

## Shared Roots and Shared Commitments: The Centrality of Social Work to Holistic Defense

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### I. Introduction

Michael Smith, a 24-year-old African-American Bronx resident, is arrested twice in consecutive weeks for allegedly stealing luxury cars from car dealerships on "test drives."

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When Michael's lawyer, Ben, explains that Michael is being charged with grand larceny – a felony – Michael becomes furious. He pleads with Ben – “I didn't steal this car [...] they gave me the keys, of course I was bringing it back – they know me!” – and makes grandiose statements that suggest delusional thinking. Michael's behavior becomes manic when Ben informs him that because this is Michael's second arrest for grand larceny in as many weeks, there is little chance that the judge will release him without bail. Michael has no criminal record and is terrified of the prospect of going to jail. Ben reaches out to Michael's family, who sound exasperated, blame Michael's behavior on drug abuse, and state that Michael needs to “get straight”.

On his way back from court that afternoon, Ben reaches out to his team's social worker. Ben suspects that Michael suffers from underlying mental health issues, along with the substance abuse that Michael's family identified. The social worker agrees that there are likely emerging mental health issues given Michael's age, his lack of a criminal record, the allegations in his cases, and his behavior in court. Michael will be in court again in a few days, and the social worker and attorney plan to meet with him together.

There is a movement afoot in the world of public defense – a growing recognition that defense attorneys must expand the scope of their advocacy and recognize that the clients they represent are full and equal human beings, and not simply cases. Over the course of nearly two decades, this idea has given rise to holistic public defender offices that provide interdisciplinary representation instead of a narrow focus on trial advocacy. Yet while holistic defense is still a relatively new concept for many public defenders, the practice model's core philosophy of understanding and responding to clients as whole people has been around for quite some time as the organizing principle behind social work.

The link between social work and holistic defense begins with the fundamental belief that in order to effectively defend individuals against the government and address clients' needs, practitioners must understand their clients as whole people. This conceptualization of clients as individuals with unique and complex needs extends throughout the history, practice, and goals of both fields. From their social justice beginnings to their broad, interdisciplinary approaches to advocacy, social work and holistic defense share many of the same roots and commitments. And for holistic defense to achieve its ambitious aims, social workers must play a central role, serving on equal footing with attorneys in the development of clients' legal strategies.

Pioneered by The Bronx Defenders since 1997, holistic defense is a model of criminal defense lawyering that connects clients with interdisciplinary teams of advocates in order to address both the underlying causes and collateral consequences of criminal justice involvement. Beginning with a general commitment to looking beyond clients' criminal cases, The Bronx Defenders has continually expanded and refined its holistic defense model to respond to the myriad civil and social punishments that result from court involvement.

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Crucial to these efforts are The Bronx Defenders' extensive community engagement and organizing initiatives, which involve clients in the fight for systemic change and also ensure that the office's advocacy is truly grounded in the community's needs.

When viewed through the traditional lens of trials won and trials lost, public defense can seem like a job with few clear victories and far too many defeats. As most public defenders know, the traditional yardsticks with which lawyers gauge themselves can leave public defenders feeling unsuccessful or inadequate.<sup>1</sup> All the while, larger questions loom: lawyers question how much impact they can have on their clients' lives when they are only able to focus on the legal facts of a case and are forced to ignore the underlying issues that both cause and stem from court involvement. Collaboration between attorneys and social workers at holistic defender offices empowers lawyers to broaden the scope of their representation to encompass these underlying issues.

Social workers in holistic defender offices play a fundamentally different role from social workers in other social service settings and even from social workers in traditional public defender offices. Holistic defense social workers are advocates, not clinicians. They are profoundly passionate about client self-determination, social justice, and every individual's right to be treated with dignity and respect. While many social workers at holistic defender offices have significant clinical skills and may have previously worked in clinical settings, the majority of the social workers involved with holistic advocacy are also students of policy and organizing who reject the location of problems within the individual alone.

In contrast to the subordinate role that social workers occupy at many traditional public defender offices, social workers and attorneys practicing holistic defense are coequal members of their clients' legal teams. Social workers not only enable their teammates to

1 See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES (2000), available at <http://www.bjs.gov/content/pub/pdf/dccc.pdf> (last visited Mar. 03, 2016) ("Approximately 9 in 10 Federal defendants and 3 in 4 State defendants in the 75 largest counties were found guilty, regardless of type of attorney. However, of those found guilty, higher percentages of defendants with publicly financed counsel were sentenced to incarceration"). See generally Justice Policy Institute, *System Overload: The Costs Of Under-Resourcing Public Defense* 11 (2011), available at <http://www.justicepolicy.org/news/2757> (last visited Mar. 03, 2016) ("79 percent of reporting state public defender systems do not have enough attorneys to meet caseload guidelines [...] When lawyers do not have enough time – sometimes only minutes per case – they are unable to conduct many of the critical tasks necessary to provide quality defense, including interviewing clients and witnesses, conducting legal research, writing motions, accessing and preparing experts, and generally preparing to represent their clients at pretrial hearings, trials and sentencing hearings").

better understand the context of their clients' lives and the challenges that are connected to clients' court involvement but also serve as powerful advocates in and out of the courtroom. In interactions with prosecutors, judges, and social services organizations, social workers share persuasive and authentic narratives to humanize their clients in the face of oppressive institutions that seek to label and demonize them.

As a replicable model, holistic defense consists of four pillars that different organizations can adapt to best address the challenges that their clients face. The first pillar is seamless access to legal and non-legal services that meet client needs. Holistic defense recognizes that clients have a variety of needs that, if left unresolved, will continue to push them back into the criminal justice system. Holistic defense accepts the challenge of addressing the needs of the whole person, rather than solely the criminal case, by providing swift and coordinated access to services that meet these needs. The second pillar is dynamic, interdisciplinary communication, both between advocates in the office and between the client and his/her team of advocates. Such communication allows advocates to strategize effectively in order to provide clients with social services and assistance with collateral consequences in the most efficient way possible. The third pillar of holistic defense is access to advocates with an interdisciplinary skillset. Attorneys at holistic defender offices should receive basic training in many areas of legal advocacy, including family, immigration, and employment law, but also be knowledgeable about other aspects of our clients' lives, like different types of addictions and mental illnesses and the many bureaucracies clients must navigate, including schools and public benefits agencies. Having an interdisciplinary skillset ensures that staff can identify a client's legal and social service needs and make appropriate referrals within the office or to other community-based service providers. The fourth and final pillar of holistic advocacy is a robust understanding of and connection to the community served. Gaining a deep understanding of the community in which we work enables public defenders to convincingly argue for individually-tailored case dispositions, get clients the social services support they need faster, and collaborate with residents to create long-term change through policy initiatives and local organizing. At The Bronx Defenders, staff members practice holistic defense on interdisciplinary teams that facilitate the application of the four pillars by enabling attorneys, social workers, civil legal advocates, parent advocates, policy organizers, and investigators to work in close collaboration.

Today, The Bronx Defenders' staff of over 250 includes attorneys specializing in criminal defense, family defense, and civil matters such as housing and immigration; social workers, investigators, parent advocates, and civil legal advocates. The office's social work practice, which dates back to the founding of The Bronx Defenders, now includes 20 full-time social workers specializing in criminal defense, adolescents, family defense, and immigration advocacy, as well as a small army of masters-level social work interns.

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Each interdisciplinary team of advocates includes a criminal defense practice social worker, a family defense social worker, and a parent advocate. Two of The Bronx Defenders' social workers specialize in immigration defense work, one specializes in adolescent advocacy, another is the program coordinator for the Healthy Mothers, Healthy Babies initiative serving pregnant mothers at risk for child welfare involvement, and yet another coordinates resources for clients with acute psychiatric or intellectual disabilities. There is a strong social work presence in the office's special projects involving solitary confinement, advocacy for military veterans, and support for clients involved in sex work or human trafficking cases. The social work practice also maintains an interdisciplinary mental health working group which assesses competency within the office for serving clients with mental health symptoms, provides training to meet identified needs, and responds to cross-practice trends relating to the representation of clients with mental health issues.

Social workers at The Bronx Defenders are almost always consulted when clients are involved in multiple legal systems. Clients who face concurrent criminal and family court allegations may experience severe and enmeshed penalties such as eviction, unemployment, loss of immigration status, and termination of public benefits. Social workers play a critical role for these clients, not only providing support and stability to clients and their families but also encouraging attorneys to connect the dots between the complex challenges and trauma in clients' lives. Outside of the office, Bronx Defenders social workers speak at city, state, and national conferences and provide technical assistance to public defender offices around the country that are in the process of building holistic practices.

