

Addressing Racial Disparity in The Criminal Justice System Through Holistic Defense

By Robin Steinberg

affected, defenders must consider ways to make other actors aware of how they might perpetuate racial disparity, and work to persuade them to resist these impulses. Defense attorneys have several ways to educate others about this bias: voir dire, motions practice, use of experts at trial, jury instructions, and sentencing advocacy.

During voir dire defense counsel should work to make jurors aware of the problem of race bias and identify those jurors who appreciate its influence. Through motions practice defense counsel might educate the judge about how bias can influence police officers and ask the judge to consider it when relevant. Counsel should consider using expert testimony to educate jurors about implicit racial bias. When relevant, they should consider crafting an instruction that explains the dangers of race bias and provide guidance on being conscious about it. And the advocate can discuss how this phenomenon influences judges at sentencing along with statistics that highlight relevant racial disparities when available.

At every step of the process the lawyer will face the likelihood of being shut down when attempting to introduce this social science. But by raising the issue, the lawyer is educating the judge, who plays a critical role in addressing racial disparity in the criminal justice system.

However, despite the lawyer's best efforts, getting others to acknowledge their biases or to admit that there is racism in the system over which they have stewardship will be difficult. It is during these times that the advocate can feel hopeless, even complicit, and may consider giving up and leaving the system. It is for these moments that the third prong is important — resistance. Criminal defense attorneys must provide inspiration and support to colleagues who are feeling beaten down. For there is value in being the one voice in the courtroom reminding others of the injustice in the system. With enough of these voices, spreading throughout the criminal justice system, consciousness will slowly be raised.

The Talmud tells the story of a just man who came to Sodom to preach against wrongdoing. No one listened. Many laughed at him. But he continued. One day a child asked him why he went on preaching when it was obvious no one was listening. He responded, "In the beginning I thought I could change the world. Today I know I cannot. If I still shout today, if I still scream, it is to prevent the world from ultimately changing me."

Criminal defense lawyers must remain acutely aware of the injustices in the system that plague their clients. Defenders must develop strategies for educating others about these injustices and enlisting help to undo them. And when that fails, defenders must resist the desire to succumb to the status quo and keep working for a more just tomorrow. ■

About the Author

Jonathan Rapping is the Founder and President of Gideon's Promise (formerly the Southern Public Defender Training Center) and is the founding Director of the Honors Program in Criminal Justice at Atlanta's John Marshall Law School.



Jonathan Rapping
Gideon's Promise
34 Peachtree St., Ste. 2460
Atlanta, GA 30303
404-525-4505
Fax 404-525-0937
E-mail: jon@gideonspromise.org

Racial disparity in the criminal justice system is a problem with which public defenders are intimately familiar. They see it every day in courthouses across the country where people of color from low income communities line the crowded hallways, fill the courtroom benches, and sit at the defense table in staggering and disproportionate numbers. Public defenders cannot eliminate racial disparity in the criminal justice system because racial disparity is the result of larger social, political, and economic issues and decisions that were made long before the police put cuffs on their clients, and long before defenders met the clients at their first court appearance. But defenders can — and should — provide public defender services that properly address the discriminatory laws and practices they see. The Bronx Defenders' model of holistic defense, guided by four "pillars" outlined in this article, combats racial disparity in the criminal justice system by enhancing the quality and meaning of individual representation for each client; providing civil legal services that improve life outcomes, in addition to case outcomes; creating structural mechanisms that capture important client and community data; and empowering attorneys, clients, and community members to advocate for a fairer criminal justice system.

Of course, public defenders strongly believe in the right to counsel for poor people of all races and ethnicities who are accused of crimes. The core of what they do is defend anyone, anywhere, charged with anything. But America's criminal justice system is not race neutral. It is impossible to ignore the fact that nearly all of The Bronx Defenders' 30,000 clients per year are African American or Latino¹ and that nationwide, 1 in 3 Black males, 1 in 6 Hispanic males, and 1 in 17 White males are expected to go to prison during their lifetime.² Mass incarceration is only part of the problem; in 21st-century America, a release from prison does not guarantee real freedom. As a result of a criminal record — or even just an arrest — clients suffer crippling collateral consequences. They face deportation and the loss of their children, jobs, employment licenses, public housing, and public benefits.³ Since the mid-1990s, draconian laws and the increased availability of criminal history information have contributed to the expansion of these collateral consequences.⁴ In this context, it is easy to understand why civil rights advocate and Ohio State Law Professor Michelle Alexander called the criminal justice system a "gateway" into a new "racial caste."⁵ While the Supreme Court decision *Padilla v. Kentucky* has made public defenders responsible for advising their clients about the consequences of a plea,⁶ more drastic measures are necessary.

