.edu/Public.Net>. Data for number of attorneys serving indigent clients was derived from data supplied by state auditor and is also available from the TIDC's website.

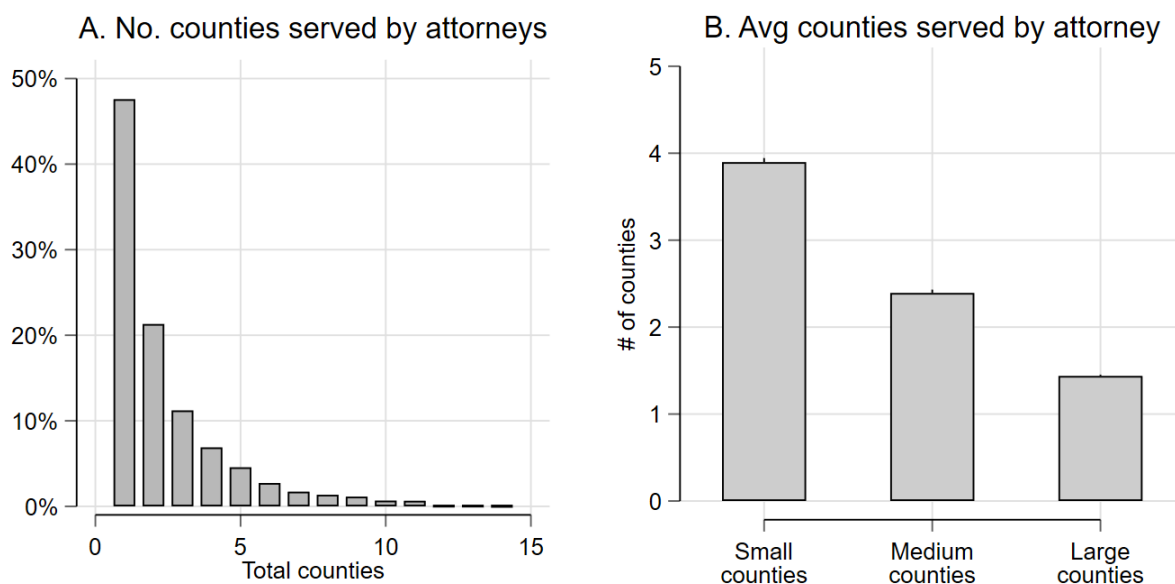
In Panel A in Figure 1, we graph the reported number of counties in which attorneys practice, which involves summing across the counties in which attorneys reported taking cases. Within our four-year window of data, a plurality of attorneys were assigned cases in only one county. However, there is modest variation in the number of counties served among the roughly 50% represent of attorneys

<sup>43</sup> The increase in case volume is grounded in the expansion of Texas's indigent defense systems to account of population growth. After the passage of the Fair Defense Act in 2001, statewide investment in access to and the quality of indigent defense increased substantially.<sup>43</sup> Total investment in the system has increased from about \$91 million in 2001 to \$265 million in 2017.

who represented defendants in multiple counties. More than 30% of attorneys, for example, were assigned cases in three or more counties. And, while a small proportion of attorneys overall, some attorneys defended cases in an excess of 10 counties.

Panel B illustrates the average number of counties in which attorneys took cases by county size. Here, small counties correspond to those jurisdictions with less than 50,000 residents, medium counties to 50,000 to 250,000 persons, and large counties with populations in excess of 250,000 residents. As we might expect, Panel B confirms that many of the attorneys assigned cases in multiple county jurisdictions practice in smaller, usually rural counties, while individuals taking cases in few counties do so in larger, often urban environments.

Figure 1. The distribution of counties served by individual attorneys



Notes: Panel A pools all unique attorney observations and plots the total number of counties served by attorneys. Average number of counties served is calculated by summing the number of counties within which attorneys practice and then dividing by the total number of attorneys. These estimates exclude juvenile cases for reasons which we outline below. County trichotomy is defined as follows: small counties contain less than 50,000 residents, medium counties between 50,000 and 250,000 residents, and large counties more than 250,000 residents.

To get a sense of the scope of attorney caseloads throughout Texas, Figure 2 portrays caseload averages among attorneys at the county level, excluding juvenile cases.<sup>44</sup> Here, we separate attorneys who are classified as non-public defenders (*e.g.*, assigned counsel, contract counsel) from public defenders.<sup>45</sup> We also break down non-public defender caseloads by the size of the county in which attorneys serve. In effect, this distinction allows us to parse caseload averages in rural counties from those in urban ones. According to the first of three panels at the top of Figure 2, the average caseload of attorneys in Texas is quite modest – roughly 79 cases per attorney in 2017. Aggregating public defender and non-public defender cases does obscure modest differences in average caseloads across these forms of counsel, however. In the second and third panels, it is clear that public defenders retain higher caseloads than their non-public defender peers.

