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Notes from The Field: Challenges of Indigent Criminal Defense

Ting Ting Cheng

Steven Zeidman
CUNY School of Law

Kathy Boudin

Mercedes Cano

Preeti Lala

See next page for additional authors

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Notes from The Field: Challenges of Indigent Criminal Defense

Authors

Ting Ting Cheng, Steven Zeidman, Kathy Boudin, Mercedes Cano, Preeti Lala, and Susan Tipograph

NOTES FROM THE FIELD: CHALLENGES OF INDIGENT CRIMINAL DEFENSE

FOREWORD

In the arena of legal scholarship, the topic of indigent criminal defense is often subsumed under a broader consideration of criminal law, the courts, institutional structures, and the reigning paradigm of the criminal justice system. However, examination of the field seldom begins from the perspective of the indigent criminal defense attorney and, by extension, the accused. The reflections of these practitioners are not only germane, but also essential to bridging the divide between the rarified theory of indigent criminal defense and its application.

With this in mind, bringing the voices of criminal defense practitioners into the fold has been the mission of this issue's Public Interest Practice Section of the *New York City Law Review*. We invited four leading practitioners—Susan Tipograph, Kathy Boudin, Mercedes Cano, and Preeti Lala—to discuss challenges in the criminal defense field. Tipograph, Cano, and Lala are criminal defense lawyers, and Boudin, who was herself incarcerated for twenty-two years, is a noted advocate in the area of incarcerated populations and their children.

We asked the practitioners about the particular difficulties they face in their practice, the trend of mass incarceration in the United States, the difficulties of recidivism, the connection between social movements and criminal defense, and alternative client-incorporating approaches to indigent public defense. In order to build dialogue between the practitioners, the essays were continually distributed among the practitioners throughout the writing process so that each participant could respond to the others.

The Law Review hopes that the insights of the practitioners, and the realities they have described, will contribute to the critical discussion in future debates on indigent criminal defense.

Ting Ting Cheng

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INTRODUCTION

While the U.S. economy struggles to cope with infirmity, the American incarceration obsession enjoys robust health. The numbers are so staggering as to be mind numbing; it is impossible to fathom the depths of our race to incarcerate.

The most recently publicized report from the Pew Center on the States (“Pew Report”) revealed that 2.3 million people are under lock and key in the United States of America.¹ That’s more

¹ PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), available at http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912 (documenting that at the start of 2008, 2,319,258 adults were incarcerated in the United States) [hereinafter PEW CENTER ON THE STATES]. In contrast, the national inmate population was 330,000 in 1972. See, e.g., MARC MAUER, THE SENTENCING PRO-

than the populations of all but three cities in the United States,² and more than the entire populations of fifteen states.³ In fact, the U.S. jail and prison numbers exceed the population figures for many countries.⁴ On the international stage, America is, indeed, number one. The U.S. rate of incarceration in 2007, 762 out of 100,000, was far and away the highest reported rate in the world,⁵ and was significantly higher than that of the industrialized nations to which we are most similar.⁶

In an effort to translate the numbers into more comprehensible terms, the Pew Report observed that 1 in 100 adults were incarcerated in the United States.⁷ Still, even that device does not illuminate the numbers in key ways. The impact of incarceration on black males is overwhelming. While 1 in 30 men between the ages of 20 and 34 were incarcerated, the rate for black men in that age group was 1 in 9.⁸ A 2007 study found that 1 in 10 black males between the ages of 25 and 29 were incarcerated, as compared to rates of 1 in 28 for Hispanics and 1 in 59 for whites.⁹

Digging deeper, one recognizes that incarceration numbers are only a part, albeit an incalculable one, of the criminal justice picture. The full frontal embrace of “quality-of-life” policing translates into millions of police–citizen interactions that, while they may not all end with arrest, impact deeply on the daily fabric of our

JECT, PRESENTATION TO THE U.S. COMMISSION ON HUMAN RIGHTS: COMPARATIVE INTERNATIONAL RATES OF INCARCERATION (June 20, 2003), *available at* http://www.sentencingproject.org/Admin/Documents/publications/inc_comparative_intl.pdf.

² Only Chicago, Los Angeles, and New York have populations in excess of 2.3 million. U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY, <http://www.census.gov/popest/cities/SUB-EST2007-4.html> (last visited Feb. 1, 2009) (follow “Excel” hyperlinks for Illinois, California, and New York).

³ Including, for example, New Mexico (1,984,356), West Virginia (1,814,468), and Nebraska (1,783,432). U.S. CENSUS BUREAU, 2008 CENSUS ESTIMATES, <http://www.census.gov/popest/states/tables/NST-EST2008-01.xls> (last visited Feb. 1, 2009).

⁴ Including, for example, Latvia (2,289,000), Namibia (2,047,000), and Slovenia (2,001,000). UNITED NATIONS CENSUS PROJECTIONS, 2008 *Mid-Year Interpolated Projection*, <http://unstats.un.org/unsd/demographic/products/dyb/dyb2006/AnnexI.pdf>.

⁵ *See, e.g.*, THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (July 2008), *available at* http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprisons.pdf (describing how U.S. prison population was the highest, and Russia came in second with a rate of 635 per 100,000) [hereinafter THE SENTENCING PROJECT].

⁶ *See, e.g.*, MAUER, *supra* note 1 (comparing U.S. prison population to the prison population of other industrialized nations, such as England and Wales (139 per 100,000); Canada (116 per 100,000); Germany (91 per 100,000); and France (85 per 100,000)).

⁷ PEW CENTER ON THE STATES, *supra* note 1.

⁸ *Id.*

⁹ THE SENTENCING PROJECT, *supra* note 5.

society.¹⁰

New York City is a prime example. In 2007, approximately 360,000 people were arrested,¹¹ more than 600,000 received a summons,¹² and more than 500,000 were stopped and frisked.¹³ That adds up to close to 1.5 million police-citizen encounters. The 500,000 stop-and-frisks deserve special attention. According to the New York Police Department's own reporting, only 10% of those stopped and frisked were either arrested or given a summons.¹⁴ And what about the other 90%? They were just sent on their way to cope with their anger and humiliation. Even more importantly, just as with incarceration, the impact is overwhelmingly felt by people of color—86% of those stopped and frisked were black or Latino.¹⁵

And while our thoughts immediately turn to the accused and the police, public defenders and other defenders of the indigent are very much part of the calculus. After all, perhaps the only common denominator for the 2.3 million presently incarcerated is that they all had a constitutional right to an attorney,¹⁶ and given that most of them were indigent,¹⁷ their lawyer was likely a public defender or some other form of government-funded and government-supplied attorney.¹⁸

¹⁰ For an explanation of the development and growth of quality-of-life policing, see Steven Zeidman, *Policing the Police: The Role of the Courts and Prosecution*, 32 FORDHAM URB. L.J. 315 (2005).

¹¹ CRIMINAL COURT OF THE CITY OF NEW YORK, 2007 ANNUAL REPORT 6 (2008), available at <http://www.nycourts.gov/courts/nyc/criminal/NYCCC%20Annual%20Report%20Final%20072508.pdf>.

¹² *Id.*

¹³ See Al Baker, *City Police Stop Whites Equally but Frisk them less, a Study Finds*, N.Y. TIMES, Nov. 21, 2007, at B1; NEW YORK CIVIL LIBERTIES UNION, STOP AND FRISK CAMPAIGN, <http://www.nyclu.org/node/1232> (last visited Feb. 1, 2009).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence." U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that states must provide attorneys for indigent defendants accused of felonies in state courts); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that a defendant could not be incarcerated in any case unless he or she had been provided counsel).

¹⁷ See, e.g., Bureau of Justice Statistics, U.S. Dep't. of Justice, *Indigent Defense Statistics*, <http://www.ojp.usdoj.gov/bjs/id.htm> (last visited Feb. 1, 2009) (finding that in 1992, about 80% of defendants charged with felonies in the 75 largest counties in the United States were represented by appointed counsel).

¹⁸ Scholars discuss the three basic types of indigent defense counsel (assigned counsel, contract counsel, and public defender). See, e.g., ROBERT L. SPANGENBERG ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY (1986); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS

Ever since the Supreme Court decided that indigent defendants were entitled to counsel,¹⁹ studies have been conducted and articles have been written about the nature and quality of indigent defense attorneys.²⁰ More specifically, articles have been written by and about the lawyers themselves. Not surprisingly, those articles have been lawyer-centric, and have focused on the attorneys and their justifications for engaging in indigent criminal defense and their motivations for forging ahead.²¹ Even though couched in terms of values like empathy and respect, the articles are about the impact of these ideals on the attorney and whether they will serve to enable him or her to continue to be a zealous and effective advocate.²²

There is always something disconcerting about indigent defense articles that focus on the lawyers. After all, as the saying goes, it isn't about them. Sure they play a key role, but in the end it is, obviously, the clients who feel the system's devastating impacts²³—the clients do the time. They struggle with the weight of the

L.J. 361 (1991); Roy B. Flemming, *If You Pay the Piper, Do You Call the Tune? Public Defenders in America's Criminal Courts*, 14 LAW & SOC. INQRY. 393, 394–95 (1989).

¹⁹ *Gideon*, 372 U.S. at 335.

²⁰ Studies compare the practices of the various types of indigent defenders. See, e.g., Larry J. Cohen et al., *Assigned Counsel Versus Public Defender Systems in Virginia: A Comparison of Relative Benefits*, in THE DEFENSE COUNSEL 127 (William F. McDonald ed., 1983); Pauline Houlden & Steven Balkin, *Costs and Quality of Indigent Defense: Ad Hoc vs. Coordinated Assignment of the Private Bar within a Mixed System*, 10 JUST. SYS. J. 159 (1985); Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176 (1985); Stuart S. Nagel, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L.J. 404 (1973). Studies compare the practices of indigent defense attorneys with those of privately retained counsel. See, e.g., Morton Gitelman, *The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases—An Empirical Study*, 24 ARK. L. REV. 442 (1971); Joyce S. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in THE DEFENSE COUNSEL 151 (William F. McDonald ed., 1983); Robert V. Stover & Dennis R. Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265 (1975); Jackson B. Battle, Note, *Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver*, 50 DENV. L.J. 101 (1973).

²¹ See, e.g., Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 176 (1983) (examining the litany of justifications offered for being a Public Defender); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) (urging a focus beyond justifications for indigent defense and suggesting empathy and heroism as necessary motivations for ongoing zealous representation); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004) (taking issue with Ogletree's keys to motivation and positing instead the triumvirate of respect, dedication to craft, and a sense of outrage).

²² See MODEL RULES OF PROF'L CONDUCT pmb. 2 (2004).

²³ *Faretta v. California*, 422 U.S. 806, 834 (1975) (“The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.”).

charges and the host of negative consequences that rain down upon them and their families. It is all too easy to miss the irony of *Gideon v. Wainwright*.²⁴ While *Gideon* was a path-breaking case that established the right to counsel, it was initiated by a defendant, Clarence Earl Gideon, a man with an eighth-grade education. Put another way, the right to counsel grew from the work of an uncounseled inmate.

And perhaps in some kind of recognition of the defendant's role in his or her case, Supreme Court Justices have served notice that counsel, while constitutionally required, is not vested with unlimited power. As Justice Stewart wrote, "[T]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."²⁵ In 1983, Justice Brennan further explained counsel's role: "The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process."²⁶

Yet now the defendant's voice, and his role in the process that seeks to condemn him, is under siege. In *Florida v. Nixon*,²⁷ the defense counsel conceded his client's guilt during the fact-finding phase of the trial. Counsel's strategy was to focus on sentencing and present the most favorable case possible for a life sentence as opposed to the death penalty, but he was unable to get his client's agreement with that plan. Nevertheless, the Supreme Court held that concession of a defendant's guilt by his own attorney, without the defendant's express consent, was not a violation of the Sixth Amendment.²⁸ Just last year, in *Indiana v. Edwards*,²⁹ the Supreme Court was again faced with a case that involved the accused's role in his own defense. The trial court determined that Mr. Edwards was competent to stand trial even though there was evidence that created cause for concern about his mental health. Mr. Edwards then sought to exercise his right to represent himself at trial, a right guaranteed by the Supreme Court years earlier,³⁰ but the trial

²⁴ *Gideon*, 372 U.S. 335.

²⁵ *Faretta*, 422 U.S. at 819–20.

²⁶ *Jones v. Barnes*, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting).

²⁷ 543 U.S. 175 (2004).

²⁸ *Id.*

²⁹ 128 S. Ct. 2379 (2008).

³⁰ *Faretta*, 422 U.S. at 819. ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to

court refused to allow Mr. Edwards to act as his own counsel. The Court, again showing disdain for the rights of the accused to control their own destiny, held that Mr. Edwards did not have a right to represent himself. Instead, the Court found that it was permissible for states to evaluate if a defendant already found competent to stand trial was also competent to represent himself at that trial.³¹ In both *Nixon* and *Edwards*, the Court's holdings served to silence the accused to render him even that much more powerless in his trial.

Where then is the client's voice in the criminal justice system? It is found in the reflections that follow from Susan Tipograph, Kathy Boudin, Mercedes Cano, and Preeti Lala. What they all share is a deep and abiding concern for the accused, a recognition that it's about the client and what their clients give them, and then—and only then—a concern for what lawyers can give to their clients. Susan Tipograph, early on, writes about how she and her colleagues became lawyers to “make a difference in the lives of people we were representing,” and yet, in the same breath, she continues, “[w]hile true, our clients also profoundly changed our lives.” Kathy Boudin urges lawyers to work collaboratively and to multiply their contributions by training others to advocate for themselves. In the process, the knowledge gained can be passed along, from peer to peer, to reach as many people as possible. Mercedes Cano writes about her clients who mirror her own experience of coming to the United States unable to speak English and full of fear and distrust about the government. The importance to her of knowing, understanding, and identifying with her clients permeates her responses. Preeti Lala details the challenges of being a public defender and bemoans the “triage” aspect of her work that frustrates her desire and ability to build relationships of trust with all of her clients. And yet she remains passionate about her work and hopeful that change is on the horizon in the form of “groundbreaking litigation” that will limit the number of clients assigned to any individual public defender.

The present state of criminal justice calls for a new indigent defense paradigm. Quality-of-life arrests proliferate in record num-

make his defense. It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded ‘compulsory process for obtaining witnesses in his favor.’ ”). Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.

³¹ *Edwards*, 128 S. Ct. at 2386.

bers, and a burgeoning list of negative consequences flow from every arrest. Problem-solving courts dot the judicial landscape and prisoner re-entry programs dominate the discourse. How do we best defend the accused in this new world? How do we best make sure that our clients and their communities are heard?

These personal reflections help us to think about how to answer those questions, about the next steps we should take. As Susan Tipograph notes, if the government is ready, willing, and able to bail out banks, car companies, and CEOs, then surely it should be ready to fully fund and support indigent criminal defense. The new presidential administration sounds the themes of hope and change. The reflections that follow offer many possibilities for hope and change. Let's hope that they, and the voices of their clients, are heard.

*Steven Zeidman**

*Director and Professor, Criminal Defense Clinic
City University of New York School of Law*

LIST OF QUESTIONS

1. Indigent criminal defense work comes with its unique set of difficulties. Examples of such barriers might include the decentralized system of providing public defense services from state to state, the lack of funding, etc. What are some difficulties, barriers, or limitations particular to the area in which you work? Please describe the ways you navigate these issues.
2. A recent report on mass incarceration concluded that 2,319,258 adults are currently incarcerated in the United States. This translates to more than one in every 100 adults, making the United States the country with the highest incarceration rate both per capita and in raw numbers. Based on your experience as a practitioner, what in your opinion is the strongest contributor to this configuration? What can be done? In addition, why is re-entry so difficult and recidivism so prevalent? What can the defense community do to address these problems?
3. Discuss the complexities of counseling clients with respect to

* Professor of Law, Director of the Criminal Defense Clinic at the City University of New York School of Law; J.D., Duke University School of Law; B.A., State University of New York at Albany. Steve Zeidman has spent the last twenty years working in the area of criminal defense, and he is a highly-respected trial lawyer and former supervisor at the Legal Aid Society.

control, advocacy, problem-solving, negotiation, and legal ethics.

