TAKING IT TO THE STREETS

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INTRODUCTION

Few contemporary challenges command our attention as compellingly as the need to improve the ways that the nation understands, discusses, and makes choices about criminal justice. The criminal justice system reflects, and is driven by, often unstated assumptions about who commits crimes, who poses a danger, and who deserves fair treatment. These assumptions, in turn, animate choices about the allocation of resources, the deployment of law enforcement personnel, and the evaluation and implementation of policies. Perhaps most unsettling is that vigilant scrutiny of these policies and practices reveals an utterly common if nonetheless flawed pattern: top-down decision making in which the most powerful—the wealthy, the privileged, and the politically well-connected—define justice priorities and initiatives to the exclusion of the vast majority in our society.

Lawmakers offer perhaps the most visible manifestation of this problem. Confronted with episodic increases in crime and violence, federal, state, and local officials succumb to the magnetic pull of familiar strategies. They wage battles against crime, fight wars on drugs, or mount "quality-of-life" campaigns in others' neighborhoods—low-income communities and communities of color—all the while presupposing the virtues of their own proposals. These legislators and political leaders routinely make sweeping claims about the latest campaign to reduce crime without having tested their operative assumptions, much less having invited informed and open debate. And the very communities in whose name and on whose streets these battles are fiercely fought rarely are permitted to play a role in evaluating such strategies or in determining whether they should be implemented at all. What results is a politically constructed vision of "justice for all" imposed by the few.

Still, politicians do not bear the entire blame. Other key players in the criminal justice system have been complicit. All too frequently, criminal justice actors have ignored the poor, the disenfranchised, the political outsiders—the precise individuals and communities whom these actors claim to serve. These appointed and elected public representatives have formulated plans and policies that they deem appropriate in the absence of any meaningful exchanges about whether they have adequately perceived, understood, or framed the problem to be addressed. But once-complacent communities have awakened of late. More particularly, they have begun to balk at their virtual exclusion from criminal justice decision-making that directly affects them. These citizens have chosen on their own to explore avenues to insert and amplify their voices in decisions about justice.[1] No matter what form this community activism has assumed—police

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oversight boards, neighborhood watch programs, court observation teams—the initial efforts of these individuals and communities to monitor the behavior of criminal justice actors and institutions have only deepened their resolve to become more actively engaged.

And they expect to have their voices heard. Largely in response to this vocal and dissatisfied public, many criminal justice institutions have begun experimenting. With varying levels of commitment and success, these institutions have adopted a wide range of strategies and practices designed to increase their responsiveness to community needs. Law enforcement offices have shifted from a singular reliance on reactive policing strategies to activities that add and incorporate community policing components.[2] Courts have targeted recurring criminal justice issues through problem-solving courts.[3] Corrections and parole authorities, in conjunction with community partners, have launched re-entry programs for offenders to ease their transition back into society.[4] And prosecutors have begun experimenting with community prosecution models to align their offices' policies and priorities with community concerns and interests.[5] But notably, public defenders and other indigent defense service providers as a whole lag behind other criminal justice players in embracing a community orientation.[6]

What accounts for defenders' delay? Few indigent defense service providers have taken the time to consider squarely just how well-grounded they

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1. *See, e.g.*, Susan F. Bennett, *Community Organizations and Crime*, *in* COMMUNITY JUSTICE: AN EMERGING FIELD 31 (David R. Karp ed., 1998).

2. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 295 (1994); *cf.* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513 (2002); Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002); Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53 (2003) (critiquing the use of problem-oriented order-maintenance strategies).

3. *See, e.g.*, Todd R. Clear & David R. Karp, *The Community Justice Movement*, *in* COMMUNITY JUSTICE: AN EMERGING FIELD 9 (David R. Karp ed., 1998); John Feinblatt, Greg Berman & Michele Sviridoff, *Neighborhood Justice at the Midtown Community Court*, *in* Crime and Place: Plenary Papers of the 1997 Conference on Criminal Justice Research and Evaluation, 1998 NAT'L INST. OF JUST. 81; Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851 (1997); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63 (2002).

4. *See* James P. Lynch & William J. Sabol, *Prisoner Reentry in Perspective*, 3 URB. INST. JUST. POL'Y CENTER CRIME POL'Y REP. 2 (2001), *at* http://www.urban.org/pdfs/410213_reentry.pdf; Jeremy Travis, Amy L. Solomon & Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, URB. INST. JUST. POL'Y CENTER (2001), *at* http://www.urban.org/UploadedPDF/from_prison_to_home.pdf.

5. *See* Barbara Boland, *Community Prosecution: Portland's Experience*, *in* COMMUNITY JUSTICE: AN EMERGING FIELD 253 (David R. Karp ed., 1998); Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002).

6. *See* Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. FOR STUDY LEGAL ETHICS 199 (1999) [hereinafter Taylor-Thompson, *Effective Assistance*] (discussing need for chief defenders to break out of traditionally isolated roles and to begin conceiving of themselves and their offices as key players in the criminal justice system).

are—or should be—in the communities whose residents they serve. Fewer still have recognized the importance of becoming better-informed about, and more involved in, community worries and aims. But paying attention to communities and their concerns could add an important dimension to the defender's role that is currently missing. Certainly, defenders have long recognized that in defining justice, too few voices are invited to the table.[7] Reforming our system of justice and making it more accessible to historically excluded voices would seem a goal that defenders would readily embrace. A community orientation could ultimately enable defenders to perceive common needs among clients and residents of communities as defenders examine the system as a whole. In the end, being alert to patterns of injustice may push defenders to perform more effectively on behalf of all of their clients—current and prospective.[8]

But even at the theoretical level, constructing a model of collaboration between defenders and communities is complicated at best.[9] Determining the nature of the interaction between defenders and residents of communities, particularly when the interests of individual clients may stand at odds with those of the community, is far from easy. And on a more fundamental level, as more voices enter the conversation about crime and the strategies to combat it, the process by which we administer justice could actually change. Currently, individual defenders can focus exclusively on the interests of a single client; the client's objectives and concerns guide the defender's strategic choices.[10] This well-defended, but perhaps not fully appreciated luxury of singular attention has historically reduced some of the complexity inherent in the defender's role.

If a defender office introduces a model of practice that invites community input and collaboration, that choice could subject even the individual defender's choices to scrutiny: community residents, for example, could perceive not just an opportunity but a right to express a view about defenders' policy choices. This, in turn, could force defenders at least to acknowledge, if not address, concerns

7. *See, e.g.*, Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 761–68 (1995) (discussing the ways in which alternative viewpoints are marginalized and de-legitimated in the social "consensus" on crime).

8. *See, e.g.*, Taylor-Thompson, *Effective Assistance*, *supra* note 6, at 200.

9. The merits and challenges inherent in collaborations between lawyers and communities have been extensively debated in the context of civil legal services. *See, e.g.*, GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 23 (1992); Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000); *cf.* William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994).

10. *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2425–29 (1996) [hereinafter Taylor-Thompson, *Alternating Visions*].

that extend beyond those of the individual client.[11] This is not meant to suggest that defenders never consider issues external to the relationship with their client. Ethical considerations can impose competing duties on the lawyer, but this is typically confined to the exceptional circumstance.[12] Changing the nature of a defender office's relationship with its community could alter the frequency with which defenders consider viewpoints that fall outside of the lawyer-client relationship. In the end, envisioning and exploring the dimensions of collaboration would likely present a considerable challenge.

And it is that precise challenge that a growing number of defender offices have chosen to embrace.[13] They perceive mutual advantage in moving beyond reactive roles and forging partnerships that are at once community-oriented and problem-solving. Initially, the impulse to work more closely with the communities from which the defender offices' clients come seemed confined to smaller offices that chose explicitly to organize around and serve the neighborhoods in which they were located.[14] Defenders launched these offices as a tacit rejection of the conventional vision of the defender, which, at least in practice, seemed to embrace a role isolated from subordinated communities. But the choice to work in collaboration with communities has become somewhat less idiosyncratic. Of particular interest is that a number of traditional offices have begun to embrace

11. Largely in response to the ways that the criminal justice system treated—and ignored—victims of crimes, victims' rights advocates, over the past two decades, have sought to empower victims of crime to push for changes in the ways that prosecutors' offices work with them and make decisions that affect victims' interests. *See generally* Walker A. Matthews, III, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998).

12. Model Rule 1.6(b)(1) pierces the veil of attorney-client privilege and permits the lawyer to reveal information relating to the representation of the client if she reasonably believes such disclosure to be necessary to prevent reasonably certain death or substantial bodily harm. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002).

13. I served as Academic Director of the Criminal Justice Program of the Brennan Center for Justice from 2000 to 2002. Our principal project during that time was the development of the Community Justice Institute, which provides technical assistance to defenders and community activists seeking to collaborate on criminal justice issues. The Community Justice Institute surveyed defenders across the country in 2001; some 127 defenders responded. Over one-half of the respondents indicated that they were currently collaborating with community residents, groups, or activists in their jurisdiction. *See* Brennan Center for Justice, Community-Oriented Defense Fact Sheet, *at* http://www.brennancenter.org/programs/cj/factsheet_cji.html (Feb. 2002).

14. One of the earliest examples of a program designed as a neighborhood-oriented office was the Roxbury Defenders in an inner-city community in Boston. *See* Harold R. Washington & Geraldine S. Hines, *"Call My Lawyer": Styling a Community Based Defender Program*, 8 BLACK L.J. 186 (1983). Building on this example, other community-based defender offices were launched in the 1990s. In 1990, the Vera Institute of Justice began a pilot community defender office, the Neighborhood Defender Service of Harlem, designed to provide better public representation to indigent criminal defendants through what it described as a complete redefinition and restructuring of the system of representation. Vera Institute for Justice, Program Plan for the Neighborhood Defender Service 1–7 (May 2, 1990) (draft, on file with author). Five years later, a former staff attorney with the Neighborhood Defender Service took the concept to the Bronx where she began a community defender office called the Bronx Defenders. For more information about this office, see http://www.bronxdefenders.org.

more of a community orientation.[15] Perhaps the choice to reach beyond the defender office's walls can be traced to the power of necessity: operating without allies in the highly politicized environment of criminal justice is tricky at best.[16] Or, perhaps the choice to engage community problems flows from a willingness to assume less reactive forms of action.[17] Whatever the reason, defender offices of all sizes and in a wide variety of jurisdictions are choosing to embark on barely-charted paths, entering into partnerships with neighborhood groups and developing justice initiatives that aim to advance the twin goals of fairness and safety.

In light of this apparent trend, the multiple and elusive dimensions of community-oriented defense bear examining. In this article, I explore whether community defense offers public defenders a viable vision of practice despite its sometimes daunting dynamics. Part I examines the challenges internal and external to the defender office in adopting more community-oriented strategies for indigent defense practice. Part II takes an empirical look at one traditional defender office's experience with adopting a community-based project aimed at addressing racial disparities in the criminal justice system. Part III examines the institutional, organizational, and office design questions that are necessarily implicated in choosing to carve out a community-oriented role for defenders.

I.
THE APPEAL AND CHALLENGE OF COMMUNITY-ORIENTED PUBLIC DEFENSE

A. Resisting the Lure of the Status Quo

Burgeoning support among defenders for a community-oriented vision of public defender offices and practice may signal the beginning of a sea change in public defense.[18] Many defender offices have begun to wonder whether they

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15. Representatives of the Seattle King County Defender Association, the Public Defender Service of the District of Columbia, the Dade County Defender, the Los Angeles Public Defender, and the Legal Aid Society of New York mentioned in discussions with me in my capacity as Academic Director of the Brennan Center that they had embarked on extended community projects.

The Knox County Public Defender in Knoxville, Tennessee recently revamped its method of service delivery and created the Knox County Public Defenders' Community Law Office. This office seeks to achieve five primary goals:

1. To prevent crime
2. To reduce recidivism
3. To empower clients to live a fuller, more meaningful, independent life
4. To increase community involvement in the criminal justice system
5. To demonstrate an innovative, effective service model

Office of the District Public Defender, Community Law Office Concept Paper 1, *available at* http://www.pdknox.org/Downloadable/CLOconcept.pdf (last visited Sept. 19, 2003).

16. Taylor-Thompson, *Effective Assistance*, *supra* note 6, at 204.

17. *See* Taylor-Thompson, *Alternating Visions*, *supra* note 10, at 2448.

18. In the past two years, a number of institutions have initiated programs designed to

can single-mindedly insist on an exclusive reliance on individuated methods of practice. That defenders are asking this question is noteworthy in itself. The individualized vision of practice has been such a dominant feature of indigent defense that public defenders often report difficulty thinking about how the office or individual defenders might go about their daily work differently.[19] But against the tremendous power of tradition that, at a minimum, spans the last four decades,[20] a growing number of defender offices have begun questioning—and resisting the pull of—certain conventions of practice.

What explains this new impulse to experiment with a wider range of practice strategies? One possible explanation may be that this sort of experimentation is not at all new. Perhaps scholars, observers, and defenders themselves have overstated the influence of the individualized vision of practice. Even as defenders have fought to advance the diverse range of goals of an equally diverse range of clients, there have been instances of collective action on behalf of those clients that suggest that another vision of practice may actually coexist with individuated strategies.[21] Typically, these collective endeavors have assumed one of two forms. First, defenders in otherwise traditional offices have chosen strategically to collaborate with each other when addressing recurring issues of concern to their clients. When legal issues have threatened to have a similar impact on a large number of clients, defenders have developed and advanced consistent arguments to be made in all cases to reinforce the strength and merits of their position in the individual case.[22] But the individual client has remained paramount, and broader issues have been relegated to an important but nonetheless secondary goal.

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stimulate thinking and encourage sharing of ideas about the ways that indigent defense service providers might play a larger role in their communities and in the criminal justice community. The Vera Institute of Justice invited public defender managers to participate in the National Defender Leadership Program. The Kennedy School of Government at Harvard has convened a series of working meetings, the Executive Session on Indigent Defense Systems, to spark conversation about this new direction among practitioners and academics. The Brennan Center for Justice at New York University School of Law has initiated a Community Justice Institute to provide technical assistance to defender organizations and communities interested in developing partnerships on issues of justice.

