

# HOLISTIC IS NOT A BAD WORD: A CRIMINAL DEFENSE ATTORNEY’S GUIDE TO USING INVISIBLE PUNISHMENTS AS AN ADVOCACY STRATEGY

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“Every saint has a past and every sinner a future.”  
—Oscar Wilde

## INTRODUCTION

THE legal disabilities and social exclusion resulting from any adverse encounter with the criminal justice system erect nearly insurmountable barriers for criminal defendants, people with criminal records, those returning to their communities after incarceration, and their families.<sup>1</sup> Recent scholarship has highlighted the draconian effects of these invisible punishments<sup>2</sup> and has argued that criminal defense attorneys should expand their practice to include defending

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1. Out of respect for our client communities and recognizing the power of language, this article will endeavor to avoid the use of labels such as “ex-offender,” “ex-prisoner,” and “felon.” In the words of the NuLeadership Policy Group, a network of justice reform leaders who were previously incarcerated:

In an effort to assist our transition from prison to our communities as responsible citizens and to create a more positive human image of ourselves, we are asking everyone to stop using these negative terms and to simply refer to us as **PEOPLE**. **PEOPLE** currently or formerly incarcerated, **PEOPLE** on parole, **PEOPLE** recently released from prison, **PEOPLE** in prison, **PEOPLE** with criminal convictions, but **PEOPLE**.

Eddie Ellis, An Open Letter to Our Friends (NuLeadership Policy Group 2004) (on file with author).

2. As noted by many commentators, “collateral” consequences are simply not collateral at all. Many of these consequences result directly from a person’s criminal charge or conviction. Even if there is an intervening decisionmaker, calling these consequences “collateral” is merely a legal fiction—the person experiences the consequences as punishments regardless of the label. As suggested by Jeremy Travis and Marc Mauer, I will use “hidden” and “invisible” to describe more accurately the broad consequences of involvement with the criminal justice system. See, e.g., Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 16 (Marc Mauer & Meda Chesney-Lind eds., 2002). See also Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (referring to hidden consequences as a “secret sentence”). In addition, this article will attempt to collapse the distinction between hidden sanctions and “reentry” issues. See *infra* part II. Excessive focus on post-release phenomena ignores the potential contributions of defenders as early intervenors. See Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1087 (2004).

against these hidden consequences.<sup>3</sup> However, few of these articles have explored the practical difficulties of taking account of hidden sanctions in defense work, or how new advocacy strategies based on these sanctions may actually benefit the defense. From a defense attorney's perspective, particularly one who represents indigent clients, an expanded vision of advocacy is both exciting and extremely daunting.

Any approach to true reform must accept the fundamental truth that criminal justice practitioners have a difficult job. Public defenders and others who represent indigent people charged with crimes operate under crushing caseloads and within unsympathetic court systems.<sup>4</sup> To be viable, a practice model must work within this context and cannot mandate unreasonable duties.

When considering the complex web of invisible punishments in the aggregate, the task of incorporating them into daily defense practice appears overwhelming. But I consult with defenders every day, and I can assure practitioners of two things: (1) a number of practical tips can make a world of difference for many clients—especially if you routinize them—and can actually result in improved criminal dispositions; and (2) even if you cannot avoid a hidden consequence, your client cannot make an informed choice unless you explain it.

This article provides a roadmap for incorporating invisible punishments into criminal defense practice. First, part I outlines the broader context of client need that demands an altered defense role. Part II discusses one attempt at a coordinated approach—the new ABA *Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (the Standards)—and examines its contributions and limitations in supporting this altered role. Part III lays out in detail how defense attorneys can use knowledge of hidden sanctions to obtain better outcomes in criminal cases and improve their advocacy. Part IV describes strategies for defenders to gain the requisite knowledge of invisible punishments through existing resources and collaborations.

#### I. THE REAL REPEAT OFFENDERS—POVERTY & DESPAIR

*Two-thirds of those released from state prisons will be rearrested within three years. One-half will be convicted of a new crime.*<sup>5</sup>

There is little question why the above is true. We know from experience that if formerly incarcerated persons cannot find work, shelter, or help, they are much more likely to be caught in a recurring cycle of crime.<sup>6</sup>

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3. See, e.g., Pinard, *supra* note 2, at 1081; Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 255 (2004).

4. See, e.g., Pinard, *supra* note 2, at 1089; Thompson, *supra* note 3, at 255.

5. See PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

6. See, e.g., *id.*; JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY (June 2001), available at [http://www.urban.org/pdfs/from\\_prison\\_to\\_home.pdf](http://www.urban.org/pdfs/from_prison_to_home.pdf).

This cycle of crime is perpetuated in significant part by the collateral damage inflicted by the criminal justice system. First, most people cycle through the criminal justice system as a result of deep and interrelated social problems that existing social services have failed to address, such as homelessness, addiction, unemployment, or mental illness.<sup>7</sup> Second, the ensuing arrest, criminal charge, or conviction can result in significant legal and practical disabilities that only exacerbate the social problems that often contribute to offender behavior.<sup>8</sup>

From arrest to reentry into the community, a web of sanctions haunts defendants and their families.<sup>9</sup> An arrest and criminal charge alone can have a devastating impact. For example, a person charged with a crime must appear regularly in court, and the resulting days of missed work frequently cause the loss of a hard-earned job.<sup>10</sup> Poorer defendants are disproportionately affected by this phenomenon, as they are more likely to have jobs without vacation benefits, flexibility, or labor protections.<sup>11</sup> In addition, a significant number of jobs require public licensing, and these licenses are frequently suspended at the moment of arrest.<sup>12</sup> New York alone has over 100 licensing regimes for a variety of occupations, from barber and security guard to cosmetologist and nurse.<sup>13</sup> The increased automatic dissemination of arrest data to these licensing regimes is making license suspensions the rule rather than the exception. Similarly, an arrest often triggers termination proceedings in publicly subsidized or private housing, without regard to the eventual criminal disposition.<sup>14</sup> To provide some context, in New York State, more than one in three people arrested are never convicted of any crime or offense,<sup>15</sup> but they still suffer drastic consequences from their arrest alone.

Conviction can lead to immediate eviction, deportation, termination of employment, or loss of benefits:

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7. See, e.g., McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV., May-June 2003, at 56, 56, available at <http://www.nlada.org/DMS/Documents/1058455948.26/Bridging%20the%20Gap.pdf>.

8. *Id.* at 57. One hopes that a broader recognition that these disabilities are not only draconian and disproportionate, but also actually foster recidivism rather than acting as disincentives to crime, will lead to a large-scale reassessment and repeal of these sanctions.

9. See generally MCGREGOR SMYTH, *THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS* (Mar. 2005) [hereinafter SMYTH, CONSEQUENCES] (discussing the civil consequences of a criminal proceeding in New York), available at [http://www.nlada.org/DMS/Documents/1110924022.69/Consequences%20of%20Criminal%20Proceedings\\_Mar05.pdf](http://www.nlada.org/DMS/Documents/1110924022.69/Consequences%20of%20Criminal%20Proceedings_Mar05.pdf).

10. See Smyth, *Bridging the Gap*, *supra* note 7, at 57.

11. See *id.*

12. SMYTH, CONSEQUENCES, *supra* note 9, at 5.

13. See *id.*

14. See, e.g., 24 C.F.R. § 966.4(1)5(iii)(A) (2004) (stating that in conventional public housing, a PHA may terminate assistance “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction”); 24 C.F.R. § 982.553(c) (2004) (analogous provision for Section 8 voucher).

15. In 2002, only 62.1% of all arrests resulted in a conviction for any offense. See New York State Division of Criminal Justice Services, *Criminal Justice Indicators New York State: 1998-2002*, at <http://criminaljustice.state.ny.us/crimnet/ojsa/areastat/areast.htm> (last visited Nov. 4, 2004). In New York City, only 57.4% of arrests resulted in convictions. These numbers reveal a significant error rate by police and prosecutors. *Id.*

- ▶ A plea to disorderly conduct, defined by New York law as a non-criminal offense, makes a person presumptively ineligible for New York City public housing for two years.<sup>16</sup>
- ▶ Two convictions for turnstile jumping can lead to deportation of a lawful permanent resident.<sup>17</sup>
- ▶ A conviction for any crime bars a person from being a barber, boxer, or bingo operator.<sup>18</sup>
- ▶ Conviction of simple possession of a marijuana cigarette makes a person ineligible for federal student loans for a year.<sup>19</sup>

These hidden sanctions can have a more severe impact on the arrested or convicted, their children, and their families than the immediate criminal sentence.<sup>20</sup> People with criminal convictions are even restricted from participation in the most fundamental processes of our democratic system.<sup>21</sup> When given an informed choice, many clients will opt for longer terms of imprisonment rather than face deportation and separation from their families or the eviction of their entire family from their home.<sup>22</sup>

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16. See N.Y. CRIM. PROC. LAW § 240.20 (McKinney 2002) (defining disorderly conduct); N.Y. PENAL LAW § 10.00(6) (McKinney 2004) (defining crime as misdemeanor or felony); N.Y. CRIM. PROC. § 1.20(39) (McKinney 2003) (defining petty offense as violation); New York City Housing Authority Applications Manual, “Standards for Admission: Conviction Factors and End of Ineligibility Periods—Public Housing Program” Ex. F. The Supreme Court’s decision in *Dep’t of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002), permits public housing authorities to evict entire families for criminal activity even if the tenant did not know of, could not foresee, or could not control the behavior of other occupants or guests. As Michael Barbosa notes, exclusion from low-income housing can be the equivalent to a sentence of homelessness. See Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL’Y & L. 135, 139 (2002).

