

Hurricane Brings Attention to Long Broken Public Defense System

By Heather Hall

Indigent defense reform advocates have weathered many hurricane seasons, but none has threatened to undermine their efforts like the 2005 season. However, such devastation also catalyzes conversations about ‘starting over’ with a ‘clean slate.’ Social change is always challenged because both advocates and their opposition are entrenched in the status quo. Hurricane Katrina has obliterated the status quo and provided a new social and financial reality that creates the opportunity to finally realize the system of indigent defense that all Louisianans – taxpayers, community members and criminal defendants – deserve.

Hurricane Katrina brought a new level of national attention to Louisiana’s indigent defense crisis. Injustice, inefficiency, waste, funny numbers and questionable representation are the shameful hallmarks of a system that incarcerates more people per capita than any other state in the country,¹ or any other country in the world.² Worse, this system simultaneously leads the nation in the frequency of wrongful convictions.³ This is the reality of a system in shambles. It is a reality born from the neglect of policy makers and the absence of public outrage.

Despite the federal guarantee to an attorney and Louisiana’s own constitutional mandate that, “the Legislature shall provide for a uniform system of securing and compensating qualified counsel for indigents,”⁴ Louisiana is far from realizing that ideal. The indigent defense crisis preceded Hurricane Katrina but has been brought to a new level as a consequence of the storm. Hundreds of men and women from Orleans and the surrounding parishes are now in precisely the same position that Gideon was in so many years ago – incarcerated, unrepresented and lacking any tool beyond a handwritten plea for help.

Pre-Katrina

There has been some effort to paint the problems in the indigent defense system as an Orleans-specific, post-Katrina crisis. This characterization misrepresents the scope of Louisiana’s problems and the many years that reform advocates have been struggling to make progress in this arena.

In 1993, in *State v. Peart*,⁵ the Louisiana Supreme Court found there was a “general pattern ... of chronic underfunding of indigent defense services in most areas of the state.” The Supreme Court called upon the Legislature to enact indigent defense programs or the Court, “may find it necessary to employ the more intrusive and specific measures it has thus far

avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.”

In April 2005, the Supreme Court again addressed the deficiencies of Louisiana’s indigent defense programs in *State v. Citizen*, reprimanding the Legislature for its failure to act. In its unanimous decision, it found: “the Legislature has enacted statutes which require the State to provide funds for indigent defense through the Louisiana Indigent Defense Assistance Board and statewide indigent defender boards in each judicial district but at the same time has failed to provide adequate appropriation to support these services.” In order to provide some remedy for the clients in question, the ruling in *State v. Citizen* gave trial judges the authority, upon motion of the defendant, to halt a prosecution if adequate funding is not available.⁶

In May of 2005, Supreme Court Chief Justice Pascal F. Calogero made an impassioned plea to the Legislature during his annual State of Judiciary: “I admonish you, simply, to do the right thing.” Systemic, reform-minded litigation has become what many see as the unfortunate consequence of the Legislature’s failure to “do the right thing.” Despite the Court’s attempt to necessitate the Legislature’s attention to remedying this issue, it is not clear what the next course of action is after a prosecution is halted. Three years remain before a defendant’s right to a speedy trial is violated, creating an unconscionable delay in the deliverance of justice.

Beginning in 2004, legislative activity had begun to gain momentum. A legislatively-created Indigent Defense Task Force⁸ (IDTF) was charged with studying the indigent defense crisis and making recommendations for its remedy. Working through the course of a year, the IDTF made three legislative recommendations which became law in the 2005 Legislative Session: 1) created uniform definitions of ‘case’ and ‘indigency’; 2) required uniform caseload reporting from all judicial districts to lay a foundation for comprehensive reform and 3) increased the authority, independence and membership of the state indigent defender board. The legislature did not, however, address the “chronic underfunding” or the unreliable funding structure. Louisiana remains the only state in the nation to attempt to fund the majority of its Constitutional obligation to provide indigent defense services through court costs, primarily through fees collected from traffic tickets.⁹

Media outlets had begun to pay attention to the indigent defense crisis as well. In the two years before Hurricane Katrina, at least 28 editorials were printed in Louisiana papers, unanimously calling for immediate and substantive indigent defense reform.¹⁰ In the months immediately following Hurricane Katrina, advocates feared that the momentum of the reform movement would be thwarted by competing needs and



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a budget shortfall. However, indigent defense reform has again resurfaced as a major issue affecting public safety, fairness and fiscal responsibility.

Post-Katrina

While the political and fiscal challenges to successfully reform Louisiana's indigent defense system have clearly increased in the aftermath of the hurricanes, there is also great opportunity in the post-Katrina context. For an extended moment, the entire nation watched a lethargic and seemingly uncompassionate response to the plight of Louisiana's poor and was appalled. In that moment, the poor were empowered, with an audience they seldom have, to share their stories. The exposure that Hurricane Katrina brought to issues of race and class created an ability to talk about them more directly than before.

