

Bridging the Gap: A Practical Guide to Civil-Defender Collaboration

By *McGregor Smyth*

Vicky G. received a Section 8 Existing Housing Voucher for ten years. The prosecutor and local public housing authority now allege that over a six-year period she failed to report that her boyfriend was living in the apartment and that she underreported her income. She is charged with grand larceny and filing a false instrument.

Adam R. is 16 years old. He lives in a public housing apartment with his grandmother and three young brothers and sisters. He is arrested four blocks from home for possession of a small amount of marijuana. The local housing authority brings an eviction proceeding against his entire family.

Lilly A. has two small children. She is arrested in her apartment for passing bad checks—a felony. The police call the local child welfare office, which takes the children into custody. Because of the circumstances of the case, Lilly is likely to spend eighteen to twenty-four months in prison.

At first glance, these clients present daunting problems. They have fallen into an alarming gap between criminal and civil legal aid, a gap that both criminal defense attorneys and civil legal aid

lawyers are usually loath to cross. Most public defenders do not think beyond the termination of the pending criminal case. Many civil legal aid attorneys would like to think that their client population has little contact with the criminal justice system. And never the twain shall meet.

Both sides of this divide can and should endeavor to bridge it, but in this article I specifically address civil legal services organizations and their staff. By widening your focus—looking at the whole client and the client's community—you can see that the same systemic problems inextricably connect low-income clients, regardless of whether their most immediate legal problem is civil or criminal. The criminal justice system inflicts damage on low-income communities generally, not just on the individuals charged with crimes. Those who pass through it have, as a result, limited access to employment, housing, and benefits and thus a reduced ability to contribute to their families and communities. Indeed, over 28 percent of adults in the United States have a criminal record.¹ No data are available on the corresponding percentage of low-

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¹ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE (2001) (finding that by December 31, 1999, over 59.065 million individuals had state criminal histories); U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (finding that adult, 18 and over, population of the United States in 2000 was 209,128,094). An additional 43 million criminal records are maintained on the federal database, but no data exist on how many duplicate the above state records. See Bureau of Justice Statistics Report.

income adults who have criminal records. The number is almost certainly higher than in the general population; 62 percent of all state felony arrests are of poor people who will be convicted of a crime.² Consider how many families are affected as a result of this statistic. You might find that your client communities overlap to a much greater extent than you ever knew.

I. Breaking the Cycle Defined by Poverty, Race, and Despair

Initiating a criminal proceeding is the state's most powerful means of exerting authority over an individual, and entire families can be swept away by the consequences. The resulting harms are often far-reaching and unforeseen, leading to lost homes, lost jobs, and broken families. For many clients, their children, and their families, these hardships are more severe than the immediate criminal charges.

Being accused of a crime frequently causes the loss of a hard-earned job for a person who has striven to establish self-sufficiency. Being sentenced to even a short prison term can result in a dramatic loss of income from work or public benefits. Accepting certain plea bargains leads to immediate eviction, termination of em-

ployment, loss of benefits, or deportation.³ In such circumstances, clients and their families, already living in poverty, face countless threats to their tenuous livelihoods regardless of guilt or innocence.

Conversely, complications such as a loss of benefits, a job, or a home often serve as the catalyst for entry into the criminal justice system. Indeed, most clients cycle through the criminal justice system as a result of deep and interrelated social problems that existing social services have failed to address.⁴ These social problems, which include unemployment, mental health issues, addiction, and homelessness, disproportionately haunt low-income and disadvantaged communities—communities of poverty and communities of color.⁵ At the same time, these communities are vastly underresourced and suffer from extensive breakdowns in social services. This fateful lack of parity between social problems and social services often culminates in a crisis point—being charged with a crime. Yet this crisis is only a single point in what is often a vicious cycle of crime and poverty defined by racial and economic disparity.

The criminal justice system magnifies and aggravates problems of race and

² Eighty-two percent of felony defendants are poor enough to be eligible for assigned counsel, and convictions are obtained in some three-quarters of these cases. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES (2000).

³ E.g., a plea to simple drug possession results in ineligibility for or termination of federal student loans, *see* 20 U.S.C. § 1091(r)(1) (2003), most public housing, *see* 42 USC § 13661 (2003), TANF (Temporary Assistance for Needy Families) benefits in most states, *see* 21 U.S.C. § 862a (2003), and, for noncitizens, probable deportation or removal, *see* 8 U.S.C. § 1227(a)(2)(B)(i) (2003).