Four Pillars

Holistic defense chips away at this "racial caste" system by responding to the legal and nonlegal challenges that clients face. The model is comprised of four pillars: *Pillar One* — seamless access to legal and nonlegal services that meet client needs; *Pillar Two* — dynamic, interdisciplinary communication; *Pillar Three* — advocates with an interdisciplinary skill set; and *Pillar Four* — a robust understanding of, and connection to, the community served. All four pillars must be met for

an office to be considered truly “holistic”; however, it is an aspirational model, and public defender offices can start by incorporating one or two pillars into their practice.⁷

Seamless access to legal and nonlegal services (Pillar One) is crucial for clients from historically disenfranchised Black and Latino communities, who have been denied access to services for far too long, leading to instability, poverty, and criminal justice involvement. By offering criminal defense, family defense, and civil legal services under the same roof, The Bronx Defenders places an emphasis on “seamless” access: defenders do not want to create another obstacle for clients, who spend their lives navigating one indifferent bureaucracy after the next, trying to get assistance for themselves and their families.

Interdisciplinary teams are also an essential part of the holistic defense model. Each team includes criminal attorneys, civil attorneys, social workers, civil legal advocates, and parent advocates, who all work together, in constant communication, to provide a wide array of services for each client (Pillar Two). In addition to in-house services, advocates have strong partnerships with Bronx shelters, churches, and social service organizations, allowing advocates to quickly and easily obtain the best shelter placement for a newly homeless client, or secure the most compassionate therapist for a client with mental health needs.

Moreover, all attorneys and advocates receive interdisciplinary training, which enables them to work more effectively as a team and to provide the best representation for each client (Pillar Three). For example, during intake, attorneys are trained to ask not just about the names of the witnesses or the search warrant, but also about the client’s immigration status, children, public benefits, police misconduct, mental health, employment, housing, and student loans.⁸ Depending on a client’s needs, a criminal attorney will refer him to the appropriate civil attorney or advocate on her team; civil attorneys, social workers, legal advocates, and parent advocates help clients secure public benefits, recover their employment licenses, comply with services mandated by the court, and stay in the country with their families. With the support of advocates who can quickly identify clients’ issues and find support, services and representation, clients are able to properly access services that they should have received long ago.⁹

Holistic defense is founded on the belief that race, class, and inequality matter in public defense (Pillar Four). Holistic defenders are trained to view a client within the larger context of his family, community and society, looking beyond individual “case” needs of clients to help them obtain the services that they desperately need. Regular community events, intake, and a 24-hour hotline keep advocates indelibly connected to the South Bronx, and enable them to collect data on the most pressing needs of the community and how to respond to those needs. Holistic defenders also lead “Know Your Rights” workshops at local schools, churches, and community centers, and volunteer at annual Bronx Defenders community events such as the Community Block Party and the Thanksgiving Dinner. They provide support for Community Legal Intake, which has an open-door policy five days per week, 9 a.m. - 6 p.m.,¹⁰ and take turns “on-call” for the 24-hour hotline.¹¹ With these experiences, attorneys are able to provide more relevant, effective and compassionate representation for clients, and collect data on the needs of the community.

Community Impact

With this data from clients and community members, The Bronx Defenders can develop a strategic plan for advocacy that incorporates myriad tactics, including organizing, policy advocacy, citywide coalition-building, direct advocacy with legislators, and impact litigation. All initiatives rely heavily on

the involvement and support of all advocates, who forge a personal and team connection to the community and motivate their clients to participate in The Bronx Defenders’ events and projects. Client leadership is crucial to the implementation of the holistic defense model: when clients learn how to advocate for themselves and their communities, they can improve their own lives and make powerful systemic changes.

