

PRE-ENTRY: EXPANDING THE METHODS BY WHICH PUBLIC DEFENDERS
PREPARE CLIENTS FOR A SUCCESSFUL RE-ENTRY PRIOR TO
INCARCERATION

by

KATHERINE LUBIANI

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Student: Katherine Lubiani

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This thesis has been accepted and approved in partial fulfillment of the requirements for the Master of Science degree in the Conflict and Dispute Resolution by:

Erik Girvan	Chairperson
Carrie Leonetti	Member

and

Scott L. Pratt	Dean of the Graduate School
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Original approval signatures are on file with the University of Oregon Graduate School.

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THESIS ABSTRACT

Katherine Lubiani

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The criminal justice system does not focus on individual needs outside of the defense against criminal charges and thus perpetuates the cycle that results in indigent people burdened with a criminal record. This paper first examines the current practices of public defenders. Next it explores the indirect consequences of involvement with the criminal justice system known as collateral consequences and the relatively new practice of holistic defense by which these consequences may be addressed. The paper then discusses issues that previously incarcerated individuals have upon their re-entry into society. Finally, the paper will introduce a new concept, “pre-entry,” inspired by the holistic defense approach.

CURRICULUM VITAE

NAME OF AUTHOR: Katherine Lubiani

GRADUATE AND UNDERGRADUATE SCHOOLS ATTENDED:

University of Oregon School of Law, Eugene
University of Memphis, Memphis, TN
Universiteit van Amsterdam, Amsterdam, Netherlands

DEGREES AWARDED:

Juris Doctor, 2017, University of Oregon School of Law
Master of Science, Conflict and Dispute Resolution, 2017, University of Oregon
Bachelor of Arts, International Studies, 2011, University of Memphis

AREAS OF SPECIAL INTEREST:

Criminal Law
Family Law
Juvenile Law
Restorative Justice
Conflict and Dispute Resolution

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To my lovely, marvelous, wonderful mother.

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CHAPTER I

INTRODUCTION

In today's society, we tend to think of the legal system as being divided into two broad areas: criminal law and civil law. If someone is arrested for a crime, he will either hire a defense attorney or be appointed one. If someone needs help modifying his child support order, preventing an eviction, or keeping his job, he will hire an attorney who specializes in family law, landlord/tenant law, or employment law, respectively. But where does it state that these areas remain separate?

People who go through the criminal justice system are often faced with a myriad of civil legal issues in addition to criminal charges. Most likely they have been dealing with these issues long before their encounter with the law. In fact, issues such as unemployment, homelessness, or mental illness may actually be the cause of the crime.¹ If they did not have issues before incarceration, they are almost certain to have them when they get out. An arrest, criminal charge, or conviction can, and often will, have detrimental effects beyond the criminal consequences. Such consequences exacerbate already existing social problems or create new ones.²

Incarceration affects every aspect of a person's life. People who are incarcerated will most likely lose their job and housing – neither of which will have been left under good terms. They will have little to no income and thus will not be able to make good on any legal obligations such as child support or any other debt owed. In order to begin to

¹ McGregor Smyth, *Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. of Tol. L. Rev. 479, 481 (2005).

² *Id.*

pay these debts, they will need to obtain employment. In order to find employment, they will likely need stable housing. Unfortunately, the black mark of incarceration will make both of these difficult.

Let's look at a hypothetical situation of Aaron, an individual recently released from prison. In 2011, Aaron was convicted of Possession of Methamphetamine, a Class C felony. He was sentenced to four years in prison. As a result, he was fired from his job and evicted from his apartment for breaking his lease. Before he went to prison, he was obligated to pay his ex-wife \$250 a month in child support. In prison, he did not have a job and thus had no income to pay for child support. Upon release in 2015, the debt had amassed to thousands of dollars. His first priority was to find stable housing. However, private landlords denied him due to his felony conviction. Public housing refused him because his felony conviction was a drug offense. With no other options, he moved in with his sister while he looked for a job. Again, his felony conviction showed up on background checks and prevented him from getting any job paying a decent salary.

Eventually, Aaron found a job at a local car wash, earning minimum wage. As required by law, his employer reported hiring Aaron and, soon after receiving the status update, Child Support came after him. Aaron could scarcely afford basic daily necessities, let alone thousands of dollars in child support debt. His failure to pay resulted in the DMV revoking his license, resulting in his inability to drive to work. His sister's house was not conveniently located near a bus line, rendering Aaron dependent on rides from friends or co-workers. Eventually, he was fired from work for showing up late or not at all. A few weeks later, he ran into a friend from the "old days" who offered to pay him to be a lookout during drug deals. The job paid under the table, so that Aaron would

not have to report his earnings to Child Support. The job paid well and soon Aaron was handling packages. In 2016, he was arrested, charged, and convicted for Possession and Delivery of Methamphetamine, a Class A felony, and sentenced to eight years in prison. The cycle began again.

What if Aaron had received assistance with all of these issues prior to incarceration? He may have been able to prevent his being fired, evicted, and saddled with impossible child support debt had his attorney had the tools and the knowledge of how to do so. Thus enters the concept of “pre-entry.”

Pre-entry is a proactive attempt to reduce barriers for individuals who will be re-entering society *prior to* incarceration. The goal is for defense attorneys to uncover the specific obligations of each client and help them address these obligations before incarceration. This is done so that the obligations may present less of an issue upon the client’s return to society. Many readers might be asking, “Isn’t that what civil attorneys are for?” The answer to that is generally, “Yes.” However, in this paper, my focus is on the indigent and low-income individuals who cannot afford to pay an attorney for assistance in these matters. Accordingly, while it would be helpful for private defense attorneys to have the knowledge and resources to address various other legal issues, my current focus is on public defenders appointed to indigent low-income clients.

Chapter Two (1) examines the current practices of public defenders, specifically the duties that we, as society, expect them to perform; (2) looks at the collateral consequences of a criminal arrest or conviction; (3) explores the relatively new concept of holistic defense – the idea that public defenders can do more to help their clients; and (4) looks at the circumstances surrounding clients upon re-entry into society post

incarceration. Chapter Three engages in a deep examination of the concept of pre-entry, primarily focusing on three specific collateral consequences: housing, employment, and child support. It discusses what needs to be done and propose recommendations for how to accomplish it.

CHAPTER II

CONTEXT AND BACKGROUND

Current Practices of Public Defenders

When most people think of public defenders, they probably imagine a tired looking person in an old wrinkled suit hunched over their desk, which is spilling over with files. Unfortunately, in most cases, this is accurate. The current criminal justice system teems with defendants charged with anything from petty offenses to major felonies. Many of the defendants are people who cannot afford to hire an attorney and will be appointed a publicly funded one. A public defender's duty is to protect the rights of people who are accused of a crime and who do not have any other means to protect themselves.³

In 1963, the Supreme Court decided the landmark case, *Gideon v. Wainwright*, wherein the Court was faced with the issue of whether a criminal felony defendant in state court had the right to publicly funded.⁴ In the case, the defendant was charged with a felony in Florida court and asked to be represented by court-appointed counsel.⁵ However, because the Florida statute only required counsel to be appointed in capital cases, his request was denied.⁶ He went on to represent himself and was convicted and sentenced to five years in prison.⁷ Later, he filed a habeas corpus petition, claiming that the trial court denied him "rights guaranteed by the United States Government."⁸

³ Mayer C. Goldman, Public Defender, J. of the Am. Inst. of Crim. L. and Criminology 557 (1915).

⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵ *Id.* at 336-337.

⁶ *Id.* at 337.

⁷ *Id.*

⁸ *Id.*

The case made it to the Supreme Court, which looked to the Sixth Amendment, which provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.”⁹ Up to this point, courts only applied this to defendants in federal courts.¹⁰ In *Gideon*, the Court held that “fair trials before impartial tribunals in which every defendant stands equal before the law...cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”¹¹ On the same day, the Court decided *Douglas v. California*¹², which extended the right to court-appointed counsel to direct appeal, reasoning, “There can be no equal justice where the kind of justice a person gets depends on the amount of money he has.”¹³ From then on, poor people accused of a crime would have the “guiding hand of counsel at every step in the proceedings.”¹⁴

Once this right to counsel was established, governments employed varying responses to ensure that this right was afforded to criminal defendants. Generally, there are three primary models of public defender systems: (1) the government employee model; (2) the contract provider model; and (3) the individual appointment model.¹⁵

The first model may be structured in three ways: offices funded and administered by the state, offices funded and administered by the county, and offices funded by the

⁹ *Id.* at 339.

¹⁰ *Id.* at 340.

¹¹ *Id.* at 344.

¹² 373 U.S. 353 (1963).