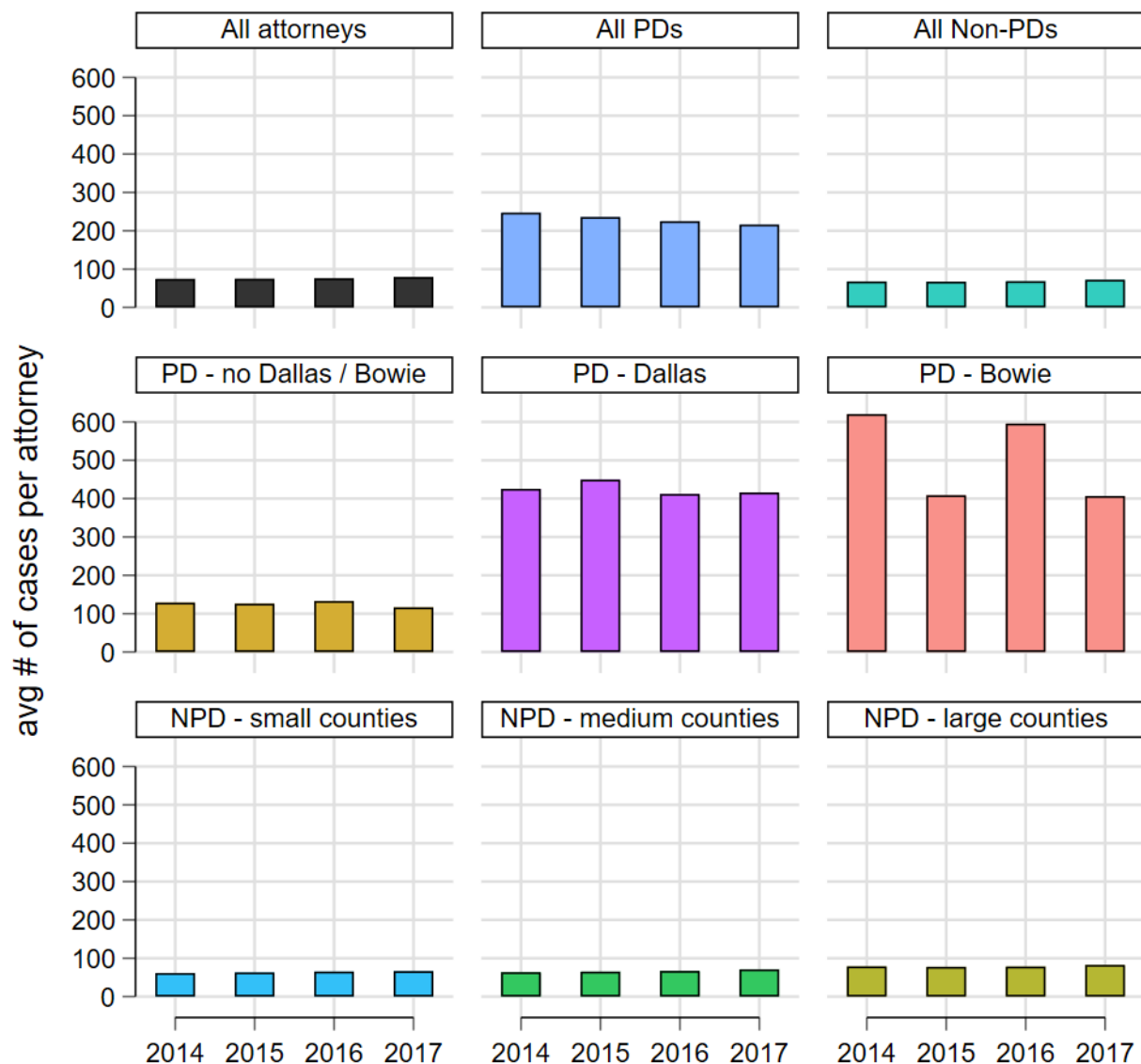
Turning to the fourth, fifth, and sixth panels in Figure 2, we also break down public defender caseloads throughout the state in different ways. Because we found that public defenders in Dallas and Bowie counties carried substantially higher-than-average caseloads than other public defense offices, we have separated those county-specific average caseloads from the rest of the public defense ecosystem (panel 4). Excluding those two counties, we find that public defenders in Texas carry caseloads roughly 60% higher than assigned counsel attorneys (116 cases per attorney vs. 72 cases per attorney). However, these differences are magnified when we look at the two public defender offices carrying the highest per-attorney caseloads in the state. In both the Dallas County and the Bowie Regional Public Defenders' Offices, the average number of cases taken by attorneys is well over 400 cases per attorney per year – almost five times the average non-public defender caseload over this period of time.

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<sup>44</sup> Throughout the following analyses, we exclude juvenile and juvenile appeals cases from analysis. Juvenile cases are peculiar in that detention hearings count as “cases,” yet these are poor substantive matches to “traditional” types of cases like misdemeanors or felonies, which are more involved across a variety of dimensions regarding practice requirements. Juvenile cases constitute about one-tenth of all cases in any given fiscal year, and are represented by a fairly limited pool of attorneys. When these cases are included in our various effort estimates, the extent to which attorneys appear overburdened is slightly more pronounced.

<sup>45</sup> In the dataset, this involves earmarking attorneys who took cases, but whose total payment is “0” dollars. For accounting purposes, public defender payments are separated from assigned counsel payments, which allows us to make these distinctions.

Figure 2. Average caseloads for attorneys working with indigent clients over time



Notes: Average caseloads are calculated by summing all cases in a given county and dividing by the number of attorneys in that county. As such, the averages reported here are average within-county caseloads across respective counties in group, in given fiscal year.

Given that non-public defender cases vastly outnumber public defender cases, we assess one final breakdown of this data to see if differences exist among urban and rural populations in small and large counties (final row of panels). Here, attorneys serving indigent clients in smaller counties tend to defend smaller caseloads than those attorneys serving in larger counties—a finding likely due to both geographic constraints and demographic considerations tied to contextual features of urban city

centers. However, the differences observed here in average caseload size across counties are not stark. On balance, average attorney caseloads in larger counties are only about 14 cases per attorney more than average caseloads in smaller counties. Further, matching our suspicion that a slight decrease in the number of total attorneys serving statewide has nominally increased average caseloads among attorneys, we see a slight increase in the average number of cases assigned in 2017 relative to 2014.

*Weighted caseload estimates: Understanding variation in caseloads*

To the extent that average caseloads possibly conceal wild differences in the *distribution* of cases among attorneys, we turn next to constructing a more uniform, standardized metric of caseload size that will allow for comparisons across attorneys and case types. In fact, while average caseloads tell us something about the raw scope of an attorney's effort, they obscure important differences regarding the investment in time and resources associated with different types of cases. Discovery, investigation, and trial preparation, for example, are significantly more time intensive for felonies than they are for misdemeanors; appellate cases, in turn, are often more complicated than run-of-the-mill felony trial cases. To get some sense of the "objective" amount of effort that attorneys spend defending cases, which facilitates comparisons of effort across attorneys and comparisons of caseload size across counties, we require a method that "weights" or standardizes attorneys' labors.

