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Public Defense at the Crossroads: Listening to the Voice of Clients

BY JONATHAN E. GRADESS / SEPTEMBER 2003

Like a three-legged stool, the criminal justice system requires three basic components: the courts, the prosecution, and the defense. Tragically, today's system is lopsided, and it is defense that suffers. Fairness cannot rest on two sure legs and one faltering one.

Ensuring quality defense is not only a constitutional mandate, but a requirement for an efficient, fair system of justice.

The quality of defense representation in New York is now at its lowest level in 25 years. Without genuine, systemic transformation, it can only become worse.

Why is this so?

It is so because of the great disparity between the resources available to the prosecution and available to the defense. It is so because the courts have allowed the sacrifice of defense resources while preserving their own. It is so because years of legislative neglect have allowed the infrastructure for public defense services to be reduced to shambles.

The right to counsel became an unfunded mandate

Forty years ago, the United States Supreme Court decided *Gideon v. Wainwright.* As a result of one man's handwritten petition to the Court asserting that the Constitution and the Bill of Rights entitled him to a lawyer, people financially unable to obtain representation in criminal matters were now guaranteed publicly-paid counsel.

Soon thereafter, New York State delegated the federal constitutional obligation to provide public defense to 57 autonomous counties and the city of New York. Although accompanied by the initial burst of State revenue-sharing, the obligation to provide defense services to the poor soon became an unfunded mandate on localities.

President Richard Nixon made "law and order" the nation's new watchwords. Crime became a household topic and crime control became an electoral strategy. Vast infusions of cash came from Washington to fight crime in New York, but lawyers for the poor were relegated, along with their clients, to the back of the government bus. Police, prosecutors, courts and corrections were first at the trough. Nascent systems for providing public defense services quickly became resource starved. Lawyers who should have been trained, instead learned – often ineffectively –

on the job. Salaries never grew to meet demand or, worse, shrank. Caseloads rose. As the Warren Court's decisions applying federal constitutional requirements to state criminal justice took shape, the need for qualified vigorous defense advocates became more and more apparent. The organizational needs of public defense programs, however, remained unmet.

At the state level, despite the constitutional responsibility to manage this newly mandated right to counsel and assure its provision, no one was minding the store. State officials neglected public defense while lavishing resources and financial affection upon the judiciary and prosecution. Our system quickly became skewed in favor of law enforcement. Meanwhile, defenders, charged with vigorously defending those presumed innocent and securing freedom for those not guilty, received no such funding. Unequal distribution from taxpayer coffers resulted in a criminal justice system in which the resources for the three parts of the justice system – courts, prosecution, and defense – are out of balance.

Two DA's in the courtroom?

Every day, New Yorkers presumed innocent by law are subjected to outrageous indignities by a system in which their own lawyers have been made pawns in the game of resource allocation. This has had a deadly impact on the relationship between clients and court appointed lawyers. It has destroyed community trust in and support for the public defense function and the justice system as a whole. Lack of a strong public defense presence in criminal justice planning and performance has allowed courts to look the other way when confronted with obvious injustice.

Bad lawyering and lack of quality defense is the elephant in the middle of every courtroom in this state. Judges, prosecutors, and public defense providers daily avoid discussion of it. If a plea can disguise it or a waiver of the right to appeal can cover it up or the threat of harsh punishment as a penalty for trial can mask it, the system rolls merrily along. Lack of time and resources give lawyers excuses for not visiting their clients, for not answering letters, for not meeting with witnesses or even with clients before coming to court. Systemic justifications are offered for not investigating cases. Rationales for not sharing information, motion papers, or even thoughts with clients are fashioned from resource deprivation. Soon clients wonder whether there is one DA in the courtroom or two. As a result, clients back off, fail to trust their lawyers, bad-mouth public counsel, and file their own writs. Lawyers, in turn, withdraw, either figuratively or literally, in frustration and anger. A cycle of conflict is imposed on lawyer and client by a system that starves the defense. The trial courts allow this and prosecutors take advantage of it. Defense providers suffer with it and politicians ignore it.

While paid lawyers prize their reputations, solicit ongoing business from clients, and stake much on word of mouth referral from one client to another, public defense lawyers often hide from

genuine client engagement, depriving both themselves and their clients of a meaningful relationship. While paying clients have the option of terminating the attorney-client relationship when it is unsatisfactory, public defense clients must often take the luck of the draw. Clients represented by court-appointed counsel do not automatically have the luxury of firing even incompetent or racist lawyers and seeking to exchange appointed counsel simply because of incompatibility is nearly impossible in most parts of this state. Lucky clients get good lawyers who advocate for their rights in their individual cases; unlucky clients get lawyers who can't or don't. Some cases are well defended; others are not.

Matters are not made better by the appellate courts — the courts of "Last Resort" — where hundreds of cases of bad lawyering are masked by affirming convictions without opinion. This happens frequently when appellate attorneys file facially inadequate briefs in a continuation of defense failure. Appellate courts label as "strategy" inexcusably incompetent, inept professional decisions by trial counsel. They deem trial errors by ill-trained lawyers "unpreserved" for appellate review; trial counsel's failure to recognize error precludes review of that same error. No matter how great the injustice observed or how poor the appellate brief filed on behalf of a client, the appellate courts largely remain silent. The railroad runs.