19. As Academic Director of the Criminal Justice Program for the Brennan Center, I provided technical assistance to defender offices that were considering—or in the initial stages of implementing—community-oriented programs. These conversations routinely covered the challenges inherent in building internal consensus among defenders about the wisdom of such programs since many defenders thought that the individual representation model offered the only approach to defender practice.

20. Most defender offices came into existence after the Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), informed states that defense lawyers were no longer a luxury but instead were constitutionally required. They tended to pattern their practice after the adversarial vision developed by the Warren Court that focused on the individual rights of the accused. *See* Taylor-Thompson, *Alternating Visions*, *supra* note 10, at 2425–29.

21. Taylor-Thompson, *Alternating Visions*, *supra* note 10, at 2433–60.

22. *Id.* at 2435–48.

The second form of collective activity has occurred when a defender office conceives of itself as an institutional actor in the political realm. This institutional role means that the office recognizes that, as a criminal justice actor among other players in the system, it has a unique voice and viewpoint. Typically, this voice finds expression in legislative advocacy when defenders perceive the need to mount resistance to lawmaking that grows out of a particular brand of anti-crime sentiment.[23] But the institutional role has also led some offices to promote a broader political vision involving community activism. That overriding conception of practice then guides decisions about the method of representation within the office[24] as well as the sorts of policies defenders will pursue outside of the courtroom.[25] Until recently, this broader community vision of public defense has tended to exist principally in small, neighborhood-based defender offices.

Defender experimentation with approaches outside of the conventional individualized practice strategies also seems to flow directly from experience with the current environment. Defenders have encountered the stark reality that the courtroom strategies which once successfully advanced their clients' goals have become much less effective. The climate has changed. The legal landscape has become less alert to—and more tolerant of—abuses that occur in police-citizen interactions, provided the government can point to evidence of "good faith."[26] The political environment encourages politicians to endorse tougher criminal justice policy initiatives regardless of party affiliation.[27] The

23. *Cf.* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 404–06 (1993) (noting the law-and-order backlash that has dominated the criminal justice system).

24. For example, the Neighborhood Defender Service of Harlem, a community-based defender office, has adopted a team approach to representation which includes a lawyer, a caseworker (with social worker training), an investigator, and a paralegal. The goal is to combine the diverse skills of these members of the team to help them better understand the reasons for a client's involvement in the criminal justice system and to address issues that might prevent future involvement. *See* Neighborhood Defender Service of Harlem, Mission & Organization, *at* http://www.ndsny.org/mission.htm (last visited Sept. 19, 2003).

25. For example, a community vision has encouraged a number of offices to engage in education and outreach to inform residents of the communities they serve about the rights of individuals in the criminal justice system and the responsibilities of law enforcement in addressing crime. *See, e.g.*, Neighborhood Defender Service of Harlem, Programs, *at* http://www.ndsny.org/programs.htm; *see also* 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, 443–48 (2001).

26. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996) (holding that the actual motivations of individual officers in making a stop are irrelevant to Fourth Amendment analysis of the validity of the search or seizure); United States v. Leon, 468 U.S. 897, 913 (1984) (establishing good faith exception to Fourth Amendment exclusionary rule); New York v. Quarles, 467 U.S. 649, 651 (1984) (adopting a "public safety" exception to rule established by Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring warnings prior to custodial interrogation)); Harris v. New York, 401 U.S. 222, 224 (1971) (holding that statements obtained in violation of *Miranda*, although inadmissible in the prosecution's case in chief, could be used to impeach the defendant's testimony).

27. Once considered a Republican platform, draconian measures in response to crime have

social setting in which the average citizen's fear mounts with every broadcast of the local or national news has encouraged jurors to lean towards conviction as a means of striking a blow against crime. The lesson seems clear: hard fought battles that previously ended in suppression of evidence, acquittals, or leniency in sentencing now yield favorable results for defenders' clients much less frequently. Thus, a singular reliance on the individualized vision may prove less capable of accomplishing the goal of providing meaningful defense to their clients.

Still, this realization does not inexorably lead defenders to choose to collaborate with low-income communities as a way of building greater political leverage for their clients or their communities. As a logistical matter, collaboration can be daunting. Communities themselves may not welcome defenders as partners in any effort to address broader political issues. Only in rare instances will a community even consider its local public defender as a resource when tackling problems of community justice. Instead, community members will likely view the defender in the more narrow role of courtroom advocate and actually may not perceive defenders as allies even in that context.[28] Communities that take an interest in addressing their local crime problems often become motivated in response to actions taken—or not taken—by their local police or prosecutors. Yet, even these activist residents tend to overlook public defenders as potential partners. Politically astute groups may correctly perceive that in some instances defenders may pose a political liability. But given the organizational mission of indigent defense service providers, defenders themselves have begun to realize that they bring strengths as partners to communities committed to the creation of more equitable criminal justice policies and strategies. And, in turn, those communities may share certain concerns about the underlying causes of crime that could form the basis of key partnerships.

Ultimately, one may never fully understand the full host of reasons that might prompt a defender office to incorporate community-oriented strategies. But these tentative moves toward involvement with communities suggest that defender offices are making a fundamental choice about the nature of their practice. Defenders would be among the first to assert that their role in the system offers them a unique vantage point. For much of their history, defenders have used that perspective as a point both of departure from the larger community and of commonality with each other and their clients.[29] But many

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been championed in the past decade by Democratic politicians as well in their efforts to appeal to a more centrist voting constituency. For example, during his term as President, Bill Clinton, a Democrat, pushed through the most restrictive *habeas corpus* bill in history. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

28. *See* discussion *infra* pp. 172–73.

29. *See* Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983–84); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) [hereinafter Ogletree, *Beyond Justifications*].

defenders are now beginning to explore whether their position in the system can serve as a bridge between their clients and communities in articulating precisely what the justice system should stand for and should seek to safeguard. Defenders are not choosing to abandon individualized representation as their *principal* focus, but as their *exclusive* focus. In appreciating this choice, it seems instructive to examine the strengths and limitations of the conventional vision from which they are choosing, in some ways, to depart.

1. The Individualized Vision of Practice

One of the most distinguishing features of the American criminal justice system is that it guarantees a right to counsel.[30] Precisely how that right should be conceived and implemented—particularly as it affects the indigent accused—remains a key question.[31] More often than not, defense lawyers interpret their role in individuated terms: the objectives and concerns of the individual accused govern lawyers' strategic choices. The lawyer's fiduciary obligation expects—indeed demands—undiluted loyalty to the individual client.[32] Thus, lawyers will tailor their arguments to advance their clients' goals without regard to any broader concern or constituency.

For all the variety that characterizes public defense, this individualized vision lies at the core of public defenders' thinking and action in the United States.[33] Individual lawyers within defender offices typically conceive of themselves as independent actors operating on behalf of their individual clients. To the extent that the office plays any role at all, it serves, at best, as a loose consortium that houses these independent actors. This concept is so prevalent that individual defenders often cannot imagine how they might define their problem-solving task differently; how they might work with other institutions, groups, and individuals; and how they might formulate different sorts of strategies and

30. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending right to counsel to misdemeanor cases); In re Gault, 387 U.S. 1, 13 (1967) (extending right to counsel in juvenile delinquency proceedings); Gideon v. Wainwright, 372 U.S. 335 (1963) (extending right to counsel in felony cases to defendants in state court).

31. *See generally* Chester L. Mirskey, *The Political Economy and Indigent Defense: New York City, 1917–1998*, 1997 ANN. SURV. AM. L. 891 (1997); Ogletree, *Beyond Justifications*, *supra* note 29; Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81 (1995); Inga L. Parsons, "*Making It a Federal Case*": *A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837 (1997); Round Table Discussion, *The Delivery of Legal Services to the Poor in the Twenty-First Century*, 3 N.Y. CITY L. REV. 191 (2000); Taylor-Thompson, *Alternating Visions*, *supra* note 10; Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461 (2003) [hereinafter Taylor-Thompson, *Tuning Up Gideon's Trumpet*]; Note, Gideon*'s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000).

32. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002); *cf.* Martin Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13, 19 (1986) (questioning the reasonableness of considering only the current case when the same judge must decide the fate of other clients the defender represents).

33. Taylor-Thompson, *Tuning Up Gideon's Trumpet*, *supra* note 31.

tactics (in and out of court). Zealous representation has simply come to mean the advancement of the individual client's interests.

History may offer a partial explanation as to why this vision of lawyering has come into being. In the 1960s, the Warren Court seized on the plight of the individual facing charges in the criminal justice system. The Court attempted at once to respond to and to rein in the brutality that had become commonplace in police interactions with individuals accused of crimes. The Court's painstaking identification and interpretation of individual rights throughout the criminal justice system[34] reflected at least three explicit goals: to set guidelines for police and other government actors in enforcing the law, to fashion a remedy that would motivate enforcement officials to comply with the Court's directives,[35] and to educate judges about the importance of remaining alert to constitutional violations. But an unspoken goal—or perhaps an unexpected impact—involved defense lawyers. By concentrating on the series of rights that attached and potential violations that could occur throughout the criminal justice process, the Court sketched a blueprint of sorts for defense lawyers to follow in providing assistance to the criminally accused. These important rulings seemed to set an expectation that a new, more invigorated role for the defense would become the norm.

Implementing that norm would prove challenging. Local and state governments scrambled to provide counsel as mandated by *Gideon v. Wainwright*[36] and its progeny.[37] Public defender offices proliferated during this period, patterning their practices after the Warren Court's vision.[38] Public defenders conceived of their roles in a decidedly adversarial fashion: they pitted themselves against the state to safeguard and champion the rights of individuals charged with crime. Uncovering and raising claims of constitutional violations by the government became the defender's principal task. To perform this duty effectively, a number of offices exerted control over their workloads. Setting caseload limits better enabled individual lawyers to concentrate on the particularized facts and circumstances of individual cases. It was no longer sufficient for a defender to focus on guilt or innocence. The defense lawyer's obligation

34. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring warnings prior to custodial interrogation); Wong Sun v. United States, 371 U.S. 471, 485 (1963) (barring the use of the "fruit" of the government's illegal actions).

35. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (extending exclusionary rule to the states as an essential part of the Fourth Amendment).

36. 372 U.S. 335 (1963) (extending right to counsel to felony defendants in state proceedings).

37. *See* Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972) (extending right to counsel to misdemeanor cases); United States v. Wade, 388 U.S. 218, 237 (1967) (extending right to counsel to post-indictment line-ups); Miranda, 384 U.S. at 444–45; Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (extending right to counsel to uncharged suspect); White v. Maryland, 373 U.S. 59, 60 (1963) (extending right to counsel to preliminary hearings); Douglas v. California, 372 U.S. 353, 357–58 (1963) (extending right to counsel to direct appeals).

38. *See generally* Taylor-Thompson, *Alternating Visions*, *supra* note 10, at 2425–29.

involved zealously providing a voice to a client who might otherwise suffer at the hands of the government in the prosecution's rush to convict.

Forty years after the Warren Court's pivotal rulings, the defender's individualized role remains central.[39] A particular set of contingent circumstances may help to explain the role's vitality. Given the public's current acceptance of—or perhaps thirst for—some measure of harsh treatment for offenders within the criminal justice system, a defender must maintain a fierce commitment to her client. That commitment cannot be overstated.[40] Catastrophically harsh sentencing schemes—cloaked in catchy rhetoric like "Three Strikes and You're Out"[41]—routinely catapult the clients whom defenders represent into fights for their lives. Once reserved for a limited number of clients who faced charges of first-degree murder, the overwhelming majority of clients in defender offices now face the prospect of mandatory prison terms.[42] Such cases increase investigation and preparation time, particularly if the case will proceed to trial. Indeed, since prosecutors will often only agree to settle a case if the accused accepts a mandatory sentence, defenders find themselves advising against guilty pleas and counseling their clients to take a risk at trial instead.[43] The picture that emerges is one in which the policies of the larger system steer defenders toward an even more aggressive and singular adherence to individualized representation.

This picture has other unexpected dimensions. The practice of defender offices has now been complicated by law enforcement efforts to target "quality-of-life"[44] offenses. Although the justice system categorically defines such cases as misdemeanors, these supposedly less serious cases routinely demand as much effort from the defender as more serious felony counts. Quality-of-life

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39. *See* Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999).

40. *See generally* Babcock, *supra* note 29; Ogletree, *Beyond Justifications*, *supra* note 29; Sadiq Reza, *Religion and the Public Defender*, 26 FORDHAM URB. L.J. 1051 (1999); Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000).

41. Career Criminal Punishment Act, CAL. PENAL CODE § 667 (West 2003); *see also* Lockyer v. Andrade, 123 S. Ct. 1166 (2003); Ewing v. California, 123 S. Ct. 1179 (2003).

42. *See, e.g.*, Charles J. Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 85 (1995) (describing impact of mandatory minimum sentencing on federal defender practice); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 13, 14 (1994).

43. *See, e.g.*, Renee Harrison, *Representing Defendants in Domestic Violence Prosecutions: Interview with a Public Defender*, 11 J. CONTEMP. LEGAL ISSUES 63, 66 (2000).

