

# THE BEST DEFENSE IS NO OFFENSE: PREVENTING CRIME THROUGH EFFECTIVE PUBLIC DEFENSE\*

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## INTRODUCTION

To some, the staunch commitment of public defenders to protect due process rights of defendants puts them in the same camp as the American Civil Liberties Union—a group once denounced by an Attorney General of the United States as a “lobby” for criminals.<sup>1</sup> The idea that public defenders are pro-criminal unfairly taints the image of public defenders and assigned counsel, making it harder for them to get a public hearing on the important values that they represent and the important function they perform. It erroneously implies that public defenders have aligned themselves with the criminal element of our society; further, it suggests that they care more about excusing crimes and keeping criminals free than they care about the welfare of victims and law-abiding citizens. In short, it suggests that they are opposed to—rather than aligned with—community interests in producing a just and secure society.

These claims are particularly damaging because, in order to be effective, public defender systems cannot rely only on their constitutional mandate. Public defender systems must, in addition, be able to secure political and financial support in the court of public opinion in order to survive and achieve their goals.<sup>2</sup> Given that public defenders depend on public support, those who lead

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1. Edward Walsh, *Meese's Viewpoint On ACLU Efforts Called His Own*, WASH. POST, May 15, 1981, at A13.

2. The conventional goals include the following: (1) to ensure that the government meets its

public defender agencies must assert both external and internal leadership when defining and articulating the public defender's role.<sup>3</sup> Anything less permits critics to distort the mission of public defenders, limit their authority, undermine their effectiveness, and vastly undervalue the contributions that they make to the overall quality of society.

More specifically, those who lead public defender offices must convince the public that their offices are producing results that are, or should be, valued by citizens. That is why the charge that public defenders are pro-criminal and act to increase crime is so damaging. If public defenders are perceived as pro-criminal, and if the operations of public defender agencies are perceived as increasing society's vulnerability to crime, the public will see no reason to support their activities.

Traditionally, in arguing for the public value of their agencies, public defenders have not talked about the practical effect they have on the overall level of crime. They have instead emphasized the contribution public defenders make to broad ideals of liberty and freedom on the one hand, and justice and fairness on the other. The argument has been (and still is) that members of the public have a stake in living in a society that offers a high degree of personal freedom, and strong protections against arbitrary state action. Public defenders believe that this interest in protecting such values extends to those situations in which the state, purportedly acting for the wider society, confronts citizens accused of criminal conduct. Indeed, public defenders believe that these values are particularly important in such situations. In order to protect liberty, ensure justice, and guard against unfair state action in confronting criminal conduct, the machinery of due process is the best means available to ensure a just result.

Accordingly, society invests money in public defenders not because they have some desired effect on levels of crime, but to ensure the protection of liberty and justice. *Liberty* encompasses the notion that the state should be subject to restraint in its efforts to control individuals' lives, and should bear a heavy burden of proof when it seeks to restrict a citizen's liberty. *Justice* includes not only the idea that those who commit crimes should be accountable for them, but also that individuals accused of crimes ought to be able to gain representation in courts in order to protect against unjust convictions. *Fairness* dictates that this fundamental constitutional right to representation not be limited to those who have the financial means to hire an attorney. Only when these conditions are met can the public be sure that the state, acting through police,

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burden of proof for each case; (2) to exonerate the innocent; (3) to ensure that those who are erroneously charged with more serious misconduct (i.e., over-charged) are held accountable only to the extent of their actual culpability; and (4) to secure just and effective sentencing results. Although these goals remain in place, this paper examines and argues in favor of adding an additional, less-obvious goal: utilizing public defenders as catalysts for the reduction and prevention of crime.

3. See Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUD. LEG. ETHICS 199 (1999).

prosecutors, courts, and correctional agencies is doing justice rather than injustice. And it is to secure justice, then, that society supports public defenders.

Focus group discussions across the nation reveal that members of the public support these broad ideas of liberty and justice.<sup>4</sup> They also support the role of public defenders in realizing these ideals in the day-to-day operations of the nation's criminal justice system.<sup>5</sup> The difficulty, however, is that as attractive as these ideals are, and as important as public defenders are in realizing them, the contemporary political context seems to assign the concerns for liberty, justice, fairness and due process a less prominent place than instrumental concerns about controlling crime.

The current political discourse emphasizes the overriding importance of reducing crime. Crime reduction seems even more important than other practical and instrumental goals that have sway in policy domains, such as controlling public spending. In short, in the rush to lengthen sentences, build more prisons, and adopt more aggressive investigative and policing methods, there has been a surprising willingness to squander not only our public funds, but also our personal liberty in order to reduce crime.

That the current sense of urgency for controlling crime focuses on a narrow band of criminal offenses proves equally problematic. In particular, this category of offenses does not include crimes that the state commits in the pursuit of controlling other kinds of crime. Indeed, the public hardly recognizes such state offenses as crimes that increase the overall burden on society, but instead regards them as actions that reduce the relevant kinds of crime. In this climate, arguments that support greater authority and more generous funding for public defender offices on the basis of concerns for liberty and justice, or even the more narrow concern for protecting basic constitutional rights, are eclipsed by the practical question of whether the activities of public defenders are increasing or reducing the crime rate.

Many efforts to reduce crime have had a negative effect on the quality of representation by public defenders and on the amount of resources available to ensure adequate representation for large numbers of accused persons who occupy lower economic classes. Justice for all requires competent legal counsel. For most public defenders and assigned counsel, however, providing a zealous defense to those who cannot afford counsel is too often no longer a reality. Moreover, possibilities for reclaiming the support needed to make it a reality are becoming increasingly unattainable.

The fact that the public discourse has focused increasingly on reducing crime rather than on ensuring justice forces public defenders to think about how they want to position themselves on the crime issue. Put rather bluntly, to what

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4. See BELDEN, RUSSONELLO & STEWART, *THE PRICE OF JUSTICE: MONEY, FAIRNESS AND THE RIGHT TO COUNSEL* 5 (2000) (describing the results of a national investigation of public opinions about due process and the role of lawyers who represent indigent criminal defendants).

5. *Id.*

extent are public defenders content to have the public describe them as pro-crime? Of course, to most public defenders, the claim that they are pro-crime is preposterous. They know they are no more in favor of crime than any other citizen. As a result, they tend to dismiss the claim as mere political rhetoric and refuse to respond. Yet public defenders must acknowledge that one of their essential goals is to provide a zealous defense of the liberty interests of their clients, which is sometimes viewed by the public as a defense of crime rather than liberty. To the extent public defenders succeed in the provision of this zealous defense, they preserve liberty for their clients. That feels like a success to them—the realization of their *raison d'être*.

To some people, however, these successes look more like self-inflicted wounds. Cast in a pejorative light, the success of public defenders in protecting the liberty interests of their clients may seem nothing more than putting criminals back on the street or spinning the revolving door of a broken criminal justice system. To the extent that the public believes that deterrence and incapacitation effectively control crime, and that a publicly financed zealous defense gets guilty defendants off on technicalities, public defenders appear to be obstacles to effective crime control. Indeed, this perception may explain why public defenders have been reluctant to report on their success in protecting the liberty interests of their clients. They know that what they view as professional success might well be seen by some members of the public as a self-defeating effort, resulting in greater expenditures that are likely to lead to more crime rather than less.