⁴ *See, e.g.*, the following Bureau of Justice Statistics reports: CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS (2003); PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002); CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN (2000); Doris James Wilson, U.S. Dep't of Justice, NCJ 179999, Drug Use, Testing, and Treatment in Jails (2000).

⁵ *See, e.g.*, U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, ANNUAL DEMOGRAPHIC SUPPLEMENT (2001 POVERTY), tbl. 3: Program Participation Status of Household—Poverty Status of People in 2001 (Mar. 2002) (comparing recipients of various means-tested benefits—including cash assistance, food stamps, and public housing—by age, gender, income, and race); tbl. 7: Years of School Completed by People 25 Years and Over, by Age, Race, Household Relationship, and Poverty Status: 2001 (Mar. 2002) (comparing by race and age); tbl. 10: Work Experience During Year by Selected Characteristics and Poverty Status in 2001 of People 16 Years Old and Over (Mar. 2002); tbl. 22: Age, Gender, Household Relationship, Race, and Hispanic Origin—Poverty Status of People and Families by Selected Characteristics in 2001 (Mar. 2002); tbl. 24: Health Insurance Coverage Status and Type of Coverage by Selected Characteristics for All People in Poverty Universe: 2001 (Mar. 2002), *available at* <http://ferret.bls.census.gov/macro/032002/pov/toc.htm>.

poverty. In 1996, the most recent year in which national data are available, court-appointed lawyers represented 82 percent of felony defendants in large state courts because these defendants could not afford an attorney.⁶ Although no national numbers exist on the race of these indigent defendants, 91 percent of indigent criminal defendants in the Bronx, New York, are African American or Latino.⁷

These indigent defendants suffer disproportionately harsher consequences at every stage of the criminal justice system, including the collateral civil consequences that fall within traditional legal services practice areas. The disparities within the criminal justice system, from targeted police interdiction to biased bail orders to disproportionate incarceration rates and sentencing, are well documented.⁸ At the end of the criminal justice process, “reentry” into the community awaits, but here the same disparities predominate, and the ex-offender is set up to fail. For example, about three-quarters of reentering prisoners have a history of substance abuse, and approximately 16 percent suffer from mental illness, but fewer than one-third receive treatment while incarcerated.⁹ Nonetheless, ex-offenders are released into the same service-deficient environment after having received little or no rehabilitation or training while incarcerated, and they now have a new gift from the system—the scarlet letter “C” of a criminal conviction.

Most inmates, in fact, are released

with little more than carfare and a short list of referral agencies. Once released, their conviction likely bars them from staying with family members who are living in any form of public housing, and for the same reasons they are not eligible for subsidized housing themselves.¹⁰ They have serious difficulties finding jobs because most employers ask questions about arrest records or discriminate based on a conviction that is often irrelevant to the job in question. Indeed, a survey of employers in five large cities found that 65 percent would not knowingly hire an ex-offender.¹¹ Perhaps the most insidious consequence of involvement with the criminal justice system is felony disenfranchisement, literally denying a large population the right to vote and thereby to have a voice in government.¹² Given the current rates of incarceration, three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime.¹³

In short, involvement with the criminal justice system sets off a domino effect of collateral consequences. Regardless of the specific charges or conviction, this fallout is much more likely to hurt extremely disadvantaged communities of poverty and color. These communities are both much more likely to have contact with the criminal justice system in the first place, and to suffer disproportionately from the rolling consequences—loss of income, loss of employment, eviction, ineligibility for publicly subsidized hous-

⁶ See CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES (2000).

⁷ This calculation is derived from case data from The Bronx Defenders.

⁸ See, e.g., N.Y. ATTORNEY GEN., THE NEW YORK CITY POLICE DEPARTMENT’S “STOP & FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (1999), available at www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html; Harlow, *supra* note 2, at 3, 5.

⁹ See ALLEN J. BECK, U.S. DEP’T OF JUSTICE, STATE AND FEDERAL PRISONERS RETURNING TO THE COMMUNITY: FINDINGS FROM THE BUREAU OF JUSTICE STATISTICS 4 (2000), available at www.ojp.usdoj.gov/bjs/pub/pdf/sfprc.pdf.

¹⁰ See, e.g., 42 U.S.C. § 13661 (2003).

¹¹ See JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31 (2001) (citing HENRY HOLZER, WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS (1996)).

¹² See, e.g., N.Y. ELEC. L. § 5-106(2)-(5) (McKinney 2003); CAL. ELEC. CODE § 2101 (West 2003); FLA. STAT. § 97.041 (2003).

