

# CASE REFUSAL: A RIGHT FOR THE PUBLIC DEFENDER BUT NOT A REMEDY FOR THE DEFENDANT

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## INTRODUCTION

Various arguments have been made to explain why public defenders continue to handle excessive caseloads: a lack of independence, organizational culture, or ethical blindness among them. All of these arguments are based on the idea that a public defender elects to labor under an excessive caseload either because they do not see it as excessive or because they realize it is but believe a refusal will lead to adverse consequences for themselves. In this essay, I argue that the decision to maintain an excessive caseload may not always be attributable to self-interest on the part of the public defender, but can be motivated by a concern for the welfare of prospective clients. The possibility that case refusal will result in prospective clients receiving no representation, the poor quality of alternative counsel, and the lack of any meaningful remedy for defendants who are denied representation creates a situation where representation by a public defender with an excessive caseload can be seen as the defendant's best option.

## I. PUBLIC DEFENDERS REFUSING TO TAKE NEW CASES

In January 2016, the New Orleans Public Defender's Office made the decision to refuse to handle certain serious felony charges due to their already excessive caseloads.<sup>1</sup> Indigent defendants who were denied representation by the Public Defender's Office were left without counsel and were relegated to a waitlist for legal representation.<sup>2</sup> That prompted a federal lawsuit by the American Civil Liberties Union (ACLU). The complaint filed by the ACLU alleges that defendants denied representation "have no access to an attorney for critical pretrial functions that would ordinarily be performed by defense counsel, such as conducting a

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1. Ben Myers, *Orleans Public Defender's Office to Begin Refusing Serious Felony Cases Tuesday*, TIMES-PICAYUNE (Jan. 11, 2016, 5:10 PM), [http://www.nola.com/crime/index.ssf/2016/01/orleans\\_public\\_defenders\\_to\\_be.html](http://www.nola.com/crime/index.ssf/2016/01/orleans_public_defenders_to_be.html).

2. *Id.*

preliminary examination to challenge their arrests and bail conditions; investigating the allegations; filing motions to preserve potentially exculpatory evidence; or negotiating with the prosecution.”<sup>3</sup>

The inability of the New Orleans Public Defender’s Office to provide adequate representation due to excessive caseloads is not a new development. Almost a quarter century ago, the Supreme Court of Louisiana found that caseloads were so excessive that they created a rebuttable presumption that indigent defendants in New Orleans were receiving ineffective assistance of counsel.<sup>4</sup> In addition to New Orleans, public defenders in Nashville, Tennessee,<sup>5</sup> and Hobbs, New Mexico,<sup>6</sup> have recently begun refusing new cases because of excessive caseloads. Over the last few years, there has been litigation in Missouri<sup>7</sup> and Florida<sup>8</sup> over the right of public defenders to refuse new cases. Due to the chronic underfunding of indigent defense delivery systems, as well as the position of the American Bar Association (ABA) regarding the ethical duty of public defenders to avoid excessive caseloads, it is surprising that more public defenders across the country are not refusing to take new cases.

## II. THE AMERICAN BAR ASSOCIATION’S POSITION ON CASE REFUSAL

The chronic underfunding of our nation’s indigent defense system has been well documented.<sup>9</sup> The ABA’s response to this ongoing crisis has been to encourage public defenders to refuse new cases when their workload becomes excessive. Just over a decade ago, the ABA Committee

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3. Complaint at 2, *Yarls v. Bunton*, No. 3:16-cv-00031-JJB-RLB (M.D. La. Jan. 14, 2016), <https://www.aclu.org/legal-document/yarls-v-bunton-complaint>.

4. *State v. Peart*, 621 So. 2d 780, 791 (La. 1993).

5. Steven Hale, *Buried Under Workload, Public Defender’s Office Pushes Back*, NASHVILLE SCENE (Feb. 2, 2017, 5:00 AM), <http://www.nashvillescene.com/news/cover-story/article/20850716/facing-an-unmanageable-workload-the-public-defenders-office-is-now-limiting-the-cases-it-takes>.

6. Phaedra Haywood, *Judge Finds Cash-Strapped Chief Public Defender in Contempt*, THE NEW MEXICAN (Nov. 29, 2016), *available at* [http://www.santafenewmexican.com/news/local\\_news/judge-finds-cash-strapped-chief-public-defender-in-contempt/article\\_1384bdd6-397d-5e90-9962-9bc1399b12d1.html](http://www.santafenewmexican.com/news/local_news/judge-finds-cash-strapped-chief-public-defender-in-contempt/article_1384bdd6-397d-5e90-9962-9bc1399b12d1.html).

