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Doing Katrina Time

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Doing Katrina Time

Pamela R. Metzger*

This Article explores one Katrina-law problem: the plight of the poor, unrepresented, and uncharged prisoners. It attempts to explain why these detainees were unrepresented and abandoned and how we might better guarantee the quality of justice for future detainees. Katrina has proved that bright-line rules are the best lines of defense for the poor; criminal justice systems honor concrete rules more readily than abstract imperatives. Katrina also proved that good lawyering on behalf of poor people can bring joy in the midst of despair.

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I. INTRODUCTION

There are countless Katrina-law problems. This Article explores one such problem: the plight of poor, unrepresented, and uncharged

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prisoners. Drawing heavily on my own experiences representing those detainees, this Article attempts to explain *why* these detainees were unrepresented and abandoned. This Article also reimagines how we might better guarantee the quality of justice for future detainees. The Article concludes with some reflections about criminal justice lawyering after Katrina.

II. KATRINA TIME

When Hurricane Katrina swept across New Orleans, over 6500 men, women, and children were locked in the sprawling Orleans Parish Prison (OPP) complex.¹ Forty-eight hours before Katrina made landfall, prison officials cut inmate phone lines, and the inmates lost all contact with the outside world.² As the storm grew closer, police continued to arrest suspects: some for serious crimes, like murder and rape; others for petty offenses, like trespass and public intoxication.³ Meanwhile, the prisoners' families either packed and fled or stayed and watched the water rise.

Within days, OPP had evacuated all of its inmates to state and parish jails and prisons across the State of Louisiana.⁴ The evacuated prisoners were taken from OPP without any of their legal documents, personal papers, or meaningful identification.⁵ Once evacuated, the OPP prisoners were lost to the known world, just as surely as if they had been among the "disappeared" of a country struggling under a repressive dictatorship.

When Katrina hit, the Orleans Indigent Defender Program did not have a list of its imprisoned clients, much less information about those prisoners' family contacts or medical needs. Still, some of those prisoners had pending and active court cases; their names appeared on

1. Statistics provided by the Orleans Parish Criminal Sheriff's office indicate that, on August 28, 2005, OPP held nearly 6700 prisoners. NAT'L PRISON PROJECT OF THE ACLU ET AL., ABANDONED AND ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 9-13 (2006), available at <http://www.aclu.org/pdfs/prison/oppreport20060809.pdf> [hereinafter NAT'L PRISON PROJECT ET AL.]. In addition, OPP was housing several hundred inmates from neighboring parishes; those parishes had evacuated their inmates to the perceived safety of OPP's facilities. *Id.* For one account of the evacuation and its aftermath, see Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 134-42 (2006) (describing the plight of OPP's population and the New Orleans criminal justice system's response following Hurricane Katrina).

2. NAT'L PRISON PROJECT ET AL., *supra* note 1, at 29.

3. Human Rights Watch, *New Orleans: Prisoners Abandoned to Floodwaters*, HUM. RTS. NEWS, Sept. 22, 2005, <http://hrw.org/english/doc/2005/09/22/usdom11773.htm>.

4. *Id.* at 139.

5. *Id.* at 148.

court dockets and in prosecutors' case files, and their cases would eventually be tracked by the larger criminal justice system. Other OPP prisoners had private counsel, counsel who knew their names, knew their families and knew their plight. But one group of prisoners vanished almost entirely. Those prisoners were uncharged, unrepresented detainees. As poor people who had been arrested, but not yet formally charged, these prisoners had no public defender.⁶ True, a public defender had "stood up" for each of these detainee's initial appearance, but that appearance was a cameo, a systemic sleight of hand that put a fig leaf over the naked abandonment of poor pretrial detainees. Even before Katrina, poor precharge detainees had languished in jail for weeks in a kind of jurisprudential limbo: not charged but not free. After Katrina, poor precharge detainees descended into a Kafka-esque hell: not charged, not free, not known.

A. Filling the Breach: My Own Journey

I knew little of the prisoners' plight when I fled New Orleans. When Katrina came, I packed for my family: children's clothes and blankies, favorite toys, books, photo albums, quilts, the dog and her worn-out bed. I packed for my law clinic and our clients: case lists, case files, code books, zip drives, and electronic copies of case memoranda and briefs.

Like most of my friends and colleagues, I watched, with growing dread, as televisions and Web sites showed shocking images: prisoners sitting broiling in the sun on the I-10 overpass; the grey stone walls of the criminal court house overtaken by murky waters; judges, clerks, guards, lawyers, and prisoners rowing to safety in small boats. I heard wild rumors: a prison riot, a prison massacre. I joined criminal defense list serves and absorbed the dribs and drabs of news that floated back to us: the criminal court evidence room had flooded, and case evidence had dissolved into unrecognizable sodden piles;⁷ the Greyhound Bus Station had been converted to a jail and courthouse; human rights' groups were recruiting volunteers to interview prisoners and catalogue detainees' names, charges, and locations.

At the Tulane Criminal Law Clinic, we functioned as best we could. We looked for our clients on Red Cross lists and evacuee postings. We contacted the family members of our incarcerated clients

6. See Leslie Eaton, *Judge Steps in for Poor Inmates Without Justice Since Hurricane*, N.Y. TIMES, May 23, 2006, at A1.

7. Garrett & Tetlow, *supra* note 1, at 138, 146.

and confirmed their whereabouts. Within a month of our evacuation, we were satisfied that we had done all we could to guarantee our clients' safety.

A small band of lawyers traveled across Louisiana to locate the Orleans Parish prisoners and to advocate for the release of those imprisoned for minor offenses.⁸ I did not. I rented a house and settled my children in school in Atlanta. Another group of lawyers filed habeas petitions for thousands of prisoners who had no access to the court and no identifiable future court date.⁹ I did not. I drafted a Supreme Court petition for certiorari on a Confrontation Clause issue and waited to see when Orleans Parish criminal practice would resume.

Two months after Katrina, in October 2005, Chief Judge Calvin Johnson of the Orleans Parish Criminal Court called me to duty. Judge Johnson appointed my clinic, the Tulane Criminal Law Clinic, and the Loyola Criminal Law Clinic to represent all indigent pretrial detainees who were charged with crimes in Orleans Parish on claims of ineffective assistance of counsel.¹⁰ Thus began my acquaintance with the unknown Katrina prisoners.

For the next several months, my colleagues and I struggled to make sense of our new calling. Who were our clients? How many clients did we have? How could we find them? How could we see them? When Tulane University School of Law reopened in January 2006,¹¹ the Criminal Law Clinic had two kinds of cases: "old" (pre-Katrina) clients and new clients. The trouble was, we still did not know who all of our new clients were.

In February, our clinic began making weekly trips to remote parish prisons to interview and triage Orleans Parish pretrial detainees. Much to our surprise, a significant percentage of the detainees were illegally detained, held long past their lawful release dates. We had been confident that those early rounds of heroic lawyering had successfully weeded out those charged with minor offenses, yet more than ten percent of interviewed detainees were released after we

8. See David Rohde & Christopher Drew, *The Inmates: Prisoners Evacuated After Hurricanes Allege Abuse*, N.Y. TIMES, Oct. 2, 2005, (National), at 26.

9. See Henry Weinstein, *Evacuated Prisoners Are Captive to Legal Limbo*, L.A. TIMES, Oct. 16, 2005, at A26.

10. Madeline Vann, *Clinic Battles for Rights of Indigent Prisoners*, Tul. Law., Spring/Summer 2006, at 19, 19.

11. Press Release, Tulane Univ. Sch. of Law, A Message from the Dean (Dec. 13, 2005) (available at <http://www.law.tulane.edu/resources/index.cfm?d=tlnews&main=inthenews.cfm&newsid=182&t=r>).

showed the court and the prosecution the undisputed court records: those inmates had already been incarcerated beyond the maximum time permitted by law. We were stunned to discover “new” prisoners—evacuees whose names did not appear on the prisoner rolls cobbled together by court officials, volunteer lawyers, prosecutors, and prison officials. How could it be that nearly seven months after Katrina, Louisiana jails housed prisoners so completely forgotten that no one even knew that they were in prison? We renewed our efforts to develop the most basic facts: who was in jail, and why?

And, we remained bewildered by the questions we had to ask. How were these people lost? No one knew. Why had they stayed lost, so many months after Katrina? No one could explain. Who represented them? No one.

In March 2006, the judges of the Orleans Parish Criminal District Court appointed me to serve as a member of the new reform board of the Orleans Public Defender.¹² Meanwhile, under the auspices of the Student Hurricane Network’s “Project Triage,” nearly fifty law students from around the country gave up their spring breaks and paid their own way to New Orleans to sit with us in front of computer screens searching criminal justice databases to sort out the detainees most in need of immediate release.¹³ By April 2006, our clinic had become the unofficial point institution for the location and release of the Orleans Parish criminal justice community’s lost detainees.

Our personal, anecdotal experiences were so shocking that we could hardly credit them. Yet our evolving empirical data reflected the same larger trend. For example, between mid-June and mid-July of 2006, the Tulane Law Clinic generated a list of 379 detainees who had not been to court even once since Katrina made landfall. Nearly three dozen of these detainees were entitled to immediate release. More than one hundred others were in desperate need of immediate legal assistance.

I have long since lost count of the number of detainees who have been released because of work done by our law clinic. As I write this, in February 2007, my students and I have spent sixteen months combing through lists of pretrial detainees, looking for those uncharged, unrepresented, and overdetained people; those who are literally unnamed and unknown; those who are lost but who need only

12. Eaton, *supra* note 6.

13. *Id.*

one lawyer, one phone call, or one court date to have the prison doors swing open.¹⁴

When Katrina came, I did not pack for these things. I would not have known how.

B. Lost in the Gap: Gregory Davis

On April 16, 2005, Gregory Davis was arrested and charged with possession of prohibited drug paraphernalia.¹⁵ The charge is a misdemeanor that carries a maximum sentence of six months of incarceration.¹⁶ Within seventy-two hours of his arrest, Mr. Davis appeared in court, along with more than three dozen other arrestees, for an initial appearance and bond setting.¹⁷ They sat in the courtroom as a single public defender, assigned to the magistrate's section of court, addressed the group. The public defender explained he was representing all of the detainees, but for today only. He gave a brief speech that went, more or less, like this:

Today, you are here for an initial appearance. The judge will set your bond, and I will represent you for that purpose. I am not representing you on your case. Nevertheless, I do have some advice and information for you.

First, today the prosecutor will tell the judge your criminal history—the number of felony and misdemeanor arrests and the number of felony and misdemeanor convictions. Based upon that information and

14. In September 2006, the Tulane Law Criminal Clinic joined the Student Hurricane Network and the Orleans Public Defenders in an ambitious project designed to create meaningful client files for the hundreds of detainees who had been arrested before, and in the months after, Katrina—months when there were no functioning courts, jails, or public defender offices. This project, known as the Katrina-Gideon Interview Project, began with an inventory of the nearly 3000 people who were in the custody of the Orleans Parish Criminal Sheriff on September 8, 2006. STUDENT HURRICANE NETWORK, LAW STUDENTS WORKING WITHIN THE POST-KATRINA LEGAL LANDSCAPE: THE STUDENT HURRICANE NETWORK ANNUAL REPORT 10 (Laila Hlass et al. eds., 2006), available at http://www.studenthurricanenetwork.org/shn_report_oct_%202006.pdf; see Laura Maggi, *Group Tries To Loosen Legal Logjam: Students To Gather Case Information*, TIMES-PICAYUNE (New Orleans), Dec. 16, 2006, at B-1; Ann M. Simmons, *Justice on Katrina Time*, L.A. TIMES, Dec. 12, 2006, at A1. In December 2006, the Katrina-Gideon Interview Project launched its first volunteer effort, consisting of remote data entry and case evaluations by students and law professors around the country. Maggi, *supra*. Within one week, project volunteers identified five detainees who were entitled to immediate release and several others who had not been to court since before Katrina's landfall. By the end of January 2007, nearly 250 lawyer and law student volunteers had traveled to Louisiana to interview indigent clients and build client files, enabling public defenders to provide meaningful and effective advocacy. See *id.*

15. First Appearance, State v. Davis, Magis. No. 454-073 (La. Magis. Ct. Orleans Parish Apr. 16, 2005).

16. LA. REV. STAT. ANN. §§ 40:1023(C), :1025 (2007).

17. First Appearance, *supra* note 15.

upon the information contained in the charge, the judge will set your bond. I have a copy of the "gist" that describes the charges against you. If there is an argument to be made that the police haven't properly charged you, I will make that argument on your behalf.