¹³ See THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2003), available at www.sentencingproject.org/brief/pub1046.pdf.

ing—that have far less effect on wealthier ex-offenders.

II. Bridging the Gap

Confronted with these barriers, the current gap in services for the poor who are touched by the criminal justice system is alarming. While the national focus on crime in the 1990s swept unprecedented numbers of people into the system, a dramatic decrease in government spending for civil legal services and the imposition of restrictions on representation of prisoners by programs funded by the Legal Services Corporation (LSC) caused many traditional civil legal assistance organizations to avoid representing anyone involved with the criminal justice system.¹⁴ One study found that no more than 14 percent of the legal needs of New York's poor were being met.¹⁵ Criminal defense offices face their own high caseloads and lack of personnel and are forced to overlook the noncriminal difficulties that lead to or result from involvement with the criminal justice system.

With a few concrete steps, however, lawyers for the poor can work together to begin to bridge this gap. This endeavor fits within a larger movement that encourages the pursuit of interdisciplinary and community-oriented solutions to our clients' problems.¹⁶ When defenders and legal services attorneys collaborate, we can address root problems that often manifest themselves in offender behavior.

A few models exist for integrated criminal and civil representation of the poor—The Bronx Defenders, Neighborhood Defender Service of Harlem, and

Public Defender Service for Washington, D.C., are all public defender offices with civil attorneys on staff. In my office—The Bronx Defenders—the Civil Action Project offers comprehensive legal and social services to minimize the severe and often unforeseen fallout from criminal proceedings and facilitate the reentry of our clients into the community. The project's three attorneys collaborate closely with the office's criminal defense teams—which consist of defense attorneys, social workers, and investigators—and represent and advise clients on the full range of legal issues, including housing, public benefits, employment, civil rights, immigration, forfeiture, and family law. By engaging the community, the project also seeks to identify pervasive issues that confront our clients and empower them to effect change. In the next year, the Civil Action Project will launch the Community Defender Resource Center, a training and resource center that will provide practical, legal, and technical support to criminal defense attorneys in New York State on strategies to overcome the collateral consequences of criminal proceedings.

Of course, many viable and useful models short of full integration of services still recognize our common organizational mission—effective advocacy for those who live in poverty. In this article I focus on the feasible steps that civil legal services organizations can take to cooperate with defender agencies and attorneys.

III. Taking Practical Steps

Legal services organizations, including those restricted by LSC funding, can take

¹⁴ See, e.g., 45 C.F.R. pts. 1613, 1637.

¹⁵ See Evan A. Davis, *A Lawyer Has an Obligation: Pro Bono and the Legal Profession* (Otto L. Walter Lecture, New York Law School, 2001), available at www.abcny.org/currentarticle/otto_walter_lecture.html.

¹⁶ See, e.g., Robert Lennon, *After Years of Incubating in the Public Interest Sector, the "Holistic" Pro Bono Movement Gains a Foothold in Big Firms*, AM. LAW. (Dec. 5, 2002), available at www.lawschoolconsortium.net/holistic%20pro%20bono.htm; PENDA D. HAIR, *LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE* (Rockefeller Found. 2001); 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); Alan M. Lerner, *Law and Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107 (1999); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119 (1997); Tanya Neiman, *From Triage to Changing Clients' Lives*, MGMT. INFO. EXCH. J. (Nov. 1995).

a number of concrete and realistic steps toward bridging this divide.

First, educate yourself on the issues that arise at the nexus of the criminal justice system and civil legal services. Contact organizations such as the Legal Action Center or the Civil Action Project at The Bronx Defenders for helpful materials, background, and advice.¹⁷ Organize a roundtable meeting with the local public defender or indigent criminal defense bar. What are the most common civil legal issues raised by their clients? Do they have suggestions for fruitful collaboration? If an institutional public defender serves your area, can they track any data that would be useful to you?

Then educate one another. At a minimum, most LSC-funded programs can make available a large set of crucial client-oriented materials ranging from pamphlets to *pro se* guides. Supply the defender office lobby or arraignment courtroom with a steady stream of your standard pamphlets on subjects such as housing, public benefits, family law, and disability. If your meeting with the defenders unearths unusual issues, consider publishing new client pamphlets targeting those needs.