Reform happens slowly, but over time advocates have seen the impact of the holistic defense model on criminal justice issues that disproportionately affect African Americans and Latinos. In 2009, members of The Bronx Defenders were part of a broad coalition that achieved significant reform of New York’s discriminatory Rockefeller Drug Laws; advocates mobilized clients, advised politicians on drafts of legislation, met with Bronx-based lawmakers, and afterward, monitored the implementation of the drug laws. Advocates at The Bronx Defenders also played an important role in ending prison gerrymandering in New York State — enabling incarcerated people to make their votes count in their home communities (majority Black and Latino), instead of upstate (mostly White). In July 2012, Gov. Cuomo signed into law a bill that The Bronx Defenders was instrumental in proposing and advocating for, which allows nonprofit organizations to post bail up to \$2,000 for poor people charged with misdemeanors.¹² This bill is a great step toward pretrial justice for poor, minority communities, as 89 percent of all people held for misdemeanors on bail amounts of \$1,000 or less are Black or Latino.¹³ Earlier in 2012, The Bronx Defenders settled a class action lawsuit against the City of New York, which was charging clients and other city residents, mostly Blacks and Latinos, with violating New York State loitering laws after the laws had been deemed unconstitutional. The city agreed to pay \$15 million to around 20,000 people in the settlement.¹⁴

Throughout 2012, advocates mobilized clients and community members in an effort to end racially discriminatory police practices in New York, including “stop-and-frisk.”¹⁵ As Steering Committee members of the citywide advocacy campaign Communities United for Police Reform (CPR), advocates at The Bronx Defenders helped marshal support for the New York City Council’s passage of the Community Safety Act. The Bronx Defenders also co-litigated *Ligon v. City of New York*, a class action lawsuit that successfully challenged the NYPD’s practice of carrying out stops and frisks in New York City apartment buildings.¹⁶

Empowering Clients and Advocates

The Bronx Defenders model of holistic defense maintains its absolute commitment to individual client representation while enabling defenders to think more broadly about the large-scale problems and obstacles clients, and their communities, face every day. By engaging in the client community in productive and meaningful ways, holistic defense is the best public defender model to address issues of racial disparity and inequality in the criminal justice system. It creates better advocates, captures relevant data and client stories about larger systemic problems, connects clients to services, and inspires advocates and clients alike to get involved in movements for systemic change. The model enables and empowers clients and advocates to be powerful voices for criminal justice reform, and therefore an effective opponent of the “racial caste” system that threatens the administration of justice in the United States.

Notes

1. Of clients who reported race and ethnicity on our intake forms, over 90 percent were Black and Hispanic. (Bronx Defenders Internal Client Data, January 2011-Present).

2. See Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, at 1. (August 2003). The "War on Drugs," launched in the late 1960s, has contributed greatly to mandatory minimum sentencing and mass imprisonment, particularly of poor Black and Latino communities. There are scores of books and articles on this topic. See, for example, Marc Mauer & Meda Chesney-Lind, Introduction in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 10-11. (Marc Mauer & Meda Chesney-Lind, eds., 2002.) Mauer and Chesney-Lind also report that today, nearly 80 percent of inmates in state prison for drug offenses are African American or Latino (6). See also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDEDNESS* 53-58 (2012). See also Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 262-270 (2002).

3. For an overview of these collateral consequences and their impact on people in criminal proceedings, see, for example, *INVISIBLE PUNISHMENT* (Marc Mauer & Meda Chesney-Lind, eds., 2002.). See also Robin Steinberg, *Heeding Gideon's Call in the 21st Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASHINGTON AND LEE L. REV. 961 (2013). See also several articles by McGregor Smyth, including; *From 'Collateral' to 'Integral': The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*. 54 HOWARD L.J. 795 (2011) and *'Collateral' No More: The Practical Imperative for Holistic Defense in a Post-Padilla World ... Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139 (2011). See also Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Re-entry into Criminal Defense Lawyering*, 31 FORDHAM URBAN L.J. 1067 (2003).

4. *Ibid.* See also McGregor Smyth, *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42 (Fall 2009); Kathleen M. Olivares, Velmer S. Burton, Jr. & Francis T. Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10 (September, 1996).

5. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDEDNESS* 12 (2010). "Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race." *Id.* at 13.

6. 130 S. Ct. 147.

