

Creating an Independent Public Defense Authority in New York State *Addressing the misperceptions, examining the structure, and finding the money for a statewide public defenders office*

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As we continue to address the many complex issues involving New York's badly broken public defense system, we have to start by reducing the problems to their fundamentals. If one looks closely enough at public policy problems, answers and solutions can usually be found by correcting long-held political misperceptions, examining the basic structure of the system in question, and finding the money to get it right.

MISPERCEPTIONS

The vast majority of public defense clients are not the "criminal element" living off of welfare on the edges of society, but ordinary working people who cannot afford to pay for a criminal defense attorney if they or their loved ones have an encounter with the law. Some are returning veterans whose combat-related post-traumatic stress disorder, brain injury, or substance abuse have led to their arrest.

In 1996 approximately 80 percent of felony-level defendants in state courts in the nation's 75 most populous counties were represented by publicly financed attorneys.¹ According to data from that same year, 77 percent of black state prison inmates reported having "a lawyer appointed by the court" compared to 73 percent of Hispanics and 69 percent of whites.² The problems are deep and insidious.

Astonishingly, for all the money we spend on the justice system, only a small percentage of those accused of crimes in this country get to have a trial in which they can confront their accusers and call witnesses in their defense. In 2003, for example, between 90 and 95 percent of the accused in federal and state cases were convicted by prosecutorial-controlled pleas.³ So where is the money being spent? The answer is that excessive waste, unnecessary expenditures, system-perpetuating budgets, and criminal justice and penal policies account for the lion's share of the billions we spend on a broken, destructive criminal justice and penal system. That system is the second largest contributor to the national deficit and is leading to

¹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "Defense Counsel in Criminal Cases," Caroline Wolf Harlow, p. 5, Nov.2000, www.bjs.gov/content/pub/pdf/dccc.pdf, retrieved Nov. 27, 2015.

² Ibid., p. 9.

³ U.S. Department of Justice, Bureau of Justice Assistance, "Research Summary: Plea and Charge Bargaining," Lindsey Devers, p. 1, Jan. 2011, <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>, retrieved Nov. 27, 2015.

the deterioration of our families, our communities, and our democracy. Most of what is wrong with it can be attributed to the disproportionate strength of prosecutors over public defenders.

“Over 10,000 ex-prisoners are released from America’s state and federal prisons every week...More than 650,000 ex-offenders are released from prison every year, and studies show that approximately two-thirds will likely be rearrested within three years of release,” states a report issued by the U.S. Department of Justice.⁴ There are too many people in our prisons and jails and most of them got there by taking expedient guilty pleas at the urging of overburdened, understaffed, and ill-equipped public defenders. And this crisis has now further fallen on our returning military veterans.

A survey compiled by the Department of Justice’s Bureau of Justice Statistics in 2004 found that nearly one in 10 inmates in state prisons had prior military service.⁵ A December 2013 article in the *NextGov* newsletter titled “VA and Defense Chiefs Confront Reality of 700,000 Incarcerated Veterans” reported on the inaugural conference sponsored by the Justice for Vets division of the National Association of Drug Court Professionals. The conference focused on veterans involved in the criminal justice system as a result of service-related PTSD, TBI, substance abuse, and mental health problems. The Vets Court Conference was attended by some 1,000 people including state and federal criminal justice officials, mental health professionals, and Defense Department and Veterans Administration officials, including VA Secretary Eric Shinseki, the conference keynote speaker.

Some grim statistics were reported at that conference, including the fact that there are 700,000 veterans “consigned to the dustbins of society—prisons and jails.” The conference participants focused on veterans involved in the criminal justice system as a result of substance abuse and mental health problems. Additional statistics released at that conference documented that one in six returning veterans from Iraq and Afghanistan suffers from a substance abuse disorder and that “since 2004, the number of veterans treated for mental illness and substance abuse increased 38 percent and that 81 percent of arrested veterans had substance abuse problems.”⁶ The same 80 percent of veterans in the criminal justice process are represented by public defenders, and those defenders are not trained in special veterans’ defense processes based upon the combat-related psychological and physical infirmities that may have led to the offense charged.

⁴ U.S. Department of Justice, *Prisoners and Prisoner Re-Entry*, http://www.justice.gov/archive/fbci/progmenu_reentry.html, retrieved January 30, 2014.

⁵ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (May 2007), *Veterans in State and Federal Prison, 2004*, p. 1.