¹³ Stephen B. Bright & Sia M. Sanneh, Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*, 122 Yale L. J. 100 (2013) (quoting Douglas, at 355) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

¹⁴ *Gideon*, *supra* note 3, at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

¹⁵ Lynn Langton & Donald J. Farole, Jr., Public Defender Offices, 2007 – Statistical Tables, Bureau of Justice Statistics (2009).

county and partially administered by the state (hybrid).¹⁶ In 2007, the Bureau of Justice calculated that there are twenty-seven county and hybrid states with 763 individual public defender offices and twenty-two states with 483 local offices with a central state-based office.¹⁷ In the second model, states may enter into a contract system with private attorneys who agree to take on a specific amount of clients who would otherwise be unable to attain a private defense attorney.¹⁸ In the third model, courts may appoint private attorneys to take on criminal defense cases for clients who cannot afford counsel.¹⁹

Public defenders are flooded with impossible caseloads, which they rarely have the time or resources to adequately work.²⁰ Although public defenders are overworked and underpaid, courts are rarely sympathetic to the plight of the defense attorneys or their clients.²¹ Every day, public defenders must interact with prosecutors, judges, and their clients. On a daily basis, they may represent clients, conduct complex legal research, and perform in front of juries to the best of their ability.²² They may balance their time between negotiating a plea bargain with the prosecutor, discussing strategy with their clients, and going in front of a judge who may prioritize docket management over fairness and deliberation. Public defenders do all this all while being perceived as having a lowly status on the legal hierarchy.

¹⁶ *Id.*

¹⁷ Robert E. Stein, Public Defenders, 39 Hum. Rts. 25, (2013).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ SMYTH, *supra* note 1, at 480.

²¹ *Id.*

²² David R. Lynch, The Nature of Occupational Stress Among Public Defenders, The Just. System J. 17 (1997).

Under these circumstances, public defenders are usually only capable of focusing on the client's immediate legal needs, which are often thought to be prevention or reduction of incarceration.²³ This is considered to be a case-centered approach, as opposed to a client-centered approach. In this scenario, the public defender's goal is to get the best outcome for the client in the present case rather than assisting the client with big picture issues.²⁴ Instead of looking long term, most public defenders do not look past the disposition of the case.²⁵ The current nature of the criminal justice system encourages attorneys to quickly negotiate a plea bargain, ignoring the extra-case needs of the client.²⁶ Regardless of how zealously they may advocate for their client in the courtroom, this type of case-based approach does not do much to assist poor clients in the long run.²⁷ Low-income clients need someone who will advocate for them in a myriad of issues, not just in the criminal justice system.²⁸

Rarely do public defender offices offer non-criminal legal services, such as civil legal services or in-house social services.²⁹ A few have partnerships with local agencies that provide such services, but even that is insufficient to assist clients with their needs on a comprehensive level.³⁰ Some agencies, via funding restrictions, actually limit the

²³ SMYTH, *supra* note 1, at 491.

²⁴ 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, 627 (2006).

²⁵ McGregor Smyth, Bridging the Gap: A Practical Guide to Civil-Defender Collaboration, 37 Clearinghouse Rev. 56 (2003).

²⁶ Deborah Leff & Melanca Clark, Doing Justice to Gideon. Human Rts. 7 (2013).

²⁷ STEINBERG, *supra* note 24, at 634.

²⁸ *Id.*

²⁹ Robin G. Steinberg, Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm, 70 Wash. and Lee L. Rev. 961, 971 (2013).

³⁰ *Id.*

amount of civil legal assistance that can be received by clients who are involved in the criminal justice system.³¹

Even if public defenders wanted to assist clients with the other legal issues that are negatively impacting their lives, they would not likely have the knowledge, means, or to do so. Their lack of resources, time, and personnel leave them with no choice but to ignore the civil issues that may have caused or contributed to the client's interaction with the criminal justice system.³² The lack of funding received by public defenders offices and social services, as well as the structure of the legal system and social service organizations, make it difficult for workers in both areas to come together under one roof.³³

Mindful of the pressing civil legal issues facing many criminal defendants, some public defenders have begun to provide those services in preparation for re-entry.³⁴ For example, the Metropolitan Public Defender Services ("MPD"), a non-profit law firm in Portland, Oregon, where I worked during my last year of law school, created a Community Law Division. This division, operating under the holistic defense model (discussed below) is primarily focused on assisting clients with post-arrest civil legal issues. Much of the work I did there was to assist clients with expunging their records through a weekly clinic held at our office. Additionally, I would write and argue motions

³¹ *Id.* at 972.

³² *Id.* at 59; Cait Clarke, Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor, 14 *Geo. J. Legal Ethics* 401 (2000-2001).

³³ SMYTH *supra*, note 1, at 491.

³⁴ Michael Pinard, A Reentry-Centered Vision of Criminal Justice, *Fed. Sent'g Rep.* 103 (2007).

for various other civil legal issues such as waiving fines and fees, reducing felonies to misdemeanors, and relieving sex offenders from having to register.

Because MPD is a non-profit public defender office, it primarily focuses on assisting indigent or low-income clients in the community. The Community Law Division also has a Veteran's Project that assists veterans with other various legal matters such as landlord/tenant litigation, Veterans Administration guardianships, and public benefit issues. The Padilla Project is another program at MPD that assists attorneys representing non-citizen clients with their immigration issues. The newly created Immigration Protection Project allows attorneys to defend immigrants threatened with removal or exclusion.

Unfortunately, the work done by the Community Law Division is rare nationally. In most offices, public defenders are still expected to focus on the individual case, and not the on the client's situation as a whole. A holistic model is needed to address the collateral consequences that affect indigent clients, whether such consequences are the cause of their involvement in the criminal justice system in the first place or its result.

Collateral Consequences

When an individual becomes involved with the criminal justice system, there are other penalties that may result in addition to the penalties imposed at trial.³⁵ These penalties have several names in scholarship such as "collateral consequences," "hidden punishments," "invisible punishments," "enmeshed penalties," and the like. Regardless of their label, they all refer to the same concept: consequences that affect an individual's life

³⁵ Ann Cammett, *Deadbeats, Deadbroke, and Prisoners*, 18 *Geo. J. Poverty L. & Pol'y* 127, 147 (2011).

outside of the criminal justice system. This paper uses the term “collateral consequences.”

Collateral consequences may result from limitations set in place by federal and state laws that restrict an individual’s participation in certain aspects of life due to involvement in the criminal justice system³⁶. For example, due to a state statute someone may be evicted from public housing after a mere arrest for drug possession.³⁷ Such consequences may also arise simply from the stigma of having a criminal record or as practical effects of physical incarceration. The areas of life most often affected are employment, housing, education, public benefits, parental rights, and immigration status.³⁸ This paper focuses primarily on how incarceration affects employment, housing, and parental rights in its discussion of collateral consequences.

A criminal conviction is not the only cause of collateral consequences. A simple arrest may result in a number of penalties, such as the loss of a job, an eviction from public housing, or immediate removal of children from the home.³⁹ These consequences may happen automatically, regardless of the eventual disposition of the case. Even if the case is dismissed, the client will likely have lost a significant amount of wages (possibly resulting in loss of employment) or missed out on other opportunities or deadlines.⁴⁰

³⁶ *Id.*

³⁷ *See, e.g.*, 24 C.F.R. § 966.4(l)5(iii)(A) (2004) (stating that in conventional public housing, may terminate assistance “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction”); 24 C.F.R. § 982.553(c) (2004) (analogous provision for Section 8 voucher).

³⁸ *Id.*

³⁹ McGregor Smyth, “Collateral” No More: The Practical Imperative for Holistic Defense in a Post-Padilla World...Or, How to Achieve Consistently Better Results for Clients, Saint Louis U. Public L. Rev. 139, 149 (2011).

⁴⁰ *Id.* at 159.

While these are not consequences that directly resulted from a criminal conviction, they are a result of alleged criminal activity, whether proven or not.⁴¹

The idea that the collateral consequences of a criminal record significantly hinder an individual from successful reintegration into society is not a novel one. In 1956, the National Conference on Parole recommended abolishing the “laws depriving convicted persons of civil and political rights.”⁴² A few years later, the American Law Institute proposed reform measures to “ease the stigma and legal burdens” imposed upon individuals with a criminal history.⁴³ These reforms included expungement laws, as well as laws that gave discretion to the court to decide whether an individual may be relieved of any other legal penalties that stemmed from their criminal conviction.⁴⁴

In 2007, the Court Security Improvement Act required the National Institute of Justice (NIJ) to “conduct a study to determine and compile the collateral consequences of convictions and criminal offenses in the United States.”⁴⁵ In 2008, the Second Chance Act required “[a] State, unit of local government, territory or Indian Tribe, or combination thereof,” that applied for reauthorization of an NIJ re-entry grant to provide a plan to analyze all of the hurdles faced by individuals attempting to reintegrate into society would face.⁴⁶ The Act also gave more funding to the NIJ grant program and expanded the number of pilot programs.⁴⁷

⁴¹ *Id.*

⁴² PINARD, *supra* note 34, at 1217.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1220.