17. Immigration and Naturalization Act (INA), § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (1997). See also Nina Bernstein, *When a MetroCard Led Far Out of Town*, N.Y. TIMES, Oct. 11, 2004, at B1.

18. N.Y. GEN. BUS. LAW § 441 (McKinney 1996); N.Y. UNCONSOL. LAW ch. 7, § 17(b) (McKinney 2002); N.Y. EXEC. LAW § 435(2)(c)(1) (McKinney 1996).

19. N.Y. PENAL LAW § 221.05 (McKinney 2000); 20 U.S.C. § 1091(r)(1) (2000).

20. Nkechi Taifa gives a powerful narrative description of the full range of invisible punishments for a person convicted of a drug felony through the lens of a fictional character named Charmaine in *Roadblocked Re-Entry: The Prison After Imprisonment*, NAT’L BAR ASS’N MAG., May/June 2004, at 20, 20-23.

21. For example, felony convictions as a rule result in at least a temporary loss of the right to vote and serve on a jury. See, e.g., N.Y. ELEC. LAW §§ 5-106(2)-(5) (McKinney 1998) (voting); N.Y. JUD. CT. ACTS LAW § 510(3) (McKinney 2003) (jury service); 28 U.S.C. § 1865(b)(5) (2003) (federal jury service); THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1-2, available at <http://www.sentencingproject.org/pdfs/1046.pdf>; Cynthia Works, *Reentry—The Tie That Binds Civil Legal Aid Attorneys and Public Defenders*, 37 CLEARINGHOUSE REV. (J. POVERTY L. & POL’Y), Sept-Oct 2003, at 328, 335, available at <http://www.nlada.org/DMS/Documents/1066401170.22/Cynthia%20Works%20Article%20from%20Clearinghouse%20Review.pdf>; Thompson, *supra* note 3, at 282.

22. This information is based on a review of case data from The Bronx Defenders. Professors Jack Chin and Richard Holmes note, “[I]n cases like these, traditional sanctions such as fine or imprisonment are comparatively insignificant. The real work of the conviction is performed by the collateral consequences.” Chin & Holmes, *supra* note 2, at 700.

Incarcerated persons face an array of legal, economic, and social hurdles when they are released from incarceration and try to reenter their communities. More than 600,000 people have been released from the nation's prisons every year since 1998.<sup>23</sup> Almost eleven million were released into the community from county and local jails in 1998 alone.<sup>24</sup> Many of the hardships faced by this population stem from the legal disabilities resulting from their convictions and other factors resulting from incarceration.<sup>25</sup> Moreover, these hidden sanctions are imposed on a population subject to disproportionate public health vulnerabilities than the general population, including higher rates of childhood abuse, homelessness, HIV infection and other infectious or chronic diseases, drug or alcohol abuse, mental illness, and physical or sexual abuse.<sup>26</sup> Persons leaving prison or jail are released into the same service-deficient environment after receiving inadequate 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.<sup>27</sup>

#### A. *Invisible Punishments in Context*

One must appreciate the context in which these invisible punishments are imposed, namely, the deep inequities of the current criminal justice system. First, many people going through the system never should have been there in the first place. Recent criminal justice policy has created a class of “criminals” through “quality-of-life” or order-maintenance policing that criminalizes petty social ills, such as public urination and public drinking.<sup>28</sup> People in targeted neighborhoods—

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23. THE SENTENCING PROJECT, PRISONERS RE-ENTERING THE COMMUNITY 1, available at <http://www.sentencingproject.org/pdfs/1036.pdf>.

24. 1 NAT'L COMM'N ON CORR. HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES ix (2002), available at [http://www.ncchc.org/stbr/Volume1/Health%20Status%20\(vol%201\).pdf](http://www.ncchc.org/stbr/Volume1/Health%20Status%20(vol%201).pdf). See also LAUREN E. GLAZE & SERI PALLA, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 205336, PROBATION AND PAROLE IN THE UNITED STATES, 2003 at 3 (2004) (reporting that over two million people entered probation), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf>.

25. See, e.g., TRAVIS ET AL., *supra* note 6, at 27-30.

26. See, e.g., NAT'L COMM'N ON CORR. HEALTH CARE, *supra* note 72, at [http://www.ncchc.org/pubs/pubs\\_stbr.html](http://www.ncchc.org/pubs/pubs_stbr.html); DORIS J. JAMES, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 201932, PROFILE OF JAIL INMATES, 2002 (July 2004, rev. Oct. 12, 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>; CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS (Jan. 2003, rev. Apr. 15, 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>; PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 (June 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>; CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN (Aug. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>; DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 179999, DRUG USE, TESTING, AND TREATMENT IN JAILS (May 2000, rev. Sept. 29, 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/duttj.pdf>.

27. Smyth, *supra* note 7, at 58.

28. See, e.g., David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J. CRIM. L. & CRIMINOLOGY 381, 384 (2004). Nearly two-thirds of the 3.8 million increase in the number of adults ever incarcerated between 1974 and 2001 occurred as a result of an increase in first incarceration rates; one-third occurred as a result of an increase in the number of residents age 18 and older. See THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 3 (2003), available at

almost without exception communities of poverty and communities of color—easily rack up misdemeanor records for minor illegal activities. One can debate the efficacy of this law enforcement policy,<sup>29</sup> but the fact remains that individuals swept up in these campaigns suffer disproportionately for their offenses. As demonstrated above, even these minor criminal records can have devastating effects on a person's ability to live and work.<sup>30</sup> The attendant invisible punishments nearly ensure that the road to stability is impossible to navigate.

Second, recent attention to issues of factual innocence has increased public awareness of the fallibility of the criminal justice system.<sup>31</sup> Underlying issues of race, class, and other forms of bias improperly influence decisions at every stage, from arrest, identification procedures, and charging decisions, to bail, plea offers, and jury decisions.<sup>32</sup> Moreover, many commentators have written extensively about the overwhelming pressures on indigent clients to plead guilty regardless of culpability.<sup>33</sup>

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<http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

29. See generally BERNARDE HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 6-8 (2001) (critiquing order-maintenance theory); Thacher, *supra* note 28, at 390 (critiquing order-maintenance theory); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513, 1527-30 (2002) (exploring advantages and disadvantages of order-maintenance theory).

30. Such sanctions have been called "internal exile." See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 157 (1999). Professor Demleitner notes, "The impact of collateral consequences is especially disturbing since such consequences frequently lack penological justification. They merely add to the overall severity of the sentence without being grounded in theories of retribution, prevention, deterrence, or rehabilitation." *Id.* at 154.

31. See, e.g., Gross, Jacoby, Matheson, Montgomery & Patel, *Exonerations in the United States, 1989 through 2003* (Apr. 19, 2004) (studying 328 exonerations), available at [http://www.soros.org/initiatives/justice/articles\\_publications/publications/exonerations\\_20040419/exon\\_report.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/exonerations_20040419/exon_report.pdf); AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

32. See, e.g., Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827 (2003) (addressing racial disparities in the criminal justice system); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253 (2002) (stating collateral consequences have a racially disproportionate effect); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (stating that at every stage of the criminal process evidence shows African Americans are not treated as well as whites). See also E.E. (Bo) Edwards, *From the President: Equal Justice Under Law—A Concept, Not Reality*, CHAMPION, May 2004, at 4 (commenting that racial disparity in the criminal justice system has increased dramatically).

33. See, e.g., Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 865-66 (2004); F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 189-90 (2002); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 405-15 (2001). Experienced public defenders report that the single most decisive factor in a client's criminal disposition is whether bail is set at arraignment. If any bail is set, the client will likely plead guilty to any misdemeanor because she cannot afford bail. Conversation with Robin G. Steinberg, Executive

A closer look at conviction data belies the common media perception that people with criminal records are predators.<sup>34</sup> In 2002 in New York State, more than two-thirds of adult arrests were for misdemeanors, while only 9% were for violent felonies.<sup>35</sup> Only 62% of arrests resulted in convictions.<sup>36</sup> Nationwide, almost 75% of those convicted of felonies and sentenced to more than a year in prison and who were released from state prison were convicted of non-violent offenses.<sup>37</sup> Of all state court felony convictions across the country in 2000, only 18.7% were for violent offenses.<sup>38</sup>

We must use this knowledge about the inequities in the current justice system to move the conversation about criminal justice out of the polemics of fear mongering and “tough on crime” politics into a more constructive discussion of the underlying causes of crime and recidivism and the externalities of many criminal justice policies.

### B. *Inadequate Services Despite Special Needs*

The size of the community directly affected by the hidden consequences of the criminal justice system, from arrest to release, is astonishing. By some estimates, more than one in three adults in the United States—over 64 million—have a criminal record.<sup>39</sup> Over 80% of those charged with crimes are indigent and unable

Director of The Bronx Defenders (Sept. 9, 2004).