7. *See State ex rel. Mo. Pub. Def. Comm’n v. Waters*, 370 S.W.3d 592 (Mo. 2012) (en banc).

8. *See Pub. Def., Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261 (Fla. 2013).

9. *See* AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf); NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>; NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR, CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS (2009), *available at* <https://www.nacdl.org/reports/misdemeanor/>.

on Ethics and Professional Responsibility published a formal ethics opinion that made case refusal an ethical obligation for public defenders.<sup>10</sup> Noting that public defenders operate within systems “created to provide representation for a virtually unlimited number of indigent criminal defendants,”<sup>11</sup> the opinion makes it clear that public defenders “have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently.”<sup>12</sup> If a public defender “believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client [and] . . . if representation has not yet begun, she must decline the representation.”<sup>13</sup>

In 2009, in order to provide additional guidance to public defenders considering case refusal, the ABA Standing Committee on Legal Aid and Indigent Defendants published the “Eight Guidelines of Public Defense Related to Excessive Workloads.”<sup>14</sup> Two years later, with the support of the Standing Committee on Legal Aid and Indigent Defendants, “Securing Reasonable Caseloads: Ethics and Law in Public Defense” was published.<sup>15</sup> This treatise emphasizes the ethical duty of public defenders to avoid excessive caseloads, discusses the detrimental effects they have on the quality of representation, and suggests strategies for avoiding them and for designing indigent defense delivery systems where caseloads can be controlled.<sup>16</sup> The ABA is not alone in its emphasis on the need to control public defender caseloads; one scholar described a public defender’s ethical duty to avoid excessive caseloads as the “Eleventh Commandment.”<sup>17</sup>

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10. STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, AM. BAR ASS’N, OPINION NO. 06-441, ETHICAL OBLIGATIONS OF LAWYERS WHO REPRESENT INDIGENT CRIMINAL DEFENDANTS WHEN EXCESSIVE CASELOADS INTERFERE WITH COMPETENT AND DILIGENT REPRESENTATION (2006), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_train\\_aba\\_ethics\\_on\\_excessive\\_caseloads.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_aba_ethics_on_excessive_caseloads.authcheckdam.pdf).

11. *Id.* at 377.

12. *Id.* at 384.

13. *Id.* at 379.

14. AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE CASELOADS (2009), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_train\\_eight\\_guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_eight_guidelines.authcheckdam.pdf).

15. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011).

16. *Id.* at 25–94, 229–268.

17. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993).

### III. WHY DON'T MORE PUBLIC DEFENDERS REFUSE CASES?

With the well-documented crisis in indigent defense and clear guidelines from the ABA on case refusal as a means to combat excessive caseloads, case refusal by public defenders should be a common occurrence. A recent report estimated that Louisiana's indigent defense system only has the capacity to handle twenty-one percent of the annual workload, and that it would take an additional 1406 full-time-equivalent public defenders to provide reasonably effective assistance of counsel to defendants.<sup>18</sup> Based on those estimates, one would expect to see case refusal in almost every parish, or county, in Louisiana. Yet case refusal remains the exception and not the norm for public defenders.

#### *A. Lack of Independence*

One reason case refusal may not occur is that many public defender offices lack independence, meaning that a refusal to accept cases could result in the termination or discipline of the lawyers involved.<sup>19</sup> One example of this recently occurred in Luzerne County, Pennsylvania, where the Chief Public Defender's efforts to control caseloads led to his termination.<sup>20</sup> Another example is New Mexico's Chief Public Defender who was held in contempt for his office's refusal to accept new cases.<sup>21</sup>

#### *B. Organizational Culture*

Organizational culture and, in particular, a lack of leadership have also been identified as factors that perpetuate the acceptance of excessive caseloads.<sup>22</sup> A recently filed complaint by the ACLU details how internal

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18. POSTLETHWAITE & NETTERVILLE, & AM. BAR ASS'N THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 21 (2017), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_louisiana\\_project\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.authcheckdam.pdf).

19. See AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002) (calling for the selection, funding, and payment of defense counsel to be independent from political influence), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

20. Bill Wellock, *Court Rules County Public Defender's Office Case Can Move to Trial*, THE CITIZENS' VOICE (Sep. 29, 2016), available at <http://citizensvoice.com/news/court-rules-county-public-defender-s-office-case-can-move-to-trial-1.2097328>.