4. Discuss the connection between progressive and conservative social movements and public interest lawyering in the indigent public defense field.
5. What are some alternative approaches to public defense? For example, approaches that take a broader, more holistic approach to client-incorporating services, traditionally regarded as social work, as part of the mission of the public defender's office. Or alternative approaches to defense that provide assistance with housing issues, public benefits, substance abuse, and various other problems that are viewed as prolonging client involvement with the justice system?

NOTES FROM THE FIELD, QUESTION 1

Indigent criminal defense work comes with its unique set of difficulties. Examples of such barriers might include the decentralized system of providing public defense services from state to state, the lack of funding, etc. What are some difficulties, barriers, or limitations particular to the area in which you work? Please describe the ways you navigate these issues.

SUSAN TIPOGRAPH

I have been a criminal defense attorney for over thirty years. I am a proud member of the National Lawyers Guild.³² I was born in 1950 and came of age watching southern policemen attacking black people, including children and the elderly, with water hoses and dogs. We were secular Jews, and my birth came five years after the end of the war, which saw six million of my co-religionists, along with countless others, murdered by a state power obsessed with hatred and violence. We were encouraged to participate in the world through education and participation in civil society. My parents supported Adlai Stevenson.³³ We were taught never to

³² The National Lawyers Guild (NLG) is an association dedicated to the need for basic change in the structure of the United States political and economic system. Founded in 1937, the NLG was the nation's first racially integrated bar association. The NLG works locally, nationally, and internationally to address social justice issues. See National Lawyers Guild, <http://www.nlg.org/> (last visited Feb. 7, 2009).

³³ Adlai Stevenson II was an American politician most recognized for his progressive stance in the Democratic Party. Stevenson served as governor of Illinois for one term and ran, unsuccessfully, for President in both 1952 and 1956. He also served as Ambassador to the United Nations from 1961 to 1965. See Adlai Stevenson II: A Voice of Conscience, <http://www.harvardsquarelibrary.org/unitarians/stevenson.html> (last visited Feb. 7, 2009).

cross a picket line, that injustice was wrong, and that we had the responsibility to deal with it—or at least not to stand idly by.

In high school, I had a poster of Bobby Kennedy on my bedroom wall. Increasingly, the war in Vietnam dominated the news, and I went off to college in Washington, D.C.—a predominantly black city—months after the assassination of Kennedy and Martin Luther King, Jr.; drugs, demonstrations, and politics dominated my college years. At the same time, the politics and emotions of the women's liberation movement, as well as a variety of other social movements, changed the fabric of the world in which I was living.

After all of that, I decided to go to law school. For many of us, we believed that by becoming lawyers, we could make a difference in the lives of the people we were representing. While true, our clients also profoundly changed our lives. In Manhattan and other boroughs, I have had the opportunity to represent mostly poor people, the overwhelming majority of whom were people of color charged with crimes in the state courts and in federal court. I have represented and worked with, among others, the Ohio Seven,³⁴ the San Francisco Eight,³⁵ the FALN,³⁶ and the Black Panther Party.³⁷

³⁴ The Ohio 7, also known as the United Freedom Front, was a radical organization active in the late 1970s and 1980s. The organization considered itself a "revolutionary group" with the mandate of opposing imperialism, and in particular, the U.S. foreign policy in Latin America and with the South African apartheid government. The group engaged in bank robberies and bombing attacks on, among others, Washington D.C., the South African Consulate in New York, and the offices of Union Carbide. See HARVEY W. KUSHNER, *ENCYCLOPEDIA OF TERRORISM* 381 (2003).

³⁵ The San Francisco 8 was a group of eight members of the Black Liberation Army (composed of former Black Panthers), accused of killing Sgt. John Young, a San Francisco police officer, in 1971. The eight defendants, arrested in January 2007, were Herman Bell, Ray Boudreaux, Richard Brown, Henry W. "Hank" Jones, Jalil Muntaqim, Richard O'Neal, Harold Taylor, and Francisco Torres. All asserted their innocence. In January 2008, conspiracy charges for O'Neal, Taylor, Boudreaux, Brown, and Jones were dropped. O'Neal has been acquitted of all charges, and the latter four are free on bail. Bell and Muntaqim remain in prison. Some of the defendants were tortured in police custody. Bob Egelko, *Charges Narrow in 1971 Slaying of S.F. Cop*, *SAN FRANCISCO CHRONICLE*, Jan. 9, 2008, at B-4, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/01/09/BALJUBKMK.DTL>.

³⁶ Fuerzas Armadas de Liberación Nacional (FALN) was a Puerto Rican paramilitary organization committed to the independence of Puerto Rico. Between 1974 and 1983, FALN was responsible for more than 120 attacks on U.S. targets such as military and government buildings, financial institutions, and corporate headquarters in New York, Chicago, and Washington D.C. The purpose of the bombings was to oppose U.S. military presence in Puerto Rico and to protest the growing influence of U.S.-based corporate and financial institutions on the island. Encyclopedia of Chicago, *Fuerzas Armadas de Liberación Nacional (FALN)*, <http://www.encyclopedia.chicago.history.org/pages/489.html> (last visited Jan. 29, 2008).

³⁷ The Black Panther Party was a radical organization that promoted Black Power, the collective social and economic well-being of the Black community, and the armed

I have represented those arrested for protesting apartheid, AIDS discrimination, the war in Iraq, and homophobia. I have also represented those charged with killing cops, blowing up buildings, lying in the street, and chaining themselves to the Rockefeller Plaza Christmas tree,³⁸ the Mexican consulate,³⁹ and to each other.

All the while, I watched and learned from those who came before me—Bill Kunstler,⁴⁰ Lenny Weinglass,⁴¹ Flo Kennedy,⁴² and countless others. While in law school, I worked for Carol Lefcourt (who represented Afeni Shakur,⁴³ Tupac Shakur's mother, in the

self-defense of African Americans against white violence and repression. Founded in 1966 by Bobby Seale and Huey P. Newton in Oakland, California, the Black Panther Party established numerous branches throughout the United States. Neighborhood patrols against police brutality and free breakfast for children were among the more notable activities of the Panthers. The Panthers' ideology stood in direct contrast to the nonviolent civil disobedience championed by Dr. Martin Luther King, Jr., and had declined in influence by the 1970s following infighting and FBI infiltration of their activities. Encyclopedia Britannica, Black Panther Party, <http://www.britannica.com/EBchecked/topic/68134/Black-Panther-Party> (last visited Jan. 29, 2008).

³⁸ I represented three women who chained themselves to the Christmas tree in Rockefeller Center on World Aids Day. The matter was dismissed on facial sufficiency grounds and the District Attorney appealed. The Appellate Term reversed and the matters were reinstated. Eventually, the women pled guilty to disorderly conduct.

³⁹ On October 30, 2006, over 200 people led a rally in front of the Mexican Consulate in New York City to protest state violence in Oaxaca and the death of American independent journalist Brad Will. See FriendsOfBradWill.org, <http://www.friendsofbradwill.org/2006/10/30/action-at-mexican-consulate-this-morning-shows-nyc-solidarity-with-people-of-oaxaca-protests-killing-of-new-york-journalist> (last visited Feb. 28, 2008).

⁴⁰ William Kunstler was a lawyer well known for defending armed radicals, political dissidents, and civil rights activists in the United States. Kunstler's most prominent case involved his defense of the Chicago 7, who were arrested for demonstrating at the 1968 Democratic National Convention and later acquitted. An avowed socialist, Kunstler served as the director of the American Civil Liberties Union from 1964 to 1972 and was a co-founder of the Center for Constitutional Rights. Encyclopedia Britannica, William Kunstler, <http://www.britannica.com/EBchecked/topic/325045/William-Kunstler> (last visited Jan. 30, 2009).

⁴¹ Leonard Weinglass is a civil rights lawyer who has defended left-wing radicals throughout his career, including the Chicago 7, Angela Davis, Jane Fonda, and Mumia Abu Jamal. He most recently served as an appellate attorney for the Cuban 5, imprisoned for espionage in the United States. See CharlieRose.com, Guests: Leonard Weinglass, <http://www.charlierose.com/guest/view/4843> (last visited Jan. 29, 2009).

⁴² Florynce Kennedy was a lawyer who advocated for feminist, abortion rights, and civil rights causes. Kennedy defended H. Rap Brown and other members of the Black Panther Party. She founded the Feminist Party in 1971, and assisted in the founding of the Women's Political Caucus and the National Organization for Women. Douglas Martin, *Flo Kennedy, Feminist, Civil Rights Advocate and Flamboyant Gadfly, Is Dead at 84*, N.Y. TIMES, Dec. 23, 2000, at B7.

⁴³ Afeni Shakur is a former member of the Black Panther Party, and was arrested in 1969 for withholding information about fellow Panthers' alleged conspiracy to kill police officers and bomb public and commercial buildings. The defendants were also known as the Panther 21. Shakur defended herself in court and was imprisoned; her

Panther 21 trial), Veronika (“Vonnie”) Kraft, and Carol Arber.⁴⁴ Carol Lefcourt and Vonnie both died of cancer, and Carol Arber is now a sculptor. We marched with lawyers of the Legal Aid Society in the 1970s and 1980s and demanded a better quality of representation for our clients. Many of us came to our work with a belief that lawyers—in both the kind of work that we choose to do and the way that we choose to do it—could be participants in movements for social change and justice. That has proven to be true for many of us in the public interest field—how gratifying it has been to be a small part of history.

Most importantly, we wanted to take on the system. We wanted to be defenders of our clients—those in the crosshairs of state power. We wanted to build relationships with clients that were based in honesty and respect, and to treat the families of our young clients with respect, even when it was hard. We wanted to be true to the principles that led us to do this kind of work.

There are countless systemic problems in the criminal justice system. Lawyers for the poor are not paid enough. The caseloads are too high. The criminal justice system serves too often as the band-aid for social problems that we are unwilling to solve elsewhere. It reflects the bigotries of race, gender, and class that exist in the larger world. It is an unmanageable, unjust, and unfair system that too often treats those caught in it with contempt. Sometimes, we as public defenders are guilty of this as well when we treat our clients with disrespect and prevent the already powerless from having a meaningful voice in their own cases. As practitioners, how we confront systemic problems is reflected in how we deal with our clients and their cases on a day-to-day basis. As criminal defense lawyers, we should constantly reflect on what brought us to this work and challenge ourselves to treat our clients with the respect they deserve.

Why would anybody in their right mind do this work? Personally, I cannot imagine doing anything more gratifying and important. Not only have I had the opportunity to be a very small part of history, I have also been invited into the homes and lives of all kinds of people. This work has provided a diversity and richness to

conviction was later overturned. She is presently active in the music industry and philanthropy, and is also the mother of the late hip-hop artist Tupac Shakur. Peter Carlson, *The Gangsta Rapper's Radical Mama*, WASH. POST, Sept. 23, 2003, at C01.

⁴⁴ Carol Lefcourt, Veronika Kraft, and Carol Arber (formerly Libow before divorce) are the founding members of Lefcourt, Kraft & Libow, one of the first all female law firms in the country committed to feminist social reform. See CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 141 (2d ed.1993).

my life that is invaluable. In defending those attacked by government power and speaking out against injustice, I have tried not to stand idly by. I feel confident that my parents would have been proud.⁴⁵

KATHY BOUDIN

I am participating in these discussions as a formerly incarcerated woman who served twenty-two years in prison. During the years leading up to my incarceration, I chose a life of commitment to social justice causes—as did many other people in my generation—beginning in the 1960s with my participation in the Civil Rights Movement and the Anti-Vietnam War movements. In 1981, I began serving twenty-two years in prison, primarily at Bedford Hills Correctional Facility, a New York maximum-security prison for women. While incarcerated, I worked with other women in prison on shared personal and social issues, building community through programs that addressed the HIV/AIDS epidemic, parenting from prison, the need for higher education, and personal transformation, including taking responsibility for the crimes that brought us to prison. I received my master's degree in adult literacy, and afterwards began my doctoral degree. During my time in prison, my son—now 28—was both a source of strength and inspiration for me personally and for my work.

In prison, writing was deeply important to me. It helped me to find internal strength, to reflect on the past and the present, and to communicate beyond the prison fences. I wrote in academic journals such as in the *Harvard Education Review*⁴⁶ and *Women and Therapy*⁴⁷; in corrections publications of the American Correctional Association on parenting and adult literacy; and I contributed memoir writings to the Eve Ensler production, *What I Want my Words to Do to You*.⁴⁸ I am also a poet who was in a decade of poetry classes with Hetti Jones, and I won First Prize for the PEN Prison Writing Poetry Award.⁴⁹

⁴⁵ I want to thank my assistant, Melissa Ballowe, J.D. 2008, City University of New York School of Law, for her assistance.

⁴⁶ See, e.g., Kathy Boudin, *Teaching and Practice: Participatory Literacy Education Behind Bars: AIDS Open the Door*, 63 HARV. EDUC. REV. 207 (Summer 1993).

⁴⁷ See, e.g., Kathy Boudin, *Lessons from a Mother's Program in Prison: A Psychosocial Approach Supports Women and Their Children*, 21 WOMEN & THERAPY 103 (1998).

⁴⁸ *What I Want My Words to Do to You* (PBS television broadcast Dec. 16, 2003); see also P.O.V., *What I Want My Words to Do to You* (PBS), <http://www.pbs.org/pov/pov2003/whatiwant/> (last visited Feb. 7, 2009).

⁴⁹ PEN American Center - 1998–1999, <http://www.pen.org/page.php/prmID/>

Since coming home, I have worked to maintain my commitment to people in prison and their families. As an extension of my work around HIV/AIDS, I work in a hospital-based HIV/AIDS clinic, generating programs related to health care for people who are HIV positive. I continue to be dedicated to drawing on the strengths of people in a peer program that we developed to assist patients in becoming peer counselors and educators in the hospital. I'm committed to those who face the challenge of being HIV positive and returning home from prison, and I am helping to build the Coming Home program⁵⁰ to meet their needs. I am also an adjunct professor at the Columbia School of Social Work and the New York University School of Social Work.

In addition, I have continued the work I began in prison by developing a program for adolescents whose parents are incarcerated to support their positive development and future aspirations. I maintain a commitment to long-termers in prison by participating in a series of projects supporting those who have little chance of seeing a parole board or being granted parole at the expected release date, despite any personal transformation they may achieve. A core piece of the work is developing a restorative justice approach.⁵¹ Finally, I am part of Our Journey, an organization and a spiritual community that offers a social network for women coming home from prison.

I completed my doctoral degree in education at Columbia University Teachers College in May 2007. My doctoral thesis examined the challenges faced by adolescents with mothers in prison, the complexity and centrality of maintaining a relationship with their mothers, the significance of peer support among them, and the possibilities for the positive development of adolescents when policies support these relationships.

Since coming home on parole, a commitment of mine has

558 (listing Kathy Boudin as winner of first prize in poetry for a first prize in poetry for her piece *A Trilogy of Journeys*) (last visited Feb. 7, 2009).

⁵⁰ The Coming Home program is a special service of the Center for Comprehensive Care (CCC) at St. Luke's and Roosevelt hospitals in New York City. As the CCC website states, "[t]he Coming Home program is a unique transition case management and support program designed specifically for people who have been incarcerated and are returning to the community." Centerforcare.org, <http://www.centerforcare.org/special.html> (last visited Feb. 20, 2009).

