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Public Defense's Role in Fighting Injustice

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PUBLIC DEFENSE'S ROLE IN FIGHTING INJUSTICE

by Derwyn Bunton, Esq.



Editor's Note: Facing a budget shortfall that has placed the Orleans Parish Public Defenders Office at the center of a statewide legal drama over indigent defense funding in Louisiana, Chief Public Defender Derwyn Bunton announced early this year that his office would stop taking on serious felony cases, leading to a burgeoning waiting

list for those who need representation.

Since then, his office has waged a high-profile battle to change the funding mechanisms in his state and fight for competent assistance to those needing his office's services. In the article that follows, Mr. Bunton explains what high stakes are involved in a stacked criminal justice system.

The late Monroe Freedman, former dean of Hofstra Law School, *Verdict* author and CCLP member, and a giant in the area of legal ethics, stated that a lawyer's obligations to represent each client zealously begins with a duty to conduct fact investigation. A defense counsel, therefore, is forbidden to carry a workload that interferes with this minimum standard of competence. Since the lawyer's total loyalty is due to each client in each case, ABA's Model Rules are violated "whenever there is significant risk that the lawyers' ability to consider, recommend or carry out an appropriate course of action for a client will be materially limited as a result of the lawyer's responsibility to other clients," citing *Defense Function Std. 401.3(e)*.

Whenever a lawyer accepts one too many clients — to say nothing of 20, 30 or several hundred too many clients — he or

she is involved in a conflict of interest. Any new client who presents a conflict of interest "must be declined." Model Rules of Prof'l Conduct, Rule 1.7, cmt 3.

After recounting these duties, in an article in *Verdict* magazine, Freedman asked, "What then is the ethical alternative to responding to the reality of underfunding and overloading by some form of triage?"

His answer: Declining representation.

What if the lawyer's supervisor nevertheless orders him or her to take the case?

His answer:

the public defender has an ethical obligation to report the supervisor's unethical conduct to the appropriate disciplinary authority and likewise for the judge who orders the lawyer to take the case despite clear violations of the Sixth Amendment and the fundamental ethical rules relating to competent representation. By putting this on record, the public defender would establish a clear violation of the Sixth Amendment, providing grounds for the defendant to attack their sentences directly and collaterally.

Freedman ended the article by saying that "By honoring their ethical obligations, public defenders would cease to be an essential part of a fraudulent cover-up of the denial of fundamental rights to countless poor people who are caught up in a criminal justice system that is unethical, unconstitutional and intolerably cruel." (See, "An Ethical Manifesto for Public Defenders," by Monroe Freedman, Esq., April 2006 *Verdict*).

I. Strengthening Public Defense Is Part of the Cure for Injustice

"I'm taking this case because the judge threatened me with contempt if I did not." That is what I said in court to my client four months ago, a young African-American

Derwyn Bunton, Esq., is the Chief District Defender for Orleans Parish (New Orleans) Louisiana, leading the Orleans Public Defenders Office (OPD). Bunton graduated from New York University School of Law in 1998.

Prior to becoming Chief Defender, Bunton was the Executive Director of Juvenile Regional Services (JRS). JRS was the first stand-alone juvenile defender office in the nation and the first non-profit law office devoted to juvenile justice reform and front-line juvenile representation. Bunton is also the former Associate Director of the Juvenile Justice Project of Louisiana (JJPL), a nonprofit juvenile justice reform and advocacy organization.

From 2000 to 2005, Bunton aided in monitoring the settlement agreement between the United States Department of Justice, the Juvenile Justice Project of Louisiana, private plaintiffs and the State of Louisiana regarding Louisiana's juvenile prisons. He was part of the litigation team that sued Louisiana over the conditions of its juvenile prisons.

During Hurricane Katrina, Bunton was part of a team of advocates and lawyers assisting the Orleans Parish Juvenile Court, the Louisiana Office of Juvenile Justice and the Louisiana Department of Public Safety and Corrections to locate and reunite youth and adults evacuated to multiple DOC facilities across the state after being trapped by floodwaters in the Orleans Parish Prison in the wake of Katrina.