Recognizing client needs

For the past twenty-five years, the New York State Defenders Association has, through its Public Defense Backup Center, provided support services to all the state's public defenders, legal aid lawyers, and assigned counsel practitioners. Through this work, we have been involved in every aspect of the defense system from helping handle murder cases to supporting adequate defender budgets, from writing and filing appellate and amicus briefs to delivering community legal education, from answering simple questions about the Penal Law to drafting requested legislation on discovery, sentencing, and public defense services, from consulting with lawyers mid-trial to running the state's only entry-level trial skills course.

Our Association, founded in 1967, has consistently tried, through the terms of five governors and nearly twice as many legislative leaders, to improve the quality of public defense services in this state, and to do so by remaining client centered in all that we do. But as the disparity of resources grows ever worse, the voice of clients has been all but silenced. Their role as consumers in the public defense system — critiquing, overseeing, and recommending — has never been valued and has usually been ignored. Their satisfaction is not a routine measure of defender performance. They currently lack the political power to effectively demand accountability, fair treatment, and quality lawyers.

What clients want and need is currently not advocated for systemically. Time constraints on public defense attorneys make efforts at client-attorney solidarity a laughable suggestion. Almost nowhere are clients the focus when administrative decisions are made. Yet, in many concrete ways, clients are experts. They are experts about their cases, about the communities from which they come, about the nature, scope and content of the services they, as consumers of legal services desire. All across New York, decisions are made about designing, operating, and funding public defense systems without any formal recognition or consideration of the opinions of clients and their communities. At best, this is paternalistic, based on the assumption that professionals in the system know better than clients what clients need. At worst, it is a deliberate and successful effort to further marginalize poor people and people of color so that they continue to fill the state's prisons and jails.

We have a long way to go.

Tinkering at the edges

This conspiracy of injustice — judicial silence, disproportionate executive funding of law enforcement, and prosecutorial advantage-taking — is exacerbated by periodic legislative tinkering that applies surface patches to a system broken to the core.

An example of such tinkering occurred this spring. After 17 years of neglect during which the infrastructure for the State's assigned counsel system collapsed and hundreds of competent lawyers quit representing poor people, the Legislature raised assigned counsel fees, the money paid to private lawyers for representing indigent people accused of crime. The amount of the statutory fee increase was $15.00 per hour less than the amount constitutionally required by two court decisions. The increase is twice delayed - the fees don't go into effect until January of 2004, and the State supplies no money to pay for the increase until 2005. Counties across the state are discovering that the eventual state payment will not equal the increase.

As a result, counties are looking to change their systems. The office they call for help is mine. Yet because of the ongoing budget battle in Albany, our Backup Center, cut by the Governor in his 2003 budget, is slated to close October 1st.

Fiscal tinkering doesn't work well. "Fixes" like the increase in assigned counsel fees this year, with its minimal future state funding to localities, are tokenism unworthy of the label "reform".

What can be done?

A great deal can be done. Doing it needs people from all walks of life and all vocations, from every profession. It needs the rich and the poor and those, who in conscience, can no longer remain silent. It needs lawyers and clients, defenders and private practitioners, teachers and unions and cops, court clerks and stenographers. It needs everyone who has spied the elephant of incompetence but remained silent to now speak; everyone who has turned their back to resource disparity needs to turn back and challenge it. Every person who has gained personal or political advantage by stepping on the backs of the poor who struggle for justice needs to step down into that struggle.

There needs to be common recognition that the system lacks standards, oversight, and accountability. The State provides little direction to localities; a few sentences in this spring's bill increasing assigned counsel fees gives a nod to the need for improving quality, but it is only a nod. The State continues its failure to adequately fund defense services. The entities that fund public defense – counties and the city of New York – focus on cost containment and never make quality of representation a priority. No one is accountable to anyone for providing poor service. Judges do not monitor poor performance, they disregard it. Defenders are hard pressed to make demands because their jobs in very real measure hang at the end of a political tether.

A Client-Centered Process for Public Defense Reform

Accountability has become a buzzword for many of our most important public systems, paid for and supported by taxpayers, but not the public defense system. In this system, accountability would mean giving voice to genuine client/consumer demands and allowing those demands to shape the future of the design, scope and nature of a reformed public defense system. It would mean using the experience of clients to identify shortcomings of the system and to remedy those shortcomings. And it would require assuring an even playing field for public defense lawyers and public defense programs so that the legitimate minimal expectations of clients – jail visits, answers to questions, returned phones calls, collegial strategy development, confidential communications, and respect – can be fulfilled.