⁵¹ See, e.g., Michael Wenzel, *Retributive and Restorative Justice*, 32 LAW & HUM. BEHAV. 375, 377 (2008) ("[A]t the core of restorative justice is a dialogical process geared toward making offenders accept accountability for the harm they have caused (as well as its repair), show remorse, and offer an apology, while victims are, at least implicitly, encouraged to overcome their resentment and offer forgiveness.").

been to focus on the issues faced by long-termers—men and women who are serving long sentences—and in particular, those who are serving indeterminate sentences of fifteen years to life or more, and whose crimes involved the loss of life. I focus on these issues because those who are serving these long sentences have been regularly denied parole after serving fifteen, twenty, thirty years or more based on one of many criteria such as the seriousness of the crime and, in some cases, the statements of the victims. Rehabilitation and release plans, which are also criteria used to make parole decisions, are not given the same weight as the crime committed.⁵²

I have watched women with whom I worked and shared a life change from being twenty-year-old young girls without a GED to forty-year-old women with a college education. They are teaching the next generation of women coming to prison about AIDS, being a mother, or getting a college degree, and how to not just survive prison, but also to take the losses and failures and turn them into possibilities and hope for a different future. These same people are frequently the role models for younger people coming into prison, offering them the guidance to grow and change; they are usually the people who have been able to get an education and have redirected their own lives, and statistics show that when they do come home, they have one of the lowest recidivism rates.⁵³

While an individual approach is needed in terms of parole release decisions, I focus on long-termers as a group because criminal justice policy has targeted them as a group. The policy of regular parole denials raises issues of fairness and justice, and offers a different window into understanding the retributive nature of the criminal justice system and the need for change. While in recent years there has been public education and the beginnings of change relating to those in prison for nonviolent crimes, one of the ironic consequences of the campaigns to stop incarcerating people who have committed nonviolent crimes has been an even greater focus on endless punishment and stigmatization of those in prison for violent crimes.

After I spoke several times with lawyers from the Legal Aid Society about the issues of parole and long-termers, it became clear

⁵² N.Y. EXEC. LAW § 259-i (McKinney 2005) (defining the legal criteria for parole release).

⁵³ DR. STEPHEN J. STEURER ET AL., CORRECTIONAL EDUCATION ASSOCIATION, THREE STATE RECIDIVISM STUDY 47–48 (Sept. 30, 2001), *available at* <http://www.ceanational.org/PDFs/3StateFinal.pdf> (showing that three of the hypotheses developed by the researchers prior to the study proved true—namely, correctional education participants recidivated at lower rates for re-arrest, re-conviction, and re-incarceration).

to me that it is important to educate attorneys about the issues that their clients will face fifteen years or more in the future when they become eligible for parole. I would like to give several examples. First, the pre-sentence probation report prepared by the Probation Department is a critical document at a parole hearing. It becomes the factual document that parole commissioners rely on to develop a picture of the incarcerated person, the role that she or he played in the crime, and his or her background. Frequently, such pre-sentence reports have erroneous facts in them. Although it adds a burden to already overburdened lawyers for the indigent, it is critical to carefully read it and to challenge facts that are wrong. When an attorney notes an error, sometimes the probation personnel will say that they will add an addendum to correct it rather than changing the actual text, but it is important to change the text if possible so that the parole commissioners do not read the erroneous material first. The client should also have a copy of the pre-sentence report so that she or he knows what the parole board is reading.

Second, the sentencing minutes are required to be taken into account by the parole board members as stated in Executive Law, Article 12-B State Division of Parole, Section 259-i.⁵⁴ Yet most incarcerated persons do not have their sentencing minutes and do not remember what the judge said—positive or negative. It would be helpful for attorneys to make certain that the person whom they are representing has copies of the sentencing minutes.

A third issue is the appeal of a parole decision. A person has a right to an administrative appeal of a parole denial. These administrative appeals, although rarely successful, can be the basis for an Article 78 petition challenging the parole denial.⁵⁵ Perhaps attorneys representing indigent people through agencies such as the Legal Aid Society can also represent people in their administrative appeals so that the appeals are as strong as possible. These observations are just a few examples of the importance of educating lawyers who represent indigent clients about parole law and procedure.

MERCEDES CANO

I was born in Colombia, South America, and I arrived in the United States when I was sixteen years of age, close to thirty-seven

⁵⁴ N.Y. EXEC. LAW § 259-i (McKinney 2005) (defining the legal criteria for parole release).

⁵⁵ An Article 78 proceeding is a means to obtain judicial review of an administrative action. N.Y. C.P.L.R. § 7801, et seq. (McKinney 2008).

years ago this coming Halloween. Colombia, today, is second only to Sudan in the numbers of internally displaced people due to a continuous war between the poor peasants and the rich oligarchy.⁵⁶

I grew up in a family of ten children, and I was the only girl who enjoyed the same freedom as the boys—until I reached puberty. By then, as culture demanded, my parents had started making plans to marry me to a distinguished and well-off person in society. To thwart their plans, I became involved in politics as a young student and started participating in the struggles of the poor and disadvantaged people in Colombia (abused women and children, Afro-Colombians, indigenous populations, peasants, trade unionists, and human rights defenders); this made me a less than attractive candidate for any well-respected man in my family's circle.

Getting involved with trade unionist student movements and human rights defenders at an early age opened my eyes to the forcibly displaced people in Colombia. Indigenous people,⁵⁷ Afro-Colombians,⁵⁸ women, and children are the most affected minorities in this internal conflict that has now claimed numerous lives for over forty years.⁵⁹

As I got involved with the student movement in the late 1960s—participating in marches and demonstrations against the government and getting arrested on at least two occasions before I turned fifteen years old—a few things became clear to my parents. I was not going to marry anyone of their choosing, and I was going to get myself killed, or worse, disappear. My father took action and convinced me to take a vacation away from the conflict “while things cooled off,” and sent me away to the United States for a short vacation. I have not returned to live in Colombia since.

What drew me to New York City, this great metropolis, in the early 1970s was the fact that despite its grandiosity and powerful architecture, it had persistent structural problems; impunity and limits on access to justice; and inequality and discrimination. I could not believe that I had left my hometown, plagued with the same problems, only to re-live the same situation in a country that

⁵⁶ See generally Elizabeth A. James, *Is the U.S. Fulfilling Its Obligations Under the 1951 Refugee Convention?*, 33 N.C. J. INT'L L. & COM. REG. 455, 456 (2008).

⁵⁷ INTERNAL DISPLACEMENT MONITORING CENTRE, RATE OF NEW DISPLACEMENT HIGHEST IN TWO DECADES 7 (2008), available at <http://www.internal-displacement.org/> (follow “Americas” hyperlink; then follow “Colombia” hyperlink).

⁵⁸ *Id.*

⁵⁹ *Id.* at 5.

was famous for its stance in fighting for human rights in the international arena. I became involved with various groups in the mid-1980s, including one that helped organize 2000 yellow cab drivers.⁶⁰ We physically stopped the streets of New York on at least two occasions, demanding respect and protection from the New York City Taxi and Limousine Commission, the agency that supervises the yellow cab industry. After, I became a shop steward for a federal union, and I organized and represented mail workers in their struggle for labor rights; that was the time when Ronald Reagan started crushing the backbone of the union movement in the United States.⁶¹

While busy fighting these injustices in my place of employment, I also organized a group of tenants in my building to demand heat and hot water from our landlord. Our building in Queens had numerous undocumented immigrant tenants. One afternoon, while I was in tenant/landlord court accompanying a tenant as an interpreter, I was urgently called to my apartment. A fire had consumed all of my belongings. The fire was labeled “suspicious” by the fire department. That did it for me. I decided to take the gloves off, attend school, and become a licensed fighter—that is, a community lawyer!

A large number of my clients are not totally indigent; they work, but their salaries are below the typical level of working poor. Most of them resemble me when I arrived in the United States over thirty-seven years ago—I didn’t know the language, had no idea what the legal system in the United States was all about, and I feared anything that resembled government. I distrusted anyone trying to do something for me and just wanted to get things over with and go back to work.

I can never advise a client who has been arrested and charged with a crime without taking his country of origin into consideration. Most of my clients—at least 90%—come from a foreign country, and to advise them I must take a specific, tailored approach when they come to see me. With the other 10%, I can speak to the person arrested—often angry at the system—in a more informal, “streetwise” language.

The first difficulty, the language barrier, is dissipated once I

⁶⁰ An example of one such protest occurred in November of 1986, when cab drivers organized to block streets in Brooklyn, Manhattan, and Queens as part of ongoing standoff with Mayor Ed Koch regarding fare increases. See Robert O. Boorstin, *700 Cabs Snarl Traffic in Protest on Fares*, N.Y. TIMES, Nov. 18, 1986, at B1.

⁶¹ Susan Erem, *Labor Pains: Inside America’s New Union Movement*, MONTHLY REVIEW PRESS, Sept. 2001, available at <http://monthlyreview.org/lpxcerpt.htm>.

explain, in Spanish, the charges and the meaning of the arrest they just endured. The second difficulty, explaining the legal system, takes a lot of patience and control on my part. Patience—because depending on their level of education, I have to explain to them how the system works, who has control over the case, and that despite their wife's or friend's desire to withdraw the charges, they are now facing criminal consequences. Control—because I need to separate myself from my own experiences with the legal system (full of delays, inequalities, and unfairness), and present it as fair, balanced, and equitable.

The third difficulty is diffusing the alarm and fear my clients will feel when they have to return to court. I try to do this by assuring them that they will be treated with respect and the utmost consideration. I tell them that police officers are supposed to tell the truth, and that judges and juries are supposed to think of them as innocent until proven guilty. I let the system disappoint them instead of me disappointing them.

How to keep them returning to court for the many court appearances that a case may take before I can file a 30/30 motion seems to me, at times, my biggest task—that is, until we have to go to trial.⁶² At that point, we have to get witnesses to come and testify for the client in a legal proceeding that is part of the same system that the client feels has just made them go through hell. Chaos sometimes ensues when I have to convince each witness to place some trust in the system and the fairness of it.

Finally, there is overcoming the distrust someone feels when I tell them that I will do X, Y, and Z for them just because I believe in their case, and that he or she should not worry about paying me a legal fee. (I am able to do this when I get grants to do defense work, or when I really feel that either I must represent this client or he or she will be doomed by the system.) Believe it or not, it is sometimes better to charge your clients even if it is a low *pro bono* fee, so they feel that they are contributing to their defense and that you, the attorney, do have an obligation to them.

Foreign-born clients are not familiar with free legal services, and those who are familiar with it tend not to believe in it very much. At times, I get the overflow from Legal Aid or the panels that represent indigenous clients. These clients tell me that their attorneys do not respond to their calls or explain to them what happened in court. The clients feel uncared for and fear that the

⁶² N.Y. CRIM. PROC. L. § 30.30 (McKinney 2006) (speedy trial motion).

busy schedules of their attorneys will deprive them of proper and dedicated representation. While listening to them, I think about all my friends at the panel who zealously advocate, running from part to part in a courthouse without even breaking for lunch. As I myself sit across from clients who may not comprehend the complexity of a proceeding or the countless hours a colleague has devoted to his or her court appearance, my heart goes out to those fine attorneys who mirror my own experience, and whom I know will give anything for their clients. I approach this last hurdle of a client's understanding by fairly analyzing the cost of the defense. I clearly explain that if the client were to pay an attorney and wanted someone to answer each of her telephone calls, she will have to pay for that service at a determined hourly rate. That is how I lose a lot of my criminal cases.

PREETI LALA

I was born in Toronto, Ontario and attended the University of Toronto, where I received a bachelor's degree with honors in Criminology and minored in English and Drama. As a first generation Indian-Canadian, I grew up in Mississauga, Ontario, a racially and ethnically diverse city where minorities and foreign-born residents make up well over 40% of the population.

I am a graduate of the City University of New York School of Law ("CUNY"), Class of 2005. I began law school with an interest in criminal and immigration law. During my time at CUNY, I volunteered with the FCJ Refugee Centre ("FCJ"), an organization in Toronto that supports individuals from the time they make refugee claims to the time they become permanent Canadian residents.⁶³ FCJ provides direct services that include housing, support groups, and legal assistance. I had the opportunity to assist clients with their refugee and asylum applications and hearings.

During my second summer in law school, I interned at the Sylvia Rivera Law Project ("SRLP") in New York.⁶⁴ The organiza-

⁶³ The Faithful Companions of Jesus (FCJ) Refugee Centre in Toronto, Canada, serves refugees applying for asylum in Canada. Founded in 1991, the Centre provides low-cost housing to female and child refugees. It also provides counseling services, translators, information about health care resources and legal representation, and education about Canadian culture to all refugees seeking aid. *See* FJC Refugee Center, A Project of the Sisters, Faithful Companions of Jesus, <http://www.fcjsisters.ca/refugeecentre/index.htm> (last visited Feb. 1, 2009).

⁶⁴ The Sylvia Rivera Law Project, founded in August 2002, provides legal representation to minority and low-income transgender, intersex, and gender ambiguous individuals residing in New York City who have suffered discrimination on the basis of their gender identity. SRLP also seeks to challenge policies that discriminate on the

tion, which operates as a law collective, is founded on the understanding that gender self-determination is inextricably intertwined with racial, social, and economic justice. SRLP seeks to increase the political voice and visibility of low-income people of color who are transgender, intersex, or gender non-conforming. I helped with direct services in areas such as prisoners' rights; discrimination in sex-segregated facilities such as group homes, homeless shelters, public restrooms, and drug treatment centers; name and gender changes on identification cards; obtaining Medicaid coverage; and immigration issues such as adjustments of status and naturalization.

I also participated in the CUNY School of Law's Criminal Defenders' Clinic, where I represented an indigent client charged with a misdemeanor in the New York City Criminal Court. I met my client at her first appearance and remained counsel until the charges were resolved. The clinic helped solidify my interest in criminal indigent representation. I was further inspired by my professors and the challenging discussions we had during the clinic on topics such as race and racism, the prison industrial complex, and alternatives to the current system.

Following law school, I accepted a position at the Miami-Dade Public Defender's Office.⁶⁵ In August 2005, I began my first placement with the office in the Juvenile Division, where I represented juveniles, ages thirteen to seventeen, charged with misdemeanors and felonies. My work included everything from first appearance pre-trial motions, trials, and sentencing. I tried over twenty bench trials and probation violation hearings during my time at the Juvenile Division. Next, I worked in the Jail Division of County Court where I represented adults charged with criminal misdemeanor charges. All of my clients in this division were incarcerated in jail as they awaited their trial date. Most of these clients were in custody because they could not afford to post bond. I also worked in a regular county court, where I gained experience trying DUI cases for indigent clients who were out of custody. Currently, I work in

basis of gender identity. Silvia Rivera Law Project, <http://www.srlp.org/> (last visited Feb. 18, 2009).

⁶⁵ The Miami-Dade Public Defender's Office provides legal representation for indigent defendants in criminal cases in the Miami-Dade County of Florida, the state's largest judicial circuit. The Office, which employs roughly 200 lawyers and is responsible for over 100,000 cases each year, was established in 1963 after the Supreme Court declared that indigent defendants are constitutionally entitled to public legal representation in *Gideon v. Wainwright*. Miami-Dade County Public Defender, Carlos J. Martinez, 11th Judicial Circuit of Florida, <http://www.pdmiami.com/> (last visited Feb. 3, 2009).

the Felony Division where I represent indigent adults charged with felonies. To date, I have tried ten jury trials.