Given that powerful elements of the public may actually believe that public defenders act to increase rather than reduce crime, it may be prudent for public defenders to take a public position on crime. Should they state clearly that they, too, are against crime? Or, would such pronouncements merely fan the flames of public hysteria about crime and criminal offenders?

Beneath the *political* question of how public defenders should position themselves on the crime issue is a much more important one: namely, to what extent can public defenders take steps to reduce crime as well as to ensure justice? In addition, if there are things that public defenders can do to reduce crime, should they embrace those activities as important new ancillary missions for their organizations?

Obviously, preventing or controlling crime cannot and should not be the most important function of a public defender office or system of assigned counsel. That place must be reserved for the all-important goal of ensuring liberty and justice for individual indigent defendants by providing the zealous defense that the Constitution and legal ethics mandate. Yet it is interesting to consider whether public defenders can leverage the activities associated with representing individual indigent defendants in court, or advocating for their interests as a class either in the courts or in the political process, in order to achieve crime-reducing, liberty-protecting and justice-enhancing effects.

In this paper, we explore the idea that public defenders are in a good position to achieve the instrumental goal of preventing crimes as well as the principled and more traditional goal of providing a zealous defense of their clients. If public defenders do, in fact, have opportunities to prevent and control crime, then exploiting those opportunities may produce benefits for the wider society as well as for public defenders and their clients. On the one hand, society will have a new tool to use for achieving the vital goal of controlling crime. On the other hand, public defenders will be able to align themselves with some important public aspirations and increase their legitimacy and support among those who now pay their bills. Public defenders may also be able to deliver improved services to their clients. For these reasons it is worth looking for ways in which public defenders can join the effort to prevent and control crime as well as to ensure justice.

## I.

### PREVENTING STATE CRIMES AGAINST CITIZENS

The most direct contribution that public defenders make to crime prevention is the role they play in preventing state crimes against citizens. Of course, most public discussions of crime do not pay much attention to state crimes but rather focus on crimes by one citizen against another: a husband who beats his wife, a robber who mugs a woman for her handbag, or a drug addict who burglarizes a house to get money for her next fix. In dealing with these kinds of crime, the state is cast in the role of protecting both the particular interests of the victim and the broader social interest in promoting justice against the offender who may have attacked the victim. The state is seen as the guardian against crime rather than the perpetrator. Yet it is easy to forget that the state and its agents can act as perpetrators and ultimately victimize rather than protect citizens. In their own initial zeal to protect citizens from one another, state agents can end up committing crimes against the state's citizens.

#### *A. Substantive and Procedural State Crimes*

In a perfect world, of course, the justice system would operate to ensure that the state protects liberty, observes fairness, and convicts only the guilty. But that is not the reality. In reality the system makes mistakes, through either negligence or deliberate acts, and when mistakes occur, a terrible injustice results. The state, which is supposed to be the guarantor of liberty and justice, becomes the primary threat to these important values.

The worst of these cases are truly awful, and are easily apparent to citizens as crimes. These are cases in which state agents deliberately frame citizens for crimes that they know the individuals did not commit—and patterns of corruption are often cyclical.<sup>6</sup> State agents may do this to get money, seek

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6. The cyclical patterns of corruption in New York City have been noted in particular:

revenge, or hide their own misdeeds. Public defenders know that more often than not it is their poor and powerless clients who are most likely to become targets of state corruption. But when this occurs, nearly everyone agrees that the state and its agents have committed a serious crime with system-eroding implications. And it is often public defenders, charged with the responsibility of defending these citizens, who are in the best position to help society to detect the crimes. They do so by taking their clients' stories seriously.

These cases, fortunately, seem to be somewhat rare. More common cases involve state agents who believe that a person is guilty but lack enough evidence to convict the offender. In order to show guilt in a criminal proceeding state agents manufacture the evidence that they need. These actions are wrong in two quite different ways. On the one hand, they are wrong because the state has not played fairly in prosecuting the alleged offender. Since the accused has rights and those rights have been deliberately abused, a significant crime has been committed against the individual defendant. On the other hand, these actions may be seen as particularly egregious when they cause the imprisonment of a person who is factually innocent rather than when they cause the imprisonment of a person who did commit an offense, but there is insufficient evidence to prove guilt beyond a reasonable doubt. In the one instance, the state is guilty of a procedural crime. In the other, it is also guilty of a substantive crime.

Many do not want to accept the distinction between procedural justice on one hand and substantive justice on the other. Under this framework, the system can never reliably produce substantive justice. The only thing that the system can consistently produce is procedural justice. Moreover, in this view, the public should seek procedural justice because that is the most reliable way of achieving substantive justice. To others, however, the distinction between procedural and substantive justice is important. They want to preserve the notion that there is something real about guilt or innocence, and that the purpose of criminal procedures is simultaneously to protect the rights of those who are accused and to find and punish those who are guilty.

People often think of those on the left of the political spectrum as being more interested in and committed to procedural rather than substantive justice. The political left sees the exclusionary rule as an important mechanism in protecting liberty even when it means that the courts exclude evidence probative

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For the past hundred years, New York City has experienced a twenty-year cycle of corruption, scandal, reform, backslide, and fresh scandal in the New York City Police Department. The Lexow Committee of 1894, the Curran Committee of 1913, the Seabury Committee of 1930, the Harry Gross investigation of 1950, and the Knapp Commission of 1971 have each served as critical signposts of a regular and repetitive cycle of police corruption within the New York City Police Department (NYPD). The creation of the Mollen Commission, [another] independent inquiry into police corruption, marks only the latest chapter in this historical pattern.

Hon. Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73, 73 (1995) (footnotes omitted).

of guilt at trial.<sup>7</sup> The political right says that this practice exacts too high a price to the cause of substantive justice. However, the recent use of DNA evidence to reverse capital punishment cases has revived interest in the idea of substantive justice.<sup>8</sup> Indeed the California Legislature was so concerned that procedurally correct but substantively flawed convictions were resulting from long-hidden police misconduct that it enacted a statute allowing challenges to convictions even when the person is no longer in prison, on parole, or on probation.<sup>9</sup> In these cases, what is dramatic about the challenges is the demonstration that the state has inflicted a substantive injustice, in spite of the quality of the procedural justice that produced it. The fact that our procedures can lead to the conviction and execution of innocent people reminds us once again that that state can be a negligent murderer even when it diligently tries to avoid mistakes. It encourages us to provide even more procedural safeguards to minimize the chance that the state will commit these terrible crimes.

### *B. Organizing to Control State Crimes*

The idea that public defenders can play an important role in reducing state crime requires little change in the philosophy of indigent defense systems. That is part of what public defenders think they are there to do in response to charges against their clients. In order for defenders to get credit from the public for reducing these crimes, however, they must convincingly reinforce the notion that the state, too, can be a perpetrator. Of course, anyone who has felt the power of the state mounted against them in a criminal or civil action can appreciate the idea that the state deploys substantial power against them. Moreover, our political culture reflects a deeply rooted suspicion of state power. The seeds of public interest in controlling state crimes are therefore sown in our social life.