With minimal assistance from the state indigent defense board, local judicial districts are responsible for generating their own revenue to maintain services. In Orleans Parish, local revenue accounted for 75 percent of the public defender office budget.¹¹ Obviously, Hurricane Katrina completely disrupted this funding stream. Traffic tickets simply aren't being written, further draining the already paltry funds available for indigent defense.

Because of this budget shortfall, the Orleans Parish Public Defender Office was forced to make dramatic cut-backs. Understaffed before Hurricane Katrina with 42 lawyers, for several months it functioned with only six attorneys. All support staff, investigators and other staff have been laid off with the exception of a single secretary.

In early February, several judges held hearings to decide how to proceed with criminal trials. These hearings revealed a completely nonfunctional system of public defense in Orleans Parish. The six lawyers who were on staff at that hearing were responsible for approximately 4,000 cases in 12 sections of court. Numbers were not available for cases in traffic/municipal court. An Orleans Parish attorney who used to work for the Indigent Defender Board estimated that caseload is approximately 1,800 cases per attorney, a number no lawyer can ethically manage.¹² The funds for 2006 were reported to have dropped to less than 20 percent of the projected \$2.2 million budget.

At this hearing, the Orleans Parish Indigent Defender Board revealed that they had recently decided to adopt the state board's recommended caseload standards.¹³ This move came after funds donated by state bar associations in Ohio and Michigan were dedicated to hiring more staff attorneys, but required that those staff attorneys comply with the ABA caseload limits.

Judge Hunter halted the prosecution of defendants in Orleans Parish Section K criminal court and Judge Calvin Johnson ruled similarly for Section L. As a result of the local board's newly imposed caseload limits, attorneys unenrolled from all but their 200 oldest felony cases. The



Photo courtesy of Heather Hall

Some inmates in the New Orleans criminal justice system have gone more than nine months without seeing a lawyer.

remainder of Orleans Parish criminal defendants are unrepresented.

Compounding this chaos is the complete collapse of the local Indigent Defender Board. Judges in each judicial district select a local board, usually of three to six members, upon the recommendation of the Bar Association. There are no assurances that local board members are qualified or uncompromised by their other positions. In Avoyelles Parish, for example, the local board recently existed of a vice principle, a real estate developer/nightclub owner and an embalmer.¹⁴ In Red River Parish, until a couple of months ago, the local board existed of the district attorney's secretary, the judge's secretary and the clerk of court.¹⁵

The Orleans Parish Board had six members, several of whom were not nominated through appropriate procedures. One member has not been heard from since Hurricane Katrina and another is bedridden with an illness. The remaining four had only been able to come together once to make quorum before mid-March, when three of them resigned. The only member left standing is Frank DeSalvo, who doubles as attorney for the Police Association of New Orleans. James Gill, an opinions columnist for the *Times-Picayune*, quipped, "who says you can't play cops and robbers all by yourself?"¹⁶

DeSalvo's position representing indigent defendants and their arresting officers is obviously conflicted. Further, DeSalvo's son and law partner is running for Orleans Parish criminal sheriff and he has admitted to "moonlighting" his private partners as contract attorneys with the public defender office he supervises to supplement their salary. Those who didn't want to believe that Louisiana public defenders run their private practice on the backs of poor people have been made cynics.

Orleans Parish Clerk of Criminal Court Kimberly Williamson Butler is no help, as she was on the lam, and then behind bars, while much of this was going down. Many clients who were once housed in Orleans Parish prison facilities were evacuated to prisons in central and northern Louisiana and remain scattered throughout the state, making it virtually impossible for them to have any

meeting with their public defender.

A number of volunteer attorneys operating out of Alexandria, LA¹⁷ conducted interviews of every evacuated prisoner and filed petitions for habeas relief in more than 2,000 cases for defendants who were either arrested for technical violations, pre-trial detainees or those who were being held beyond their release date. More than 50 percent of their clients were released from confinement as a result of their efforts. However, these interviews reveal a grim reality. The survey of more than 2,000 storm-evacuated indigent prisoners revealed more than 30 percent who reported they did not have a lawyer, 32 percent who reported that they were unsure if they had a lawyer and 14 percent who knew they were presented by a public defender but did not know their lawyer's name. Less than 10 percent – only 196 prisoners – knew the name of their public defender.¹⁸

This data is supported by a study released by the Safe Streets Coalition in cooperation with the Southern Center for Human Rights. After interviewing 102 Orleans Parish prisoners, they found that the average defendant had not heard from their attorney in more than a year. The average number of days that the men and women they interviewed had been detained pre-trial was 385 days, with the longest wait being 1289 days and the shortest being 179. During that time, the average time they had spoken to their attorney was zero.¹⁹

Reform Efforts Throughout the State

The impact of Hurricane Katrina has placed an enormous burden on storm-affected parishes, but given the absence of a strong, stabilizing state system, local jurisdictions throughout the state are suffering as well. Other public defender offices, such as Baton Rouge, are overwhelmed with an influx of cases due to the forced and continued evacuation of people out of the New Orleans area. (Meanwhile, these offices are plagued by pre-Katrina challenges. In Baton Rouge, for example, the public defenders finally resolved their eviction dispute in mid-March, agreeing to pay local government \$300,000 in back rent.) Further, the costs of incarcerating thousands of people in prisons throughout the state is creating tensions concerning who will reimburse for these costs.