44. This category of offenses generally refers to misdemeanor or low-level violations that are deemed to disrupt the general order in a jurisdiction. Typical offenses are turnstile jumping, aggressive panhandling, and public drinking. *See generally* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); *see also* David Rohde, *Decline Is Seen in Legal Help for City's Poor: Changes to Improve Aid Worsened It, Panel Says*, N.Y. TIMES, Aug. 26, 1998, at B1 (describing report citing cuts in funding to Legal Aid and increased prosecution of quality-of-life crimes as causes of decreased quality of representation provided by the Legal Aid Society).

campaigns have swept large numbers of individuals with mental health and substance abuse problems into the criminal justice system.[45] Representing these individuals fairly and effectively often means stabilizing them sufficiently to enable them to make judgments about their cases. Defenders frequently need to locate and put in place treatment regimens for a client during the pre-trial period to provide her with the necessary support to make basic decisions about her case. In a system that all too often has failed to address the individual's problems in the first place,[46] arranging such treatment is no small undertaking. Still, regardless of whether the defender office principally tackles felony cases, misdemeanors, or some combination of these categories, the complexity of these cases demands a studied focus on the individual.[47]

Despite the significance of this role, some jurisdictions fail to live up to the expectations and promise of the Warren Court's vision. Many jurisdictions today do not even have public defender offices.[48] Just as troubling, these jurisdictions often fail to have a systematic appointment process for lawyers to defend the indigent accused. Instead, they rely on *ad hoc* appointments that aggravate ineffective lawyering.[49] When we examine those jurisdictions that actually have public defender offices, the norm is that they are underfunded, overloaded, and incapable of providing anything that approaches what either the Warren Court envisioned, or more importantly, what a client commonly expects from her lawyer.[50] These deficiencies remain real and far too common.

Still, notwithstanding the considerable challenges, some defender offices have gained stellar reputations for the quality of service that they deliver to the indigent accused.[51] These offices' practices tend to be premised on an indivi-

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45. *See, e.g.*, Harcourt, *supra* note 44, at 297.

46. *See generally* Marnie E. Rice, *The Treatment of Mentally Disordered Offenders*, 3 PSYCHOL. PUB. POL'Y. & L. 126 (1997).

47. *See* Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000).

48. *See, e.g.*, Adam Liptak, *County Says It's Too Poor to Defend the Poor*, N.Y. TIMES, Apr. 15, 2003, at A1 (discussing suit against county in Mississippi to provide indigent defense services).

49. *See* Richard Klein & Robert Spangenberg, *The Indigent Defense Crisis*, 1993 A.B.A. SEC. CRIM. JUST. REP. 3.

50. In Louisiana, a lawyer with the Orleans Indigent Defense Program represented 418 clients charged with felonies in a period of seven months, leading one trial judge to remark, "Not even a lawyer with an 'S' on his chest could effectively handle this [caseload]." State v. Peart, 621 So. 2d 780, 789 (La. 1993), *quoted in* Klein & Spangenberg, *supra* note 49, at 1. In that same jurisdiction, the defender office had been particularly aggressive in its defense of clients, much to the chagrin of the local prosecutor's office. But since the defender office relied on fees from traffic tickets for almost all of its budget, *see* Klein & Spangenberg, *supra* note 49, at 8, the District Attorney's office was able to shut down the defender office by instructing the police to stop writing tickets. Louisiana offers but one example of the crisis conditions under which lawyers fight to protect their clients' liberty and lives.

51. *See* Clarke, *supra* note 25, at 448–54 (describing the innovative programs at the Neighborhood Defender Service of Harlem, the Bronx Defenders, and the Public Defender Service for the District of Columbia); Taylor-Thompson, *Tuning Up Gideon's Trumpet*, *supra* note 31, at 1500 (listing the Public Defender for the District of Columbia, the Seattle Defender Association,

dualized vision. The heightened level of indigent defense practice that these offices exemplify flows directly from their choice to inculcate, as a value, the commitment to learning the circumstances of a client's life which might have contributed to her involvement in the criminal justice system.[52] Discovering as much as possible, with the client's help and consent, about her background better enables the defender to bring the client's experiences to life in a context that would otherwise silence the client's voice.[53] These offices do not neglect the responsibility to investigate and marshal facts in the client's defense, but they also choose to gather more substantive information about their client to facilitate access to more comprehensive services that address her broader needs.

Treating a client as an individual rather than a personification of her charge drives this form of representation. Holistic advocacy or "whole-client" representation recognizes that working effectively with the client in advancing her goals and preventing future involvement with the criminal justice system requires assistance and counseling that extends beyond fact-specific courtroom advocacy.[54] The lawyer's focus in representation widens to include the client's condition at the time of her engagement with the criminal justice system in addition to the legal parameters of the case.[55]

This expanded view of representation does not require the lawyer to become all things to each client. Some of the client's needs may reach well beyond the defender's area of expertise. But this form of advocacy does push defenders to collaborate with other professionals to address each client's needs comprehensively. For example, lawyers might collaborate with social workers, job counselors, or mental health professionals in attempting to understand and address the larger problems that their clients face. Resolution of these problems often has instrumental advantages: stabilizing the individual's most pressing problems can provide a client with the necessary space and calm to make reasoned decisions about her current legal case. As importantly, tackling the issues that may have contributed to the individual's criminal involvement might help her remain out of trouble and reintegrate successfully into her family and community.

The traditional focus on the client's current legal predicament has not now become either unnecessary or useless. But this venerable approach may no longer, by itself, produce sufficiently favorable results to support or enhance the

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the Neighborhood Defender Service of Harlem, and the Bronx Defenders as among the offices that have gained such reputations).

52. *See, e.g.*, Gerald P. López, *An Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C.R.-C.L. L. REV. 315 (1996); Ogletree, *Beyond Justifications*, *supra* note 29; *see generally* DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT CENTERED APPROACH (1991); Robert Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

53. *See* Smith, *supra* note 40.

54. *See* Clarke, *supra* note 25, at 427–30 (grounding holistic advocacy in the lawyer's counseling function).

55. *Id.* at 429.

interests of the indigent accused. Ardent defenders of this inherited tradition may concede that a singular concentration on an individual criminal case may have little impact—or possibly even a negative effect—on the larger legal, political, and social environment in which clients maneuver. But they will likely accept these shortcomings as tolerable limitations on an otherwise important model. Those who have begun to question the choice to rely on this vision of practice to the exclusion of all other strategies counter that defenders may need to add broader weapons to their arsenal to provide more comprehensive service to their clients in today's environment. Before choosing to engage other strategies, though, defenders will need to examine whether they are willing to push beyond the comfort zone of tradition to play a role outside of the courtroom.

2. *Defenders' Invisibility*

For better or worse, defenders often perceive themselves as outsiders in the justice system. The individuals who dedicate themselves to public defender practice often choose this path in part because of a certain degree of irreverence and discomfort with authority.[56] They treasure being able to win a hard fought battle against all odds, relying not on outside help, but instead on their own ingenuity.[57] Of course, seeing themselves as underdogs in an uneven battle does not inexorably lead defenders to shun allies. But more often than not, it defines and delineates a mode of practice that prides itself on independence and finds less value in working with others.[58]

Political realities have contributed to this isolation. Defender offices have all too frequently found themselves under siege from external sources. In the past two decades, defenders have struggled to survive various budget crises that occurred in large part due to the ease with which defenders could be made the scapegoat for crime. Somewhat counter-intuitively, defenders and their offices have encountered strong criticism for their *contribution* to the crime problem: the very representation of individuals charged with crimes has been pitched as the crux of the problem. Defenders have often found themselves locked in a battle for their very existence with few allies outside of the defender community. They have not been able to depend on support from the public when funding authorities have routinely pit defenders and their clients against the "deserving" poor for a limited fiscal pie.[59] Such confrontations have tended to position

56. *See generally* Randy Bellows, *Notes of a Public Defender*, *in* PHILIP B. HEYMANN & LANCE LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES 69 (1988); JAMES KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE? (1983); Babcock, *supra* note 29.

57. *See* Babcock, *supra* note 29, at 178 ("The [e]gotist's [r]eason" for defending the guilty is that "winning, ah winning has great significance because the cards are stacked for the prosecutor.").

58. *See generally* KUNEN, *supra* note 56.

59. *See, e.g.*, John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1219 (1993–1994) (observing that since the public does not even allocate money to its deserving

defenders on the losing end of the public relations and political battle.[60] Thus, the defense of the accused that the United States Supreme Court and the general public[61] had once championed as a symbol of liberty has with increasing frequency been held up for public scorn as an example of what is wrong with the system: it coddles criminals.

Defenders have attempted to rise above such accusations. Rather than openly fighting back in their own defense, defenders have opted to continue representing clients zealously within the limitations imposed by this environment. And in so doing, they have embraced a degree of invisibility.[62] Silence in the face of attack can at times be prudent, particularly if open confrontation will result in greater losses. But the impact of this choice has been that defenders have ceded control of the battleground and policy debate to those whose interests tend to diverge significantly from defenders and their clients.

What then has motivated defenders to position themselves below the political radar screen? Their choice has roots that predate the retributive push in the 1980s and 1990s. Public scrutiny of the defense function has always seemed fraught with peril. Most defenders have perceived that their message of defense for all—including the guilty—would only have a limited appeal: "It might sell to left-leaning folks, but could not possibly appeal to a broader audience" became an all-too-common claim. Defenders set out to exemplify by their actions, if not their public words, the promise of the Sixth Amendment. They stood by the accused in her battle against the state, protecting her from abuse at the hands of state officials and unjust punishment. But putting tidy constitutional justifications aside, the public too often perceived defenders as unleashing back onto the streets the very individuals whom the public considered dangerous. Since defenders could never imagine standing before the public and conceding either the dangerousness of their clients or the need to remove them from civilized society, defenders understandably expected that the public would likely reject defenders' claims and actions as, at best, the naive behavior of bleeding-heart liberals, or worse, the amoral conduct of professionals who should know better.

So, defender offices more often than not have made a conscious decision to use obscurity as a shield.[63] Lack of visibility in the press and in communities

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poor, it is "unlikely to rally behind the protection of those it perceives are preying upon it").

60. *See, e.g.*, Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for all Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 85 (1993) (discussing the reasons that the great majority of public defender systems are understaffed and underfunded and describing attempts by defenders to increase public financial support for their offices).

61. *Gideon v. Wainwright* has been hailed as one of the Warren Court's most popular decisions. *See* Yale Kamisar, *The Gideon Case 25 Years Later*, N.Y. TIMES, Mar. 16, 1988, at A27.

62. *See* LISA J. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 62–70 (1987) (discussing the practice and experience of the Cook County Public Defender in Illinois).

63. *Id.* at 72–73.

seemed a reasonable response to the anticipated backlash against defenders' work. For example, one defender justified this choice in this way:

> [W]e feel that the more obscurity we have the more likely it is that we will be permitted to do what we think we ought to do. Basically, I think the public and the Board of Supervisors do not look on us with favor because, to be oversimplified about it, I think they have a kind of gut reaction that we are employed to raise impediments in the way of the conviction of bad people. . . . So we have always felt that we will stay out of the press. We have never called, to my knowledge, in all my years in the office, a press conference.[64]

Defenders did not trumpet their successes. The more they focused on winning, the more vulnerable they seemed. Boasting about an acquittal seemed impolitic given that the public often clamored for convictions of individuals who had already been condemned in the media.[65] Defenders feared that if the general public perceived them as winning trials too frequently, the public would hold defenders accountable, rather than perceiving that the prosecutor bore responsibility for an improper prosecution.

The choice to stay out of the limelight in individual cases then had a spillover effect on broader policy matters. Defender offices rarely staffed public relations positions or employed a spokesperson to explain the importance of their work to the general public or to articulate policy stands.[66] This choice can be traced to two possible sources. The first, as mentioned, may be that defenders suspected that the public would not be receptive to their position, and so they chose not to engage the debate unless forced to react to a position taken by their institutional adversaries. The second source of this refusal to engage in debate seems to be some defenders' view that media work and public relations efforts

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64. *Id.* at 73 (quoting defender from Alameda County, California).

65. This presumption of guilt based on the arrest itself led defenders to develop ways of questioning jurors in voir dire to unearth this bias. Particularly in high-profile cases that had received considerable media attention, one defense lawyer, Gaston Fairey, developed the following strategy to acknowledge and combat this presumption which he taught other defense lawyers at the National Criminal Defense College Trial Institute:

> How many times have we heard about a crime and when we open the newspaper and read that the police have arrested someone, we say, "Good. Glad they caught the guy." But imagine opening the paper and reading that they arrested someone you knew. You would likely say, "Oh no. I don't believe that. They're going to have to prove this to me." Well, that's how the presumption of innocence works—whether it's someone you know, like your friend, or someone you don't know at all, like my client.

66. In an unusual move at the time, the Public Defender for Cook County hired a public relations coordinator in 1988. There were considerable internal concerns about using the funds to hire a non-lawyer given the burden of cases and the view that the media and public relations concerns were at best peripheral to the "real" work being done in the office. Still, the Public Defender saw clearly that his efforts to improve the quality of the defense provided by his office were linked to the task of promoting public recognition that the defender office was an effective legal entity. Randolph N. Stone, *The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases*, 17 AM. J. TRIAL ADVOC. 205, 222 (1993).

were at best peripheral to the real work that demanded their resources, energy and time. Defenders had embraced a piecework approach to criminal justice issues, which was in one sense extraordinarily liberating. They could focus on critical questions of liberty, life, and death on a case-by-case basis with little distraction. Because they subordinated broader issues to the demands of an individual case, they permitted the larger policy debate to occur around them and without them. Their voices and unique perspectives on issues of crime and policy remained absent from public discussion.[67]

The political climate of the late 1980s and 1990s only reinforced this response.[68] Given the sort of anti-crime sentiment that has dominated political discourse and driven criminal justice policy-making, defenders have felt pushed into isolation.[69] Whether or not they raised their voices in political discourse, they could expect to be vilified, particularly by victims' rights advocates.[70] Defenders were routinely scapegoated for criminal justice failings and portrayed as part of the problem instead of as part of the solution. This zero tolerance of defense lawyers and their clients led to considerable funding hurdles in this period. Politicians reflexively used the latest crime as a platform for proclaiming the need for new draconian measures. Media horror stories about crime inundated the wire services and airwaves. Then, liberal politicians delivered a final blow. To attract a broader constituency, those who had once operated as the defenders' allies shifted to the right on crime, leaving defenders and their clients to suffer the effects.[71]

So, defender isolation not only has deep roots but in many ways seems an understandable response to attacks by the media and politicians. On an instrumental level, invisibility appeared to be a necessary precaution. On a more basic level—often unspoken outside of defender circles—defenders felt an allegiance to and affinity for their clients. Defenders and their clients circled the wagons

67. *See* We Interrupt This Message, *Soundbites and Cellblocks: Analysis of the Juvenile Justice Media Debate & A Case Study of California's Proposition 21*, at 7 (2001), *at* http://www.interrupt.org/pdfs/Sndbts&Cellblks.pdf (noting that in a comprehensive review of newspaper coverage over a fifteen month period from January 1, 1999 to March 21, 2000, legal defenders for youth were rarely quoted in articles that mentioned youth offenders or discussed juvenile justice policy).