21. Haywood, *supra* note 6.

22. See LEFSTEIN, *supra* note 15, at 95–112 (discussing the impact of social psychology, organizational culture, and the role of leadership on public defender behavior); see also Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training and Mentoring*, 3 HARV. L. & POL'Y REV. 161 (2009)

policies in the Fresno County Public Defender's Office have created an environment where individual attorneys feel as though they are not permitted to refuse cases.<sup>23</sup> The complaint identifies an internal policy that prohibits attorneys from withdrawing from an existing case and prohibits them from refusing cases unless they obtain approval from the head of the office.<sup>24</sup> While the complaint describes the office as being in a "state of crisis" since 2008,<sup>25</sup> there appears to be only a single instance of widespread case refusal in 2010. However, that refusal did not occur because of a concern over the adequacy of the representation provided but because the public defenders could not physically staff all the courtrooms.<sup>26</sup>

### C. Ethical Blindness

Another argument advanced to explain why case refusal does not occur more often is that public defenders suffer from a form of "ethical blindness."<sup>27</sup> This theory posits that while public defenders "may believe that they are engaged in representation that serves the best interests of their clients," existing research on "the automatic preference for self-interest suggests that . . . [public defenders] may often fail to perceive the many ways in which their conduct does not comport with their professional duties."<sup>28</sup> Because chronic underfunding creates a "self-interested motivation to resolve cases quickly," public defenders can be tricked "into believing that they are serving as effective advocates, even when they are not."<sup>29</sup>

A recent interview with public defenders from Colorado's Ninth Judicial District offers a window into the thought process that can lead to ethical blindness.<sup>30</sup> The head of the Public Defender's Office "brushes off

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(arguing that recruitment, training, and mentoring can lead to the reform of the public defender system).

23. Petition for Writ of Mandate & Complaint, Phillips v. State, No. 15 CE CG 2201 (Super. Ct. July 14, 2015), available at [https://www.aclu.org/sites/default/files/field\\_document/file\\_stamped\\_phillips\\_v\\_state\\_of\\_california\\_complaint.pdf](https://www.aclu.org/sites/default/files/field_document/file_stamped_phillips_v_state_of_california_complaint.pdf).

24. *Id.* at 20–21.

25. *Id.* at 1.

26. *Id.* at 12.

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

28. *Id.* at 368.

29. *Id.* at 394.

30. Ryan Summerlin, *Public Defenders Drawn to Mission, Not Money*, GLENWOOD SPRINGS POST INDEPENDENT (Jan. 3, 2017), available <http://www.postindependent.com/news/local/public-defenders-drawn-to-mission-not-money/>.

the insane workload as just part of the territory,” and claims that “public defenders are the best lawyers in court” “[b]ecause of the sheer amount of time they spend in the courtroom,” which enables them to become familiar with the arguments that will work in front of certain judges, and because of their relationship with the district attorneys.<sup>31</sup> Excessive caseloads are not just normalized; they are seen as advantageous since they give public defenders more experience than other attorneys.

#### *D. Identification with Heroic Ideals*

An often-overlooked factor in the acceptance of excessive caseloads is how public defenders see themselves. Professor Charles Ogletree identified two factors, empathy and heroism, that motivated him when he worked as a public defender.<sup>32</sup> In response to Professor Ogletree, Professor Abbe Smith, also a former public defender, suggested that public defenders needed to maintain “a sense of outrage about the inequality, injustice, and the routine abuse of power by those in a position to wield it . . . .”<sup>33</sup> Professor Jonathan Rapping, the founder of Gideon’s Promise (an organization devoted to training and supporting public defenders) has also described public defenders as heroic.<sup>34</sup> Some scholars have gone so far as to compare the decision to become a public defender to a religious calling.<sup>35</sup> The National Association for Public Defense has this quotation from a public defender on its Facebook page: “I am a public defender. That isn’t a job description. That is my identity.”<sup>36</sup>

Public defenders see themselves as a unique class of lawyers who are engaged in a heroic struggle against an unjust system. In this context, case refusal is seen as an admission that the system is winning. To the heroic warrior, the refusal to continue fighting is to surrender to the forces of evil. Derwyn Bunton, the Chief Public Defender for Orleans Parish, was asked in an interview how he was explaining to the families of those accused of crimes that they could not provide representation.<sup>37</sup> His response typifies

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31. *Id.*

32. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1243 (1993).

33. Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1208 (2004).