Second, other than any questions the judge or I may have for you, I advise you not to say anything about your case today or to anyone else in the future except your attorney.

Third, you are here because the police have arrested you for committing a crime. However, the district attorney's office has not decided whether to accept the case for prosecution. If you do not make bond and you are charged with a misdemeanor, the district attorney will have forty-five days to decide whether to accept the prosecution of the case; if you are charged with a felony, the prosecutor has 60 days to decide whether to prosecute your case. If the district attorney accepts your case, your case will be allotted to a section of court; the judge in that section of court will set your case for an arraignment within 30 days. At your arraignment, the court will determine whether you are indigent and qualify for a court-appointed attorney. If you do qualify for a public defender, your lawyer will be appointed for you then.

The court found probable cause to believe that Mr. Davis had committed the charged crime.¹⁸ The court set bond at \$2500 and set the case on its calendar for May 31, 2005, forty-five days later, for a rule-to-show-cause hearing.¹⁹ If, by May 31, 2005, the district attorney's office had not accepted the charges, the court would order Mr. Davis's release.²⁰ Two days later, Mr. Davis posted bond and was released.²¹

On May 20, 2005, the district attorney's office filed a bill of information accepting the charges.²² The case was set for arraignment on June 6, 2005.²³ On that date, the court appointed a public defender to represent Mr. Davis.²⁴ The court set the trial for two weeks later, on June 28, 2005.²⁵ Thus, after nearly two months without counsel, Mr. Davis was ordered to proceed to trial with a lawyer who would have represented him for less than three weeks.

18. *Id.*

19. *Id.*

20. See LA. CODE CRIM. PROC. ANN. art. 701(B) (2003).

21. Surety Bond Filing, State v. Davis, Magis. No. 459-591 (La. Crim. Dist. Ct. Orleans Parish filed May 23, 2005).

22. Bill of Information Filing, *Davis*, Magis. No. 459-591 (filed May 20, 2005).

23. Surety Bond Filing, *supra* note 21.

24. Arraignment Appearance, *Davis*, Magis. No. 459-591 (June 6, 2005).

25. *Id.*

On June 28, 2005, Mr. Davis pled guilty as charged.²⁶ He was sentenced to a five-month suspended sentence, one year of inactive probation, and approximately \$450 in fines and fees.²⁷ Mr. Davis was directed to appear in court on August 9, 2005, to pay these fines and fees.²⁸ Mr. Davis and the public defender bid each other farewell; the public defender did not monitor fine payments.

On July 26, 2005, Mr. Davis was arrested in a new case and charged with two felony theft offenses.²⁹ His initial appearance was a virtual carbon copy of the one he had only three months before, except this time the judge set a \$25,000 bond.³⁰ The case was scheduled for a rule-to-show-cause hearing on September 24, 2005.³¹ Until then, Mr. Davis would be unrepresented. Because he had no attorney representing him in this new case, or one in his old case, Mr. Davis was unable to address a serious problem confronting him: If he was in custody on the new case, how could he show up in court on the old case to pay his fines and fees?

August 9, 2005, came and went. No one brought Mr. Davis to court for his scheduled appearance to pay fines and fees in his first case. The judge had his clerk enter an order: "Defendant Davis failed to appear for payment. The court issued a no bond alias capias [warrant] for the arrest of the defendant."³² No one in the criminal justice system realized that Mr. Davis was in jail, in the building next door to the courthouse, waiting for the prosecutor's decision about whether to accept prosecution of a new case against him. When the sheriff's office did report Mr. Davis's arrest to the court, the court calendared the case for a new status hearing on September 28, 2005.³³

When Katrina came, Mr. Davis was lodged in the OPP. Like other evacuated detainees, Mr. Davis was transferred to several different state and local facilities. Mr. Davis was one of the lucky ones, he had made contact with his family, who had lived in New Orleans' ravished Ninth Ward. His mother, who had refused to evacuate, was rescued from her home by a neighbor who had

26. Trial Appearance, *Davis*, Magis. No. 459-591 (June 28, 2005).

27. *Id.*

28. *Id.*

29. First Appearance, *State v. Davis*, Magis. No. 458-290 (La. Magis. Ct. Orleans Parish July 26, 2005).

30. *Id.*

31. *Id.*

32. Order for Failure To Appear for Payment, *Davis*, Magis. No. 459-591 (filed Aug. 9, 2005).

33. *Id.*

commandeered a boat. The water had risen above the threshold of the kitchen in her raised home.

In February of 2006, the Tulane Law Clinic interviewed a randomly assembled group of Orleans Parish prisoners who were temporarily housed in Ferriday, Louisiana, nearly 200 miles from New Orleans. Mr. Davis was among them.³⁴

Mr. Davis had no legal papers that explained why he was in jail. He had not seen or heard from an attorney since a month before Katrina.³⁵ He did not know the name or the telephone number of the last public defender who had represented him. In truth, no public defender represented him at all.

Mr. Davis told the law students that he was in jail on a theft charge. As he explained it, the charges against him must have been accepted. After all, his sixty days of D.A. time had come and gone, but he had not been released.

The students returned to New Orleans and pulled Mr. Davis's court files. The district attorney's office had refused the theft charges against him on August 20, 2005, more than a week before Katrina made landfall.³⁶ The reason Mr. Davis had been detained, evacuated, and imprisoned for nearly six months after Katrina? He failed to appear to pay \$448 in fines and fees because he was in jail on a charge that would eventually be dismissed.

What could have prevented this tragedy? A lawyer.

III. PRECHARGE DETAINEES: THE PRE-KATRINA STATUS QUO

Louisiana's statutes require that every criminal defendant be provided with counsel within seventy-two hours of arrest.³⁷ Until recently, however, it was the practice in Orleans Parish for the public defender to represent new arrestees for their initial appearance only.³⁸ That is, the public defender stood up at the initial appearance, where the defendant's bail was set. Then, the public defender sat down, and

34. See Defense Counsel Appearance, *Davis*, Magis. No. 459-591 (Feb. 24, 2005).

35. Of course, had he known the number, no one would have answered; those phones would remain out of order for several more months.

36. Charges Refused, *State v. Davis*, Magis. No. 458-290 (Aug. 23, 2005).

37. Louisiana's *Code of Criminal Procedure* article 230.1(A) (2003) states: "The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel." However, article 230.1(B) tempers subsection A's imperative with a clause that seems to beg the question of the entitlement to precharge counsel: "At this appearance, if a defendant has the right to have the court appoint counsel to defend him, the court shall assign counsel to the defendant." *Id.* art. 230.1(B).

38. See Vi Landry, *Defense Less*, GAMBIT WKLY., Sept. 5, 2006, at 19.

poor defendants remained unrepresented, pending a prosecutorial decision to accept or refuse the charges.

According to Louisiana law, following an arrest, the prosecution has sixty days to accept or refuse prosecution of felony charges filed against a detained suspect; the prosecution has forty-five days in which to make this decision about a misdemeanor case.³⁹ If the forty-five-day or sixty-day screening period passes without the prosecution accepting the charge, the defendant is entitled to release without any bond obligation.⁴⁰ Pre-Katrina, in casual acknowledgement of this entitlement, the initial appearance judges routinely calendar felony cases for sixty days after arrest for routine monitoring of whether the defendant should be released because the prosecution failed to file charges within sixty days. However, no public defender maintained a list of precharge detainees and their maximum charge-or-release date. So, in theory, sixty days after arrest, if the district attorney had not filed a bill of information, the court ordered the defendant's release. In reality, if the court missed a release date, the detainee stayed in jail.

How can this be legal? Does the United States Constitution really permit the detention of uncounseled, uncharged criminal suspects?

The question itself is perhaps best broken down into two questions. The first is a black letter question: Does the United States Constitution, as interpreted by the United States Supreme Court, permit the state to detain unrepresented precharge suspects for up to sixty days? An answer to this question requires close examination of the *rules* established by the Supreme Court's Fifth and Sixth Amendment jurisprudence. The second is a normative question: Does a constitutional system that permits the state to incarcerate unrepresented precharge suspects for up to sixty days comport with our expectations of a meaningful adversarial system that promotes due process and fair combat? An answer to this question requires close

39. LA. CODE CRIM. PROC. ANN. art. 701(A) (2003).

40. *Id.* art. 701(B). Although Louisiana's lengthy screening period is unique, the dilemma posed by uncounseled precharge detainees is a national one. In Riverside, California, each year 12,000 defendants plead guilty without ever speaking to a lawyer. Kyung M. Lee, Comment, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 375 (2004). Ironically, *County of Riverside v. McLaughlin* is the birthplace of the Supreme Court's forty-eight-hour rule for probable cause determinations. 500 U.S. 44, 57 (1991). Only eight states guarantee the right to counsel at an initial appearance. See Douglas L. Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653, 709 (2006).

examination of the *rhetoric* that accompanies the Supreme Court's Fifth and Sixth Amendment jurisprudence. A comparison of the rules and the rhetoric offers insight into the problem of precharge detainees and suggests reimagining those detainees' constitutional rights.

A. *Black-Letter Law*

In its earliest formulations, the Supreme Court's right-to-counsel jurisprudence arose under the fundamental-fairness test of the Fifth Amendment Due Process Clause.⁴¹ *Powell v. Alabama*, the bedrock of right-to-counsel rules and rhetoric, was a Fifth Amendment decision.⁴² *Powell's* holding was, in reality, quite narrow. It held simply that, in capital cases in which an indigent defendant was "incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like" the Due Process Clause required a court to assign counsel to represent the defendant "at such a time or under such circumstances" that the assigned counsel could provide meaningful assistance "in the preparation and trial of the case."⁴³

Despite *Powell's* narrow holding, its reasoning and rhetoric were broad and powerful. *Powell's* power lies in its affirmation that a criminal defendant's need for legal assistance may be greatest during the pretrial period "when consultation, thoroughgoing investigation and preparation [are] vitally important."⁴⁴

Six years later, in the context of a federal criminal case, the Supreme Court developed a Sixth Amendment rule founded on *Powell's* Fifth Amendment rhetoric.⁴⁵ Considering the plight of three marines who "were arraigned, tried, convicted and sentenced that day to four and one-half years in the penitentiary," the Supreme Court moved to a Sixth Amendment analysis.⁴⁶ The fundamental unfairness of forcing untrained laymen to combat professional prosecutors prompted the Court to establish a Sixth Amendment right-to-counsel rule that guaranteed appointed counsel to all indigent defendants faced with federal criminal prosecutions.⁴⁷ While *Johnson v. Zerbst* was a Sixth Amendment opinion, it was based on *Powell's* Fifth Amendment

41. The phrase "fundamental fairness" was first articulated in *Betts v. Brady*, 316 U.S. 455, 462 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (concluding the Sixth Amendment's right to counsel is a fundamental right).

42. 287 U.S. 45, 68 (1932).

43. *Id.* at 71.

44. *Id.* at 57.

45. *Johnson v. Zerbst*, 304 U.S. 458, 463, 467-68 (1938).

46. *Id.* at 460, 467-68.