We settle on the use of full-time equivalencies, or FTEs. Used by organizations ranging from government bureaucracies to private firms, FTEs are a way of thinking about what constitutes a "normal" workload that allows for comparisons across individuals and organizational contexts.<sup>46</sup> For our purposes, we draw on a recent multimethod evaluation of attorney caseloads in the state of Texas that established a template for calculating the maximum advisable volume of cases to which attorneys ought to be assigned.<sup>47</sup> To arrive at the caseload estimates presented in Table 2, researchers used a three-part methodology. First, they leveraged the reported activity of 196 Texas criminal defense attorneys to assess what sort of time was actually being spent on trial-level appointed cases. These data were used as a baseline to assess what sorts of adjustments were necessary to supplement expert evaluations of caseload size. The results of that self-reported time-keeping study were then tabulated and circulated among public and private-practice defense attorneys in Texas to assess the extent to which the initial reported effort was reasonable. Finally, using an evaluation technique known as the Delphi Process, a group of attorneys participated in a three-round process whereby they: 1)

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<sup>46</sup> The 2,087-hour work week is taken from the US Government's Federal civilian employee full-time pay computation, available online at: <http://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/>.

<sup>47</sup> Supra note 15, Hereafter, "WCL."

anonymously identified the appropriate maximum volume of cases for a variety of different case types, 2) reconciled their estimates with those of their peers by reviewing descriptive summary data derived from the sample of participants' estimates, and 3) met to discuss and reach consensus regarding the final caseload guidelines.

Table 2. Maximum cases equivalent to 1.0 FTE

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Misdemeanor:	226 cases / year
Felony:	128 cases / year
Appellate:	31.2 cases/ year

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Notes: FTE calculations exclude juvenile cases. Guidelines were derived from *Guidelines for Indigent Defense Caseloads* (Carmichael et al. 2015). An FTE score is calculated by: 1) taking the number of cases assigned to an attorney in each case type and dividing that total by the respective maximum number of cases equivalent to 1.0 FTE listed above; and, 2) by summing the resulting case-specific FTEs together. The remaining value encompasses the "total" effort of an attorney's caseload.

Table 2 outlines the recommended maximum caseload that is equivalent to full-time effort as defined by this comprehensive process.<sup>48</sup> Importantly, such equivalencies are *weighted* by the type of case due to fundamental differences among the responsibilities and requirements that are unique to felonies, misdemeanors and appellate cases. To operationalize the FTE status of an attorney assigned to indigent cases, we first divide the number of assigned cases by the maximum recommended number of cases associated with that case type. We then sum together all case-specific FTEs in order to establish the full body of effort across all case types. For example, if an attorney was assigned 226 misdemeanor cases in a given fiscal year, then that attorney would be at 1.0 FTE *before taking any other cases*. Thus, if this attorney took all 226 misdemeanor cases and added to that 31.2 appellate cases, then they would be defending the equivalent of 2.0 FTEs. Or, consider that if an attorney was assigned 113 misdemeanors, then this would be equivalent to roughly 0.50 FTEs; if that attorney also

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<sup>48</sup> As noted above, juvenile cases have been excluded from analysis for substantive reasons, but also because the WCL did not provide formal guidelines for these cases, we do not utilize juvenile cases in our estimates.

took 64 felony cases, then that would be another 0.50 FTEs; summing the respective FTEs together results in a total of 1.0 FTE or the equivalent of a full-time effort.

Because Texas' system of indigent defense is a decentralized one, an attorney may take any number of cases across different counties without restriction (per Figure 2). This feature of the way that cases are assigned has important ramifications for how we think about the nature of FTEs and whether or not counties themselves bear any responsibility for assigning cases to overburdened attorneys. If the volume of cases assigned to an attorney within a given jurisdiction (county) does not approximate the total volume of cases that attorneys take *across* a number of counties, then it may be the case that part of the reason that attorneys defend too many indigent clients involves counties' lack of awareness regarding the totality of attorneys' efforts. Thus, the potential for attorneys to defends cases *across* counties demands that we account for an attorney's entire, statewide caseload, lest reported workloads *within* counties are mistakenly evaluated.

An example helps to illustrate this point. In Table 2, we describe an attorney from our dataset who represents a large multi-county caseload. This example depicts how effort varies within and across counties, and how those different "caseloads" affect FTE status across all counties in which cases are assigned. Note that in this example, the total number of cases taken in any given county never exceeds 89 cases. At first glance, nothing about that volume of cases seems amiss based on the guidelines outlined in Table 2. However, across all of the counties in which this attorney serves, they are assigned 210 cases. Because those 210 cases include a variety of different case types, the likelihood that that attorney is objectively overburdened according to our FTE calculations is high. Whereas the within-county FTE never exceeds 0.55 – which might not concern stakeholders or judges within any given county in which this attorney is assigned cases – the FTE score calculated in the final column conveys that the attorney is actually 30% over 1.0 FTE.

Thus, how we conceptualize the behavior of attorneys matters. If counties are unaware of the cross-county caseloads of attorneys operating within their jurisdictions, then it is unlikely that they are aware of whether or not they are assigning cases to already-overburdened attorneys. Indeed, given that counties do not generally have access to this information from other jurisdictions, there is no way to remediate this problem given the current reporting mechanisms. Effectively, then, this shifts the burden of caseload management from the county, which has plausible deniability regarding the assignment of cases in jurisdictions outside of their own county, to the attorneys, who should be responsible for understanding the volume of their statewide efforts. Yet, as we will show momentarily, it is rare that objectively-overburdened attorneys actually perceive that the volume of their own caseloads violates expectations regarding ethical representation.