68. *See* Taylor-Thompson, *Alternating Visions*, *supra* note 10, at 2430–31 (discussing the impact on defender offices of vocal and organized hostility in the 1980s and 1990s against those who committed crimes); Kathleen Sylvester, *Indigent Defense in Crisis: Strikes, Suits by Attorneys for Poor Are on the Rise*, NAT'L L. J., Sept. 26, 1983, at 10 (explaining that inadequate funding for indigent defense results from combination of government budget crises and fact that "defending the poor is not politically popular").

69. Taylor-Thompson, *Effective Assistance*, *supra* note 6, at 209.

70. *See, e.g.*, John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1219 (1994) (observing the reluctance of the general public to "rally behind the protection of those it perceives are preying upon it").

71. *See* Taylor-Thompson, *Alternating Visions*, *supra* note 10, at 2431 n.60 (discussing fact that defenders lost many of their traditional liberal allies in the early 1980s in the push to garner support from voters that embraced more conservative positions); Herbert W. Cheshire, *Staking Out the Crime Issue*, BUS. WK., Aug. 3, 1981, at 95.

and faced their attackers together. And, as in any battle, defenders understood the importance of not taking blows that one could avoid. This routinely translated into a decision not to fight larger battles in case victory might occur at the expense of an individual client. Thus, defenders eased into a reactive role, often saying as little as possible in public settings. Their comments were reserved for the courtroom.

But confining discussion to the individual case and individual courtroom has led to a surrendering of the debate about crime to those who can command media attention: law enforcement officials and political leaders who have built their careers on fighting crime. These actors have been free to play to cultural fears, often using sensational tactics as a way of pushing a retributive political agenda. In a culture in which mass media plays a central role in shaping public opinion and policy, refusing to play the media game comes at a high price. To the extent that the public perceives players as familiar actors in policy-making, they gain in legitimacy. The public expects to hear their positions and at least to consider their perspective on issues before adopting a view. As one might expect, a lack of recognition that comes from reduced public exposure can easily translate into a perceived lack of legitimacy which could undermine the work in which defenders engage.[72] While avoiding the limelight may have had some merit initially, the consistent failure to engage the broader criminal justice discussion has come back to haunt the defender. For defender offices themselves, silence in the face of attack has contributed to inadequate funding and case overload.[73] Given that defenders lack the support of a voting constituency—a principal source of leverage in the political arena—they have needed to align themselves with forces that can wield power in this environment. But consistently, defenders have chosen to make requests independently with little to offer in return and without real support in an environment that thrives on exchange relationships.

More importantly, defender silence may have hurt their clients. Revolutionary changes in the criminal law have taken place in the last decade. Defenders have seen firsthand the effects of shortsighted policy-making on their clients. Three-strikes and quality-of-life laws have played well in the media in part because a critical and knowledgeable voice in opposition has been raised infrequently and only after these laws have been implemented. Defenders' representation of clients has taught them the reality that lengthy sentences for less serious offenses do more harm than good. Defenders have witnessed the predictable cycle of under-funded mental health systems releasing individuals back into the community with inadequate treatment or support, only to have

72. *See* MCINTYRE, *supra* note 62, at 65; CHARLOTTE RYAN, PRIME TIME ACTIVISM: MEDIA STRATEGIES FOR GRASSROOTS ORGANIZING 217–18 (1991).

73. For fuller discussion of this point, see Taylor-Thompson, *Effective Assistance*, *supra* note 6, at 200–11 (discussing the need for chief defenders to reconceive their role in the legislative process to gain greater control over their budgets).

those individuals rearrested in the latest clean-up campaign. But without the benefit of defenders' experiences and insights, legislators and policy-makers who may have wanted to be fair have lacked the information they needed to develop just policies.

Still, choosing to take a more public role exposes the defender office to the reality that its views may not be welcomed by those in power. Even those without traditional forms of power—communities that are often treated as outsiders in the political system—may not necessarily share defenders' views on criminal justice issues or welcome their voices in the public debate. Defenders, consequently, need to think carefully about how they wish to engage in a more public role. As importantly, defenders must assess whether that public role can be grounded in collaborations with the communities from which their clients come.

3. *Perceptions of Communities*

Does common ground exist between defenders and their clients' communities? Defenders frequently (some would say reflexively) anticipate hostility in those communities. As a result, defenders, like others, draw lines of distinction. They tend to place tremendous stock in familiar categories such as victim and accused, seeing them as dichotomous groupings. The common instinct has been to see the communities from which their clients come in one-dimensional terms—as against the accused. Given the expectation of hostility, defenders as a whole remain unlikely to trust communities to share defenders' vision of what is just and fair.

Of course, the distrust runs both ways. Many residents of neighborhoods plagued by crime do perceive the work of defenders as releasing dangerous individuals back onto their streets. Since most defenders do not live in these neighborhoods,[74] their actions are considered all the more reckless and insensitive. What may once have been considered noble work within communities of color has now come to be regarded by some as dangerously misguided.[75] Indeed, some of the most vocal supporters of tough law enforcement have been residents of low-income communities of color.[76] Rather than being allies, they

74. *See, e.g.*, KUNEN, *supra* note 56, at 59 (noting that when Kunen and fellow defenders helped win the release of a client, "we didn't put him on *our* street").

75. A former student who interned at the Public Defender Service of the District of Columbia in 1992 described her encounter with community residents who had attended a trial to provide moral support to the victim in the case. The residents came to realize that the student worked for the public defender who was representing the accused. During a break in the trial, the spectators displayed open hostility toward her. They were dismayed that a young African American law student would choose to be a public defender and tried to engage her in dialogue on this matter. One elderly African American man asked her directly, "Why be a public defender? Can't you find a better cause?" (student journal on file with author).

76. *See, e.g.*, Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1772 (1992) ("At times, 'the black community' or an element thereof repudiates those who break the law and proclaims the distinctiveness and

offer the political right the opportunity to justify retributive policies as applauded by and appreciated in the very communities in which these laws will be enforced. This leads defenders to withdraw from engagement with residents of these communities even though their clients come from those same communities.

As importantly, many residents of low-income communities do not perceive a defender's role as extending beyond that of courtroom advocate. This is the role with which the public is familiar. Often, the sole contact that the public has with a defender is on the occasion when a court appoints a public defender to represent an individual in a pending court proceeding. In some instances, those interactions leave both clients and their families favorably impressed with the zeal with which defenders fight on behalf of their clients.[77] But in too many jurisdictions, clients and their families tend not to view the defender as an aggressive or especially effective voice in the courtroom. In a society that predicates value on cost, defenders will at times suffer from the perception that "you get what you pay for": the fact that the defender is free must mean that she cannot be that good. And, sadly, in some jurisdictions where defenders wrestle daily with case overload and lack sufficient time and training to perform their tasks as well as they would like, that public perception may have merit. Public distrust of defenders even in the performance of their traditional role may in those instances run deep.

But the depth of communities' distrust of defenders can be overstated. Community residents do not necessarily fall into an anti-crime camp or a pro-accused camp. These categories are often fluid, depending on the issue and the discussion. More than perhaps any other actor in the criminal justice system, defenders should recognize that walls of demarcation between themselves and the communities in which they operate—much like the lines between victim and accused—may be very permeable. Particularly since economically and racially subordinated communities tend to experience crime at higher rates and face a greater likelihood of detentions by the police, there may be opportunities to identify more common ground than might at first glance seem likely.

B. Thinking Beyond Convention

If defender offices and individual defenders are willing to think beyond convention, what might it mean to engage in a broader range of activities with any degree of expertise? While the individualized role would continue to figure centrally in the work of defenders, it would not necessarily remain the only

worthiness of those who do not."); Yawu Miller, *Muslims Play Key Role in Hub's Fight Against Drugs, Crime*, BAY ST. BANNER, Feb. 27, 1997, at 1 (noting the anti-crime efforts of black Muslims and grass roots groups in Boston).

77. *See* ROBERT HERMANN, ERIC SINGLE & JOHN BOSTON, COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA 137 (1977) (finding in interviews with defendants in the District of Columbia that they expressed a clear preference for the institutional defender, the Public Defender Service, over the individually-appointed lawyers from the Criminal Justice panel).

conception of the practice. Yet perhaps the least talked about, least examined, and least understood dimension of the defender's role involves the forms of advocacy that can occur outside the context of the courtroom and the individual case. What does it mean to attempt to incorporate "community-oriented" activities into the representation of clients? What forms might these activities take? At a minimum, one might imagine that such activities would mean learning about the physical community where defenders' clients reside or the experiences and traditions of individuals living in communities at the margins. This in itself could constitute an important step in beginning to understand the problems that their clients face.

Still, a community orientation might take defenders further. Perhaps defenders could engage the political, social and economic forces that all too often facilitate clients' entry into and exit from the criminal justice system. Learning about the political economy operating in their clients' neighborhood might offer defenders new insights into their clients' behavior and the range of choices available to clients. Defenders might discover a wider array of individuals, groups, and organizations with whom they can collaborate in advancing their clients' goals. They might begin to rethink not just the problems that their clients encounter, but what strategies—both familiar and unfamiliar—lawyers might pursue. In exploring these possibilities, it would seem important to examine the degree to which the office design encourages, discourages or impedes efforts to incorporate these other dimensions into their practice. And as defenders push themselves beyond the borders of the familiar, an equally important ambition would be to evaluate systematically whether it makes any sense to engage in these sorts of activities.

1. The Task of Redefining the Defender's Mission

Given the considerable pull of the familiar and the inherent difficulty of breaking routines, the fact that a growing number of defender offices have chosen to embrace community-orientations is remarkable. Within these offices, rather than being perceived as a dilution of the duty to clients, working with communities is seen as central to defenders' work.[78] The ideology that motivates defenders to understand and unearth the circumstances that have propelled their clients into the criminal justice system seems similarly to push at least some defenders to work outside the confines of the individual case in addressing those contributing circumstances. These defenders have willingly chosen to become systematic and careful social observers. As self-taught anthropologists of sorts, they make certain to observe as much about their clients' communities as possible, in order to understand in some real depth their individual client's background. But in so doing, they have chosen to reach out, work with others

78. *See* Clarke, *supra* note 25.

and to confront head-on the task of formulating a role for themselves and their offices that may stretch them beyond the conventional.

Obviously, such a process of reconceptualization is one thing when beginning from scratch and quite another when considering how to change an existing office. Opening an office with a new perspective means that from the start defenders can confront the question of the office's identity, cultivate goals, and take on responsibilities that reflect those goals. The process still has inherent challenges, but these seem infinitely more manageable than the difficulties posed when working with an existing outfit. Thinking differently about practice entails asking staff to retool, often fundamentally. Individual defenders typically have grown comfortable with what they do. Even when they find their work frustrating, it at least remains familiar, perhaps even second-nature. Like everyone else, public defenders define their professional identity—their claims to knowledge, respect, and self-worth—in terms consonant with the status quo conception of their practice. So redefining how defenders frame and pursue their work can be enormously unsettling.

Still, what might be involved in redefining a mission? Defenders rarely engage in the practice of developing an overriding vision of what they do. They operate under a mandate to provide counsel to clients that is shaped largely by ethical and constitutional concepts. But in breathing life into these concepts, defenders have learned to define their work as client-centered and client-driven. Their definitions have not developed in a vacuum. Defenders have had to figure out how to respond to the demands of the criminal justice system, particularly how to handle overwhelmingly large numbers of indigent clients. They have learned to adapt themselves to whatever the system as a whole yields. But defenders have more affirmatively chosen to frame the problems they will address by being sensitive to the demands of the system and yet not entirely acquiescing in what others in the criminal justice system define as their role and their practice.

Being alert to other issues that affect their clients may begin to broaden possible remedies and widen the range of allies available to engage in the fight for a fair system. Liberated by such an outlook, defenders might find themselves asking quite different questions about the nature of their practice and the scope of their work. For example, curiosity about clients and their communities can sometimes stem from the simple desire to connect. But what begins as an interest in connecting may evolve into something considerably more profound. Defenders may encounter other problem-solvers—lay and professional—whose vision of their own "practices" (as parents, community activists, social workers, shopkeepers, or ministers) can inspire defenders to view their own roles in a new light. For the first time, they come to understand new ideas about possible strategies, possible collaborations, and possible ways of measuring the impact of their own efforts. Such inspiration may then, in turn, raise questions about how the office is organized and how it might be better designed to accommodate a newly conceived idea of public defender work.

Still, defenders themselves may put up the strongest resistance. Given the pull of customary practices and the demands inherent in them, defenders may be reluctant to add other responsibilities. Thus, asking the defender to consider expanding her role seems at best inconsistent with the other demands that we typically place on her.[79] Moreover, those with whom, and for whom, defenders typically work may not welcome change. Other players in the criminal justice system (from clients to prosecutors to judges) and the public at large may have more than a little to say about just how easily public defenders can redefine their mandate and alter their practices and office. For at least four decades, the individualized vision of practice has at once guided defenders' activities and shaped public expectations. Given that history, the system itself has come to assume that the defender will perform a particular role within prescribed and generally understood parameters. To the extent that the public or the criminal justice system expresses concern about the defender's performance or role, those recommendations for improvement tend to indicate a need to make adjustments to perfect the traditional function rather than urging innovations that might change the nature of the role altogether. Making radical role alterations can threaten not only the defender's identity, but it potentially threatens the ways in which every actor in the system conducts business. In the face of such obstacles, it seems quite understandable that only a few offices have chosen to begin the process of retooling.