47. *Id.* at 463.

analysis and *Powell's* normative expectations of what fairness required when untrained laypersons navigated a complex legal system and confronted a professional adversary.⁴⁸

In the landmark case of *Gideon v. Wainwright*, the Supreme Court extended the Sixth Amendment right to counsel to indigent defendants charged in state criminal court proceedings.⁴⁹ *Gideon's* reasoning suggested some rough equation between normative expectations and legal entitlements. The “widespread belief that lawyers in criminal courts are necessities, not luxuries,” was a key factor in the Court’s decision.⁵⁰ *Gideon's* rhetoric consisted of a fiercely realistic evaluation of the fate of an unrepresented criminal defendant: “[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁵¹

In 1964, in *Massiah v. United States*, the Supreme Court relied upon the Sixth Amendment right to counsel to exclude unrepresented statements that an indicted defendant made, unknowingly, to a secret jailhouse informer.⁵² The Court’s rule and its rhetoric reflected a holistic concern about the effects of unrepresented statements: a right to counsel at trial must also protect a defendant from unrepresented police interrogation.⁵³ “Anything less . . . might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’”⁵⁴

In that same year, the Supreme Court announced the short-lived rule of *Escobedo v. Illinois*.⁵⁵ In *Escobedo*, the Court extended the Sixth Amendment right to counsel to protect as-yet unindicted defendants against precharge, unrepresented police interrogation.⁵⁶ The rhetoric and rationale supporting *Escobedo's* rule illustrated the close relationship between the Fifth Amendment prohibition on forced self-incrimination and the Sixth Amendment right to counsel, which implied a fair trial based only on evidence lawfully obtained.⁵⁷ Had *Escobedo* and its precharge right to counsel survived, the Katrina

48. *See id.*

49. 372 U.S. 335, 343-45 (1963).

50. *Id.* at 344.

51. *Id.*

52. 377 U.S. 201, 206 (1964).

53. *Id.*

54. *Id.* at 204 (quoting *Spano v. New York*, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)).

55. 378 U.S. 478 (1964).

56. *Id.* at 490-91.

57. *Id.* at 488-89.

precharge detainees would never have faced their incarceration unrepresented.

However, *Escobedo* prompted a collective panic across criminal justice communities.⁵⁸ How was the criminal justice system to provide counsel to every defendant at the station house? States were still grappling with *Gideon*'s imperative of appointed counsel for all state court defendants. Now, the ante had been upped significantly. It appeared that the state would have to provide all arrestees with counsel, while they were still at the station house.

In a jurisprudential blink of an eye, *Escobedo* vanished, and the Supreme Court launched itself in to a new pattern of constitutional rulemaking. With its Fifth Amendment holding in *Miranda v. Arizona*, and its Sixth Amendment holding in *Kirby v. Illinois*, the Supreme Court severed the rule-based relationship between arrest, interrogation, and the right to counsel.⁵⁹ Yet, the Supreme Court's rhetoric continued to portray arrest, interrogation, and the right to counsel as deeply intertwined.

The *Miranda* analysis itself was surprising to legal observers; *Miranda* had been submitted to the Supreme Court as a Sixth Amendment right-to-counsel case.⁶⁰ Instead of considering the due process and right-to-counsel implications of custodial interrogations, the Supreme Court veered unexpectedly back toward the Fifth Amendment privilege against self-incrimination.⁶¹ Viewed against the backdrop of the Court's right-to-counsel jurisprudence, *Miranda* substituted a less expensive, more convenient constitutional protection than the expensive and logistically challenging provision of counsel to arrestees. The Court's solution—the now-ubiquitous *Miranda* warnings—was to create a stopgap remedy, one that would serve as short-term replacement for a forthcoming attorney. The suspect would be told he has the right to consult with an attorney; if he cannot afford a lawyer, the court will appoint one for him.⁶²

Even as it substituted warnings and promises for actual lawyers, the Supreme Court further narrowed the temporal scope of the Sixth

58. See Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker*, 11 ROGER WILLIAMS U. L. REV. 473, 488-89 (2006) (noting concern after the *Escobedo* decision about its potential effect on crime-control measures).

59. *Miranda v. Arizona*, 384 U.S. 436, 477-79 (1966); *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972).

60. *Miranda*, 384 U.S. at 440, 465-66.

61. *Id.* at 439, 442.

62. *Id.* at 444.

Amendment right to counsel by establishing the critical-stage doctrine.⁶³ In relevant part, the critical-stage doctrine holds that the right to counsel attaches only after the initiation of adversary criminal proceedings by “formal charge, preliminary hearing, indictment, information, or arraignment.”⁶⁴

Yet, despite this narrow rule, the rhetoric of the Supreme Court’s right-to-counsel law remained relatively unchanged. The analytical shift narrowly defined the meaning of the term “prosecution” as used in the Sixth Amendment’s Counsel Clause.⁶⁵ The Court’s rhetoric continued to focus upon the complex machinery of modern law enforcement that involves “critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”⁶⁶ The Supreme Court held that the term “criminal prosecution” limited the Sixth Amendment’s counsel guarantee to those proceedings in which “adversary judicial proceedings have been initiated.”⁶⁷ As one state court explained, a complaint is not “a formal commitment by the People to prosecute [the] defendant” and absent a “formal commitment by the People,” there is no right to counsel.⁶⁸

This narrow reading of the text of the counsel guarantee was heretofore unknown in the Supreme Court’s right-to-counsel jurisprudence. The Supreme Court went to some lengths to try to square its restrictive rule with its expansive rhetorical commitment. The *Kirby* plurality insisted that its commitment to the formal commencement of adversary proceedings was not a retreat from its rhetoric of fairness.⁶⁹ Rather, the formal, prosecutorial-proceedings rule was a natural outcropping of criminal justice realities.⁷⁰ The initiation of adversary proceedings was “the starting point of our whole system of adversary criminal justice.”⁷¹ Notwithstanding the fine rhetoric, the Supreme Court had narrowed the Sixth Amendment’s reach in order to avoid “drastic expansion of the right to counsel.”⁷²

63. See *United States v. Wade*, 388 U.S. 218, 224-27 (1967).

64. *Kirby*, 406 U.S. at 689. The sole exception to this bright-line approach is the rule in *United States v. Wade*, a case that guarantees a right to counsel at pretrial line-up identification procedures. 388 U.S. at 241-42.

65. *Kirby*, 406 U.S. at 689-91; see U.S. CONST. amend. VI.

66. *Kirby*, 406 U.S. at 699 (Brennan, J., dissenting) (quoting *Wade*, 388 U.S. at 224).

67. *Id.* at 689-91 (majority opinion).

68. *People v. Thompkins*, 521 N.E.2d 38, 51 (Ill. 1988).

69. *Kirby*, 406 U.S. at 689.

70. *Id.* at 690.

71. *Id.* at 689.

72. *United States v. Ash*, 413 U.S. 300, 316 (1973).

Miranda would compensate for any attendant harm that might befall unrepresented precharge detainees; uncharged detainees would henceforth lack counsel's guiding hand.

Of course, the Fifth Amendment prohibition on the deprivation of liberty without due process might still be invoked to prevent two months of unrepresented detention. To date, the Supreme Court has not ruled upon this question.

In the late 1980s, the Supreme Court had a limited opportunity to articulate the relationship between the Fifth Amendment Due Process Clause and the rights of precharge detainees. Although *United States v. Salerno* involved the legality of the detention of indicted suspects, the Supreme Court lavished considerable analysis upon the procedural protections that rendered defendant Salerno's pretrial detention lawful.⁷³ Chief among them was the fact that the law providing for his detention, the Bail Reform Act, guaranteed Salerno the assistance of counsel in litigating his entitlement to release.⁷⁴ While the opinion suggests that an arrestee may have a right to counsel at bail proceedings, it still does not address a right to counsel during the period between arrest and formal charging.⁷⁵ As a result, across the nation, there is a firm legal consensus: uncharged detainees have no Sixth Amendment right to counsel.

B. Normative Expectations

Critiques of the "no charge, no counsel" detention abound. Most reflect our normative expectations about access to counsel and the adversary relationship between detainees and the state. Most obvious is the sheer absurdity of the proposition that a person detained (in Louisiana, for two months) lacks an adversary relationship with the state.⁷⁶ Sixty days into pretrial detention, news that they lack an

73. 481 U.S. 739, 750-52 (1987). The deprivation of counsel at the precharge stage advances the fictional distinction between punitive and regulatory pretrial incarceration articulated by the majority in *Salerno*. *Id.* at 749.

74. *Id.* at 751; see Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C. (2000)). For a thorough discussion of the right to counsel at bail proceedings, see Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002).

75. In this view, a complaint is not "a formal commitment by the People to prosecute [the] defendant" and absent a "formal commitment by the People" there is no right to counsel. *People v. Thompkins*, 521 N.E.2d 38, 51 (Ill. 1988).

76. See *United States v. Gouveia*, 467 U.S. 180, 183, 186-89 (1984) (finding that respondents were not entitled to counsel even though they remained in "administrative detention" because "adversary judicial proceedings" had not been instated).

adversary relationship with the state would surprise most detainees; the prison jumpsuits, shackles, guards, and bars would seem to indicate an adversarial relationship between the detainee and the state. Yet the misguided, formal-initiation rule guarantees that, however adversary the circumstances may be, a pretrial detainee is not entitled to the assistance of counsel until an experienced professional prosecutor takes the steps necessary to trigger the counsel guarantee.

Louisiana's *Code of Criminal Procedure* magnifies and exacerbates the fundamental unfairness associated with the incarceration of uncounseled poor people. The extraordinary length of the Louisiana screening period converts an otherwise appropriate administrative charging function into an illicit system of plea extortions and punishment without trial. Louisiana's mind-boggling sixty-day screening period means that the old criminal justice maxim, "you can beat the rap, but you can't beat the ride," is truer in Louisiana than elsewhere.

If the state declines to accept the charges against a detainee, the end result is equally shocking to our expectation of procedural fairness: the state can unabashedly imprison an unrepresented suspect for two months and then release that suspect without any opportunity to clear his or her name.⁷⁷

Yet, if we continue to believe the Supreme Court's promise that custom and practice can provide evidence of when counsel is required, then the answer to whether precharge detainees are entitled to counsel is clear. As the Supreme Court has explained, poor defendants are entitled to appointed lawyers, just as "defendants who have the money hire lawyers to defend [them]" as soon as possible after arrest.⁷⁸ Our normative expectation that defense counsel will begin his or her work as soon as possible after arrest comes directly from the Supreme Court's mouth. Nevertheless, the Supreme Court's rules circumvent its right-to-counsel rhetoric; the "widespread belief that lawyers in criminal courts are necessities, not luxuries," has nevertheless failed to generate a rule providing precharge detainees with counsel.⁷⁹

Within our normative expectations of criminal procedure, "we tend to forget that, for all our fine words and complex constitutional

77. LA. CODE CRIM. PROC. ANN. art 701(B). It has been my experience, and the experience of other defense attorneys in Orleans Parish, that suspects are often held for sixty days without formal charges *because*, as one assistant district attorney explained to me, "sixty days was as much time as he was going to get anyway, so he did the time, we'll let it go now."

78. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

79. *Id.*

doctrine, . . . the Sixth Amendment . . . [does not] require[] the appointment of lawyers at the earliest stage of proceedings.”⁸⁰ The *Miranda* rhetoric has played a key role in raising our expectations about appointment of counsel and obscuring the true plight of precharge detainees.⁸¹

The *Miranda* warnings are quintessential American hallmarks, known to most citizens across the country and to observers of American culture around the world. For example, I once told a cab driver in Indonesia that I was a public defender in New York City. He braked, turned his head back toward me and gave a flawless recitation of the *Miranda* warnings.

If one takes the *Miranda* warnings literally, one expects that upon arrest a poor person can request the appointment of counsel and that an appointed lawyer will thereafter be provided. But our normative expectations about the right to counsel go beyond the expectation raised by *Miranda*. True, after hearing the police intone “you have the right to an attorney, if you cannot afford one, one will be appointed to represent you,” an arrestee might rightly invoke his right to counsel and then look wonderingly about the jail as the police explain, “you have to see a judge to get an attorney appointed.” But nothing about our *Miranda* expectations explains our gut response to the rest of the right-to-counsel story. Consider the following hypothetical.