This article is the first scholarly work to detail the practices and aims of social workers at holistic public defender offices. In this paper, the authors will demonstrate why social work is foundational to holistic defense and how this relationship differs from the roles that social workers occupy in traditional public defender offices. The article proceeds in three sections. The first contextualizes the parallel history and philosophies of public defense, holistic defense and social work; the second addresses some of the theoretical questions of utility and appropriateness of attorney-social worker collaboration; and the third is an in-depth discussion of attorney-social worker collaboration in practice. It is the authors' goal to persuade traditional public defender offices that already employ social workers to adopt more holistic practices, encourage public defenders who do not currently employ social workers to recognize the centrality of social work to client-centered advocacy, and to inspire social workers who may not have previously imagined a role for themselves in public defense to become advocates at holistic public defender offices.

## II. Professional Responsibilities and Ethics

Efforts to integrate social work and public defense begin with each profession's commitment to clients and responsibility to promote social justice. The rich historical roots and mandates of social work and public defense – both written and envisioned by each profession's founders – drive practitioners in both fields to zealously advocate for their clients. Sharing this client-centered foundation contributes immensely to the effectiveness of attorney-social worker collaboration through holistic defense.

Social work and public defense in the United States also share notable historical ties. Professional social work in the United States traces its roots to the Settlement House Movement and the rise of social welfare institutions,<sup>2</sup> while the concept of a public defender office was first proposed at the end of the 19<sup>th</sup> century by Clara Shortridge Foltz, a pioneering advocate who was involved in a myriad of social justice campaigns, including prison reform and women's suffrage.<sup>3</sup> Both social work and public defense found renewed zeal and vigor in the 1960's, an era that witnessed increased government funding for social services through the War on Poverty<sup>4</sup> as well as the Supreme Court's landmark decision in *Gideon v. Wainwright* affirming the right to state-provided legal representation in criminal cases.<sup>5</sup>

The aims and responsibilities of public defenders have been the subjects of debate as early as the very first time that the concept of public defense was proposed. When Clara Shortridge Foltz first campaigned for the establishment of public defender offices, she envisioned attorneys who would “engage the law's presumption of innocence on a deep level, making no distinction between the factually and presumably innocent”.<sup>6</sup> Notably, Foltz's plan drew from her firsthand experiences defending clients in criminal court and was tied to other social justice causes that Foltz pursued such as prison reform.<sup>7</sup> Foltz's vision of public defenders contrasts with a competing proposal that would have had public defenders ally themselves with the courts rather than clients and advocate solely on behalf of the factually innocent.<sup>8</sup>

2 See Albert R. Roberts & Patricia Brownell, *A Century of Forensic Social Work: Bridging the Past to the Present*, 44 SOCIAL WORK 359, 363 (1999); Mimi Abramovitz, *Social Work and Social Reform: An Arena of Struggle*, 43 SOCIAL WORK 512 (1998).

3 See BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* (2011).

4 See Abramovitz, *supra* note 2. see also Roberts & Brownell, *supra* note 2, at p. 364–365.

5 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6 See Barbara A. Babcock, *Inventing the Public Defender*, 43 AM CRIM L. REV. 1267, 1267–1269 (2006).

7 *Id.*, at p. 1279, 1278.

8 *Id.*, at p. 1270.

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These two visions for the role of public defenders reflect divergent understandings of where attorneys' allegiance should lie. With its client-centered focus and connection to broader social justice movements, Foltz's vision better equips public defenders both to provide clients with the zealous advocacy required by the Constitution<sup>9</sup> and to pursue systemic reforms. The alternative model leaves clients without genuinely zealous advocacy and inappropriately narrows the broader concerns of public defenders to protecting only the factually innocent. Today, while all public defenders do not necessarily adhere to the precise models discussed above, there is substantial variation across different defender offices in the United States. Many defender organizations have firmly committed themselves to client-centered advocacy that goes beyond individual cases,<sup>10</sup> while others perform a more limited role.<sup>11</sup>

The unique position of public defenders in the criminal justice system brings with it a responsibility to promote social justice. Public defenders' allegiance to their clients and proximity to the operations of the criminal justice system generate an obligation to look beyond their clients' cases and challenge systemic injustice. Because public defenders witness the problems in the criminal justice system firsthand and work with marginalized

9 See *Gideon v. Wainwright*, supra note 5.

10 Examples of public defender offices locating their work in broader social justice reform movements include The Bronx Defenders' Fundamental Fairness Project and Organizing Project and the Arch City Defenders' white paper on municipal court reform. See The Fundamental Fairness Project, The Bronx Defenders, available at <http://www.bronxdefenders.org/programs/fundamenta-fairness-project/> (last visited Dec, 2015); Municipal Courts White Paper, Arch City Defenders, <http://www.archcitydefenders.org/wp-content/uploads/2014/11/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf> (last visited Dec, 2015). Among the many offices committed to client-centered advocacy are the members of the Community-Oriented Defender Network. See Community-Oriented Defender Network, *National Legal Aid & Defender Association*, available at <http://www.nlada100years.org/member-resources/defender-resources/community-oriented-defender-cod-network> (last visited Jan, 2016). For a more detailed account of client-centered and community-oriented defense, see Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 975–984 (2013).

11 In many instances, extreme underfunding is responsible for the limited nature and zeal of certain public defender offices. In several New York counties, underfunding was so egregious that the New York Civil Liberties Union (NYCLU) filed a class action in 2007. See New York Civil Liberties Union, *State of Injustice: How New York State Turns its Back on the Right to Counsel for the Poor* (2014), available at [http://www.nyclu.org/files/publications/nyclu\\_hh\\_report\\_FINAL.pdf](http://www.nyclu.org/files/publications/nyclu_hh_report_FINAL.pdf). Nevertheless, some offices have found ways to holistically expand the scope of their practices on miniscule budgets. See Steinberg, supra note 10, at p. 1011–1013 (discussing the work of the Tribal Defenders of the Confederated Salish and Kootenai Tribes).

communities that possess minimal political power, they are uniquely positioned to serve as informed, effective, and zealous drivers of change in the criminal justice system.

Working one-on-one with clients, public defenders are able to establish trust with individuals and learn about the entire constellation of issues that affect them prior to, during, and after their involvement with the criminal justice system.<sup>12</sup> Moreover, public defenders' role as advocates makes them less likely to adopt a paternalistic approach to systemic change. Just as zealous, client-centered criminal defense advocacy requires attorneys to pursue their clients' stated interests, public defenders' role as advocates enables them to more broadly represent the stated interests of their clients' communities.<sup>13</sup>

For these reasons, The Bronx Defenders has chosen to implement a model that shares similarities with Foltz's client-centered vision of public defense and also integrates policy advocacy with direct services. The model, holistic defense, seeks to redefine and expand the role of public defenders to address not only clients' immediate cases but also the underlying causes and enmeshed penalties – also called “collateral consequences” – of criminal justice involvement.<sup>14</sup>

Holistic defense best facilitates public defenders' role in promoting social justice because of its commitment to treating clients as whole people, its natural tendency to encourage creative strategies, and its synergy of direct services and policy advocacy. At the core of holistic defense is an understanding that clients are more than the immediate criminal cases that they face and that they should be treated as such.<sup>15</sup> This mindset,

12 For further discussion of the importance of public defenders' ties to clients and their communities, see Steinberg, *id.*, at p. 997–1002 (discussing the fourth pillar of holistic defense: a robust understanding of, and connection to, the community served).

13 Similarly, Michael Grinthal writes that, “The challenge [...] for lawyers [...] [who] work for social change, is to create structures that facilitate lawyering with and for un- or partially-organized constituencies [...] lawyers seeking to work with marginalized groups must be concerned not only with ethical questions of accountability and paternalism, but with maximizing the power available to those groups”. See Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J. L. & SOC. CHANGE 25, 64 (2011). By the nature of their work, public defenders are well positioned to represent clients' communities in this manner.

14 For an in-depth survey of the history and practice of holistic defense, see Steinberg, *supra* note 10.

15 The Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010) helps establish the constitutional basis for requiring defense attorneys to look beyond clients' immediate criminal cases. Although *Padilla* specifically deals with enmeshed penalties related to immigration status, the decision stands more broadly for the principle that defense attorneys should engage in holistic advocacy. See McGregor Smyth, *From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 How. L.J. 795 (2011).



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combined with the interdisciplinary team structure of holistic defender offices, helps attorneys recognize the big picture not only in individual clients' lives but also across clients' entire communities. The interdisciplinary nature of holistic defense also lends itself to creative reform efforts by bringing together advocates from different backgrounds and areas of expertise around common goals. The different members of each holistic team bring with them various techniques and skills that they can share with their teammates and adapt to create novel reform strategies.