2. *Working Collaboratively with Individuals and Communities*

At a minimum, retooling would involve reconsidering the strategic choice to act as an isolated entity in the criminal justice system. But, defenders' commitment to independence may reflect a genuine fear of being co-opted in any collaborative enterprise. Too few actors in the criminal justice system actively work to protect and promote the interest of the accused. Defenders embrace—and ethical rules demand[80]—a singular devotion to the client's goals as a means of protecting their clients against any dilution of zeal in representation. Choosing to consider other perspectives is seen as allowing other interests to trump client concerns, leading to an unacceptable result: abandonment of the client. Thus, in the face of such obstacles and concerns, it should not be at all surprising that public defenders, like the rest of us, may not be anxious to rethink what they do.

The choice to consider interests other than the client's and to consult with the community raises an enormous policy question. Defenders must consider to what extent community views can inform the defender's mission and responsibilities. For example, defenders worry that in a contest between the interests of

79. *See* Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999).

80. *See* MODEL RULES OF PROF'L CONDUCT (2002); MODEL CODE OF PROF'L RESPONSIBILITY (1980).

a neighborhood and the needs of the accused, the neighborhood's concerns will always prevail. If a community-oriented defender office seeks input about the scope of its services from the neighborhood in which it will operate, won't community residents attempt to intrude on the types of services the office provides or, worse still, attempt to restrict the sorts of cases that the defender office will handle? Particularly if a neighborhood is experiencing problems with a particular type of crime, will residents be able to accept that the defender's role is to defend individuals accused of those precise crimes about which residents worry most? The concern is that in any effort to involve the community or to become more community-oriented, the community will gain control of the defender's work and in the process divert it from its mission to represent even the most despised members of a community.

But defenders need not presuppose that all involvement with communities will assume this form. Defenders may need to understand that community-oriented organizations can run the gamut between community-sensitive models (where organizations consult with communities and develop feedback mechanisms for discussion) and community-driven models (where the organization may choose to let the community dictate the precise methods and scope of its operations). It will be critical for the defender office interested in community interaction to have a clear understanding of the boundaries of community interaction. Rejecting community involvement out of fear that such interaction will inevitably lead the office to cede control to community residents seems an overreaction. After all, defenders have accepted and placed value on community participation in individual cases. Perhaps more than any other actors in the criminal justice system, defenders recognize the overlap between an individual's involvement in the justice system and the absence of sufficient social structures that can provide assistance and support. On those occasions when defenders can arrange for such backing, they often welcome and invite community input in individual cases. Defenders have found the assistance of church members and community outreach groups to be of enormous assistance when trying to persuade a court to consider an alternative to incarceration. Thus, defenders have experienced the reality that community interaction need not devolve into community control of the defense function. Community interaction can instead develop partnerships in furthering the needs of the accused, the safety of the community, and the mission of the office.

Of course, community involvement implicates more than the office mission. It may threaten the defender's very identity. Most lawyers have developed a level of expertise in the legal arena in which they operate. Shortly after beginning practice, they acquire skills on how to try a case and how to judge the worth of a case, and they develop a degree of comfort with the traditional components involved in litigation. For some, their role in defending clients becomes impossible to separate from their own personal and professional

identities.[81] To a considerable extent, the role that lawyers, like other professionals, adopt reflects their view of how capable they consider themselves in certain contexts. For better or worse, lawyers often believe that work that seems non-legal is beneath or beyond them. And perhaps still more believe that understanding their clients' lives and neighborhoods in any real depth must be someone else's responsibility—say a social worker or an investigator. So moving to include other perspectives may involve a fundamental reconsideration not only of what defenders do, but of who they are.

3. Political and Structural Implications of Community-Oriented Defense Strategies

The decision to expand the defender office's function or to re-orient its advocacy cannot be undertaken lightly. After all, the defender office, as a public institution, operates pursuant to a formal mandate. Although the parameters of indigent defense representation may seem broad, legislators and other funding agencies have quite effective ways of setting expectations and then holding public entities accountable. Budget allocations offer perhaps the most concrete evidence of what at least the funding authorities deem to be a defender office's purpose. They define and measure performance according to the defender office's ability to represent, often at low cost, a set number of cases during the fiscal year. Consequently, efficiency tends to take precedence over effectiveness in representation. This quantitative oversight of the defender's role means that defenders who are opting to make a substantive change in their role will need not only to identify the value of a community orientation but must also be prepared to provide the various audiences with which they interact a plausible rationale for this effort.[82]

This begins by establishing legitimacy and support for the new orientation. Public organizations are defined by mandates that typically involve addressing a particular problem. In this case the problem involves representing an indigent client facing a given criminal charge. Funding authorities do not eagerly embrace the idea that they should provide support even in the context of traditional defense work,[83] as seen in massive underfunding of defender offices' core functions. Making the case for expanding beyond the basics may prove particularly challenging, but the traditional singular focus may be at odds with the variable needs of the individual who faces that charge. The precise contours of the client's legal case may constitute but one small part of the many issues

81. *See generally* Babcock, *supra* note 29.

82. *See generally* MARK H. MOORE, CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT (1995) (discussing the need for public sector managers to focus managerial attention upward toward defining the political value of the organizations' efforts and outward toward defining the public value of the effort).

83. *See* Klein & Spangenberg, *supra* note 49, at 1; Spangenberg & Schwartz, *supra* note 42, at 13 (noting that limited criminal justice resources have been used for law enforcement and corrections rather than public defense).

that the client will need to address, sometimes even before she can assist in her own defense. By setting categorical boundaries strictly aligned with the legal case, the defender office and the criminal justice system as a whole may miss the opportunity to manage the problem that brought the client to the attention of law enforcement officials.

Once the defender begins to explore a community orientation in individual cases, it becomes apparent that she must reach out and build ties with the people, activists, support groups, and service providers in her clients' communities. Creatively engaging those connections may move the defender toward developing a broader range of support. The more community members have the opportunity to see the defender as providing a service that has meaning for more than just the accused and that can make a difference in how they experience justice in their neighborhoods, the more likely those community members will entertain the notion that the defender office has value.

Who benefits from this community orientation? The defender's individual clients could benefit directly. To the extent that the defender office has established contacts in the community that might furnish support and services specifically geared toward the needs of the offender, such connections would have an obvious impact. Similarly, collaborative efforts on broader criminal justice issues affecting the community could extend benefits to clients and residents of those communities. For example, if the defender office chooses to collaborate in the development of a community oversight board for police misconduct,[84] such involvement might offer residents a vehicle to maintain some level of control over police conduct and a legal channel through which to air concerns. When the defender office takes on projects with community partners, a broader spectrum of the community might come into contact with the defender office and might ultimately support its efforts.

Even if the defender office determines that it possesses not only the will but the capacity to engage in community work, political concerns may remain. Whenever a publicly-funded entity attempts to transform its mission, resistance is predictable. Operating outside or beyond a mandate may come with costs. Certain constituencies have expectations of defenders and defender offices that may affect the defender's choice to move into a new arena. If defenders are engaging in what appears to be extra-legal activities, these constituencies might object. But the task facing the defender office is to begin to develop relations with its broader constituency in small steps at first and then to build on those successes.

The next section explores how one defender office undertook this challenge and made the decision to push its boundaries toward a more community-oriented practice.

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84. In 2001, the federal defender in Las Vegas, Nevada worked with local government officials to establish such an oversight board following citizen complaints of police abuse and misconduct. Interview with Franny Forsman, Federal Defender of Las Vegas (Nov. 1, 2001).

II.
COMMUNITY-ORIENTED PUBLIC DEFENSE IN PRACTICE: A CASE STUDY

A. Seattle Defender Association's Racial Disparity Project

In 1999, the Seattle Defender Association applied for and received a $146,000 grant from the U.S. Department of Justice to establish a Racial Disparity Project (RDP). With this seed money, the RDP set as its admittedly bold ambition the reduction of racial disparity and racial bias in the criminal justice system. To meet this objective, the RDP identified three strategies: client representation, training of defenders and other justice system professionals about ways to raise and address these issues, and public education. The project grew out of the Defender Association's view that defenders could play a role in shaping policy and in advocating for their clients in a broader political context by working closely with communities.

The work of the RDP differs from conventional public defender work in fundamental ways. The RDP has chosen to initiate activities around the issue of race in the criminal justice system rather than simply reacting to problems as they occur. This means specifically selecting cases that have racial implications, using those cases as opportunities to educate judges, the public and the office about the role of race in the system. RDP lawyers have not abandoned their commitment to individual representation. On the contrary, the RDP team's focus on issues of race has heightened their awareness of the racial dynamics involved in, for example, a police officer's decision to stop or detain an individual, and has influenced the team's advocacy on behalf of individual clients. But perhaps the most visible difference in approach has been the RDP team's concerted and organized effort to form and maintain alliances on criminal justice issues. Whether the team is developing partnerships with community groups representing the same constituency as the Defender Association or working to maintain open lines of communication with other players in the criminal justice system, the RDP team embraces collaborative work to address racial disparity.

1. The Office's Activist Origins

The Defender Association's broader political orientation has deep roots in its past. The Defender Association began in 1969 as a small non-profit corporation founded by the federal Model Cities Program.[85] Seattle had experienced much of the same social unrest that erupted throughout the country in the late 1960s. In the midst of this upheaval, the Model Cities program held weekly meetings for Seattle citizens focused on education, health and public

85. The Defender Association, Thirtieth Anniversary Report 1969–1999 1 (1999) (on file with author) [hereinafter Anniversary Report].

safety. Many of those citizens interested in public safety sought to develop a plan for an independent public defender office patterned after the San Diego Federal Defender office. They then established that the office's principal mandate was to represent indigent clients. But they also insisted that the office commit itself to the practice of law reform by working both to remove procedural roadblocks to justice and to change practices that led to unfairness in the system.[86] A coalition that included the Mayor, the County Executive, the County Bar Association and the Urban League made appointments to the Defender Association's Board of Directors in the spring of 1969.

One of the office's first legal acts marked its initial foray into the political arena. Early in 1970, a protest at the federal courthouse in Seattle ended with seventy-five arrests by the police. Not only did the new defender office receive more than enough clients, it used this opportunity to forge a coalition with other community activists. The Defender Association, along with representatives of the Lawyers Committee for Civil Rights Under Law, the American Civil Liberties Union, and the Medical Committee for Human Rights, held a press conference in which these organizations criticized the conduct of the police, highlighting the instances of abuse. This mix of politics and law characterized the Defender Association's practice over the next few years as defenders set up offices on college campuses to gather information about and document instances of police abuse during political demonstrations. In this period, the office hired a full complement of staff and successfully represented individuals charged in the political and social unrest that continued to occur in the Seattle area in that decade.

The Defender Association's innovative practice throughout its thirty-four year history has earned the office a reputation for setting the standard for criminal defense.[87] It established a pre-sentencing counseling unit staffed primarily by ex-offenders in 1972 that ultimately evolved into a professional social work and dispositional planning unit. The office pioneered a "holistic" approach to juvenile advocacy that treats the client as a whole person rather than as the personification of her charge. To that end, it collaborated with Columbia Legal Services and the Washington Defender Association to form TeamChild, an independent office that seeks to assist juveniles charged in Juvenile Court with their education and other non-criminal needs.[88]

Individualized criminal defense necessarily took precedence over other political issues in the 1980s and early 1990s. Seattle defenders and their clients encountered a virtual revolution in criminal law. Clients faced charges growing

86. *Id.* at 2.

87. *See* CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 306 (1978) (recognizing the office's use of investigators, social workers and senior supervisors as providing comprehensive and professional service to clients).

88. TeamChild was founded on the premise that many children "can be diverted from delinquency or other trouble if their basic needs are met." TeamChild web site, *at* http://www.teamchild.org (last visited Sept. 19, 2003).

out of new statutes; they could expect to receive longer penalties due to the onslaught of mandatory sentencing schemes such as three-strikes laws and "sexually violent predator" laws;[89] and their adolescent clients faced increasing incidences of prosecution in adult court.[90] Coinciding with these fundamental changes in the practice of criminal law—or perhaps in response to the media attention to crime that may have led to these initiatives—the public became more fearful of crime and less receptive to appeals for leniency. Jurors and judges mirrored this retributive response. Thus, gaining acquittals or otherwise favorable results for clients posed greater challenges during this period than in the office's previous history.

Still, the Defender Association embraced a broader mission. In representing individual clients, defenders recognized more than ever the importance of seeing their clients as whole human beings and conveying a complete picture to decision makers in the courtroom who might otherwise attempt to objectify them.[91] This meant working with social work staff, families, and individuals in their clients' neighborhoods to compile information that might help a fact-finder empathize with their clients through a fuller understanding of their clients' circumstances and motivations. Even the office's external advocacy agenda focused on improving the quality of representation that could be provided to the individual accused. The Defender Association worked with courts, other defenders and legislators to advance the idea of workload standards for defenders both in Seattle and nationally.[92] Their advocacy helped to produce the Seattle and King County Bar Association standards, which included individual lawyer annual caseload ceilings.[93] The Defender Association also worked to ensure the adoption of caseload standards in its contract with the City of Seattle[94] and the provision of comprehensive and consistent training to all lawyers charged with the defense of the accused.

The representation of an ever-growing number of clients offered defenders a unique perspective. They were positioned to identify issues that recurred over time. One issue that stared defenders in the face was the racial disparity

89. WASH. REV. CODE ANN. § 71.09.010–.09.350. (West 2002); *see also* Seling v. Young, 531 U.S. 250, 260 (2001) (upholding Washington's sexual predator laws).

90. Anniversary Report, *supra* note 85, at 9.

91. *See e.g.*, Ogletree, *Beyond Justifications*, *supra* note 29; Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1287 (2000).