The arrestee asks: “When will I see the judge?”
“Tomorrow.” The arrestee heaves a sigh of relief: “So, I’ll get my lawyer tomorrow.” *“Not exactly,” is the police officer’s reply.*
“There will be a lawyer in the courtroom when the judge sets bail, but that lawyer’s in that courtroom every day for every new arrest. That won’t be your real lawyer. You’ll get one of those later.”

“When might that be?” the suspect wonders. The officer explains: “The DA has to decide if he wants to prosecute you. He’s got 60 days to decide about you, that’s a rush job because you’re in custody; if you bond out, they get 120 days to decide.”

80. Victoria Nourse, *Gideon’s Muted Trumpet*, 58 MD. L. REV. 1417, 1420 (1999).

81. Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 799-801 (2006) (noting that *Kirby* made the Sixth Amendment inapplicable to precharge detainees); Michael J. Howe, Note, *Tomorrow’s Massiah: Towards a “Prosecution Specific” Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 138 (2004) (“*Miranda* . . . returned the Sixth Amendment debate back to the post-indictment [or information] context.”).

“So once the district attorney decides, I’ll get a lawyer?” asks the suspect. “Not exactly,” is the officer’s reply. “Once charges are filed, you’re arraigned. That’s where you say ‘not guilty.’ You get your lawyer at that proceeding.”

“When will the arraignment be?” asks the increasingly alarmed prisoner. “Within 30 days of the DA’s decision—all told, you’re guaranteed to have your own lawyer within 90 days.”

Desperate, the suspect asks: “Can I just go ahead and agree that the district attorney should charge me?” “Nope,” says the officer, “they make that decision on their own.”

“But I’m not guilty,” wails the prisoner. “In 90 days it will be too late. There won’t be any way to find all the witnesses who saw what happened. And I’ll have lost my job. My wife won’t be able to make the rent. Can’t this go any faster?” The officer smiles. “Perhaps you’d like to make a statement to us after all? We could try to clear this whole thing up and send you on home.”

As one commentator has noted:

If the principal purpose of criminal procedure were to protect courts, then this upside-down world would make perfect sense. It would make perfect sense to start the right to counsel at *judicial* proceedings rather than when the defendant sits in jail But that is not what most lawyers or most people think.⁸²

Our normative expectation is that defense counsel enforces otherwise unenforceable rights by arriving at the arrestee’s side and remaining there, metaphorically, throughout the process. The reality in an upside-down world is that, for a newly arrested poor person, the right to counsel depends entirely upon the speed with which prosecutors decide to accept or refuse prosecution of the alleged offense. And, as discussed, the operative institutions of criminal justice have strong incentives to postpone access to counsel for as long as possible, for as many people as possible.⁸³

Pre-Katrina, the consequences of this upside-down world were clear, if not commonly understood.⁸⁴ Precharge incarceration creates a perilous plight for poor people. The state has deprived them of their liberty and prevented them from working to feed their families or prove their innocence. They confront a complicated procedural system

82. Nourse, *supra* note 80, at 1427.

83. See *infra* text accompanying notes 123-160.

84. See Garrett & Tetlow, *supra* note 1, at 132-34 (noting problems with the New Orleans criminal justice system prior to Katrina).

and a knowledgeable professional adversary. Yet, prosecutors and law enforcement have a perverse incentive to delay filing formal charges: without formal charges, they can negotiate with unrepresented individuals, after prolonged incarceration: they can easily encourage detainees to plead guilty, cooperate, or to confess. The story of Gregory Lewis is illustrative.

Gregory Lewis was arrested on October 9, 2005, and charged with a petty offense carrying a maximum penalty of six months of incarceration and a \$500 fine.⁸⁵ As was the custom in Orleans Parish, a public defender stood up for Mr. Lewis at his initial appearance. He was then abandoned and unrepresented pending a screening decision by the district attorney's office. The district attorney's office accepted the case, but because Katrina had closed the state courthouse and scattered the state prisoners, Mr. Lewis was never brought to court for arraignment. Between October 2005 and July 2006, Mr. Lewis remained in the custody of the state and unrepresented.⁸⁶

When the Tulane Law Clinic enrolled on Mr. Lewis's behalf, students and faculty appeared to demand his prompt release. After all, he had already spent ten months in jail, unrepresented, and without ever being arraigned.⁸⁷ He had served nearly four months longer than the maximum sentence available had he been convicted of the offense.⁸⁸

At the arraignment and hearing on the motion for release, the prosecutor offered Mr. Lewis the opportunity to plead guilty as charged in exchange for "time served." When Mr. Lewis declined the offer, both the prosecution and the court expressed surprise. After all, Mr. Lewis had already done the time, what was the harm in taking the plea?⁸⁹

85. Bill of Information Filing, State v. Lewis, Magis. No. 462-851 (La. Crim. Dist. Ct. Orleans Parish filed Nov. 30, 2005).

86. Arraignment Reset, *Lewis*, Magis. No. 462-851 (July 31, 2006).

87. *Id.*

88. *Id.*

89. Ultimately, the clinic filed a motion to dismiss the charges against Mr. Lewis on the grounds that the state had violated his constitutional right to a speedy trial. Motion To Quash the Bill of Information, *Lewis*, Magis. No. 462-851 (Aug. 21, 2006). In response, the state argued that Mr. Lewis had been represented by counsel at initial appearance, knew of his right to a speedy trial, and had deliberately chosen not to pursue a speedy trial. The state also argued that Mr. Lewis's incarceration was not unreasonable because, as an alleged addict, he benefited from an incarceration that allowed the "deadly poison" of drugs to leave his body. The trial court granted Mr. Lewis's motion for dismissal with prejudice. Defense Motion Granted, *Lewis*, Magis. No. 462-851 (Aug. 21, 2006).

Unregulated and unreviewable acts of prosecutorial discretion determine the earliest point at which the constitutional right to counsel will arise. Yet, prosecutors and law enforcement officials have clear incentives to delay formal charges in order to negotiate with unrepresented individuals instead of with attorneys. Judges with crowded criminal dockets have a similar incentive. Perhaps unrepresented individuals are more likely to plead guilty and take a sentence of “time served,” thereby clearing the court’s docket, than are detainees who have counsel to assist them in making persuasive bail arguments or marshaling facts to present a cogent trial defense.⁹⁰

Katrina exposed the fundamental unfairness of this upside-down world because it magnified, in raw numbers of detainees and in raw measures of weeks and months, the harms worked by the critical-stage doctrine. When the functioning systems of government failed, their record keeping and file maintenance failed as well. Court record keeping failed too. Because no counsel was assigned to “remember” the plight of the precharge detainees, the New Orleans criminal justice system experienced a kind of collective system failure that left hundreds of unrepresented, uncharged detainees languishing in the prison. Those uncharged, unrepresented people remained in jail long after the authorized screening period had expired, long after the date on which they were absolutely and unequivocally entitled to release.

Of course, the United States Constitution provides a ceiling, not a floor, for the constitutional rights of criminal defendants. Louisiana could have, with its constitution or its laws, created a meaningful right to counsel for precharge detainees. Indeed, as noted earlier, Louisiana statutes explicitly provide for the appointment of counsel to all precharge arrestees. Why then did Louisiana fail the precharge detainees?

IV. DELVING DEEPER: EXPLAINING THE PLIGHT OF THE ORLEANS PARISH PRECHARGE DETAINEES

Louisiana statutory law clearly and unequivocally states that counsel is to be appointed within seventy-two hours of a suspect’s arrest.⁹¹ Why was this clear and unambiguous rule flagrantly, repeatedly, and unabashedly broken by judges and lawyers alike?

90. *But see* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 447 (2007) (noting that “pro se felony defendants were much more likely to go to trial than represented defendants”).

91. LA. CODE CRIM. PROC. ANN. art. 230.1(A).

A. *Gross Underfunding*

How could the public defender system absorb and institutionalize the unconscionable compromises associated with the abandonment of precharge detainees? Chronic, pervasive, and grotesque underfunding offers one answer to this question. Katrina's aftermath helps illustrate this, as Katrina was the straw that broke the camel's back of the precarious public defense system.

1. How Underfunding Public Defense Led to the Abandonment of Precharge Detainees

For decades prior to Katrina, the New Orleans public defender system was too poorly resourced to meet all of its client obligations. The abandonment of precharge detainees helped the public defender conserve scarce resources.

It has long been common knowledge in Orleans Parish that the district attorney's office declines prosecution in nearly fifty percent of the arrests made by police.⁹² Thus, without the public defender lifting a finger, the prosecution eliminated a significant percentage of the public defender's incoming caseload. Under those circumstances, the institutional cost-benefit created a resourcing imperative that was clear to the lawyers, if not to the detainees. Identifying precharge detainees as potential clients, rather than as actual clients, markedly decreased the number of clients the public defender was obliged to assist. Public defenders rationed their resources by withholding legal assistance; a public defender would not assist a detainee unless the prosecutor formally charged that detainee. The precharge detainees whose cases were refused by the prosecution received no legal assistance at all.

For those whose cases were ultimately refused, the lack of representation worked incalculable personal suffering. Had a lawyer represented them, those detainees might have been released on bail. Had a lawyer investigated their cases and approached the state with exculpatory evidence, the prosecution might have dropped the case after five or ten days, not five or ten weeks. Those detainees might have reemerged from jail to find their jobs still available, their families still intact, and their rent still current. Instead, the public defender system rationed resources by trading one detainee's unnecessary jail time for another detainee's access to counsel. Detainees waited for

92. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 74 (2002).

sixty days to see whether they had won the Pyrrhic victory of being one of the fortunate detainees whose cases had been refused.

For those whose cases were ultimately accepted, the lack of representation may well have cost them their chance of acquittal. Prolonged pretrial detention exacerbates the asymmetry of power between the state and the individual.⁹³ It also moots a defendant's most important goal: the avoidance of jail time.⁹⁴ Counsel's critical pretrial role in investigation and case preparation is at the core of the Supreme Court's right-to-counsel rhetoric.⁹⁵ After sixty days, bystander witnesses are virtually impossible to locate. Physical evidence, such as blood splatters or fingerprints, have been washed away. Memories have faded and appearances have changed. The defendant has lost immeasurable and unknowable opportunities for investigation and case development.

When Katrina hit, all of these harms were multiplied. For those whose cases were ultimately refused, there are no words to adequately describe the unnecessary suffering caused by their evacuation terrors and their long incarcerations. For those whose cases were accepted, there is no way to measure how Katrina altered their ability to muster a defense. Witnesses and crime scenes simply vanished overnight.

2. How Katrina Caused the Collapse of Public Defense

Article I, section 13 of the Louisiana Constitution states that the legislature "shall provide for a uniform system for securing and compensating qualified counsel for indigents."⁹⁶ The legislative response to that constitutional mandate has been disgraceful. Prior to Katrina, the only money that the legislature guaranteed to the public district defender board was the sum of \$10,000 per year and fees generated by criminal bonds, bond forfeitures, and convictions.⁹⁷

93. See, e.g., *People v. Martinez*, 810 N.Y.S.2d 638, 641-44 (Sup. Ct. 2006) (noting that deliberately delaying initiation of formal adversary proceedings by the state in order to delay attachment of the right to counsel would weigh against a finding of the voluntariness of the defendant's confession).

94. For a discussion on the importance of precharge investigation, see Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty To Investigate, and Pretrial Discovery in Criminal Cases*, 31 *FORDHAM URB. L.J.* 1097, 1101-04 (2004). For a discussion of counsel's role in precharge screening and bargaining, see Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 *NW. U. L. REV.* 1635, 1663-77 (2003).

95. See generally Roberts, *supra* note 94, at 1103 (noting the Supreme Court's "renewed attention . . . to failures to investigate").

