

A 3-Step Solution to the Public Defender Crisis

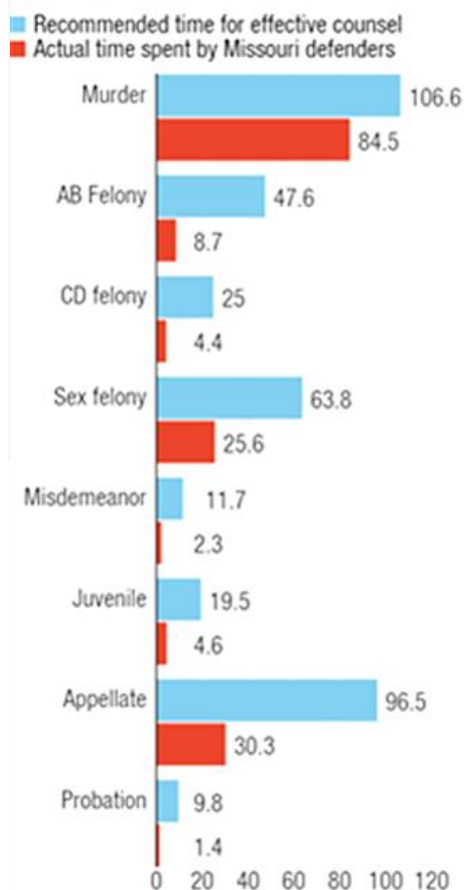
By Devon Johnson

Public defenders in the United States are facing insurmountable caseloads. Left with insufficient time to prepare, attorneys provide an ineffective defense which denies Sixth Amendment rights to those seeking state-sponsored legal counsel.

The Problem

In Louisiana, for example, approximately **3,679,792 hours** of work would be required for attorneys meet the annual public defense caseload. This would require **1,769 full-time attorneys** – they currently only have **363** and are losing full-time staff every year.¹⁰ Consequently, Louisiana has the highest state imprisonment rate in the US of **816 per 100,000** citizens.¹⁰ The scope of this crisis, however, is national. Lawyers in **Washington State** reported that they handled approximately **1,000 cases** each in one year. One non-felony attorney in **Florida** handled **971 cases** in one year, 80% of which were felonies. Attorneys in **Rhode Island, Pennsylvania, Maryland, Nebraska, and New York** affirmed that excessive caseloads are endemic nationally, citing annual misdemeanor caseloads in **excess of 1,000**.³

Hours Spent Per Case



How Have We Gotten to This Point?

As a consequence of the **expansion of citizens' right to public defense** combined with **economic distress**, many attorneys have been laid off while more citizens qualify for public defense.¹⁰ Furthermore, **court cases are more complex** due to changing mental health standards, criminalization of minor offenses, and new forensic technology.³ **Poor financial prioritization** has also contributed to the growth of this issue, as the US spends just **.0002% of GDP on public defense**, and spends **14 times more on corrections** than defense.⁵

source: Overworked And Underfunded...

Consequences

- **Denial of Sixth Amendment rights**
- **97%** of federal cases and **94%** of state cases are **decided by guilty plea deals**²
- Clients **cannot reasonably appeal** with ineffective defense claims. In some states the **success rate of appeals is less than 4%**⁵
- **Violations of ethical standards** under the Model Rules of Professional Conduct¹
- In many states **public defenders cannot withdraw** from cases due to overload²
- Some attorneys handle up to 50 cases per day, leaving **1-5 minutes for case prep**⁶

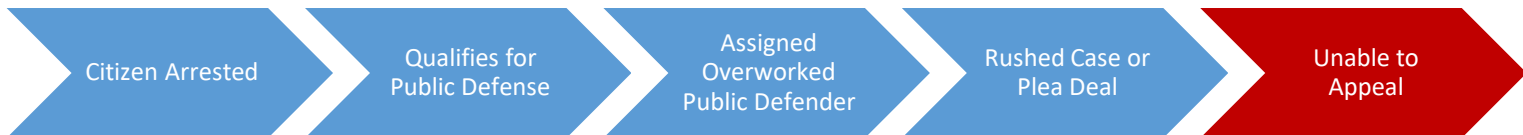
Legal Precedents

In 1963 the landmark Supreme Court case *Gideon v. Wainwright* affirmed that the right to counsel extends to individuals unable to afford an attorney in state felony prosecutions. In some states, the right to counsel is recognized in misdemeanor cases as well.³ In 1984 the Supreme Court expanded this decision to include the requirement of “reasonably effective assistance of counsel pursuant to prevailing professional norms of practice”.⁹

Racial Equity Concern

Current caseload levels lead public defenders to triage and prioritize cases. In doing so, implicit bias leads to lower priority for defendants of color. Implicit bias is most common when people have limited time, are cognitively taxed, and decision-making is highly discretionary – the exact context in which PDs operate. Even the most egalitarian PDs and PDs of color are influenced by implicit biases. Manifested as biased evaluations of evidence, interactions, and acceptance of punishments, implicit biases impede the judicial process and lead to harsher punishments for Black defendants.⁷

“When obstetricians have five times as much work as they can handle competently, terrible things happen. When public defenders have five times as much work as they can competently handle, terrible things happen, too.”⁶



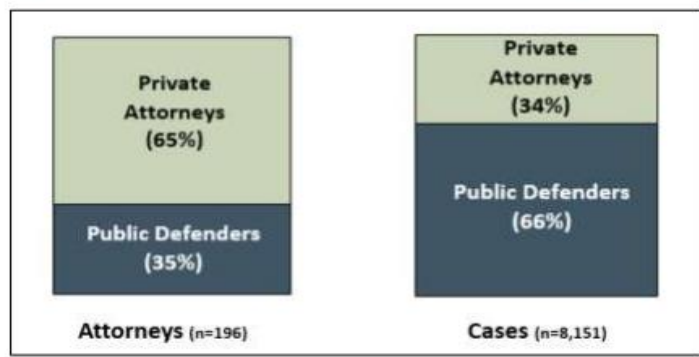
The Role for Policy: Why Aren't the Courts Handling This?