Table 3. Distribution of cases for attorney with large, multi-county caseload

County	Felony	Misd	Felony appeals	Misd appeals	Total cases in county	Total cases across all counties	FTE within county	FTE accounting for cases across all counties
1	47	42	0	0	89	210	0.55	1.30
2	0	6	0	0	6	210	0.03	1.30
3	1	0	0	0	1	210	0.01	1.30
4	4	4	0	0	8	210	0.05	1.30
5	2	3	0	0	5	210	0.03	1.30
6	0	7	0	0	7	210	0.03	1.30
7	6	3	0	0	9	210	0.06	1.30
8	33	21	0	0	54	210	0.35	1.30
9	1	0	0	0	1	210	0.01	1.30
10	14	15	0	0	29	210	0.18	1.30
11	1	0	0	0	1	210	0.01	1.30

Notes: Data presented in table reflect one actual attorney caseload and have been de-identified, accordingly. Juvenile and juvenile appeals cases are excluded in FTE calculations.

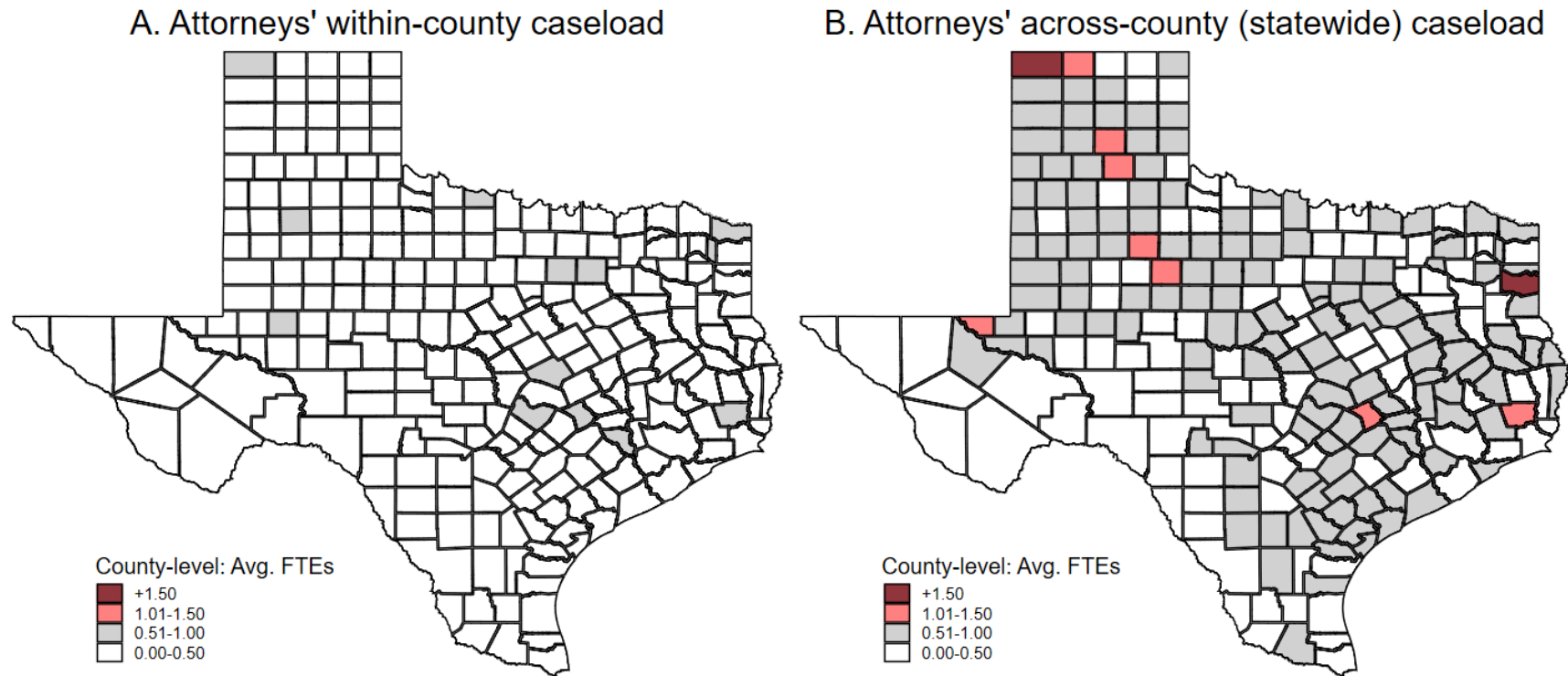
As we noted previously, in Texas, the financial and institutional burdens of indigent defense fall almost wholly on counties. As such, it would be useful to understand whether or not attorneys practicing within counties are meeting their obligations to clients in light of the FTE guidelines that we have outlined above. Drawing on our sense that attorneys' within and across-county behavior likely paints very different portraits of effort, we construct two separate FTE measures: 1) a within-county FTE measure, that accounts only for the cases assigned to an attorney in any given county, which constitutes the type of data that counties would readily have at their disposal, and 2) an FTE measure that accounts for an individual attorney's total, statewide caseload.

After calculating *attorney* FTEs, we then construct average FTE scores for each of the 254 counties in Texas. To operationalize this county-level metric, we first sum together the FTEs of all attorneys serving in a given county and divide those FTEs by the number of attorneys practicing within that county. Where average FTEs overshoot the 1.0 FTE threshold, then counties are, perhaps inadvertently, assigning cases to attorneys who are overburdened.

Panel A in Figure 3 plots counties' average FTE scores accounting only for attorney-cases within the associated county. Here, variation in coloration conveys the range of average FTEs of all attorneys taking cases in a given county. Counties with attorneys serving indigent clients that average below 0.50 FTEs are shaded light grey. Those counties that average between 0.50 and 1.00 FTEs are shaded darker grey. Counties shaded in grey, then, ostensibly assign manageable caseloads to their attorneys. Pink counties convey that the average FTE of a county's attorneys are over 1.00 FTE, while counties shaded dark red convey that a county's average FTE for its attorneys is over 1.5 FTEs, or roughly 50 percent higher than the recommended caseload guidelines.