Since I began working at the Public Defender's Office, I have volunteered at several Redemption Workshops, where members of the community attend sessions to restore their voting rights.⁶⁶ The workshops also help those who are eligible to seal or expunge their records. My interest in this work comes from an inner desire to seek justice for those who are most likely to have their rights violated—often those least likely to be able to protect themselves from being taken advantage of by the criminal justice system. I am against the death penalty and the prison industrial complex, and I strive to be a zealous advocate for immigrants, people of color, and the indigent and homeless.

"Are you satisfied with the services of your attorney?" asks the Judge during the typical colloquy that occurs when a client accepts a plea offer.

"What services?" I sometimes find myself muttering. There is a moment of hesitation, until the client acquiesces with the response he knows the judge is looking for.

"Yes," he responds.

Working as an Assistant Public Defender in Miami on felony cases means that I can be personally responsible for over 425 cases per year, with well over 100 open cases at any given time. Some clients get no more than five minutes of my time at an arraignment, where all I am able to do for them is a quick conveyance of a plea offer from the prosecutor. In these situations, I know little more than what the police have written on the arrest form. For a variety of reasons, a client may choose to accept an offer without having a private conversation with the attorney, without an opportunity for an investigation, and without receipt of full discovery from the state.

Over the past four years the caseloads have increased by 30%,⁶⁷ while the budget has decreased by more than 10%.⁶⁸ The

⁶⁶ The Public Defender's Redemption Project, established in 1998, helps reintegrate former convicts into civil society through services such as sealing criminal records, restoring voting rights, and assisting in finding employment. The Project is run by the Miami-Dade Public Defender in Florida, and its workshops have harnessed the volunteer expertise of community organizers and public officials. Over 2500 ex-convicts have received aid from the Redemption Project. See Redemption Project, http://www.pdmiami.com/redemption_project.htm (last visited Feb. 2, 2009).

⁶⁷ See, e.g., Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1.

⁶⁸ See, e.g., Joe Follick, *State Budget Cuts Weighing on Scales of Justice*, HERALD-

Florida Governor's Commission recommended an annual limit of 100 felony cases for a Florida attorney.⁶⁹ The maximum annual caseload established by the Florida Public Defender Association is not more than 200 felonies per attorney per year,⁷⁰ while the annual caseload established by the National Advisory Commission on Criminal Justice Standards and Goals is a maximum of 150 felonies per attorney per year.⁷¹

The reality is that the lack of government funding for public defense and the increase in our caseloads has had an alarming effect on indigent persons' constitutional entitlement to effective criminal representation. Pushing the limit of the number of managed caseloads means that lawyers face the real potential of violating the Rules of Professional Conduct every day. This is now a cyclical problem. Budget cuts have forced public defender offices to stop replacing most of the attorneys who leave, which in turn has increased workloads for the remaining legal staff. Further, the increased workloads have led people to leave the office. Most attorneys leave the field of indigent criminal defense due to financial reasons, including student debt, lack of raises, and low salaries, while others leave from burn out triggered by excessive workloads.

Unmanageably high caseloads affect every area of representation, including preparation, thoroughness, and communication with the client. Having too many cases can often lead the defense to request a continuance, which waives a client's right to a speedy trial within 175 days.⁷² The level of preparation can sometimes fail to fall within an acceptable range. It is rare that I am personally able to visit crime scenes, or spend more than an hour with my client before they decide to accept a plea involving incarceration,

TRIBUNE.COM, June 15, 2008, *available at* <http://www.heraldtribune.com/article/20080615/NEWS/806150589/-1/newssitemap>.

⁶⁹ See Lee Molloy, *Injustice for All*, MIAMI SUN POST, July 3, 2008, *available at* <http://www.miamisunpost.com/BESTOF2008/070308bennettbrummer.htm>.

⁷⁰ See *Florida v. Loveridge*, No. 08-1, at 4 (Fla. Cir. Ct. Sept. 3, 2008) (order granting in part and denying in part Public Defender's motion to appoint other counsel in unappointed noncapital felony cases), *available at* http://reports.jud11.flcourts.org/Judicial_Orders/Order on Motion to Appoint Other Counsel - Judge Blake 09-03-08.pdf.

⁷¹ See American Council of Chief Defenders, Statement on Caseloads and Workloads, Aug. 24, 2007, at 3, *available at* www.nlada.org/News/NLADA_News/2007090740258996.

⁷² Florida state law grants defendants charged with felonies the right to a speedy trial without a demand within 175 days. See FLA. R. CRIM. P. 3.191(a) (2008). However, defendants charged with any crime can demand the right to a trial within sixty days. See FLA. R. CRIM. P. 3.191(b) (2008). The right to a speedy trial for criminal defendants is guaranteed by the Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .") U.S. CONST. amend.VI.

or even before a trial. The caseload also means that at times, I have to rely solely on non-attorneys to assist in critical work like investigation. The support is definitely critical but can be detrimental to the case in situations where an investigator or support staff member may not have a full understanding of the legal issues involved or may never have met the client. The less time I am able to spend with my client, the less I am able to build a relationship of trust and adequately build their case. In essence, most of my clients receive “triage representation.”

Part of the solution involves having a comfort and understanding of the intricacies of the system in which you work. Having a clear sense of how cases generally play out allows me to prioritize my work. Knowing which cases and clients require more attention is a skill needed in order to navigate a high caseload. Thankfully, Miami-Dade Public Defenders is working on groundbreaking litigation that seeks to develop a method by which the office may refuse to take additional felony cases that do not involve the death penalty. The hope is that we will be able to manage our existing cases, while sending a clear message to the legislators that when it comes time to determine which entities are in need of funding, public defenders need to be at the top of their list of priorities.⁷³

NOTES FROM THE FIELD, QUESTION 2

A recent report on mass incarceration concluded that 2,319,258 adults are currently incarcerated in the United States. This translates to more than one in every 100 adults, making the United States the country with the highest incarceration rate both per capita and in raw numbers. Based on your experience as a practitioner, what in your opinion is the strongest contributor to this configuration? What can be done? In addition, why is re-entry so difficult and recidivism so prevalent? What can the defense community do to address these problems?

TIPOGRAPH

These questions would be “easy” to answer if we had volumes

⁷³ One of the historical weaknesses in public defender systems is that lack of funding for resources and low salaries for practitioners severely degrade the quality of legal representation that indigent defendants receive. For instance, public defenders may not be able to devote adequate resources to acquitting innocent individuals or reducing the sentences of defendants who are convicted. *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *HASTINGS L.J.* 1031 (2006) (discussing the effects of underfunding, excessive caseloads, and low salaries on indigent criminal defense).

of writing to fill up and thousands of hours to discuss racism, justice, mandatory minimums, sentencing guidelines, poverty, parole, personal responsibility, gender issues, rehabilitation, childhood abuse, etc. As an individual practitioner representing individual clients, these large questions of how to achieve justice and fairness often get subsumed (most often by necessity) by the seemingly more mundane concerns of speedy trial,⁷⁴ motion practice, plea offers, and schedules! It is often difficult when you are in the middle of the daily storm to see that the problems of the system are widespread and deep.

On a day-to-day basis, we try to deal with our clients honestly and respectfully. I call them and their families, and meet with them when I am able to get them into my office—the younger ones in particular. I try to represent them zealously and advocate for a better plea offer, a drug program, or a fair trial, depending on their wishes and their best interests. After many years and many clients, I cannot say what effect that kind of practice has on adults incarcerated in the United States or the problems of recidivism. I leave that assessment to others.

The criminal justice system is at least one of the more raw reflections of the kind of society we have and the state of our communities. It is the Band-Aid and the dumping ground for all of the pervading social issues that we have not solved—education, racism, male violence against women, drug addiction, mental illness . . . and the list goes on.

During the 1980s and 1990s, in the New York City criminal courts, you saw some of the front lines of the so-called “War on Drugs.” Using Draconian laws, thousands upon thousands of mostly young, black and Latino male defendants were processed through the courts for mostly minor violations of the drug laws.⁷⁵ Often, I would represent a young black man who at age nineteen

⁷⁴ See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . .”). This guarantee ensures that defendants are not subject to lengthy periods of incarceration before trial. The speedy trial period can be defined through statute or under a substantive theory based on the Sixth Amendment.

⁷⁵ Signed into New York State Penal Law in 1973, the Rockefeller drug laws stand as the toughest drug sentencing laws in the United States. The Rockefeller drug laws increased the sentencing penalty for the sale of two ounces or more and possession of four ounces or more of “narcotic” drugs to equal the sentencing minimums for second-degree murder—minimum of fifteen years to life; maximum of twenty-five years to life. These statutes were criticized by the political left and right for placing punishment of nonviolent drug possession crimes on par with second-degree murder. Further, the civil rights community opposed the Rockefeller laws due to its disproportionate application on African Americans.

had been arrested and convicted for selling ten or twenty dollars worth of crack cocaine to someone who turned out to be an undercover police officer. Often, depending on many factors, such as the specific prosecutor's office that was prosecuting him, whether he had a functional family or had a previous bench warrant on an earlier, minor matter—he was sentenced to five years probation or maybe a few months in the Rikers Island Prison Complex or jail. Now, fast forward three years. He's been arrested again for selling a few dollars of crack to an undercover police officer and this time he would be a predicate felon if convicted.⁷⁶ If he lost at trial (which would be likely), the best judge could give him no less than four-and-a-half to nine years in state prison; a bad judge would give him anywhere between six to twelve or seven to fourteen years. Often you'd negotiate the best possible plea—for years it would be two to four and then three to six. For years, entire communities and entire generations were sent—almost as if on a conveyor belt—to Attica, Sing-Sing, Elmira, and Coxsackie prisons. After they have done their time, they come home as convicted felons with very limited job prospects and return to the same streets and communities.

As individual lawyers connected to no community movements, we can hardly address the systemic problems and issues that are reflected in such high incarceration rates and prevalence of recidivism. I want to be a part of a legal community that addresses issues of justice in an ethical and moral way. In my youth, I was moved by the public movements for justice. My contemporaries and I watched while black children in the South and elsewhere were water-cannoned and beaten by dogs and racist cops for wanting justice. We saw their mothers and fathers walking in dignity and power along Alabama roads seeking the right to vote, the right to protect their families from physical and spiritual violence, and sometimes the right to do something as simple as riding on a bus. Therefore, I want to be a part of an *activist* legal community that participates and responds to movements for social and economic justice. I want to be professional and ethical in the way that I practice, and I am unwilling to stand silent in the face of injustice.

BOUDIN

Between 1980 and 2001, the female population in prison in-

⁷⁶ The law defines a predicate felony offender as a second violent felony offender whose previous felony conviction occurred within the past ten years. *See* N.Y. Penal Law, Sec 70.06(1)(a) (McKinney 2008).

creased 654%.⁷⁷ Women make up the fastest growing segment of the prison population. In New York and nationally, women have been incarcerated at nearly double the rate of men.⁷⁸ Black women in particular account for a high percentage of women incarcerated today.⁷⁹ In the prison where I was incarcerated, there were approximately 550 women when I entered in 1984. By 1989, there was a new set of buildings holding 200 more women, and several new prisons for women in New York State. Broadly, two factors contribute to the size of a prison population: (1) the number of people who are put into prison; and (2) the length of time that people stay in prison. The question is, Why did this expansion happen and what created this mass incarceration phenomenon?

From my experience, the key reason for greater numbers of people entering prison was the expansion of arrests, prosecutions, and convictions for offenses relating to drugs.⁸⁰ The majority of women who came to prison during this period were convicted of nonviolent, drug-related offenses. Mandatory sentencing laws with fixed sentencing policies such as the Rockefeller drug laws⁸¹ played a major role in the incarceration rates, as did “Three Strikes and You’re Out” laws.⁸² Moreover, race was a critical factor as demonstrated in the statistics: in New York State, blacks and hispanics make up over 80% of the entire prison population, and they comprise 90% of those incarcerated for drug offenses.⁸³ The “War on

⁷⁷ KATHY BOUDIN & ROSLYN SMITH, *Alive Behind the Labels: Women in Prison*, in *SISTERHOOD IS FOREVER: THE WOMEN’S ANTHOLOGY FOR THE NEW MILLENNIUM*, 244, 244 (Robin Morgan ed., 2003); JOHANNA E. FOSTER, PH.D., *Bringing College Back to Prison: The State of Higher Education Programs for Incarcerated Women in the U.S.*, 2 (2005), available at <http://sites.csn.edu/workforce/workforce/community/counselist/fosterjohanna.pdf> (citing a study showing that “[s]ince 1980 the rate of imprisonment for women has increased a chilling 654%”).

⁷⁸ Malik Russell, *Incarceration on Autopilot: The Misperceptions of 3 Strikes Laws*, *NBA Ass’n Mag.*, Dec. 16, 2004, at 22-24 (discussing that the number of women entering prisons in the United States has risen nearly 500%, double the rate of increase of men).

⁷⁹ Harvard Law Review Association, *Alternative Sanctions for Female Offenders*, 111 *HARV. L. REV.* 1921, 1923-24 (1998) (discussing the disproportionately high rate of incarceration among black women). This rate is nearly seven times as high for black women as for white women).

⁸⁰ Alfred Blumstein, *Population Growth in U.S. Prisons, 1980-1996*, 26 *CRIME & JUST.* 17, 53-54 (1999) (discussing how drug-related arrest and prosecutions contributed to the dramatic growth in incarceration rates over the past twenty-five years).

⁸¹ See *supra* note 75.

⁸² Spiros A. Tsimbinos, *After Jenna’s Law, is it Time to Modify the Rockefeller Drug Laws?*, *N.Y. CRIM. L. NEWS*, Sept.-Oct. 1998, at 8 (discussing circumstances around New York State’s increase in prison population from 13,000 to 70,000 since the Rockefeller drug laws were enacted).

⁸³ Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64

Drugs” was the major contributor to the incarceration of African Americans, and it exacerbated racial disparities in incarceration while simultaneously making no positive contribution to the real problems related to drug use. There was differential treatment in arrests, in indictments, as well as in sentencing laws that distinguished between crack cocaine and powder cocaine, and these distinctions played a major role in targeting African Americans as well as other people of color.⁸⁴

Yet, saying the main factor leading to mass incarceration was increased arrests, prosecutions, and convictions related to drugs raises the next question—Why did the “War on Drugs” happen? A short history starts with the “get tough on crime” policies under Nixon in response to civil unrest, the Black Freedom Movement, the War in Vietnam, and the many movements of groups in society that were inspired to struggle for change during the end of the 1960s and 1970s.

Reagan continued and expanded the “law and order” policies. By the 1980s, “Reagonomics” meant budget cuts that removed programs addressing social problems and an increase in military spending. Prisons became a form of social control and the government’s approach to dealing with the consequences of unsolved social problems. Mandatory sentencing guidelines played a role in filling the prisons, just as differential treatment in arrests and indictments based on the type of drugs played a role in incarcerating a far higher rate of people of color.⁸⁵

During this same period there was the crisis of the HIV/AIDS epidemic. In a blind study of incoming women to the New York State prison system almost one in five, or 20% of women coming into the system, was HIV positive.⁸⁶ This aspect of the epidemic affected not only the women themselves, but also their families who also became a part of the devastation faced by people who

U. COLO. L. REV. 743, 754 (1993) (discussing racial disparities in the criminal justice system and noting high rates of arrest of African Americans for drug-related offenses).

⁸⁴ U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY xi n.62. (2002) (“Federal sentencing data leads to the inescapable conclusion that blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine.”).

⁸⁵ Carol A. Brook, *Racial Disparity Under the Federal Sentencing Guidelines*, 35 NO. 1 LITIG 15, 15 (2008) (summarizing raw data in the U.S. Sentencing Commission report that suggests wide variations across crimes, with blacks more often than whites receiving top-of-the-range and above-the-range sentences).