Appointed Chief Public Defender in 2009, Bunton has led OPD to be among the most highly regarded public defense programs in the country and a leading voice for public defense and criminal justice reform. He is the 2015 recipient of the Louisiana Association of Criminal Defense Lawyers' prestigious Justice Albert Tate Award.



United States: the highest incarceration rate in the world: two million
Louisiana: highest incarceration rate in the United States
New Orleans: highest incarceration rate in Louisiana

Illustration by Peter K. McDonnell

man in his twenties. His charge carries a mandatory life-in-prison-without-parole term (LWOP). The Orleans Public Defenders Office (OPD) was in the midst of service restrictions due to a lack of resources: hiring freeze, cuts to expert funding, case refusals and waitlists for representation. His case was initially refused by OPD.

"I know; I understand." Surprisingly and sadly, he understood and accepted what I told him. My client's understanding illustrates what poor people — particularly poor people of color — have come to expect from an unjust criminal justice system.

As I think back to that conversation with my client four months ago, and as I observe the unrest in Baton Rouge, Dallas, Minnesota and elsewhere, I am convinced part of the cure for injustice in our communities, especially for poor people and people of color, is

a stronger system of public defense. The citizens and law enforcement killed across the country in recent weeks are casualties of a myriad of injustices. Law enforcement and citizens alike are safer when communities know the criminal justice system is fair, when justice for the rich and powerful is the same as justice for the poor and vulnerable.

Reforming public defense, creating a system with the resources to live up to *Gideon's* Promise, actually and perceptively increases fairness and justice in our criminal justice system. Louisiana and other states should recognize this and take advantage of this opportunity to increase poor people's and poor communities' access to fairness and justice by increasing resources for public defense systems.

A. Unfair and Unjust at the Outset: User-Pay System of Funding

Years of chronic underfunding due to Louisiana's user-pay criminal justice system — a system where public defender budgets depend on traffic fines and other fees charged to their poor clients — have given way to the worst public defense crisis since Hurricane Katrina prompted the Louisiana legislature to pass the Public Defender Reform Act of 2007, popularly known as Act 307. Act 307 was meant to ensure the right to counsel is delivered by qualified and competent counsel in a manner that is fair and consistent throughout the state. Act 307 aimed to create a standards-based, ethical and constitutional system of public defense, a transparent and accountable public defense system. Act 307 was meant to help Louisiana live up to the promise of *Gideon v. Wainwright*, and provide counsel with the resources to insure rich and poor alike would be equally protected within our criminal justice system.

Act 307, while important and necessary, did not go far enough to live up to *Gideon's* promise. Specifically, Act 307 did not address or cure Louisiana's inadequate, unstable and unpredictable public defense funding structure. No other state in the country depends on such a funding structure to protect the rights of the poor in criminal proceedings. Fully two-thirds of public defender budgets

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Photo courtesy of Orleans Public Defenders Office

Staff of the Orleans Public Defenders gather in front of the Louisiana State Capitol on July 10 at a rally protesting the police shooting of Alton Sterling in Baton Rouge.

depend on court fees levied against their clients, and the public defender fee levied against clients is only payable if the client pleads guilty or is found guilty. In short, public defenders in Louisiana are paid to lose.

Currently, 33 of 42 public defender districts across Louisiana are restricting services at some level. Many offices are unable to accept additional clients, resulting in poor people in jail in Louisiana without attorneys due to staff shortages and dwindling resources. Poor people in Louisiana are now subject to unacceptable jail time without ever speaking to or seeing an attorney. Public defense in Louisiana — the institution labeled fundamental to justice in *Gideon* — is systemically incapable of demanding or delivering justice for poor people in our criminal justice system.

B. Systemic Resource Disparity and Excessive Workloads

The current funding structure produces great disparity between public defenders and the rest of the criminal justice system. Other criminal justice agencies traditionally receive more local parish support than public defenders — reducing their reliance on fines, fees and costs. By contrast, in most places across Louisiana, public defenders receive no parish support. As a consequence, great disparities exist, like the disparity between agencies here in New Orleans. In 2015, New Orleanians paid nearly \$355 per capita to support the New Orleans Police Department, nearly \$17 per capita for the District Attorney, but only about \$2.40 per capita for public defense.