⁴⁶ PINARD, *supra* note 34, at 1220.

⁴⁷ Nathan James, *Offender Reentry – Correctional Statistics, Reintegration into the Community, and Recidivism* (2015).

In 2010, in *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment required defense attorneys to advise their client of the immigration risks and consequences of pleading guilty to a crime.⁴⁸ In *Padilla*, the petitioner had pleaded guilty to transportation of large amounts of marijuana.⁴⁹ During plea negotiations, his defense attorney falsely assured him that the conviction would not adversely affect his immigration status.⁵⁰ Unfortunately, this was not true and the petitioner faced deportation.⁵¹ The petitioner claimed that, had he known the immigration consequences, he would not have pleaded guilty and would have taken his chances at trial.⁵²

Padilla claimed that he had not received the “effective assistance of competent counsel” to which he was legally entitled prior to entering his guilty plea.⁵³ The Kentucky Supreme Court denied this claim because immigration consequences were a collateral issue, a “matter not within the sentencing authority of the state trial court.”⁵⁴ The United States Supreme Court rejected the distinction between direct and collateral consequences and held that *Strickland* required counsel to provide “constitutionally reasonable professional assistance” in advising a client about pleading guilty.⁵⁵

Under *Strickland*, the first issue is “whether counsel’s representation fell below an objective standard of reasonableness.”⁵⁶ The second issue is “whether there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the

⁴⁸ *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

⁴⁹ *Id.* at 359.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 365 (quoting *McMann v. Richardson*, 397 U.S. 759 (1970) (establishing that a defendant is entitled to effective assistance of competent counsel)).

⁵⁴ *Padilla*, 559 U.S. at 365.

⁵⁵ *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984))

⁵⁶ *Padilla*, 559 U.S. at 366.

proceeding would have been different.”⁵⁷ Padilla established that both prongs had been met and thus the Court found his counsel to have been “constitutionally deficient.”⁵⁸

Although the case focused primarily on an attorney’s obligation to inform a client about the risk of deportation, the Court used broad language in discussing what consequences may result from a criminal conviction.⁵⁹ While acknowledging that deportation was not technically a criminal sanction, the Court determined that it was “nevertheless intimately related to the criminal process” and thus should have been included in the advice of counsel.⁶⁰ Much like deportation, other collateral consequences exist that may jeopardize a large part of defendants’ lives after conviction and incarceration. The Court’s analysis in *Padilla* can be applied to any serious and likely consequences resulting from a criminal conviction.⁶¹ In fact, The *ABA Standards on Pleas of Guilty* require both the court and defense attorneys to warn the defendant about collateral consequences.⁶² Standard 14-1.4(c) provides:

Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant’s immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.⁶³

⁵⁷ *Id.*

⁵⁸ *Id.* at 374.

⁵⁹ STEINBERG, *supra* note 29, at 973-974.

⁶⁰ *Padilla*, at 365.

⁶¹ SMYTH, *supra* note 39, at 141.

⁶² SMYTH, *supra* note 1, at 497.

⁶³ American Bar Ass’n Criminal Justice Standards Committee, *Pleas Of Guilty* 116 (3d ed. 1999) at Standard 14-1.4(c).

Standard 14-3.2(f) provides: “To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”⁶⁴ Therefore, after *Padilla*, criminal defense attorneys have a duty to advise their clients of all collateral consequences that may result from involvement with the criminal justice system. They should incorporate these consequences into their analysis, much like they do with sentencing guidelines.⁶⁵ Anything less would qualify as ineffective assistance of competent counsel and warrants reversal of a subsequent conviction based upon an uncounseled guilty plea.

Notwithstanding this obligation, because collateral consequences are thought of as civil legal issues separate from the criminal justice system, as opposed to consequences that directly constitute criminal punishment, criminal defense attorneys, prosecutors, and criminal law judges often pay them no attention.⁶⁶ The criminal justice system is already so inundated with clients and cases that the actors involved are often unwilling to take on anything that they perceive to fall outside of their domain. However, the effect of these consequences has grown so much that actors in the criminal justice system can no longer reasonably ignore them.⁶⁷

⁶⁴ *Id.* at Standard 14-3.2(f).

⁶⁵ McGregor Smyth, From “Collateral” to “Integral”: The Seismic Evolution of *Padilla v. Kentucky* and Its Impact on Penalties Beyond Deportation, 54 *How. L. J.* 795, 834 (2011).

⁶⁶ Michael Pinard, Reflections and Perceptions on Reentry and Collateral Consequences, *The J. of Crim. L. and Criminology* 1213, 1219-1220 (2010).

⁶⁷ Alexandra Natapoff, Gideon’s Servants and the Criminalization of Poverty, *Ohio St. J. of Crim. L.* 445, 460 (2015).

Collateral consequences will often have more of a long term effect on individuals' lives than any criminal punishment imposed upon them.⁶⁸ Let's look at Aaron's situation again. While he was in prison, Aaron got behind on his child support payments. When he got out, he had trouble finding housing and employment due to his felony conviction. He found a job, but lost it when his child support arrearages caused his license to be revoked. Eventually, Aaron ended up back in the criminal justice system. While this story is hypothetical, it reflects the reality of collateral consequences suffered by individuals with involvement in the criminal justice system.

Housing

Housing, one of our most basic needs, is difficult enough to obtain for large numbers of people in our society. Obtaining affordable housing is even more difficult for low-income individuals with a criminal history. Even if they do find housing, they will face multiple barriers, including statutes barring them from renting certain homes, discrimination by landlords, and eligibility requirements for public housing.⁶⁹

Rejections need not be based on a conviction, and denial of housing may be based on a simple arrest.⁷⁰ Most, if not all, landlords will conduct a background check on everyone who submits an application. Technology has advanced to the point where conducting a background check is a simple process that often produces immediate results

⁶⁸ American Bar Ass'n Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualifications of Convicted Persons (3d ed. 2004) at 7.

⁶⁹ JAMES, *supra* note 47, at 42; Sheila A. Gaddis et al., Special Committee on Reentry, (2016).

⁷⁰ GADDIS, *supra* note 63, at 65.

and shows criminal history in local, state, and federal records.⁷¹ Even if a person were able to afford private housing, which is rare, landlords generally have discretion to deny them housing based on their background.

What the majority of people in this situation will be dealing with is a public housing authority (PHA) or a Community Development Corporation (CDC), subsidized by the federal Department of Housing and Urban Development (HUD), which either manages a project-based public housing development or administers Section 8 subsidies for use on the private housing market. Federal statutes exist that allow PHAs, CDCs, and private landlords participating in Section 8 programs to deny project units and Section 8 subsidies based on criminal history. Again, this can be *any* criminal history, not just a conviction. For example, a subsection of the Fair Housing Act (FHA) provides:

“[I]f the public housing agency or owner of such housing...determines that an applicant or any member of the applicant's household is or was...engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees, the public housing agency or owner may...(1) deny such applicant admission to the program or to federally assisted housing; and (2) after the expiration of the reasonable period beginning upon such activity, require the applicant...to submit to the public housing agency or owner evidence sufficient...to ensure that the individual or individuals in the applicant's household who engaged in criminal activity...have not engaged in any criminal activity during such reasonable period.”⁷²

Essentially, any applicant may be denied publicly subsidized housing for criminal activity occurring before, during, and after their application, *even if another member of the household committed the alleged crime*. Accordingly, an entire family may be denied or

⁷¹ STEINBERG, *supra* note 29, at 968.

⁷² 42 U.S.C.S. § 13661(c).

evicted from their homes due to the acts of a single individual, whether family member or guest, whether on or off the premises.⁷³

Some courts will look to the tenant's knowledge or control over the offending party and rule on the legitimacy of the eviction.⁷⁴ In *Dep't of Hous. v. Rucker*, the Court ruled on the legitimacy of the HUD evictions of four tenants.⁷⁵ While the court upheld the evictions in those particular cases, it found that "Congress did not intend [the statute] to permit the eviction of innocent tenants... We need look no further than the facts of this case for an example of the odd and unjust results that arise under HUD's interpretation."⁷⁶

The FHA does allow some wiggle room for people with past criminal histories by permitting landlords to deny housing for criminal history only within a "reasonable time" of application.⁷⁷ It specifically mentions "drug-related activity" and "violent criminal activity," but it still includes a catchall for other criminal activity in discretion of the landlord.⁷⁸

In 2011 and 2012, HUD issued reminders to PHAs, stressing the broad discretion they have to *provide* housing to people with convictions.⁷⁹ While the FHA gives PHAs discretion on whether to admit or deny an applicant, few heed HUD's recommendations, most employ a blanket approach, denying anyone who has or lives with anyone with

⁷³ Amy E. Hirsch et al., *Every Door Closed: Barriers Facing Parents with Criminal Records* (2002).

⁷⁴ *Id.* at 47.