34. See, e.g., Thompson, *supra* note 3, at 263 (“[T]elevision coverage of crime more than doubled from 1992 to 1993, despite the fact that crime rates remained essentially the same.”).

35. New York State Division of Criminal Justice Services, *supra* note 15. Numbers were similar for New York City: almost two-thirds of adult arrests were for misdemeanors and only 11% were for violent felonies. *Id.*

36. *Id.*

37. MATTHEW R. DUROSE & CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 207081, PROFILE OF NONVIOLENT OFFENDERS EXITING STATE PRISONS 1 (Oct. 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf>.

38. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, at 447 tbl. 5.44 (2003), available at <http://www.albany.edu/sourcebook/pdf/t544.pdf>. Moreover, even the label “felony” can have little relation to the severity of the offense. For example, a person who buys any amount of marijuana in Florida is guilty of a felony. See FLA. STAT. tit. 46, § 893.13(2)(a)2 (2004). Professor Pinard correctly notes the disproportionate focus in the media and in academic literature on the hidden consequences of felony convictions, despite the far greater proportion of misdemeanor convictions and comparable invisible sanctions. Pinard, *supra* note 2, at 1076 n.8.

39. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 200343, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2001, at 15 tbl. 2 (Aug. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis01.pdf> (finding that by December 31, 2001, over 64.282 million individuals had state criminal histories). See also BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ 187670, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf> (finding that by December 31, 1999, over 59.065 million individuals had state criminal histories); U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, at 1 (2001), available at <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf> (finding that the 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-referenced state records. See BUREAU OF JUSTICE STATISTICS REPORT, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION, *supra*, at

to afford an attorney.<sup>40</sup> The disparate racial and economic impacts cannot be overstated and are well-documented.<sup>41</sup> If current incarceration rates remain unchanged, an estimated one in fifteen persons born in 2001 will serve time in prison during their lifetime.<sup>42</sup> The likelihood rises to one in three for African-American males.<sup>43</sup> Countless families are affected: over ten million children have parents who were imprisoned at some point in the children's lives.<sup>44</sup>

An alarming gap in services exists for the large population of people involved with the criminal justice system. This gap primarily manifests itself in three ways. First, many clients simply cannot obtain necessary services, particularly legal services, to cope with hidden civil consequences.<sup>45</sup> Second, the existing services are fragmented and marked by a lack of coordination and communication.<sup>46</sup> Finally, when clients are able to access services, the providers are often uninformed about the wide-ranging consequences of criminal proceedings, particularly those outside the provider's narrow practice areas.<sup>47</sup>

These problems are resistant to conventional service solutions because the effects of involvement with the criminal justice system require the participation of social services agencies, civil legal aid lawyers, and criminal defense attorneys.<sup>48</sup> For example, a person charged with endangering the welfare of a child could easily have a criminal defense attorney handling his criminal case, a family court lawyer handling a related civil action on abuse, neglect, or termination of parental rights, a civil legal services attorney handling his eviction case, and a social services agency providing treatment services. Rarely do these players communicate effectively with each other. As recognized by the Standards, in many cases people charged with crimes, their defenders, civil legal services lawyers, prosecutors, and judges are unaware of these invisible effects at critical decision-making points.<sup>49</sup>

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40. See CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 1 (Nov. 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

41. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272-73 (2004); The Sentencing Project, Report Summary, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment*, available at <http://www.sentencingproject.org/pdfs/9050summary.pdf> (last visited Mar. 2, 2005).

42. BONCZAR, *supra* note 28, at 7.

43. *Id.* at 7-8.

44. CENTER FOR LAW AND SOCIAL POLICY (CLASP), EVERY DOOR CLOSED: FACTS ABOUT PARENTS WITH CRIMINAL RECORDS 1 (Fact Sheet Series No. 1, 2003), available at [http://www.clasp.org/publications/EDC\\_fact\\_sheets.pdf](http://www.clasp.org/publications/EDC_fact_sheets.pdf).

45. One study found that no more than 14% of the legal needs of New York's poor were being met. See Evan A. Davis, Otto L. Walter Lecture at New York Law School, *A Lawyer Has an Obligation: Pro Bono and the Legal Profession* (Apr. 10, 2001), available at [http://www.abcnyc.org/currentarticle/otto\\_walter\\_lecture.html](http://www.abcnyc.org/currentarticle/otto_walter_lecture.html). In New York, one of the largest legal services providers is forced to turn away at least six eligible clients for every client that it can help. See Michael Barbosa, *Lawyering at the Margins*, 11 AM. U. J. GENDER SOC. POL'Y & L. 135, 137 (2003).

46. MCGREGOR SMYTH, THE BRONX DEFENDERS, REENTRY.NET: REPORT ON THE PLANNING PROCESS 9-10 (Apr. 2004) (on file with author).

47. See *id.*

48. See, e.g., Thompson, *supra* note 3, at 291.

49. See, e.g., Pinard, *supra* note 2, at 1080-81.

The problems that this client population faces do not fall into neat categories. The breadth of the hidden consequences described above demonstrates that this special-needs population requires coordinated advocacy, not segregated services. Conventional divisions of labor cannot address this need. These complex problems beg comprehensive solutions.

### C. *Breaking the Cycle*

Invisible punishments plot a useful outline of the structure that traps low-income clients in recurring encounters with the criminal justice system. Coordinated or integrated services can target hidden consequences to resolve clients' problems in a comprehensive manner. The Bronx Defenders' experience, for example, has shown the following:

- ▶ Comprehensive services can help stabilize a family during the crisis of a criminal case and address many of the underlying social problems (such as addiction and homelessness) that contribute to the cycle of poverty and crime.
- ▶ By mitigating the collateral damage of criminal proceedings (such as eviction or loss of a job), comprehensive services can address the root problems that lead to crime and help clients reenter society as productive citizens.

As described in detail below, defenders play a critical role in the broader conception of criminal justice because of their unique potential for early intervention in the cycle of crime.<sup>50</sup>

## II: ONE ATTEMPT AT A COORDINATED APPROACH—THE ABA STANDARDS

The new *Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (the Standards), adopted by the ABA in August 2003, have been described as the “first effort since the 1970s to address the collateral legal consequences of a conviction in a coherent and comprehensive fashion.”<sup>51</sup> As a set of policy recommendations, they provide a useful focus for a discussion of an expanded defense role.

### A. *Summary of the New ABA Standards on Invisible Punishments*

The Standards have two overarching goals. First, they intend to promote awareness of the full legal consequences of a criminal conviction, particularly those imposed automatically upon conviction. As stated in the drafters' Report to the House of Delegates, “[t]here is no justification for the legal system to operate in

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50. Many authors, from practitioners to academics, have argued for an expanded defense role. See, e.g., Robin G. Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123 (2004) (practitioners); *infra* note 72 (academics). This article will attempt to give guidance on how to implement this vision.

51. Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1727 (2003).

ignorance of the effects of its actions.”<sup>52</sup> Second, the Standards endeavor to focus attention on the deleterious effects that hidden punishments have on the process by which a convicted person reenters his community and attempts to become a law-abiding and productive member of society. These invisible sanctions “restricting convicted persons in their life activities have multiplied” and create “a class of people who live permanently at the margin of the law.”<sup>53</sup>

The Standards begin with two legal distinctions that reflect these goals:

(a) The term “collateral sanction” means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.

(b) The term “discretionary disqualification” means a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.<sup>54</sup>

The Standards use these definitions to create a bifurcated set of policy recommendations—a strong set focused on “collateral sanctions” and a weak set focused on “discretionary disqualifications.”

### 1. *Collateral Sanctions*

The robust standards on collateral sanctions intend to define and limit the scope of the sanctions, ensure notification about and consideration of the sanctions during the criminal case, and provide a judicial or administrative mechanism for obtaining relief from the sanctions.<sup>55</sup> As a first step to limiting collateral sanctions, the Standards attempt to expose them—they require each legislature to collect or reference all collateral sanctions in a single chapter of the jurisdiction’s criminal code. This new part of the code should “identify with particularity the type, severity and duration of collateral sanctions applicable to each offense or to a group of offenses specifically identified by ... easily determinable means.”<sup>56</sup> The Standards, therefore, recognize that a compilation of hidden sanctions is critical to

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52. AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS COMM’N, REPORT TO THE ABA HOUSE OF DELEGATES ON PROPOSED STANDARDS ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS at R-6 (3d ed. 2003) [hereinafter ABA REPORT].

53. *Id.*

54. ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS Standard 19-1.1(a)-(b) (3d ed. 2004) [hereinafter ABA STANDARDS].

55. ABA STANDARDS, *supra* note 54, at Standard 19-1.2(a). The strong set of standards effectively adopts Jeremy Travis’ recommendations to limit invisible punishments through visibility (making the punishments visible in statutory codes and sentencing), proportionality, individualized justice, and avenues for relief, all to embrace the goal of reintegration. *See* Travis, *supra* note 2, at 34-36.