In this context, it may be useful for public defenders to reconsider public defender office practice. It is one thing for an individual public defender to discover and show that her client was the victim of a state crime. It is quite another for her to win a civil case against the state and force damages to be paid

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7. Some conservatives argue in favor of preserving the rule, albeit for different reasons. For example, Timothy Lynch, Director of the Cato Institute's Project on Criminal Justice, views the exclusionary rule as the only effective method that the judiciary has to preserve the integrity of its warrant-issuing authority. Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711 (2000). The exclusionary rule was first introduced in federal criminal cases in *United States v. Weeks*, 232 U.S. 383 (1914). Forty-seven years later the Supreme Court applied the exclusionary rule to the states through the due process clause of the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961).

8. E.g., Peter J. Neufeld, *Have You No Sense of Decency?*, 84 J. CRIM. L. & CRIMINOLOGY 189 (1993) (discussing the practical problems when science and law collide in court and the substantive injustices when prosecutors embrace DNA evidence to convict but reject the use of DNA evidence to prove innocence). See also BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

9. Act of Sept. 29, 2002, ch. 1105, 2002 Cal. Stat. § 3.

to the victim for its offense. In addition, it may be harder still to add up the number of times that the state has victimized clients, to publicize that aggregate fact, to look for potentially important patterns of state misconduct and to initiate proceedings against particular agencies or practices that seem to be responsible. Each of these steps represents an effort by public defenders to keep the issue of state crime before citizens as an important public concern.

In the end, public defenders must recognize that relatively few institutional opportunities exist for society to monitor the way the state uses its authority and spends the public's collectively owned freedom. It is easy to track the manner in which the state uses public funds. It is much harder to track the way the state uses public authority. Constitutionally and institutionally, public defenders are fairly unique in that they are well positioned to protect the accused from the injustices that, for example, dishonest police officers perpetrate. They can use this position for two different purposes. First, public defenders can prevent the misuse of state authority in individual cases. Second, public defenders can use their position to alert society as a whole and marshal action against the larger forces that encourage the misuse of state authority. In effect, public defenders can become the auditors of the use of state authority. This kind of system will better assure society that the justice system will honestly and reliably sort things out and accurately determine innocence or degrees of guilt. Public defenders could operate as vigilant justice system auditors, entrusted with commensurate authority and responsibility to execute the monitoring mission.

Developing this framework as a means to control state crime is what public defender Michael Judge had in mind as he responded to a scandal involving the CRASH (Community Resources Against Street Hoodlums) unit of the Rampart Division of the Los Angeles Police Department. The scandal began with the discovery that members of the CRASH unit of the Rampart Division of the Los Angeles Police Department had engaged in a systematic practice of intimidating, assaulting, and threatening residents of the Rampart area in Los Angeles.<sup>10</sup> Some of the victims were gang members or persons with past criminal records; others were not. This unit of police officers who dominated Rampart community members viewed all of them as powerless and unworthy of respect, whether they were law-abiding or not. By any account, such behavior constitutes crimes that society should seek to control and prevent.

The public cannot and should not minimize the scope of the Rampart scandal. As the Los Angeles County Bar Association Task Force on the State Criminal Justice System explained, "[t]he Los Angeles Police Department's Rampart scandal has had broad repercussions: criminal convictions of police officers involved, the dismissal of over 100 cases upon motion of the District Attorney's office as a result of 'tainted evidence,' and millions of dollars in civil

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10. TASK FORCE ON THE STATE CRIMINAL JUSTICE SYSTEM, LOS ANGELES COUNTY BAR ASS'N, A CRITICAL ANALYSIS OF LESSONS LEARNED: RECOMMENDATIONS FOR IMPROVING THE CALIFORNIA CRIMINAL JUSTICE SYSTEM IN THE WAKE OF THE RAMPART SCANDAL 1 (2003).



settlements relating to Officer Rafael Perez's allegations."<sup>11</sup> Nor should the public dismiss the Rampart scandal as something likely to occur only in a major metropolitan area such as Los Angeles or a large state such as California.

Witness the railroading of ten percent of African Americans by a rogue narcotics officer in Tulia, Texas.<sup>12</sup> Similarly, in Davidson County, North Carolina, prosecutors dismissed at least forty drug cases due to corrupt narcotics officers who fabricated search warrants, planted evidence, kept drugs and money seized during arrests, and also conspired to distribute cocaine, marijuana, ecstasy, and steroids.<sup>13</sup> Another example comes from Manatee County, Florida, where prosecutors dismissed more than one hundred charges against sixty-seven defendants who were the victims of an anti-crime squad that routinely framed, robbed, and beat innocent people.<sup>14</sup>

What is notable, however, is that while the problems had their roots in the police department, and while there were supposed to be safeguards other than the public defender's office, the justice and political system as a whole malfunctioned in a way that allowed the state to perpetrate the crimes systematically on a large scale. The political system not only failed to prevent the crimes against citizens in the first place; it also failed to respond promptly and control the problems once they occurred. The Los Angeles County Bar's Task Force recognized the need to look beyond the police department's failures and engage in a "broader analysis . . . to ascertain what improvements could be made within the criminal justice system as a whole, particularly in prosecutorial offices and in the judiciary, to provide stronger and additional safeguards against such abuses in the future."<sup>15</sup>

The difficulty with responding effectively and controlling state crimes against citizens starts with the fact that citizens who fall victim to bully police officers are often too powerless, especially when dealing with officers assigned to elite units, to seek justice through statutes, case law, and decisions of trial judges and appellate justices who are under the influence of the prevailing tough-on-crime rhetoric. Increasingly, political and legal power has been consolidated in the hands of police and prosecutors, creating a considerable imbalance in the American justice system—an imbalance that increases not only the likelihood that the state will commit crimes against its own citizens, but also that the system will not respond effectively to such crimes.

A ready solution is elusive because the police possess both the incentives

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11. *Id.*

12. Bob Herbert, *Lawman of the Year*, N.Y. TIMES, Aug. 1, 2002, at A25.

13. Craig Jarvis, *Drug Cops' Shock Waves*, NEWS AND OBSERVER (Raleigh), June 30, 2002, at B1.

14. See Elijah Gosier, *\$18,000? That's Chicken Feed*, ST. PETERSBURG TIMES (Florida), Nov. 28, 2000, at 1D; *Ex-Agent Pleads Guilty*, SARASOTA HERALD-TRIBUNE (Florida), Nov. 18, 2000, at BM1.