34. Jonathan A. Rapping, *Reclaiming Our Rightful Place: Reviving the Hero Image of the Public Defender*, 99 IOWA L. REV. 1893 (2014).

35. Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999).

36. Nat’l Ass’n for Pub. Def., FACEBOOK, <https://www.facebook.com/nationalassociationforpublicdefense/> (quoting Memphis Public Defender Melody Dernocoeur).

37. Interview by Audie Cornish with Derwyn Bunton, Chief Public Defender, Orleans Public

the attitude of public defenders: “It is really difficult. The ethos in our office is to help folks. You don't become a public defender to turn cases away.”<sup>38</sup>

#### *E. The Best Interests of the Defendant*

A lack of independence, organizational culture, ethical blindness, and the perception of themselves as heroes are all factors that discourage public defenders from refusing cases. These factors all have one thing in common: they discourage case refusal because it is not in the best interest of the public defender. A lack of independence or an organizational culture that discourages case refusal creates an environment where a public defender may suffer adverse consequences if they refuse cases. Ethical blindness is rooted in an unconscious preference for one's own self-interest. The conscious identification of themselves as heroes leads public defenders to believe that they can handle excessive caseloads. In all of these cases, it is the public defender, either consciously or unconsciously, who chooses their own interests over those of the client.

There is, however, another explanation for why some public defenders do not seek to refuse cases when they have excessive caseloads. This explanation places the interests of the client above those of the public defender. If refusing to represent a defendant will prejudice the defendant more than if the public defender represented that defendant, even while managing an excessive caseload, then it is in the defendant's best interests to be represented by the public defender. This perverse incentive to continue representation, despite the recognition that a public defender's caseload is excessive, is attributable to the lack of a remedy for a defendant who is denied counsel because of the unavailability of the public defender.

#### IV. RIGHT FOR THE PUBLIC DEFENDER BUT NOT A REMEDY FOR THE DEFENDANT

The Supreme Courts of Louisiana, Missouri, and Florida have all recognized that excessive caseloads create a situation where a public defender is presumptively providing ineffective assistance of counsel. These decisions make it possible for public defenders to comply with the ethical guidelines put forth by the ABA, but defendants who are not

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Defenders (Jan. 29, 2016, 4:29 PM), <http://www.npr.org/2016/01/29/464893246/new-orleans-public-defenders-refuse-new-cases-to-highlight-underfunding>

38. *Id.*

represented by the public defender may find themselves without counsel or with counsel that is unqualified and has a financial incentive to devote as little time as possible to the case. These decisions have also failed to create the necessary incentives for state legislatures to adequately fund indigent defense delivery systems. The result is that being represented by a public defender with an excessive caseload may be a defendant's best option.

#### *A. Louisiana*

In 1993, the Supreme Court of Louisiana decided two cases that dealt with Louisiana's inadequately funded indigent defense system. In *State v. Peart*,<sup>39</sup> the court found that the excessive caseloads of public defenders in New Orleans gave rise to a "rebuttable presumption" that indigent defendants "are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards."<sup>40</sup> The court warned that if "legislative action is not forthcoming and indigent defense reform does not take place," it might need to "employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel."<sup>41</sup> This rebuttable presumption of ineffective assistance of counsel was to be applied by trial judges who were instructed to "hold individual hearings" for each defendant.<sup>42</sup> After "applying this presumption and weighing all evidence presented," if the trial judge finds that a defendant was not receiving reasonably effective assistance, "then the court shall not permit the prosecution to go forward until the defendant is provided with reasonably effective assistance of counsel."<sup>43</sup>

In *State v. Wigley*,<sup>44</sup> the Louisiana Supreme Court upheld the practice of appointing members of the private bar to represent indigent criminal defendants, but found the State "must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs."<sup>45</sup> As long as the amount of time the attorney needs to devote to the assigned case does not become unreasonable, "a fee for services need not be paid."<sup>46</sup> Before a trial judge can appoint counsel for an indigent defendant, the court must find "that funds sufficient to

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39. 621 So. 2d 780 (La. 1993).

40. *Id.* at 791.

41. *Id.*

42. *Id.*

43. *Id.* at 791-92.

44. 624 So. 2d 425 (La. 1993).

45. *Id.* at 429.