Conduct continuing legal education training for public defenders and panel attorneys on relevant issues. Such training can cover eligibility requirements for public assistance and subsidized housing, including the most likely scenarios in which the relevant agency will suspect fraud, common mistakes made by the agencies, and how to interpret the paperwork. For each practice group within your office (e.g., housing, disability, benefits, HIV/AIDS, immigration), survey the local and federal law to determine the collateral consequences of criminal proceedings or convictions. In particular, educate both defense attorneys and the larger community on the criminal conviction eligibility bars for the local public housing, Section 8, Temporary Assistance for Needy Families, and food stamp programs and the consequences of a criminal conviction in the immigration context. You may be surprised how little criminal defense attor-

neys know about these consequences, particularly when they result from convictions for minor offenses. Emphasize that many defenders have been successful in obtaining more favorable dispositions when they educate judges and prosecutors about the myriad collateral consequences. You need not start from scratch: contact the Legal Action Center (or The Bronx Defenders in New York State) for an overview of your state's law.

Conduct client workshops at the local criminal defense provider. Have "Know Your Rights" clinics on the important issues identified above. The question-and-answer sessions with the criminal defendants and their families will be incredibly informative for you as well. Find a service provider who can run workshops on writing a résumé, job interviewing, finding housing, and filling out benefit applications. In return, ask defense attorneys to conduct "Know Your Rights" clinics at your offices on interactions with the police and navigating the criminal justice system. Reach out to local law schools for free labor to launch some of these programs.

Consider establishing a formal referral arrangement with the local defense providers. Indeed, a streamlined referral process may enable you to intervene much earlier, and consequently more effectively, in a client's civil legal problem—public defenders are often the first to hear about difficulties such as an eviction or loss of benefits. Moreover, the client's experience during her time of crisis will be more positive if she is not referred blindly across town for assistance. In turn, these experiences build trust with clients and the communities that you serve. At the very least, teach the defense attorneys about your intake process so that they can tell their clients what to expect. Many clients, when simply given a phone number or address for a referral, give up if they encounter a single barrier.

The legal services office could designate the public defender as an outreach site. You could staff a table in the office at scheduled times to provide brief advice and consider cases for intake. If no local

¹⁷ The Legal Action Center is a law and policy organization that specializes in issues related to criminal justice, alcoholism and substance abuse, and HIV/AIDS. See www.lac.org.

institutional criminal defense provider exists, ask the criminal court for permission to set up an outreach site, or at least an information table. Also, consider assigning an attorney or paralegal to be “on call” during certain periods to give quick advice. If LSC restrictions apply, you can formally limit the type of advice and representation that you provide to ensure compliance.

Although each organization must perform its own assessment, careful planning will ensure that these collaborations do not violate LSC restrictions. Particular attention should be paid to 45 C.F.R. Part 1613 (representation in criminal proceedings), Part 1615 (habeas corpus collateral attacks on criminal convictions), Part 1637 (representation of prisoners in civil litigation), Part 1633 (representation in certain drug-related eviction proceedings), and Part 1612 (conducting training programs for restricted activities).¹⁸ While some of the training, advice, and representation detailed above may prove unfeasible under the restrictions, many rich opportunities for cooperation remain.

Potential conflicts of interest, particularly within the context of domestic violence, can also be addressed through planning. Although some might fear that conflicts would arise more often in these collaborations with defenders, the same conflict checks used for any outreach site that gives brief advice should prove sufficient.

IV. Seeing It in Practice

The three scenarios outlined at the beginning of the article illustrate how these collaborations can work in practice to benefit our clients.

The advice of a legal services attorney could prove invaluable to Vicky G. First, the civil attorney could make a list of all relevant documents and printouts produced by the local Section 8 authority and advise the defense attorney how to obtain them. Through training or individual

advice, the legal services attorney could teach defense attorneys how to interpret these documents, which are often quite arcane and indecipherable. In particular, notations from housing assistants or other workers can be crucial in undermining fraudulent intent.

Moreover, reviewing the eligibility and subsidy calculations could reveal fundamental errors. (The agencies’ computations are frequently incorrect for legal services clients, and it is no different in criminal cases.) If the landlord has failed

The legal services office could designate the public defender as an outreach site, staffing a table at scheduled times.

to make repairs, Vicky may have a warranty-of-habitability issue that would entitle her to rent abatement. Section 8 payments may have been suspended for failure to meet housing quality standards, and the prosecutor’s computation may not reflect this. Careful recalculation can reduce the amount by which the subsidy was allegedly overpaid. Not only can this exercise reduce an offense from a felony to a misdemeanor; it also will reduce the amount of restitution that Vicky G. will have to pay. The defense attorney must also understand the importance of determining whether Vicky G. was receiving any other public benefits during the time in question. If so, a careless plea or factual allocution could establish further criminal or civil liability related to those benefits.