⁷⁵ *Dep't of Hous. v. Rucker*, 535 U.S. 125 (2002).

⁷⁶ *Id.*

⁷⁷ Jerry J. Cox et al., *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime – Roadmap Report to Restore Rights and Status After Arrest or Conviction* (2014).

⁷⁸ COX, *supra* note 77, at 40.

⁷⁹ *Id.*

someone with any criminal history.⁸⁰ This is most likely due to the fact that PHAs are subject to oversight from their local communities, which may lean more toward a “tough on crime” position.⁸¹

PHAs who do not apply a blanket denial will have vastly different policies than others. Roberta Meyers, the director of the National HIRE Network observed, “It’s haphazard. The policies differ all across the country. You can go housing authority to housing authority to housing authority, and you’ll have a different policy.”⁸² Such inconsistencies are a severe hindrance to those individuals desperately seeking places where they are permitted to live.

Housing is not only vital for people to fulfill their basic human needs like shelter, but it is critical in the process of obtaining other necessities. People with criminal records are already suffering as a result of their past actions. Being denied housing will hinder them in many other aspects of life such as seeking gainful employment and keeping their families together.⁸³

Employment

Finding gainful employment is another essential aspect of an individual’s life where an individual’s criminal history can interfere. Like landlords, employers have a wide range of access to criminal records and will, more often than not, perform background checks on prospective employees. Once such individuals’ records of criminal

⁸⁰ GADDIS, *supra* note 69, at 65.

⁸¹ Michael Zmora, *Between Rucker and a Hard Place: The Due Process Void For Section 8 Voucher Holders in No-Fault Evictions*, 103 Nw. U. L. Rev. 1961 (2009).

⁸² COX, *supra* note 77, at 40.

⁸³ HIRSCH, *supra* note 73, at 42.

history are discovered, employees are often loath to hire them. Employers attach a stigma to employees with a criminal history and will be less likely to hire them for fear of any repercussions.⁸⁴

Additionally, someone who has been incarcerated will not only be marked with a criminal background, but they will likely lack the training and skills necessary to find a good job.⁸⁵ These skills may be lacking due to inadequate education, the absence of relevant job training resources, or the fast-paced, changing nature of technology.⁸⁶

People who have been incarcerated are also less likely to have the strong social networks necessary to connect them to good quality jobs.⁸⁷ Whether due the elapsing of time or burning of bridges, people with a criminal record typically have less of a support system than those with a clean record. As a result, they may find it more difficult to reach out to people in their community for any employment connections.

Even if they do find a job, they are more likely to be paid less while also having reduced potential for earnings to increase. According to one study, people with criminal convictions have 30% lower wage growth than that of their counterparts with no criminal history.⁸⁸ Any jobs that they do get will most often lack in stability and will often experience high amounts of turnover.

⁸⁴ Douglas Evans, *The Debt Penalty — Exposing the Financial Barriers to Offender Reintegration*, New York, NY: Research & Evaluation Center, John Jay College of Criminal Justice, City U. of N.Y. (2014).

⁸⁵ *Id.* at 11.

⁸⁶ *Id.* at 11; CAMMETT, *supra* note 35, at 146-147.

⁸⁷ EVANS, *supra* note 84, at 11.

⁸⁸ EVANS, *supra* note 84, at 10.

In some employment areas, a criminal history will render the applicant ineligible outright due to legal barriers, usually in fields requiring a license.⁸⁹ These barriers can be lifetime bans or restricted for a specified number of years.⁹⁰ Persons with a criminal history can be subject to prohibitions, strict regulations, or no regulations at all, depending on the state.⁹¹ Again, because it varies by state, it is vital that people with a criminal history seeking employment know the rules of the state in which they live or the state in which they intend to live. This requires more than a common knowledge of state laws and policies. Most people in this situation do not have access to or time for such research, and they likely cannot afford an attorney or professional who does have such access.

Employment is crucial for everyone, and it is especially so for those with criminal records. Gainful employment increases the likelihood that a person avoids criminal behavior. It allows them to afford proper housing and to provide for themselves and their families.⁹² If they cannot contribute meaningfully to their homes, communities and families, then they are more likely to end up on the streets, go back to prison, or even have their children taken away from them. Therefore, finding gainful employment remains a high priority for individuals with a criminal history.

Child Support

People with a criminal history have a difficult enough time supporting themselves, let alone their families. However, many of these people have an obligation to

⁸⁹ HIRSCH, *supra* note 73, at 2.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² PINARD, *supra* note 66, at 1215.

pay child support, which can oftentimes accrue into crushing amounts of debt that are practically impossible for them to satisfy. An encounter with the criminal justice system only exacerbates the financial situation of a person already indebted to child support. Legal fines and fees are often associated with a criminal case. As discussed above, a criminal record will often have a negative impact on a person's ability to obtain gainful employment and stable housing. Without these basic needs, paying child support quickly becomes a much lower priority.

Regardless of its relevance to the individual's priorities, child support is the highest of priorities when it comes to debt collection.⁹³ Those who do not pay child support are then subject to a host of penalties, such as garnished wages, withheld tax returns and benefits, and suspension of a driver's license.⁹⁴ They may also be labeled as a delinquent on their credit report, which will have a strong negative impact on their attempt to find housing.⁹⁵ None of these sanctions directly benefit the child and, in fact, often cause more harm than good. If someone loses their driver's license, they may be significantly hindered in getting to work. Even if they get to work, their paychecks will see a decrease due to wages being garnished by Child Support. A person earning less money is clearly less able to maintain a stable living environment.

Non-payment of child support does not only harm the child financially, but it may also have a detrimental effect on the relationship between the parent and child.⁹⁶ The parent may feel guilty for not paying child support and the child may resent the parent.

⁹³ EVANS, *supra* note 84, at 6.

⁹⁴ *Id.* at 5.

⁹⁵ Jessica Pearson, Building Debt While Doing Time: Child Support and Incarceration, 43 Judges' J. 5 (2004).

⁹⁶ EVANS, *supra* note 84, at 5.

Such negative emotions may cause either one to become distant from the other, which does not typically serve the best interest of either person, especially the child.

Parents with a criminal record may resort to taking jobs “under the table” for a number of reasons.⁹⁷ For one, employers are required to report employment to Child Support within twenty days of hiring them, thereby giving Child Support access to employee paychecks.⁹⁸ Conversely, wages from an undocumented job cannot be garnished or taxed. Additionally, Child Support will not be able to calculate the correct amount of money owed without an accurate account of the parent’s income.

Unfortunately, “under the table” jobs are not a legitimate means of earning income and therefore are typically associated with a lifestyle bordering on illegality or criminality. Under these circumstances, individuals are more likely to end up back in the criminal justice system, thus repeating the cycle all over again.

Assuming that the parent both gains lawful employment and reports to child support, they often still have difficulty paying the right amount at the right time. The amount a noncustodial parent owes is calculated and determined at the time of the Child Support Order.⁹⁹ The earnings are based on the parent’s earnings at that time, or if unknown, on minimum wage for forty hours a week.¹⁰⁰ People who have been incarcerated, usually earning no income, will often have child support arrearages that have accrued to an amount that is impossible for a parent to pay.¹⁰¹ Child Support is able

⁹⁷ CAMMETT, *supra* note 35, at 129.

⁹⁸ PEARSON, *supra* note 95.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ GADDIS, *supra* note 69, at 40.

to collect up to 65% of a parent's paycheck.¹⁰² Such large garnishments of their wages will almost guarantee that they will not be able to establish and maintain a stable lifestyle for themselves or their children.

These orders may be modified to more accurately reflect a parent's current income, if the change is involuntarily. However, courts are not often sympathetic to the plight of a parent whose loss of income is the result of incarceration. Because the act of committing the crime was voluntary, the resulting incarceration is not an involuntary circumstance that warrants a modification of child support. Thus, courts often reason that they should not be "rewarded" for their criminal actions by a reduction in the amount of child support owed.¹⁰³

Some courts – though few in number – have recently begun to shift their stance regarding the voluntariness of changes in circumstance due to incarceration.¹⁰⁴ While these courts are willing to modify child support based on circumstances resulting from incarceration, the process is an arduous one. Unfortunately, people are unwilling to go through this time-consuming process as they have a pessimistic view of the outcome.¹⁰⁵ Sometimes, they are simply not even aware that it is an option. Even if they are aware and willing, it is difficult to go through the process while incarcerated.¹⁰⁶ There are some few fortunate people who have success in this matter. Unfortunately, they are not the

¹⁰² *Id.*

¹⁰³ Frank J. Wozniak, Loss of Income Due to Incarceration as Affecting Child Support Obligation, 27 A.L.R. 5th 540 (1995).