### 1. For Social Workers, A Foundation of Shared Ethics

The National Association of Social Workers (NASW) Code of Ethics is illustrative of the parallels between holistic defense and social work. Significantly, the Code's preamble calls upon social workers to pay "particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty".<sup>16</sup> The Code's parallels to holistic defense continue with its emphasis on "the environmental forces that create, contribute to, and address problems in living".<sup>17</sup> In other words, the Code commits social workers to providing holistic services to clients. The message of holistic defense – that clients are complex and unique human beings with lives that extend well beyond the confines of criminal cases – closely mirrors this person-in-environment perspective<sup>18</sup> that is so fundamental to social work practice. Similarly, holistic defense's interdisciplinary team approach and synthesis of direct services and policy advocacy echo the stipulation in the Code that social workers should serve clients through a variety of methods, including "direct practice, community organizing, supervision, consultation administration, advocacy, social and political action, policy development and implementation, education, and research and evaluation".<sup>19</sup>

16 See CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, Preamble, available at <http://www.socialworkers.org/pubs/code/code.asp> (last visited March 2015) (hereinafter: NASW CODE).

17 Id.

18 See ENCYCLOPEDIA OF SOCIAL WORK, PERSON-IN-ENVIRONMENT (2013) available at <http://socialwork.oxfordre.com> (last visited Jan. 21, 2016) (The person-in-environment perspective in social work is a practice-guiding principle that highlights the importance of understanding an individual and individual behavior in light of the environmental contexts in which that person lives and acts. The perspective has historical roots in the profession, starting with early debates over the proper attention to be given to individual or environmental change. Theoretical approaches that have attempted to capture the meaning of person-in-environment are presented, as well as promising, conceptual developments).

19 See NASW CODE, supra note 16.

Finally, and perhaps most importantly, the Code of Ethics positions social workers as change agents by proclaiming that “social workers promote social justice and social change on behalf of clients [...] and strive to end discrimination, oppression, poverty, and other forms of social injustice”.<sup>20</sup> Holistic defense, by recognizing in the representation of each client an opportunity to both zealously defend individual rights and challenge systemic racism and oppression, affords both social workers and defense attorneys the chance to make good on this professional pledge.

## 2. Shared Responsibility for Social Justice

Similar to public defense, social work carries with it a professional responsibility to promote social justice.<sup>21</sup> In fact, social work is unique among helping or mental health professions in its commitment to promoting justice for both individuals and communities. Both professional codes and scholarly literature in the field consistently and explicitly charge social workers with advancing social justice.<sup>22</sup> This professional orientation stems in large part from the person-in-environment perspective that is at the heart of social work and that encourages practitioners to understand and address the contextual forces that trap individuals, families, and communities in cycles of poverty.<sup>23</sup>

However, social work, like public defense, has experienced a divide between practitioners who actively pursue social justice through their work and others who view their

20 Id.

21 Ping Kwong Kam, *Back to the 'Social' of Social Work: Reviving the Social Work Profession's Contribution to the Promotion of Social Justice*, 57 INTERNATIONAL SOCIAL WORK 723, 725 (2012) (“Since the founding of the social work profession, social justice has been recognized as the crucial mandate of social workers”).

22 No similar profession emphasizes dual commitments to both social justice and individual clients to the same extent as social work. Both the NASW CODE of Ethics and International Federation of Social Workers (IFSW) Statement of Ethical Principles call upon social workers to actively promote social justice. See International Federation of Social Workers, *Statement of Ethics*, Section 4.2 Social Justice, available at <http://ifsw.org/policies/statement-of-ethical-principles> (last visited Mar. 03, 2016) (“Social workers have a responsibility to promote social justice, in relation to society generally, and in relation to the people with whom they work”); NASW CODE of Ethics, supra note 16. This charge is also present in scholarly articles examining the history and ethics of social work. See Kam, supra note 21; Abramovitz, supra note 2, at p. 512.

23 Kam, supra note 21, at p. 731 (“Social worker does not only look at individual problems but examines the problems within the social context [...] The ‘social’ in social work implies that social workers have to adopt the person-in-environment or person-in-situation perspective to understand and analyze human problems”).

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professional responsibilities more narrowly.<sup>24</sup> In recent decades, critics from within the profession have noted a value shift away from diagnosing social problems and advocacy for structural change and toward the provision of clinical or therapeutic services to individual clients.<sup>25</sup> As a result, more social workers focus on problems that are perceived to be located within individuals, rather than organizing behind broader advocacy that targets systemic problems.

With its dual focus on both individual and systemic advocacy, holistic defense empowers social workers to rediscover their roles in advancing social justice. Holistic defense, arguably more than any other contemporary social work occupation, marries social work's competing commitments to individual and systemic advocacy,<sup>26</sup> a goal that multiple experts in the field have suggested as a remedy to the profession's shift away from social justice.<sup>27</sup> By understanding clients' legal problems in the social context of their lives and court involvement and using anti-oppressive, empowerment, and strengths-based interventions, holistic defense meshes perfectly with the person-in-environment perspective of social work. Beginning with their work helping individual clients understand and address the issues they face within and beyond the criminal justice system, and extending to their work educating the Courts and local service providers about those issues, social workers in holistic defender offices have an opportunity to promote social justice in all that they do.

24 Abramovitz, *supra* note 2, at p. 513 (“The initial struggle within social work took place around the issues of individual change and social change [...] the social change-oriented Settlement House Movement (SHM) vied for control of the emerging profession with the older and more individually oriented Charity Organization Society (COS). This initial conflict [...] anticipated a century of struggle”); Kam, *supra* note 21, at p. 723 (“Historically, social work has developed along two traditions. The first [...] is a tradition showing concern for individual problems [...] The second [...] paid attention to the deficits in social environments, creating structural changes, combating social discriminations, and fighting for social justice”).

25 *Id.*, at p. 726–730 (detailing the “weakening of the practice of advancing social justice”).

26 R.P. Butters & V. Vaughan-Eden, *The Ethics of Practicing Forensic Social Work*, 1 J. FORENSIC SOC. WORK 61, 62 (2011) (“Foundational to forensic social work is the contextual nature of the individual and the importance of social justice”).

27 See Kam, *supra* note 21, at p. 733–734 (advocating for “breaking the division between micro and macro practice”); Abramovitz, *supra* note 2, at p. 524 (“The history of the profession suggests that social workers recommit social work to individual growth and social change”).

### III. Threshold Concerns and Practical Tensions: Much Ado about Nothing?

Skeptics of attorney-social worker collaboration in public defense suggest that ethical obligations may present significant obstacles to success. A deeper understanding of social work ethics and the practical reality of truly integrated legal teams, however, should assuage any doubts about interdisciplinary tension impeding zealous defense.

Questions regarding the possibility of fruitful cooperation between lawyers and social workers generally focus on two of the most important tenets of criminal defense: confidentiality and zeal.<sup>28</sup> First is the question of whether a client's right to confidentiality is threatened by a social worker's involvement in a legal case.<sup>29</sup> Second, one might wonder how a lawyer's zealous advocacy may be influenced by working with a social worker and whether that social worker's influence profoundly changes the representation the client receives. Whereas attorneys are bound to represent each client's stated wishes, some social workers are legally required to make decisions based on a client's "best interests", even when this may be at odds with their own self-determination. Lawyers may therefore be wary of bringing a paternalistic, "best interests" oriented perspective to their legal team.<sup>30</sup> These are undoubtedly important intellectual issues to consider when contemplating attorney-social work collaboration. However, in the daily practice of integrated teams at holistic defender offices, these tensions rarely arise because social workers are fully integrated members of legal defense teams and are explicitly focused on client empowerment and self-determination.

#### 1. Mandated Reporting and Confidentiality

One perceived conflict in the attorney-social worker relationship regards client confidentiality and social workers' status as mandated reporters of child and elder abuse. Statutes in every state require social workers who discover evidence of child or elder abuse during the course of their professional work to report such evidence to government agencies.

28 See Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J. L. & POL'Y 83, 89 (2003) ("Simply put, zeal and confidentiality trump most other rules, principles, or values").

29 See also Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 FORD. L. REV. 2123, 2135, 2140–2142 (1999); Alexis Anderson, Lynn Barenberg & Paul. R Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism, and Mandated Reporting*, 13 CLIN. L. REV. 659, 664 (2007).

30 See Galowitz, supra note 29, at p. 2140–2142; Anderson, Barenberg & Tremblay, supra note 29, at p. 664.

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However, client confidentiality and attorney-client privilege – except in extremely limited circumstances – forbids lawyers from revealing clients’ confidences.<sup>31</sup> At first glance, this conflict appears to doom the role of social workers on holistic defense teams. How can a social worker respect an advocate’s responsibility and commitment to confidentiality when that same social worker might be required by law to report the client to the government?