7. I discuss the holistic defense model and the four pillars at length in a recent article: Robin Steinberg, *Heeding Gideon's Call in the 21st Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013). See also Holistic Defense, www.holisticdefense.org (last visited Nov. 28, 2012) and The Bronx Defenders, www.bronxdefenders.org (last visited Nov. 28, 2012).

8. Our arraignment checklist serves as a useful guide for attorneys: The Bronx Defenders Arraignment Checklist. Updated March 2012.

9. Client satisfaction surveys and life outcomes are just two indicators that show that holistic advocacy is making a difference for clients. In our most recent client survey, we interviewed 132 clients at random, charged with a wide array of crimes. Eighty-four percent of clients interviewed said that the services they received at The Bronx Defenders were "Excellent" or "Good." Ninety-one percent of clients said they would want The Bronx Defenders to represent them again [Internal Survey, Summer 2012]. In 2010, 87 percent of the hundreds of plea consults given by our immigration attorneys resulted in an immigration-positive outcome in the criminal case. [Internal Case data 2010. Also cited in McGregor Smyth, *'Collateral' No More: The Practical Imperative for Holistic Defense in a Post-Padilla World ... Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 154 (2011).] Last year, we prevented the eviction of over 150 families with more than 400 household mem-

bers, and we prevented over 100 deportations, affecting over 200 family members. Fifty-two clients obtained legal immigration status. We also preserved jobs and employment licenses for over 100 clients who are heads of their households, and obtained health insurance for more than 70 families. [Civil Action Practice. Internal Case Data for 2011].

10. We serve approximately 1,500 Bronx residents per year through intake. Community intake also ensures "seamless" access to services for community members who are often told by other offices to "come back later" or to "make an appointment." Robin Steinberg, *Heeding Gideon's Call in the 21st Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013). See also Holistic Defense, www.holisticdefense.org (last visited Nov. 28, 2012) and The Bronx Defenders, www.bronxdefenders.org (last visited Nov. 28, 2012).

11. The hotline enables The Bronx Defenders to provide pretrial representation in the event of an arrest or the removal of a child by the Administration for Children's Services.

12. NY INS § 6805. See also Cindy Rodriguez, *Charities to Play Bail Bondsman Role*, WNYC News (July 23, 2012). <http://www.wnyc.org/articles/wnyc-news/2012/jul/23/charities-now-allowed-post-bail-poor-new-york-state/>.

13. New York City Department of Correction Data cited in Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, 48-9 (December 2010).

14. See William Glaberson, *Long Fight Ends Over Arrests for Loitering*, N.Y. TIMES, Feb. 7, 2012. http://www.nytimes.com/2012/02/08/nyregion/new-york-settles-suit-on-illegal-arrests-for-loitering.html?_r=1. See also Ailsa Chang, *City to Award \$15M to New Yorkers Unlawfully Arrested for Loitering*, WNYC News Blog, Feb. 7, 2012.

15. *Id.*

16. According to the New York Civil Liberties Union (NYCLU), in the first nine months of 2012, New Yorkers were stopped by the police 443,422 times. Eighty-seven percent of people stopped were Black or Latino. Eighty-nine percent were totally innocent. See NYCLU 'Stop and Frisk Data': <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Nov. 28, 2012).

17. The lawsuit was filed on March 28, 2012, in the Southern District of New York. The NYCLU, LatinoJustice PRLDEF, and Shearman & Sterling LLP are co-counsel with The Bronx Defenders. We completed a preliminary injunction hearing in November 2012. According to the NYCLU, police officers made 329,446 stops on suspicion of trespassing between 2006 and 2010, 12 percent of all stops. Only 7.5 percent of trespass stops resulted in arrest. See *Class Action Lawsuit Challenges NYPD Patrols of Private Apartment Buildings* (March 28, 2012): <http://www.nyclu.org/news/class-action-lawsuit-challenges-nypd-patrols-of-private-apartment-buildings>.

About the Author

Robin Steinberg is the Founder and Executive Director of The Bronx Defenders. She has experience in every aspect of public defense — from representing individual clients to creating a nonprofit organization. Steinberg advocates nationally and internationally for holistic representation and the community defender movement.



Robin Steinberg

The Bronx Defenders
360 East 161st Street
Bronx, NY 10451
718-838-7878
Fax 718-665-0100

E-mail: info@bronxdefenders.org