15. TASK FORCE ON THE STATE CRIMINAL JUSTICE SYSTEM, LOS ANGELES COUNTY BAR ASS'N, *supra* note 10.

and the capability to prevent their victims from effectively reporting their victimization. The inquiry by the LAPD revealed an exceptional number of recantations of citizen complaints. Residents of the Rampart Division returned after several days to withdraw complaints about officer misconduct. Sometimes these unscrupulous police officers framed citizens to cover up their own misconduct. Some police officers manufactured evidence against complainants to justify their own actions by perjuring themselves, or by falsely alleging the existence of reliable snitch tips. In other instances, they retaliated against those who complained by effecting unjustified forfeitures of money or property, or taking other kinds of revenge. Police officers intended some of these actions as a message that the police rule the local community and hold power that the public cannot resist by traditional means. The overall effect was to intimidate citizens from filing complaints against the police. A report by an independent review panel aptly summed up how the police operated:

Rampart CRASH officers developed an independent subculture that embodied a “war on gangs” mentality where the ends justified the means, and they resisted supervision and control and ignored LAPD’s procedure and policies . . . . The ultimate result is a police corruption scandal of historic proportions involving allegations not just of widespread perjury and corruption, but of routine evidence-planting, and incidents of attempted murder and the beating of suspects.<sup>16</sup>

Despite the best intentions of police management, including the department’s internal affairs, and oversight by prosecutors, it is unlikely that their combined efforts alone will be fully effective in detecting, punishing, and deterring police misconduct. The strong code of silence that exists among police officers means they will not report on one another. The symbiotic relationship between police administrators on the one hand and rank and file officers on the other, means that police managers will often look the other way rather than make the effort to ferret out misconduct. The fact that prosecutors must rely upon and work with the police means that they, too, will be motivated to preserve positive relationships with individual officers and police departments as a whole rather than aggressively investigate the police.

As a result of this general institutional breakdown, the Los Angeles County Public Defender created the Public Integrity Assurance Section (PIAS) to interdict official crime. It did so through three different mechanisms. First, it sought to identify those cases in which wrongful convictions had occurred, and to apply to the courts to overturn them. Second, the office established an agenda of sensible mainstream reform measures for monitoring the police, and provided a training curriculum for the deputy public defenders to reduce the likelihood of such outrages in the future.

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16. RAMPART INDEPENDENT REVIEW PANEL, A REPORT TO THE LOS ANGELES BOARD OF POLICE COMMISSIONERS CONCERNING THE OPERATIONS, POLICIES, AND PROCEDURES OF THE LOS ANGELES POLICE DEPARTMENT IN THE WAKE OF THE RAMPART SCANDAL 2 (2000).

The third, and most aggressive way in which the PIAS sought to interdict crime was by beginning a database which compiled evidence of misconduct and disciplinary actions against individual police officers. In principle, the evidence necessary to create that database should be readily available from police and prosecutors who are duty bound by *Brady* obligations to supply exculpatory evidence in individual cases, including information about police misconduct.<sup>17</sup> In practice, however, local police departments and prosecutors rarely fully comply with the Supreme Court's ruling in *Brady*. In almost every case in which the defense secures a discovery order from the court requiring disclosure of an officer's history of misconduct, the police obtain a protective order that unreasonably restricts defender use of the information.

Despite the difficulties, the PIAS office has now assembled considerable information detailing alleged malfeasance and misfeasance by more than one hundred police officers in Los Angeles County. Sources of this evidence include public records such as proceedings of the police Board of Rights disciplinary hearings, civil indexes and other court records of judgments against the police, newspaper articles and other media reports, records of criminal prosecutions of police officers, and records of cases that were presented for criminal filings against officers that the District Attorney subsequently declined to file. In addition to these public databases, the Los Angeles County Public Defender relies on written reports of follow-up interviews by public defender investigators of witnesses named in those records.

The Public Defender database, however, contains virtually no information from records that the District Attorney provided pursuant to a specialized discovery procedure<sup>18</sup> that governs discovery of evidence of police malfeasance in police personnel files. This is because the California Supreme Court has ruled that in every case in which prosecutors disclose evidence of police misconduct contained in police personnel files, public defenders may use the information in that specific case.<sup>19</sup> The Public Defender does not compile information that this very restrictive protective order governs.

The practical effect of the California Supreme Court ruling is that it allows offender police officers to testify in front of a jury while cloaked in an undeserved aura of veracity. Although in one case the defense may have learned that a particular police officer has fabricated arrest reports, roughed up citizens, or planted contraband, public defenders must forever sequester that information and use it only in the case in which the prosecutor disclosed it. This means the defense must in every single case make the very same discovery motion over and over in order to obtain information it already possesses but is legally unable to

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17. *Brady v. Maryland*, 373 U.S. 83 (1963) (mandating that government actors have ongoing affirmative duties to disclose any evidence in their possession that is favorable to the accused and is material to the issue of guilt or punishment).

18. CAL. EVID. CODE § 1043-1046 (West 1995).

19. *Alford v. Superior Court*, 63 P.3d 228 (Cal. 2003).

use in any other case.

This court-sanctioned secrecy is detrimental to the fundamental purpose of trials: to pursue truth and to seek justice. Although the California Supreme Court refused to disclose instances of officer misconduct, the Ninth Circuit was not so stingy:

On the other side of the scale, the privacy interest of [Hermosa Beach Police Officers] McColgan and Charles are not strong in this case. McColgan and Charles are not ordinary citizens; they are public law enforcement officers. It is true that individuals do not waive all privacy interests in information relating to them simply by taking an oath of public office, but by becoming public officials their privacy interests are somewhat reduced.<sup>20</sup>

California Supreme Court Justice Carlos Moreno, dissenting in part in *Alford v. Superior Court*, explained it thus: “[I]n daily trial practice, the . . . pendulum has swung too far in favor of police privacy rights and against the disclosure of relevant evidence. In the present case, the pendulum continues to swing in the wrong direction.”<sup>21</sup> Because of the restrictive ruling in *Alford*, the Public Defender’s database cannot and does not contain a trove of police misconduct information that would otherwise be relevant to the defense in many criminal cases and would serve to minimize the impact of state crime.

Critically, public defenders do not retain the information in the database as a license to manufacture a defense where none exists. Use of the police misconduct database is triggered when an individual client advises her deputy public defender that an officer planted evidence, fabricated a story, or used excessive force, and it appears that the criminal case is either the result of the misconduct or exists to cover up the misconduct. If a client makes such an allegation, public defenders conduct an investigation to see if evidence tending to corroborate the client’s account exists. One such source of verification is the Public Defender database. Public defenders may use the database only to locate relevant, admissible evidence supporting a defense claim in litigation and do not use it as an independent source for a defense.

Even more disappointing is the fact that the California Supreme Court has sanctioned the routine destruction of police-maintained records of peace officer misconduct.<sup>22</sup> Although the California Legislature has mandated that police departments maintain records of citizen complaints against peace officers for at least five years, the courts had not until recently specifically addressed the issue of whether or not the state can routinely destroy those records, including founded and sustained complaints, even though they constitute *Brady* material. However, the California Supreme Court ruled that the destruction of these records “does

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20. *Lissner v. U.S. Customs Service*, 241 F.3d 1220, 1223 (9th Cir. 2001) (citations omitted).

21. *Alford*, 63 P.3d at 243 (Moreno, J., dissenting in part).