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Statewide, for every dollar spent by public defense, prosecution spends three. Of the overall criminal justice expenditures statewide, public defense accounts for less than 2% of overall spending. Put another way, 98% of criminal justice resources are used to catch, prosecute and incarcerate. Moreover, these resources are aimed largely at poor communities — more specifically, poor communities of color.

Compounding these disparities are OPD workloads which historically and chronically exceed state and national standards. Tina Peng, Staff Attorney for OPD, put it this way in her 2015 *Washington Post* article:

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We are already stretched thin: Our office represents 85 percent of the people charged with crimes in Orleans Parish but has an annual budget about a third the size of the district attorney's. The American Bar Association recommends that public defenders not work on more than 150 felony cases a year. In 2014, I handled double that.

An unconstitutionally high caseload means that I often see my new clients only once in those two months. It means that I miss filing important motions, that I am unable to

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properly prepare for every trial, that I have serious conversations about plea bargains with my clients in open court because I did not spend enough time conducting confidential visits with them in jail. I plead some of my clients to felony convictions on the day I meet them. If I don't follow up to make sure clients are released when they should be, they can sit in jail for unnecessary weeks and months.

With such disparities, Louisiana naturally leads the nation in incarceration and wrongful convictions. New Orleans leads Louisiana in both categories.

II. And Justice For All: Gideon's Promise

The first step in changing the perceived unfairness and injustice in our criminal justice system — a perception now at the center of unrest, violence and tragedy in our communities — is to change the reality of our unfair and unjust criminal justice system. Our system is unfair. The resource disparities crippling public defense in Louisiana (and around the nation) are fueling fairness and justice disparities. A well-resourced public defender system changes and saves lives. Properly resourced public



Photo courtesy of Vanderbilt University Law School

Orleans Parish Chief Public Defender Derwyn Bunton speaking at Vanderbilt University Law School, where he was the 2015-2016 Social Justice Fellow.

defenders are able to fulfill their obligations to hold our criminal justice system accountable: protecting the innocent, defending the constitution and demanding justice.



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Photo courtesy of Orleans Public Defenders Office

More than 250 public defenders, clients and friends of the Orleans Public Defenders Office, led by Chief Public Defender Derwyn Bunton (front, third from right), stand in silence on the steps of the New Orleans Criminal District on December 14, 2014, closing the courthouse for 4 1/2 minutes, symbolically representing the 4 1/2 hours that a black man, Michael Brown, was left dying on the street after police shot him in Ferguson, Missouri. The protest called for an end to police brutality and demanded a just legal system.

A. Role of the Defender

Municipal Court in New Orleans handles misdemeanors and city (public order) offenses, exclusively. The court handles up to 400 cases daily. It is a system where individuals get lost in the volume and speed of the court docket. Tens of thousands of individuals pass through Municipal Court each year.

In Municipal Court, OPD's clients are the poorest and most vulnerable. Many of them have been failed by Louisiana's key social institutions, and are in dire need of proper health care, affordable housing and quality schools. Many of our clients are mentally ill, homeless or struggling with serious addiction issues. Without OPD, these members of our community are unable to access any mental health care, housing or rehabilitation.

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Darian Hunter, a client of the Orleans Public Defenders, recently recounted his journey through the criminal justice system. In and out of jail for a host of drug and alcohol-related charges and ready to stop running, Mr. Hunter appeared in Municipal Court to turn himself in. There he met OPD Client Advocate Tess Kilbane Myers and Staff Attorney Jack Muse, who changed his life.

After enormous mitigation efforts, Mr. Hunter's team was able to secure placement in a treatment program and lift all attachments, allowing him a second chance. Now four months sober and setting his sights on becoming a drug counselor himself, Mr. Hunter says it absolutely wouldn't have been possible without his public defender.

The injustices happening in Orleans Parish Criminal District Court are akin to Municipal Court, only with higher stakes and longer sentences. One by one, defendants are asked if they can afford an attorney. Eighty-five percent of the time they say "no." Nearly 500 times this year, we have had to say "I'm sorry, we don't have an attorney at this time."

