

M-READ

To: Articles Team

From: [REDACTED]

Date: March 25, 2022

Re: S-16093 – Public Defenders as Gatekeepers of Freedom

RECOMMENDATION

I recommend a **no to advancing to C-Read**.

SYNOPSIS

This article discusses the role that public defenders play in restricting criminal defendants' access to pretrial release. Using a case study of public defenders in New York City, the article argues that public defenders regularly choose not to pursue pretrial release without consulting with their clients. In doing so, public defenders do not violate any ethical rules or constitutional rights of criminal defendants. However, they take an incredibly significant decision away from the people the decision affects, placing the decision out of the hands of predominantly people of color and placing it into the hands of predominantly white public defenders.

This article is on an incredibly interesting and important topic. It counters the common narrative of public defenders as always advocating for the interests of their clients and centers the personal narratives of people who are incarcerated. However, there are a few key shortcomings that prevent me from recommending this article for C-Read. First, the article is very sparsely footnoted. There are a lot of spots where the author makes important claims without support. While doing this a couple of times may have been okay and could have been fixed in the editing process, I think it is too frequent of a problem to fix in this piece. Second, I think the case study does not really present enough evidence to prove its claims. The case study lists only a handful of examples of gatekeeping, limited to a single public defender's office in a single city, which, while providing some interesting evidence, does not seem sufficient to convince me that gatekeeping is a problem that extends further than these examples, even if I am generally inclined to believe that proposition.

PRELIMINARY LITERATURE REVIEW

As far as I can tell, this claim is novel. From my own knowledge and a brief search on google and Westlaw, I don't know of any articles arguing that public defenders purposefully refuse to litigate bail issues without consulting their clients. There are, of course, criticisms of the role of public defenders in the criminal legal system—many people think they often do a great deal of harm, largely because they lack the resources to devote a sufficient amount of time to this case. There is also certainly criticism of the effective assistance of counsel doctrine and the low bar it sets for public defenders.

PROS

Important, timely topic: This article seeks to uncover a key reason why people remain incarcerated pretrial, a phenomenon that can keep people needlessly behind bars for years. It is

undoubtedly an important subject and challenges a key assumption that public defenders act based on what their clients want.

Effective use of individual stories and narratives: I found the article's use of individual stories, both within the case study portion and in other parts of the article to be effective. For example, the story of Kalief at TAN 84 – 90 really drove home the consequences of leaving people in pretrial detention. I also found that the narrative quality of the case study examples, with quotes, also helped me understand what gatekeeping is and how it manifests in practice.

Short and accessible: At 41 pages, this article is a pretty quick read, and I found the writing to be relatively simple and accessible.

Centrality of race: I appreciated that this article made race a central theme of the argument at various points. It discusses the way in which the nature of bail changed as the criminal legal system became more racialized after the end of slavery. It also talks about how gatekeeping transfers the decision making power and agency from largely people of color who are incarcerated to predominantly white public defenders. I think it is important that criminal law and procedure pieces grapple with race as a central theme, and this article does so.

Diversity: This article is written by a woman of color outside of the T14.

CONS

Limited support: In various ways, the article falls short in supporting its argument. The case study of gatekeeping is limited to New York City and, specifically, the Legal Aid Society. The case study discussion includes only seven examples. The article does not grapple at all with the possibility that these examples could be outliers, either because they are representative only of a culture within the Legal Aid Society, or because they are just examples of a few particularly bad public defenders.

In addition, the article makes a lot of claims without providing citations to support. For example, page 32 contains only one footnote. Page 29 has only footnotes that are completely blank. Footnote 77 provides no support for its description of bail systems in other jurisdictions besides New York. Footnote 53 also does not provide any support for its explanation of which jurisdictions allow preventive detention. These are just a couple of examples, but there are many more examples throughout the article. I think a couple of instances of this would be okay, but it seemed to be an issue in most sections of the article. It made me really concerned that there was just a lack of support for what the article was saying.

Sparsity of analysis: Beyond the lack of support, I found the analysis to fall short at times. The article says that it is going to argue that there should be a constitutional right for defendants to decide whether or not to pursue release from pretrial detention. However, the discussion of this argument is extremely brief. The discussion of the solutions is also quite short, just one page, and does not acknowledge any counterarguments.