46. *Id.*



cover the anticipated expenses and overhead are likely to be available to reimburse counsel . . . .”<sup>47</sup> Trial courts were ordered not to “appoint members of the private bar to represent indigents” if the court determines funds are not available to reimburse them.<sup>48</sup> The Louisiana Supreme Court acknowledged that “this solution may impair the functioning of the indigent defense system . . . . However, budget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys’ professional responsibilities.”<sup>49</sup>

Notably absent from the court’s analysis in *Peart* and *Wigley* is the direct effect that lack of counsel will have on defendants. While the court in *Peart* created a “rebuttable presumption that . . . indigents are not receiving assistance of counsel effective enough to meet constitutionally required standards,”<sup>50</sup> they provide no remedy for indigents who are deprived of representation, other than to delay the prosecution of the case. Similarly, in *Wigley*, the court prohibits prosecutions from going forward if there are no funds to reimburse assigned counsel.<sup>51</sup> However, one of the problems associated with excessive caseloads is the inability of public defenders to adequately investigate the charges. As the United States Supreme Court observed many years ago, “perhaps the most critical period of the proceedings” is “from the time of [the defendant’s] arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [is] vitally important.”<sup>52</sup> In *Peart*, the Louisiana Supreme Court based its decision, at least in part, on the fact that public defenders have too many cases to adequately investigate and prepare for trial,<sup>53</sup> but its solution was to deprive the defendant of any representation during a critical stage of the case when investigation is “vitally important.”<sup>54</sup>

From the perspective of a public defender in Louisiana, case refusal is not an appealing option because it only results in delay, which, at best, gives rise to a highly speculative future claim that there was a violation of the defendant’s right to a speedy trial. It can also result in the defendant

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Peart*, 621 So. 2d at 791.

51. *Wigley*, 624 So. 2d at 429.

52. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

53. *Peart*, 621 So. 2d at 789 (“Many indigent defendants . . . are provided with counsel who can perform only pro forma, especially at early stages of the proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified.”).

54. *Powell*, 287 U.S. at 57.

being assigned counsel who has no experience with criminal defense and has a financial incentive to spend as little time as possible on the case since they are not entitled to a fee. In Concordia Parish, out of desperation, the Chief Public Defender offered a local attorney \$1,000 for every 100 cases she accepted.<sup>55</sup> In Caddo Parish, the court appointed every lawyer in the Parish, including those with no criminal defense experience whose practices focused on tax, real estate, and adoption, to cases that the public defender refused to take.<sup>56</sup> As one Louisiana lawyer assigned to a criminal case admitted: “I wouldn’t want me representing me.”<sup>57</sup> To a dedicated public defender in Louisiana, case refusal is a no-win situation. They can continue to soldier on and do the best they can, or they can refuse new cases and leave those clients at the mercy of unqualified and uncompensated assigned counsel.

Nor have the halting of prosecutions authorized in *Peart* and *Wigley* created the necessary incentive for the Louisiana Legislature to act. As of 2015, Louisiana had the nation’s highest rate of incarceration,<sup>58</sup> and the New Orleans Public Defenders Office has had to resort to online crowdfunding campaigns to cover budget shortfalls.<sup>59</sup>

### B. Missouri

In Missouri, the Public Defender Commission has an administrative rule that permits district defender offices to decline new appointments after exceeding caseload capacity for at least three consecutive calendar months.<sup>60</sup> While this rule was upheld by the Supreme Court of Missouri in *State ex rel. Missouri Public Defender Commission v. Waters*,<sup>61</sup> the court also made it clear that “the trial judge has authority over the public

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55. Dylan Walsh, *On the Defensive*, THE ATLANTIC, June 2, 2016, available at <https://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/>.

56. Oliver Laughland, *When the Money Runs out for Public Defense, What Happens Next?*, THE MARSHALL PROJECT (Sept. 7, 2016, 7:00 AM), <https://www.themarshallproject.org/2016/09/07/when-the-money-runs-out-for-public-defense-what-happens-next#.cCl6eZoaz>.

57. Eli Hager, *Louisiana Public Defenders: A Lawyer with a Pulse Will Do*, THE GUARDIAN Sept. 8, 2016, available at <https://www.theguardian.com/us-news/2016/sep/08/louisiana-public-defender-crisis>.

58. DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015 12 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

59. *Crowdfunding Campaign Reaches \$25,000*, ORLEANS PUB. DEFS., <http://www.opdla.org/defense-matters-archive/listid-3/mailid-31-crowdfunding-campaign-reaches-25-000> (last visited Mar. 1, 2017).

60. MO. CODE REGS. ANN. tit. 18, § 10-4.010 (2015); *State ex rel. Mo. Pub. Def. Comm’n v. Pratte*, 298 S.W.3d 870 (Mo. 2009) (en banc).