⁸⁶ BUREAU OF DISEASE INTERVENTION, N.Y.C. STATE DEPT. OF HEALTH, HIV SEROPREVALENCE 126 (1999), available at www.womenandprison.org/HIVHepC-factsheet.pdf (citing a 1999 New York City Department of Health study that found that more than 18% of women entering the New York City jail system had HIV).

suffered from substance abuse and poverty. Accompanying this were the consequences of deinstitutionalization of mental institutions and the promises of community-based mental health services that never were put into place. Poverty, HIV/AIDS, and drugs were major social problems. Yet, instead of the government treating drug abuse as a problem needing treatment, or spending money to challenge conditions of poverty within a neighborhood, incarceration was used to address social problems.

During the late 1980s and 1990s I was working in our parenting center programs, helping to facilitate programs for mothers. I listened to the life stories of the women in our classes and they spoke about their own drug addictions and poverty. They spoke about neighborhood schools where more people dropped out than graduated and told their own stories of dropping out of school to earn money. Selling drugs became a short-term way of surviving. They spoke about the abusive relationships they were in and being surrounded by family members who were addicts, and how drug use became a way of coping with the pain.

Prisons have become a default response to social problems. Thus, mass incarceration produces prison programs for vocational training, academic education, personal development, and parenting skills for people who come from communities where these services did not adequately exist. The misuse of resources that could have been used for preventive measures and alternatives to incarceration has resulted in an added expense for society. Certain locations in Brooklyn have been referred to as “million-dollar blocks” because so many residents from those blocks were sent to state prison that the total cost of their incarceration will exceed one million dollars as documented by the Justice Mapping Center and Columbia University’s Spatial Information Design Lab.⁸⁷ In addition, mass incarceration exacerbates stress on neighborhoods. Research shows that incarceration and reentry destabilize neighborhoods by increasing the levels of disorganization.⁸⁸

A second major factor contributing to the crisis of mass incar-

⁸⁷ Jennifer Gonnerman, *Million-Dollar Blocks: The Neighborhood Costs of America’s Prison Boom*, THE VILLAGE VOICE, Nov. 9, 2004, at 28, available at <http://www.villagevoice.com/2004-11-09/news/million-dollar-blocks/>.

⁸⁸ See, e.g., Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33 (2003); Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552 (2003); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441–79 (1998).

ceration is longer sentences. Long sentences are not solely implemented by decisions made by judges. They are also implemented by decisions of a parole board. Today, people serving long sentences are usually held long past their minimum sentences given by the judge, long past the age when they are likely to offend again, and long past the period at which they have achieved overwhelming evidence of rehabilitation. And yet, those who serve long sentences are usually the people who have changed the most and who have contributed to the community by serving as positive role models for other prisoners. When *finally* released, they have the lowest recidivism rate and make the greatest contributions to their communities when they come home.⁸⁹

In New York State, the recidivism rate for women who have been convicted of murder is close to zero.⁹⁰ One study followed thirty-eight women who were convicted of murder and released from prison between 1986 and 2003.⁹¹ None of the thirty-eight women returned to prison for a new commitment within a thirty-six month period. This represents a zero-return rate to prison on new crimes for women released for murder in a study that included nineteen years of releases from New York State prisons.⁹² Another study focused on the “length of sentence” rather than “original conviction.”⁹³ That study followed 128 women who served a minimum of eight years in prison and were followed over a twenty-four month period after their release. The study found that after serving fifteen years or more, none of the women returned to prison within two years following their release. And, none of the forty-two women who served ten-to fifteen-year sentences were recommitted to the Department of Corrections for a new offense; only one woman (constituting 2.3% of the study) returned to prison for a parole violation. Out of the sixty-one women who served eight to ten

⁸⁹ *Contra El v. SEPTA*, 479 F.3d 232, 246 (2007) (“Because Dr. Blumstein is a duly qualified professional criminologist and because nothing in the record rebuts his statement, we must take him at his word that former violent criminals who have been crime free for many years are at least somewhat more likely than members of the general population to commit a future violent act.”).

⁹⁰ RESEARCH & EVALUATION STAFF, N.Y. STATE DEPT. OF CORRECT. SERV. DIV. OF PROF. PLANNING, SPECIAL COMPUTER SEARCH ANALYSIS (2008) (on file with author).

⁹¹ *Id.*

⁹² *Id.*

⁹³ A twenty-four month study was conducted on men and women who were released after serving eight years or more within 2000 to 2004 and also returned to the New York State Department of Correctional Services (DOCS). Since the study focused on “length of conviction,” the study observed women who were convicted of both nonviolent and violent crimes. The results of this study are unpublished (on file with author).

years, one woman was returned to the Department of Corrections after being convicted of a new offense (1.6%) and four were returned for parole violations (6.6%).⁹⁴

Among men who have served fifteen years or more, 2.2% were convicted of a new felony, and 12.5% returned to the Department of Corrections for a parole violation looking at data over a twenty-four month period.⁹⁵ Men who are long-termers also have a very low recidivism rate, yet their sentences are made even longer by parole denials.

The challenges of reentry and the high recidivism rates are not difficult to understand. First, people end up in prison largely because the basic human needs—education, jobs, decent housing, and decent schools for their children—are lacking.⁹⁶ When people come home and return to their neighborhoods, they face the same conditions. In some prisons, while it is possible to take advantage of education and vocational programs, for women to find some escape from abusive relationships, and for those addicted to drugs to have time away from the drugs, the primary goal and emphasis in prison is security. Helping people grow and change and be able to cope with life's challenges is best done in the community, and the government must invest in these communities. In addition to the ongoing conditions of poverty that exist in combination with both race and gender, many practices and laws make it difficult for a person convicted of a felony to integrate into society as a normal citizen. Such an impact can be seen in the person's participation in voting,⁹⁷ qualifying for student loans,⁹⁸ professional licenses,⁹⁹ and public housing¹⁰⁰—the difficulties of

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ WESLEY SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN CITIES* 3 (Free Press) (1990) (arguing that disorder, in the form of graffiti, abandoned cars, vandalism of public and private property, and decaying homes, is an instrument of destabilization and neighborhood decline).

⁹⁷ Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 133–34 (2003) (discussing how felon disenfranchisement undermines rehabilitation and promote recidivism).

⁹⁸ 20 U.S.C. § 1091(r)(1) (2000) (codifying the 1998 amendment to the Higher Education Act of 1965 restricting federal financial aid and guaranteed loans for individuals with drug convictions).

⁹⁹ Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 187–88 (1995) (discussing effects of licensing restrictions on felons); see also *A Stigma That Never Fades*, THE ECONOMIST, Aug. 10, 2002, at 25, 26 (reporting survey data showing that 65% of employers in five major American cities “would not knowingly hire an ex-convict”).

¹⁰⁰ Avi Brisman, *Double Whammy: Collateral Consequences of Conviction and Imprison-*

which all contribute to recidivism by making it even more difficult for a person coming home to actually rebuild their lives.

What is the role of lawyers in challenging mass incarceration and in helping prevent recidivism? First, lawyers continue to have an important role in representing individuals as they face the criminal justice system at each point of contact—from arrest to sentencing, from appeals to parole, to violations of parole. Individual representation remains critical. Second, lawyers have an understanding of the system and the issues of justice and injustice and can play a role in educating others through policy work and teaching. Lawyers can work to change laws by taking on cases that challenge a particular law or help to build pressure for change. Lawyers can utilize their experience and work within the government, either as elected or appointed officials, and work for change in policies, laws, and budgets so that priority is given to addressing the social conditions behind incarceration, rather than emphasizing punishment.

CANO

A Pew Center on the States report dissects the problem and how to go about addressing it.¹⁰¹ But, as a community attorney who represents people facing, for the most part, their first or second arrests for non-violent crimes and who almost certainly will face years in jail on their next conviction, I can say that the problem is deeper and the solution is a more complex one than the report indicates.

At the top of my list of contributors to this problem, I will place a society run by a market that cares only about the bottom line—that is, to sell. We have laws that prohibit children from buying cigarettes, and we fine and even incarcerate those who break them. But, in reality, the tobacco companies and the CEOs of companies surreptitiously direct sales toward and profit from underage smokers. The same goes for guns and war. We incarcerate young men for possessing guns or anything that could be categorized as a weapon; meanwhile, our government is engaged in a despotic war,

ment for Sustainable Communities and the Environment, 28 WM. & MARY ENVTL. L. & POL'Y REV. 423, 442–44 (2004) (arguing that “[l]ow-income individuals affected by criminal records . . . need access to public benefits—including welfare, food stamps, Medicaid, and public housing—as they learn to live drug and crime-free in the community, and without these temporary supports, it is unrealistic to expect full recovery without relapse and recidivism.”).

¹⁰¹ PEW CENTER ON THE STATES, *supra* note 1.

and persecutes and incarcerates people while violating all of their constitutional rights. And we want our youth to respect the laws?

To hold the market and the government accountable for what they do, we need a revolution. For a revolution we need people to start talking to each other, start meeting in places, and start freely objecting to our government's actions. I think the days for revolutionary thinking ended in the 60s, and it will take a lot of pain and suffering for this generation to wake up and organize itself. The internet has isolated people from one another, and the police are constantly chasing people from parks and other places of gathering. Thus, it will take many years before those of us who saw a revolution in the 60s see another one.

Another contributor to the high incarceration rate, and a strong reason for this phenomenon, is the lack of leaders in our community who dare speak and act on behalf of our youth. We lack spaces for young people to meet and practice sports, to access healthy entertainment, or to have plain space to gather and relax. Every square foot in New York has a price to be paid or a cop to shush people away; i.e., parks closed at dusk, private areas with "no trespass" signs, and in the last few years, city parks with cameras and locks. Those of us who strolled freely in the 70s in the parks holding hands and enjoying beers would have been penalized, summoned or jailed at least ten times over.

Next on my list are tired and overworked parents with little or no skills who themselves come from totally disadvantaged households, don't know any better than to let their children watch television all day, have no control over their own children, and are perhaps, themselves, poor role models for their young ones.

Reentry is close to impossible for a reformed person who tries to move into our society. Most ex-felons, who have straightened out their lives as they have gotten older or smarter, have had to make it on their own. Few employers in any state want to give them opportunities, so they end up in menial jobs or opening their own businesses under a friend or family member's license, if one is needed.

The legal defense community, especially those of us working in immigrant or poor communities, is overburdened with all kinds of emergencies. At times, I feel like a fireman putting fires out during the day, listening to family members and clients complaining about the unfairness of the system, just to dive at night into arraignments to pull one more, usually young black or Hispanic person from the prosecutor's fangs. And when my client is

finally out and he or she feels very grateful, I usually tell him that I don't want to see him anymore and that I hope we meet one day when he is doing great things. I also tell him that our lives are in his hands. He usually looks at me like I have two heads on my shoulders. But, I really mean it!

LALA

High incarceration rates in Florida

I believe that one of the leading causes of high incarceration rates is the treatment of recidivists within the criminal justice system. For example, in Florida, section 775.084 of the criminal code outlines sentencing enhancements for those classified under four different categories.¹⁰² This statute allows the state to seek enhanced penalties or mandatory minimum prison terms. A defendant must have prior convictions for certain enumerated charges to qualify under these labels. Despite the scary names of the classifications, it does not take very much to be at risk for an enhanced sentence, as demonstrated by the statutory descriptions outlined below.

In Florida, a "habitual felony offender" is a defendant that has previously been convicted of two or more felonies. The felony for which the defendant is to be sentenced must have been committed within five years of the date of the defendant's last prior felony conviction or conviction for another qualified offense.¹⁰³ The statute is not applicable to charges for most possession of controlled substance. Sentencing under the enhancement may be life in prison in the case of a life felony or a felony of the first degree, which would normally be up to thirty years.¹⁰⁴ In the case of a second-degree felony, a sentence term of years not exceeding thirty would be appropriate, which would typically amount to a period of up to fifteen years.¹⁰⁵ In the case of a felony of the third degree, a sentencing term of years not exceeding ten would be appropriate, which would normally amount at most to five years.

A "habitual violent felony offender" is a defendant who has previously been convicted of a felony or an attempt, or conspiracy to commit a felony, and one or more of such convictions was for

¹⁰² See FLA. STAT. ANN. § 775.084 (2008) ("Violent career criminals; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory minimum prison terms").

¹⁰³ § 775.084(1)(a).

¹⁰⁴ § 775.084(4)(a).

¹⁰⁵ *Id.*

“violent” charges such as: arson, robbery, kidnapping, aggravated abuse of an elderly person or disabled adult, aggravated assault with a deadly weapon, armed burglary, aggravated battery, or aggravated stalking.¹⁰⁶ In the case of a life felony or a felony of the first degree, a defendant could be sentenced for life, and would not be eligible for release for fifteen years. In the case of a felony of the second degree, a defendant could receive a term of years not exceeding thirty and not be eligible for release for ten years.¹⁰⁷ In the case of a felony of the third degree, a term would not exceed ten years and the defendant would not be eligible for release for five years.¹⁰⁸

Yet another enhancement category includes “three-time violent felony offenders”—those defendants previously convicted of a felony as an adult two or more times (or an attempt to commit a felony) when two or more of the convictions were for committing, or attempting to commit, any of a number of violent felonies, with the addition of home invasion robbery and carjacking. In the case of a felony of the first degree, the court must sentence the defendant to a term of thirty years imprisonment; with a felony of the second degree, to fifteen years; and in the case of a felony of the third degree, five years.¹⁰⁹

Lastly, Florida defines a “violent career criminal” as a defendant who has previously been convicted as an adult three or more times for an offense or another qualified offense that is defined as a forcible felony, such as aggravated stalking, aggravated child abuse, aggravated abuse of an elderly person or disabled adult, lewd or lascivious-conduct-related charges, escape, or a felony involving the use or possession of a firearm.¹¹⁰ For those guilty of life felonies or a felony of the first degree, the term is life; in the case of a felony of the second degree the term cannot exceed forty years with a mandatory minimum term of thirty years; for a felony of the third degree the term cannot exceed fifteen, with a mandatory minimum of ten years.¹¹¹

The state of Florida has discretion as to when to file a notice of its intention to seek statutory enhancements; so in some cases, people who may qualify are still not given the enhanced penalty. Even when enhancement penalties are filed against my clients, the state

¹⁰⁶ § 775.084(1)(b).

¹⁰⁷ § 775.084(4)(b) .

¹⁰⁸ *Id.*

¹⁰⁹ § 775.084(4)(c).

¹¹⁰ § 775.084(1)(c)–(d).

¹¹¹ § 775.084 § (4)(d).

often waives the enhancement recommended or minimum mandatory sentences when conveying plea offers. In these cases, the client is often in greater fear of the consequences of going to trial and more likely to accept a plea offer. These plea offers still involve significant prison time, but are not nearly as severe as the penalties risked if my clients lose at trial.

Recidivism and reentry

The difficulties of reentry are far-reaching and numerous. The primary cause of recidivism is the lack of infrastructure that could be successfully utilized to reintegrate those released from prisons and jails back into the community. Every day on my drive to work, I see people who have just been released from jail begging for some change to make a phone call to loved ones in order to get a ride home. Others are begging for money just to get back home on public transportation. Because prisons are usually located far away from major cities and individuals have been away from home for long periods of time, even returning home can be a very difficult task at release.

Generally indigent clients tend to suffer from under-education. For many, before they were ever in the criminal justice system, they were forced to deal with inadequate school facilities, lacking appropriate funding for supplies, teachers' salaries, and developmental programs. I believe people are only as good as the options available to them. People with criminal convictions lacking education credentials who have been away from the community for months or years are less likely to be able to find gainful employment opportunities. They often return to associate with the same individuals that may have been a "bad influence" on their lives prior to being incarcerated. Many former inmates ultimately return to substance abuse as a means of coping with their situations, which tends to lead towards recidivism.