In keeping with our distinction between within- and across-county caseloads, Panel A in Figure 3 illustrates that average caseloads *within* counties never exceed the 1.0 FTE threshold. In fact, the within-county average FTE rarely approaches the equivalent of "half-time" work efforts. However, after taking into account an attorney's total statewide caseload, Panel B illustrates stark changes in the average FTEs of attorneys within the same counties. In this case, we not only find that eight counties now average more than 1.0 FTE across all attorneys, but that the number of counties in the 0.50-1.00 FTE range increase dramatically. On balance, two conclusions seem warranted. First, it appears that counties do a reasonable job in ensuring that the assignment of cases to attorneys are distributed equally insofar as few counties have average FTEs beyond 1.0. Second, it is obvious that any accurate portrait of caseload estimates ought to include the full volume of an attorney's cases statewide.

Figure 3. Average county-level FTEs of attorneys serving indigent clients in Texas during FY2017



Notes: Estimates convey average of FTEs among all attorneys taking indigent cases in a given county. FTE counts exclude juvenile cases.

However, while it is encouraging to note that average FTEs are below the recommended thresholds for the overwhelming majority of Texas' 254 counties, these averages do not necessarily imply that case assignment practices are healthy. Indeed, averages often conceal values at the extremes that could, in this case, be extremely problematic. Moving beyond average FTEs, we pivot to a presentation of the proportion of attorneys within a given county that carry caseloads in excess of 1.0 FTEs. Returning to the attorney-level, we calculate the proportion of attorneys in a given county whose caseloads exceed the 1.0 FTE mark. Importantly, we again present the resulting estimates in two ways in Figure 4. Whereas Panel A presents the proportion of attorneys over 1.0 FTE accounting only for attorney caseloads within a given county, Panel B, alternatively, illustrates the proportion of attorneys in a given county over 1.0 FTE once we account for those attorneys' full statewide caseloads.

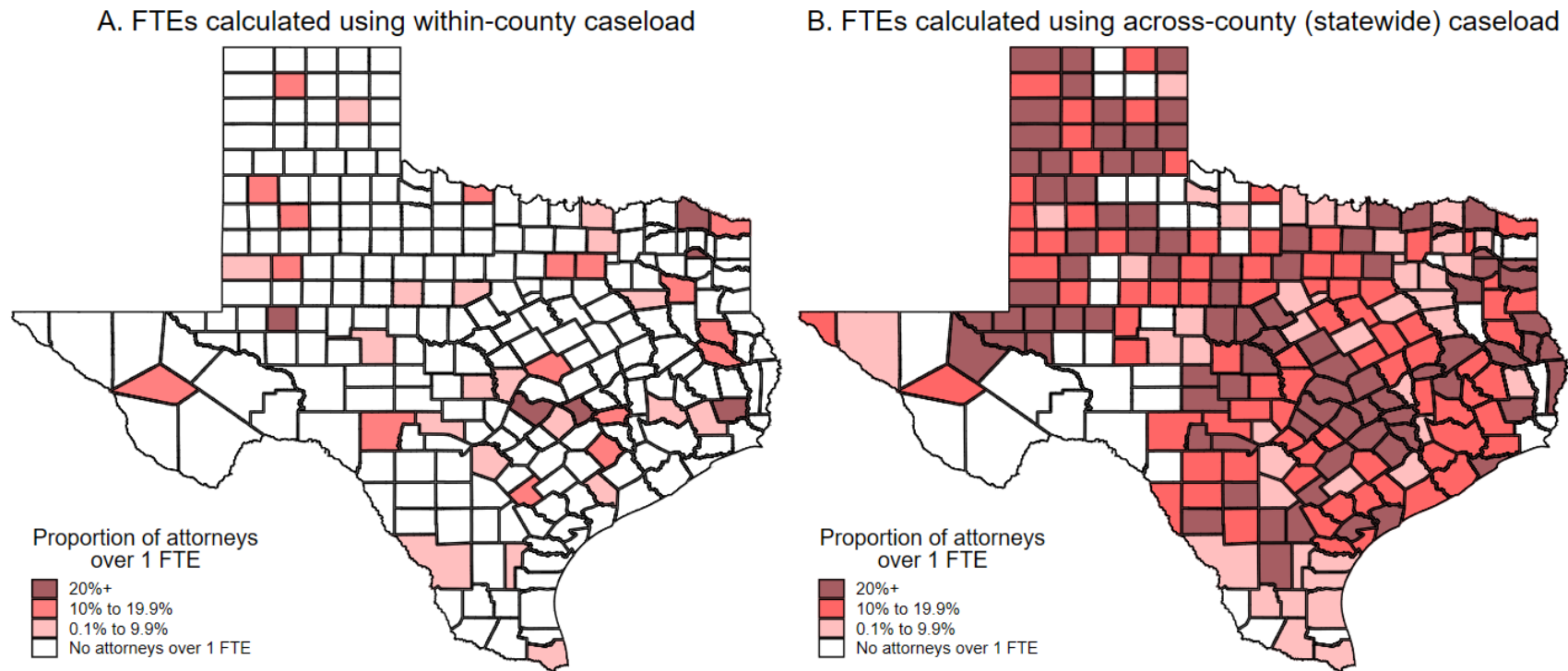
In Panel A, we find some evidence that counties employ a modest number of attorneys whose caseloads within that county are above 1.0 FTEs. Among counties with average FTEs well below the 1.0 threshold (per Figure 3), there are about 40 counties in which at least some attorneys are over the 1.0 FTE threshold. Further, in at least six counties, more than 20 percent of all attorneys actually carry a caseload above the 1.0 FTE threshold within that county.