56. ABA STANDARDS, *supra* note 54, at Standard 19-2.1.

achieving meaningful policy change and to incorporating invisible punishments into daily legal practice.<sup>57</sup>

Standard 19-2.2 provides a general rule of limitation, whereby a legislature should only impose a collateral sanction if it determines that it can justify the sanction in all circumstances based on the conduct underlying the offense.<sup>58</sup> A number of specific collateral sanctions are prohibited: disenfranchisement; deprivation of judicial rights, including the rights to initiate or defend a lawsuit and to jury service; deprivation of domestic relationship rights, including divorce, parental rights, and adoption; deprivation of real or personal property rights; and ineligibility for government programs providing “necessities of life,” including food, housing, clothing, and medical care, or programs relevant to successful reentry into society.<sup>59</sup>

To incorporate collateral sanctions into the criminal case, the Standards require that a defendant be notified of the sanctions before entering a guilty plea and that a court consider the sanctions at sentencing. Standard 19-2.3 states that the rules of procedure should require a court to ensure that a defendant is fully warned about the consequences of his plea before the court accepts a guilty plea.<sup>60</sup> A statement on the record that defense counsel has satisfied her duty of advisement under Standard 14-3.2(f) is sufficient.<sup>61</sup> Moreover, the Standards state that a sentencing court should consider collateral sanctions in determining the overall sentence.<sup>62</sup> In this way, the court can ensure that the “totality of the penalty is not unduly severe and that it does not give rise to undue disparity.”<sup>63</sup>

Finally, the Standards require procedures for waiver of, modification of, and relief from collateral sanctions. Individual sanctions, including those for convictions outside the jurisdiction, should be subject to a modification or waiver order by a court or an administrative body.<sup>64</sup> In addition, convicted persons must have access to a legal process to obtain an order relieving them of all collateral sanctions.<sup>65</sup>

## 2. *Discretionary Disqualifications*

A noticeably weaker set of provisions applies to discretionary disqualifications, which are disqualifications imposed by separate judicial or administrative action.

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57. See, e.g., Travis, *supra* note 2, at 16.

58. ABA STANDARDS, *supra* note 54, at Standard 19-2.2.

59. ABA STANDARDS, *supra* note 54, Standard 19-2.6. The list of prohibited sanctions contains many conditions and exceptions beyond the scope of this summary.

60. ABA STANDARDS, *supra* note 54, Standard 19-2.3.

61. See AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS COMMITTEE, PLEAS OF GUILTY 116 (3d ed. 1999) [hereinafter ABA PLEAS OF GUILTY]. Failure to notify, however, will not generally constitute a sufficient basis for withdrawing the plea. ABA STANDARDS, *supra* note 54, at Standard 19-2.3(b).

62. ABA STANDARDS, *supra* note 54, at Standard 19-2.4(a).

63. ABA REPORT, *supra* note 52, at R-11 n.21. Because invisible punishments disproportionately harm those who live in poverty, Standard 19-2.4 could inspire an interesting redistribution of punishments at sentencing that is in stark contrast to the current practice.

64. ABA STANDARDS, *supra* note 54, at Standard 19-2.5(a) & (b).

65. *Id.* at Standard 19-2.5(c).

The goal of these Standards is to reduce unreasonable barriers to reentry.<sup>66</sup> First, Standard 19-3.1 imposes a much weaker rule of limitation on legislatures by prohibiting discretionary disqualifications unless “engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.”<sup>67</sup> Second, there must be some process for review of and relief from discretionary disqualifications.<sup>68</sup> Finally, the Standards prohibit denial of insurance or employment licenses on the basis of convictions, subject to the general exception listed above.<sup>69</sup> Notably, the Standards do not set forth any general protections against discrimination in private employment, opting instead for encouragement of employment through financial incentives to employers and other measures.<sup>70</sup>

*B. Holistic Defense and the Contributions of the New Standards*

The new Standards represent a significant progression in the conventional conception of criminal justice by recognizing that collateral consequences simply are not collateral. In their own small way, the Standards represent a mainstreaming of an alternative approach to public defense, often called community or holistic defense. This vision of public defense has been described in many ways,<sup>71</sup> but in essence exhorts advocates to serve a client as a whole person—a person with complex needs, a family, and who is a part of a community—rather than a case or a legal issue.<sup>72</sup>

On one level, the most shocking feature of this vision is its obviousness. How could it be innovative or revolutionary to provide comprehensive services to clients with complex needs, or to view a person as ... a person? Outside the context of serving those who live in poverty, people grasp these concepts immediately and consider them the most basic of propositions.<sup>73</sup> Unfortunately, when the focus turns

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66. ABA REPORT, *supra* note 52, at R-12.

67. ABA STANDARDS, *supra* note 54, at Standard 19-3.1.

68. *Id.* at Standard 19-3.2.

69. *Id.* at Standard 19-3.3.

70. *Id.* at Standard 19-3.3; ABA REPORT, *supra* note 52, at R-22.

71. See, e.g., Pinard, *supra* note 2 (holistic); Kim Taylor-Thompson, *Taking it to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153 (2004) (community oriented); Steinberg & Feige, *supra* note 50 (client-centered); 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) (community justice and problem-solving).

72. An advocate should then use every problem-solving tool available, including community organizing, legal advocacy, social services, and policy work, to meet the client’s interconnected needs. See, e.g., PENDA D. HAIR, LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE 4-6 (Rockefeller Foundation, 2001), available at <http://www.rockfound.org/Documents/431/louderthanwords.pdf>; Clarke, *supra* note 71, at 401-02; Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 112 (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, 121-22 (1997); Tanya Neiman, *From Triage to Changing Clients’ Lives*, MGMT. INFO. EXCHANGE J., Nov. 1995.

73. Even large firm white collar lawyers, when asked about their own clients, simply presume that comprehensive representation is the most effective way of providing services. Many firms now

to those who live in poverty, what once was obvious becomes revolutionary. What once was a basic tenet of representation becomes a Cadillac model. What once was reflexive becomes too much to ask.

Make no mistake—this vision *is* revolutionary within the world of public defense.<sup>74</sup> The simple fact is that implementation of this broader vision is rare. Many institutional barriers, such as fragmented justice funding and calcified organizational design, make housing comprehensive services in one office extremely difficult.<sup>75</sup> However, the complexity of the law, fragmentation and restrictions of funding streams, and organizational inertia are only a few of the reasons why services remain Balkanized.<sup>76</sup>

Defenders in particular face substantial obstacles to realizing this vision. The traditional defense role is to focus on the client's immediate legal needs, and traditional defenders believe that "removing or reducing the imminent threat of incarceration is their function."<sup>77</sup> The unique burdens imposed on public defenders by high caseloads and limited funding provide significant disincentives to expanding this role or changing office culture. Given these intractable barriers, the growing success of programs that have been able to expand their services across the civil/criminal divide is astonishing.<sup>78</sup> The new Standards contribute to this movement by encouraging expansion of defense services into one area of holistic services—hidden punishments.

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market themselves in part as advocates who pay special attention to invisible punishments. *See, e.g.*, Debevoise & Plimpton LLP, *Practice Areas*, at <http://www.debevoise.com/practices/area.asp?areaid=18&groupid=2&LangID=1> (last visited Nov. 2, 2004); Hughes Hubbard & Reed LLP, *White Collar Crime and Corporate Compliance Practice*, at <http://www.hugheshubbard.com/practice/detail.asp?PracticeAreaID=128> (last visited Nov. 2, 2004); Fowler White Boggs & Banker, *White Collar Criminal Defense Group*, at <http://www.fowlerwhite.com/practiceareas/White-Collar.asp> (last visited Nov. 2, 2004); Shipman & Goodwin LLP, *White Collar Defense, Investigations, and Corporate Compliance*, at [http://www.shipman-goodwin.com/practice\\_areas.php?pid=92](http://www.shipman-goodwin.com/practice_areas.php?pid=92) (last visited Nov. 2, 2004). Martha Stewart certainly had a team of attorneys and mitigation specialists thinking about every hidden consequence.

74. *See* Pinard, *supra* note 2, at 1091.

75. *See, e.g.*, Richard Cho, Putting the Pieces Back Together: Overcoming Fragmentation to Prevent Post-Incarceration Homelessness, Columbia University Center for Urban Research and Policy Symposium on Housing & Criminal Justice Policy in New York City (Mar. 22, 2004) (unpublished manuscript, on file with author). Government and foundation funding is difficult to obtain because the integrated services model falls into a gap between criminal and civil funding, and this gap is proving difficult to bridge. This compartmentalization of public and private funding streams maintains the very fragmentation of services that contributes to the cycle of poverty and crime.

76. *See, e.g.*, Thompson, *supra* note 3, at 291-92.

77. Steinberg & Feige, *supra* note 50, at 124. *See also* Pinard, *supra* note 2, at 1068 n.6.

78. For profiles of such programs, see Works, *supra* note 21, at 336-37; Pinard, *supra* note 2, at 1067-68; Clarke, *supra* note 71, at 429-38; Cait Clarke & Christopher Stone, *Bolder Management for Public Defense: Leadership in Three Dimensions*, 29 N.Y.U. REV. L. & SOC. CHANGE 113, 114-20 (2004); Francisca D. Fajana, *Race-Based Lawyering: Engaging Minority Communities in Legal Need Assessments*, 36 CLEARINGHOUSE REV. (J. POVERTY L. & POL'Y) 213 (July-Aug. 2002). Many of these programs, including that of The Bronx Defenders, were supported by public interest law fellowships from the Skadden Fellowship Foundation, the Open Society Institute's Soros Advocacy program, Equal Justice Works, and the Arthur Liman Public Interest Program.