The criminal justice system is still structured to work against poor people of color, who often experience unequal treatment as a result of racial profiling, police abuse, and discrimination. Only people of color with "priors" or a history of convictions fare worse. Those individuals at risk of sentencing enhancements become informally—or in some cases formally—"watched" by police personnel. They are most likely to be put in police lineups, and more likely to be wrongfully charged. People are less likely to believe that someone is innocent when they have priors for similar crimes.

I can recall one particular client of mine who believed that the

officer who arrested him in his current case did so solely because he made an admission to prior criminal convictions and plea agreements when the officer first stopped and interrogated him in relation to an alleged burglary. He recalled that one of the first questions asked was about his prior record. Once the officer heard my client's truthful answer, he immediately took him into custody. Perhaps the officer would not have been so quick to close his investigation at this early stage if the answer had been different. Perhaps the investigation would have been thorough and not haphazard as it was in this case. There is a good chance that my client would not have sat in jail awaiting trial if it were not for the resume of priors that now follows him and taints the impression of his character that many people have when they first meet him.

NOTES FROM THE FIELD, QUESTION 3

Discuss the complexities of counseling clients with respect to control, advocacy, problem-solving, negotiation, and legal ethics.

TIPOGRAPH

Many years ago, I represented a man charged with murder in New York County (Manhattan). I was a court appointed counsel and he had previous counsel who seemed to take particular pleasure in appearing intimidating towards me. The homicide the defendant was charged with was of a particularly cold-blooded nature. At an extended *Mapp* hearing,¹¹² I had been successful in excluding a piece of evidence that would have been particularly prejudicial if admissible at trial. While I was addressing the court during jury selection in the presence of the jury, the client whispered to me, in response to nothing in particular, "Cross me bitch and I'll kill you." I could feel my knees buckle. Never before had I felt so physically threatened by a client.

What is it that you, the reader, think was the ethical and appropriate thing for me to do? What I did do after thinking and composing myself for a moment was to ask to approach the judge at the bench without the presence of the prosecutor. After informing the judge of what the client had said to me, I informed the Court that I was seeking to be relieved from representing him.

¹¹² A *Mapp* hearing determines whether evidence should be suppressed on the ground that it was obtained as the result of an illegal search and seizure. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence obtained by an unconstitutional search is inadmissible in both the federal and state contexts).

The judge took a break from jury selection and called some other cases on his calendar while he considered what to do. I went into the robing room behind the courtroom and started to cry.

The issues of counseling clients and the matters raised by this question have been the subject of countless textbooks and treatises written by law professors and ethicists. These issues and the questions they raise have been the subjects of CLEs,¹¹³ symposia, and law review articles. I have taken CLEs which addressed what rights and responsibilities are maintained by the lawyer and the client in a criminal case context. For instance, the client has the absolute right to testify at his own trial, despite his attorney's advice. Complications arise often when the attorney knows the client will testify falsely.

How certain do we need to be about that possibility (or its likelihood)? How vigorously must we pursue our concerns about the "truth"? What if your client repeatedly insists—perhaps in an obnoxious manner—that his girlfriend can provide an alibi for him in a serious felony matter? How confrontational should you be with the girlfriend when interviewing her to investigate the proposed alibi? What if you don't believe her? What if she would be unable to withstand the cross-examination of even a minimally competent prosecutor? How do you make these decisions? Do they implicate ethical issues of truth and integrity? Are they only about trial tactics and strategy? Which decisions does the client make and which ones does the lawyer make? These are the kinds of questions that are not easily answered by CLEs. Some of the things that occur in our relationships with our clients should not be mysteries. It makes sense to work hard at building relationships of trust and respect with those clients. It goes a really long way to be able to work collaboratively with your clients (and their family members). It is the right thing to do.

But, it is often not so easy. There are frequently cultural, racial and gender barriers that can be difficult to overcome. I am not always happy, but I appreciate being challenged about my own biases, even though I may not necessarily agree. Race, in particular, is not a topic that is discussed easily by us—especially in my lifetime between blacks and whites. I do not believe that racism and white supremacy will disappear if we build individual relationships of trust between white attorneys and clients of color, but those relationships cannot be effectively built without a consciousness of racism. Nor can one effectively represent these clients without a

¹¹³ Continuing Legal Education programs.

willingness to address issues of race, trust, and perception since it will be relevant in every aspect of the case—from the relationship between attorney and client to bail hearings, possible plea offers, and jury selection.

Nor should we romanticize our clients. What do you do when your client does not return your telephone calls, or cancels appointments at your office, or just doesn't show up? What if the client's interest in a quick disposition of the case is contrary to your ability to litigate serious Fourth Amendment claims? On the other hand, what if your client is inappropriately optimistic about winning at a trial that you think is unwinnable?

When I first started out, I believed most of what my clients told me. It took me a while to learn that not only was that not helpful for my clients' interests, it was an uncomplicated and superficial basis upon which to build relationships of trust. Such relationships, which if established, would best advance and defend the client's interest. It does not help to romanticize these issues. It is really important that these ethical and legal questions get thought about and discussed.

I hope none of you will have the experience that I had with the client who threatened me in your own practices. The countless number of ethical quandaries that will arise during the course of your practices will perhaps be less dramatic but surely no less important.

BOUDIN

For women, custody issues related to their children are a major legal issue that involves control, advocacy, problem solving, and negotiation. These issues arise in the context of foster care or non-foster care, where custody issues surface between themselves and those family members (or friends) raising their children. Almost 75% of the women in prison in New York State are mothers, and the relationships between them and those raising their children are frequently complicated.¹¹⁴ The issues focus a great deal on visitation, but also on the legal definitions of custody and, at the most extreme, on the potential of losing their parental rights.¹¹⁵

¹¹⁴ Jacqueline Smith, *Imprisonment and Families Fact Sheet*, 214 PLI/CRIM 75, 77 (2008) (noting that more than 72% of New York's incarcerated women have children).

¹¹⁵ David Crary, *Prison Moms Fight Termination of Parental Rights*, L.A. TIMES, Jan 12, 2003, at 16, available at <http://articles.latimes.com/2003/jan/12/news/adna-prison-mom12>.

At Bedford Hills Correctional Facility, where I was incarcerated for 20 years, we had the benefit of working collaboratively with a lawyer, Phil Genty, who trained some of us in the legal issues of foster care and child custody law. Based on this we were then able to develop a curriculum from which we taught hundreds of women about their rights and responsibilities related to being a mother in prison, and trained other women to teach this information. The work involved helping women learn to advocate for themselves when they dealt with the foster care agency workers or their relatives. It involved problem solving as they figured out who might be the best guardian for their children or how to actually move a child out of foster care into a guardian situation, as well as negotiation with family members over issues of decision-making. It also involved counseling women as they struggled to come to terms with the complex situation of juggling their needs, their children's needs, the needs of the families raising the children, and, perhaps most difficult, struggling with the real losses in their relationships with their children that flowed from their incarceration and the resulting need to form new roles. All of these issues underscore the power dynamics between the mothers, the outside guardians, and the larger systems that they had to deal with. It will never be possible to find enough lawyers to address the needs of mothers in prison related to these issues that they face with their children. Yet, in training the women, Phil Genty, multiplied his contribution and then, through a law clinic at Columbia Law School where he teaches, he was able to take on particular legal cases that required going to court. In addition, Volunteer Legal Services was able to develop a project that trained lawyers from pro bono sectors of law firms to take on some of these cases.

The model involves understanding the role of women in prison as a critical part of a network imparting legal knowledge to their peers in prison, supported by lawyers being involved either through a law clinic or an organization of volunteer attorneys. The issues related to children may have a clear legal component but are never truly separate from issues of negotiation, advocacy, and problem solving. This work is time consuming, and it is something that peers (i.e., other women in prison) can play a central role in. Hence, the role of lawyers can be to train women in prison to assist their peers, as well as taking on some of the cases that require court proceedings or the intervention of an attorney in the negotiations.

Criminal cases are of primary concern to all people in prison, women and men. In prison, people live with the dream of over-

turning their convictions. After their appeal has been turned down, and they look ahead at ten, fifteen, twenty or fifty years in prison, Where do lawyers fit into the process? Representation for post-conviction remedies such as 440 motions or habeas corpus writs is a key need. Usually it takes money to hire a lawyer, families to raise the money, or in the rare situation of a person who can network for themselves, a lawyer to take the case pro bono. Occasionally for men, a case fits into the category covered by the Innocence Project.¹¹⁶ There are some law school clinics that may consider such cases. Sometimes cases are won; everyone dreams of being that person.

One of my friends and colleagues was seventeen when she was arrested and then sentenced to fifty to life. Now she is forty-five. She has completed her bachelor's degree, taught parenting programs, tutored in the college program, raised a puppy with Puppies Behind Bars to help the visually impaired, and so much more. She is a person who was able to find a lawyer to work with her. Will she get released? That is not known, but she lives knowing that people on the outside are trying to help her. But there are hundreds of others—women and men—who have no one working with them to analyze their cases and explore the possibility of helping them. Hope inside is almost as vital as air. People in prison try to help one another figure out strategies for their cases. How can the model utilized in the area of foster care and child custody cases relate to the criminal cases that have led to people's imprisonment? It is more difficult, yet perhaps there are some useful lessons from it. Once the appeal is turned down, lawyers seem far away. Prisons in New York State have law libraries. It is general knowledge among women that the men's prisons' law libraries are far better equipped with more up to date books and computers, and that law clerks, from among the men who are incarcerated, are better trained and therefore can do more serious legal work.

It is important for the legal professionals to know that inside the prisons there are men and women who work in law libraries helping others to reopen their cases, to file *pro se* motions, and to analyze cases and strategize for possible post-conviction remedies. Lawyers could play an important role in equipping people in the prison to help one another by designing workshops to train those who work in the law library or workshops for all who are interested. Workshops could include trainings on specific post-conviction rem-

¹¹⁶ Innocence Project, <http://www.innocenceproject.org/> (last visited Feb. 3, 2009).

edies as well as strategies for analyzing cases; it could include contributing to the law libraries specific books such as the Jail House Lawyer's Manual.¹¹⁷ The key is that lawyers can multiply their contribution by knowing that people in prison can and will help one another because there are not enough outside resources to reach everyone. Lawyers can play a key role in educating people inside who can then educate and help others.

CANO

My clients, mostly from immigrant backgrounds, have no clue how our system works. As a community attorney, I have to find the time to explain, at their different levels of understanding, how our system works—how it is possible that we spend millions of dollars enforcing laws that separate parents, children, and close relatives for an incident that, to their eyes, should be resolved within the immediate or extended family. Here is an example: last night, I spent the night and the morning at an arraignment in Queens Criminal Court. My client was facing charges for “calling his girlfriend over fifteen times on her cell demanding that she return with their child back home.” I had seen him that very same day on a consultation. He told me that the mother of his child was very upset because he did not want to marry her to start the family proceeding to obtain her green card. Thus, she left him and did not inform him of the whereabouts of the child.

My client couldn't understand how it was possible that when he went to the precinct looking for his child—lodging a complaint that the mother had disappeared with his child—he was arrested. The additional complication is that he just received his green card. This means that an aggravated harassment charge will put that green card in jeopardy,¹¹⁸ even if he had never faced the legal system anywhere in his life. And of course, he made an admission to the police officer that he did indeed call her repeatedly because he was worried about his child.

Today, I spent forty-five minutes going over what this small incident will cost him. It was difficult for him to understand that in

¹¹⁷ Jail House Law, <http://www.jailhouselaw.org> (last visited Feb. 3, 2009).

¹¹⁸ See MANUEL D. VARGAS, NYSDA IMMIGRANT DEFENSE PROJECT, IMMIGRATION CONSEQUENCES OF NEW YORK CRIMINAL CONVICTIONS, (2007) *available at* <http://www.kccba.org/Immigration%20Consequences%20of%20NY%20Criminal%20Convictions%20article%202006.pdf>; *see also* NYSDA IMMIGRANT DEFENSE PROJECT, QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES A-86 (2006), *available at* http://www.immigrantdefenseproject.org/docs/06_QuickReferenceChartforNewYorkStateOffenses.pdf.

order to go to trial, it would be costly, time consuming, and quite possibly a very bad idea. But then again, justice is justice and he is entitled to pursue a trial out of the justification of innocence. This story illustrates the complexities faced by solo practitioners in these immigrant and foreign communities. This is also the reason why I believe that education in our communities is vital, and I keep it alive by continuing to give presentations about legal rights and obligations in churches, hospitals, schools, and other not-for-profit organizations.

With regard to the advocacy, a criminal defense attorney must explain to her adversary (government, prosecutors, corporation counsel, etc.) that some of these charges will have collateral consequences on the entire family. Most of the time, my client is the breadwinner of the family. If his or her legal status in the United States is jeopardized at any time, the entire family will suffer. I think it is time for us, as a country, to think about ways to educate immigrant communities and to help keep families together. It is different to advocate for clients who basically don't have many people on their side, and have little to show to help us in their advocacy.

Legal ethics in advocacy is a big issue because our clients understand that justice is an elusive thing, and that poor people hardly see it taking place in a court of law. Why then, must they tell the truth or trust the prosecution to do the right thing? God knows that I feel the same way, but my job is to tell them that we must trust that the system will work and bring the truth with all the proceedings that we will embark on. With luck we can make small steps toward attaining justice.

LALA

As an advocate with a high caseload, I constantly strive to inform my clients of the circumstances, law, and discovery processes involved in each of their cases as best as I can. The primary barrier to achieving this is the perceived and actual unfairness of the system. Some things seem illogical to a client, particularly the lack of control that both my client and I have in the face of procedural barriers. It is a daily struggle to balance those things that are out of my control with those things that are in my control.

When a client is arrested, the case is eventually turned over to the Florida State Attorney's Office, which has twenty-one (and in some cases up to forty) days to decide whether it is going to file

charges against my client.¹¹⁹ This period can be particularly frustrating for the client. He wants to get out of jail, have an opportunity to explain his side of the story, and in most cases, have the state drop the charges. Advocacy at this period is difficult because the clients are usually not assigned to me specifically until they are arraigned. Often during this phase, a client will arrive at court to find out that the state is asking for more time to make its decision. Understandably, the client becomes angry and frustrated, especially because in some cases the client wants a chance to explain to the judge that the police got it wrong and that they should be released from jail. Unfortunately, all I can be at that point is a watchful censor, preventing the client from jeopardizing his defense by making statements in court about the facts of the case. I know that the decision as to whether the case will be filed is not in the judge's hands, but this can be hard for an accused to accept. With limited time in court during a busy calendar full of cases, it is not always easy to explain that to a client.

For some clients the perception is that I, as an attorney, am "working with the state," not acting quickly enough, or not saying the correct thing to the judge to get the case thrown out. What the clients are not aware of are the procedural limitations. They do not see the clear line that separates my relationship or association with the state. They do not see the meaning behind the things that I am saying on their behalf. Those of us working in the system, work in a world with a secret language. This language compels us to practice according to the rules—which for many clients does not make any sense.

Once clients are arraigned and their custody status has been addressed, I begin preparing for trial. At the first chance I get to spend any kind of extensive time with my client, I do my best to outline the procedural phases of their case so far, including the meaning of the things I have already done on their behalf. I explain what the charges mean and the potential consequences of a finding of guilt. I outline the possible outcomes of the case, describing the likely results if the client decides to go to trial or if the client instead accepts a plea offer.

I often tell my clients that this is their case, and that nobody should know the facts and circumstances of their case better than they do. My hope is that they have a realistic view of what they are up against and are clear on the role that I play. I let them know what steps I will take in preparation for trial, while simultaneously

¹¹⁹ See FLA. R. CRIM. P. RULE 3.133 (2008).

trying to achieve whatever goal they may have, if any, in getting a plea that they feel is fair from the state.