61. 370 S.W.3d 592 (Mo. 2012) (en banc).

defender's caseload that the public defender itself does not."<sup>62</sup> The solution to excessive caseloads proposed by the Supreme Court of Missouri is "triage" by the trial court where the public defender is only appointed to cases "alleging the most serious offenses, those in which defendants are unable to seek or obtain bail, and those that for other reasons need to be given priority . . . ."<sup>63</sup>

In addition to "triage," the court also suggests that "the judge, prosecutor, public defender and, where appropriate, the local bar associations work together" and use "creative mechanisms" to avoid excessive caseloads in the future.<sup>64</sup> The court acknowledges that the use of these unidentified "creative mechanisms" comes with potential costs, such as the "delayed prosecution of cases," which could result in "a delay in the imposition of punishment on those later found guilty, a delay in providing justice for those who are victims of crime and a delay in acquittal for those who ultimately are found not guilty."<sup>65</sup> These delays may also "result in the release of some offenders because of a violation of their rights to a speedy trial . . . ."<sup>66</sup> Absent from the court's decision, however, is any suggestion that the denial of a defendant's fundamental right to counsel will result in a dismissal of the charges pending against them.

Just as in Louisiana, the Missouri Supreme Court gives the public defender the right to refuse cases, but no remedy to those defendants who are refused representation. The court suggests that the public defender "meet with the court and prosecutors to determine categories of cases in which representation by public defenders is not mandated constitutionally or in which the lack of such representation would have less egregious consequences . . . . [A]t least until such time as the public defender office is funded adequately."<sup>67</sup> This sort of "triage" has been condemned by scholars of legal ethics, including Monroe Freedman, who felt that the "promotion of triage encourages public defenders to prostitute the ideal of *Gideon v. Wainwright*."<sup>68</sup>

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62. *Id.* at 611.

63. *Id.*

64. *Id.*

65. *Id.* at 612.

66. *Id.*

67. *Id.* at 610.

68. Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 918 (2005). See *Gideon v. Wainwright*, 372 U.S. 335, 344, (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.")

The Court's suggestion that "triage" will only be necessary until the public defender office is adequately funded also ignores Missouri's history of underfunding indigent defense. An assessment of the Missouri State Public Defender System (MSPD) in 2009 documented a decade of underfunding.<sup>69</sup> That study found that:

MSPD is confronting an overwhelming caseload crisis, one of the worst of its kind in the nation—a crisis so serious that it has pushed the entire criminal justice system in Missouri to the brink of collapse. The severity of this crisis has been forecasted [sic] for years, by those closest to it, but next to nothing has been done. And now the situation is as urgent as it is dire.<sup>70</sup>

In an effort to call attention to the caseload crisis, the head of the Missouri Public Defender's Office recently tried to use his statutory authority to appoint the Governor to represent an indigent defendant.<sup>71</sup>

### C. Florida

In *Public Defender, Eleventh Judicial Circuit of Florida v. State*,<sup>72</sup> the Supreme Court of Florida upheld the right of a public defender to withdraw from cases. The court noted that, as a result of the public defender's excessive caseload, "[c]lients who are not in custody are essentially unrepresented for long periods between arraignment and trial" and that the public defenders engage "in 'triage' with the clients who are in custody or who face the most serious charges getting priority to the detriment of the other clients."<sup>73</sup> In Florida, if the public defender is unable to represent an indigent defendant because of a conflict of interest, the trial court can appoint the regional conflict counsel<sup>74</sup> or a private attorney.<sup>75</sup> As in most states, private attorneys who are assigned to represent indigent defendants are typically paid low hourly rates that come with a cap on

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69. See THE SPANGENBERG GROUP & CTR. FOR JUST., LAW, AND SOC'Y AT GEORGE MASON U., ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM (2009), [http://www.nlada.net/sites/default/files/2009%20Assessment%20of%20the%20Missouri%20State%20Public%20Defender%20System%20\(TSG\).pdf](http://www.nlada.net/sites/default/files/2009%20Assessment%20of%20the%20Missouri%20State%20Public%20Defender%20System%20(TSG).pdf).

70. *Id.* at 64.

71. Matt Ford, *A Governor Ordered to Serve as a Public Defender*, THE ATLANTIC (Aug. 4, 2016, 10:56 PM), <http://www.theatlantic.com/politics/archive/2016/08/when-the-governor-is-your-lawyer/494453/>.