From there, the majority of the defendants sit and wait in the former Orleans Parish Prison, now dubiously named the Orleans Justice Center. They wait and remain jailed pretrial simply because they can't post bail and because no lawyer is assigned to immediately advocate for release. Jobs are lost. Families are strained. Physical and mental health deteriorate. Most are charged with nonviolent, drug-related charges and they are overwhelming African-American men.

This is why public defense is so critical. Well-supported, properly funded public defenders are the only people in the system standing up for the poor men and women in the criminal justice system. Leaving people in jail without an advocate increases length of stay, which increases jail costs. Poorly resourced public defenders can lead to costly retrials and reversals of convictions. This not only wastes money but is heartbreaking for victims of crime praying for closure. Most harmful, the innocent run a higher risk of wrongful conviction without properly resourced counsel.

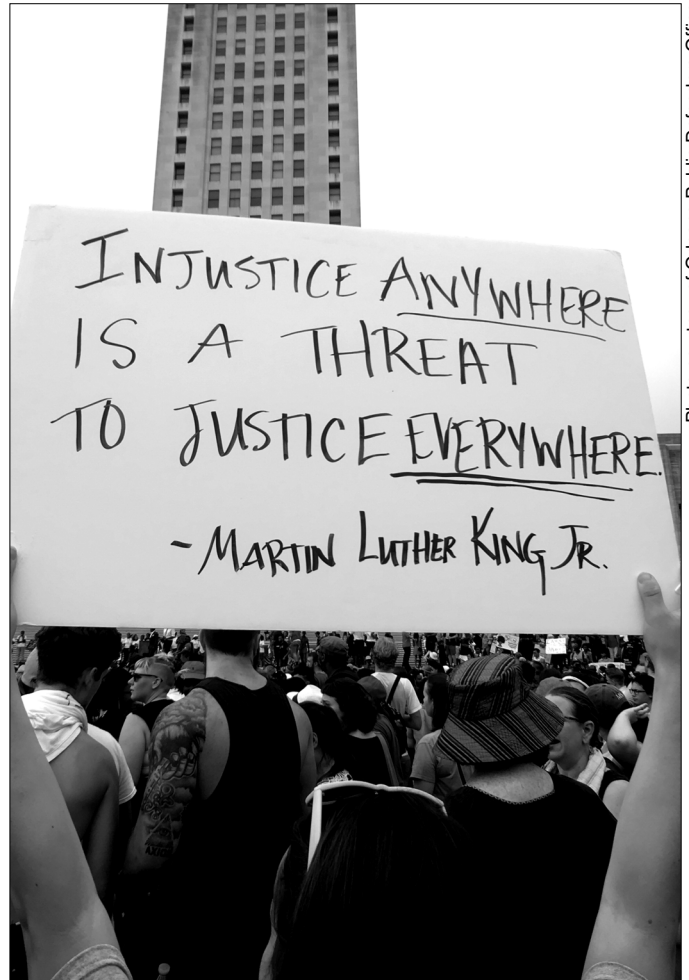


Photo courtesy of Orleans Public Defenders Office

Orleans Public Defenders office protesters at July 10 rally in Baton Rouge.

Properly resourced public defenders effectively advocate for treatment and care in lieu of incarceration, social services instead of lengthy sentences, and programming that allows clients to break free from the criminal justice cycle. Each of these outcomes have better long-term return for the client, the community and the justice system as a whole when compared to a lengthy and costly prison sentence.

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Keep up the good work
CCLP!

Sheldon Siegel

Despite the demonstrated benefits of a well-resourced public defender, the criminal justice system continues to demonstrate hostility to public defenders and our clients.

In New Orleans, OPD attorneys are threatened with contempt for advocating release for homeless clients — after working to secure two placements in shelter-based rehabilitation programs. Two OPD investigators have even been prosecuted for simply doing their job. One for daring to interview a child witness (the investigator was charged with kidnapping) and another for seeking material owed to the defense under *Brady v. Maryland*.