I get annoyed when I have clients who know they have an open case, and who are out of custody, but never bother to make an appointment with me to discuss their case. I will attempt to reach them if there is a phone number somewhere in their file. Often times, we do not have a phone number. In all cases, we send letters to their last known address reminding them of future court dates and of the need to schedule a meeting. They are even given letters at arraignment once the charges are filed indicating how to reach their attorney and of the importance of scheduling an interview. In many cases, the trial date will come up, and we are meeting them for the first time. In these cases they accept a plea offer or we ask for a continuance. I used to get visibly annoyed with the client, but now I make a joke: “Hi, I’m your attorney, I’ve never met you before, and because of that I have not done any work on your case, but today is your trial. You ready to go to trial today?”

Often, the biggest challenge arises when the facts of the client’s case are not good for trial and the state’s plea offer is considerably high, or they are not waiving a minimum mandatory offer. In these cases I feel stuck, and can only imagine how stuck the client feels. I understand when the client walks away from that situation taking a plea that they feel is unfair. They may think I did not do anything for them, despite my efforts to research the case, complete discovery, prepare for trial, and ask the state for a better plea offer. In those situations, the final product is not different—they are accepting the plea that was being offered from the start.

Barriers to communication include the need for interpreters, the limited amount of time the client may have with me (particularly if they have scheduled only a half hour meeting and I have depositions or other clients on my schedule), personality conflicts, varying communication styles, and mental health issues. Dealing with the barriers to advocacy work is always a struggle. With experience, I am able to anticipate some of the barriers and am still in the learning process of trying to be the most effective zealous advocate.

NOTES FROM THE FIELD, QUESTION 4

Discuss the connection between progressive and conservative social movements and public interest lawyering in the indigent public defense field.

TIPOGRAPH

It would be a mistake to characterize progressive political leadership as being unilaterally supportive of the indigent public defense field, and to criticize so-called conservative politics as having only a negative impact. While there is undoubtedly some significant truth to that dichotomy, we have also seen the opposite hold true. Some of the more repressive legislation and policies relating to criminal justice issues have been taken up or strengthened by Democratic or liberal administrations, both nationally and in New York, where I primarily practice. Under President Bill Clinton, the federal death penalty was reinstated and the constitutional right to habeas corpus was legislatively limited so as to become close to meaningless in many instances.¹²⁰ In New York, while taking a moral and courageous stand against the death penalty, then-Governor Mario Cuomo presided over a meteoric rise in the number of state prisons—and the inevitable prisoners to fill them up.¹²¹

Under federal and state administrations, Republican and Democratic, liberal and conservative, mandatory sentencing laws have been added and strengthened, the most meaningful rehabilitative prison programs done away with, and parole discarded, either in fact or in practice. In New York State, it was under Governor George Pataki's administration that even the most minimal changes to the repressive Rockefeller drug laws occurred.¹²²

Don't get me wrong—this is not an argument that there is no difference between George Bush and Barack Obama, or George Pataki and David Paterson. There certainly is a difference, even on criminal justice issues. However, the makers of laws, both executive and legislative, and the interpreters of the law, the judiciary,

¹²⁰ In April of 1996, President Bill Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 into law. See generally Marianne L. Bell, *The Option Not Taken: A Progressive Report on Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act*, 9 CORNELL J. L. & PUB. POL'Y 607 (2000). See also Stephen Labaton, *Constitutionality Is Conceded In Habeas Corpus Arguments*, N.Y. TIMES, June 4, 1996, at D1.

¹²¹ See Randall Robinson, *What America Owes to Blacks and What Blacks Owe to Each Other*, 6 AFR. AM. L. & POL'Y REP. 1, 4 (2004) (describing Cuomo's construction of prisons as "willy-nilly"); see also Sarah Lyall, *Without the Money to Supply Prison Beds, Officials Consider Reducing Demand*, N.Y. TIMES, Feb. 17, 1992, at B1 (quoting then-Governor Cuomo as stating: "I am going to go down as having built more prisons than any governor in New York State history, and it disgusts me that they're going to put that on my tombstone.").

¹²² See Al Baker, *Time Eases Tough Drug Laws, But Fight Goes On*, N.Y. TIMES, Apr. 16, 2004, at A2 (quoting then-Governor Pataki as stating, "We have enacted some reforms over the course of the years and we have lessened the harshness of the pre-existing Rockefeller drug laws . . . [b]ut having said that, I still believe there is room for significant additional reform.").

are politicians. They respond to the political and moral climate that they live and function in. Sadly, it has been a very long time since those in the indigent public defense field are seen for what we are or certainly what we should be—zealous and ethical defenders of the Constitution.

On the television series *Law and Order*,¹²³ as well as other similar shows, cops are seen as cynical and hardened, yet decent and hardworking. Prosecutors are considered the only real public servants, always doing what is right in defending victims and prosecuting the merciless predators who prey upon an innocent public. Defense attorneys, however, are portrayed as greedy and self-promoting, without any ethical standards. Further, public defenders are often seen as naive and stupid. Even the uncovering of those innocently convicted is more often than not depicted as the heroic act of the very prosecutors who convicted them in the first place.

We live in a society where, too often, we see harsh and unforgiving laws as our best protection against violence. Surely the theory is that the robbers, murderers, child pornographers, and drug dealers must be taken off our streets—warehoused in inhumane prisons—and it would be best if they were never released. Rigorous defense attorneys with proper funding and ancillary services are a waste since only the innocent are worthy of such protections.

Nothing can be further from the truth. Even a hardened conservative can have a change of heart about criminal justice issues when a son or niece or neighbor gets arrested on a drug charge. They learn what we already know: a vigorous and well-funded defense bar is the best protection against violations of the Constitution. We need to encourage young lawyers to do this work, either as public defenders or privately. We need to encourage our elected officials to fully fund defender services, and to pay attorneys who do that work under contract¹²⁴ at a fair rate.

Perhaps most importantly, we need to encourage and be a part of a public conversation that discusses and addresses the important issues in how we address crime and justice in our communities. How do we best reduce crime? How do we insure a just criminal justice system and demand personal responsibility from ourselves and our fellow residents? If we are going to oppose “snitching,” shouldn’t we first oppose murder and robbery? What

¹²³ *Law and Order* (NBC).

¹²⁴ This includes “18(b)” attorneys as provided under N.Y. COUNTY LAW §§ 722–722-f (McKinney 2008).

kind of police force do we want and how is it best made accountable to the communities it polices? How do we insure vigorous and respectful representation for people arrested for criminal conduct? How do we make sure that defendants receive fair treatment in the courts and, if they are convicted, what are appropriate and humane sentences? I appreciate the *New York City Law Review* for being a significant contributor to this conversation with this issue.

BOUDIN

Social movements serve to frame an issue and this framing plays a role in policy, funding, programs, and public attitudes. It strongly affects lawyering in the indigent public defense field. Often, the conservative movement's simplistic view on people who commit crimes characterizes them as individuals that violated the law, hurt people, caused suffering, and as fundamentally "bad apples" who need to be punished. In cases where defendants have been involved in the death of someone, conservatives often push for a death sentence or life in prison.

The consciousness about racism and poverty that flowed from the black freedom movements, the war on poverty, and the prison uprisings—specifically Attica in 1971¹²⁵—gave rise to an emerging view that regarded people in prison as human beings whose lives were shaped by the social conditions in which they lived. As a result of these movements, the concept of rehabilitation became more prevalent, and different programs were instituted in prisons that tried to offer inmates opportunities that were lacking in their own communities. Education programs, from GEDs to college, flourished in the mid-70s as a result of the progressive movements. Legal resources were made more available through government funding; the Prisoners' Legal Services, founded in 1976 in New York State, is one notable example.¹²⁶

Progressive social movements inspired law students in a direction of service. During the 60s, young people of all backgrounds were engaged in struggles to challenge racism, the unequal conditions of their lives, unequal education, the draft, and the war in Vietnam. As communities mobilized for change, a consciousness emerged that related crimes to societal injustices, inadequate opportunities for decent schools, housing, lack of jobs, fast money

¹²⁵ See Fred Ferretti, *Attica Prisoners Win 28 Demands, But Still Resist: Hold Out for a Full Amnesty from Prosecution and for Superintendent's Ouster*, N.Y. TIMES, Sept. 13, 1971, at A1.

¹²⁶ Prisoners' Legal Services, <http://www.plsny.org> (last visited Feb. 2, 2009).

with drugs, and violence in the neighborhood. This was not about justifying the crimes, but rather understanding why they occurred and understanding the people who committed them.

It was during this time that the public began to understand shifting policy frameworks. As a result, more money was made available for indigent defense, and there were more people in policy positions that would take into account the social framework. As the conservative social movements began to gather momentum throughout the 1970s and during the Reagan years, the “tough on crime” strategy¹²⁷ became a core component of those movements. In fact, there was a distinct strategy to reach out to law students, recruiting them into the Federalist Society to create a foundation of future conservative policy makers.¹²⁸

The role of the progressive women’s movement during this era was key. The issue of violence against women has been one central area of the women’s movement that impacts on indigent legal representation. The women’s movement has struggled to reframe the discourse surrounding women and violence, particularly in clarifying the ambiguities that might exist between a woman’s criminal physical aggression and the necessary self-defense she might undertake against battering, rape, and other forms of violence.¹²⁹

In the mid-1980s, a group of women, through the initiative of women at the Bedford Hills Correctional Facility and women active in women’s groups outside the prison (including those in Governor Cuomo’s Women’s Commission), began to meet and tell the stories of what had led them to prison. The link between their stories of abuse and the crimes that they ultimately committed began to emerge. Legislative hearings were carried out inside the prison as women testified about their life experiences with abuse before the public and the legal community.¹³⁰ Although no self-defense law existed in New York at the time, lawyers for women arrested for crimes related to abuse began to tell the same story in

¹²⁷ See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2005 (2008) (noting Reagan’s use of tough-on-crime rhetoric in his early bid for the California governorship).

¹²⁸ See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

¹²⁹ See Carol Jacobsen, Kammy Mizga, & Lynn D’Orio, *Battered Women, Homicide Convictions, and Sentencing: The Case for Clemency*, 18 HASTINGS WOMEN’S L.J. 31, 32–33 (2007) (discussing feminist critiques of the inadequacy of the self-defense construct).

¹³⁰ BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 14 (Routledge 1996).

court using the framework of battered women's syndrome.¹³¹ This strategy played an important role in achieving plea bargains, choices by juries to convict on manslaughter instead of murder, and reduced sentences. Since then, some states have passed laws that allow the issue of domestic violence to be used to reopen cases, and some governors, including New York State's, have granted clemencies or pardons.¹³²

Equally important for outcomes in the indigent public defense field, the women's movement has created a context in which more women attend law school, are appointed as judges, and are in policy-making positions. This trend has made it more likely that women arrested or in prison for acts related to abuse or violence will have new opportunities to fight for their freedom by advancing a legal framework that considers underlying causes of violence. Clearly, change is very slow and many women throughout the country still receive long sentences in spite of the history of abuses that they have suffered. However, there is now at least an existing framework that allows lawyers to present the events and defendants in a different way, and as more than the traditional and misogynistic stereotype of "man-hater."

A third example of the role of social movements in indigent representation relates to both support for and the backlash against the U.S. government's War on Drugs. The War on Drugs was a central component of the "tough on crime" and "law and order" part of the conservative movement's policies, and played a central role in the unprecedented growth of the prison population.¹³³ New legislation, increased arrests, indictments, and convictions, longer sentences, and parole denials all flowed from the War on Drugs, impacting differentially based on race, especially upon African Americans in our country.¹³⁴ More progressive movements have struggled both to bring to bear differential treatment theories on

¹³¹ In New York State, a women may plead self-defense using evidence of battered women's syndrome pursuant to N.Y. PENAL L. § 35.15. See also Michael Dowd, *Battered Women: A Perspective on Injustice*, 1 CARDOZO WOMEN'S L.J. 1, 39 (discussing the history of violence against women and the application of battered spouse defense as informed by Dowd's own practitioner experiences defending battered women in New York).

¹³² See Jacobsen, Mizga, & D'Orio, *supra* note 129, at 53; William Glaberson, *Pataki Grants Clemency To 4 in Prison*, N.Y. TIMES, Dec. 25, 2002, at B1.

¹³³ Saby Ghoshray, *America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 313, 321 (2008).

¹³⁴ See generally Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the 'War on Drugs' was a 'War on Blacks'*, 6 J. GENDER, RACE & JUST. 381 (2002).

the drug issue, and to reframe it entirely as a medical issue, requiring treatment rather than incarceration.¹³⁵ Lawyers of indigent defendants have also had to grapple with legislation, such as the Rockefeller drug laws,¹³⁶ that has made it more difficult to achieve justice while judges continue to implement War on Drugs policies through their decisions.

Differences between progressive and conservative social movements reflect tensions and tendencies that have characterized our history as a country, and they certainly impacted on the issues debated during the recent election. Social progressive movements usually adopt the view that government as an entity has the responsibility to meet the core needs of its citizens through the provision of basic services and by securing fundamental rights to obtain housing, medical care, and education. By contrast, conservative movements tend to view government with less of an emphasis on its role in meeting basic human needs, and instead promote the idea of individual responsibility. Progressive movements also frequently involve the struggle for equality and greater distribution of wealth. Conservative movements, instead, emphasize minimizing the struggle for rights and decreasing the government's role in a fair distribution of wealth. While progressives often view the role of government as secular, conservatives historically see in government not only a greater role for religion—in particular Christianity—but also an opportunity to allocate responsibility away from government's role in meeting the needs of the people; it is the private sector and the church that fills in this gap. These ideological differences ultimately affect the way in which indigent defense policy takes shape.

The United States is a country that is very legalistic—the role of law, and of lawyers, is a dominant one. Hence, it is not surprising to see the strong connection between social movements and the law. Social movements, progressive and conservative alike, play a major role in structuring the ability of lawyers to serve indigent clients. It is the laws, policies, and attitudes of judges, legislators,

¹³⁵ The establishment of drug treatment courts, however, does appear to indicate a considerable shift in the thinking of policy-makers and judges. See Hon. Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717 (2008).

¹³⁶ See generally Lisa R. Nakdai, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message?*, 30 HOFSTRA L. REV. 557 (2001).

and the public that, both individually and together, play a role in the possibilities for indigent representation.

CANO

To avoid semantic misinterpretations, I would like to clarify what progressive and conservative can mean when applied to public interest lawyering in the public defense field. In this field, a “progressive” view has an expansive and inclusive connotation that includes programs for redressing social misconduct. The progressive approach incorporates reformation and new opportunities for those who are in trouble or who do not know how to follow society’s rules for normal human behavior. Progressives are criticized as “soft on crime,” bleeding-heart liberals, rule-benders, and the ones at fault whenever a society fails to keep its citizens at bay. A “conservative” approach in this field may mean a stricter application of laws: one that castigates its violators; one that demands people to know the consequences of misbehavior; and one that argues that the only recourse and remedy for human failure is either death or incarceration. People are accountable for their behavior but are given fewer opportunities to improve, and then only under strict rules.

At this point in U.S. history, we can analyze the results of both approaches and accept the fact that at least the prevailing one—a conservative approach that focused on punishment and a reduction of social programs and opportunities for people—has taken a toll on our society. As a Pew Center report shows, our society incarcerates more people than several other countries combined, and state legislatures have now realized that building jails and incarcerating people can have devastating results on the quality of life of citizens and on state budgets.¹³⁷

One can start analyzing local conservative approaches that failed miserably. The recently amended New York Rockefeller drug laws,¹³⁸ for example, incarcerated people for decades for non-violent drug crimes, and yielded a society of young people who are only now emerging from jails without any skills to function in our society.¹³⁹ Similarly, Mayor Rudy Giuliani’s iron-fist rule, under which New York City adopted a “zero tolerance” approach on

¹³⁷ See PEW CENTER ON THE STATES, *supra* note 1.