96. LA. CONST. art. I, § 13.

97. LA. REV. STAT. ANN. § 15:146(B)-(C) (Supp. 2007).

Section 15:146 of Louisiana's Revised Statutes provides the primary source of funding for public defenders.⁹⁸ It provides, in relevant part: "The sum of thirty-five dollars shall be assessed in cases in which a defendant is convicted after a trial, a plea of guilty or nolo contendere, or after forfeiting bond, and shall be in addition to all other fines, costs, or forfeitures imposed."⁹⁹ As a result, "criminal violation assessments, mostly traffic tickets," are the primary source of public defender funding in Louisiana.¹⁰⁰

Prior to Katrina, approximately seventy-five percent of the Orleans Parish public defender's budget consisted of fines and fees imposed on convicted traffic, misdemeanor, and felony defendants.¹⁰¹ After Katrina, there were no tickets, there were no courthouses, and certainly there were no guilty pleas or trials, so there were no convictions and thus no assessments. Without the criminal assessments, the public defender's office could no longer pay its employees. Katrina put the public defender out of business and thereby magnified the conflicts of interest inherent in Louisiana's funding scheme.¹⁰²

3. What Katrina Laid Bare

The Louisiana public defender funding system creates extraordinary conflicts of interest between the public defender and indigent defendants.¹⁰³ In this funding system, appointed counsel labor

98. *Id.* § 15:146(A).

99. *Id.* § 15:146(B).

100. *State v. Peart*, 621 So. 2d 780, 789 (La. 1993). Other statutes provide dribs and drabs of funding based upon similarly conflict-laden scenarios. For example, fees associated with the posting of each commercial bail bond are funneled to the public defender. LA. REV. STAT. ANN. § 15:85.1(A)(2)(b) (2005).

101. *See* Laura Parker, *City's Public Defender System Troubled Before Katrina*, USA TODAY, May 23, 2006, at 4A.

102. *See id.*

103. Conflicts of interest arise when counsel's situation is "inherently conducive to divided loyalties." *State v. Kahey*, 436 So. 2d 475, 484 (La. 1983) (citing *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979)). A divided loyalty may arise either from counsel's duty to another client or from counsel's personal interest. *See* *Beets v. Scott*, 65 F.3d 1258, 1269-70 (5th Cir. 1995) (finding that a conflict exists where attorney's personal interests are adverse to those of his client); *Zuck*, 588 F.2d at 439 ("The interests of the other client and the defendant are sufficiently adverse if . . . the attorney owes a duty to the defendant to take some action that could be detrimental to [another] client."); LA. RULES OF PROF'L CONDUCT R. 1.7(a) (2006) ("A . . . conflict of interest exists if . . . there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client . . . or by a personal interest of the lawyer."); *see also* *State v. Cisco*, 01-2732, pp. 18-20 (La. 12/3/03); 861 So. 2d 118, 131 (2003) (noting that Louisiana courts have found that an attorney cannot render effective legal assistance when faced with a conflict of interest).

under two actual conflicts of interest. First, the public defender's representation of each individual client conflicts with his obligation to all of the public defender's other clients.¹⁰⁴ Second, the public defender's personal interests are adverse to the interests of indigent defendants.¹⁰⁵ Yet, these rules have stood, with only minor modifications, for nearly forty years.¹⁰⁶ Prior to Katrina, no indigent client or public defender raised any serious challenge to the rules' constitutionality, although there have been many challenges to the adequacy of the resulting funding situation.¹⁰⁷ Surely something is profoundly amiss in the local legal culture's conception of the attorney-client relationship. Katrina laid bare the ugly underbelly of criminal justice dollar and cents and thereby lent insight into a lawyering culture that long labored under these conflicts of interest.

The conflicts themselves are straightforward. It is black-letter law that all criminal defendants, including indigent defendants, are entitled to the assistance of counsel.¹⁰⁸ This right to counsel is not satisfied by the mere appearance of a warm body wearing a business suit and holding a copy of the criminal code. Rather, the right to counsel is the right to effective assistance of counsel, free from any conflict of interest.¹⁰⁹

104. See LA. RULES OF PROF'L CONDUCT R. 1.7(a).

105. See *id.*

106. See LA. REV. STAT. ANN. § 15:146 notes (Historical and Statutory Notes) (Supp. 2007). The most significant changes have been the ever-increasing amount of the assessment for convictions. See *id.*

107. See, e.g., *Anderson v. State*, 05-0551, 05-0321, pp. 3-4 (La. App. 3 Cir. 11/2/05); 916 So.2d 431, 433-34 (discussing challenges to the inadequate funding of the Louisiana public defender system).

108. U.S. CONST. amend. VI; LA. CONST. art. 1, § 13.

109. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)); see also *State v. Franklin*, 400 So. 2d 616, 620-21 (La. 1981) (finding that the defendant did not receive "effective" counsel as required by the United States and Louisiana Constitutions because his attorney had a conflict of interest).

Although it is beyond the scope of this Article, it is worth noting that ethical rules prohibit attorneys from laboring under conflicts of interest such as those created by the Louisiana funding statutes. For example, the American Bar Association's *Model Rules of Professional Conduct* prohibit a lawyer from representing a client if that representation "will be directly adverse to another client," if "there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client," or will be materially limited "by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2003). The Louisiana *Rules of Professional Conduct* demand a similar conflict-free relationship. LA. RULES OF PROF'L CONDUCT R. 1.7(a) (2006). An attorney's ethical obligation to a client creates a fiduciary duty that prohibits conflicted representation. See *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1040 (La. 1987) (noting that as a fiduciary, a lawyer has an "obligation to render a full and fair disclosure" of all his interests to his client).

Each of the public defender's clients is entitled to zealous and effective representation in all aspects of his or her case, including assessments, fines, and fees associated with conviction. Yet, as mentioned above, the Louisiana funding system creates two actual conflicts of interest.

In the Louisiana funding scheme, if a public defender aggressively objects to the imposition and collection of fines and assessments, that lawyer forsakes funds essential to public defender's ability to represent other clients. Alternatively, if the public defender aggressively pursues the assessments and fees, the public defender forsakes the interests of the individual indigent client, who is entitled to challenge the imposition of fines and fees.

More significantly, in the Louisiana system, public defenders rely upon client convictions for their own paychecks. Public defenders are funded not by fees assessed for *representation*, but by fees assessed for *convictions*.¹¹⁰ A public defender with a perfect "no losses" record can rapidly become a public defender with a perfect "no paycheck" record. Thus, the funding scheme creates an institutionalized conflict of interest that forces the public defender to choose between individual client interests and the institutional and individual interests of the public defender's office and employees.¹¹¹ A failure to impose and collect criminal assessments results in a failure to pay public defenders and their staffs.

Even before Katrina, there was no administrative mystery or financial sleight of hand that insulated individual public defenders from understanding and appreciating this conflict. In one Louisiana parish, a public defender's office sued to compel local judges to increase the assessments imposed upon convicted persons and to more aggressively pursue collection of those assessments in order to better fund the woefully under-resourced public defender's office.¹¹² This type of action does little to promote good relationships between public defenders and their clients. It is little wonder that many indigent

110. LA. REV. STAT. ANN. § 15:146.

111. I do not suggest that any public defender has ever "thrown" a case for a \$35.00 fee. The conflict is one of institutional interest and client-population outcomes.

112. Cf. Mark Ballard, *Senate Sends Indigent Defense Bill to Blanco*, ADVOCATE (Baton Rouge), June 22, 2005, at 8A (noting a lawsuit alleging that "the state's public-defender system is so under-funded and so defectively organized that the legal representation poor people receive at criminal trials does not meet constitutional standards").

detainees believe that their attorneys get a “special deal” for every plea their clients take.¹¹³

For a system to have persisted with such flagrant conflicts of interest, one might suppose it to be successful in accumulating and distributing resources. This has not been true for Orleans Parish or for other parishes across the state.¹¹⁴ Indeed, notwithstanding the public defenders’ efforts to ration scarce resources across an ever-larger client pool, this funding system has remained spectacularly unsuccessful. In the words of the Louisiana Supreme Court, the Louisiana legislature has created an inherently “unstable and unpredictable approach” to indigent defense funding.¹¹⁵

It is not surprising that defenders who worked within such an ethically dissonant funding system made ethically dissonant choices about the allocation of resources. Prior to Katrina, no indigent client or public defender raised any serious challenge to the rules’

113. See, e.g., Brief of Appellants at *6-7, *Everett v. Rodenbeck*, 961 F.2d 1575 (5th Cir. 1992) (No. 91-5038), 1992 WL 12149997 (alleging a public defender deliberately provided ineffective assistance of counsel in order for the defender to receive a fee under LA. REV. STAT. ANN. § 15:146).

114. For example, in 1990, the police department of the City of East Baton Rouge ran out of preprinted traffic tickets. *State v. Peart*, 621 So. 2d 780, 789 n.9 (La. 1993) (citing SPANGENBERG GROUP, STUDY OF THE INDIGENT DEFENDER SYSTEM IN LOUISIANA 25 (1992)). The fees associated with those preprinted tickets were the indigent defender program’s primary source of funding. *Id.* No tickets were written, no defendants were charged, no defendants were convicted, no assessments were paid, and public defender salaries were “suspended while more tickets were being printed.” *Id.*; see NAT’L LEGAL AID & DEFENDER ASS’N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER *GIDEON* 10-29 (2004), available at http://www.nlada.org/Defender/Defender_Evaluation/la_eval.pdf (detailing the political and funding considerations that hinder Louisiana’s indigent defense system).

115. *Peart*, 621 So. 2d at 789 (quoting SPANGENBERG GROUP, *supra* note 114, at 25). This funding structure also has the peculiar effect of giving a defendant’s adversaries—police and prosecutors—substantial control over the public defender’s budget. Moreover, the prosecutorial discretion inherent in our adversary system means that police and prosecutors have unbridled discretion in how they use that control. Formal policing policies and day-to-day police decisions about whether to charge certain crimes imposes a cap on potential criminal assessments available to the public defender. These policing decisions may be entirely legitimate policy decisions about law enforcement priorities or may reflect politics and priorities wholly independent of any animus toward the public defender. See NAT’L LEGAL AID & DEFENDER ASS’N, *supra* note 114, at 24-25. For example, one Louisiana police department reduced its traffic enforcement in order to encourage business at local casinos. *Id.* at 24-25. Another police department refused to accept partial payment of fees in order to avoid the “administrative” costs associated with processing those fees. *Id.* District attorneys exercise a second layer of control over the public defender’s funding. District attorneys have prosecutorial discretion to make charging decisions that range from whom to charge to how many counts to allege. See LA. CODE CRIM. PROC. ANN. art. 701 (2003). Each charge represents a potential conviction and therefore a potential public defender fee.

constitutionality, although there have been many challenges to the adequacy of the resulting funding situation.¹¹⁶

After Katrina, everyone knew—the judges, the lawyers, and the clients—that only criminal assessments, i.e. client convictions, could keep the public defender’s office afloat. No convictions? No lawyers.

Katrina made explicit this implicit and unspoken conflict. In April 2006, the Tulane Law Clinic successfully challenged section 15:146 as an unconstitutional violation of the Sixth Amendment right to counsel.¹¹⁷ When the trial judge ordered a halt to the imposition and collection of criminal assessments, a veteran Orleans Parish public defender was sitting in the gallery, watching. Upon hearing the court’s ruling, he jumped to his feet and anxiously inquired: “Will the Court stay its ruling and continue to collect the fees until the appellate courts have ruled?”¹¹⁸

So, the Katrina funding disaster accounts for the total collapse of the Orleans Indigent Defender Program. It explains why there were no budgeted funds to pay the attorneys and why, months after Katrina, no new funds were forthcoming.¹¹⁹ But these funding failures cannot account for the public defender’s failure to institute a record-keeping system that, at a minimum, monitored the status of precharge detainees. Even a poor public defender, even one appointed in name only, could surely keep a list of who was arrested, on what date, and for what charge. No one has yet alleged that the public defenders in Orleans Parish had sunk so low that pens and paper were unavailable.

B. *Court-Centered Public Defenders*

Another answer then to the public defender’s pre- and post-Katrina failure to accept responsibility for the fate of the precharge detainees lies in the lawyering culture itself. For a wide range of institutional and funding reasons, public defenders in New Orleans

116. See, e.g., *Anderson v. State*, 05,0551, 05-0321, pp. 3-4 (La. App. 3 Cir. 11/2/05); 916 So. 2d 431, 433-34 (discussing challenges to the inadequate funding of the Louisiana public defender system).