C. *Limitations of the New Standards*

Though the Standards promote a comprehensive approach, in limiting their scope to narrow definitions of “collateral sanctions” and “discretionary disqualifications,” they ignore significant invisible punishments suffered by those touched by the criminal justice system. As mentioned above, the Standards only cover two classes of hidden sanctions: collateral sanctions and discretionary disqualifications. The definitions of these penalties, however, replicate two fundamental flaws of traditional criminal justice policy. First, the definitions on their face only apply to consequences arising from *convictions*. Second, although the Standards attempt to collapse the legalistic distinction between “collateral” consequences and “direct” consequences, they duplicate this legal fiction in the false distinction between “sanctions” and “discretionary disqualifications.”

On one level, these definitions make a rational and intelligible attempt to categorize, define, and limit. The Standards must provide clear guidance for policy makers and institutional players contemplating their adoption.<sup>79</sup> On another level, however, these limitations on the Standards significantly reduce their impact and ignore the actual experiences of those suffering under invisible punishments. As Kent Markus notes, the public now has extraordinary access to a range of criminal history data to use in any number of standardless, discretionary decisions regarding employment, housing, licensing, and other sustaining life activities.<sup>80</sup> Because of the dearth of information on how well criminal history information works as a predictor of risk, decisionmakers—concerned with liability and the appearance of impropriety—tend to implement a zero-tolerance approach.<sup>81</sup> Private employers, landlords, and other decisionmakers are increasingly using any arrest or criminal

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79. The Report notes:

We recognize that the line between a mandatory collateral sanction and a discretionary disqualification is not always a bright one. And, de facto distinctions that rely on a conviction to establish conduct may as a practical matter be just as burdensome and discouraging as distinctions based on rigid legal categories. But because they tend to be more subtle, they are correspondingly more difficult to get a handle on.... We have gone as far as we can in drawing a distinction between the two categories. We expect that further refinements will come only with experience.

ABA REPORT, *supra* note 52, at R-9.

80. Kent Markus, Legal and Policy Options for Dealing with Discretionary Criminal Background Checks, University of Toledo College of Law Symposium on the Legal Barriers to Reentry in Ohio: The ABA Collateral Sanctions in Theory and Practice (Sept. 24, 2004). Devah Pager studied the consequences of a criminal record for the employment outcomes of African American and white job seekers. Using matched pairs of individuals applying for entry-level jobs, she found that a criminal record presents a major barrier to employment. *See generally* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIOLOGY 937 (2003). Moreover, a white person with a criminal record was more likely to get a call-back interview than an African American without one. *Id.* at 958.

81. *See* Pager, *supra* note 80, at 958. *See also* Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1301-06 (2002).

justice involvement to deny access, regardless of the actual disposition or conviction.<sup>82</sup>

In addition, many of the most damaging hidden punishments qualify only as “discretionary disqualifications” under the current definition.<sup>83</sup> Most immigration, public housing, and employment decisions require the intervening decision of an independent court, agency, or official. Because these consequences fall outside the strict “collateral sanction” definition, the strongest provisions of the Standards do not apply.<sup>84</sup> None of these consequences would be codified in the criminal code section on “collateral sanctions,”<sup>85</sup> the court or defense counsel would not be required to notify a person charged with a crime of their existence,<sup>86</sup> and the sanctions would not be considered at sentencing.<sup>87</sup>

Of course, an even more fundamental exception in the Standards undercuts their power: even for collateral sanctions, the failure of court or counsel to inform the defendant of the real consequences of the pleas “shall not be a basis for withdrawing the plea.”<sup>88</sup> With this small provision, the Standards replicate the most damaging legal distinction between “collateral” and “direct” consequences. By carving out such large exceptions to its most powerful mandates, the Standards threaten to doom themselves to irrelevance.<sup>89</sup>

These deficiencies demonstrate the need for a broader definition that encompasses the actual experiences of people harmed by contact with the criminal justice system. In addition, a broader view would expand the strategies that defense attorneys can use to improve their own practice.

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82. Eighty percent of large corporations perform background checks on job applicants; 69% of small businesses do. Eight years ago, only 51% of large corporations did. *See* Susan Llewelyn Leach, *Bosses Peek into Job-Seekers' Pasts*, CHRISTIAN SCI. MONITOR, Oct. 13, 2004, at 15.

83. ABA STANDARDS, *supra* note 52, at 41-43 (Standard 19-3.1 & commentary).

84. Countless practical barriers arise as well, including the tremendous weight of child support arrears accrued while in prison or the adverse effect of a criminal history on a credit report. *See, e.g.*, ANN CAMMETT, NEW JERSEY INST. FOR SOCIAL JUSTICE, MAKING WORK PAY: PROMOTING EMPLOYMENT AND BETTER CHILD SUPPORT OUTCOMES FOR LOW-INCOME AND INCARCERATED PARENTS (2005), available at <http://www.njisj.org/reports/makingworkpay.pdf>; AMY E. HIRSCH ET AL., EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS (2002), available at [http://www.clasp.org/publications/every\\_door\\_closed.pdf](http://www.clasp.org/publications/every_door_closed.pdf).

85. ABA STANDARDS, *supra* note 54, at Standard 19-2.1.

86. *Id.* at Standard 19-2.3.

87. *Id.* at Standard 19-2.4.

88. *Id.* at Standard 19-2.3(b).

89. The ABA Task Force that drafted the Standards advocated stronger provisions governing private employment, as existed in the earlier ABA Standards on the Legal Status of Prisoners. As noted in its report to the House of Delegates, the Standards Committee had reservations about a prescriptive approach to private employment of convicted persons, “at least in part because of concerns about how effective such an approach [was] likely to be.” ABA REPORT, *supra* note 52, at R-22. The Standards Committee’s report to the House also suggested that an agency’s failure to exercise discretion where it exists may make a “discretionary disqualification” into a *de facto* “collateral sanction.” This suggestion does not appear in the commentary later developed to accompany the Standards. *Id.* at R-9.

### III. HOW ROLE EXPANSION CAN BENEFIT CRIMINAL DEFENSE ATTORNEYS AND THEIR CLIENTS

The breadth of hidden consequences is daunting, both to clients and defenders who are faced with learning them. When the subject is raised in a room full of defenders, a variety of passionate responses emerge, but these may be distilled to two opinions:

- ▶ *Why should I even care? I'm a defense attorney, not a social worker or civil lawyer.*
- ▶ *I know it's important, but I just don't have time. I have to prioritize my clients' needs and only concentrate on their liberty interest.*

Our experience at The Bronx Defenders proves that knowledge of these consequences is a critical direct advocacy tool for the defense in criminal cases.

As public defenders, we meet individuals when their lives, their families, and their communities are in crisis. Indeed, defenders are often the first to hear about the devastating problems that the people they represent face—a post-conviction eviction of a family from public housing, the loss of the public assistance that enables a mother to make ends meet, police abuse during a search or an arrest, or the suspension of the Medicaid benefits that permit an elderly person to keep diabetes under control. Accordingly, public defenders have a unique opportunity for early intervention in a crisis. Proper civil advocacy can result in the reinstatement of benefits or employment, or the prevention of an eviction, often effectively eliminating the legal difficulties that catalyzed the initial arrest. A goal of this article is to convince other defenders that by looking beyond the criminal case, they become more effective advocates within the criminal justice system.

#### A. *Improved Criminal Dispositions*

Since the establishment of the Civil Action Project four years ago, The Bronx Defenders has built an expertise in the full range of hidden consequences and, more important, the art of using that knowledge to improve outcomes in criminal cases.<sup>90</sup> Experience has shown that defenders can be successful at leveraging more favorable pleas—or even outright dismissals—when they are able to educate prosecutors and judges on the draconian hidden consequences for the clients and their families. Knowledge of these consequences and zealous defense advocacy have preserved many clients' hard-earned jobs, prevented many evictions from subsidized housing, and resulted in improved dispositions in the criminal cases.

In our experience, prosecutors and judges respond best to consequences that offend their basic sense of fairness—consequences that are absurd or disproportional.

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90. The Civil Action Project provides comprehensive legal services to The Bronx Defenders' clients and their families by fully integrating civil representation with criminal defense practice. Its goal is to minimize the severe and often unforeseen fallout from criminal proceedings and facilitate the reentry of its clients into the community. See The Bronx Defenders, *The Civil Action Project*, at <http://www.bronxdefenders.org/comm/006.html> (last visited Mar. 28, 2005).

tionate, or that affect innocent family members. Four major categories of hidden punishments provide the most leverage: (1) housing (loss of public housing or Section 8 housing); (2) employment (loss of a job or employment license, particularly for the primary breadwinner); (3) student loans; and (4) immigration.