What happens when we loosen the restrictions on the calculation of within-county FTEs and account instead for the total statewide caseload of the attorneys? Panel B in Figure 5 does just this, and the results are stark. When we account for the full body of cases that attorneys represent across the state, the proportion of attorneys within counties who carry caseloads that are designated as objectively overloaded increases dramatically. We find that, in more than 170 of the 254 counties in Texas, attorneys with caseloads above the recommended FTE guidelines comprise more than 10 percent of all attorneys taking indigent cases in those respective counties. Perhaps more troubling, in more than 30% of counties, we find that attorneys over 1 FTE comprise greater than 20% of all attorneys assigned indigent cases.<sup>49</sup>

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<sup>49</sup> It is unlikely that "a few bad apples" dominate these estimates, given how widely these results are dispersed across the state. Geographic constraints often limit attorneys to an immediate, 100-mile radius, and there are a significant number of counties statewide that assign cases to overloaded attorneys that cannot be explained by the behavior of a few, centrally-located attorneys.

Figure 4. Within- and across-county differences in proportion of overburdened attorneys serving indigent clients in FY2017



Notes: Left panel utilizes appointed caseloads from within a given county, while right panel allows caseloads to encompass all cases that attorneys take statewide. This latter strategy suggests that, unless counties understand the totality of appointed caseloads, the proportion of attorneys over 1 FTE increase dramatically. The proportion of counties with no attorneys over 1 FTE is roughly 15% ( $n = 37$ ); the proportion of counties with under 10% of attorneys over 1 FTE is 17% ( $n = 44$ ); the proportion of counties with between 10% and 20% of attorneys over 1 FTE is 35% ( $n = 88$ ); finally, the proportion of counties with more than 20% of attorneys over 1 FTE is 33% ( $n = 85$ ). Data are drawn from 2017.

In light of these findings, it would appear that for decentralized systems of indigent defense that assign cases independently at the county level, it is absolutely essential for concerned stakeholders to consider the full volume of an attorney's work across counties. Not assessing the total statewide caseload of an attorney conveys an inaccurate portrait of the effort of individual attorneys, which can result in judges assigning cases to attorneys who are otherwise overburdened. This is not to imply that judges are inappropriately assigning cases, per se, but, rather, that counties may not have a robust or informed understanding of the extent to which attorneys are committed across counties. Indeed, given the technology silos that exist within decentralized bureaucracies, it is difficult to expect counties to grasp the full docket of cases carried by individual attorneys. Further, given the lack of any legal restrictions on the actual volume of cases assigned to attorneys, this matter is almost entirely one of self-policing. Attorneys can accept or decline cases, but counties have no formalized set of restrictions on caseload volume guidelines.

*The scope of the problem and lack of awareness*

If many counties assign cases to overburdened attorneys, then how prevalent is this problem for Texas' indigent system in the aggregate? We have shown graphically that attorneys in many counties across Texas have caseloads that exceed the recommended guidelines, but this data does not speak to the total number of cases that might be affected by attorneys over the 1.0 FTE threshold. Figure 5 portrays the proportion of cases assigned to attorneys over 1.0 FTE annually. From 2014 to 2017, *more than 40% of all cases annually were defended by an attorney who is statistically over standard, full-time equivalencies*. In other words, although the average FTE of attorneys is well below 1.0 FTE, more than 200,000 cases annually are assigned to attorneys who possess caseloads that exceed the limits of what prior research conveys is reasonable.

While these findings imply that attorney caseloads in Texas are higher than best-practice standards, it is unclear if attorneys realize whether they are contributing to this problem. After all, if caseload volume is left to attorney discretion, then we might explore whether these caseload metrics match the sort of effort that attorneys *think* they are giving. Put another way, do attorneys understand their own efforts in ways that match the "objective" standards for what that effort entails?

Figure 5. Distribution of cases represented by attorney over 1.0 FTE



Notes: FTE status accounts for attorneys' total statewide caseload. FTE calculations and total cases presented here exclude juvenile cases.

As part of the reporting procedure regarding the cases for which they are paid, attorneys representing criminal cases were asked to self-report the perceived effort of their indigent defense caseload in an online portal. Although attorneys do not report the percent of time spent on cases taken outside of the indigent defense system, they nevertheless still report the percent of time spent specifically on their indigent cases. As such, it is possible for us to compare attorneys' self-reported conceptualization of effort with their objective FTE score.

Figure 6 illustrates the distribution of the difference between the objective FTE calculated for each attorney minus the self-report effort that attorneys reported. We begin with a caveat. To our surprise, roughly 44 percent of all attorneys *do not self-report the time spent defending indigent cases*. This makes the following analysis somewhat less representative of the total population of attorneys taking indigent cases insofar as there may be systematic reasons for which certain attorneys do not self-report their effort (e.g. attorneys who know they are well over the FTE guidelines may not report

their effort, etc.). Still, as it relates to our general point that something is amiss regarding perceived effort, this dearth of data is concerning because it cuts against the oversight purposes of such reports.

To generate the difference between perceived and objective caseload effort, we take the FTE score that we calculated in the section above and subtract from it the percent of effort that attorneys report. In theory, 1.0 FTE of objective work ought to translate to attorneys reporting 100 percent effort. As we will see, however, this is rarely the case – roughly half of all attorneys who self-reported effort perceive that they are committing less effort to their caseload than we calculate “objectively.”