⁶ Brewin, Bob, “How the Government is Handling 700,000 Jailed Veterans,” December 3, 2013, *Defense One*, <http://www.defenseone.com/management/2013/12/how-government-handling-700000-jailed-veterans/74831/>, retrieved Nov. 27, 2015.

STRUCTURE

It should be apparent that there is a fundamental structural flaw in the way we finance and administer our state public defense systems.

Under the existing structure, each of New York State's 62 counties funds a public defender's office and assigned counsel plan. That same county budget office also finances the county district attorney and county probation department. The office of the district attorney is part of the executive branch of the county government, as is the county probation department. These agencies are also funded by the county budget office, and both are placed in daily contention with the public defender's office and attorneys in the assigned counsel plan.⁷

The result is that the same political subdivision charged by statute with the duty to prosecute the criminal offenses occurring in its vicinage is administering and financing the criminal defense of the persons they have accused. If that very obvious defect is not bad enough, the problem plays out further in the annual political struggle for the allocation of funds in the county budget. The public defense agency is competing with the district attorney for scarce tax dollars, and the result is always glaringly disproportionate and heavily weighted on the prosecutorial side. And it gets worse—some public defenders actually shun offers of increased or supplemental funding out of fear of alienating the district attorney, with whom they must interact on a daily basis.

These problems become even more attenuated in matters of daily administration and implementation of the public defense system. The county-funded public defense systems are implemented by county, supreme, and family court judges and justices as well as city, town, and village judges and justices who are paid, funded, and administered by the New York State Office of Court Administration and are ultimately accountable to the chief judge of the New York Court of Appeals.⁸

This creates yet another level of structural dissonance. The county district attorney, funded by the same budget authority responsible for financing the county public defense system, prosecutes, while the state judiciary responsible for the final adjudication of innocence or guilt and punishment implements the appointment of counsel for the accused defendant who cannot afford a privately retained lawyer.

This fundamentally flawed and disordered public defense apparatus cannot be relied upon to construct dispositions of criminal charges against defendants in a fair and even-handed manner. The system will always be skewered in the direction of the money and administrative

⁷ *County Law Sec. 700.*

⁸ *Judiciary Law Section 39; See also, New York State Constitution, Article 6, Sec. 28.*

source. District attorneys always have vastly larger budgets and staffs, greater resources, and more control over the ultimate outcome of the criminal process.

If we allowed PepsiCo to have control over Coca Cola's research and advertising budgets and to have the last word on where Coca-Cola could be sold, we would see the Justice Department pursuing an anti-trust investigation. Allowing the county and state funding and administrative sources to finance and assign counsel to an accused causes far worse societal harm, and yet we accept this as standard operating procedure.

The public defense system needs to be independently financed, administered, and implemented. Creating a new financially independent public defense authority mandated to finance, construct, and operate a statewide public defender's office is the best way to eliminate the conflicts and inadequacies of our present system of public defense.

Public authorities preside over revenue-producing facilities for the public benefit, assist the public sector with projects intended to spur economic development, provide financial support for nonprofit sector projects that serve public needs, and/or coordinate the development or management of resources that transcend traditional political boundaries. [*See appendix for information on the role and operation of public authorities in New York State.*]

FINDING THE MONEY: The use of public authority borrowing power and social impact bonds to finance an independent public defense authority and a statewide public defender's office

New York State public authorities are independently empowered to raise funds by selling their own bonds in the public markets. This process is undertaken in conjunction with the Office of the New York State Comptroller and with the assistance of investment bankers and licensed securities dealers.

In addition to the issuance of conventional public authority bonds, social impact bonds are fast becoming a favored tool for financing government or quasi-government programs to advance public causes. Federal funding to complement this form of financing, and private-sector professional assistance in planning and implementing this raising of capital, are also available

In the United States, social impact bonds are referred to as "Pay for Success Bonds."⁹ A report from the Center for American Progress, released in February 2011, analyzes the potential of social impact bonds, and surveys state and local governments across the country that have begun launching social impact bond pilot projects. Social impact bonds are now in full use in New York State on public safety and prison recidivism prevention programs.

⁹"Performance Bonds: who succeeds gets paid," *The Economist*, February 17, 2011, http://www.economist.com/node/18180436?Story_id=18180436.