Four actual case studies can illustrate the power of this knowledge as an advocacy tool:

- ▶ Juan R. was charged with a drug crime, and the prosecutor refused to agree to any plea below a misdemeanor. Juan, however, was disabled and lived in public housing, and a misdemeanor would result in his eviction. Knowing the public housing rules on termination for criminal activity, the defense attorney convinced the prosecutor to consent to a non-criminal disposition, and Juan kept his home.
- ▶ Joanne F. had worked hard to get a steady job as a security guard. In a domestic incident with her boyfriend, she was charged with assault and harassment. The initial plea offer would have resulted in the loss of her security guard license and her job. The defense attorney used this disproportionate consequence to convince the prosecutor to offer an adjournment in contemplation of dismissal.<sup>91</sup> Joanne kept her job and her stability.
- ▶ Last summer, eighteen-year-old Max S. was charged with possession of a marijuana cigarette. The prosecutor would only offer a plea to a marijuana violation, defined by New York law as a non-criminal offense.<sup>92</sup> Max, however, was enrolled for his freshman year in college in the fall and had secured needed federal student loans. Under federal law, even a non-criminal plea to a drug offense would render Max ineligible for student loans and, thus, unable to attend college.<sup>93</sup> Citing this sanction, the defense attorney persuaded the prosecutor to offer an adjournment in contemplation of dismissal. Max has now started college.
- ▶ Jose L. had lived in the United States for over eight years and was applying to be a permanent resident. He was charged with grand larceny of a car. The plea offer of misdemeanor larceny or possession of stolen property would have rendered him deportable. Knowing this, his lawyer convinced the prosecutor

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91. In New York, with consent of the prosecution and defense, a court can order a misdemeanor or felony case adjourned in contemplation of dismissal (ACD), subject to certain conditions such as no further arrests during the adjournment or paying a fine or restitution. *See, e.g.*, N.Y. CRIM. PROC. LAW §§ 170.55, 210.47, 215.40 (McKinney 1993). In addition, a special ACD for specified marijuana charges requires an adjournment of one year. *See* N.Y. CRIM. PROC. LAW §§ 170.56, 210.46 (McKinney 1993). Once the case is dismissed, all official records and papers, including the criminal history record, are sealed. *See* N.Y. CRIM. PROC. LAW § 160.50 (McKinney 1993). As with all terminations favorable to the defendant in New York, “[u]pon the termination of a criminal action or proceeding against a person in favor of such person, ... the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution.” N.Y. CRIM. PROC. LAW § 160.60 (McKinney 1993).

92. N.Y. PENAL LAW §§ 10.00(6), 221.05 (McKinney 1993); N.Y. CRIM. PROC. LAW § 1.20(39) (McKinney 1993) (defining violation as non-criminal offense).

93. 20 U.S.C. § 1091(r)(1) (1999).

to offer an equivalent misdemeanor, unauthorized use, that had no immigration consequences.

### B. Risk Management

A substantial number of invisible punishments are imposed only after a separate proceeding. When a client lives in subsidized housing, is accused of endangering the welfare of a child, is a public employee or has an employment license, has a driver's license and is accused of a drug or driving offense, or is a non-citizen, defense attorneys should take note. In all of these cases, the client is likely to have an ancillary civil or administrative proceeding pending at the same time as the criminal case.

Identifying such situations is critical because clients will often testify or give written statements in these collateral proceedings about the underlying facts of the criminal case, without the presence or guidance of their defense attorney, and often in the presence of a government lawyer. Defenders must be mindful of the changed context of a civil or administrative proceeding—clients can invoke the Fifth Amendment privilege against self-incrimination, but they will be penalized for it with an adverse inference.<sup>94</sup>

For example, in New York City, the District Attorney's (D.A.) office in each borough staffs a Narcotics Eviction Unit that forces private landlords to evict tenants virtually any time there is a drug arrest on the premises.<sup>95</sup> All of these eviction cases are brought in one courtroom, and a representative of the D.A.'s office sits in that court all day, listening to tenants answer questions about the eviction cases and directing the landlords' attorneys. These statements obviously affect the criminal case. Therefore, defenders must first be familiar with the invisible sanctions and the separate proceedings that result so they can anticipate these statements.

### C. Additional Discovery

Eviction cases, family law proceedings, employment licensing proceedings, DMV suspension hearings, immigration proceedings, school suspension hearings—these are all venues where an administrative or lower court judge is likely to have subpoena power. If defense attorneys know the range of relevant hidden punishments and related ancillary proceedings, they can use them to obtain additional discovery not available in the criminal cases.<sup>96</sup>

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94. See, e.g., *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 42 (1980).

95. See, e.g., Karah Woodward & Cassi Feldman, *Breaking the Seal: DAs Dig Up Old Court Files*, CITY LIMITS WEEKLY, June 7, 2004, available at <http://www.citylimits.org/content/articles/weeklyView.cfm?articlenumber=1530>; Office of the Bronx District Attorney, *Drug Crime*, at <http://www.bronxda.net/forime/dcrime.htm> (last visited Nov. 8, 2004) (Bronx District Attorney's description of Narcotics Eviction Unit); PETER FINN, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 153146, THE MANHATTAN DISTRICT ATTORNEY'S NARCOTICS EVICTION PROGRAM (1995) (Manhattan's District Attorney's description), available at <http://www.druglibrary.org/schaffer/govpubs/mann.pdf>.

96. An especially important consideration, given the limited nature of criminal discovery. See,

*D. Effect on Plea Bargaining System*

Because of the drastic effects invisible punishments can have on clients and their families, defense attorneys must counsel their clients so that the clients can make informed decisions about whether to accept a plea bargain or to go to trial.<sup>97</sup> The *ABA Standards on Pleas of Guilty* require warnings from both the court and defense counsel about hidden sanctions. Standard 14-1.4(c) (“Defendant to be advised”) states:

Before accepting a plea of guilty or nolo contendere, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.<sup>98</sup>

Moreover, Standard 14-3.2(f) requires: “To the extent possible,<sup>99</sup> defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”<sup>100</sup> Remarkably, Standard 14-3.1, detailing the responsibilities of the prosecuting attorney, does not require any consideration of these punishments in charging decisions or plea offers.<sup>101</sup>

First and foremost, this counseling requirement ensures that the defense attorney is representing the client as a whole person with complex interests, rather than simply as a person charged with a crime. As other scholars have noted, ensuring that clients understand hidden sanctions can counteract the perverse incentive to plead guilty in cases with minor traditional consequences, such as imprisonment or fines.<sup>102</sup> In such cases, including misdemeanors, traffic violations, and non-criminal offenses, even factually innocent defendants believe they have limited incentive to contest the charges. Full knowledge of the invisible punishments that will haunt them may cause them to reconsider.

Defendants’ increased awareness of the actual consequences that they will face may indeed lead to marginally fewer pleas at first. In addition, defense counsel’s

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*e.g.*, Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 *FORDHAM URB. L.J.* 1097 (2004).

97. See, *e.g.*, Pinard, *supra* note 2, at 1081; Chin & Holmes, *supra* note 2, at 736 (“Without considering collateral consequences, lawyers cannot effectively advise their clients about the risks and benefits of pleading guilty, and cannot effectively negotiate the terms of guilty pleas.”).

98. ABA PLEAS OF GUILTY, *supra* note 61, at Standard 14-1.4(c).

99. The Report on the new Standards states, “If information on applicable collateral sanctions is properly collected and made available to defense counsel pursuant to Standard 19-2.1, the contingent nature of this defense counsel duty should be eliminated.” ABA REPORT, *supra* note 52, at R-10 n.18.

100. ABA PLEAS OF GUILTY, *supra* note 61, at Standard 14-3.2(f).

101. More scholarship should be devoted to this significant oversight.

102. Chin & Holmes, *supra* note 2, at 740.

use of these sanctions as leverage during the plea bargaining process may prolong cases, often by at least one court appearance as the cases are adjourned for longer negotiations. The system, however, is resilient. After a transition period, these invisible punishments should become just another factor in negotiations. As these hidden sanctions are incorporated into the justice system's calculus of punishments, the hope is that the baseline of plea offers will shift to reflect more accurately the real consequences of criminal proceedings. The hope is that the aggregate effect will create positive pressures on criminal justice policymakers to stop using the criminal justice system as a sledgehammer to solve social problems.

*E. A Practical Guide to Issue-Spotting*

To help defense attorneys perform triage for hidden punishments that have the most devastating impact on their clients and to help them have the greatest potential for positively affecting the disposition in the criminal case, each attorney or office should implement a simple screening system. At the first contact with the client, intake personnel should focus on four simple questions:<sup>103</sup> (1) Immigration status: Were you born outside the United States?;<sup>104</sup> (2) Housing status: Do you live in publicly-subsidized housing (public housing or Section 8 housing)?; (3) Employment status: Are you a public employee or do you hold an employment license?; (4) Student loans: Do you receive student loans or do you attend, or are you planning to attend, a post-high school educational institution?

If the client answers "yes" to any of these questions, the attorney knows to be vigilant about potential invisible sanctions that will affect the client long after the criminal case is over. This information can then be used to counsel the client and guide negotiation strategy. If the office or attorney uses a standardized client folder, these questions can be preprinted on the inside cover of the folder to remind advocates to ask them and to properly consider their importance throughout the case.

Keeping in mind these principles for identifying clients affected by hidden consequences, four general practice tips will further guide defense attorneys in incorporating the Standards into their daily practice:

- ▶ Always advise your clients to attend a relevant treatment program—drugs, alcohol, violence. Such evidence of rehabilitation can prove invaluable to your client.<sup>105</sup>
- ▶ Always apply for a certificate of rehabilitation, if available, in your jurisdiction.<sup>106</sup>

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103. Professors Chin and Holmes proposed a similar list of questions in *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, *supra* note 2, at 738.