¹⁰⁴ PEARSON, *supra* note 95.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

majority. Regardless of the causal factors, the inability to pay child support has a strong, detrimental impact on both child and parent alike.¹⁰⁷

Conclusion

Difficulties with housing, employment, and child support are just a few of the many collateral consequences that result from being involved with the criminal justice system. They often intertwine with each other to form even knottier and profound problems (e.g. Child Support affecting income, income affecting housing). These are urgent civil legal needs that can be daunting to a person already suffering from the stigmatization of a criminal record.

Holistic Defense

Holistic defense is the practice of representing the client as a whole, individual person, not just a criminal defendant. Holistic defense attorneys are client-based instead of case-based, focusing on the long-term needs of the client and not the outcome of the case at hand. These attorneys understand the drastic effect that collateral consequences have on the client. Their goal is to address both civil and criminal legal issues in house, if possible. If in-house is not possible, another goal is to develop a plan to seamlessly connect clients to programs and resources that address client's civil needs.

Holistic defense is especially important for clients who are unable to attain an attorney. Oftentimes, clients are not aware of the collateral consequences that may result from being processed through the criminal justice system. Even if they are aware, many

¹⁰⁷ CAMMETT, *supra* note 35, at 154.

cannot afford the necessary services to guide them through the process.¹⁰⁸ Under the rare circumstance that they can afford these services, the services are often difficult to navigate due to simple miscommunication or inconvenience.¹⁰⁹ If they can access services while navigating the process, the caseworkers on the civil end may not be as familiar with the criminal side of the law or areas outside of their specialization. If so, they may not be as capable of assisting the client to the best of their ability.¹¹⁰ Ideally, a person who is involved in the criminal justice system should have access to social services, civil attorneys, and criminal defense attorneys. Holistic defense aims to house all of these needs under one roof.

Robin Steinberg is the Executive Director at the Bronx Defenders in New York City, the law firm that pioneered the practice of holistic defense. According to Steinberg, successful holistic defense has four essential pillars: (1) seamless access to legal and non-legal services that meet client needs; (2) dynamic, interdisciplinary communication; (3) advocates with an interdisciplinary skill set; and (4) a robust understanding of, and connection to, the community served.¹¹¹

The first pillar, seamless access to legal and non-legal services that meet client needs, is important to making the process of holistic defense accessible for clients. Because collateral consequences can span over every aspect of people's lives, holistic practitioners must be able to seamlessly connect resources from each place so that they and the client can have a more efficient approach to tackling the issue. The first step to

¹⁰⁸ SMYTH, *supra* note 1, at 486.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ STEINBERG, *supra* note 29, at 987, 991, 995, and 998.

doing so requires that the attorney know what issues the client has in the first place.¹¹² In order for an attorney to figure out the client's needs, they should be trained to know which questions to ask.

Another way of figuring out a client's needs is to look to the community.¹¹³ A community may have a unique issue unto itself. For example, one community may have problems with immigration, while another community has an issue with housing laws.¹¹⁴ Holistic practitioners should focus primarily on the issues that caused the client to become involved with the legal system, as well as the issues that are likely to affect their involvement with the system in the future.¹¹⁵

Once the attorney gets the right information, she should then *seamlessly* connect her client to the appropriate resources, whether they be in-house or in the community.¹¹⁶ A seamless process should be as simple as possible. Ideally, the criminal defense attorney would perform the initial intake and then walk the client over to a civil attorney and/or a social worker who can better address the civil legal needs or social services, respectively.¹¹⁷ This would eliminate the amount of intakes and eligibility analyses that one client is usually forced to endure by going to several different offices.¹¹⁸ The holistic practitioners, who are trained in this process, should bear the burden of administrative

¹¹² *Id.* at 988.

¹¹³ The Bronx Defenders, *The Four Pillars of Holistic Defense*. (Nov. 15, 2010), <http://www.bronxdefenders.org/the-four-pillars-of-holistic-defense/>

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ STEINBERG, *supra* note 29, at 988.

¹¹⁷ *Id.*

¹¹⁸ THE BRONX DEFENDERS, *supra* note 113.

snarls and complexities.¹¹⁹ The client, who is already overwhelmed with the complexities of the case, should not.

The second pillar, dynamic and interdisciplinary communications, exists to assist the holistic practitioners with sharing and collaborating with each other.¹²⁰ For example, one office may include criminal defense attorneys, civil attorneys, family law attorneys, and social workers. In order for each person to do her job most efficiently, she needs an easy way of sharing and giving information with others in the office.¹²¹

If the individuals working for a client do not have a clear way of communicating with each other, it is unlikely that the client will have a seamless experience. For example, not only should a criminal defense attorney know the status of the criminal case at hand, but she also should be talking to the social worker about the client's progress participating in social services.¹²² The social worker should know about the client's progress in treatment, as well as information about the client's housing status, as communicated by the civil attorney.¹²³ While this may be a strain on resources, there are methods of keeping the communication simple and seamless. Perhaps the workers share one database where everyone can access and enter information about a particular client.

One of the most important factors in a client's situation is time. Having an existing network of civil, criminal, and social resources will save the client's time, effort,

¹¹⁹ *Id.*

¹²⁰ STEINBERG, *supra* note 29, at 991.

¹²¹ *Id.*

¹²² THE BRONX DEFENDERS, *supra* note 113.

¹²³ *Id.*

and money.¹²⁴ A seamless network of communication and collaboration is key to a successful representation.

Additionally, a client's involvement with the criminal justice system may often be a traumatic experience. Creating a seamless network of resources will hopefully mitigate the trauma and foster a sense of trust and security between client and attorney.¹²⁵

The third pillar, advocates with an interdisciplinary skill set, ensures that holistic practitioners will have a well-rounded knowledge of areas outside their specific area of expertise.¹²⁶ According to Steinberg,

“Newly hired criminal attorneys should receive basic training in family, housing, employment, and immigration law; they should be educated on the complexities of school, welfare, and healthcare bureaucracies; and they should be taught about the different types of addictions and mental illnesses. They should also spend time shadowing advocates in disciplines other than their own to make what they have learned concrete and to enable them to better understand their clients’ experiences.”¹²⁷

Being trained in multiple areas will not only allow each practitioner to have a better understanding of her clients’ entire situation, but the clients will feel supported by a team dedicated to all of their needs.

The fourth pillar, a robust understanding of, and connection to, the community served, is similar to the third pillar in that it helps holistic practitioners to have a broader understanding of their clients’ daily lives. By going out into the community, practitioners can truly experience the lives of the people they represent and with whom they interact. Additionally, by going into the community, they can more accurately assess the needs of

¹²⁴ STEINBERG, *supra* note 24, at 628.

¹²⁵ SMYTH, *supra* note 25, at 60.

¹²⁶ STEINBERG, *supra* note 29, at 995.

¹²⁷ *Id.*

the community and therefore develop a program tailored to its unique needs.¹²⁸ This will not only help their clients, but their families, neighborhoods, and the community as a whole.¹²⁹

Although the individuals charged with crimes are more directly affected, the members of the community also suffer the collateral consequences of the criminal justice system.¹³⁰ As previously discussed, people with a criminal history are less likely to obtain gainful employment, housing, and benefits.¹³¹ Therefore, they are unable to successfully contribute back to the community.¹³² These practices are holistic in the sense that they are focused on the whole client, as well as the whole community.

By adhering to the four pillars model of holistic defense, criminal defense attorneys, namely public defenders, are able to broaden their role as counsel. In their traditional roles, public defenders concern themselves with investigating the facts of the case, preparing for trial, and negotiating plea-bargains with the prosecuting attorney.¹³³ By doing so, traditional public defenders focusing on the case and not the client may be accentuating the flaws of the criminal justice system that we currently have.¹³⁴ They are often unaware of the civil and social problems that the client may be facing. Conversely, holistic attorneys will understand that clients walking through their doors may be burdened with issues involving poverty, addiction, mental illness, housing, employment,

¹²⁸ *Id.*

¹²⁹ BRONX DEFENDERS, *supra* note 113.

¹³⁰ SMYTH, *supra* note 25, at 57.

¹³¹ *Id.*

¹³² *Id.*

¹³³ CLARKE, *supra* note 32, at 429.

¹³⁴ STEINBERG, *supra* note 24, at 626.

or any other number of issues.¹³⁵ Being aware of these issues will ensure that the attorney's representation is all encompassing, addressing as many of the client's issues as possible.

This does not mean that public defenders should focus less on the aspects of the criminal trial. In fact, negotiations with the prosecutors are critical parts of the representation. If an attorney is able to negotiate less jail time in exchange for treatment and rehabilitative services, the client will be better off in the long run.¹³⁶ In turn, this will have a better effect on the client's family, friends, the community, and the criminal justice system.¹³⁷

The practice of holistic defense is not meant to dilute an attorney's concentration on the case but to assist attorneys with building skills in addition to their zealous advocacy skills.¹³⁸ Holistic defense attorneys are simply taking advantage of the opportunities presented and utilizing resources in the community in order to put their clients in the best a position possible.¹³⁹

Attorneys who are familiar with collateral consequences beyond the criminal area will be able to better advocate for their clients and prepare them for any and all penalties to come.¹⁴⁰ Clients who are aware of the possible penalties will be able to make a more informed decision regarding their case. For some clients, incarceration may not be the worst possible outcome. If a client agrees to a plea deal, the prosecution may amend charges so that the client does not get evicted, lose custody of their children, or suffer the

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ CLARKE, *supra* note 32, at 407.