¹³⁸ See Rockefeller Drug Laws, *supra* note 75.

¹³⁹ See Nakdai, *supra* note 136, at 559–570 (discussing the effects of Rockefeller sentencing on minorities and women).

crime,¹⁴⁰ also produced limited results. Under Giuliani, the New York City Police Department had an array of resources to arrest and prosecute serious crimes, especially those related to prostitution and drugs. Yet powerful gangs of criminals were still not prosecuted for producing and selling fraudulent documents on the street, while “arrests for such low-level crimes as subway turnstile jumping, public intoxication and urination, jaywalking, unlicensed street vending, and window-squeegeeing” increased.¹⁴¹ The mayor, the police department, and the entire administration of New York’s safety claimed that their repressive practices were deterrents for crime.

On the national level, North Americans have most recently tired of George W. Bush’s strict, conservative policies that have only created a world of terrorism, and as a result, elected the first black man in U.S. history as president. In the meantime however, the tone of conservatism set by the Bush administration has meant that assigned legal counsel and judges have gone decades without seeing an increase in their salaries. Public defense attorneys are still bogged down by hundreds of cases with hardly a chance to challenge illegal stops and arrests for small crimes that chip away at a person’s constitutional rights.

What about the 1970s and 1980s, when police and government corruption ran rampant among liberals and progressive movements? Many of the programs created at that time were full of incompetent people who fattened their pockets and did little for the betterment of the people. Our infrastructure at that time was falling apart—just as now it appears that we are falling apart in the eyes of the world. The only common thing about these extremes is the people who always seem to lose the most, such as underserved communities, minorities, community projects, children, the elderly, and those who are unaware but honest.

Are we community lawyers, community activists, people working at different levels of problems, educating and informing our people of what is going on in our society? I think that we are, but I think that the system itself is targeting and punishing those who are involved in political activism today more than ever. If anybody doubts it, look at the Republican National Convention in New York

¹⁴⁰ See, e.g., Peter A. Barta, *Giuliani: Broken Windows and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL’Y 165 (1999) (discussing the Giuliani administration’s repressive zero tolerance regime as applied to panhandlers and the homeless).

¹⁴¹ Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 994 (2003).

in 2004 when thousands of people demonstrated and were arrested.¹⁴² The message was loud and clear: if you dare to speak against the system, you will be arrested. Yes, people were eventually released and the city was sued, but the damage was already done. The message, like during the Cold War, was made clear to people: you speak up against the system and the system will shut you out.

LALA

To me the notion of what is “progressive” is a fluid, ever-evolving concept that is most clear when juxtaposed with something that is conservative. With regard to the criminal defense world, a progressive movement tilts towards that of a holistic practice that looks at all the intersections between criminal defense and other relevant legal areas such as immigration, housing, and individual rights, and involves preventive measures such as community outreach, and building and finding support organizations for clients outside the criminal justice realm. I think a conservative approach to criminal law tends to lean towards initiatives cloaked in the rhetoric of protecting the victim and society at large. The conservative approach to the criminal justice system has focused on making justice as speedy and efficient as possible. Particularly in unstable financial times, there seems to be an increase in crime but a decrease in funding to support high caseloads.¹⁴³

Specialized courts, or problem-solving courts, attempt to take on a social problem approach to crime. They seek to address crime’s “root causes” within the individual who is charged with a crime, as well as within society at large.¹⁴⁴ The concept of specialized courtrooms or court systems is arguably progressive. Examples of areas that have adopted the specialized court model across the nation include mental health, drug, domestic violence, and career criminal courts. The primary purpose of these courts is to sanction the defendant with punishments specifically designed to address the particular type of behavior that resulted in the charges in the first place.

In Florida, there are some existing specialized court programs

¹⁴² See Sabrina Tavernise, *Prosecutors Won't Pursue Cases of 227 in Disputed Protest*, N.Y. TIMES, Oct. 7, 2004, at B1.

¹⁴³ See Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic: Balanced Allocation of Resources Is Needed to End the Constitutional Crisis*, 9 CRIM. JUST. 13, 53 (1994).

¹⁴⁴ See Rehka Mirchandani, *What's So Special About Specialized Courts? The State and Social Change in Salt Lake City's Domestic Violence Court*, 39 LAW & SOC'Y REV. 379 (2005).

that get mixed reviews. There are those who identify as progressive criminal defense attorneys that support this system, while others, including myself, feel that the benefit is limited. Because of the conservative move to save money and make things run more efficiently, our clients get stuck with more cumbersome hoops to jump through than if they had been processed in a “normal” courtroom.

Usually defendants have to be convicted or sentenced to receive any kind of program or treatment. Once they are sentenced in a specialized court, the help comes through probation or community programs for which they have to pay. The cost and time these requirements take often ends up hurting clients more than doing them any good. Indigent clients have a hard time paying for the costs of their requirements, which may include special classes, evaluations, drug testing, and treatment sessions. In addition to the costs of the programs, they struggle to find the time to attend these programs with the stresses of finding a low-income job, dealing with childcare issues, and paying for their own daily transportation costs.

Rather than meet the holistic approach to criminal justice, these specialized courtrooms may end up being a more conservative solution. Without the resources and ability to make the programs more meaningful, clients are better off going before a judge who deals with a multitude of criminal cases. As long as the judge has knowledge and a certain sensitivity to the client’s social issues, better results—if not the same results—can be reached in a regular mainstream criminal courtroom.

NOTES FROM THE FIELD, QUESTION 5

What are some alternative approaches to public defense? For example, approaches that take a broader, more holistic approach to client-incorporating services, traditionally regarded as social work, as part of the mission of the public defender’s office. Or alternative approaches to defense that provide assistance with housing issues, public benefits, substance abuse, and various other problems that are viewed as prolonging client involvement with the justice system?

TIPOGRAPH

It is better if a person charged with a crime has the benefit of a legal defense that not only addressed his or her problems in the criminal courts, but also assisted with the other problems he or she may inevitably face. In my years of practicing law, I have seen a

variety of efforts and experiments in how to better represent our clients facing criminal charges.

In the 1970s, Legal Aid lawyers and their supporters marched and protested to demand that lawyers for the poor were paid fairly and that their clients received “vertical”¹⁴⁵ rather than “horizontal”¹⁴⁶ representation. Today, attorneys who represent indigent criminal defendants actively participate in CLEs to better educate ourselves on the collateral consequences of convictions in immigration, housing, and benefits so that we can better address the full spectrum of our clients’ needs. We advocate for better ancillary services for our clients from investigators, forensic psychologists, and other experts. Our efforts as individual practitioners to provide quality legal representation to indigent clients are complemented by the longstanding contributions of organizations such as the Neighborhood Defender Service of Harlem,¹⁴⁷ New York County Defender Services, and Bronx Defenders.¹⁴⁸

As public interest attorneys, we should continue to experiment with innovative ways to provide more effective representation to our clients. However, bold measures are difficult to take at a time when the country is experiencing an unprecedented financial crisis and when the delivery of legal services to the poor has chronically failed. Public defense agencies are closing or do not have enough attorneys, social workers, or investigators to maintain a vigorous practice. Press reports and personal anecdotes tell stories of public defenders with overwhelming caseloads and agencies that have stopped taking new cases altogether.¹⁴⁹ In New Orleans, public defenders continue their struggle to maintain progress in an already Katrina-backlogged criminal justice system, despite a complete lack of funding from the city.¹⁵⁰

I don’t think there are any easy answers to resolving these problems. As a progressive legal community, we can be part of ac-

¹⁴⁵ Vertical representation is representation by the same lawyer from the client’s first appearance in court until the conclusion of the case. See Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1254 (2006) (comparing the vertical and horizontal methods of representation).

¹⁴⁶ Horizontal representation is representation by a different lawyer for every stage of the client’s case—*i.e.* arraignment, pre-trial motions, and trial. See *id.*

¹⁴⁷ Neighborhood Defender Service of Harlem, <http://www.ndsny.org/>.

¹⁴⁸ Bronx Defenders, <http://www.bronxdefenders.org/>.

¹⁴⁹ See, e.g., Nic Corbett, *Budget Cuts Hit Public Defender*, TALLAHASSEE DEMOCRAT, Nov. 24, 2008, at 1A; Katie Mulvaney, *Public Defender: Budget Cuts Court Disaster*, PROVIDENCE JOURNAL-BULLETIN, Dec. 15, 2008, at 1.

¹⁵⁰ Derwyn Bunton, Editorial, *Public Defenders Need City Support Now*, TIMES-PICAYUNE, Nov. 21, 2008, at 7.

tivist movements that demand that an economic crisis is no excuse for continuing to fund wars and the bailout of CEOs, while cutting programs and funds for poor and working people. We can also experiment with bold and imaginative ways to better address the needs of our clients—although never at the expense of the quality of our representation. Let's start our own law offices and legal collectives where we seek to provide high-quality representation at reduced or sliding-scale fees.

An old colleague of mine, now deceased, had a private criminal defense practice out of the Lower East Side [in New York, NY] for about fifty years. He used to bemoan the drug epidemics of the 1980s and 1990s that helped destroy the private criminal defense bar in New York City. Beginning in the 1980s, many criminal defendants, flush with the cash of the drug business, paid defense attorneys large fees, driving up costs for all. Folks who previously could have paid moderate fees to private lawyers (often in installment payments), could no longer pay the fees that were being charged and increasingly relied on the services of Legal Aid, 18(b) lawyers, and other providers of services to the poor. Yet my colleague still maintained a successful practice representing people from his community, and continued to charge reasonable fees. Maybe it's time that we recreate the practices that my now-deceased colleague fought so lovingly to uphold.

BOUDIN

A model of public defense that takes a broader, more holistic approach to clients would be a *team defense model*.¹⁵¹ This kind of model involves lawyers, social workers, paralegals, investigators, and parents' and children's advocates working together to address the client as a whole person. The team collaborates to help understand the clients' needs and find programs to meet those needs. Individual team players, such as social workers, also help in specific situations, such as during mediation. Many examples of such an approach to indigent public defense already exist.

An example of an existing organization that takes a holistic approach to serving clients is that of Bronx Defenders, one of the alternative providers of legal services to the Legal Aid Society. The Bronx Defenders describe their work as "interdisciplinary" and "cli-

¹⁵¹ Cait Clarke, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, 17 ST. THOMAS L. REV. 781, 785 (2005) (discussing the Neighborhood Defender Service of Harlem's team defense approach to criminal defense).

ent-centered.”¹⁵² They start with the assumption that people enter the justice system with many social, psychological, and economic problems, and that these problems are interrelated. For example, let’s say the child welfare system determines that a certain child is suffering from neglect, and it turns out that the mother lost her housing and is simply unable to provide shelter. Bronx Defenders’ social workers will work on the housing problem with that mother during the course of her legal representation. What if a mother is in an abusive relationship and needs domestic violence support? Or if a man or woman with mental health problems has assaulted someone? Bronx Defenders will employ the same approach, utilizing its staff of social workers, parent advocates, and community organizers to address the underlying issues that relate to the particular individual’s criminal or civil case.

A holistic approach in legal defense is an important problem-solving strategy because it works with the whole person, understanding that illegal behavior is usually related both to specific personal problems and broad social issues that impact on the person’s behavior.¹⁵³ The criminalization of conduct arising from mental health issues or drug use makes the need for this approach even more important. Mental health institutions have historically opposed the idea of deinstitutionalizing care and creating a community-based model; unfortunately, the community-based model also appears not to have developed adequately enough to meet the existing need, and prisons have instead become a dumping ground for people with mental health problems.¹⁵⁴ In response to this trend, the Legal Aid Society has created a special Mental Illness Chemical Abuse (“MICA”) unit to serve the growing number of clients suffering from mental illness and chemical addictions.¹⁵⁵ People with mental health problems need the help of social workers to figure out their needs, and explore their possible options. The MICA unit brings together lawyers and social workers to work with an individual and best serve his or her needs.

Restrictions on the use of specialized courts have also pushed

¹⁵² See Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 630–31 (2006).

¹⁵³ *Id.* at 634–35.

¹⁵⁴ Chris Kempner, *Unfair Punishment of the Mentally Disabled? The Constitutionality of Treating Extremely Dangerous and Mentally Ill Insanity Acquittes in Prison Facilities*, 23 HAWAII L. REV. 623, 634–35 (2001).

¹⁵⁵ The Legal Aid Society in New York City, The Enhanced Defense-MICA Project, <http://www.legal-aid.org/en/whatwedo/criminalpractice.aspx> (last visited Feb. 5, 2009).

public defender organizations to develop their own services in a *team defense* model. The creation of these courts occurred in response to an increasing awareness that certain psychosocial issues (i.e., mental health and drug addiction) require special attention that the standard criminal courts cannot give.¹⁵⁶ Yet the courts still operate in a criminal justice framework, and, as a result, the bare right to participate in the New York drug court requires an admission of guilt (in contrast to California which has no such requirement).¹⁵⁷ Thus, if you want to fight some of the issues in a case (e.g., a suppression issue) you won't be able to get the services that the drug court offers. The establishment of drug and mental health courts may still be an innovative response to the limitations of serving indigent clients that have long existed under the older model of legal representation, but it is the development of special units at places such as the Legal Aid Society and the adoption of the *team defense* strategy that continues to make the real difference.

CANO

Holistic approaches are often available, but they cost our clients money. Paying some of the cost of a program may serve as an incentive to full participation and may also give the client a sense of responsibility. But I believe that society must first give people the tools to earn money to pay for those services. Although I agree that most of my clients may need outside services that they would not participate in were it not for the court-ordered programs, I also believe that some provision must be made for people who have very low income to afford those programs. Unfortunately, I have found that a lot of alternative programs in New York are currently losing funding and are thus forced to charge fees—sometimes hefty ones—to clients. I have clients that have warrants for re-arrest simply because they lack the funds to pay for and participate in their programs. In those circumstances, I try my best to explain to the court that my clients' warrants are a result of their financial need, and ask the court to fashion a program to his means. If I press hard enough, I can usually find a cheaper agency, but such situations are not ideal.

¹⁵⁶ See generally *Mental Health Courts and the Trend Towards a Rehabilitative Justice System*, 121 HARV. L. REV. 1168 (2008).

¹⁵⁷ New York City Criminal Court: Special Projects, <http://www.courts.state.ny.us/courts/nyc/criminal/specialprojects.shtml> ("Criminal Court's Drug Treatment Courts operate under the deferred sentencing model and participants must plead guilty to an offense prior to admission to the program.").

LALA

In my experience, many of my clients have ongoing problems with mental health issues and substance abuse. For many, dual-diagnosis is a problem, and individuals who have a history of mental health issues cope with their illnesses by self-medicating. I think a holistic approach to addressing clients' needs must be balanced with their personal desire to seek out help. Oftentimes the courts can be too imposing with their requirements and mandatory treatment.

In some circumstances, where clients have indicated to me that they wish to receive some sort of help for their illnesses, I try to use that as a bargaining chip with the state. For example, if I know what the client wants to accept some sort of probation offer, I will recommend a condition that touches upon the help they are seeking rather than have the state select arbitrary conditions as part of their punishment.

The Public Defender's office in Miami has a full-time staff of social workers called "disposition specialists." They work with the attorneys who seek their help on a variety of issues. Work includes assessing clients, obtaining records, drafting persuasive alternative sentencing and treatment plans, and identifying appropriate educational, substance abuse, and mental health placements for clients. If there is an agreement reached with the court, they also assist with finding placement in residential and outpatient programs that meet the clients' needs. This is just one way a public defender can begin to address the client's issues that often prolong their involvement in the system.