117. Vann, *supra* note 10, at 19.

118. Transcript of Record, *State v. Henry* (transcript on file with author).

119. It is beyond the scope of this Article to explore why the legislature failed to provide emergency funds to maintain and sustain public defense in New Orleans. However, application of public choice theory to the public defense crisis offers one common sense explanation. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 253-54 (2004). The population served by public defenders are all either nonvoters (e.g., recidivist felons) or potential nonvoters (e.g., felons-in-waiting). See *id.* Among the victims of Katrina, criminal defendants ranked last in the legislative priorities.

were not assigned to represent clients, but to handle sections of court. As a result, the public defender system was court-centered rather than client-centered.¹²⁰ This court-centered philosophy fostered a court-dependent practice.

The public defender system was so focused on courts, instead of clients, that public defenders did not routinely maintain files on clients whose cases had been formally charged. Instead, many lawyers simply appeared in their assigned section of court each day and handled the cases listed on the docket. Several months after Katrina, when the public defender system began to reemerge, the rest of the criminal justice system learned just how profoundly the public defenders had abdicated their roles. The testimony of public defender Powell Miller is illustrative.

- Q. As you understand it, what is your job? What specific tasks are you required to perform?*
- A. I was assigned [this week] to Section "K" to handle all of the cases there for the public defender's office.*
- Q. And when you were assigned to handle all of the cases in Section "K" for the public defender's office, did [the Chief Public Defender] or anyone else provide you with a list of who those people are?*
- A. No.*
- Q. Did [the Chief Public Defender] or anyone else in your office provide you with a list of case numbers as to those defendants that you were to represent?*
- A. No.*
-
- Q. Now, you and I have talked somewhat about this process of trying to determine who you represent and yesterday we had a chance to speak and I asked yesterday morning and yesterday afternoon, I guess, in court here, I said, "who do you represent" and you said—I think it was "I don't know." Is that correct?*
- A. Correct.*
-
- Q. At my request, did your office undertake to produce a list of which cases in "K" have indigent defendants who are currently represented by [the public defender], who your clients are?*

120. See Ari Shapiro, *All Things Considered: Locked Up and Forgotten: Flaws in New Orleans* (NPR radio broadcast Jan. 16, 2007) (transcript available at www.npr.org/templates/story/story.php?StoryId=6874458).

A. *I believe that [the Chief Public Defender] is working on that now.*¹²¹

As the public defenders began to openly acknowledge the profound disabilities under which they had always worked, the plight of precharge detainees became even more apparent. The testimony of Tilden Greenbaum, Director of the Orleans Indigent Defender Program, is illustrative.

Q *Mr. Greenbaum, how many lawyers, prior to Katrina, worked in Magistrate's Court?*

A *Three.*

Q *How many were in Magistrate's Court present at a time?*

A *One.*

Q *On any given day, approximately how many defendants would appear in Magistrate's Court?*

A *Twenty; thirty; forty; who knows.*

Q *... pre-Katrina, did [the public defender] have an opportunity to conduct a private interview with each and every defendant?*

A *That's not a—facilities for that is not allowed—not available.*

....

Q *Between the initial appearance and arraignment, does [the public defender] represent indigent defendants?*

A *We don't have the resources or manpower to do that during screening.*

Q *So during screening there's no investigation conducted by your office?*

A *No, there is not.*

....

Q *Okay. So in other words your lawyers are not in position to make an individualized investigation or adversary presentation about bond?*

A *Because they don't have enough lawyers or resources.*¹²²

In what type of criminal justice does a lawyer feel that interviews of new arrestees are “not allowed?” Perhaps systemic factors, unrelated to the public defender's office, also explain the abandonment of detainees. A close look at the systems involved in arresting, detaining, processing, and charging the detainees demonstrates that

121. Transcript of the Court Proceeding at 6, 8, 9, State v. Crockett, Case No. 443-180 (La. Crim. Dist. Ct. Orleans Parish Apr. 21, 2006) (testimony of Powell Miller) (transcript on file with *Tulane Law Review*).

122. Transcript of Habeas Corpus Hearing at 21-23 (La. Crim. Dist. Ct. Orleans Parish Apr. 13, 2006) (testimony of Tilden Greenbaum) (on file with *Tulane Law Review*).

perverse incentives fostered the Orleans Parish criminal justice system's "no charge, no counsel" approach.

The costs associated with the state's failure to provide poor detainees with precharge counsel are deftly hidden, while the benefits are widespread and obvious to police, prosecutors, courts, and jailers.

A man went to the Gulf Coast in October of 2005, just days after the storm. He went with his construction buddies and their boss; they have come to rebuild New Orleans.

The man is named Pedro Parra-Sanchez.¹²³ He is a Mexican citizen and a lawful resident alien residing in the United States with a valid green card.¹²⁴ He lives in Bakersfield, California, with his wife and four children.¹²⁵ He has lived in the United States for twenty years.

On October 13, 2005, New Orleans police arrested Mr. Parra-Sanchez and charged him with battery.¹²⁶ He is forty-four years old and has never before been charged with a crime. None of the courts are open and the local jail is flooded.¹²⁷

The police handcuffed Mr. Parra-Sanchez and took him to an old Greyhound Bus Station that has been converted to a make-shift jail.¹²⁸ A piece of plywood hangs crookedly over the door; across it someone has scrawled: WELCOME TO ANGOLA SOUTH.

Mr. Parra-Sanchez waited. Court proceeded in a blur of activity he cannot understand. No Spanish interpreter is available, so everyone in the courtroom manages as best they can. Spanish is made to suffice. The public defender in the courtroom that day neither met Mr. Parra-Sanchez nor interviewed him about his bail prospects.

Louisiana's Code of Criminal Procedure entitled Mr. Parra-Sanchez to have counsel appointed to represent him from the day of his initial appearance through the resolution of his case.¹²⁹

The judge tells Mr. Parra-Sanchez that the public defender is his lawyer for that day only. He will get his own lawyer if and when the prosecution decides to accept the charges against him.¹³⁰ Thus, the

123. Laura Maggi, *Inmate Lost in System Resurfaces: After 13 Months He Gets Day in Court*, TIMES-PICAYUNE (New Orleans), Nov. 29, 2006, at A-1; Simmons, *supra* note 14. The following story of Mr. Parra-Sanchez is based on the personal knowledge of the author, with some details related in the above *Times-Picayune* and *Los Angeles Times* stories.

124. Simmons, *supra* note 14.

125. *Id.*

126. Arrest Filing, *State v. Parra Sanchez*, Case No. 463-568 (La. Crim. Dist. Ct. Orleans Parish filed Nov. 15, 2006).

127. Simmons, *supra* note 14.

128. *Id.*

129. LA. CODE CRIM. PROC. ANN. art. 230.1 (2003).

130. See discussion *supra* Part II.A.

public defender who meets Mr. Parra-Sanchez is not his lawyer at all. The lawyer is just constitutional and statutory window dressing, allowing the system to place a check mark in the counsel column. The lawyer is not a true check on the power of the prosecution or the court.

Because Mr. Parra-Sanchez is unrepresented, no one gathers information about Mr. Parra-Sanchez and his family. No one contacts his wife and children to tell them where he is. No one argues for his release. The judge knows only that Mr. Parra-Sanchez is a Mexican citizen who is charged with aggravated battery.

The judge sets the bond at \$20,000. To secure his release, Mr. Parra-Sanchez will have to get the unthinkable sum of \$2400, in cash, to a local bail bond company. He has no way to reach his family, and no attorney has offered to contact them.

The Code of Criminal Procedure gives the state an unprecedented period of sixty days in which to charge or release Mr. Parra-Sanchez.¹³¹ Accordingly, the court sets the case for a status hearing sixty days later; if the district attorney has not filed a bill of information, the court will order Mr. Parra-Sanchez released without any bond obligation.

The clerk is indifferent to Mr. Parra-Sanchez's plight. He does not enter Mr. Parra-Sanchez's case into the court's docketing system: neither Mr. Parra-Sanchez's case, nor his potential release date appear on any judicial calendar.¹³² Because the public defender is appointed for initial appearance only, that lawyer makes no record of Mr. Parra-Sanchez's existence. The public defender has no case file for Mr. Parra-Sanchez, no notes about his circumstances, not even a calendar notation of Mr. Parra-Sanchez's article 701 release date.

Sixty days come and go, then ninety, then one hundred and twenty. No charges are filed. No release is ordered. No lawyer petitions the court for Mr. Parra-Sanchez's release. Mr. Parra-Sanchez is lost.¹³³

More days go by. More weeks. Months. Guards move Mr. Parra-Sanchez to a small jail in rural St. Charles Parish. No lawyer comes to visit. Days drag on. Other prisoners leave for court appearances. Others return and then leave again for court—for hearings and conferences, and even for trials. Others never return;

131. LA. CODE CRIM. PROC. ANN. art. 701(B) (2003).

132. Maggi, *supra* note 123. During the weeks and months after Katrina, many brave and loyal court personnel performed their jobs with honor and accuracy. Several months of investigating what happened to the lost Katrina prisoners have demonstrated that one clerk, among the many who served well, simply failed to enter any court data about any case processed through "Camp Greyhound."

133. Simmons, *supra* note 14.

they have been released and sent home or sentenced and remanded to a state penitentiary in the north. Mr. Parra-Sanchez never leaves the jail. Not once.

In early January 2006, someone in the district attorney's office notices the Parra-Sanchez file.¹³⁴ The district attorney's office accepts the charges and files a bill of information against him.¹³⁵ Perhaps the district attorney's office believes Mr. Parra-Sanchez is not in jail; under those circumstances the Code of Criminal Procedure gives the district attorney ninety days to file charges against him.¹³⁶ No one seems quite sure.

The bond in the case is suddenly reduced to \$15,000, although nothing in the record suggests that anyone has taken any action on the case.¹³⁷ No one tells Mr. Parra-Sanchez that the district attorney has filed a bill of information signaling its intent to prosecute him. No one tells Mr. Parra-Sanchez that his bond has been reduced. Of course, the bond reduction is of little use to him now. His family has sold his tools to pay for food and clothing. After several months without his income, the family is behind in the rent and will soon be evicted from their home.¹³⁸

Article 701 of the Code of Criminal Procedure entitles Mr. Parra-Sanchez to an arraignment within thirty days of the filing of the bill of information.¹³⁹ According to local practice, arraignment triggers Mr. Parra-Sanchez's right to counsel. He should have an arraignment within thirty days and counsel should be appointed at that time.¹⁴⁰ Motions should be set, discovery produced, a trial scheduled, plea discussion begun. Yet days drag on, then weeks. Nothing changes.

No one from the court or the district attorney's office seems quite sure whether Mr. Parra-Sanchez is in custody or on bond. Or perhaps no one cares. Meanwhile, the public defender's office is indifferent to Mr. Parra-Sanchez.

As an institution, the public defender's office does not know that Mr. Parra-Sanchez exists. He was a client for "initial appearances only" in October 2005. The public defender never added his name to its client list, opened a file under his name, or assigned an attorney to

134. Maggi, *supra* note 123.

135. Bill of Information Filing, State v. Parra Sanchez, Case No. 463-568 (La. Crim. Dist. Ct. Orleans Parish filed Jan. 9, 2006).

136. *Id.*; see also LA. CODE CRIM. PROC. ANN. art. 701(B)(2).

137. Bill of Information Filing, *supra* note 135.

138. Simmons, *supra* note 14.

139. LA. CODE CRIM. PROC. ANN. art. 701(C).

140. *Id.* art. 701.

assist him. The public defender's calendaring system has no mention of him. In the view of this chronically underfunded, judicially controlled public defender system, Mr. Parra-Sanchez will become a public defender problem if and when he's produced in a section of court and assigned to the section defender.