22. *See City of Los Angeles v. Superior Court*, 52 P.3d 129 (Cal. 2002).

not implicate a defendant's constitutional right to a fair trial," and that, in fact, destroying records in accordance with routine practice "tends to indicate 'good faith.'"<sup>23</sup> Moreover, the police do not have to disclose evidence of misconduct that is more than five years old, no matter how egregious its contents. A court may, however, order the disclosure of *Brady* information more than five years old if the police first present it to the trial court for review.<sup>24</sup>

Once again, Justice Moreno, in a partial dissent, pointed out the absurdity of the majority's opinion:

Thus the five-year limitation is invalid for two reasons: (1) it exalts police officer testimony over all other witness testimony since relevant impeachment evidence can be excluded as to police officers only, solely on the basis of the age of the evidence; and (2) it establishes an arbitrary limit on discovery that is unrelated to the materiality of the evidence.<sup>25</sup>

Justice Moreno also explained why destruction of records of citizen complaints undermines the discovery process. Noting that the majority allowed disclosure of *Brady* information more than five years old if the police presented the material to a trial court for review, Moreno wrote:

While this holding may be tenable in theory, the majority ignores the stark reality that, as a practical matter, there will be no document older than five years available for an in-chambers review. This is so because the majority also upholds the leg of the . . . [discovery] scheme that, as interpreted by the majority, permits police agencies to routinely destroy every relevant . . . document over five years old . . .<sup>26</sup>

The effect of PIAS activities, such as the rollout of the database, identification of additional multiple repositories of relevant admissible evidence, and the provision of training with regard to discovery, is an extraordinary increase in discovery and investigation by defenders.<sup>27</sup> Judges have found that the police custodians of records were misleading them by falsely declaring they had *personally* searched *all* repositories of records when in fact they had done neither. As the defense has become more active in pursuing evidence of police misconduct, judges have also become more aware that there is a small, yet significant number of officers repeatedly involved in highly suspect arrests. Although many judges display a reluctance to invade the privacy of a police

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23. *Id.* at 12 (quoting *California v. Trombetta*, 467 U.S. 479, 488 (1984)).

24. *Id.*

25. *Id.* at 24 (Moreno, J., dissenting in part).

26. *Id.* at 36.

27. Numerous writs of *habeas corpus* have been filed by public defenders on behalf of people who appear to have been wrongfully convicted, and many dubious convictions have been set aside. A number of open cases pending trial have been dismissed due to proven deficits in credibility of certain officers. Tainted identifications resulting from misconduct of police investigators have been discerned by defenders, and such cases have been dismissed.

officer's personnel file, they nonetheless recognize that fundamental fairness requires them to be diligent when reviewing personnel files for evidence of misconduct.

The District Attorney has reacted to revelations of police abuse by implementing policies and procedures that seek to formalize the disclosure of *Brady* information to the defense. Unfortunately, these procedures have not actually been effective in ensuring that prosecutors discover and promptly disclose *Brady* information to the defense. The District Attorney's policies actually serve to limit the information an individual deputy district attorney may disclose, require protective orders on every disclosure, and may actually preclude prosecutors from collecting and retaining viable evidence of police misconduct, including actual, sustained findings of misconduct from a Board of Rights or Civil Service hearing. The District Attorney's policies are a start, but much more is necessary to make the procedures practically effective.

A bilateral agreement, establishing a process whereby defenders will supply information that the Sheriff's Department will consider for retraining, potential imposition of discipline, and possibly even triggering criminal investigations of deputy sheriffs, has been implemented. Defenders negotiated a similar arrangement with the Los Angeles Police Department, but it has yet to realize its full potential.

Michael Judge and his deputies have broadcast their views to the general public through television, radio, internet interviews, op-ed pieces, letters to the editor, and presentations at general public and professional forums. Judge presented his recommendations for reform to the Los Angeles County Bar Association Task Force on the State Criminal Justice System.

Following the Rampart scandal, corrupt officers and those tempted by corruption face an environment today that is much more vigilant. Today, police witnesses are more likely to be held to the same standards as all other witnesses are; however, there may be trouble brewing. Police and prison guard unions are very powerful entities with enormous political clout, and they routinely and adamantly oppose disclosure of any information in a police officer's personnel file, regardless of how corrupt the officer may be. In one instance, a police union engaged the services of a former state senator to hold what they politely termed a "hearing," but which was in reality an inquisition into the practice of one California public defender's office that had created a database of police misconduct similar to the one that Los Angeles County Public Defender Judge created.

We emphasize that concealing evidence of misconduct does not benefit the good police officers; it protects only the bad ones. By vigorously discharging their watchdog role, public defenders help to cull corrupt police officers out, allowing the many good ones to enjoy the respect to which they are fully entitled. Consequently, public defenders help the state to avoid improper convictions and to restore public faith in the system. In addition, the public

defenders are comfortable to continue the practice of recommending that suspects surrender rather than evade warrants and possibly risk injury during an arrest. The defender's job is to help clients trust that the legal system will treat them fairly and to work hard for each client.

In these ways, public defenders can play an important role in preventing an egregious kind of crime—crimes the state commits against citizens. Indeed, former Los Angeles Chief of Police Bernard Parks himself recognized this important role. In what initially seemed a surprising act, Chief Parks blamed the Public Defender's Office for failing to detect, deter, and prevent the police misconduct, which had sullied his department's reputation and led to many wrongful convictions. Upon reflection, however, Judge concluded that, as head of the Public Defender's Office, he did, indeed, have some responsibility for controlling official misconduct, and he is now moving expeditiously to live up to the responsibilities that the Police Chief conceded to him.<sup>28</sup>

## II.

### PREVENTING CRIME AND VIOLENCE AMONG CITIZENS

Beyond the direct role that public defender offices can play in preventing state crimes is the more difficult question of how public defender offices might operate to reduce crime and violence among citizens. This issue has been circulating among innovative public defenders. Offices like the Miami-Dade Public Defender's Office are now asking themselves how public defense programs can reduce crime and violence both generally in society and particularly in individual cases. Bennett Brummer, director of the Miami-Dade Public Defender's Office, has led the way in this idea by creating an Anti-Violence Initiative (AVI) under the auspices of his office. As he describes it:

The Anti-Violence Initiative . . . consists of defender-community collaborations designed to help clients lead law-abiding lives by developing more constructive diversion and sentencing options and expanding their access to effective treatment . . . AVI is also intended to improve public safety and reduce the number of victims by expanding the role of public defenders.<sup>29</sup>

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28. Correspondence from Michael Judge, Chief Public Defender, County of Los Angeles, to Cait Clarke, Project Manager, Executive Session on Public Defense, John F. Kennedy School of Government (Sept. 27, 2001) (on file with the author).

29. Bennett H. Brummer, '*Community Partnerships, Holistic Advocacy Through a 'Public Defender Anti-Violence Initiative,*' INDIGENT DEF. (Nat'l Legal Aid & Defender Ass'n, Washington, D.C.), May–June 1999, at 1.

Brummer states:

The objectives of the AVI are to promote:

- Case disposition and sentencing planning that will benefit clients and their families, rather than simply processing clients through the criminal justice system;
- Creation of sentencing alternatives to incarceration that would, because of their effectiveness, be attractive to judges and prosecutors;
- Legal and programmatic changes that will improve prevention and treatment of criminal conduct;
- Research to increase understanding of the positive and negative personal and environmental factors at the root of most violent and criminal conduct and how these factors are at play in the lives of clients; and
- Criminal justice system and community awareness of sound and cost-effective crime prevention methods and responses to criminal conduct.<sup>30</sup>

This list of objectives reflects the fact that the AVI works when there is interplay between internal and external components. Internally, the public defender dedicates resources to addressing the social and medical needs of her clients—hiring social workers to assist her lawyers. Externally, the office establishes partnerships with universities, organizations, treatment providers, agencies, and the faith community to facilitate research, awareness, and systemic change.