72. 115 So. 3d 261 (Fla. 2013).

73. *Id.* at 274.

74. See FLA. STAT. § 27.511(5) (2008); *Johnson v. State*, 78 So. 3d 1305, 1309 (Fla. 2012).

75. See FLA. STAT. § 27.40(2) (2008); *Escambia Cty. v. Behr*, 384 So. 2d 147, 150 (Fla. 1980) ("We hold that the court has the option of appointing the public defender or private counsel. This is a matter within the sound discretion of the trial court judge.").

compensation.<sup>76</sup>

As the court notes, there is “a long line of cases involving attorney compensation as it relates to safeguarding a defendant’s right to effective representation” in Florida.<sup>77</sup> The reason that “long line of cases” exists is because the Florida Legislature has repeatedly passed laws limiting the compensation paid to assigned counsel in criminal cases. The Florida Supreme Court first held such statutes to be unconstitutional as applied over thirty years ago,<sup>78</sup> but that fact has not diminished the legislature’s enthusiasm for them as a way to control the costs associated with indigent defense. The year before the decision in *Public Defender, Eleventh Judicial Circuit of Florida v. State*, the legislature once again set limits on the compensation of assigned counsel in criminal cases to levels below the minimum wage.<sup>79</sup> In light of this longstanding hostility toward funding indigent defense, a public defender handling an excessive caseload might conclude that he or she is still a defendant’s best option.

#### *D. The United States Supreme Court*

Just prior to the Florida Supreme Court’s decision in *Public Defender, Eleventh Judicial Circuit of Florida v. State*, the United States Supreme Court had the opportunity to send a message to states like Florida, Missouri, and Louisiana whose underfunding of indigent defense resulted in the absence of conflict-free counsel for indigent defendants. In *Boyer v. Louisiana*,<sup>80</sup> the Court granted certiorari in a case where the defendant’s trial was delayed for seven years because of a lack of funding for defense counsel, but then dismissed the writ as improvidently granted.<sup>81</sup> In her dissenting opinion, Justice Sotomayor argues that delays caused by a state’s refusal to fund counsel for indigent defendants should weigh against the state in determining whether there was a deprivation of a defendant’s Sixth Amendment right to a speedy trial.<sup>82</sup> The Court could have sent a

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76. See JOHN P. GROSS, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (2013), <https://www.nacdl.org/reports/gideonat50/rationingjustice/> (finding that the average national compensation rate to attorneys handling felony cases was less than \$65 per hour).

77. See *Pub. Def., Eleventh Judicial Circuit of Fla.*, 115 So. 3d at 272.

78. See *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986).

79. David Carroll, *Florida Institutes a “Dangerous Game of Chance” in Conflict Representation*, SIXTH AMEND. CTR.: PLEADING THE SIXTH (July 23, 2012), <http://sixthamendment.org/florida-institutes-a-dangerous-game-of-chance-in-conflict-representation/>.

80. 133 S. Ct. 1702 (2013) (per curiam).

81. *Id.* at 1703 (Alito, J., concurring).

82. *Id.* at 1707 (Sotomayor, J., dissenting).

clear message that delays caused by a lack of funding for defense counsel should *always* be viewed as prejudicial to a defendant's right to speedy trial, but instead the Court relies on the *ad hoc* balancing test it required in *Barker v. Wingo*.<sup>83</sup> Courts must consider the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."<sup>84</sup>

### *E. The Defendant's Best Option*

While case refusal provides a benefit to the public defender in terms of a reduced caseload, that personal benefit may seem less appealing because of the consequences case refusal has on potential clients. Since most public defenders see themselves as representing an entire class of defendants, not individual clients, the impact of case refusal on prospective clients is a factor that will impact a decision to refuse new cases. If public defenders believe that by refusing cases prospective clients would be worse off, then they will continue to accept new cases even if they have excessive caseloads that limit the quality of the representation they can provide.

Courts have given public defenders the right to refuse cases, but they have not made the decision to invoke that right an easy one. The prohibition on cases going forward when counsel is unavailable may result in lengthy pretrial detention for some defendants, and it forecloses the possibility of a prompt investigation by defense counsel. The thought that potential clients will sit in jail needlessly and that evidence proving their innocence might be lost does not encourage public defenders to refuse cases. The only advantage refusing the case confers on the defendant is a speculative claim that the delay in prosecution will violate their right to a speedy trial. Even if all the public defender can provide is "triage," it is arguably better than the total absence of representation.