Figure 6 presents a series of histograms that distribute attorney-level observations along the x-axis. In Panel A, the x-axis denotes mismatches between perceived and objective effort. Negative values convey that attorneys reported that they were committing more time to their cases than was required by the FTE guidelines. All attorney observations to the left of the 0 threshold do not represent a problem because none of those observations include attorneys over 1.0 FTE, which would have required attorneys to admit that their indigent caseloads were over 100% effort.<sup>50</sup> However, attorneys to the right of the 0 threshold (positive responses) conveyed that their effort undershot the objective caseload estimates for their body of work. Each integer on the x-axis represents 100% effort. If an attorney scored a “-1,” then they reported spending roughly 100% more time than was required to minimally to satisfy the objective calculated effort for that configuration of cases. Relatedly, if an attorney scored “+1,” then they under-estimated the effort required to represent their given configuration of cases by 100%. All observations in the red, shaded area of Panel A in Figure 6 represent a problematic disconnect between objective and perceived effort. Given that the range of estimates spans all the way through 500%, we conclude that some attorneys truly do not understand just how egregious their current caseload volumes are.<sup>51</sup>

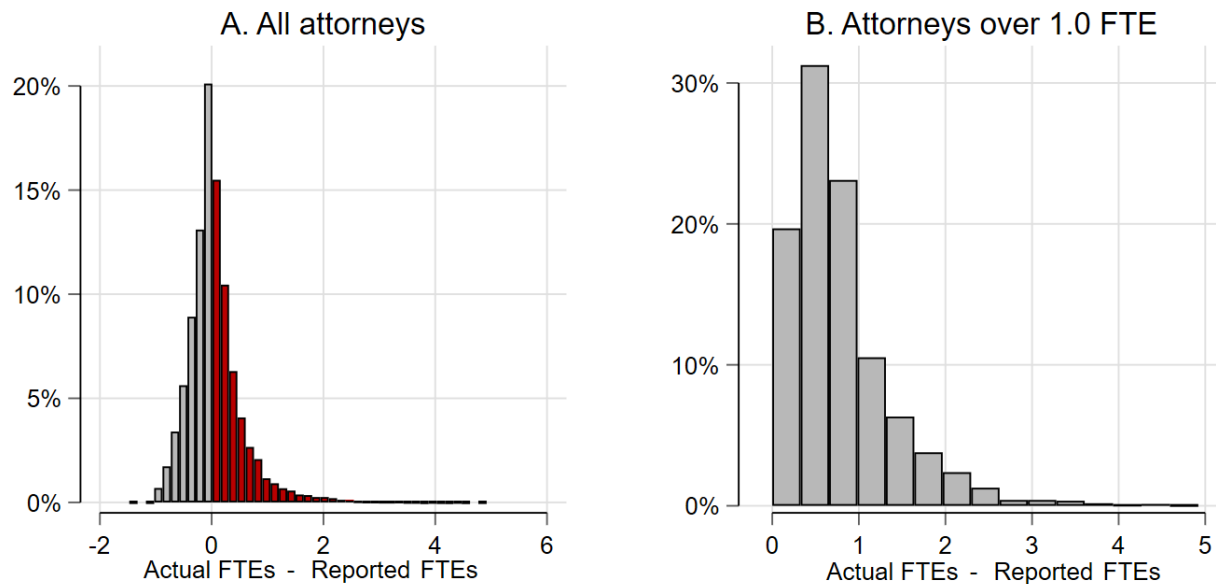
While Panel A illustrates the breadth of the disconnect between perceived and actual FTEs, Panel B illustrates such differences for attorneys that a) self-reported effort, and b) were objectively over 1.0 FTE. In effect, more than 60% of all attorneys who carried higher-than-recommended caseloads do not realize that they exceed the recommended caseload effort by almost 50%. Further, almost 20% of these overburdened attorneys do not recognize that their objective caseload effort is more than 100% of their perceived workload. Thus, not only is this disconnect widespread, but the severity of the problem is acute.

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<sup>50</sup> Two attorneys reported 700% and 750% effort, respectively, but it is clear from their caseload volume – the attorneys defended 107 and 154 cases, which comprised misdemeanor and felony cases – that this was a mistaken entry for 70% and 75%, respectively. Outside of those two outliers, no one else reported above 100% effort – itself an interesting observation.

<sup>51</sup> For example, an attorney who reports 50 percent effort but actually carries 2 FTEs would score 1.5 on the x-axis.

Figure 6. Difference between self-reported and calculated FTEs



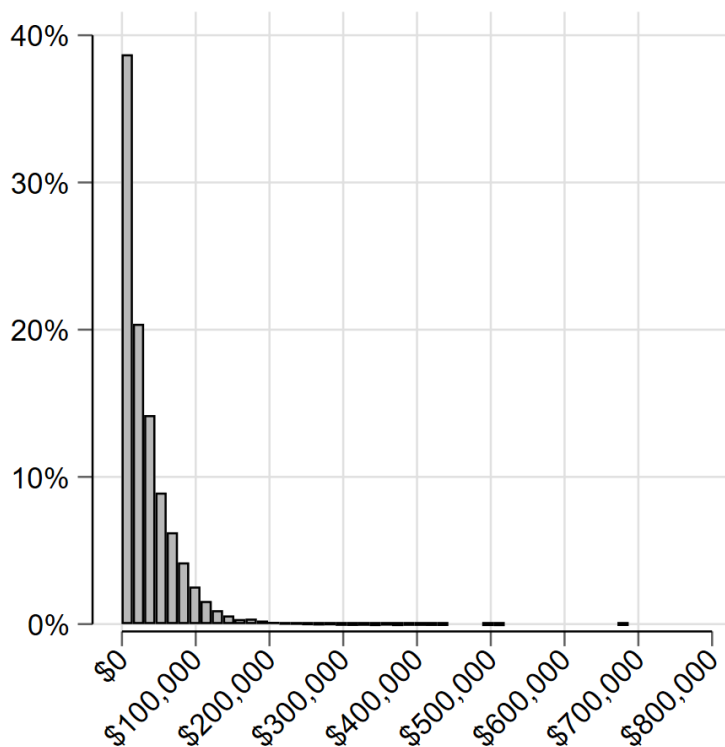
Notes: Estimates do not include all attorneys in dataset because not all attorneys self-report perceived effort. Data in Panel A includes all observations for which we have non-missing data from period 2014 to 2017 ( $n = 13,710$ ), which represents about 50% of all attorney observations. Data in Panel B represents roughly 75% of all attorneys over 1.0 FTE ( $n = 2,033$ ).