Some offices keep social workers completely separate, both physically and in terms of their work with the client, from the defense lawyer and the case. In other offices, lawyers warn their clients that the social worker, to whom they are being referred, though employed by the same organization, is subject to different reporting duties and therefore confidentiality protections are limited in those interactions.

Yet many recognize that without protecting confidential communications between clients and their defense teams, including social workers, clients are not afforded their constitutional right to right to counsel or the effective assistance of counsel, let alone the myriad advantages of being represented by a holistic defender office. Maintaining client confidentiality is also paramount to building trust between a client and his/her lawyer and social worker. At The Bronx Defenders and elsewhere, interdisciplinary defense teams carefully engage social workers as integrated members of clients’ legal defense teams<sup>32</sup> within the umbrella of state and national codes of professional responsibility that extend the duty of confidentiality and attorney-client privilege to non-lawyer employees of legal organizations working at the direction of the lawyer.<sup>33</sup> It is important to note, however, that

31 For a more in-depth discussion of the potential conflict between attorney-client privilege and social workers’ mandated reporting requirement, see *id.*, at p. 670–678; Galowitz, *id.*, at p. 2135–2154. see also Maryann Zavez, *The Ethical and Moral Considerations Presented by Lawyer/Social Worker Interdisciplinary Collaborations*, 5 WHITTIER J. CHILD & FAM. ADVOC. 191 (2005); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2000–2001).

32 See Galowitz, *supra* note 29, at p. 2138 (“Many legal services and clinical programs take the positions that social workers and social work students who participate in the program’s legal representation of clients come under the rubric of law office personnel and therefore are bound by attorney-client rules of confidentiality”). See also Anderson, Barenberg & Tremblay, *supra* note 29, at p. 700–701 (“Our assessment is that a court facing this dilemma would likely conclude that a social worker employed within a law firm ought to be treated as a member of a legal team and not as a free-standing social worker”).

33 See Galowitz, *supra* note 29, at p. 2138 (“The New York Code of Professional Responsibility, like other state codes, provides that a ‘lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client.’ Accordingly, employees of lawyers, including social workers or social work students, are bound by the attorney’s professional rules of confidentiality”); *id.*, at p. 206–208 (discussing Rule 5.3 of the Model

the specific language of mandated reporter statutes and codes of professional responsibility vary from state to state.

While there are differences from state to state in the exceptions permitting a lawyer to break confidentiality if they have reason to believe death or serious bodily injury may otherwise result, and in a few states there are rules actually mandating attorneys to report such information, in most states and according to the Model Rules of Professional Conduct (“Model Rules”), lawyers are bound not to disclose any information related to their representation of a client without express consent from their client.<sup>34</sup> The Model Rules further mandate that attorneys do everything within their power to ensure that any subordinate lawyer or non-lawyer employee abide by the rules.<sup>35</sup> This cloak of attorney-client privilege is based on the Sixth and Fourteenth Amendments to the United States Constitution and is the foundation upon which all attorney-client trust is built.<sup>36</sup> Where defense social workers are employed as an ‘agent’ of the attorney, they are bound by these same guidelines governing lawyers and their non-lawyer employees.

Social workers, with clearly defined roles as agents of the attorney, and acting at the direction of the attorney, cannot be divorced from legal representation. Social workers are not providing clinical services to clients outside of the scope of the legal case or without connection to the pending legal matter. Furthermore, the social workers are anchored in the teams to which they belong, and are so completely integrated that a social worker’s work product could never be separated and therefore made subject to different statutory mandates.

Code of Professional Responsibility); MODEL CODE OF PROF’L CONDUCT r. 5.3 (AM. BAR ASS’N 1983) (“a lawyer [...] shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer [...] a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer”). Note that while social workers and attorneys are on equal footing at The Bronx Defenders, attorneys designated as Team Leaders act as supervisors for all members of each interdisciplinary team.

34 *Id.*, r. 1.6.

35 *Id.*, r. 5.3.

36 See NAPD Formal Ethics Opinion 14-1 (Nat’l Ass’n For Pub. Def. 2015).

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In addition to social workers' requirements to ensure client confidentiality as part of an integrated legal team, social workers also have multiple "compelling professional reasons"<sup>37</sup> to protect full confidentiality when working in a legal setting. In the preamble of the NASW Code of Ethics, social workers are called to "strive to end discrimination, oppression, poverty, and other forms of social injustice". Social workers engaged in defense work feel ethically and morally compelled to safeguard their clients' interests from systems of criminalization, including the child welfare system. Holistic defense social workers understand their role in resisting the historical and contemporary professional norm of mandated reporting as it aligns with their ethical allegiance to ending social injustice.

As a practical matter, the understanding that social workers at holistic defender offices are fully integrated within clients' legal defense teams is the best reflection of social workers' proper role in the holistic defense model.<sup>38</sup> While social workers on holistic defense teams may at times engage in short-term counseling, crisis intervention, and other direct services, it is always at the direction of the lawyer and in service of the client's legal needs and the *legal* defense strategies in the pending case. As full-fledged members of defense teams, social workers at holistic defender offices cannot act as mandated reporters without also violating the duty of confidentiality imposed by rules of professional conduct and attorney-client privilege.

## 2. Enhancing Attorneys' Capacity for Zealous Advocacy

Another concern about the integration of social work and public defense is that social workers will dilute or otherwise alter the level of zealous advocacy advanced on the client's behalf, as some legal commentators believe that the presence of social workers on interdisciplinary teams is at odds with defense attorneys' obligation to provide zealous

37 See NASW Code, *supra* note 16, at 1.07 ("(c) Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person. In all instances, social workers should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed").

38 See Galowitz, *supra* note 29, at p. 2138 ("If employees were not covered by the confidentiality protections, lawyers could not draw on their assistance in representing a client. Thus, for example, lawyers would not seek the assistance of social workers in instances of suspected child abuse").

advocacy.<sup>39</sup> It is easy to understand why the worry exists: to many, social work represents nothing more than a thinly veiled vehicle of social control and coercion. With both a history of aggressive intervention<sup>40</sup> and a contemporary practice of reframing paternalistic interventions – both individual and macro level – as “empowerment”, it is no surprise that those public defenders fighting *against* the system have worried about collaborating with social workers. While the biggest critics of social work as a mechanism of social control – including sociologists, historians, and lawyers – are usually outside the profession, many social workers critique their own field for its focus on fixing or saving “broken” individuals (and their families and communities). The criticism is a valid one, as constant vigilance for paternalism is a crucial component of responsible social work, and social workers must recognize their own profession’s “profession’s inadequate theorizing and state of denial about the context of coercion framing much of its practice”.<sup>41</sup>

While there is undoubtedly a problem with paternalism among social workers, paternalistic tendencies are hardly unique to the field of social work. Lawyers (and public defenders in particular) often struggle with paternalism in their own work. When it comes to zealous representation of clients, the bigger threat impeding public defenders’ advocacy is not the integration of another discipline like social work, but instead movements such as therapeutic jurisprudence that are bubbling up within their own discipline.<sup>42</sup> Therapeutic jurisprudence, a model associated with the problem-solving courts movement, is defined by its founders as an examination of the ways in which law and legal procedure affect the mental and psychological wellbeing of those who interact with it.<sup>43</sup> Proponents of therapeutic jurisprudence believe that the law should be redesigned in order to minimize

39 Id., at p. 2140–2142 (discussing the perceived conflict stemming from the notion that “the lawyer’s responsibility is to advocate zealously for the client’s wishes while the social worker’s is to safeguard the client’s best interests”). On the other hand, Anderson, Barenberg & Tremblay note that social workers and lawyers “both serve as counselors, advisors and advocates for their clients”, and argue that concerns regarding perceived tensions between social workers’ and attorneys’ allegiances “are ultimately unfounded”. See Anderson, Barenberg & Tremblay, *supra* note 29, at p. 664–665.

40 See LESLIE MARGOLIN, *UNDER THE COVER OF KINDNESS* 97–105, 172–180 (1997).

41 Gale Burford & Paul Adams, *Restorative Justice, Responsive Regulation and Social Work*, 31 J. SOC. & SOC. WELFARE 7 (2004).

42 See Mae C. Quinn, *An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007).

43 Bruce J. Winick, *Therapeutic Jurisprudence and Problem-Solving Courts*, 30 FORDAM URB. L.J. 1055, 1063 (2002) (explaining the concept of theoretic jurisprudence); Quinn, *supra* note 42, at p. 540 (Describing therapeutic jurisprudence: “a particular way to study law – one that explicitly considers the therapeutic impact of legal rules, procedures, and processes on those they affect”).