92. In 1983, the Defender Association helped to found the Washington Defender Association (WDA), a membership and support group for defenders across the state of Washington. The Defender Association director has served as its president since its founding. The WDA developed a set of standards which were endorsed by the Washington State Bar Association Board of Governors in 1985. That same year, the American Bar Association House of Delegates endorsed a set of defender caseload standards based largely on recommendations by the Defender Association. *See Report to the House of Delegates*, 1985 A.B.A. SEC. CRIM. JUST. REP. 1, *at* http://www.sado.org/misc/nladap2.html.

93. *See* http://www.defensenet.org; *see also* Anniversary Report, *supra* note 85, at 4.

94. Interview with Bob Boruchowitz, the Defender Association (Sept. 4, 2003).

involved in the decisions to arrest and prosecute. Staggering numbers of people of color faced charges in the criminal justice system. Like most defenders, the Seattle lawyers raised matters of race in the context of individual cases where appropriate. But the sheer volume of individuals needing representation overwhelmed the office, often leaving insufficient time to focus on attacking this problem in any systematic or sustained manner.

2. Framing the Problem

Still, the Defender Association's concern over the racial dynamics in the criminal justice system continued to mount. More often than not, clients facing criminal charges were people of color. But the individualized strategy, in which defenders raised race in the context of a given case, only allowed defenders to react to, rather than prevent, race-based stops and arrests of their clients. Even on those occasions when defenders managed to persuade a court to suppress evidence or to convince a prosecutor to dismiss charges in an individual case, these successes predictably failed to stem the tide of cases flowing into the system. The Defender Association recognized a need to do more and chose to act. In 1999, when the office sought and received a grant from the U.S. Department of Justice to develop a project aimed at uncovering and addressing racial disparity in the criminal justice system, it gained the resources to develop a systemic attack.

The problem was that the defenders were unsure where to begin. Framing the problem and constructing a strategy offered entirely new challenges. In an individual case, the strategies that defenders would adopt were well known. But the boundaries of the systemic problem that they were planning to address seemed less clear. And the depth and breadth of this problem seemed almost limitless. The defenders conceded that while they possessed some experience with issues of race in the context of the criminal justice system, they could not on their own establish priorities that would ensure their efforts had an impact on the intended constituency.

So they sought help. As a first step, they chose to consult with community organizations in Seattle. This choice in itself marked a radical departure from strategies that defenders typically employ. Instead of relying on their own judgment about the issues of greatest concern to the communities that they represented, they chose to inquire. The defenders did not reflexively assume that the community would express opposition to issues that the defender might choose to pursue. Rather, community residents were seen as critical partners in this venture because they had expertise that the defenders lacked. Because these community residents experienced the impact of criminal justice policies, they could offer insights about priorities. Of course, not only might communities' evaluation of issues differ from those of defenders, but defenders were not confident that criminal justice issues would rise to the top of communities' own list of priorities. Concerns about the operation of the criminal justice system

may have been less pressing than, for example, economic issues confronting the residents of Seattle's low-income neighborhoods.[95] Interestingly, the Defender Association discovered that residents in certain low-income communities perceived real links between economic issues and criminal justice concerns.

The Central Area Motivation Program (CAMP) offered the defenders their starting place. CAMP, a Seattle social service organization, had conducted a survey of its constituents regarding major barriers to success in obtaining and retaining jobs. The first two issues mentioned were expected: a lack of housing and day-care for children. But the survey identified a third impediment that incorporated a criminal justice issue: lack of driver's license privileges.[96] Washington State law mandates the suspension of a person's license if she fails to pay the fines assessed for traffic violations.[97] Anyone who subsequently drives can be charged with a misdemeanor offense: Driving While License Suspended (DWLS) in the third degree.

The issues of racial and economic disparity were stark. The defenders discovered that enforcement of this particular law had a disparate impact on low-income communities of color. Although African Americans represented approximately 9% of the city's drivers, African American drivers received 16.8% of traffic citations in 1999.[98] Twenty percent of those cases involved driving with a suspended license.[99] The disproportionately high numbers of people of color who were stopped for traffic violations raised the specter of racial profiling.[100] Economic survival coupled with the geographic location of employment opportunities seemed to be creating a vicious circle. Once ticketed for traffic violations, many individuals could not afford to pay the substantial fees. The only hope these individuals had of acquiring sufficient funds to pay

95. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 75, 305 (1997) (discussing fact that because most residents in low-income communities of color are law-abiding and highly vulnerable to serious crime, treatment of individuals in the criminal justice system, while important, might not be of paramount concern to residents, and that residents may support measures considered "tough on crime").

96. john powell, Seattle Defender Association's Racial Disparity Project (RDP) 2 (1993) (unpublished report prepared for the Institute on Race and Poverty at the University of Minnesota, on file with author) [hereinafter Evaluation Report].

97. WASH. REV. CODE ANN. § 46.20.289 (West 2002 & Supp. 2003).

98. *Seattle Police Say Blacks Ticketed Disproportionately*, OREGONIAN (Portland), July 21, 2000, at C6.

99. *Id.*

100. For a general discussion of how race plays a role in police officers' decisions to arrest, stop, or frisk, see DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 16–62 (1999) (discussing police practices focusing on "poor black and Hispanic people living in the inner city"); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 425 (1997) (describing "Driving While Black" as a social phenomenon); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–81 (1994) (asserting that police target minority neighborhoods for police stops and searches); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999) (discussing the constitutional and policy implications of race-based stops by police).

fines was to continue to go to work. The heart of the problem was that they needed to use their cars to get to and from work. So, these individuals typically drove cars even though their licenses had been suspended. Because drivers of color were more likely stopped by the police, they were also more likely to be found driving with a suspended license.

Yet another racial impact became apparent. In Seattle, the handling of DWLS cases differed depending on which police agency performed the arrest. An arrest by the city police would be channeled through Seattle Municipal Court. The county sheriff's office processed its arrests through King County District Court. The principal difference between the ways that the city and county addressed the DWLS offense involved impoundment of vehicles. In 1998, the Seattle City Council had adopted a rule that the King County Council had rejected. That rule authorized city police officials to impound a vehicle driven by a person charged with DWLS for a period from fifteen to ninety days.[101] The owner of the car, even if she had not been driving, could not redeem the car until the conclusion of the impoundment period. At that time, the city assessed an administrative fee, the cost of removal, towing, and storage in addition to the fines for the underlying traffic offenses. The owner could only recover the car once those costs were paid and upon proof that the owner had a valid driver's license.[102] African Americans drove 39.5% of the vehicles impounded under Operation Impound in 1999.[103] Statistics revealed that black drivers were six times as likely as white drivers to have their cars impounded.[104]

The Defender Association had found its starting point. The director of the office assembled a team of three defenders who would constitute the Racial Disparity Project (RDP). Leo Hamaji, the Defender Training Coordinator with seventeen years of public defense experience, would devote 20% of his time to the RDP. Lisa Daugaard, who had spent three years working in the Defender Association, brought community experience to the equation. Before joining the Defender Association, she had served as the director of the Urban Justice Center in New York and the legal director for the Coalition for the Homeless. The third lawyer on the team was Song Richardson, who had previously worked with the NAACP Legal Defense Fund and the New York Legal Aid Society. Both Daugaard and Richardson spent 40% of their time on the project. Finally, Director Robert Boruchowitz, with twenty-six years of defender experience, served as the team leader. Together, the team's time commitment to the project amounted to that of one full-time employee.

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101. SEATTLE, WASH., MUN. CODE § 11.30.105 (2002), http://clerk.ci.seattle.wa.us.

102. *Id.* § 11.30.120.

103. Evaluation Report, *supra* note 96, at 3; *see also* Lisa Daugaard, *Impound Policy Goes After the Poor*, SEATTLE POST-INTELLIGENCER, Aug. 17, 1999, at A9, *available at* 1999 WL 6599130.

104. Evaluation Report, *supra* note 96, at 3.

This division of labor served two critical purposes. First, although Boruchowitz had proposed in his grant application—and had received funds for—only one full-time employee, he soon began to reconsider that choice. The person assigned to the project would need to draw on specialized skills to perform the wide-ranging and varied tasks that he envisioned for the RDP. This led Boruchowitz to conclude that utilizing several individuals might prove more effective than expecting a single individual to have such a broad array of skills.

The second purpose is perhaps more apparent. Allowing three defenders to collaborate reduced the burden on any single lawyer to develop the RDP. The team approach ensured against isolation and encouraged a cross-pollination of ideas among the team members. Using teams was not new to the Defender Association. It had developed this approach to handle serious cases such as when individuals faced the possibility of the death penalty or a conviction under "three strikes" laws. The decision to employ the team model reflected the view that racial disparity was no less serious and no less complex. And this approach reinforced what these team members already knew: the importance of building on each other's expertise and taking care not to assume that they knew everything or had anything approaching all of the answers. They embraced and modeled the value of collaboration.

3. *Differently Configured Vision of Practice*

The team initially used familiar strategies and approaches. The RDP team chose to represent individuals in DWLS proceedings in court. But the implementation of these choices soon illuminated a broader vision of practice. Despite the often devastating impact of DWLS charges, individuals who faced the impoundment of their cars had no right to counsel. Still, the RDP team observed that on those rare occasions when an individual could afford representation, she could successfully challenge and, in the end, reduce the fines to be paid. So the RDP team began by providing free counsel to a select number of clients who had chosen to appeal the impoundments of their vehicles. The team met with remarkable success in the impoundment cases they handled, often persuasively raising issues of race and racial profiling with respect to the initial stops of their clients.[105] But this form of assistance, while important, particularly to the clients who otherwise would not have had representation, seemed inadequate to the task. The already stretched resources of the Defender Association only permitted RDP to handle a small number of cases on behalf of people whose cars had been impounded.[106]

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105. *See* Heath Foster, *Impoundment a Threat to Many; Simple Necessities Can Depend on a Furtive Drive to the Store*, SEATTLE POST-INTELLIGENCER, Aug. 27, 2001, at A1, *available at* 2001 WL 3565417 (noting that in the nineteen cases of impoundment appeals handled by public defenders in 1999 and 2000, eighteen were overturned); *see also* Jim Brunner, *Impound Law Dealt Setback by Judge*, SEATTLE TIMES, May 16, 2001, at B1.

106. Largely due to the RDP's recognition that counsel mattered in these hearings, the

The key effect of the impoundment law continued to loom: thousands of people were suffering under its disproportionate impact. To address this concern, the RDP team implemented two strategies. The first related to their decision about which cases to take on. Rather than taking the first case to come forward,[107] RDP consciously chose to link their representation with the team's broader goals. In selecting clients, they picked cases in which the client would likely choose to become actively involved in fighting the issue and working to organize other residents of the community who had been caught in the DWLS net. Particularly when they won—but interestingly, even when they did not—these clients worked to help others appreciate the significance of this issue.

The second mechanism that RDP employed to reach larger numbers of affected individuals involved self-help training. The court had the authority to allow re-licensing by establishing a payment plan for unpaid tickets, but only implemented such plans when lawyers advocated for them. So the Defender Association, in collaboration with CAMP, offered clinics designed to inform individuals about the processes available to regain their licenses. Hundreds of interested residents attended the clinics. Lisa Daugaard wrote a twelve-page re-licensing manual for CAMP that outlined the process and prepared individuals for the common types of arguments they could make and expect to hear. CAMP and the Defender Association originally planned to distribute these self-help kits as guides through the court process.

This choice of tactics in itself proved innovative. The Defender Association lawyers recognized that they could tap the advocacy talents of community residents. The team appreciated that lawyering at its core involves persuasion and that the individuals who were now facing an unfamiliar forum certainly had learned to use persuasive power in their daily interactions.[108] This did not mean that these individuals could immediately navigate their way through a court hearing. They needed the tools of information and rules of the game that the lawyers possessed and could provide. But once armed with that information, these individuals could fight battles on their own behalf.

But these plans were soon interrupted. Once the Seattle Municipal Court learned of the plan, the judges both worried about the potential increase in their caseloads and suspected that the development of the clinics was a tool to put pressure on the court. So the court summoned Defender Association represen-

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Defender Association Director Boruchowitz has worked with the University of Washington Law School to establish an impoundment clinic where law students can provide representation to individuals whose cars have been impounded. *See* Bobbi Nodell, *Steering Help in Right Direction: UW Law Students Assist People Whose Cars Have Been Impounded*, SEATTLE TIMES, Sept. 30, 2002, at B1.

107. Taylor-Thompson, *Alternating Visions*, *supra* note 10, at 2441 (discussing the tendency among defender offices to follow a first-come first-served approach rather than engaging in case selection).

108. *See* LÓPEZ, *supra* note 9, at 39 ("When problem-solving requires persuading others to act in a compelling way, we can call it lawyering . . . ."); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (describing lawyering as problem solving that involves persuasion).

tatives to meet with judges and the City Attorney to discuss the clinics. This led to an unprecedented negotiation. The Defender Association eased the court's fears about its motivations and was able to proceed with a re-licensing program at CAMP with the court's blessing. The Defender Association helped to secure $300,000 from the City Council to fund what became known as the Revenue Recovery Program in the municipal court. The funds covered the cost of helping people chart their way through this process and enabled them to take advantage of time payment arrangements. The City Council budget also paid for a re-licensing coordinator. On the third Tuesday of each month, CAMP held re-licensing meetings conducted by the re-licensing coordinator. Anyone who proceeded through CAMP's re-licensing program would have her case taken out of the collections process and would thereby reduce the amount of fees that she would need to pay.

Building on this success, RDP aimed to cross traditional adversarial lines. It proposed a partnership with the King County Prosecutor's office to develop alternatives to both prosecution and punishment for DWLS offenses. What emerged from this collaboration was the King County Re-licensing Project, a more comprehensive diversion program. The program permits anyone with a DWLS charge to participate, except those who have prior convictions for driving while intoxicated or other serious driving offenses. The prosecutor's office agrees to dismiss an individual's DWLS charge if the accused sets up and maintains a payment schedule for paying the underlying fine. At the individual's first appearance in court, the judge explains the terms of the program. If an individual chooses to participate, she must waive her right to a speedy trial for one year and agree to meet a schedule that requires a monthly payment of a minimum of 10% of the total amount owed. In return, the court withdraws the fines from the collections process and has the authority either to reduce the fines or to convert some of the fines to community service. Once the person begins making payments, the court lifts the suspension on her license. Upon completion of the payment schedule, the court dismisses the charge. If successful, this program will divert thousands of people from prosecution and possible jail sentences.