¹³⁹ *Id.*

¹⁴⁰ SMYTH, *supra* note 39, at 153.

effect of any other issue that could arise.¹⁴¹ Depending on the complexity of the case and its evidence, some clients may choose to plead guilty instead of going to trial when there is a high likelihood for failure. They may do so because they are concerned about the effect this process will have on their families. Accordingly, they may choose a plea deal rather than putting their family and friends through the long ordeal of a trial.¹⁴²

Holistic defense takes a broken machine that is the traditional practice of public defenders and replaces it with a newer, evolved model. This new model reconstructs the way attorneys view their clients, the way clients view their attorneys, and the way society views the criminal justice system. By identifying the needs of clients and providing the appropriate resources, clients will enter into the criminal justice system with a team of people who are dedicated to ensuring that they successfully re-enter the community.

Re-Entry

According to one study, more than 95% of people currently in prison will be released in the future.¹⁴³ On average, 590,400 individuals have been released annually from prison since 1990.¹⁴⁴ Most of these people have and will suffer the consequences of having a criminal record, or the “scarlet letter ‘C’ of a criminal conviction”.¹⁴⁵ They will have difficulty finding jobs if employers discriminate based on criminal history and will not likely be eligible for publicly subsidized housing.¹⁴⁶ Any restrictions to accessing the necessities of life will hinder an individual’s attempt to successfully reintegrate back into

¹⁴¹ *Id.* at 155.

¹⁴² *Id.*

¹⁴³ PINARD, *supra* note 66.

¹⁴⁴ JAMES, *supra* note 47, at i.

¹⁴⁵ SMYTH, *supra* note 25, at 58.

¹⁴⁶ *Id.*

society.¹⁴⁷ Much like Aaron’s hypothetical situation, these consequences set off a domino effect that can result in re-offending.¹⁴⁸

“Re-entry” is a term used to describe the reintegration process of individuals back into society after they have been incarcerated.¹⁴⁹ Re-entry programs often focus on assisting people with finding housing and employment and other aspects of their lives that have been affected by incarceration – also known as collateral consequences.

A successful re-entry means that the individual will reintegrate into society and not have any further involvement in the criminal justice system. An unsuccessful re-entry typically means that an individual will fall back into a life of crime, thus increasing the recidivism rate.¹⁵⁰ Recidivism is a term used to define the re-arrest, re-conviction, or re-incarceration of someone released from prison within a specific time frame.¹⁵¹

According to the most recent recidivism study by the Bureau of Justice Statistics (BJS), almost three-quarters of people released from prison in 2005 came back through the system within five years.¹⁵² Over half of them went back to prison for committing a new crime, while the rest violated their release conditions.¹⁵³

In order to discover the root cause of recidivism, studies have shown that people with a criminal history are typically less educated, less likely to have a good job, and more likely to have mental illness or addiction issues.¹⁵⁴ All of these factors are proven

¹⁴⁷ CAMMETT, *supra* note 35, at 147.

¹⁴⁸ *Id.*

¹⁴⁹ SMYTH, *supra* note 1, at 501.

¹⁵⁰ HIRSCH, *supra* note 73.

¹⁵¹ JAMES, *supra* note 47, at 5.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ CAMMETT, *supra* note 35, at 146.

risk factors for recidivism.¹⁵⁵ Re-entry programs that focus on ameliorating these factors, such as employment programs, have been more successful in reducing recidivism.¹⁵⁶

Re-entry programs are usually sorted into three categories: 1) programs that prepare individuals to re-enter society while they are still incarcerated, 2) programs that immediately assist individuals post-incarceration by connecting them with resources in the community, and 3) programs that offer long-term support and supervision.¹⁵⁷ The focus of re-entry is typically on transitioning back into the community by offering work release, halfway houses, or other reintegration programs.¹⁵⁸ Alternatively, some re-entry programs focus on treatment for the individual in certain areas such as substance abuse, mental health, or education.¹⁵⁹

For example, Sponsors, Inc. (Sponsors) is a re-entry program located in Eugene, Oregon. At Sponsors, case managers meet with incarcerated individuals about six months prior to their release date to assess whether they are eligible to live in transitional housing upon re-entry for a period ranging anywhere from one month to a year. They do this via various risk assessments and interviews. If someone is deemed eligible, they will move straight from prison into one of the rooms on the property. While there, they will participate in treatment programs (e.g. group therapy, substance abuse), all while receiving assistance looking for employment and future housing. At the women's transitional housing, women are allowed to live on site with their children. Parenting

¹⁵⁵ *Id.*

¹⁵⁶ HIRSCH, *supra* note 73.

¹⁵⁷ JAMES, *supra* note 47.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 12.

classes are available to both men and women who want to learn how to form a stronger relationship with their children.

After my first year of graduate school, I did an internship with the Mentorship Program at Sponsors. There, we matched up clients with a criminal record (mentees), with members of the community (mentors). The pair would then be encouraged to participate in active, healthy, prosocial activities around the city such as bike riding, fishing, going to the theater, and more. Occasionally, the Mentorship Program would sponsor events at the Mentorship House. However, most of the time, we connected with partners from the community who would donate time, money, or whatever they could to help these individuals reintegrate into the part of society that would not tempt them back into to their old ways.

Individuals who go through the program still have access to these resources once they have left. In fact, anyone who has a criminal record has access to the non-residential resources as well. These resources include a monthly free legal clinic, wherein a pro bono attorney supervises volunteer law students who do intake and provide quick legal analysis for a variety of issues (e.g. child support, child custody, expungement analysis, landlord/tenant law).

Sponsors also had a career center where staff would assist anyone with a criminal history with improving their job skills. For example, the staff would hold workshops on resume building and interviewing techniques, as well as connect people with employers out in the community who were willing to hire individuals with a criminal record.

While no program is perfect, Sponsors continues to help many individuals transition back into society so that they are better equipped to experience a successful re-

entry. These are the goals of any re-entry program. To quote community justice and economic development consultant, Wayne Rawlins, “A person that can get a job, that can pay taxes, that can feel vested in the community is less likely to reoffend than someone that doesn’t.”¹⁶⁰ Re-entry is a matter of public safety in that the programs attempt to deter any further crime being repeated by someone with a past.

¹⁶⁰ COX, *supra* note 77.

CHAPTER III

PRE-ENTRY

What is Pre-Entry?

Pre-entry is the concept of addressing clients' post-incarceration needs prior to incarceration so that they are better prepared to re-enter society upon release. Instead of waiting until they get out of jail or prison to tackle their issues, clients figure out what problems they can expect upon release. Then, with help from attorneys and social workers, clients can try to mitigate the consequences before they arise.

The practice of holistic defense inspired the concept of pre-entry; practitioners are attorneys and social workers from various parts of the community assisting clients with all of their needs, not just the criminal matter at hand. To quote my supervisor, Alex Bassos, Director of Training and Outreach at Metropolitan Public Defenders and coiner of the term “pre-entry,” public defenders appointed to a client should “think of these clients as forever clients...At the point when you know [clients] are going to prison, public defenders should set them up for long-term success.”¹⁶¹ The idea is to coordinate with resources in the community to prepare the clients for re-entry into society before they are incarcerated.

Incarceration alone causes problems. Pre-entry hopes to minimize or decrease the collateral consequences of incarceration by addressing the issues before they begin. Whereas the traditional public defender is case-based and not client-based, pre-entry shares the holistic view that the most important part of the case is the client.¹⁶² “Hundreds

¹⁶¹ Alex Bassos, Director of Training and Outreach, Metropolitan Public Defenders, January 5, 2017.

¹⁶² SMYTH, *supra* note 1, at 497.

of thousands of people flow downstream from the criminal justice system that are trapped in a downward spiral...It is absurd to cut off [client] representation right at sentencing when there are so many consequences [for the client] after sentencing in the weeks that follow.”¹⁶³

At Metropolitan Public Defenders, Alex Bassos has planted the seed of pre-entry and is exploring the methods by which it can be implemented. While he focuses on a host of issues to address prior to incarceration, I will still be focusing primarily on housing, employment, and child support issues.

Housing

When it comes to housing, the most common issue for individuals reentering society is finding affordable housing that will admit applicants with a criminal record. As previously discussed, having a criminal record is grounds enough for denial. A criminal record and a housing record with an eviction will almost always convert an implausible situation to an impossible one.