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“antitherapeutic effects” and increase the law’s therapeutic potential to rehabilitate individuals. Although therapeutic jurisprudence was founded with the intention to address the underlying issues driving people into the criminal justice system, this model is inherently paternalistic in nature, as it seeks to locate the reasons for criminal justice involvement within the individual client, rather than focusing on the larger structural issues at hand.

Therapeutic jurisprudence builds upon a number of flawed and simplistic assumptions about clients of criminal defense (for example, that clients are guilty, clients can and should be rehabilitated, and if clients are not rehabilitated, they will continue to offend) to suggest that criminal defense attorneys should not only accept these inferences about their clients, but should also shift their focus to individual rehabilitation, thereby relinquishing their duty to zealously represent clients based on their expressed wishes.<sup>44</sup> Therapeutic jurisprudence lays bare a tendency within segments of the criminal defense bar to substitute paternalistic presuppositions for zealous, client-centered advocacy. Proponents of the movement, as well as the criminal defense attorneys who conform to its undergirding philosophy, fail to recognize that the “reforms” suggested miss the mark. Therapeutic jurisprudence focuses too heavily on an individual client’s own pathologies and potential for rehabilitation, and thereby misses a crucial opportunity for defense attorneys to critically examine and critique the criminal justice system at large.<sup>45</sup>

44 *Id.*, at p. 569 (Professor Quinn explaining why she must reject the “invitation” to join the therapeutic jurisprudence movement: “Beyond this, I fear Professor Wexler’s TJ model, with its emphasis on rehabilitation and transforming clients’ lives, is laden with assumptions about the criminal defense client population – not the least of which is that they are guilty, likely to offend again, and in need of transformation. These assumptions seem somewhat misguided. First, this fails to take into account the many truly innocent clients whom defense attorneys represent. Although it may be true that a large number of criminal defendants have committed the crimes with which they are charged, defense attorneys play an integral role in ensuring that their constitutional right to be presumed innocent is protected. Encouraging lawyers, even indirectly, to undertake representation harboring a different presumption may work to undermine or at least discount this important justice consideration”).

45 See Margolin, *supra* note 40, at p. 105 (“By focusing on the characteristics of clients, on *their* pathology, *their* delinquency, *their* failures, attention was diverted from the conditions external to them that constrained and limited their choices. The point is that aggressive social work’s discourse on the negative traits of the poor legitimized the existing social order by deflecting attention from the unequal distribution of social resources and opportunities responsible for turning some people into clients and others into their judges”); *id.*, at p. 179 (“Rather than being guilty of boldfaced lies, social workers are guilty of twisting the facts and misdescribing them. They systematically dismiss evidence, producing a gap between their self-conception and action: they describe themselves as empowering

Recognizing the possibilities for paternalism in some segments of the criminal defense bar and social work profession, socially conscious advocates at holistic defender offices reject paternalistic approaches to representation, and instead seek to understand, acknowledge and work to fix the problem of paternalism within public defense. To that end, the very nature of the holistic defense model, with an explicit focus on serving the community and understanding the underlying issues driving people into the criminal justice system, leaves little room for the professional, whether lawyer or social worker, who paternalistically believes s/he knows what a client's "best interests" are. Advocates at holistic defender offices understand that the reasons their clients become involved with the criminal, family and civil court systems have far more to do with unequal access to personal safety, food, education, healthcare, and employment than they do with personal failings or inherent deficiencies. Armed with this understanding, holistic advocates are much less likely to paternalistically encourage "rehabilitative" services, and instead focus on representing clients' stated interests.

Because social workers practicing holistic defense serve as advocates on fully integrated legal teams, social workers do not substitute their individual judgment, promote clinical determinations of their client's "best interests" or otherwise subvert zealous advocacy provided by their team's attorney. Rather, social workers at holistic defender offices enhance attorneys' capacity to serve as client-centered advocates, as they contribute a broad perspective that allows their teams to better understand individual clients and the criminal justice system as a whole. This perspective manifests itself not as a conflict between social workers' allegiance to clients and the courts, but rather as an ability to help the other members of their teams recognize and address the entire constellation of issues related to clients' court involvement.

In short, the idea that social workers on integrated legal teams will either increase paternalism or be more concerned with diagnosing and treating individual clients than obtaining favorable legal outcomes is unfounded. While the issue of social workers impeding attorney's zealous advocacy must be addressed because of the critical importance of such advocacy to the practice of law,<sup>46</sup> those who have practiced with social workers in a holistic defense setting understand that these criticisms are misguided.

It seems plausible that the aforementioned questions are so hotly debated and preoccupy professionals (though more often attorneys considering introducing social workers to their practices), either because attorneys have never practiced with social workers or because

while their actions disempower. Their offense is against discourse, complexity, difference").

<sup>46</sup> See Smith, *supra* note 28.

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their collaborations with social workers have been ambiguous, rather than as an explicit part of a legal defense team. Anderson, Barenberg and Tremblay, in their exhaustive consideration of these questions, conclude that with good communication and clearly defined professional roles, the potential pitfalls of social worker-attorney collaboration can be easily avoided.<sup>47</sup>

As simple as it may seem, quality communication is the true key to the collaborative attorney-social worker enterprise, so much so that it is encapsulated in the second pillar of holistic defense.<sup>48</sup> In order to foster the best communication within teams and across practices, all lawyers, social workers, parent advocates, investigators, and administrators on a team are seated together and participate together in regular team meetings as well as smaller group case conferences. As a result of their physical proximity, holistic advocates are primed to promptly collaborate on their clients' cases when multidisciplinary challenges arise.

## IV. Functions of Social Workers at Holistic Public Defender Offices

### 1. Assist Attorneys in Identifying and Understanding Underlying Issues

The presence of social workers on a legal team allows attorneys to ask deeper questions of their clients and thus have a fuller understanding of clients' situations. Public defenders practicing without social workers present might be reticent to ask questions of their clients beyond the factual information directly related to the case because they would be ill-equipped to handle issues such as requests for social services. With the knowledge that social workers are part of the team, however, attorneys not only feel comfortable asking these deeper questions,<sup>49</sup> but understand that doing so is part of their duty as holistic defenders.

<sup>47</sup> Anderson, Barenberg, Tremblay, *supra* note 29, at p. 701.

<sup>48</sup> Steinberg, *supra* note 10.

<sup>49</sup> In a more traditional public defender setting, a lawyer might ask questions about a client's life beyond the criminal charges at arraignment or first appearance, in large part for the purpose of a bail argument or to otherwise inform the direction of the criminal case. When initial interviewing elicits pertinent information suggesting legal involvement in another court system, potential immigration consequences, a family court filing, or employment discrimination, any criminal defense lawyer would hopefully be inclined to make referrals to appropriate legal counsel if they, like most criminal defense attorneys, do not have an interdisciplinary practice. However, the more questions an attorney asks, the greater the likelihood for there to be increasing work for the lawyer. There is, therefore, an incentive

Even at public defender offices employing the most holistic practices, there will likely be far fewer social workers than attorneys on staff. As a result, attorneys must sometimes make initial determinations as to whether or not they should utilize the social work resource on behalf of a given client. Lawyers must therefore learn the basic interdisciplinary skills of how to assess clients for potential mental health issues, intellectual or developmental disabilities and significant addiction or trauma histories in their clients. At The Bronx Defenders, social workers play an active role in cross-practice training for all new lawyers and advocates, teaching them when they should probe a client further, what types of questions to ask, and how best to ask them.

By modeling conflict-avoidant communication skills grounded in active listening, social workers teach public defenders how to obtain delicate or sensitive information that will aid them in pleading their cases before judges and juries as well as facilitate appropriate treatment for clients when needed. Social workers help lawyers understand what it means to start where the client is, how to communicate empathy, and how to normalize what a client is experiencing. In such trainings, social workers teach lawyers a variety of skills and techniques for effective client communication, including the importance of maintaining professional boundaries, managing expectations, not overpromising, and asking permission before probing certain kinds of questions.