104. Obviously, the answer to this question is not dispositive of citizenship, but experts recommend it as the simplest way to flag potential immigration issues for deeper exploration. See MANUEL VARGAS, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE 2-2 (New York State Defenders Ass'n Immigrant Defense Project, 3d ed. 2003).

105. Such evidence can be used in plea negotiations, sentencing, and in later civil or administrative proceedings, where these hidden sanctions may be imposed.

106. In New York, a Certificate of Relief from Disabilities relieves most automatic forfeitures and

- ▶ Talk to your clients. There is a good chance that they are making statements on the record about relevant facts in ancillary civil proceedings.
- ▶ Broaden your strategy. Consider using these ancillary civil proceedings as a way of getting discovery for the criminal case.

#### IV. OVERCOMING THE PROBLEM OF THE LEARNING CURVE

Once convinced of the necessity and efficacy of learning the range of hidden sanctions, defenders still must overcome the practical obstacle of how to do it.<sup>107</sup> We cannot fool ourselves—this mandate is daunting. As the new Standards note, these sanctions are “hidden” precisely because they are scattered throughout federal, state, and local statutes, regulations, and policy memoranda.

##### A. Existing Resources

Many practical resources already exist to assist defenders in their education and training. The most comprehensive support infrastructure is organized around hidden immigration punishments. A wealth of excellent practice materials are available to guide defense attorneys through the immigration consequences of criminal convictions. The Defending Immigrants Partnership (DIP)—an initiative of the Immigrant Legal Resource Center, the National Immigration Project, the New York State Defenders Association, and the National Legal Aid and Defender Association—offers invaluable assistance.<sup>108</sup> DIP “has coordinated on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent noncitizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.”<sup>109</sup> The DIP has created a network of national and local immigration law specialists and defense attorneys to map the application of federal immigration law to each state’s criminal code, and it offers extensive trainings and technical assistance on individual cases.

Broad compilations of invisible punishments have been authored by groups in a growing number of jurisdictions, such as Arizona (Arizona Public Defender Association and Maricopa County Public Defender), the District of Columbia (Public Defender Service of DC), Maryland (University of Maryland Law School),

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disabilities that are automatically imposed by law as a result of the conviction (including out-of-state and federal convictions). N.Y. CORRECT. LAW §§ 701-703 (McKinney 2003). A person must apply for a certificate for each conviction and is ineligible if he has more than one felony conviction. *Id.* A Certificate of Good Conduct can be granted to those with more than one felony conviction. N.Y. CORRECT. LAW § 703-a to 703-b. *See also* Love, *supra* note 51, at 1717-26 (discussing methods of restoring rights lost due to collateral sanctions).

107. *See* Pinard, *supra* note 2, at 1088-90.

108. Formerly directed by Lory Diana Rosenberg, its “work is guided and carried out by principal partners Katherine A. Brady, Maureen James, Dan Kesselbrenner, Ross Shepard, Manuel D. Vargas, Jo-Ann Wallace, and Marianne C. Yang,” and a network of local partners across the country. Nat’l Legal Aid & Defenders Ass’n, *About the Defending Immigrants Partnership*, at [http://www.nlada.org/Defender/Defender\\_Immigrants/Defending\\_Immigrants\\_About](http://www.nlada.org/Defender/Defender_Immigrants/Defending_Immigrants_About) (last visited Feb. 7, 2005).

109. *Id.*

Michigan (Michigan State Appellate Defender Office), New York (The Bronx Defenders), Ohio (University of Toledo Law Review<sup>110</sup>), and Washington (Washington Defender Association).<sup>111</sup> Many of these compilations were written specifically for defense attorneys. Efforts are ongoing in other jurisdictions, including Minnesota and New Jersey.<sup>112</sup>

If a compilation does not exist in a jurisdiction, an advocate's starting point should be the Legal Action Center's groundbreaking fifty-state survey, *After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records*.<sup>113</sup> The survey compiles the invisible punishments that each state imposes in seven major areas: employment, housing, benefits, voting, access to criminal records, parenting, and driving, and it explains the federal limitations on student loans. Its Report Card grades each state on the extent of its invisible punishments, and its Vision for the Future offers a set of recommendations that federal and state policymakers can implement to "help reintegrate people with criminal records into society in ways that better promote public safety."<sup>114</sup> Of particular note, the fifty-state survey includes a listing of all statutory citations—a substantial aid to future local efforts.

In addition, the National H.I.R.E. (Helping Individuals with criminal records Re-enter through Employment) Network, a project of the Legal Action Center, is a national clearinghouse for information and an advocate for policy change on employment issues facing people with criminal records.<sup>115</sup> Founded by Debbie Mukamal, the Network publishes a wide range of practical resources and offers technical assistance to local agencies working to improve employment prospects for people with criminal records.<sup>116</sup> It has also compiled an extensive list of advocates, community-based organizations, and policymakers in each state that are working on these employment issues.<sup>117</sup>

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110. See generally Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. TOLEDO L. REV. \_\_\_\_ (2005).

111. The wonderful organizations engaging in this work around the country are too numerous to list here, but please contact the author for a listing by state.

112. See, e.g., Council on Crime and Justice, *2004 Advocacy Initiatives*, at <http://www.crimeandjustice.org/Advocacy/Advocacy.htm> (last visited Nov. 8, 2004); NANCY FISHMAN, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, BRIEFING PAPER: LEGAL BARRIERS TO PRISONER REENTRY IN NEW JERSEY 1 (Apr. 11, 2003), available at [http://www.njsj.org/reports/barriers\\_report.html](http://www.njsj.org/reports/barriers_report.html).

113. See generally DEBBIE MUKAMAL & PAUL SAMUELS, LEGAL ACTION CENTER, *AFTER PRISON: ROADBLOCKS TO REENTRY, A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS* (2004) (cataloging the legal barriers each state imposes on people with criminal records), available at [http://www.lac.org/lac/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf).

114. *Id.* at 7.

115. Nat'l H.I.R.E. Network, *National H.I.R.E. Network Mission Statement*, at <http://www.hirenetwork.org/who.html> (last visited Nov. 8, 2004).

116. See Nat'l H.I.R.E. Network, *Publications*, at <http://www.hirenetwork.org/publications.html> (last visited Nov. 8, 2004); Nat'l H.I.R.E. Network, *Technical Assistance Available from the National H.I.R.E. Network*, at [http://www.hirenetwork.org/tech\\_assistance.htm](http://www.hirenetwork.org/tech_assistance.htm) (last visited Nov. 8, 2004); Nat'l H.I.R.E. Network, *Staff Directory*, at <http://www.hirenetwork.org/staff.html> (last visited Nov. 8, 2004).

117. Nat'l H.I.R.E. Network, *Resources, Information & Assistance*, at <http://www.hirenetwork.org/resource.html> (last visited Nov. 8, 2004). Debbie Mukamal is now the Director of the Prisoner Reentry Institute at John Jay College of Criminal Justice. See Press Release, John Jay College of Criminal Justice, John Jay College Establishes Prisoner Reentry Institute (Feb. 18,

*B. Increasing Capacity by Seeking Organizational Partners*

Realistically, collaboration is key. It has become apparent to many in the criminal justice field that to provide truly effective assistance to people who encounter the criminal justice system, services must be integrated. Despite the above-mentioned barriers to institutionalizing comprehensive services, similar results can be obtained through the active coordination of services among criminal justice providers.

Some have begun organizing statewide and regional efforts to promote better service delivery and policymaking around invisible punishments. Most of these efforts have been inspired by the pressures and problems arising around “reentry,” often defined as the process of reintegrating people into their communities as they are released from terms of incarceration. Reentry is a useful term for a complex set of issues that has gained well-deserved prominence in recent years, but it can be limiting. Too often policymakers and advocates focus only on the back-end process of discharge planning and release from custody.<sup>118</sup> Reentry actually implicates all of the invisible punishments that this article argues are so critical to defense work. I submit that we must redefine reentry as a process that *begins* at arrest and continues through community reintegration. Defense advocates and clients must plan for reentry from the moment of arrest by implementing strategies of supportive interventions, from bail applications to plea negotiations to pre-sentencing reports.

For example, the New Jersey Institute for Social Justice convened the New Jersey Reentry Roundtable (NJRR), “a year-long initiative gathering policy makers, researchers, service providers and others to assess and develop a strategic response to state, local and individual challenges posed” by the reentry of people released from prison in New Jersey.<sup>119</sup> Directed by Nancy Fishman, the project is now launching a three-year comprehensive reentry initiative focusing on policy research and advocacy, communications, and the development of a demonstration reentry project. The project will work closely with defenders to implement strategies to address reentry problems at the front end.

In New York, a coalition of organizations is building Reentry Net, a collaborative network and online training and support center for individuals and organizations in New York State that advocate for people who have criminal records or who are reentering the community after incarceration.<sup>120</sup> An intensive six-month planning process involving over seventy participants, including public defenders, social services agencies, civil legal services organizations, and systemic reform groups,

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2005), at <http://johnjay.jjay.cuny.edu/info/calendar/pressrelease/pressreleasedetails.asp?id=44>.