Prisoner Rehabilitation Bonds

In February 2012, the City of New York issued a \$9.6 million social bond for prisoner rehabilitation to be run by the Osborne Association with support from Friends of Island Academy.¹⁰ Goldman Sachs purchased the bonds and would have profited if recidivism decreased.¹¹ While the City of New York did not actually issue bonds or advance up-front capital for the administration of the program, (Goldman did this directly), the City could have been liable for some amount if the program had succeeded, presumably paid from savings associated with reduced recidivism. Independent evaluation will be performed by the Vera Institute for Justice.¹²

Goldman Sachs withdrew from the Rikers program in the summer of 2015 after three years and took a \$1.2 million (17 percent) loss. The primary reason for this was that a corresponding guarantee participation program with Bloomberg Philanthropies did not provide sufficient backup for the Goldman investment.¹³ However, a separate New York State investment impact bond project that seeks to reduce recidivism, launched in 2014 and involving Bank of America and Merrill Lynch, is reporting far more successful outcomes.¹⁴ Undaunted by the disappointing outcome of its Riker’s initiatives, Goldman invested in social impact financing for a special education program in the State of Utah, as recently reported in the *New York Times*, and has achieved significant success.¹⁵

Prisoner Employment Bonds

In mid-2012, the New York State Department of Labor selected Social Finance U.S. as its intermediary partner in structuring an application for federal funding for a social impact bond. In 2013, New York State approved \$30 million in its budget to support social impact bonds over the subsequent five years. In September 2013, New York State received a \$12 million grant from the U.S. Department of Labor to fund a Pay for Success project in partnership with Social Finance U.S. and the Center for Employment Opportunities. The project, designed to increase

¹⁰ “Goldman To Invest in City Jail Program, Profiting if Recidivism Fails Sharply,” *New York Times*, Aug. 2, 2012, http://www.nytimes.com/2012/08/02/nyregion/goldman-to-invest-in-new-york-city-jail-program.html?_r=1&hp, retrieved Dec. 2, 2014

¹¹ *Ibid.*

¹² “Managing the Social Bond Initiative,” NYU Wagner Executive Briefing Series, <http://www.accenture.com/us-en/company/events/pages/event-Wagner-executive-briefing-series.ASPX/Albany/index.html>, Feb. 9, 2012.

¹³ Bank, David, “The Prison # Fail That is Shaking the Social-Impact Bond Market,” *Impact Alpha*, July 2015.

¹⁴ Bank, David, “Rebuilding Lives, Reducing Costs, Social Impact Bond Financing—Jobs not Jail,” *Impact Alpha*, December 2014.

¹⁵ Nathaniel Popper, “For Goldman, Success in Social Impact Bonds that Aides Schoolchildren,” *New York Times*, Deal Book, October 7, 2015.

employment and reduce recidivism among 2,000 formerly incarcerated individuals, was the largest grant awarded by USDOL for Pay for Success projects.¹⁶

Second Chance Act Federal Grants Back Social Impact Bonds

The U.S. Department of Justice gave “priority consideration” to fiscal year 2012 Second Chance Act grant applications that included a Pay for Success component.¹⁷ The Second Chance Act (P.L. 110-199) authorizes federal grants to support services that help reduce recidivism.¹⁸

In 2013, the U.S. Department of Labor awarded nearly \$24 million in grants to Pay for Success projects that provide employment services to formerly incarcerated individuals in order to increase employment and reduce recidivism.¹⁹ The use of “Pay for Success” Social Impact Bonds and federal grant funds to finance an independent Public Defense Authority in New York State would be a logical, responsible vehicle to reduce the immense costs associated with incarcerating and supervising criminal defendants who with proper legal representation would either be acquitted or diverted from the traditional criminal justice and penal systems.

The Right to counsel is a structural component of liberty and a societal requirement with significant fiscal impact and essential for the preservation of our democratic institutions. Public authority status and financing and the use of social impact bonds to further these societal interests are necessary and proper.

“The right to counsel is important for it is through counsel that all other major rights of the accused are protected and all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.”²⁰

Historically, when state officials have addressed the inadequacies of our public defense system, it has been through the lens of the tough-on-crime and hard-on-criminals public protector. As well-intentioned as this may seem, this mindset has distorted the problem, thwarted meaningful solutions, and resulted in the waste of billions of taxpayer dollars on jails and

¹⁶ “Governor Cuomo Announces \$12 Million Federal Grant for ‘Pay for Success,’ ” Governor Andrew M. Cuomo Pressroom, Sept. 23, 2013, <https://www.governor.ny.gov/news/governor-cuomo-announces-12-million-federal-grant-pay-success>, retrieved Dec. 2, 2015

¹⁷ U.S. Department of Justice, Bureau of Justice Assistance, “Pay for Success and the Department of Justice’s Second Chance Act Programs,” Frequently asked questions, <https://www.bja.gov/Funding/12PayForSuccessFAQ.pdf>, retrieved April 8, 2014.