Social workers also give attorneys concrete suggestions for client communication and relationship building, such as: Be responsive to the person in front of you in the moment they are with you; Be mindful of the physical space – is it comfortable, noisy, private, who is around? Be mindful of what has happened in your client's life before court/the meeting and what will happen after. Has your client been in holding area for several hours already? Is your client staying in a shelter? Is s/he facing eviction? Has s/he eaten today? To convey

for attorneys to keep interactions with a client focused solely on the criminal case at hand. Because lawyers practicing in holistic defender offices know that they have a social worker to whom they can turn, they feel more confident asking questions that extend beyond the criminal case, including about a client's mental health history, substance abuse history, history of trauma, or family situation. Holistic defense attorneys know that no matter what the answers to those questions are, they have seamless access to robust social services support from their team's social worker. Social workers also assist attorneys in learning *how* to ask these "deeper" questions of clients, so that clients understand what is being asked and so these questions convey the least amount of judgment possible. With social work support, attorneys can better understand the different ways a client may define her/his own cognitive limitations, mental health diagnoses, or struggles with addiction, and how to structure or rephrase questions in the most culturally competent way. When attorneys not only know the questions that are important to ask, but are confident that they have access to social support services *within their team*, holistic advocates and clients alike benefit from increased communication and transparency.

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empathy, social workers suggest reflecting what the client is saying back to them without an interpretation. Using empathetic response starters such as: “I sense that you are feeling...” “Correct me if I’m wrong but it seems like...” and “I hear you saying...” allows lawyers to be much more successful in building trust and rapport with the individuals they are representing. Lawyers also learn to nonjudgmentally validate what clients are experiencing by acknowledging that they have heard what the client said and that what s/he is saying makes sense. For example, an attorney might say, “You’ve been through a lot of awful events recently. I can definitely understand why you feel \_\_\_\_\_ about this. I wish there were more options.”

In some circumstances, social workers may help to support the team’s zealous, holistic representation by slowing the pace of an attorney’s advocacy in order to ensure that the client is being fully heard and understood. In the context of a public defender office where attorneys carry heavy caseloads, more than ninety percent of cases end in a guilty plea, and the court system is fraught with delay, the presence of a social worker can give a much-needed moment of pause to the process.

By helping the members of their teams take into account all aspects of clients’ lives, social workers do not hold their teams back, but rather ensure that advocacy is truly holistic. The presence of social workers on criminal defense teams allows attorneys to retain their focus on clients’ liberty interests while also gaining a deeper understanding of how their clients’ lives are shaped by their environments. In this way, the introduction of an ecological, person-in-environment perspective into legal advocacy helps public defenders embrace the humanity of their clients and empower clients to become agents of change themselves. Through close collaboration, lawyers at holistic defender offices will, over time, begin to embrace the perspective, values, and communicative tools brought to the table by social workers. More generally, the presence of social workers on defense teams pushes attorneys to adopt a broader understanding of clients’ needs as well as an expanded view of the roles that advocates can fill in pursuit of addressing those needs.

## 2. Facilitate Better Trust and Communication Between Lawyers and Clients

Relationships between public defenders and their clients are often fraught affairs – many clients are understandably suspicious of attorneys who they perceive as part of the system, who might have different racial or socio-economic backgrounds from them, and whose services they receive free of charge.<sup>50</sup> This is particularly true with more serious cases when

50 See Jason Boyle, *Gideon In The Garden State: New Jersey’s Support For Public Defenders* (Spring 2013) (unpublished B.A. thesis, Rutgers University), available at <http://nbcjm.rutgers.edu/images/stories/Program/HonorsTheses/JasonBoyleThesis.pdf> (last

clients are facing lengthy prison sentences or when mental health or addiction problems get in the way, or disagreements over how to resolve cases complicate already stressful relationships. Moreover, many clients initially mistrust the professional competence of public defenders and suspect that they will not receive the same caliber of representation that they might receive from a private attorney.<sup>51</sup>

Social workers, many of whom do not come from the communities they are representing, will similarly confront suspicion and scorn. Not only do they have professional degrees, but they also generally come from different socioeconomic and racial backgrounds than their clients. Coupled with social work's past and present patterns of removing children, revoking public assistance, and participating in paternalistic policymaking, it is surprising that clients are at all receptive to social work participation on a legal team. Social workers must join public defenders, sometimes known in the community as "public pretenders," in acknowledging, validating and accepting this mistrust. Social workers must be aware of and in touch with the deep problems in the profession and practice anti-oppressive, client-driven, social work. There is an understanding that social workers must earn trust, not expect it.

However, something interesting and distinct happens when defense social workers introduce themselves as a member of the legal defense team and explain that attorney-client privilege extends to their communications with a client. Very often, suspicions give way to curiosity as clients begin to see the social worker as a confidant, aid, interpreter, liaison, support, resource and defender. The introduction of another advocate to a client's defense team, particularly a social worker who is trained as an active listener and is equipped to

visited Feb. 1, 2016) (There is an idea among many defendants that they are simply a part of an "assembly-line" justice system which has no regard for their wellbeing. Since they were first prosecuted by the state and then provided with state lawyers in court it can appear that public defenders are merely representatives of the system). See also Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1219&context=facpub>. ("Lawyers are privileged. The criminally accused are generally among the least privileged members of society. Even those defenders who came from the same sort of neighborhood as many of their clients can no longer claim to be part of their client's community once they are lawyers; they have altered their socio-economic status").

51 See Marcus T. Boccaccini, Jennifer L. Boothby & Stanley L. Brodsky, *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 LAW & PSYCHOL. REV. 97, 104 (2002) (Description of survey responses in which attorneys describe their clients' general lack of trust of public defenders. "There is an immediate skepticism where [the clients] say, 'Well, I suppose if I were paying you, you'd probably be cutting a better deal'").

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offer access to concrete resources, can enhance the client's confidence in his or her attorney. If an attorney introduces a social worker to a client based on something that the client disclosed, the client knows that the attorney not only listened and showed enough interest in the client's life to discuss issues beyond the immediate case, but also followed through and involved another expert dedicated to assisting the client. The social worker's ability to help the client understand the context of his or her court involvement also improves the attorney-client relationship by providing the client with a sense of control over the direction of the case.

### 3. Perform Bio-Psychosocial Assessments

When a public defender suspects that a client may have mental or cognitive impairments, the first question that s/he wants to know is: what's wrong? By performing psychological assessments of clients, social workers can answer this question in a timely manner and facilitate early interventions, dramatically improving clients' chances at obtaining favorable outcomes in court. Without social workers on staff, a public defender's only alternative if she has concerns about a client's mental health is to arrange an assessment by an outside forensic psychologist or psychiatrist, an evaluation that often takes time and almost always comes at significant expense. At holistic defender offices, the availability of social workers to perform bio-psychosocial assessments – as early as clients' very first meetings with attorneys at arraignments – facilitates prompt and effective treatment plans and also enables lawyers to address clients' mental or cognitive impairments into their advocacy in court.

### 4. Hands-on Referrals and Building Relationships with Service Providers

Building and maintaining relationships with the service providers who offer support to clients in areas such as mental health, substance abuse, harm reduction, and alternative education is essential to success in holistic defense. Social workers who have visited community-based programs and have met with counselors face-to-face are able to have more honest conversations with their clients' counselors and case managers. Most importantly, social workers who develop positive relationships with service providers may be able to secure second chances for their clients, which could mean the difference between successful rehabilitation and years in prison.

Social workers at The Bronx Defenders often bring clients to their first intake appointments at social services programs. Accompanying clients for initial interviews or assessments not only ensures that clients understand and complete what can sometimes be a complicated process, but also lets service providers know that there is a team of advocates at the other end of each referral who understand clients' family situations, treatment histories, and legal involvement.

Once a client enters a program, advocating for the client to receive effective, individualized care can sometimes present a challenge. Many of the program options available to clients with government health insurance and/or court mandates are not suitable or clinically appropriate from the outset but are nevertheless the best available option. Social workers who forge relationships with service providers can advocate for clients to receive individualized treatment and can also expect that program counselors will reach out to them if clients experience problems or difficulties with program rules or treatment protocols.

## 5. Crisis Intervention

Even clients with relatively few mental health issues will find their emotional and psychological wellbeing depleted as their cases wear on. When a crisis occurs, having a social worker on staff who is available to immediately provide counseling can help refocus clients on their goals and even save their lives. Social workers at The Bronx Defenders are on call at both criminal court arraignments and family court intake so that they can intervene and help clients in crisis stabilize as early as possible. Bronx Defenders social workers have also developed relationships with local psychiatric emergency rooms to ensure prompt connection to intensive services and counseling when crises become severe.

The Bronx Defenders also offers a number of short-term resources to clients that often help make dire situations more manageable. The Client Emergency Fund, which is administered by a group of Bronx Defenders advocates and funded through private contributions, provides clients with small-scale donations of items such as school supplies, food, winter coats, and diapers. Similarly, the office provides clients with single-use metro cards and car vouchers so that they can attend court dates and program appointments.