An attorney representing a client should find out if that client has a current rental agreement. Clients with rental agreements will most often default on their rent once they are incarcerated. As a result of non-payment and no communication, the default will result in an eviction. The eviction process is a lengthy one. As such, it is unlikely that a landlord will *want* to go through with such a process that costs time and money, especially when they do not stand to gain much, if anything.

¹⁶³ BASSOS, *supra* note 161.

Alternatively, a pre-entry attorney or practitioner may intervene on the client's behalf. Upon conviction, the attorney should request the client's permission to negotiate with the landlord. As soon as a client knows he will be breaking the lease, a representative should go to the landlord and negotiate a settlement where both parties are put in a better position. The landlord will have notice of the broken lease and the client will hopefully avoid an eviction on his record. Realistically, an eviction only hurts the client and does not benefit the landlord. It would be in the best interests of all parties to negotiate a settlement and move on with their respective responsibilities.

Employment

Similar to landlords, employers are often placed in an inconvenient situation when a client is arrested and sentenced to a period of incarceration. If the client has been booked into the system, they will likely be unable to call their employer to notify them of the situation. In fact, they are probably not thinking about work (or their apartment lease) at all in that moment. By not showing up to work, the client is not only risking getting fired, but also foregoing any positive work reference in the future.

Being processed through the criminal justice system is often a traumatic experience and thus clients are likely only thinking of the present situation and its possible outcome. Once sentenced, they typically do not worry about the consequences of incarceration and instead focus on the daunting period of impending incarceration.

This is where a pre-entry practitioner can be of assistance. Someone trained to look for these issues can ask a client for permission to speak to an employer. That person should then call the employer and notify them of the client's circumstances. This

proactive effort can go along way to improve an employee's reputation. Perhaps, the client may then leave the job with something other than a poor job reference and a history of being fired.

Child Support

Child support is a trickier issue than housing and employment because it involves not only the client but the client's children. Laws and public policy place the utmost importance on what is in the best interests of the child. That is why child support payments are of the highest priority and the most difficult to modify. However, due to a person's criminal history and/or current incarceration status, payment may not be a possibility. If a person cannot pay child support from prison, arrears will accrue over time and become impossible to pay.¹⁶⁴

Upon re-entry, after arrears have accrued, a client has no option for reducing them. Child support orders may be modified, but modification does not apply retroactively. Modifying a child support order from prison is extremely difficult. This is why pre-entry is an important strategy in these cases. The attorney, or another pre-entry practitioner, should file a petition to modify the child support before the client is incarcerated. While most courts currently do not consider incarceration to be an involuntary, substantial change in circumstances, some courts are coming around to see incarceration as a whole or partial justification for modifying a child support order.¹⁶⁵

¹⁶⁴ PEARSON, *supra* note 95.

¹⁶⁵ Dep't of Economic Sec. v. Valentine, 945 P.2d 828 (1997) (establishing that a court must consider incarcerated parent's available assets and income, or possible income, as well as whether application of guidelines in particular case would be inappropriate and unjust or in best interest of child in question); Davis v. Vance, 574 N.E.2d 330 (1991)

Judges who consider incarceration to be a voluntary act probably feel justified in ordering an incarcerated individual to pay child support as an additional penalty for committing a crime. However, while children of incarcerated parents do require financial support, a child support order will not magically produce income for said parent. Instead, it will place a heavier burden on the parent upon re-entry, which can lead to a host of collateral consequences that impede the parent's successful re-entry and possibly place a strain on the parent-child relationship.

Instead of issuing orders for money that will unlikely be paid, courts should more frequently allow modifications to child support while a parent is incarcerated. This way, the parent will re-enter society with less of a financial burden and a better ability to support himself and his family.

The sooner clients anticipate the start of incarceration and the length of the sentence, the sooner they can petition the court to modify the child support order. A pre-entry practitioner should be able to identify these needs and begin to prepare the petition as soon as possible.

(establishing incarceration may serve as a changed circumstance so substantial and continuing as to make the terms of the support order unreasonable, and a support obligation should be set based on the obligated parent's actual earnings while incarcerated and other assets available to the incarcerated person); *Wills v. Jones*, 667 A.2d 331 (1995) (establishing that a prisoner's incarceration may constitute material change of circumstance if effect on prisoner's ability to pay child support is sufficiently reduced due to incarceration; *In re Marriage of Rottscheit*, 664 N.W.2d 525 (2003) (establishing that court should examine factors including: the length of incarceration, the nature of the offense and the relevant course of conduct leading to incarceration, the payer's assets, the payer's employability and the likelihood of future income upon release, the possibility of work release during incarceration, the amount of arrearages that will accumulate during the incarceration, and the needs of the children).

Miscellaneous

Plenty of other circumstances may be present for a client facing incarceration. People in society have monthly, weekly, and daily responsibilities that the abrogation of which would hardly occur to them when facing incarceration. In addition to rent, clients may have utility bills, cable bills, and other various bills and memberships that they will need to cancel prior to incarceration. How many people think about cancelling their Netflix subscription of \$9.99 per month? After 24 months in prison, that starts to add up to a lot of unwatched streaming content. If someone owes loans (other than child support), they can request to defer payment so that they do not go into default and thus avoid getting sent to a collections company with sky-high interest rates.

Clients do not only have obligations, but some may receive benefits. For example, a client receiving social security benefits may need to transfer those benefits to someone else during the length of incarceration. Veteran services should be contacted in the event that the client is a vet who is entitled to certain benefits and resources. Clients should also consider where certain valuables (e.g. identification, social security card, passport, dog) should be held during incarceration.

As evidenced by this small but diverse list, there are numerous areas in a person's life that can be affected by incarceration. It is better for a person, with help from pre-entry practitioners, to be proactive in dealing with these matters, rather than let them fall by the wayside and be even more detrimental to them upon re-entry.

How Can Public Defenders Execute Pre-Entry Practices?

The most important aspect of pre-entry is the timing. Public defenders should be in the pre-entry mindset the moment the client walks through the door the first time. Clients are often at their most vulnerable right after an arrest has occurred, whether it be hours or days since the event.¹⁶⁶ It is precisely for this reason that the attorneys take a proactive approach during the initial interview. Because clients are already seeking help from the attorney for their criminal case, they will be more likely to request and accept help in other aspects of their lives.¹⁶⁷

In the initial interview, the questions the attorney is asking will not only assist the attorney in connecting the client with other civil and social resources, but will also allow the attorney to adapt representation of the client in the criminal matter.¹⁶⁸ This first meeting is also important for establishing a client's trust and confidence in the attorney, setting forth the foundation for a collaborative relationship.¹⁶⁹

During the interview, the attorney should keep an ear out for certain triggering words such as “subsidized housing,” “public employment,” “employment license,” “endangering the welfare of a child,” “driver’s license,” “non-citizen,” anything drug-related, and other words and phrases that may clue in the attorney about certain collateral consequences that will occur as a result of an arrest or conviction.¹⁷⁰

The next question may be, “How are public defenders, whose main focus is on criminal matters, supposed to know what questions to ask about issues outside of their

¹⁶⁶ STEINBERG *supra* note 24, at 627.

¹⁶⁷ *Id.*

¹⁶⁸ PINARD, *supra* note 34, at 104.

¹⁶⁹ SMYTH, *supra* note 39, at 156.

¹⁷⁰ *Id.* at 153.

field?” Ideally, they should be incorporating concepts from holistic defense by cross training in other fields and collaborating with civil attorneys and social workers. The former is probably a long-term option while the latter is more realistic at this time. Even if civil attorneys and social workers are not in-house, there should be a network in place where each can reach out to the other for advice and resources about any particular issue.

For example, MercyCorps Northwest is a non-profit organization in Portland, Oregon whose goal is to provide services and resources to those who would otherwise not have access to them. Specifically, their Reentry Transition Center assists individuals who have been released from incarceration and are re-entering the community. Such resources may be to address immediate needs (e.g. access to phones, food, clothing) or long term goals (e.g. employment assistance, alcohol and drug treatment, educational training).

If public defenders do not have social workers in house, they should attempt to create a seamless connection with an organization like MercyCorps Northwest to ensure that their clients have help addressing their social needs, in addition to their legal needs.

At Metropolitan Public Defenders, Alex Bassos, along with two law students, created an interview questionnaire with standard questions that a public defender should be asking clients regarding civil and social needs.¹⁷¹ It includes questions about employment, housing, financial status, child support, benefits, and other miscellaneous needs for which the client may need assistance. Although neither the attorney nor the client will know the outcome of the case at that first meeting, it is best to get all of the information at once so that the pre-entry team can be prepared to do what needs to be done from the beginning. Moreover, the public defender will know what issues the client

¹⁷¹ Alex Bassos et al., “Pre-Entry Program, Reducing Barriers to Re-Entry Before Incarceration.”

has, specifically what is the most important factor of the case, so that she can adequately tailor her representation to reflect the client's needs.