But more remained to be accomplished. Although these strategies reached greater numbers of affected individuals, the RDP team often conceived of the problem in somewhat conventional terms. The team was acquiescing in the state's framing of the issue as a legal problem that required a resolution in court. But realizing this, RDP lawyers had already begun to imagine the problem from other angles. The alternative approaches to this issue at the city council level revealed a political problem. The far-reaching impact on community residents presented a social and economic problem. And when framed in this way, the racial disparity problem posed by DWLS seemed to call for different allies, different strategies, and different tools.

B. Implementing Community-Oriented Defense Strategies

The Defender Association had always recognized the importance of legislative advocacy. In 1998, when the Seattle City Council had adopted the impoundment ordinance, the Defender Association had not yet implemented its Racial Disparity Project. Still, the Defender Association's director saw tremendous problems with the proposed ordinance. He sent a letter to the council detailing his concerns, including the potential racial and economic impact of such a rule. Though the Council did not vote the ordinance down, it did make an important concession: it directed Seattle police to maintain data on the race of drivers whose cars were seized and impounded and to issue a quarterly report with those figures.[109] This in itself constituted a success.

But in 2000, RDP had more ambitious plans. They participated in a campaign to repeal the ordinance. Building on relationships they had developed through the course of representation and work with CAMP, the defenders set out to create a political environment in which policy-makers were more aware of the devastating impact of the ordinance and more inclined to be open to arguments for repeal. RDP knew that they needed to help orchestrate a media campaign. They needed to highlight the common, but perhaps unintended, consequences of impoundment. Having been exposed to individuals affected by the impoundment law, RDP set about identifying those individuals who might exemplify the real problems caused by this law. Their consistency and hard work on this issue helped residents trust that RDP would be a good political partner in this strategy.

1. Working Collaboratively with Individuals and the Community

Putting a public face on the problem was essential. The face that they found would not have been available to them but for the trust they had engendered. An African American grandmother, who in her seventy-four years had never received a traffic infraction nor had any involvement with the justice system, had her car impounded. She had allowed her granddaughter to use her car one day. The grandmother had no way of knowing that her granddaughter's license had been suspended; nor would it have occurred to her to cross-examine her granddaughter about this possibility before letting her borrow the car. Shortly after the granddaughter had borrowed the car, she was stopped by the police for a traffic violation. A routine check revealed that she was driving with a suspended license. Despite her protests that the car was not hers, the police officers seized and impounded the car, which they could lawfully do under the terms of the ordinance. RDP successfully fought the impoundment of the car and arranged for the return of the car.

109. Seattle City Council Resolution 30467 (2002) (adopted as amended), *available at* www.cityofseattle.net/leg/clerk/sv2002.htm.

An elderly activist was born; this grandmother's case graphically demonstrated that the ordinance's reach extended too far. Although she objected at first to the idea of appearing on television with her old car, she ultimately decided that the larger issue should win out over her personal concerns. She made it clear that this ordinance harmed individuals who were otherwise law-abiding citizens. Her story, along with others detailing similar effects, began to gain greater coverage by the local media. Indeed, RDP met with editors of the local newspapers and managed to place opinion pieces by RDP[110] and one City Council member[111] in the major local newspapers. These newspapers also covered the DWLS issue as news stories.[112] The press coverage permitted RDP to reach an even broader audience within the Seattle community.

The City Council entertained a vote to repeal the impoundment ordinance in June 2000.[113] RDP had organized community residents to testify at the hearings and to meet with individual council members. Rather than viewing themselves as directors of this effort and taking a leadership role, the RDP team played a facilitative role. They assisted and coordinated the legislative effort so that affected residents could speak for themselves and could stand in the forefront. RDP advised residents on strategies and encouraged their efforts to mobilize untapped groups within communities. Despite their efforts, the City Council voted against repeal of the ordinance, but only by a five-to-four margin. This vote revealed a remarkable shift from the initial vote for the ordinance two years earlier when it had passed by an eight-to-one margin.

RDP and community residents did not see this as a loss. Instead, it spurred them on to further efforts. Shortly after the vote, Lisa Daugaard testified before the council's public safety committee in support of a proposal that the city provide public defender representation to drivers who elect to appeal their impoundments to the municipal court.

RDP did not limit its political campaign to the impoundment issue. The team recognized that racial profiling exacerbated many of the racial problems inherent in the criminal justice system. Anecdotal evidence suggested that the practice was rampant in Seattle. But like most activists engaged in attacking the

110. *See* Robert C. Boruchowitz & Fred Bonner, *Better Court Practices, Not Impoundment, Have Reduced DWLS*, SEATTLE POST-INTELLIGENCER, Feb. 7, 2001, at B5, *available at* 2001 WL 3552916; Nick Licata & Lisa Daugaard, *Ruling on Impounds Restores Rights*, SEATTLE POST-INTELLIGENCER, May 29, 2001, at B5, *available at* 2001 WL 3560135.

111. *See* Larry Gossett & Robert C. Boruchowitz, *Reasons to Change City's Impound Law*, SEATTLE POST-INTELLIGENCER, May 2, 2000, at A13, *available at* 2000 WL 5294252.

112. *See, e.g.*, Kerry Murakami, *Judge Puts Brake on Sidran's Use of Car-Impoundment Law*, SEATTLE POST-INTELLIGENCER, May 16, 2001, at B1, *available at* 2001 WL 3559305; Mike Roarke, *Some Say Law Impounds Rights; Crackdown on Bad Drivers May Hurt Innocents, Critics Say*, SPOKESMAN-REVIEW (Spokane, Wash.), July 5, 2000, at A1 (describing unfair reach of impoundment law), *available at* 2000 WL 22731123.

113. *See* Jim Brunner, *Cries of 'Shame' as Law Is Retained; Impound-Ordinance Foes Berate Council*, SEATTLE TIMES, June 27, 2000, at B1 (covering City Council rejection of proposal to repeal impoundment ordinance).

practice of racial profiling, the RDP team understood that anecdotes would not suffice. They needed to gain a clearer understanding of the numbers involved. So, together with CAMP, they mounted a media[114] and legislative campaign directed at city and state officials to mandate data collection on the race of all drivers stopped by law enforcement officers. They engaged in discussions with the Seattle police department and testified before the legislature in favor of data collection. Beginning in March 2000, they began to see results. The Washington State Legislature became one of the first legislative bodies to enact a law requiring the state patrol to record and report on the race of all drivers stopped by its officers.[115] Then, five months later, the newly-elected police chief for Seattle announced that the police department would voluntarily collect racial data in the course of all traffic stops to determine whether Seattle was engaging in racial profiling.[116]

The alliances that RDP formed have led to other collaborative efforts. For example, RDP played an instrumental role in the development of a grassroots committee, Drive to Survive, in response to the impoundment law. Drive to Survive grew out of community-organizing meetings held by RDP, CAMP, the Northwest Labor and Employment Office, and a member of the County Council. The program is run by a Seattle resident, not by RDP. It lobbies local legislators on issues related to impoundment, engages in public outreach, and works to mobilize community residents in opposition to the impoundment law.

Efforts to make known the racial impact of the impoundment law raised the Defender Association's visibility. As a result, local community organizations began to refer cases involving racial issues to the RDP team. One program's referral resulted in a new but related direction for the RDP team. Youth at Risk sent the case of an Asian adolescent who had been rousted by the gang unit of the Seattle Police Department and subsequently charged with obstruction of justice. RDP ultimately won a dismissal of the case, but that did not end their involvement. Leo Hamaji, the senior staff lawyer on RDP, developed a relationship with a group of about ten Asian teenagers to discuss their experiences with local police authorities. Largely as a result of these ongoing discussions and at the urging of RDP, the ten teenagers testified about the activities of the gang unit. Since that testimony, the gang unit has been less active.

The community work of RDP has enhanced its representation of individual clients. For example, Song Richardson defended an African American man pulled over by a sheriff's deputy for a traffic violation and then ultimately charged with possession of crack when a small quantity was discovered in his

114. *See, e.g.*, *We Should Prevent Racial Profiling*, SEATTLE POST-INTELLIGENCER, May 13, 1999, at A12, *available at* 1999 WL 6590624.

115. *See* WASH. REV. CODE ANN. § 43.43.480 (West 1998 & Supp. 2003).

116. *See, e.g.*, Kimberly A.C. Wilson, *Police to Track Race Factor: Officers Will Help Learn If Profiling Occurs During Traffic, Pedestrian Stops in Seattle*, SEATTLE POST-INTELLIGENCER, Aug. 22, 2000, at A1, *available at* 2000 WL 5301952.

car. Richardson filed a discovery motion requesting access to the deputy's disciplinary records and the training materials of the sheriff's department. Similar motions had been filed and denied in other cases brought by the Defender Association. What differed in this instance was Richardson's ability to support the request with several affidavits from community residents. This time the court granted the discovery motion. The sheriff's department's training documents revealed that the deputy had not only been taught to use pretextual stops, but that his supervisors praised him for making stops of "dirtbag types."[117] Because of the relationships that the RDP team had developed with the community, they were in a better position to advance the interests of their individual clients.

2. Impact on Community's Perceptions of Defenders

RDP has worked hard to develop and maintain relations with communities of color in Seattle. Rather than accepting that the community and the defender office should operate on separate tracks, RDP actively sought to discover common ground that might permit collaboration on issues of mutual interest. The team did not perceive its role as making a decision and then seeking allies. It chose instead to listen to community concerns and to determine if the team could respond to, or provide assistance on, those issues in a meaningful way. In looking at the partnerships that began in 1998 and continue today, it becomes clear that RDP has engendered a level of trust within the communities it serves. Building on that trust, the communities and RDP have successfully mounted campaigns to reform laws and rules that could reap substantial benefits for low-income communities. On the level of the individual case, this community interaction has helped to improve the quality of the Defender Association's representation.

Representatives of the community groups with whom RDP has forged relationships express the highest praise for the work of the team. During the course of its evaluation of the RDP program, a team of evaluators met with members of CAMP and Drive to Survive.[118] A founding member of Drive to Survive admitted that she had always viewed lawyers with some degree of skepticism: as she saw it, lawyers always put themselves in the spotlight and wavered in their commitment to communities. RDP changed her view of lawyers. She reported that she can tell residents of her community that while every public defender office is not the same, "we have a jewel, because they really want to do what is right by the community. . . . [W]e can trust this public defender office."[119]

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117. *See* Evaluation Report, *supra* note 96, at 9.

118. In compliance with the initial grant to implement the Racial Disparity Project, the Defender Association engaged the services of the Institute on Race and Poverty at the University of Minnesota to develop a team to evaluate the program. This resulted in the Evaluation Report, *supra* note 96.

119. Evaluation Report, *supra* note 96, at 6.

The Executive Director of CAMP echoed these views. Before RDP's inception, CAMP's contact with the Defender Association had been limited. But since the RDP team had begun to work with the community to identify and alleviate the problems associated with racial disparity, their relationship had flourished. The Executive Director of CAMP noted his appreciation of the way that RDP operates as a team. He observed that they work together to develop strategies and approaches, and that this method of doing business carries over into their working relationship with community residents. RDP demonstrated its respect for the talents of residents by soliciting and listening to their ideas and by playing a facilitative role enabling residents to gain access to decision-makers. He remarked that they possessed a genuine grassroots orientation and that he had not seen this level of activism in a long time.[120]

As with the residential community in Seattle, RDP has begun to alter its working relationships with actors in the criminal justice community. Instead of being left out of the dialogue, the defenders have come to be seen as important players with the ability to mobilize residents in support of their positions. The King County Prosecutor considers his office's working relationship with RDP beneficial to all parties involved. The prosecutor's office viewed its work on the development of the re-licensing diversion program as advantageous because it met an efficiency objective: in a world in which criminal justice resources remain static or dwindle, innovative cost-savings approaches become all the more important. The initial collaboration led the County Prosecutor to work with the Defender Association on the development of drug courts and domestic violence courts that would satisfy defense concerns. Of course, the non-adversarial relationship on policy matters did not mean that in individual cases either side would see their roles differently. But outside of the traditional setting, they perceived tremendous promise in their working relationships.

Thus, by developing partnerships with community groups and moving beyond familiar but limiting traditional roles with prosecutors, the Defender Association has begun to change the public's perception of the scope of the defender's role and the potential for discovering common ground and common objectives.

3. *Political Considerations and Side Effects*

As the Defender Association embarked on this path, it needed to pay particular attention to the political implications of its choice to become more active and more visible. Interestingly, its first project involved a low-level crime about which the defenders could reasonably anticipate little if any political or public outcry.[121] Concentrating on an offense that does not tap fears about threats to

120. *Id.* at 7.

121. *See* Taylor-Thompson, *Effective Assistance*, *supra* note 6, at 215 (suggesting that defenders choose community projects that might garner widespread support while still reflecting the defender office's values).

safety made sense from a public relations standpoint. The community residents had identified it as an issue about which they cared, and this helped stave off any criticism that the defenders were imposing their views. From a legal perspective, neither the courts nor the prosecutors' offices had reason to resist reform efforts. DWLS cases clogged the system: they accounted for thousands of filings annually and constituted about 35 to 40% of all criminal case filings in King County District Court. The court and prosecutors eagerly accepted any proposal that might ease that docket. Thus, the choice itself made sense given the constituencies involved.

The work of the RDP team also generated good will. The residents of various low-income communities in Seattle witnessed time and again the team's dedication to this issue and the team's commitment to collaboration. Their successes encouraged groups within these communities to believe in their own ability to work for and achieve positive changes in the criminal justice system.