## 6. Oral Advocacy

Defense attorneys often wish that prosecutors would meet with their clients and get to know them as people before deciding to pursue particular charges, pleas, or sentences. Prosecutors sometimes agree to such meetings, but these arrangements are extremely rare. Oral advocacy by social workers before prosecutors and judges humanizes clients and can dramatically shift the narratives of cases by forcing court actors to consider the full stories of clients' lives.

Clients also benefit from oral advocacy by social workers because judges and prosecutors may be inclined to give more weight to the opinions of social workers on matters such as psychological and developmental challenges than they would to the same arguments by defense attorneys.<sup>52</sup> After several years of practicing holistic defense in the

52 See Butters & Vaughan-Eden, *supra* note 26, at p. 63; Lori James-Townes & Marquis Chandler, *Educating Social Workers in a Client-centered Defense Practice*, in SOCIAL



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Bronx, it is now a normal occurrence for a judge to request to hear from the social worker on a particular case, to request a social worker's presence at arraignment and even to prod attorneys to assign a social worker to work with a client if none has yet been assigned. If a public defender, in the course of making a plea for a non-incarceratory sentence, emphasizes the psychological issues with which her client is struggling, a judge might dismiss her argument as a diagnosis fabricated by a biased advocate. Social workers, with their training in psychological assessment and treatment, as well as their dual professional responsibilities to clients and the community, are often viewed by judges and prosecutors as more credible sources of information than defense attorneys. Of course it should go without saying that a social worker acting as part of a legal defense team would never share information with the Court that could affect their client's case adversely.

At The Bronx Defenders, social workers are on call for defense attorneys' first meetings with clients at arraignments and often speak before judges on behalf of clients. In doing so, social workers offer judges a third voice to factor into bail decisions, one that provides deep insight into how even brief periods of pre-trial detention can impact clients' families, educational prospects, employment, and mental health. Beyond arraignments, Bronx Defenders social workers continue to appear in court whenever their involvement might benefit clients. For example, if participation in a program is proposed at arraignments as part of a potential plea agreement, the social worker who was present for the initial appearance will return to court each time that the plea might be discussed.

In addition to advocating on behalf of clients, social workers fill an educational void in courtrooms by explaining how specific mental health diagnoses or substance dependence issues might influence clients, mitigate the circumstances of particular allegations, or influence clients' abilities to comply with court-ordered mandates. Similarly, social workers can help judges and prosecutors who are inclined to offer plea agreements involving alternatives to incarceration identify and understand programs that will mean the difference between freedom and prison for clients.

## 7. Written Advocacy

Since most cases do not go to trial, the ability to engage in persuasive written advocacy is a critical skill for public defenders. Social workers on holistic defense teams work collaboratively with attorneys to draft pre-pleading and sentencing reports that successfully humanize clients at crucial stages in their cases.

Leveraging their skills in engagement and assessment, social workers interview clients with both the active listening skills of mental health professionals and the strategic

orientation of zealous advocates. Working together with the attorneys on their interdisciplinary teams, social workers piece together the challenges and circumstances of clients' lives in a manner that emphasizes mitigating factors that prosecutors might empathize with. The input of clients' defense attorneys ensures that pre-pleading and sentencing reports respond to the concerns of the court and state the legal grounds for offering less restrictive case outcomes.

## 8. Community Organizing and Policy

Due to their training in micro, mezzo, and macro analysis, social work staff and interns maintain big picture analysis in a way that other advocates might find more challenging. Working together with policy organizers and attorneys, social workers at The Bronx Defenders office play a critical role in linking clients' felt needs with systemic reforms.

Social workers contribute to policy advocacy first and foremost by listening to clients and viewing their struggles through the person-in-environment perspective. Because they pay careful attention to the ways in which institutional and structural forces affect their individual clients, social workers make vital contributions to strategies and discussions concerning systemic change. Social workers also advance policy efforts by representing the office in local coalitions and committees.

At The Bronx Defenders, social workers testify before the City Council at hearings on issues such as excessive uses of force, solitary confinement, and mental health services in local jails. Social work students interning in the office's Community Organizing and Policy Practice have also bolstered reform efforts of full-time staff by dedicating substantial amounts of time to policy advocacy. In just the past year, social work interns at The Bronx Defenders have interviewed clients for the office's Solitary Confinement Project, begun work on a report on the effects of child removals, conducted Know Your Rights workshops, and participated in lobbying efforts related to sentencing and drug policy reform.

# V. Attorney-Social Worker in Action: How Social Workers and Attorneys at Holistic Defender Offices Collaborate in Practice

## 1. Revisiting Michael's Story

At Michael's next court date, Ben and Julie explain that Julie is there to get to know Michael, find out more about what happened, and help him leave jail as soon as possible. During her interview, Julie starts piecing together Michael's heartbreaking story of emerging mental illness, debilitating medical conditions, poverty, drug addiction, and tragic loss.

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As the interview progresses, Julie begins to understand Michael's fascination with cars, a subject he studied in specialized vocational education classes at school. His dream – to drive, fix, own, and sell luxury cars – explains the origins of his criminal charges. Michael believed that the cars he took for joy rides from the dealership were actually cars he had every right to drive and return at his leisure.

Following her meeting with Michael, Julie reaches out to Michael's case manager at a program for children and adolescents living with HIV so that she will be prepared to advocate for placement in an alternative to incarceration program. Julie also obtains a Patient Review Instrument (PRI)<sup>53</sup> from the transitional health care coordinators at the jail to determine which levels of programming Michael might qualify for given his HIV status. Julie identifies one of only three skilled nursing facilities in New York City available to treat Michael and liaises with staff members to obtain an acceptance letter for Michael and ensure that he will have access to his medications upon discharge from jail. With the letter in hand, Julie and Ben successfully advocate in court for Michael to be released from jail. When the judge releases Michael, Julie accompanies Michael and his family to his first meeting with the intake staff at the residential program.

Unfortunately, Michael experiences difficulties while adjusting to the program. Within a few weeks of his arrival, Julie visits the program for a case conference to address the staff's concerns that Michael has not been taking his prescribed medication and, as a result, has been threatening staff and experiencing heightened states of mania that were disturbing both staff members and other residents. Julie explains that because Michael has only recently received a diagnosis for bipolar disorder, he has never undergone appropriate treatment before and needs time to learn about his condition and the necessity of compliance with both antipsychotics and his HIV regimen. Julie asks the facility staff to be patient with Michael, but within a week of the case conference, the program calls Julie to report that Michael had been hospitalized at a local psychiatric emergency room after one of the nurses from the program called 911 in response to threatening comments that Michael made.

53 The Patient Review Instrument (PRI) is an assessment tool developed by the New York State Department of Health to assess selected physical, medical, and cognitive characteristics of nursing home residents, as well as to document selected services that they may receive. Each of the State's nursing facilities is visited bi-annually and all residents in the facility are assessed with the PRI. The information collected from the PRI is used to determine Medicaid reimbursement for nursing homes in New York State. These data are audited after they are submitted in order to ensure their accuracy. See New York State Department of Health, *Selecting a Nursing Home in New York State* (2006), available at [https://www.health.ny.gov/facilities/nursing/select\\_nh/glossary.htm](https://www.health.ny.gov/facilities/nursing/select_nh/glossary.htm) (last visited Feb. 1, 2016).

Julie fights to get Michael readmitted, but the program refuses to take him back and appears ill-equipped to handle Michael's mental health issues. Although Julie helps Michael obtain emergency housing after his discharge from the psychiatric emergency room, his mental health rapidly deteriorates without medication and the supportive structure of a treatment program. Michael disappears from the shelter and is arrested shortly thereafter for attempting to steal another car. This time there is no chance that Michael will be released at arraignments. He now faces up to three years in prison.

The only remaining option is to assemble an exhaustive sentencing memo that will lend a voice to Michael's story and persuade the prosecutor that, given Michael's health problems, denying him another chance at treatment and sending him to prison is likely to hasten his death. Over the next few months, Julie develops the mitigation narrative for a sentencing report that she and Ben will submit to the court. She interviews Michael in jail, reviews mountains of records from Michael's psychiatric hospitalizations and medical crises, and meets with Michael's doctor, case manager, and family.

During this time, Michael begins taking medications, and while he continues to struggle with the debilitating effects of AIDS, his mental health starts to stabilize. Julie researches alternative nursing facilities that would be willing to house Michael despite the circumstances of his discharge from the first program, pending criminal charges, and history of psychiatric hospitalizations. Eventually, Julie finds a program that promises to work closely with her in order to provide Michael with the best treatment possible. Julie and Ben call the prosecutor to present their sentencing memo and secure a second chance for Michael.