However, increased attention to the unfathomable workloads of public defenders – and the increased liability – has created a movement for local boards to adopt their own standards. Baton Rouge was the first to do so early this year, Orleans has followed suit and numerous others are currently considering it.

The State Indigent Defense Board held its first meeting after the storm, composed of several new members created by the 2005 legislation, as well as a new chairwoman. In that meeting, they voted to tie all District Assistance Funds – which were previously unmonitored funds identified by a formula and sent to local districts – to caseload limits. This is an encouraging move as advocates hope that the state board will have a strong, independent and regulatory authority over the state indigent defense system.

The Louisiana State Bar Association has formed a new committee to address the indigent defense crisis. The Right to Counsel Committee is committed exclusively to indigent

defense and has held several meetings.

Bar associations across the country have donated money to hurricane recovery and the Louisiana Bar has met several times to ensure that money is spent ethically and efficiently.

In House Bill 1 – Louisiana's state budget – Governor Blanco has proposed an additional appropriation of \$10 million to assist the indigent defense crisis. While advocates say that an additional \$20-\$30 million is needed, this appropriation reflects her acknowledgement of the severity and immediacy of the indigent defense crisis.

Conclusion

Hurricane Katrina caused much speculation about the rebuilding of New Orleans and federal reinvestment in the state of Louisiana. To counter those concerns, and in an effort to provide Louisianans with the quality of life they deserve, policy makers across the board are promising “a better Louisiana.” Community welfare, a sense of safety and confidence in our public officials are all at stake. Louisiana needs proactive leadership and creative problem solvers to create a criminal justice system that serves the poor, protects the innocent, keeps us safe and spends money wisely. The time is now. ★

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¹ <http://www.ojp.gov/bjs/pub/pdf/pjim99.pdf>

² Deep Impact: Quantifying the Effect of Prison Expansion in the South, Jason Ziedenberg, Justice Policy Institute, released 4/04/03, also available at <http://www.justicepolicy.org/article.php?id=124>

³ Exonerations in the United States 1989 Through 2003, Samuel R. Gross et al., The Journal of Criminal Law and Criminology, Vol. 95, No. 2, 2005

⁴ Louisiana State Constitution (revised 1974), Article I, Section 13

⁵ 621 So.2d 780, La. 1993

⁶ The complete decision for State v. Citizen can be found at:

<http://www.lasc.org/opinions/2005/04ka1841.opn.pdf>

⁷ 2005 State of the Judiciary address to a Joint Session of the State Legislature.

⁸ 5/03/05. The full text may be found at:

<http://www.lajusticecoalition.org/reports+resources/2005+state+of+judiciary/>

⁹ The Task Force includes representatives from all three branches of government, public defenders, private attorneys, law enforcement, prosecutors, the faith community, client constituents, juvenile advocates, labor organizers, good government groups and minority organizations.

¹⁰ Research conducted in Louisiana over the last 30 years have consistently indicated that such a funding structure threatens the integrity of the state's system of justice. See In Defense of Equal Access of Justice, pg. 2.

¹¹ The majority of these editorials can be found at www.lajusticecoalition.org

¹² Testimony of Orleans Parish Chief Public Defender Tilden Greenbaum, February 8, 2006, Section K Criminal Court, before Judge Arthur Hunter.

¹³ This number was the estimate of former Orleans Parish Public Defender Rick Teissier, made on January 27, 2006.

¹⁴ These standards may be found at www.lidab.com (150-200 non-capital felonies)

¹⁵ In Defense of Public Access to Justice, NLADA Publication, March 2004, pg. 29. Active members.

¹⁶ Reported at the Louisiana Association of Criminal Defense Lawyers meeting, 2/4/06

¹⁷ The Case of the Disappearing Lawyers, Opinions Columnist James Gill, Times-Picayune, 3/24/06

¹⁸ This pro bono effort was coordinated by attorneys Phyllis Mann of Alexandria, LA and Julie Kilborn of Baton Rouge, LA, from September 2005 through February 2006

¹⁹ These are rough numbers from the work of Ms. Mann and Ms. Kilborn. Exact numbers will be available shortly.

²⁰ Safe Streets/Strong Communities. Who Pays the Price for Orleans Parish Broken Indigent Defense System? A Summary of Investigative Findings Released March 2006, pg. 4