Brummer emphasizes that the AVI targets not only clients within the context of a case, but also problems outside direct case representation. These defenders explore, for example, how systemic characteristics make it hard for public defenders to access specific resources necessary to provide quality representation.<sup>31</sup> As a result of this broadened systemic approach, the AVI has catapulted Brummer's office to a position of leadership in the area of crime prevention. To better understand the opportunity that Brummer is developing, it is worth looking in detail at three aspects of the program: the internal/operational part that is closely linked to the handling of individual cases; the internal/operational part that seeks to engage those intimately connected to

30. Bennett H. Brummer, *Public Defender Anti-Violence Initiative: Partnerships in Action*, 'INDIGENT DEF. (Nat'l Legal Aid & Defender Ass'n, Washington, D.C.), May–June 1999, at 14–15.

31. Brummer explains that with traditional sentencing approaches in adult and juvenile courts, the lawyer and social worker only focused on the client's specific issue, "[b]ut our advocacy quickly rose to the macro level, driven by our lawyers' and social workers' conclusion that there were substantial gaps in the continuum of service and that many of the existing programs were ineffective or even counter-productive." Brummer, *supra* note 29, at 1. Miami public defender leaders continue to support broader systemic reform efforts that are consistent with restorative justice and public health models. *Id.*



offenders with crime prevention efforts; and the external/advocacy part that focuses on representing both the client and broader society's interests in prevention programs for crime control.

*A. Preventing Crime Through More Effective, Whole-Client Representation*

In the ordinary practice of public defense, public defenders are supposed to be responsive to their clients' wishes, and the ordinary assumption is that the client's wish is to maximize her liberty. It naturally turns out, then, that most public defenders think of their work as a devotion to maximizing the liberty interests of their clients. This is what they most comfortably do.

Some offices, however, have begun to recognize that this comfortable model is not necessarily a complete view of what occurs.<sup>32</sup> Nor is it necessarily the best idea of what can usefully happen in an attorney-client relationship. For one thing, it is not necessarily optimal for an attorney to do nothing more than represent the client's interests as the client sees them. Of course, when a client is clear about what she wants, it is vitally important that the attorney act as a zealous agent for those purposes.

But there is often a period in which a client is struggling to figure out what she wants given the situation in which she finds herself. During this time, defense attorneys provide important information, advice, and even counseling. They help clients face up to the reality of the charges against them, and make them aware of likely future scenarios in the handling of the case. They may discuss and agree on tactics in defending the case. Sometimes the conversation goes beyond discussing the case at hand and the best defense tactics. It extends to the way the client feels about her situation and what she needs to do not only to minimize restraints on her freedom in the short term, but also to manage her relationships in the long term with those who matter to her or are depending on her in some way. These individuals may include spouses, siblings, parents, children, friends, and neighbors—even victims. She may also focus on the question of how to avoid future entanglement in the system, and express interest in alternative dispositions; not only for liberty-enhancing features, but also for the potential impact that they may have on the way she lives her life. Some clients, upon reflection, often prefer less liberty coupled with more drug treatment, job training, or schooling, than more immediate liberty as a result of the disposition of their cases.

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32. E.g., 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 (2001) (describing several public defense offices that are grounded in maximizing clients' liberty interests but also recognize that a broader vision of the public defense role is a more complete view of providing counsel). Wrap-around services and team-based representation with lawyers and nonlawyers are sometimes referred to as "whole-client representation" or "holistic advocacy." *Id.* at 426–27.

Public defenders might see these moments between the client and her lawyer as important crime prevention opportunities. That objective should not be their dominant focus, of course. The public defender is there primarily to ensure that her client's rights and liberty interests are defended, not to help the wider community to accomplish its crime control objectives. But there are at least two potential crime prevention opportunities that fall well within the ethos and ethical guidelines that shape the behavior of public defenders.

One important role for a public defender might be to help a client leave her family in the best shape possible in the unhappy circumstance that she is sent to jail. It may be particularly important to ensure the care of a dependent spouse or of children. A review of deaths of children in Washington, D.C., for example, revealed that some of those deaths occurred shortly after a mother or father went to jail, when the children found themselves exposed to the anger and fear of an ill-suited caretaker suddenly left in charge of them.<sup>33</sup>

A second more obvious and well-developed role is for public defenders to engage in an active, vigorous search for a "client specific disposition," that is, a particular regimen, or placement, or form of supervision that satisfies the court's need for some degree of punishment and control, but does so in a way that allows the defendant to remain relatively free to continue to meet responsibilities to her family, and/or to receive services that may promote rehabilitation.<sup>34</sup> Once again, this effort will be a valuable activity in each individual case. But it is also valuable to keep a record of cases in which alternative dispositions would have been acceptable and beneficial, but could not be arranged due to insufficient capacity of one kind or another. Public defenders can then present that tally to correctional institutions, human service agencies, or directly to defender funding sources for consideration in their annual budgeting activities.

While some public defenders may think that such activities detract from more traditional ideas about effective representation, Bennett Brummer holds the contrary position:

By expanding our role and changing the nature of the dialogue about representing the interests of indigent criminal defendants, and not simply defending constitutional principles (or what the shortsighted denigrate as legal technicalities), we become more effective advocates for these professional principles. Taking moral positions in a broader

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33. PATRICIA KELLY ET AL., U.S. DEP'T OF JUSTICE, RESPONDING TO VIOLENCE IN CORNET CITY: THE PROBLEM-SOLVING EXERCISE 131-132 (Sept. 1994).

34. See, e.g., Susan Wardell et al., "Alternatives to Incarceration: The Team Approach to Plea Negotiation and Sentencing" (Nov. 2001) (paper presented at the Nat'l Legal Aid and Defender Ass'n Annual Meeting, Nov. 8, 2001, available through the Fulton County Conflict Defender, Inc.). See also SENTENCING PROJECT, COMPONENTS OF AN EFFECTIVE ALTERNATIVE SENTENCING PROGRAM FOR PUBLIC DEFENDERS (identifying "Client Specific Planning" as one component of an effective alternative sentencing program), at <http://www.sentencingproject.org/pdfs/1000.pdf> (last visited July 6, 2003) (identifying "Client Specific Planning" as one component of an effective alternative sentencing program).

context, we break stereotypes and make it more difficult to dismiss us. We gain a real opportunity to educate people from other disciplines and the general public, legitimizing the defense function and increasing community understanding and support for it.<sup>35</sup>

*B. Preventing Crime by Using Dispositions to Strengthen  
Nongovernmental Social Control*

Beyond searching for more effective dispositions that can shape the rehabilitation of individual offenders, public defenders might be able to help prevent crime by strengthening family or neighborhood capacities to exercise informal social control. Most dispositions in criminal cases ostensibly require someone to take responsibility for supervising the defendant and to see to it that the defendant both lives up to her obligations and takes advantage of the services supplied under the court-ordered disposition. This individual is usually the judge or the probation officer.