## 2. Excerpts from Sentencing Memo

Michael Smith was born on the last day of July 1989. That year, the number of reported cases of AIDS in the United States broke 100,000... Nevertheless, five years would pass before the Centers for Disease Control began recommending that pregnant women use Zidovudine or Azidothymidine (commonly referred to as AZT) to prevent perinatal transmission of HIV.

"HIV babies" as the cohort of newborns infected perinatally with the virus were nicknamed, were never supposed to live through childhood... Baby Michael's story, born HIV positive to a crack and alcohol addicted mother who could not take care of him, had a different ending than anyone would have predicted.

We are now asking the Court to once again prevent Michael's story from ending up where some might have predicted it would. We are hoping that the Court can see just how hard Michael's family and doctors have worked to keep him alive, to defy the odds, and to show him a future. His unlucky circumstances – born with HIV, developing AIDS by the age of 12 and becoming multi-drug resistant before likely inheriting a second illness from

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his mother, bipolar disorder, made worse by the neuropsychiatric effects of his medical condition – are nothing anyone chooses for their life. Michael always wanted to be just like every other kid, every other teenager and now, every other young man.

Michael realizes that he faces a potential jail sentence of one to three years in prison. Nevertheless, we believe that a treatment facility like Morningside can truly address Michael's treatment needs while also fulfilling the purposes of sentencing – retribution, rehabilitation, deterrence and incapacitation”.

The sentencing memo goes on to describe Michael's family history, the early years of his life, and the close relationship between his family and his treating physician, and his first years living with AIDS as an adolescent. The memo explains how at around the time of Michael's graduation from high school, his body became multi-drug resistant and he experienced a tension between craving independence and facing his reality that led him to marijuana dependence and complete disengagement from HIV treatment. Soon after Michael's diagnosis of MAI, an opportunistic infection, he began to struggle with the emergence of serious mental health symptoms. The memo details this trying time in Michael's life and concludes by emphasizing that Michael understands his situation and is better prepared to move forward with his life than he was when he entered the first residential program:

“Michael is in a very different place than he was at the beginning of his still fresh introduction to the criminal justice system [...] He misses his family deeply and has clear goals for repairing the relationships that have been strained by his mental illness and arrests [...] Michael is desperately seeking a final chance to get the high level of treatment and supervision he needs to keep his mania at bay and to ensure his fantasies of driving fancy cars remain as just fantasies”.

The sentencing memo – the team's last effort at keeping Michael from going to prison – works. The prosecutor agrees to release Michael and allow him to enter a second program. One year later, Michael returns home to live with his parents and attend an intensive outpatient HIV/AIDS adult healthcare center. Michael has stopped smoking marijuana and has been medically and psychiatrically stable for months.

In Michael's case, holistic, interdisciplinary advocacy that included social work support was invaluable to his ability to access much-needed services and avoid the devastating possibility of incarceration. At their first meeting, Ben quickly picked up on Michael's issues and didn't challenge his delusions, but instead recognized right away the need to bring a social worker onto the case. The inclusion of a social worker allowed the team at The Bronx Defenders to address a variety of issues that Michael was facing in addition to his criminal case, including mental and physical health problems and substance abuse.

Julie's involvement in Michael's case from the very beginning allowed her to swiftly conduct bio-psychosocial assessments, which revealed the constellation of issues that Michael was suffering from. Julie and Ben then advocated zealously on Michael's behalf using oral and written advocacy to demonstrate how these underlying issues relate to his criminal charges, which was crucial to their ability to obtain a placement in an alternative treatment program for Michael.

## VI. Conclusion

The American criminal justice system is in crisis. The United States has 5% of the world's population and more than 20% of the world's prisoners.<sup>54</sup> In a report to the United Nations Human Rights Committee, The Sentencing Project cited predicts that, minding current trends, one in every three African American men and one in six Latino men will go to prison in his lifetime.<sup>55</sup>

To those who understand America's legacy of racism and economic inequality, the vast overrepresentation of poor African American and Latino men and women and children detained in jails and prison should come as no surprise. Huge segments of the population can only meet their daily needs by acting in ways that put their liberty, citizenship or parental rights at risk. The communities that are chronically and systematically under-resourced and marginalized when it comes to education, health care, and economic opportunity are the same communities that are overpoliced, disproportionately arrested, sentenced and incarcerated. As the American government has shrunk the social safety net, access to support services and public assistance has become increasingly linked to coercive programming. For impoverished families and communities of color, social services now include "preventive" and "family preservation" services, which are available only once clients are under investigation by child protective authorities or have had their children removed.<sup>56</sup> Today, America's jails and prisons represent the largest provider of mental health services in the country,<sup>57</sup> further compounding racial and social inequity in America

54 See American Civil Liberties Union, *The Prison Crisis*, <https://www.aclu.org/prison-crisis> (last visited Dec. 14, 2015).

55 See Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 SUPP. 3 THE PRISON JOURNAL 87S, 88S (2011), available at <http://sentencingproject.org/doc/publications/Prison%20Journal%20-%20racial%20disparity.pdf>.

56 See Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881 (2007).

57 See E. Fuller Torrey et. al., *More Mentally Ill Persons are in Jails and Prisons than Hospitals: A Survey of the States*, Treatment Advocacy Center and National Sheriff's Association (2010), available at <http://www.treatmentadvocacycenter.org/storage/>

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by restricting access to lifesaving mental health services to those involved in the criminal justice system.

Holistic defense presents an opportunity for social workers and public defenders alike to return to the social justice roots of their profession, and to address the ways in which the criminal justice system has both grown in size and become increasingly intertwined with the family, civil, and immigration legal systems. Public defenders who focus solely on criminal cases now risk exposing their clients to enmeshed penalties that are often more severe than the potential criminal penalties associated with their cases. At the same time, social work in the United States has experienced a shift toward clinical practice and an emphasis on treating the individual at the expense of maintaining a commitment to social justice.<sup>58</sup> Holistic defense redirects the resources of both social workers and public defenders toward advocating on behalf of individuals and communities marginalized by the American criminal justice system.

Public defenders and social workers practicing holistic defense have an opportunity to be part of a movement to radically alter criminal justice in America. By understanding and working to solve the underlying issues that may affect each client, holistic advocates are able to provide zealous defense for individual clients while also reducing the overall numbers of people entering or reentering the justice system. However, zealous, client-centered advocacy is only one aspect of holistic defense – the social worker-attorney team seeking to fundamentally change the criminal justice system must also work to address damaging and ill-conceived laws and policies that disproportionately affect their clients. Advancing policy reform that would stop discriminatory policing and low-level arrests, end

documents/final\_jails\_v\_hospitals\_study.pdf (last visited Feb. 1, 2016) (“Using 2004–2005 data not previously published, we found that in the United States there are now more than three times more seriously mentally ill persons in jails and prisons than in hospitals. Looked at by individual states, in North Dakota there are approximately an equal number of mentally ill persons in jails and prisons compared to hospitals. By contrast, Arizona and Nevada have almost ten times more mentally ill persons in jails and prisons than in hospitals. It is thus fact, not hyperbole, that America’s jails and prisons have become our new mental hospitals”). See also Matt Ford, *America’s Largest Mental Hospital is a Jail*, *The Atlantic*, Jun. 8, 2015, available at <http://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/> (last visited Feb. 1, 2016) (“At least 400,000 inmates currently behind bars in the United States suffer from some type of mental illness – a population larger than the cities of Cleveland, New Orleans, or St. Louis – according to the National Alliance on Mental Illness. NAMI estimates that between 25 and 40 percent of all mentally ill Americans will be jailed or incarcerated at some point in their lives”).

58 See Abramovitz, *supra* note 2; Kam, *supra* note 21 (discussing weakening the practice of advancing social justice).

the criminalization of homelessness, mental illness and addiction, and reduce the collateral punishment of civil systems also fall within the holistic advocate's ambit of work.

Many public defender offices have already integrated social workers into their practice in roles such as reentry specialists, who can help to ease clients through the reintegration processes when they leave jail or prison. While offering such social support services is undoubtedly valuable, public defender offices considering the addition of social workers must broaden the scope of their understanding about the roles of social workers and keep in mind the many possibilities of true interdisciplinary advocacy. On an individual client level, social workers at holistic defender offices ensure that each client's voice is central to the defense strategy and that the psychosocial factors and collateral damage of multisystem involvement are always in the balance. On a community and systems level, social workers understand their moral and professional responsibility to respond to the client community they serve and to expose the racial and social injustice that they see each day.

It takes courage and vision to push far beyond the traditional governmental obligation to deliver effective counsel and change the boundaries of what society has come to expect from public defense. Holistic defense is the product of this vision, but it can only succeed if social workers, so central to the functioning of the holistic model, are fully included and supported in their work to amplify the voices of clients and the community served