118. Serving the whole client with comprehensive services after the criminal case (or incarceration) ends should be a part of a broader vision of public defense, but it is beyond the scope of this article. For excellent discussions of the expansion of the defender role into aftercare, see Pinard, *supra* note 2, at 1067-70; Thompson, *supra* note 3, at 294-97.

119. New Jersey Institute for Social Justice (NJISJ), *What We Do*, at <http://www.njisj.org/eji.html> (last visited Feb. 7, 2005). NJISJ’s website has an extensive set of materials on reentry and hidden sanctions.

120. The website for the project will be located at the Reentry Resource Center on the Pro Bono Net platform, at <http://www.reentry.net/> (last visited Feb. 7, 2005).

took place throughout the state.<sup>121</sup> The project will network, train, and support organizations and advocates working with criminal defendants, persons with criminal records, and those reentering their communities after jail or prison.<sup>122</sup> It will also provide materials to affected communities, family members, and people with criminal records to link them with services and provide them with strategies for overcoming barriers. At the most fundamental level, Reentry Net seeks to promote better outcomes for the reentry community by improving individual advocacy, strengthening collaborations, and empowering the community itself. Reentry Net will link all groups providing services from arrest through release, promote continuity of care, and increase capacity through collaboration and access to resources.<sup>123</sup>

These initiatives illustrate how defenders can increase their capacity by dedicating internal resources and seeking organizational partners.<sup>124</sup> Many defense offices have designated certain attorneys as “in-house counsel” charged with developing expertise in specific areas of hidden sanctions.<sup>125</sup> This model has proven particularly successful with complicated areas of law such as immigration. For most hidden consequences, a defense office could select volunteer law interns for the summer for the express purpose of collecting information on relevant invisible punishments. Much of this work could even be done off-site during the school year. Law school clinics can also provide invaluable resources in collecting this information and modeling behavior.<sup>126</sup> NYU Law School and Maryland Law School have reentry clinics dedicated to helping clients suffering from hidden sanctions after release from incarceration and engaging in policy change efforts and community education.<sup>127</sup>

The most obvious target for collaboration, but sometimes the most problematic, is the local civil legal services office.<sup>128</sup> Local legal services offices are the repositories for available information on hidden punishments in a broad range of traditional poverty law areas—housing, public benefits, disability, family, consumer, health, and HIV/AIDS. Due to the complexity of the law and funding pressures, most legal services offices are stratified into practice areas reflecting the topics just mentioned.<sup>129</sup> As a result, their knowledge of invisible punishments is similarly fragmented, but it offers a rich source of expertise upon which to rely.<sup>130</sup>

An entire spectrum of collaboration is possible. As a way of opening the conversation, defenders should organize a roundtable meeting with the local legal

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121. See JEHT Foundation, *Criminal Justice Grants*, at [http://www.jehtfoundation.org/criminal\\_justice/reentry/reentry\\_overview.html](http://www.jehtfoundation.org/criminal_justice/reentry/reentry_overview.html) (last visited Mar. 6, 2005).

122. *Id.*

123. Reentry Net is supported by generous grants from the JEHT Foundation and the Bernard F. and Alva B. Gimbel Foundation.

124. See, e.g., Thompson, *supra* note 3, at 293; Smyth, *supra* note 7, at 59-60.

125. See, e.g., Pinard, *supra* note 2, at 1089.

126. See, e.g., Thompson, *supra* note 3, at 297-98.

127. See *id.* at 299; University of Maryland School of Law, Re-entry of Ex-offenders Clinic, at [http://www.law.umaryland.edu/course\\_info.asp?coursenum=598D](http://www.law.umaryland.edu/course_info.asp?coursenum=598D) (last visited Mar. 30, 2005).

128. For the corollary argument that legal services offices should collaborate with defenders and methods for pursuing these relationships, see Smyth, *supra* note 7.

129. See, e.g., Thompson, *supra* note 3, at 292-93.

130. *Id.* at 296-97.

services office. Share the scale of services that your offices provide and talk about your clients' greatest needs. Work to convince the legal services organization that you share the same client population.

The legal services office will have a wealth of information useful to defense attorneys and their clients. Legal services groups invariably publish a large set of client- and community-oriented materials ranging from pamphlets to *pro se* guides. At a minimum, defenders should stock their lobby with the full set of client education materials. See if the organization will write new pamphlets about hidden sanctions most relevant to the community.

Defense attorneys should also take advantage of legal services Continuing Legal Education programs on poverty law issues that arise in defense practice—welfare law, disability, housing, civil rights. In some criminal cases, civil legal issues determine the outcome. For example, when a client is charged with public benefits or subsidized housing fraud, knowledge of the administrative process is critical to defending the case. A legal services specialist will know about all the relevant documents and budgeting printouts produced by the administrative agency and will know how to obtain them outside of the criminal discovery process. These documents are often nearly indecipherable without training, but notations from workers and housing assistants can be critical in undermining a state's proof of fraudulent intent. Moreover, these administrative agencies frequently make mistakes in calculating eligibility and recoupment amounts. Criminal cases are no different, and prosecutors rely on the administrative calculation. Therefore, reviewing these documents is critical to a client's case. The client may also have been entitled to a rent abatement because of bad conditions in the apartment. By recalculating with the help of a legal services attorney or training, a defense attorney can trim the amount of claimed loss, lowering the restitution amount and potentially reducing the case from a felony to a misdemeanor.<sup>131</sup>

These trainings are also wonderful networking opportunities upon which to build collaborative relationships. Defenders should try to develop formal referral systems from their office to the legal services office. Such an arrangement will benefit everyone involved; because defenders are often the first to hear of legal problems, the legal services office can intervene earlier and more effectively than if the client waits until the problem reaches crisis proportions. Defense offices should explore whether the legal services office will designate the defender as an outreach site for intake or brief advice. Legal services attorneys or paralegals could staff a table in the defender office at designated times. If no institutional public defender exists, the legal services office could staff a table at the criminal courthouse.<sup>132</sup>

These collaborative efforts serve to build trust with clients and their communities. These efforts, however, are not without their challenges. Most legal services offices receive federal funding from the Legal Services Corporation (LSC). Congress has placed increasingly severe restrictions on all services of organizations that receive any LSC funding.<sup>133</sup> Many of these restrictions have the potential to limit the

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131. See Smyth, *supra* note 7, at 61.

132. See *id.* at 60.

133. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537-38. See also David Luban, Essay: *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209,

services available for people affected by invisible punishments. For example, the Code of Federal Regulations prohibits LSC-funded groups from representing clients in criminal proceedings<sup>134</sup> or habeas corpus collateral attacks on criminal convictions,<sup>135</sup> from representing any currently incarcerated person on most civil matters,<sup>136</sup> from representing clients in certain drug-related eviction proceedings,<sup>137</sup> from representing most non-citizens,<sup>138</sup> and from conducting training programs for restricted activities.<sup>139</sup>

In discussing collaborative efforts with LSC-funded organizations, defenders should be aware of these restrictions and educate the organizations about the wide range of services still possible.<sup>140</sup> Permitted activities include sealing or expunging criminal records; seeking a pardon; seeking a certificate of rehabilitation; defending the eviction of someone charged with a drug crime where the charges were dismissed or where the proceedings concluded in a non-criminal disposition; reinstating public benefits after incarceration, or challenging a recoupment based on a period of incarceration; and representing the child of an incarcerated adult to enable visitation with the parent.

In fact, many barriers to representation can be avoided by representing the *family* affected by hidden sanctions rather than just the individual with the criminal record.

#### CONCLUSION

The invisible punishments of the criminal justice system can be far-reaching and debilitating, sentencing an ever-increasing population to life on the margins. The fateful gap between social problems and social services is a catalyst for entry into the criminal justice system, and the hidden sanctions imposed all but ensure that people never break free.

Defense attorneys occupy a unique position in the fight to break this cycle. By learning the hidden punishments that result from criminal proceedings and incorporating that knowledge into their advocacy strategies, they can better serve their clients and families. They can obtain improved outcomes in criminal cases and forestall the “civil death” now imposed through involvement with the criminal justice system. Many resources now exist to aid in this endeavor, and the need is great. We must seize these opportunities to break the cycle of punitive measures and unforeseen consequences that prevent people who live in poverty from establishing any sense of stability.

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221 (2003).

134. Restrictions on Legal Assistance with Respect to Criminal Proceedings, 45 C.F.R. § 1613 (2003).

135. Restrictions on Actions Collaterally Attacking Criminal Convictions, 45 C.F.R. § 1615 (2003).

136. Representation of Prisoners, 45 C.F.R. § 1637 (2003).

137. Restriction on Representation in Certain Eviction Proceedings, 45 C.F.R. § 1633 (2003).

138. Restrictions on Legal Assistance to Aliens, 45 C.F.R. § 1626 (2003).

139. Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612 (2003).

140. For a more complete discussion of LSC restrictions and permitted services, see Works, *supra* note 21, at 335-36, 339-40. The Legal Aid Bureau of Maryland, Bay Area Legal Aid, Massachusetts Law Reform Institute, and Legal Services of New Jersey are only a few of the offices that have already expanded their services to support people with criminal records.