The resulting good will has had practical benefits for the defender office. Regardless of their success, defender offices must still justify their time and expenses to funding authorities. The funding for the Racial Disparity Project had come from a federal grant, but the office could have faced problems from its principal funding authorities if they perceived that defenders were engaging in work that took them away from their principal mission. Because the defenders were now moving beyond expectations, it was not hard to imagine that they might continue along this path. Interestingly, community residents made a point of attending the defender office's budget hearings and specifically testified on its behalf. These constituents had come to recognize that the defender office has an important role to play in ensuring fairness in the justice system, and they made clear that they expected funding to continue.

III.
ORGANIZATIONAL CONCERNS

A. Internal Dynamics

The task of selling a new vision internally and externally is no small matter. Demonstrating that community-oriented defense strategies supplement rather than supplant the individualized vision of practice is important in helping the variety of audiences with which the defender office interacts appreciate the importance of community-oriented advocacy. As importantly, thinking about the design of public defender offices will help defenders explore how they might better respond to the demands of clients and their communities.

Current organizational design of public defender offices may reflect more of a reaction than a choice. From their inception, defender offices have faced the prospect of needing to respond to the demands of the criminal justice system. Consequently, the organizational structures adopted by defender offices were intended to assist them in handling the legal proceedings for large numbers of

indigent clients. Such divisions typically took the form of specialized units that handled particular types of proceedings—trial divisions, appellate bureaus, juvenile branches. These divisions reflected the office's desire to provide focused attention to the diverse matters facing a client. But perhaps as an unexpected consequence, the organizational structure over time has defined and shaped the way that individual defenders conceive their role.

Today, the demands on the defender office have only increased. The growing number of cases, coupled with greater complexity presented in those cases, has meant that defenders have had to adapt themselves and their organizations to the ever-changing needs of both clients and the criminal justice system. This has typically occurred within the organizational boundaries that have existed for the past forty years. But imagine what might look different if public defenders chose to design their organizations more affirmatively. What if they thought about their workplace without entirely acquiescing in what others in the criminal justice system define as the role and practice of a defender?

Adopting such an outlook might lead defenders to ask new sorts of questions and consult new sorts of people. For example, curiosity about clients and their communities can sometimes stem from the simple desire to connect. But what might begin as an interest in connecting could then evolve into something considerably more profound. Defenders might encounter other problem-solvers—lay and professional—whose vision of their own "practices" (as parents, community activists, social workers, shopkeepers, ministers, etc.) could inspire defenders to see their own roles in a new light. For the first time, defenders might come to understand new ideas about possible strategies, possible collaborations, and possible ways of measuring the impact of their own efforts. Such inspiration could, in turn, raise questions about how the office is organized and how it might be better designed to serve a newly-conceived idea of public defender work.

At its roots, community-oriented defense must stem from a belief that the community from which defenders' clients come is at once a valuable resource and an ally in the effort to improve the justice system. Too often, low-income communities and communities of color are defined by their deficiencies. They seem to lack stability, good schools, safe streets. Changing the lens through which defenders see communities might allow them to perceive these communities in less pathological terms than do others outside those communities. Most defenders have come to recognize their own clients as individuals with a range of talent and knowledge who can be important partners in the defense of a case. Indeed, defenders tend to accept the premise that assets and allies can come in unexpected packages; extending this view to communities would be indispensable. But convincing defenders to move beyond their own preconceptions of the larger community may nonetheless prove difficult.

A critical first step in convincing defenders of the need to change their orientation may be to begin by focusing on ways that community ties can

improve outcomes for their clients. Contacts with residents in a client's neighborhood can increase the likelihood of mounting a viable defense. Knowing people in a given neighborhood can facilitate investigation of a case, and can help the defender develop facts and identify witnesses who might provide jurors with a different or more complete understanding of what transpired in a given case. Forging relationships with service providers or employers can assist in securing favorable dispositions for clients and maintaining support networks to prevent recidivism. If defender clients are homeless, allies might include local housing authorities. If clients face mental health issues, psychologists, psychiatrists, and other mental health experts might provide community-based services. Not only might these allies share concerns about the populations with whom the defenders work, but they may share defenders' disdain for the criminal justice system's heavy reliance on retributive measures rather than rehabilitative methods that may be cost effective and increase community safety.

1. Building on Community Ties Within the Defender Office

Some defenders already have developed their own community connections.[122] These contacts may arise from relationships cultivated outside of the workplace that may have little or no relationship to public defense. Like most people, individual defenders may have religious affiliations, may engage in volunteer work, or may participate in a child's school or sports activities. As an initial step toward developing relations with communities, the defender office may want to take stock of those connections. Once the defender office has catalogued already existing ties, it can begin to identify issues of concern that it shares with those entities. For example, if the office intends to take a public stand opposing proposed death penalty legislation, it will have access to a list of religious leaders in the area who may be willing to join the effort. If the police department engages in a campaign to arrest homeless individuals as part of a "quality-of-life" initiative, the office might seek support from individuals who work at the shelter where a defender volunteers once a month.

As defenders draw on their own connections, they should begin to consider what they bring to these community relationships. The defenders' legal expertise seems an obvious asset that they can contribute. For example, defenders can offer "know-your-rights" courses that attempt to deconstruct complex legal issues for the average citizen and provide an important service to citizens who might not otherwise have ready access to such information. Some defenders might elect to extend their efforts further. The Miami Dade County Public Defender undertook an anti-violence initiative that makes defenders available to schools and community organizations to discuss ways to resolve disputes short of violence and to avoid involvement in the criminal justice

122. *See, e.g.*, Brennan Center for Justice, Community-Oriented Defense Fact Sheet, *supra* note 13.

system.[123] Defenders can be seen as contributing a service to the communities with which they engage and in which they operate.

Perhaps the community defender's greatest contribution would be to make itself available to listen to community concerns. More often than not, community voices are ignored in policy debates, even when those policies will directly affect that community. Defenders have an opportunity to step into the breach and to make an effort to improve communication with communities that have specific concerns about the criminal justice system, the defender office, or larger issues of policy. Overcoming the almost natural skepticism that communities may harbor can be daunting. Defenders will need to earn the trust and respect of communities, but listening and being willing to address the community's concerns will likely move the defender office toward more meaningful relations with community residents.

The defender office's community involvement does not only extend to the work of lawyers. It should also include other members of the office's staff. In many ways, the non-legal staff members of the defender office are the face of the practice. Too often, though, the critical role they play is either ignored or taken for granted.[124] Receptionists and assistants field calls from clients and families. Investigators locate and interview a wide array of witnesses. In a growing number of offices, social workers or sentencing advocates work closely with clients and their families, evaluating clients and directing them to particularized services. As a practical matter, involving all staff makes community-oriented advocacy much more likely to succeed. Rather than expecting a limited number of individuals within the organization to shoulder outreach responsibilities, the defender office can spread the task around. This increases the likelihood that community outreach will occur and will be consistent. By tapping into passions that staff members already have, the defender office increases the odds that its staff will remain motivated and involved in a community effort.

2. *Incorporating the Team Approach*

Asking defenders who are already overworked to incorporate community work into their practice may seem too demanding. Providing comprehensive representation to an individual client can overwhelm the most committed lawyers. Given the prevalence of three-strikes legislation, many of the cases that defenders handle involve potential life sentences. These draconian sentencing consequences make preparation for mounting a defense all the more critical. The task of developing such a defense becomes even more complicated if the accused is detained pending trial because she is effectively unable to assist the defender in her defense. She cannot help to locate witnesses as she might if

123. For a more complete discussion of the anti-violence project, see Clarke, *supra* note 25, at 432.

124. LÓPEZ, *supra* note 9, at 87–101.

released. Add to that complexity the likelihood that the bulk of clients whom the defender represents will have mental health problems, and the task of defending the case alone is crushing.

To address these realities, some defender offices have chosen to incorporate a team approach to representation. At first, only smaller experimental offices utilized this approach.[125] The choice to design an office that challenged conventional views of representation led some community-based offices like the Neighborhood Defender Service of Harlem (NDS) to adopt team representation in individual cases.[126] The team concept evolved out of a desire to provide comprehensive services to an individual client. NDS, for example, utilized teams that consisted of lawyers, investigators, and community workers to work with each client from a variety of angles. The team shared files and strategies in an effort to address all of the client's needs. But as importantly, sharing of responsibilities enabled the team to produce high-quality work without overwhelming any single member of the team.

As this model enjoys more widespread use in traditional defender offices for the representation of clients, new possibilities arise for those offices hoping to develop a community-orientation. Not every defender will possess or develop the skills to engage effectively with the community. Many of the traits that help to increase a lawyer's success in a trial setting—identifying and targeting flaws in an opponent's arguments, using confrontational tactics to expose those weaknesses—tend to be diametrically opposed to the characteristics that enhance community interaction. Dedicating training resources to the development of these skills would be an important component in a defender office's strategy to transform the office's orientation. But even following such training, some staff may be better suited to engage in this work than others. The team model would enable the defender office to recognize those unique strengths in its staff and to utilize their skills most effectively. Placing individuals with complimentary skills on teams together could enable the office to provide comprehensive individual attention to its clients and engage in strategies that move the office into its community.

The Racial Disparity Project in Seattle offered one possible example of the benefits of a team approach. By assigning three staff lawyers to the project at roughly one third of their time, the defender office capitalized on the thinking of three of its lawyers in addressing community issues, but for budget purposes assigned only one position to the community aspect of the work. Since RDP's inception, the defender office has continued to explore ways to extend this model throughout the office. One possibility that the office is considering involves

125. *See* Clarke, *supra* note 25, at 448–52 (discussing team approach to legal representation in Neighborhood Defender Service of Harlem and Bronx Defenders).

126. *See* Vera Institute of Justice Program Plan for the Neighborhood Defender Service, *supra* note 14, at 5–6 (stating that Neighborhood Defender Services will designate defense teams, consisting of attorneys, community workers and administrative assistants, rather than individual lawyers to represent clients).

arranging to have racial disparity units in each of the office's divisions. The unit would involve three lawyers from each division who would address racial issues unique to their division. The community involvement would be limited to members of that team, but lawyers would rotate through that team to expose them to this work.

Rotation of defenders through the team does raise questions about whose interests such a system might serve. The need to maintain some measure of consistency with community partners with whom the team has developed relations would seem to militate against short rotations. Given this concern, the team might choose to keep certain members constant and to allow only one position to rotate. But the overall ambition of the rotation system would be twofold. First, it would enable a broader array of lawyers—with presumably an equally broad array of talents—to engage in these activities and to bring their ideas to bear on common problems. Secondly, by creating an ever-expanding cadre of community-sensitive defenders, the office would increase the number of lawyers whom community residents might contact even if those lawyers did not happen to be assigned to the team at that moment.

B. Questions of Accountability

Any expansion of the defender's work should raise questions about the impact on the office's core function: providing legal representation to individuals who are accused of a crime. In any effort to focus on broader issues, there is a real danger of losing sight of the defender's paramount task. Providing high-quality representation to the client, understanding her goals and working with her to resolve the case favorably remain critical defense functions. But if community work adds an important dimension to that practice, defender offices will need to remain alert to methods for holding themselves accountable to the clients whom they seek to serve.

This is no small task. Defenders, like most professionals, rarely engage in the sort of self-conscious evaluation of objectives and outcomes that might be necessary to determine whether they are indeed achieving the goals they have set. But if they hope to provide a certain level of representation and guard against dilution of that mission, then defender offices will need to think hard about who should hold them accountable and the measures for doing so.

1. Continual Reexamination of Office Focus

To facilitate a community orientation and to ensure its success, the defender office will need to engage in a regular process of reflection on the actions it has taken. Defenders could hold regular meetings with staff to discuss and assess outreach efforts. Such an assessment might mean holding meetings with current and former clients to determine whether these community efforts have impeded or enhanced the office's work on individual cases. Facilitating regular conversations between the office and the community organizations with whom the

office interacts is essential. Regular dialogue—perhaps at monthly lunch meetings—might enable the defender office to monitor its progress and to address concerns raised by community partners.

The central purpose of such meetings would be to provide feedback and data that might help the defender office understand the impact of this orientation. If, in the course of such discussions, it becomes apparent that defenders are surrendering zealous advocacy by becoming more involved in the community, then the defender office would need to adjust its activities to remain true to its principal mission. A key component in engaging in this expanded range of activities would be to remain mindful that community involvement may have limits. The defender's office would quickly lose internal support if it were to take positions on policy that seemed inconsistent with the needs of its clients. It might also lose necessary external support if it raises expectations that it would engage in certain community activities and then only performed those activities haphazardly. Monitoring the office's work and readjusting its focus would help to guard against slippage.

2. *Changing External Perceptions of the Defender's Job*

Central to any effort to engage in activities that fall outside the defender's recognized mandate is engaging in concerted public education about the nature of the defense function. Unless defenders take it upon themselves carefully to articulate this expanded view of their role, they will encounter resistance that may well impede any effort they may make to change their orientation and to provide more comprehensive service. Mounting a campaign to utilize every available opportunity to educate the public about the role of public defense in securing justice and maintaining fairness for individuals and communities will assist the defender office in steering its activities in a somewhat different direction.

Defenders will need to overcome a general reluctance to articulate that which they do. Too often, defenders have chosen to say as little as possible about their role for fear of retribution in the form of budget cuts or unfavorable publicity. But in any effort to move an institution, the groundwork must first be laid to prepare others for the change. This education can mean the difference between resistance and success.

CONCLUSION

Choosing to carve out a community-oriented role for defenders is fraught with challenge and risk. Reorienting any institution, let alone one that has operated in a particular way for more than forty years, can seem too overwhelming a challenge to tackle. But despite the risks, a growing number of defender offices are embracing this task and making strides toward changing the public defense landscape. More remains to be done in examining their efforts and evaluating their success. At a minimum, defenders seem to recognize that in

conjunction with their clients and their clients' communities, they may have tapped a new-found power: the power to define justice priorities, to evaluate criminal justice policies, and to create a system that includes the voices of those individuals and communities that have historically been excluded from decision making. In this partnership, defenders may find a new role for themselves and their offices that compliments and expands their traditional function as they work to construct a more inclusive vision of justice for all.