So, as January turns into February, February into March, and March into April, Mr. Parra-Sanchez continues to sit in the St. Charles Parish jail. He sees the jail psychiatrist, implores her for help; she cannot help him unless his case goes to court.¹⁴¹ He begs the guards. "Will I have a court date? When? When can I go home?" They are kind, but they cannot help him.¹⁴² Thousands of Orleans Parish prisoners are scattered across the state asking the same questions to similar guards in similar prisons. The answer is always the same. A shrug and a brief explanation that they cannot do anything until the court sends for him. Mr. Parra-Sanchez makes a few friends in jail. They share with him the little they know about Louisiana criminal procedure. Those who speak English help him file two *pro se* motions for a speedy trial.

In May 2006, the Parra-Sanchez case appeared on the docket in a criminal district court.¹⁴³ The case is set for arraignment: the appointment of counsel and the entry of a preliminary plea of "guilty" or "not guilty." No one calls St. Charles Parish jail and tells Mr. Parra-Sanchez to get ready for a trip to court. No one calls the sheriff to tell him to bring Mr. Parra-Sanchez to court. No one tells the public defender's office about a new case on the calendar. The arraignment date arrives. Mr. Parra-Sanchez is in the St. Charles Parish jail. The judge orders his deputy to call Mr. Parra-Sanchez's name three times in the hall. No response. The judge issues an arrest warrant based on Mr. Parra-Sanchez's willful failure to appear in court.¹⁴⁴ This warrant for failure to appear will appear on any future court records or criminal history records. Mr. Parra-Sanchez knows none of this. He is still in jail. No new court date is set.

May, June, July, August, September, and October pass in the same way for Mr. Parra-Sanchez. He is in a small jail, in a small town in southeastern Louisiana. He misses his children and his wife. He

141. Simmons, *supra* note 14.

142. *Id.*

143. Arraignment Set, State v. Parra Sanchez, Case No. 463-568 (La. Crim. Dist. Ct. Orleans Parish May 1, 2006).

144. Order for Failure To Appear, Parra Sanchez, Case No. 463-568 (filed May 11, 2006).

has already missed Thanksgiving, Christmas, New Years, and Easter. His family has moved into an RV park.¹⁴⁵ His eldest daughter has run away from home to live with her boyfriend; her struggling mother could not support all four children.¹⁴⁶ Mr. Parra-Sanchez can do nothing. He has no lawyer. He has never been to court. Independence Day comes and goes. Columbus Day, Halloween, and Veteran's Day. More than one year has passed.

In November 2006, someone calls the Tulane Law Clinic asking about Pedro Parra-Sanchez. My students and I file a habeas petition for his release and move to dismiss the charges filed against him for violation of his constitutional right to a speedy trial.¹⁴⁷ He is released in mid-November, 2006.¹⁴⁸

C. Other Institutional Interests

When the police arrest a suspect, the initial institutional costs associated with the arrest begin and end within the relatively short period of time required to complete booking forms and transport the arrestee to a place of detention. Yet the police acquire individual and institutional benefits that survive for the entire period of the arrestee's detention and beyond. Institutionally, each person who is incarcerated, whether guilty or innocent, is another incapacitated potential law breaker. Absent the rare public backlash against unmerited or biased arrests, police departments benefit from the detention of suspects.

Individual police officers also incur short-term costs and long-term benefits from the detention of arrestees. The costs are those associated with initial arrest procedures (i.e., booking the prisoner, writing a police report, transporting the prisoner according to local practices) and those associated with increasingly rare case adjudications, appearance at motion hearings, and the increasingly rare trial.

Yet, the benefit for officers may be incalculable. First, as noted above, regardless of a suspect's guilt or innocence, each arrest represents the incapacitation of a potential lawbreaker. Second, each arrest is another hit credited to an officer's personal record and to the statistics maintained on that officer's division or unit. Third, each arrest creates a potential ally, a suspect turned state's witness, who can

145. Simmons, *supra* note 14.

146. *Id.*

147. Petition for a Writ of Habeas Corpus, *Parra-Sanchez*, Case No. 463-568 (filed Nov. 17, 2006).

148. Release Issued, *Parra-Sanchez*, Case No. 463-568 (Nov. 17, 2006).

help police effect more law enforcement and more arrests, with less police-generated investigative work.¹⁴⁹

The prosecutor enjoys a similarly high-benefit to low-cost ratio when the state fails to provide precharge detainees with counsel. As an elected official, the district attorney has a powerful political incentive to reduce crime rates. Every person incarcerated represents another potential crime uncommitted. Absent meaningful assistance of counsel during the precharge period, a defendant is less likely to be released on bond.

This increased ability to incapacitate uncharged potential offenders has no cost for the prosecutor; the district attorney neither pays for, nor is held accountable to explain, the number of nights that a suspect remains in jail without any formal charges pending.

The length of the screening period, sixty days for a felony, serves as a disincentive for swift screening of cases and the prompt release of suspects when circumstances indicate that no conviction will be obtained.¹⁵⁰ At worst, the district attorney endures occasional bad press for incarcerating and then failing to prosecute some unfortunate individuals. At best, the district attorney maximizes the opportunity to prevent new offenses while simultaneously obtaining a significant advantage in investigation and case preparation.

Finally, there are no legal disincentives for the prolonged incarceration of precharge suspects. If a suspect is unlawfully deprived of counsel, suppression of any resulting statements may be required.¹⁵¹ But absent a formal charge, there is no unconstitutional deprivation of counsel, so that remedy is illusory and its deterrent power negligible. Prosecutors enjoy unparalleled immunity for charging decisions. Absent some self-executing speedy trial statute, such as the Speedy Trial Act,¹⁵² unrepresented suspects are limited to pursuing the

149. Incarceration serves as a powerful inducement for suspects to cooperate with law enforcement by providing information about ongoing criminal activity. Since the federal government's formalization of cooperation benefits, many states have followed suit. See Ross Galin, Note, *Above the Law: The Prosecutor's Duty To Seek Justice and the Performance of Substantial Assistance Agreements*, 68 *FORDHAM L. REV.* 1245, 1251-52 (2000). Criminal defense practitioners generally agree that, while cooperation still carries a stigma, that stigma has decreased as the benefits of cooperation have become more and more apparent. See Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 563-65 (1999).

150. See *LA. CODE CRIM. PROC. ANN.* art. 701 (2003).

151. *Miranda v. Arizona*, 384 U.S. 436, 473-75 (1966).

152. Speedy Trial Act Amendments Act of 1979, 18 U.S.C. §§ 3161-74 (2000 & Supp. 2006).

extraordinary relief available under the Speedy Trial Clause of the Sixth Amendment.¹⁵³

In the best of circumstances, a jailer would be neutral as to the consequences of unrepresented precharge detention. However, in New Orleans, the Orleans Parish Criminal Sheriff's office has historically had a tremendous financial interest in maximizing the number of persons it incarcerates.¹⁵⁴

The costs of incarceration do not deter police and prosecutors from unnecessary arrests or unwarranted pretrial detention. It is the City of New Orleans that pays for the incarceration of pretrial detainees, currently at the rate of \$22.39 per night.¹⁵⁵ City government is unlikely to discourage its police from making arrests. As to the length of precharge incarceration, that is a matter solely within the control of the district attorney.¹⁵⁶

The judicial officers, who preside over initial appearances, should be neutral and detached. The reality, however, is that the elected magistrate answers to the public—no elected judge wants to see his or her name attached to the headline: “Suspect Strikes Again Only Days After Release By Judge X.” The appointed commissioners, who serve at the whim of the local judges, have far more immediate concerns than those of the elected magistrates. The magistrate runs for office once every six years.¹⁵⁷ In contrast, the commissioners have no ability even to predict when the judges might reevaluate their employment.

And why has the Louisiana legislature permitted this subversion of the adversary system? The stock answer is a simple one: no one ever got elected by voting for more money for criminal defense. Yet,

153. U.S. CONST. amend. VI; see *Barker v. Wingo*, 407 U.S. 514, 530-36 (1972). A key factor in evaluating the merits of a constitutional speedy-trial claim is evidence of the prejudice caused to the defendant's case by the delay in proceedings. *Id.* at 530-33. Assuming a suspect can allege the necessary delay, the prolonged period of incarceration, without assistance of counsel, renders it impossible to say with certainty whether and to what extent the passage of time has caused actual prejudice to the defendant's ability to assemble a defense. *Id.* How can an unrepresented Katrina detainee demonstrate such harm? Because no lawyer investigated the case before Katrina, it is virtually impossible to show how Katrina altered the available defenses.

154. See ROD AMIS, *KATRINA AND THE LOST CITY OF NEW ORLEANS* 110 (2005).

155. Interview with Brian Firstly, New Orleans Chief Administrative Office, in New Orleans, La. (Feb. 16, 2007).

156. The city attorney does prosecute municipal offenses and there are significant costs to the City of New Orleans associated with those prosecutions. HOME RULE CHARTER OF THE CITY OF NEW ORLEANS § 4-401 (1996), available at <http://www.cityofno.com/portal.aspx?tabid=9>. However, as noted elsewhere, a critique of the municipal offense system is beyond the scope of this Article. See discussion *supra* note 163.

157. LA. CONST. art. VII, § 51(D); LA REV. STAT. ANN. § 13:1346(A)(1).

in Louisiana, that need not be so. By law, all first time felons are eligible for full restoration of rights.¹⁵⁸ While most reentering offenders fail to pursue restoration, that is a function of ignorance and expense—many ex-offenders are unaware of their restoration rights, and, in Orleans Parish, it costs \$125 to obtain an expungement.¹⁵⁹

Ultimately, silent system-wide incentives discourage the early appointment of counsel. Appointed counsel is by far the most frequent adversary match for the prosecutor. Accordingly, the weight of the criminal justice system tends naturally to postpone, as far as is possible, that adversary's entry into the criminal justice fray. After all, adversary procedures are the most labor-intensive, expensive, and time-consuming aspects of criminal procedure. When the right to counsel attaches, adversary battle and its attendant noise and disruption may follow.¹⁶⁰

V. LESSONS LEARNED

A. *Legal Lessons*

While no one solution will resolve the chronic underfunding of public defense or the judicial underenforcement of criminal practice norms, my struggle for answers about the uncharged Katrina detainees has led me far from my early views about the right to counsel. Where I once urged flexibility and substantive inquiry, I now know better.

In an earlier article, I argued that the critical-stage doctrine fails to honor the Sixth Amendment's promise of the right to counsel.¹⁶¹ As a result, I urged that the United States Supreme Court should adopt a more flexible approach to the attachment of the counsel guarantee.¹⁶² Katrina proved me right about the problem, but wrong about the solution. Application of the bright-line, critical-stage doctrine left hundreds of uncharged pretrial detainees without any assistance of counsel at a time when, without counsel's assistance, their fundamental rights were irretrievably lost.¹⁶³

158. LA. REV. STAT. ANN. § 44:9 (Supp. 2007).

159. LA. REV. STAT. ANN. § 15:572(B) (2003).

160. For a more extended discussion of systemic impulses toward suppression of adversary procedures, see Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 477, 480-81 (2006).

161. See Metzger, *supra* note 94, at 1636-37.

162. *Id.* at 1689-90.

163. *Id.* at 1662-71. My examples are restricted to the criminal district court; although worthy of an article in its own right, the dilemma of the municipal defendant, charged with a petty offense, is beyond the scope of this Article.

Katrina taught me that bright lines are the best lines of defense for the poor. When criminal justice resources are scarce, the poor are most likely to enjoy those constitutional rights that are enforced as bright-line, black-letter, categorical imperatives. Criminal justice systems honor concrete rules more readily than abstract imperatives, particularly when institutions of power are pitted against pools of nonvoters.