¹⁸ National Reentry Resource Center/CSG Justice Center, “Second Chance Act,” <https://csgjusticecenter.org/nrrc/projects/second-chance-act>, retrieved Dec. 2, 2015.

¹⁹ U.S. Department of Labor news release, Sept. 23, 2013, <http://www.dol.gov/opa/media/press/eta/ETA20131936.htm>, retrieved Dec. 2, 2015.

²⁰ *Penson v. Ohio*, 488 U.S. 75, 84 (1988), quoting *Walter V. Schaefer*, “Federalism and State Criminal Procedure,” 70, *Harvard Law Review*, 1, 8 (1936).

prisons and the needless destruction of individuals, families, and communities. And more than this, it is eroding the legitimacy of our criminal justice and judicial systems and causing the slow undoing of public confidence in the law. The state of public legal services in New York State has reached crisis proportions. Our public defense system has crossed the line from being inadequate to inimical.

Hurrell-Harring

The recently concluded class action filed by the New York Civil Liberties Union in *Hurrell-Harring et. al. v. State of New York* in 2007 challenged New York State's failure in its constitutional duty to provide effective counsel to New Yorkers accused of crimes who cannot afford to pay private lawyers. This case targeted public defense systems in the New York counties of Onondaga, Ontario, Schuyler, Suffolk and Washington for failing to provide adequate public defense services. In July 2009, the Appellate Division of New York State Supreme Court for the Third Judicial Department, in a split decision, reversed the lower court's denial of the state's motion to dismiss. In May 2010, the State Court of Appeals overturned the Third Department in a historic 5-4 ruling, allowing the case to proceed. The case was nearing trial last fall and was settled by the parties on October 21, 2014.

On one level the compromise represented significant progress in recognizing and repairing fundamental flaws in New York's public defense system. It established several meaningful provisions for increasing state aid to public defense, creating uniform standards and performance measurements, through the New York State Office of Indigent Legal Services, an agency within the executive branch. However it confined itself to the five targeted counties in the class action and did not address the core structural problem and primary goal of public defense advocacy groups, i.e., the need for the creation of an independent statewide public defender's office, with standing and financial resources equal to that of the state's 62 district attorneys.

Leveling the criminal justice playing field by providing competent lawyers to the 80 percent of criminal defendants in felony cases who must rely on the public defense system will reduce the number of people in our jails and prisons and save taxpayers millions of dollars. It will result in increased tax revenues from people who are working and not in prison and save millions more in the almost incalculable indirect financial and human costs and racial injustices associated with imbalanced prosecutions and over-incarceration. A strong and qualified public defender would be the "gatekeeper" of the many of the constructive, cost-effective, and redeeming alternative disposition mechanisms that are available to criminal justice practitioners but are grossly underutilized, such as restorative justice programs, drug and veterans courts, and special juvenile justice initiatives. Without a qualified, committed defense lawyer, such programs are largely ignored and go to waste.

Wasted Tax Dollars

In New York State the average cost of housing and caring for a state prisoner is \$60,076.00, the highest average of all states surveyed.²¹ Furthermore, it was recently reported that the cost of incarcerating one inmate in a New York City Department of Corrections facility was \$168,731 per year, the equivalent of four years tuition at Harvard University.²²

A survey of 40 states by the Vera Institute of Justice in fiscal year 2010 found that state corrections spending including prisons, probation, and parole had nearly quadrupled over the past two decades, making it the fastest growing state budget item after Medicaid.²³

THE FAIR AND COST-EFFECTIVE ALTERNATIVE

An independent self-financed, self-administered Public Defense Authority can attract the very best and brightest legal talent in the country. By performing their constitutional functions these new defenders will yield dividends beyond our expectations, by ensuring that every criminal defendant is provided constitutionally effective, quality legal representation and by keeping the criminal justice process in financial check and promoting accountability to the rule of law.

²¹ The Vera Institute of Justice, January 2012, "The Price of Prisons: What Incarceration Costs Taxpayers" p. 10.

²² "NYC inmate almost as costly as Ivy League tuition," Associated Press (September 30, 2013), <http://bigstory.ap.org/article/nyc-inmate-almost-costly-ivy-league-tuition> (item retrieved January 30, 2014).

²³ Jun Peng, *State and Local Pension Fund Management* (New York: CRC Press, 2009), 211.