This issue isn't high on the legislative agenda because there is no lobby for it, so many think the courts should solve it.² However, **Missouri** is one of few states that has successfully argued a case in favor of regulating public defender caseloads, but not without consequences.² In 2012 the Missouri Supreme Court held that **judges and attorneys have a right to refuse to represent a client if ethical standards are jeopardized** based on the American Bar Association's Opinion 06-441. However, attorneys must refuse to represent an appointed client in order to begin this process. This left a Missouri man **in prison for seven months** during proceedings.¹ Furthermore, legal decisions do not come with resources to support the enforcement of the ruling. **Without more resources for public defenders, court-established limits cannot be reasonably upheld.**¹

How Have Some States Implemented Solutions?

Knowing that simply establishing caseload limits isn't a catch-all, some states have explored ways of providing more resources. In 2012 **Massachusetts'** governor tried **shifting more of the state budget toward public defenders and away from private attorneys**, estimated to save **\$45 million**.¹ However, this solution was politically challenging due to the power of private bar lobbies. Some states like **Florida** are **charging a fee** for indigent defense in an effort to increase funding for public defense offices.¹ While this is effective in increasing revenue, this solution violates the Sixth Amendment right to free representation expressed in *Gideon* and acts contrarily to the ultimate goal of expanding access to defense. In 2013, one proposed solution was the establishment of a **Public Defender Corps** comprised of recent law graduates placed in public defender fellowships nationwide. In collaboration with Equal Justice Works and Southern Public Defender Training Center, the corps would seek to **increase the number of attorneys available** to redistribute high caseloads while also **creating a new cultural prestige** for careers in public defense. This movement, however, suspended applications in 2013 after **federal funding was cut**.¹

Figure C-4. Proportions of Attorneys and Cases by Type of Counsel



Source: Carmichael et al.

Policy Recommendation: A 3-Step Solution

Establish National Caseload Limits and Right of Refusal

Federally Subsidize Public Defender Corps

Advocate For Smart-Justice Policy to Reduce Crime

1) Establish national caseload limits and a right of refusal for public defenders. In order to set the national standard the Delphi Method – a comprehensive tool used by researchers in Texas³ and Louisiana¹⁰ – should be implemented. Once limits are established, there will be a need to redistribute the caseload among more public defenders. In order to fill the deficit of public defenders we must **2) federally subsidize a public defender corps program.** Operations should be left to non-governmental agencies like Equal Justice Works and the Southern Public Defender Training Center, who have established the infrastructure in the past. Lastly, we must take steps towards reducing the amount of cases brought to public defenders by **3) advocating for smart-justice policy.** *Gideon* asserts that one qualifies for public defense when loss of liberty is possible punishment⁵, so by taking a smart-on-crime approach we can reduce the need for public defenders in the first place. By striving to reduce reliance on incarceration, tackle over-criminalization, and collaborate to find cost-effective ways to reduce recidivism, the smart-on-crime approach to criminal justice policy inherently eases strain on public defenders.⁴ The crux of this issue has historically been **funding**, the lack of which has limited the data available for policy-based solutions. By **investing in testable solutions** like these to ease attorney caseloads, redistribute workload among new talent, and become smart-on-crime, we can change the unconstitutional status quo.

Works Cited

1. Baxter, Heather. "Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations." *Federal Sentencing Reporter*, vol. 25, no. 2, 2012, pp. 91–102. *JSTOR*, www.jstor.org/stable/10.1525/fsr.2012.25.2.91. DOI: 10.1525/fsr.2012.25.2.91
2. Cara H. Drinan. "Lafler and Frye: Good News for Public Defense Litigation." *Federal Sentencing Reporter*, vol. 25, no. 2, 2012, pp. 138–140. *JSTOR*, www.jstor.org/stable/10.1525/fsr.2012.25.2.138. DOI: 10.1525/fsr.2012.25.2.138
3. Carmichael, Dottie, et al. "Guidelines for Indigent Defense Caseloads." Public Policy Research Institute, 2014, pp. 1–114
4. FAIRFAX, ROGER A. "Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda." *The Yale Law Journal*, vol. 122, no. 8, 2013, pp. 2316–2335. *JSTOR*, www.jstor.org/stable/23528674.
5. Joy, Peter. "Unequal Assistance of Counsel." *Kansas Journal of Law & Public Policy*, 2015, pp. 518–38, http://law.ku.edu/sites/law.drupal.ku.edu/files/docs/law_journal/v24/Joy%20Final.pdf.
6. Oppel Jr., Richard A., and Jugal K. Patel. "One Lawyer, 194 Felony Cases, and No Time." *The New York Times* 31 Jan. 2019. Web. 31 Jan. 2019.
7. "Overworked And Underfunded, Mo. Public Defender Office Assigns Case — To The Governor." NPR, NPR, 4 Aug. 2016, <https://www.npr.org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-govern>.
8. RICHARDSON, L. SONG, and PHILLIP ATIBA GOFF. "Implicit Racial Bias in Public Defender Triage." *The Yale Law Journal*, vol. 122, no. 8, 2013, pp. 2626–2649. *JSTOR*, www.jstor.org/stable/23528687.
9. "State-by-State Data." The Sentencing Project, The Sentencing Project, 2016, <https://www.sentencingproject.org/the-facts/#map?dataset-option=BWR>.
10. "The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards." American Bar Association Standing Committee on Legal Aid and Indigent Defendants, 2017, pp. 1–64