In the new era of privatization and enthusiasm for community-based organizations, however, one can imagine assigning responsibility for the supervision of offenders not to the court or probation office, but to private individuals or community organizations specifically targeting that purpose. In the course of working with a client's family to make sure that they are settled, and in searching for a client-specific disposition, the public defender might find some person—a father, a brother, an uncle, an employer—or organization willing to step forward and take responsibility for supervising the conduct of the offender. Alternatively, a defender office that regularly refers clients to a trustworthy organization may be willing to go to bat for the accused. That group might well be some kind of faith-based group animated by its religious commitments to care for those whom society has rejected.<sup>36</sup>

Those who accept the responsibility for offenders, could, in turn, become a potent force within a community that stands for the basic principles of lawful living and respect for the lives and property of others. Indeed, to the extent that we think the criminal justice system as a whole reduces crime and to the extent that we believe this comes at least partly as a result of the perceived quality of the justice it dispenses, we may think that public defender offices help to produce that perception by giving the system the legitimacy that makes it influential.<sup>37</sup>

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35. Brummer, *supra* note 29, at 13.

36. See, e.g., David Cole, *Faith Succeeds Where Prison Fails*, N.Y. TIMES, Jan. 31, 2001, A21; Ann Costello, *Volunteer Group Works to Lift Spirits Inside Sing Sing*, N.Y. TIMES, Aug. 6, 1995, § 13WC, at 11.

37. See generally Mark Moore, *Legitimation of Criminal Justice Policies and Practices*, Speech at the National Institute of Justice, Washington D.C. (1997) (transcript on file with the author); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

### *C. Preventing Crime Through External Advocacy Activities*

Strategically, bringing a preventive focus to individual cases presents one of the best ways to demonstrate the crime preventive value that public defenders can provide to society as a whole. It increases the likelihood that the work of public defenders will be valued and appreciated by the community it serves because clients and those near and dear to them will come to see that their lawyers truly care about them. "Many in our community believe the costs of our current criminal justice mentality are too high, in human, fiscal, and liberty terms. They hunger for a cost-effective, humane approach to public safety that warrants their confidence."<sup>38</sup> And just as individual members of the public—whether clients, relatives, or others—value defenders who work toward the improvement of their clients' lives, so will elected representatives and policy decision-makers.

Once defenders accept that much of what they do, and much of what their clients care about, can appropriately be described as crime prevention, they must confidently make their case to decision-makers in these terms: "This stance [that public defenders should seek to prevent and reduce crime] is consistent with defender interests in promoting constitutional and civil liberties."<sup>39</sup> This approach allows defenders to build alliances that are much more persuasive than ones focused on protection of individual rights alone. Service providers struggling with the same clients around the same social and economic issues will see defenders who strive to help their clients become law-abiding citizens as allies, and will support them in policy conflicts. Similarly, decision-makers responsible for defender funding can also gain greater appreciation for such defender work, either independently of their constituencies or because of them.

## III.

### BUILDING THE CAPACITY OF PUBLIC DEFENDERS TO PREVENT CRIME

Assuming for a moment that it would be both politically and substantively valuable for public defenders to align themselves with the goal of preventing crime, what would public defenders have to do to realize opportunities to accomplish that purpose? We see three challenges: (1) getting past the "laugh test" both outside and inside the office; (2) changing practices within the office; and (3) building the capacity for external representation and support for crime prevention approaches.

#### *A. Getting Past the Laugh Test, Both Outside and Inside the Office*

It is difficult to imagine anyone not laughing, or raising an eyebrow, when told that public defenders work to prevent crime. If defenders zealously fight to

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38. Brummer, *supra* note 29, at 13.

39. *Id.*

get their clients out of custody, and thus, back on the streets, then how are they preventing crime? After all, are not most defendants guilty of something? Even public defenders themselves might be inclined to see such a claim as purely a political ploy—a cynical move designed to expand their constituency and hide what it is they do to and for society.

Yet public opinion polls show that more Americans favor treatment and other rehabilitation programs over incarceration for nonviolent offenses.<sup>40</sup> Most people know or have heard that an overwhelming percentage of defendants have substance abuse and mental health problems. With individual clients, public defenders and assigned counsel are in a unique position to identify the problem, counsel the client, and advocate for treatment services. Unlike other criminal justice system players (prosecutors, police, judges), public defenders have an ethical obligation to explore legal and nonlegal options for defendants. Public defenders may also develop personal relationships with their clients, which allow them to be influential with them. Because public defenders represent so many defendants, they are in a good position to identify gaps in services, ineffective treatment programs, and other barriers to better outcomes. Through such methods, public defenders could potentially help to prevent crime as well as ensure justice.

In Miami, Bennett Brummer has found that the public was more receptive than his own office to the message that public defenders can help reduce crime.<sup>41</sup> Public defenders are likely to be skeptical of that message because they (1) do not have sufficient resources to perform their primary defense function; (2) fear that zealous advocacy will suffer under a more paternalistic/maternalistic model; (3) do not want the public to hold them to a standard of reducing crime and recidivism because of the inherent conflict of interest that will exist if they have to choose between selling clients on treatment or risking not meeting crime reduction goals; and (4) are by training skeptical of anything that sounds too good to be true.

The crime reduction strategy is a tough sell internally because public defenders have had extensive, gut-wrenching experience with (1) being saddled with additional responsibilities without corresponding funds; (2) finding that they are disadvantaged relative to police and prosecutors in competing for public funds; (3) feeling the hostility towards their clients and themselves in the increasingly harsh sentences that clients receive; (4) seeing the difficulties that other criminal justice agencies who have committed themselves to crime

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40. See THE SENTENCING PROJECT, CRIME, PUNISHMENT AND PUBLIC OPINION: A SUMMARY OF RECENT STUDIES AND THEIR IMPLICATIONS FOR SENTENCING POLICY (2000), 2 n.11–3 n.17 (discussing National Opinion Surveys finding public support for rehabilitation), at <http://www.sentencingproject.org/pdfs/1005.pdf> (last visited July 6, 2003).

41. In describing the potential pitfalls of the Miami public defenders' crime-fighting program, Brummer writes: "Establishing an [anti-violence initiative] requires imagination and advocacy in a broader forum than many defenders are accustomed to functioning in. The rules of procedure are less clear than lawyers may be comfortable with." Brummer, *supra* note 29, at 12.

reduction have faced in achieving these goals; and (5) knowing that legislators are particularly likely to slash public defense budgets if public defenders commit to preventing crime and then fail to do so. In short, to public defenders, embracing these goals and activities seems like a burdensome and risky move. For defenders to happily accept an expanded mission that includes crime prevention as an ancillary goal, they will want to see the money up front.

### *B. Changing Practices Within the Office*

Beyond the issue of self-perception and role definition among public defenders, however, lies another matter. In order for public defenders to take a broader crime prevention role, it is necessary to add new capabilities to their offices. First, a public defender organization has to be prepared to devote a greater portion of its resources to nonlawyer staff, such as social workers, investigators, paralegals, community education workers, and so on. For public defense leaders, this increased expenditure of resources is a challenge. Many have limited resources while others do not want to risk moving too far from the traditional mission of the public defense program as defined by statute, contract, or oversight board. Public defenders can nonetheless achieve the shift incrementally. The more innovative defender programs try to improve client representation while also helping reduce recidivism risks among their clients. Some make the link to saving taxpayer dollars over the long run. Resourceful defender programs have reported that tapping into the skills of nonlawyers to address client problems directly while a criminal case is pending can provide more time for lawyers to prepare cases and expand their legal strategies in preparing for trial, plea negotiations, or a sentencing hearing. Thus, the inclusion of nonlawyers in the representation does not diminish a lawyer's traditional role, but rather strengthens it.