After Katrina, the criminal justice systems of New Orleans defaulted to formal and pro forma compliance with those constitutional rules that are clear, bright-line “thou shalt” and “thou shalt not” imperatives. For example, the criminal justice system quickly complied with the forty-eight-hour, *County of Riverside v. McLaughlin* rule, ensuring that a neutral and detached magistrate reviewed the facts for each warrantless arrest and honored the clear imperative that a defendant have the assistance of counsel at arraignment.¹⁶⁴ Compliance with these constitutional mandates was overwhelmingly thorough.¹⁶⁵ Within forty-eight hours of their respective arrests, a neutral and detached magistrate reviewed each defendant’s arrest for probable cause.¹⁶⁶ Even during mass arraignments at prisons outside the New Orleans metropolitan area, each defendant had a public defender standing by his or her side to waive reading of the charges and enter a not guilty plea.¹⁶⁷

Thus, after Katrina, the surviving institutions of criminal justice, whether deliberately or subconsciously, took stock of the rights the Supreme Court extended to pretrial detainees, and then provided those rights, to the letter of the law (but not one step beyond). Why were the Orleans Parish precharge detainees without counsel? Because the institutions of criminal procedure believed that precharge detainees could be detained without counsel and without consequences to those empowered to detain them.

Katrina helped me understand that the right to counsel requires a bright line, but a different one than that drawn by the critical-stage doctrine. Where should the line be drawn? Katrina taught me lessons about that as well.

First, Katrina reminded me that lawyers, even bad lawyers, matter in the simplest but most profound ways. Inside the post-Katrina prison

164. Garrett & Tetlow, *supra* note 1, at 145-53 (discussing the Orleans Parish judicial response to Katrina); *see* *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

165. Garrett & Tetlow, *supra* note 1, at 145-53.

166. *Id.*

167. *Id.*

system, those who lacked lawyers were lost.¹⁶⁸ Only when a lawyer is personally responsible for representing a named and known defendant can we expect someone with the power to affect legal proceedings will use that power to prevent that defendant from disappearing without a trace.

Second, Katrina proved to me that appointment of counsel at arraignment is categorically and unequivocally too late. Poor people detained on criminal charges need the assistance of counsel from the moment of their arrest. Two days later, or two hours later, can be too late. Once a suspect disappears into the bowels of the prison system, that suspect can disappear forever unless a lawyer is personally responsible for safeguarding that suspect's fate.

I will not pretend to offer fully developed constitutional theory about why the right to counsel attaches upon arrest. Some scholars have urged a merging of the Fifth and Sixth Amendment rights to counsel.¹⁶⁹ Others have posited that the Supreme Court's recent recommitment to an originalist view of the Sixth Amendment requires a return to a Fifth Amendment due process-based right to counsel.¹⁷⁰

For myself, sixteen months after Katrina, the daily deluge of criminal chaos cautions me against too hastily seeking a single constitutional theory to solve a practical problem. The Supreme Court's recent and radical revisiting of its Sixth Amendment jurisprudence, albeit in the context of the Confrontation Clause, suggests that constitutional rules and rhetoric are poised to change again.¹⁷¹ And having been once bitten by the unwarranted certainty of my constitutional theorizing, I am twice shy about too quickly pretending to devise a solution about a problem so pressing and so important.

What I can offer is a pragmatic vision about how our criminal justice systems can provide a right to counsel at arrest and some educational observations about how a counsel-upon-arrest rule would

168. See Human Rights Watch, *supra* note 3.

169. See, e.g., Daniel C. Nester, *Distinguishing Fifth and Sixth Amendment Rights to Counsel During Police Questioning*, 16 S. ILL. L.J. 101, 104 (1991) (arguing the right to counsel in the pretrial setting under the Fifth and Sixth Amendments should be merged).

170. See, e.g., Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125, 140 (2005) (discussing Fifth Amendment due process in the context of the right to counsel).

171. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). For an excellent and thorough consideration of the right-to-counsel consequences of the line of cases decided prior to *Crawford*, see Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 12-25 (2001).

benefit the entire criminal justice system. In New Orleans at the end of 2006, Katrina has validated *Escobedo's* long-abandoned premise: the right to counsel should attach upon arrest and must continue until charges are dismissed or the case is resolved. As the dissenting justices feared after *Escobedo*, a bright-line, counsel-upon-arrest rule will create new entitlements and require new means for enforcing them.¹⁷² Yet, the plight of the uncharged Katrina detainees in itself makes a persuasive case for earlier representation for all arrestees.

All defendants should have access to assigned counsel from the earliest practicable moment after they enter police custody. This counsel need not be physically present at the station house. Those with retained counsel can call that counsel. Those without counsel, and those too poor to afford counsel, should have access to an on-call public defender, twenty-four hours a day, seven days a week. That public defender would consult with arrestees and take responsibility for ensuring that their fundamental rights are vindicated.

At a later point, a court or public defender would still make an indigency determination. Those able to retain private counsel would be instructed to do so. Because the vast majority of criminal defendants are indigent, there is likely to be little waste or unnecessary expense in offering assistance to those who are unable to reach retained counsel at the moment of arrest.¹⁷³

In the early twenty-first century, providing access to counsel upon arrest is a readily accomplishable goal. Indeed, in Vermont and Minnesota, persons accused of drunk driving already have a right to counsel upon arrest.¹⁷⁴ Those with private counsel are entitled, as a matter of law, to call their counsel.¹⁷⁵ Those without means, or those whose counsel is unavailable, are provided with access to a public defender via a call-in line that provides telephone counsel twenty-four hours a day, seven days a week.¹⁷⁶

Early provision of access to counsel serves all of the fundamental goals of criminal procedure. While scholars and lawyers may disagree about the foremost goals of criminal procedure, there is a general

172. *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964) (White, J., dissenting) (noting concern for the majority decision's effect on law enforcement efforts).

173. See Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 741 n.164 (2006) (noting that the "majority of criminal defendants" utilize public defender services).

174. MINN. STAT. ANN. § 481.10 (West 2002); VT. STAT. ANN. tit. 23, § 1202(c) (Supp. 2003).

175. MINN. STAT. ANN. § 481.10; VT. STAT. ANN. tit. 23, § 1202(c).

176. MINN. STAT. ANN. § 481.10; VT. STAT. ANN. tit. 23, § 1202(f).

consensus that criminal procedures should legitimate the system sufficiently to ensure continued public confidence in, and acceptance of, the criminal justice outcomes.¹⁷⁷

In Vermont, an arrested, but uncharged, drunk driver can talk to a lawyer before deciding whether to exhale.¹⁷⁸ Surely all criminal suspects should be entitled to have a lawyer know their names, before they disappear into prison to await formal charging. Surely people charged with serious felonies and capital crimes should be entitled to have someone investigate their cases immediately, before the evidence has disappeared or the witnesses have vanished. What criminal justice goals do we value if we come to any other conclusion about the necessity of counsel at the time of arrest?

As they did when the Court issued its *Miranda* holding, critics and naysayers will no doubt object that such a counsel-upon-arrest rule will deprive law enforcement of a valuable investigative tool: post-arrest confessions.¹⁷⁹ The *Miranda* critics were wrong. Indeed, to the chagrin of prosecutors and criminal defense lawyers everywhere, defendants continue to confess, early, often, and inaccurately.¹⁸⁰ Often, they confess in stages, revealing small truths here, larger truths there. The end result for law enforcement is often that the incomplete and inaccurate statement produces an incomplete and inaccurate investigation. The end result for the defendant is the lost opportunity to strike a good bargain with other side: a clean confession and some good leads in exchange for a better deal.

There is no reason to believe that a right to counsel at arrest will result in fewer post-arrest statements. Indeed, in a world in which cooperation with law enforcement is an increasingly popular negotiating tactic, early advice from counsel might well be intended to encourage a prompt and complete confession.

Experienced prosecutors and defense attorneys alike recognize that half-hearted confessions that omit some facts and shade others are rarely best for prosecutors or defendants. As federal prosecutors and

177. See, e.g., Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 45 (2006) (noting that the “policing of criminal procedure” should “prevent erosion” of the public’s confidence in the justice system).

178. VT. STAT. ANN. tit. 23, § 1202(c).

179. See, e.g., Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda & Defenders*, 90 NW. U. L. REV. 1084, 1093-97 (1996) (providing statistical criticism of *Miranda*); William J. Stuntz, *Miranda & Mistake*, 99 MICH. L. REV. 975, 978-80 (2001) (arguing that *Miranda* has limited effective police interrogation).

180. Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1004 (2001) (noting a ten percent increase in confession rates after *Miranda*).

agents can surely attest, counseled statements are more accurate and provide better long-term results in investigating and prosecuting those named as co-conspirators in the confession. Provision of counsel, upon arrest, will help insure the accuracy and completeness of station house confessions, thereby improving the accuracy and efficiency of police investigations.

In addition, a counsel-upon-arrest rule will yield earlier case resolutions, thereby saving scarce criminal justice resources. Certainly, some prosecutor's offices have come to favor prescreening case resolution over postscreening resolution because of the efficiencies earned by such a system.¹⁸¹

Earlier appointment of counsel will also lead to better judicial determinations about pretrial release. There is strong empirical evidence that "delaying representation until after the pretrial release determination" is the most significant cause of "lengthy pretrial incarceration of people charged with nonviolent crimes."¹⁸² In part, this reflects the significant effect an advocate can have upon judicial decisions: "Without counsel present, judicial officers [make] less informed decisions and [are] more likely to set or maintain a pretrial release financial condition that [is] beyond the individual's ability to pay."¹⁸³

In short, assignment of counsel upon arrest will likely benefit the entire criminal justice system. But even if its only benefit is to prevent the abandonment of precharge detainees, that benefit would be enough.

B. Lawyering Lessons

So, Katrina taught me about bright lines. But there should be no confusion: Katrina, for all her power, neither created Louisiana's right-to-counsel catastrophe nor caused the resulting constitutional crisis. Katrina simply ripped away the scrim, exposing the system's long-standing failures.

Indeed, many of my Katrina stories are not really Katrina stories at all. They are pre-Katrina stories: stories about rights' failures that

181. See Wright & Miller, *supra* note 92, at 58-66 (discussing the prescreening process in the New Orleans district attorney's office).

182. Colbert et al., *supra* note 74, at 1720. Of course, as Katrina demonstrated, appointed counsel upon arrest deters excessive pretrial incarceration simply by providing a detainee with an advocate who can count and who can say: "My client is in jail and has been for more than sixty days; he has not been charged; therefore, he must be released."

183. *Id.*

were already complete long before Katrina approached the Gulf Coast. Katrina simply magnified systemic flaws and exposed systemic failures. Katrina proved that the old liberal saw: “The personal is political” can be as aptly turned into a criminal justice axiom: “Individual wrongs reflect institutional failures.”

I learned other lessons from Katrina. For what it is worth, I share one more: a lesson about being a lawyer who represents poor people.

Good lawyering on behalf of poor people can bring joy in the midst of despair. Truly, I had days that were filled with pure joy. Once, I met a man who had not seen or heard from his family in the more than seven months that he had been in jail. Within two days, our clinic had him safely home. It felt magnificent, powerful, humbling, and almost biblically just.

There were days when our small band of lawyers and students had a cause so just and so righteous that we felt a mystical thrill standing in court uttering the incantations of freedom: due process, fundamental fairness, and habeas corpus. There were days when students lined up, one after the other, in a line extending out of the courtroom, well beyond the audience, nearly to the hall, for a lightning round of habeas arguments to be made before the temporary courthouse closed for the day.

There were swaggering, podium-pounding days of joy, moments when row upon row of men, chained together in orange prison jumpsuits, leaned forward and burst into spontaneous applause when a judge ordered one of their number back to freedom.

Those days of joy were, in truth, few and far between. But those days have lingered long in my memory. Those days made sense of the countless hours we spent kneeling in front of boxes full of charging papers and jail lists searching for unknown, uncharged, and unrepresented detainees. Those days lent a leavening sense of hope that sustained us through the mind-numbing process of referencing, cross-referencing, and referencing again, prisoner names against birthdates and dates of arrest against charging deadlines.

Those days inspired whatever merit this Article has. Katrina gave me those days, and Katrina gave me that joy. Katrina reminded me that having a lawyer matters and being a lawyer matters.