Limitations

The primary concerns regarding the practice of holistic defense are the financial and legal barriers that currently constrain what public defenders can do for their clients. Depending on how they are structured, asking them to do even more work may be impossible at this time. As previously mentioned, there are three primary models of providing publicly funded defense services: the government employee model, the contract provider model, and the individual-appointment model.¹⁷² Each of these models will have its own barriers to pre-entry. While the ideal solutions may not currently be possible, hopefully there exist some short term remedies to each of these barriers.

While the court ruled that individuals who cannot afford an attorney have a right to court-appointed counsel, it did not establish how said counsel would be paid.¹⁷³ Implementing pre-entry in the government employee model, whether funded by state or county, will be restricted by the amount of money that can be allotted from their budget. Because budget cuts have already affected public defenders offices by reducing funding for attorneys and support staff¹⁷⁴, it is unlikely that states or counties will increase amounts allotted to public defenders for holistic services that are not required by statute.

¹⁷² LANGTON, *supra* note 15.

¹⁷³ Lorelei Laird, *Starved Of Money For Too Long, Public Defender Offices Are Suing And Starting To Win*, ABA Journal (Jan. 1, 2017),

http://www.abajournal.com/magazine/article/the_gideon_revolution

¹⁷⁴ *Id.*

Although one can hope for a nationwide economic windfall, it is more practical to examine strategies concerning budgetary allotments from the state or county. Decision-makers will need to be convinced that the benefits of public defender offices engaging in holistic defense practices will positively affect other budget expenditures. For example, in New York City, the city council considered passing legislation to provide lawyers to low-income clients facing eviction. The New York State Bar Association (NYSBA) president, President Kathryn Grant Madigan, found, “[NYSBA has] shown that for every dollar spent on pre-eviction legal services, the city will save \$4 that won’t be spent on other city services such as housing the homeless. By paying for preventive legal services now, you save money.”¹⁷⁵ If budget committees can be convinced that providing more resources for holistic defense will benefit the population as a whole, they may be more willing to allot the resources accordingly.

Alternatively, the contract provider model is essentially an agreement between a city, county, or state and a law firm or non-profit organization outlining the terms of the latter’s representation of clients who are unable to afford an attorney.¹⁷⁶ Such terms include the duration of the contract, minimum qualifications for attorneys, performance requirements, and compensation.¹⁷⁷ Because these contracted law firms or non-profit organizations do not have their resources allocated by the government, they will not have the same budgetary issues experienced under the government employee model. However,

¹⁷⁵ Robert J. Derocher, *Access to Justice: Is Civil Gideon a Piece of the Puzzle?*, 32 ABA Bar Leader 6, (2017), https://www.americanbar.org/publications/bar_leader/2007_08/3206/gideon.html

¹⁷⁶ National Legal Aid and Defender Association, *Model Contract for Public Defense Services with Notes and References to National Standards* (2000).

¹⁷⁷ *Id.*

they are bound by the terms of the contract set forth by the government actor with whom they contract.

For example, the Public Defense Services Commission in Oregon provides for certain limitations on case expenses (e.g. laywitness fees, discovery expenses, medical records fees) in addition to the proposed contract price.¹⁷⁸ While this particular contract provides that attorneys may represent clients in certain civil cases¹⁷⁹, other contractors in other states may neglect to do so. Because contractors may be concerned about malpractice or liability issues, they may be hesitant to take on holistic practices that go beyond the scope of normal public defender duties.

The National Legal Aid and Defender Association (NLADA) created a “Model Contract” upon which contractors should rely.¹⁸⁰ NLADA understands that some governments may seek to contract for the requisite legal representation of low-income clients at the lowest possible price.¹⁸¹ The goal of the Model Contract is to ensure that minimum national standards comply with the constitutional and ethical requirements of legal representation. In Section VII(F), the contract states, “Adequate support staff is critical to an attorney’s ability to render competent assistance of counsel at the [specified] caseload[s].”¹⁸² It then states that the contracting agency will provide a minimum number of full time support staff, including at least one legal assistant per a specified number of attorneys, social service caseworkers per a specified number of amount of felony,

¹⁷⁸ Public Defense Services Commission, Public Defense Legal Services Contract General Terms (2017).

¹⁷⁹ *Id.*

¹⁸⁰ Model Contract, *supra* note 176, at iv.

¹⁸¹ *Id.* at v.

¹⁸² *Id.* at 7.

juvenile, and misdemeanor cases, as well as attorney access to “mental health evaluation and recommendation services as required.”¹⁸³

A platform already exists upon which to build the types of services offered by contract provider models. Whether these services are included in the contract depends on the negotiation abilities of the parties involved. The goal is for more contract provider states to use as a basis for their contract negotiations the practices of provider states that have already successfully implemented these services. The more successful these states become, the more encouraged the others will be to follow in their footsteps.

Finally, the individual appointment model must be addressed. This model is generally structured so that a private attorney is selected from a list to represent a criminal defendant who is unable to afford counsel.¹⁸⁴ If the crime is serious, a more senior attorney may be selected based on their experience.¹⁸⁵ An alternative to this method is for one attorney to take on any case that arises within a specific time period (e.g. day, week, or month).¹⁸⁶

If private attorneys appointed to represent indigent clients are held to the same standard as public defenders, they may be deterred from voluntarily being on the list once holistic defense practices are expected. This may be due to their lack of resources or unwillingness to do more work in a case that is already an addition to their regular caseload. This is an issue that is hard to combat. Because these private attorneys are not

¹⁸³ *Id.*

¹⁸⁴ Court-Appointed Counsel Procedures & Guidelines Manual, Suggested Procedures for Appointment of Counsel/Maintaining Attorneys Lists (2016), <http://www.courts.state.va.us/courtadmin/aoc/djs/resources/manuals/ctapptatty/chapter04.pdf>

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

likely housed in the same offices, incorporating a holistic model of defense is impractical. The essence of holistic defense and pre-entry is the seamless communication between the various holistic defense practitioners. Private attorneys are inherently not set up for such a business model. However, this does not mean they should be excluded completely from the concept of holistic defense. Private attorneys may have offices located in various parts of the community.

Perhaps a private criminal defense attorney works in a building with a family law attorney, a drug and alcohol counselor, and an accountant. If she is appointed a client with any issues outside of the criminal case (e.g. custody, addiction, bankruptcy), she may be able to connect her client with these resources. While she may not be able to refer her client directly to one of her neighbors, communication with them may result in references to other people in the community who help people of limited means. Of course, she would have to be aware that such issues exist and can be remedied. Ideally, she would have been educated on these topics via Continuing Legal Education presentations, additional research, and through conversations with her fellow attorneys.

In sum, there are a variety of barriers to holistic defense and pre-entry practices. The most vital components in breaking down these barriers is informing people about the benefits, both long term and short term, that holistic defense and pre-entry practices can achieve. While it is important to consider the costs and limitations of pre-entry, such considerations should not be allowed to completely impede change. Education about these issues is essential to incite change, but collaboration is key in sparking the revolution.

CHAPTER IV

CONCLUSION

Almost everyone agrees that the criminal justice system is flawed in one way or another. Many scholars and practitioners have offered opinions on how to achieve the most positive change. Everyone from public defenders, to legislators, to re-entry advocates, to the Supreme Court, acknowledges the very real existence of collateral consequences and the effect that they have on individuals, as well as society as a whole.

Not only can collateral consequences stemming from involvement with the criminal justice system affect where a person can live and where they can work, they may dictate a person's involvement with family. When we think of criminal defendants going to trial, we typically think of the outcome as just. If a person is found or pleads guilty, he will be sentenced and serve his time accordingly. This seems to fit within most people's concept of justice. If a person is found innocent, they avoid any criminal punishment and are free to go.

Unfortunately, "free" is a relative term. Although not convicted, the person has been arrested, maybe charged, and processed through the legal system. Even the minimal contact with the criminal justice system will have an adverse effect on every other aspect of a person's life. They may lose their job, license, housing, and family as a result of a simple arrest that is later dismissed. And that is if they are one of the fortunate few with that result. More likely, the person will plead guilty and serve their sentence. If this includes incarceration, they will find themselves in a predicament, to say the least, upon re-entry into society. Even probation has its slew of collateral consequences.

Pre-entry hopes to prevent, or perhaps just mitigate, these consequences at the earliest possible moment. While incarcerated, it is almost impossible for a person to accomplish anything in the outside world, especially in the legal system. After incarceration, they are burdened with so many issues that dealing with any of them may be overwhelming. Pre-entry practitioners should aim to attack as many issues as possible at the onset of the legal case. By identifying a client's current and future needs, and subsequently preparing them with the tools to assist them upon reintegration into society, practitioners may ensure that their client has the best chance at a successful re-entry. Successful re-entry benefits the individual, their family, their community, and society as a whole.

As the old epigraph goes, "Don't put off until tomorrow what you can do today."

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