B. Increase Resources for Public Defense: Provide the Justice

Louisiana needs to fundamentally reform its system of public defense funding so we can provide constitutional, ethical and professional representation for poor people. To this end, Louisiana must abandon the user-pay system. Louisiana's user-pay system must be replaced with an adequate, reliable and stable funding source that is recurring and based on reasoned projections of workload. Fines and fees, to the extent they exist at all, should act as a supplemental resource.

The role of the public defender is to protect innocence, defend the constitution and demand justice and fairness within the criminal justice system. When resources are out of balance, so is the system, and the result is community unrest and systemic injustice.

Most prescient are the words Michael Barrett, the State Public Defender for Missouri, wrote a year ago to Governor Nix of Missouri:

The civil unrest that followed the events of Ferguson in 2014, which incidentally resulted in yet another scathing DOJ report, caused the state to incur about \$12 million in response costs. Ironically, and tragically, this civil unrest resulted from chronic civil rights violations experienced by some of the most vulnerable Missourians. This leads me to a rather obvious suggestion — instead of paying millions to respond to civil unrest brought about by injustice, why not simply provide the justice?

A mentor of mine once told me, "What you accept is what you deserve." My clients and our communities do not deserve this unfairness and injustice, and I do not accept it.

Editor's Afterword: When was slavery ended in the United States of America? Some say it was in 1862 with President Lincoln's Emancipation Proclamation. Others say it was with the passage of the Thirteenth Amendment in December 1865. But slavery, referred to euphemistically as "involuntary servitude," was never really abolished in the United States, and it is high time we set that injustice right for good and for all.

The Thirteenth Amendment abolished slavery in all cases except for those convicted of crime. But the federal government

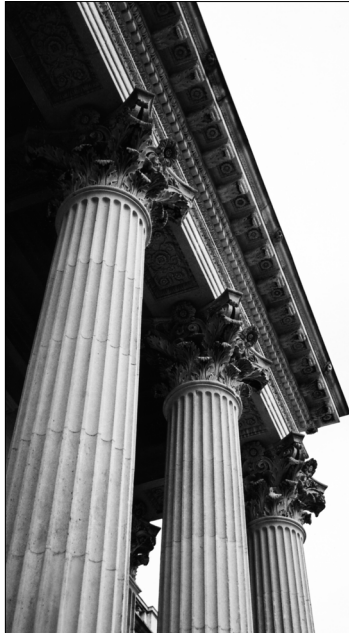


Photo courtesy of the Orleans Public Defenders Office

The New Orleans Criminal District Courthouse.



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left the protection of constitutional rights, including the right to a fair trial and the right to counsel, to the states, who did a patently inadequate job of protecting those rights for poor and minority residents.

In the 1950s and 1960s, landmark United States Supreme Court rulings purported to guarantee those rights on behalf of the federal government, but again, that government failed to provide a mechanism to guarantee that poor and minority residents charged with crime were protected from enslavement by states. Criminal defense is an "unfunded mandate," and many states and localities consistently throughout the last 150 years have not provided adequate funding to prevent the enslavement of their minorities and poor, creating a class system which has pitted the "middle class" against the largely minority and immigrant working class.

The process has been further institutionalized through the building of a mammoth criminal justice system, complete with police and prosecutors and judges and government administration, as well as prisons where one portion of the population



Stacks of legal files indicative of the heavy caseload in the Orleans Public Defenders office.

Photo courtesy of the Orleans Public Defenders Office

is hired to guard the other. Blaming individual policemen or prosecutors or guards begs the larger question.

This class war is playing out on the streets of the United States every day, because the promises of the Civil War's Reconstruction Amendments have proved themselves empty for many of society's most vulnerable (who are precisely those the amendments were supposed to protect). This extends to voting rights as well. This nation has warehoused, exploited and abused its minority youth, who should be playing a pivotal part in the process of building 21st Century America and a more just, safe and peaceful world. Our nation now finds it all but impossible to wage an international war against terrorism while this class war

continues at home. The necessary first step is to ensure that slavery, in all its manifestations and by whatever name it is called, is ended forever in the United States.

We applaud the New Orleans Public Defender's fight to stand to the rule of law, in a system where there is no level playing field, long before the defendant appears in court.



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