Undoubtedly, part of the problem with the disconnect between perceived and actual effort regards the issue of attorney compensation. To be blunt, the modal attorney taking indigent cases is not getting rich, and, if anything, is severely under-compensated. Figure 7 illustrates that 95% of attorneys taking indigent cases were paid \$100,000 or less annually. Individuals who were paid more were almost uniformly likely to have defended either a) a high volume of non-capital murder felonies or, b) a number of expensive capital murder cases. At the individual attorney level, in 2017, attorneys made roughly \$237/case for misdemeanors and \$588/case for felonies. At Delphi-recommended hours-per-case standards, this is equivalent to hourly rates of \$18/hour and \$37/hour for misdemeanor and felony cases, respectively. Considering that the Texas Bar Association's compilation of median hourly rates for criminal defense attorneys exceed \$150/hour for private practice counsel, these estimates reflect poor compensation.<sup>52</sup> As such, it is hardly surprising that attorneys might be incentivized to

<sup>52</sup> State Bar of Texas. Department of Research and Analysis: 2015 Hourly Fact Sheet. url: [https://www.texasbar.com/AM/Template.cfm?Section=Demographic\\_and\\_Economic\\_Trends&Template=/CM/ContentDisplay.cfm&ContentID=34182](https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=34182)

take on more cases in order to increase their earning capacity. In effect, such an arrangement in a system that utilizes assigned-counsel indigent defense incentivizes over-work. It is difficult to expect attorneys to follow recommended caseload guidelines while so severely under-compensating them. Simply put, no rational actor is going to conform to this arrangement under such zero-sum terms. To codify strict caseload limitations would be laudable, but the solution is not inexpensive because pay rates would have to rise in order to avoid hemorrhaging attorneys to the private sector (which would, in turn, further increase average caseloads).

Figure 7. Distribution of attorney compensation in Texas, FY2014-2017



Notes: Estimates comprise attorney compensation across all cases in given fiscal year.  
Data comprises FY2014-2017.

## V. CONCLUSIONS: ATTORNEY CASELOADS IN TEXAS

This manuscript began by outlining the ways in which judicial decisions helped produce a needed, though unfunded mandate to improve access to legal defense among poor citizens. In the process, these events inadvertently sentenced attorneys to increasingly demanding workloads given static fiscal commitments to funding this defense. Not until 2001 did Texas take issues of access to legal representation seriously, and, only lately, has it begun to wrestle with the extent of its underlying problems. We highlight a number of important findings that should contribute to discussions regarding reforming this system. While the average county in Texas employs many attorneys who take defensible numbers of indigent clients, a modest proportion of attorneys retain high-volume caseloads. This culminates in some 40% of cases being represented by attorneys who are statistically over the recommended full time equivalences related to best practice standards. While troubling, it is perhaps even more worrisome that we observe that many attorneys are either completely unaware of the sheer volume of their dockets or, perhaps worse, ignore volume-based recommendations.

This work offers value for involved in the indigent defense system. First, our findings convey to policymakers the extent to which scarce public resources are being stretched. In a state like Texas, where the delivery of indigent defense services occurs primarily at the county level, it is unlikely that lawmakers from rural, less populous counties grasp the difficulties faced by counties in dense, urban jurisdictions. Yet, they each face their own related problems. In neither context are the prevailing systems of indigent defense sufficient to adequately deal with the pressing demands of too many cases and an insufficient pool of attorneys. This argument may sound unsettling to the ears of legislators who worry that spending within Texas' indigent defense system have increased since the passage of the Fair Defense Act in 2001. Yet, not only has the volume of total cases assigned to attorneys taking indigent clients dramatically increased over this period, but the relative share of indigent cases as a proportion of *all* cases in Texas (i.e. the assignment rate) has risen as well. Given that many counties – well over 100 – assign cases to a nontrivial proportion of overburdened attorneys, the bare reality is that redressing some of the issues regarding effort and representation will likely take a commitment to greater funding. While our case study involves Texas, similar circumstances are likely to be observed in other states that blend assigned counsel with public defender representation.

Second, documenting the extent to which high caseloads are characteristic of the overarching system is important with respect to defendants' experiences. Irrespective of whether a defendant has been assigned private counsel or a public defender, access to *quality* legal representation is vital. If quality covaries with time and payment structures, then assignment to an attorney taking 1,000 misdemeanor or 300 felony cases annually likely presents a quality problem – regardless of counsel

type.<sup>53</sup> Unfortunately, testing this linkage regarding outcomes is beyond the scope of our data. Texas does not presently link defendant outcomes to attorney caseload reporting at the individual attorney-defendant level. This makes it difficult to comment on how overburdened attorneys in Texas (negatively) affect defendant outcomes. Further, our caseload data cannot discriminate between different levels of severity within the schedules related to misdemeanor and felony arrests. Not all misdemeanors or felonies are equal, and accounting for that granularity is important to understanding caseload volume.

These limitations notwithstanding, the descriptive results provided here are not encouraging. While average effort at the county level rarely exceeds recommended guidelines, accounting for the behavior of attorneys across counties produces worrying results. Many attorneys take work among a handful of counties. Aggregating their statewide caseload illustrates that a nontrivial proportion of attorneys representing indigent clients are overburdened. While we cannot explain causally why some counties produce severely overburdened attorneys and not others, or what sorts of demographic characteristics predict burdensome caseloads at the attorney level, there is still value in this descriptive effort. We now know the extent to which high caseloads bedevil ethical representation within the nation's largest state. There is still much to learn, however, regarding the severity of this situation and the ways to best redress it.

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<sup>53</sup> Benjamin Schwall, "More Bang for Your Buck: How to Improve the Incentive Structure for Indigent Defense Counsel" (2017) 14:2 Ohio State J of Criminal L 553.