For the last six months, with funding from the Gideon Project of the Open Society Institute, The New York State Defenders Association has employed a client community organizer to help us capture the energy of the client community: those who have been served by public defense attorneys, the families of such clients, and others from the communities serviced most frequently by public defense attorneys. Standards for Client-Centered Representation have been drafted in cooperation with our Client Advisory Board and submitted to client community scrutiny and refinement. Three focus groups on the standards have been held in New York City, and the standards have been shared with public defense clients in prison.

We have also held three public hearings at which invited members of the client community and client community advocates testified either about the standards or about their own personal experiences with the public defense system. Listening sessions have been held with dissatisfied and underserved clients in rural New York. Problem courts identified by allies have been observed. Over a four month period, our organizer spent time working with migrant workers in northwestern New York and recently held two days of private hearings and a public hearing in Albion.

In this process, we are experimenting with ways to allow clients to be heard and to influence the scope, design, and content of a reformed public defense system. In September, two Town Meetings – one in a church and one in a housing project – are scheduled in Albany. In our work among farm workers, we found ourselves at migrant camps speaking late at night in kitchens and living rooms. In Brooklyn, plans are underway to do street video interviewing. In late September, we will be meeting with New York Native Americans whose representation frequently leaves much to be desired. In seeking input on the client driven standards, we are able to hear the stories of clients in a whole new way and to derive immediate positive suggestions for system improvement.

We are interested in building a clear alliance with those who have been consumers of public defense services and those who provide them. So far, public defenders have reacted positively. One office has sought to be evaluated pursuant to the standards. We have been asked by one public defender to help establish a client advisory board. We have also used our field work to identify client members for our board and for other programs' boards.

In the months ahead, we intend to continue holding listening sessions, Town Meetings, and public hearings. We want to hear from clients whose experience can help shape a new system and whose involvement can help bring one into being. We also would like to see interested clients form their own interest group to make demands within the community. Our Client Advisory Board has been invited to the National Legal Aid and Defender Association Convention in Seattle to report on our project and inspire its replication elsewhere. If our efforts are successful, some form of public defense client council will emerge.

One of our reasons for working directly with the client community is to promote the idea of an Independent Public Defense Commission empowered to promulgate standards, conduct oversight and require accountability. We have recommended such a commission to the state legislature (See www.nysda.org/ResolvingtheAssignedCounselFeeCrisis_01.pdf). The Committee For An Independent Public Defense Commission subsequently proposed a bill to create one. Bills to create a commission have since been introduced in both houses of the Legislature

(A.5394/S.1894). Such a commission functioning at the state level would ultimately develop a quality public defense system.

Today, in New York, more than a hundred plans for representation exist in 62 counties. No two of them are the same: they differ in size, scope, staffing, salaries and ability. Some offices have lawyers with caseloads of more than 1000 clients. Some offices are full-time; others are part-time operating essentially out of private law offices. Some have investigators; others do not. The quality and scope of public representation provided to eligible clients varies widely depending on where in New York State they are. In too many counties across the state, people are arraigned alone, held without lawyers, and subjected to onerous eligibility inquiries that lack standards. By the time counsel is assigned in many places pressure is already being exerted on the client to plead guilty.

In addition to establishing standards designed to overcome these problems, an Independent Public Defense Commission would also act as the conduit for state funding of defense services. Receipt of money would depend upon meeting the standards. Experts and investigators would have to be available in criminal cases. Lawyers would be trained. Caseloads would be controlled. There would be an expectation and requirement of quality representation that is too often lacking now.

Recognizing the elephant

The work to mobilize the client community and to support and encourage the establishment of an Independent Public Defense Commission is only a piece of the solution. More is needed. It is time for us – all of us – to stop allowing poor people to be treated as second-class citizens in our courts. Each client charged with a crime, presumed innocent, deserves to have a competent qualified lawyer provided by the state if the client cannot afford counsel. Supplying young, inexperienced lawyers who want to learn at the expense of the poor cannot fulfill this constitutional obligation. It cannot be fulfilled by allowing callous pleameisters to monopolize assignments. Constitutional representation cannot be supplied by lawyers whose own personal problems and addictions prevent them from working in supervised practice. If the recent fee increase helps bring competent lawyers back to public defense work, terrific, but we need standards, guidelines, and training for all public defense lawyers to be sure quality is achieved. We cannot leave it to the many bar committees and judges who have conflicted loyalties when it comes to acting on client centered criticism of incompetent lawyers.

Once a year, we come to Law Day, the legal profession's celebration of itself. On May 1, system actors wrap themselves in our flag and declare the goodness of equal justice and the wonder of the legal profession. Maybe, briefly, they acknowledge the need for greater resources to serve the

poor in the system, asking lawyers to do more pro bono or support some tinkering fiscal change. I have lived through 34 of these glad-handing self-congratulatory days, usually avoiding them by spending my time advocating for clients who would be very puzzled by the content of the glowing bar association speeches. It would be so refreshing just once to hear a full-blown confession about our unmitigated failure to provide justice to the poor and our ongoing conspiracy not to talk about it. Maybe, if we finally talk about the elephant in our courtrooms and in our public defense system, we can begin the long journey to justice.

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