The prospect of lawyers who have little experience in criminal law or who have financial incentives to resolve cases as quickly as possible being assigned to represent indigent defendants also discourages public defenders from refusing cases. A public defender with an excessive caseload may have a better chance of providing adequate representation than a private attorney who has been given a three hour "Do's and Don't's [sic] of Providing Effective Assistance" in criminal cases presentation, which is exactly the situation facing defendants in Caddo Parish, Louisiana.<sup>85</sup>

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83. 407 U.S. 514 (1972).

84. *Id.* at 530.

85. Eli Hager, *Louisiana Public Defenders: A Lawyer with a Pulse Will Do*, THE GUARDIAN

## V. THE RELUCTANCE TO GIVE DEFENDANTS A REMEDY

The reluctance of courts to give indigent defendants a more concrete remedy when they are denied counsel is understandable. There is a legitimate separation of powers issue that influenced the decision of the Louisiana Supreme Court in *Peart*.<sup>86</sup> The ACLU's lawsuit alleging a systemic failure to adequately fund indigent defense in Orleans Parish was recently dismissed due to similar concerns.<sup>87</sup> Still, there have been instances where courts have ordered an increase in compensation rates to assigned counsel because the failure to adequately compensate them was impairing the ability of the court to function.<sup>88</sup>

The biggest factor discouraging courts from imposing a more drastic remedy, such as the dismissal of cases when defendants are unrepresented, is the fear that the guilty will go free. As one judge in rural Winn Parish, Louisiana said:

I'm not going to be the one that lets one of them out, unless a higher court tells me I must . . . What I'm scared of is some serious offender who is guilty ending up walking down our streets because of this . . . All I can do is find a lawyer to agree to do it, or else these suckers are fixing to be home free.<sup>89</sup>

The potential release of defendants charged with violent crimes in New Orleans even prompted one prosecutor to argue that doing so would result in "nothing less than anarchy."<sup>90</sup>

In light of the chronic underfunding of our nation's indigent defense systems and the excessive caseloads that result, giving public defenders the right to refuse cases is not enough. Courts need to be aware that the lack of

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(Sept. 8, 2016), available at <https://www.theguardian.com/us-news/2016/sep/08/louisiana-public-defender-crisis>.

86. See *Peart*, 621 So. 2d at 791 ("We decline at this time to undertake these more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance.").

87. Ken Daley, *Federal Judge Dismisses ACLU Lawsuit Aimed at Boosting New Orleans Indigent Defense Funding*, THE TIMES-PICAYUNE, Feb. 1, 2017, available at [http://www.nola.com/crime/index.ssf/2017/02/federal\\_judge\\_dismisses\\_aclu\\_1.html](http://www.nola.com/crime/index.ssf/2017/02/federal_judge_dismisses_aclu_1.html).

88. See, e.g., *State v. Lynch*, 796 P.2d 1150, 1164 (Okla. 1990); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67–68 (Mo. 1981); *N.Y. Cty. Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 409 (N.Y. Sup. Ct. 2003); *New York County Lawyers' Ass'n v. State*, 745 N.Y.S.2d 376, 386 (N.Y. Sup. Ct. 2002).

89. Hager, *supra* note 85.

90. John Simerman, *Suck It Up: That's Orleans DA Office's Message to Private Attorneys Seeking Release of Indigent Clients for Lack of Funds*, THE NEW ORLEANS ADVOC. (Apr. 4, 2016, 1:49 PM), [http://www.theadvocate.com/new\\_orleans/news/article\\_96b0911a-ef79-5d1b-a523-d385ac2e4204.html](http://www.theadvocate.com/new_orleans/news/article_96b0911a-ef79-5d1b-a523-d385ac2e4204.html).

a remedy for a defendant who is denied counsel creates a perverse incentive for public defenders to try to manage excessive caseloads instead of refusing additional cases. The public defender's refusal needs to trigger something more than a delay in the proceedings or the drafting of a private attorney with no criminal defense experience. If courts were willing to release defendants or dismiss cases when public defenders refused them because of excessive caseloads, it would give those public defenders the ability to, as one scholar has put it, "crash the system."<sup>91</sup>

Courts need to give defendants who are denied representation a remedy that will motivate legislatures to provide adequate funding for indigent defense. Until courts are willing to dismiss cases when counsel is not available due to a lack of funding, legislators will continue to underfund indigent defense, and public defenders will suffer from excessive caseloads in silence.

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91. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1100 n.44 (2013).