When public defense statutory mandates are narrow or resources tight, resourceful defender leaders seek out community member volunteers to assist defense lawyers in addressing the underlying problems a client faces, such as housing, childcare, or mental health issues. For example, James D. Hennings, Executive Director of the Metropolitan Public Defender Services, Inc., in Portland, Oregon, reports that his office has had much success over the years, improving client representation and forging positive community relations through their volunteer Legal Assistants and Outreach Coordinators program. These volunteers—from an array of professional backgrounds including nuns, bartenders, and homemakers—not only advocate on behalf of individuals, but are also valuable liaisons to the community in different venues.<sup>42</sup> More traditional defenders often claim that the community is hostile to public defenders and would not volunteer or support the expansion of defender services. To the contrary, there are inspired defender leaders who contact a variety of

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42. Clarke, *supra* note 32, at 430–31.

community members, beyond the usual suspects, who say they represent the whole community, and have found strong public support for local public defenders among citizens who want to see balanced justice regardless of wealth or status.<sup>43</sup>

The academic community is another source of volunteers, interns, and potential staff. Mary Hoban, Chief Social Worker in the Connecticut Division of the Public Defender Services, began many years ago as the one social work intern inside the Connecticut Public Defender office. The key was that a public defender established one contact at the local social work school. Ms. Hoban suggests that other public defense managers interested in hiring social work interns or full-time staff begin by establishing contact with one faculty member at a local university that offers social work courses.<sup>44</sup> Others have contacted a school of anthropology. Social work graduate students interested in forensic social work are excellent candidates for public defender internships. Innovative defender leaders educate students and faculty in the value of public defense work and opportunities for social workers and others to assist in problem solving for clients. Public defender leaders can use their staff social worker to find volunteer interns, write funding proposals or engage in legislative outreach to expand the state or county public defense mandate so they can hire more on-staff social workers. Evidence that this approach works is the fact that the Connecticut Public Defender now has forty social workers on staff to cover thirty-nine field offices throughout Connecticut.<sup>45</sup>

This work requires a re-conceptualization of the attorney's role in a defender office and her relations to other staff. The familiar debate over lawyers not being social workers is not only about the substance of the work that they do and the kind of training they receive, but also about issues of power, status, and funding in the office. Lawyers receive litigation training that focuses almost exclusively on trial advocacy, although some law schools are now broadening their educational efforts to support a wider set of capabilities. The discomfort with being a social worker is in part a result of the lack of training and skills in the discipline.

The first and most important challenge within the office is for public defenders to develop an appreciation of the value of broadly defining their role. The romantic view of public defenders is that they are advocates who ensure that

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43. Several innovative defender offices that have forged highly supportive community links include: The Bronx Defenders in New York City, NY; Neighborhood Defender Service of Harlem in New York City, NY; the Community Law Office in Knoxville, TN; the Georgia Justice Project in Atlanta, GA; the Miami-Dade Public Defender's Office in Miami, FL; the Charlottesville-Albemarle Office of the Public Defender in Charlottesville, VA; and The Defender Association of Seattle-King County, WA.

44. Mary Hoban, Remarks at the Executive Session on Public Defense (May 3-5, 2001) (discussing social workers as staff members in public defense or assigned counsel programs).

45. See CONNECTICUT DIVISION OF PUBLIC DEFENDER SERVICES, THE ANNUAL REPORT 2001 OF THE CHIEF PUBLIC DEFENDER 2, 31 (2002).

the prosecution is held to its burden of proof by testing the adequacy of the evidence at trial. For some defenders, this narrowly defined role reflects the limit of their personal commitment. Most defenders, however, want more than this. They want to do more for their clients, whom they see as fellow human beings trying to make their way in the world, not simply as clients whom they represent in legal proceedings. They want to ensure that their clients do not go again through the revolving door. They want them to live with, support, and care for their loved ones. In most cases, a defender's ethical responsibility to provide zealous advocacy includes efforts to convince the court to make individualized determinations with the goal of minimizing the harm to defendants and their families. This vision of the role of the public defender is not inconsistent with the traditional role; it is simply broader. It calls out to those public defenders who want to serve their clients and society as effectively and decently as possible. Indeed, public defenders and assigned counsel serve and protect society by engaging in problem solving for individual clients.

#### IV.

##### BUILDING A CAPACITY FOR CRIME PREVENTION ADVOCACY

To fully utilize public defenders' capacity to prevent both state crimes against citizens and crimes and violence among citizens, public defenders must also go beyond their operational roles in handling individual cases; they must develop the capacity to represent their views forcefully in public, a role that leads them to the legislative and justice planning arenas. The most important step in building this capacity is for those who lead public defender offices to recognize that this external policy advocacy is one of their most important functions, and to devote the time and effort necessary both to develop their skills in this activity, and to do it. As Michael Judge has observed: "Public Defenders must assert strong leadership in defining and articulating the nature of the defender role in the justice system and society at large. To do otherwise permits outsiders to distort our mission, circumscribe our authority, limit our effectiveness, and vastly undervalue us."<sup>46</sup>

In addition to this, however, public defender offices must develop the capacity both for effective media relationships and effective policy research. They must be able to craft and communicate a message that aligns with the public's desire to prevent crime, and that shows the ways in which their offices can contribute to this important goal. They have to provide both the persuasive stories that help the public see their potential for reducing crime, as well as the statistics and empirical evidence that show that the impact can be large and systematic. One powerful example of this approach is offered by the Bronx Defenders' recent publication that takes the form of an actual case folder.<sup>47</sup> This

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46. *Id.*

47. See THE BRONX DEFENDERS, BEYOND THE COURTHOUSE . . . , (n.d.). This publication, which resembles an actual case file (a 14 ½ by 8 ½ manila folder with a lawyer's handwritten notes



device allows citizens who are otherwise unfamiliar with the work of a public defender to see the concrete issues they face and the opportunities they have to make a difference in the world.

Just as it is hard for public defenders to accept the idea that they must change the way the office operates in individual cases, it is also difficult for them to accept the idea that they must engage in political and policy advocacy. They would much prefer to confine their advocacy to the courtroom, not the court of public opinion. Yet the reality of a democratic system is that the people and their elected representatives make important decisions about how to spend public funds and utilize public authority. The Supreme Court is not the only entity that can decide the form that public defense will take and dedicated lawyers are not the only individuals drawn to this task. Elected chief executives of cities and states and those who are elected to represent those in city councils and state legislatures also get to decide the form that public defense will take. They might well be interested not only in what public defenders can do to protect liberty and ensure justice, but also in what they can do to prevent and control crime.

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on the cover) describes the vision and team structure of the Bronx Defenders office. Each client of the Bronx Defenders is represented by a small group consisting of lawyers, social workers, investigators, and support staff.