Adam R.’s family faces a tough battle after last term’s U.S. Supreme Court decision in *HUD v. Rucker*, which allowed public housing authorities to evict entire families for drug-related activity even if the tenant did not know, could not foresee, or could not control behavior by other occupants or guests.¹⁹ Because the pri-

¹⁸ See Alan W. Houseman & Linda E. Perle, Ctr. for Law & Soc. Pol’y, *Representing Individuals with Criminal Records Under the LSC Act and Regulations* (2002) (on file with McGregor Smyth).

¹⁹ See *HUD v. Rucker*, 535 U.S. 125 (2002).

mary tenant is the grandmother, rather than Adam R., who is the person charged with the crime, the LSC restriction on drug-related evictions does not apply. Therefore an LSC-funded office may represent Adam R.'s family in the eviction proceeding.²⁰ You can work closely with the defense attorney to ensure that Adam enters a relevant treatment or rehabilitation program immediately—mitigation evidence that could prove crucial to the eviction case. Collaboration with the defense attorney may also expose factual or legal defenses with which you are unfamiliar, such as the details of standard narcotics interdiction and lines of attack for cross-examination of the police officers involved.

On a broader level, collaboration with the local defense bar may help you effect a policy change through tactics that should meet even LSC restrictions. Ask the defenders to refer to you all defendants who live in public housing or have Section 8 vouchers. If your office can commit to taking every eligible “*Rucker*” case to trial, the local PHA may reconsider its policy.²¹

Finally, Lilly A. must receive help and advice to prevent her from permanently losing her children. The Adoption and Safe Families Act of 1997 requires the state to petition to terminate parental rights when a child has been in foster care for fifteen of the last twenty-two months.²² When a parent is incarcerated, those fifteen months expire quickly. Maintaining family contact during incarceration and securing family reunification afterward are critical to successful reentry into the community.

Help or advice with a simple form may keep Lilly's family intact. Depending on your state's laws, you can develop a

pro se packet on informal custody arrangements for incarcerated parents—usually placement with relatives—that do not qualify as “foster care” under the Act. Of course, LSC-funded offices may not represent anyone who is currently incarcerated, but no restrictions apply in Lilly's situation to those who are released on bail or bond and anticipate being reincarcerated.²³ Any *pro se* materials would be universally useful to all in similar situations.

V. Conclusion

The criminal justice system is not simply a forum for affixing blame and assigning punishment. It also highlights a population most in need of help. Being arrested and charged with a crime is a unique and horrible moment of crisis for anyone, even more so for people whom the system has failed. Our responsibility is to fight to ensure that the deep and embedded injustices of race and poverty do not trap entire communities. We must break the cycle of punitive measures and unforeseen consequences that prevent our clients from establishing any semblance of stability.

Because of the gap in services, however, this population as a whole simply is not being served. By focusing on the needs of “whole” clients—assisting their families, advocating for their communities, and addressing the underlying issues that have caused their involvement with the criminal justice system—we empower individuals, strengthen families, and help communities prosper.

Holistic advocacy is not simply an ideal; it is a necessity. To those living in poverty, the margin of survival is precariously narrow. Each lives in a house of

²⁰ Entities funded by the Legal Services Corporation (LSC) are prohibited from defending any person in a public housing eviction proceeding if that person has been criminally charged with or has been convicted of the illegal sale, distribution, or manufacture of a controlled substance, or of possession of a controlled substance with the intent to sell or distribute. See 45 C.F.R. § 1633.3 (2003). The prohibition does not apply when a charge has been dismissed or the person has been acquitted of the illegal drug activity. See 45 C.F.R. § 1633.2 (2003).

²¹ See *supra* note 5. Also, LSC restrictions prevent grantees from representing currently incarcerated persons. See 45 C.F.R. § 1637.3.

²² See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. § 675).

²³ See 45 C.F.R. §§ 1637.3, 1637.4.

cards, and one adverse action may send the structure tumbling down. The fact of the matter is that these issues are already interrelated, and they require an interdisciplinary set of tools to attack them. We need to adjust ourselves, our practice, and

our organizations to this reality. We must challenge traditional legal services organizations and public defenders to expand the vision of their mission, integrate, collaborate, and concentrate on their clients' full set of needs.