

# PUBLIC DEFENSE AND AN ABOLITIONIST ETHIC

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*The American carceral state has grown exponentially over the last six decades, earning the United States a place of notoriety among the world's leaders in incarceration. That unprecedented growth has been fueled by a cultural addiction to carceral logic and its tools—police, prosecution, jails, prisons, and punishment—as a one-size-fits-all response to the myriad vectors of socioeconomic disadvantage that drive people into the jaws of the criminal legal system. The system operates in the shadow of endemic racial inequality, feeding on the conflated amalgam of race, criminality, and dangerousness. For those who experience the worst of what the system has to offer, it is little more than a purveyor of harm and injustice, deepening the inequality that characterizes America.*

*The modern public defender was born before the rise of mass incarceration and criminalization and has evolved ever since, from helpmate to the criminal system to a zealous advocate for the accused. The last major evolutionary turn transformed public defenders into a bulwark against America's penal impulses, defending people against the state while working holistically to address the range of legal and social needs that drive criminal legal system involvement. Recent years have witnessed a growing willingness to grapple with abolition as a strategy and vision, and with it an increasing recognition that being a bulwark—while an essential feature of public defense—is simply not enough to upend the status quo. In this Article, I contend that public defense can and should embrace an abolitionist ethic. I do so because I believe that an abolitionist ethic orients the work of public defenders more pointedly at the interlocking structural causes that lead people into the clutches of the criminal system, and it directs sustained energy at its oppressive nature, ultimately benefitting the people and the communities that public defenders serve.*

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*What does an abolitionist ethic mean for a public defender? Fundamentally, it is a merger of retail-scale zealous criminal defense with wholesale structural change aimed at dismantling the criminal system. Beyond that, it means building a world in which police, jails, and prisons are obsolete. And it employs frameworks and advocacy tools that are accessible to public defense. A public defender's abolitionist ethic combines a racial justice lens informed by Critical Race Theory to understand the forces that animate the criminal system; zealous holistic defense of individuals infused with the spirit of resistance lawyering; movement lawyering to support social justice advocacy aimed at reducing the size, scope, and scale of the system on the way to dismantling it; and organized efforts to render the carceral state dispensable.*

*Shifting the paradigm of public defense and the work of public defenders is no easy task. Indeed, it is laden with challenges. Inadequate funding, the skepticism that travels with abolition, the sheer difficulty of criminal defense work, and the seemingly intractable nature of the criminal system can make the turn to an abolitionist ethic seem like a fruitless pursuit. For the public defender, those challenges cannot be the end of the story. The lessons that flow from the centuries-long struggle for racial justice, where abolition was born, teach us that—as organizer and activist Mariame Kaba says—“hope is a discipline.” By nature, public defense work rests on that discipline. Defenders fight against long odds in an unforgiving system. They do so for a host of reasons, among them the hope that what they do will make a difference in the broader fight for the dignity and humanity of those they represent. Defenders must draw on that same sensibility in pursuit of the world that those whom they defend—and all of us—deserve.*

INTRODUCTION . . . . . 1637

I. THE EVOLUTION OF PUBLIC DEFENSE. . . . . 1649

    A. *Public Defense 1.0: The Public Defender as Reformer*. . . . . 1650

    B. *Public Defense 2.0: The Public Defender as Adversarial Guardian of Constitutional Rights* . . . . . 1652

    C. *Public Defense Today: Holistic Defense to Meet the Rise of the Carceral State*. . . . . 1657

II. INFUSING PUBLIC DEFENSE WITH AN ABOLITIONIST ETHIC . . . . . 1669

    A. *Why Public Defense Should Embrace Abolition* . . . . . 1669

    B. *How Public Defense Can Embrace an Abolitionist Ethic*. . . . . 1674

        1. *Adopt a Racial Justice Orientation to the Criminal System* . . . . . 1674

        2. *Deploy a Client-Centered, Holistic Defense Mindset Informed by Resistance Lawyering* . . . . . 1686

        3. *Support Social Movements, Practices, and Policies to Shrink Scale, Scope, and Reach of the Criminal Legal System* . . . . . 1691

        4. *Build a New Society: Advance the Positive Dimension of Abolition*. . . . . 1701

III. THE CHALLENGES OF INCORPORATING AN ABOLITIONIST ETHIC INTO PUBLIC DEFENSE PRACTICE . . . . . 1709

A. *What Makes It Difficult* . . . . . 1709

    1. *Politics and Practicality* . . . . . 1709

    2. *Underfunding and the Challenges of Public Defense* . . . . . 1711

    3. *Tensions Inherent in Criminal Defense* . . . . . 1712

B. *Overcoming the Difficulties* . . . . . 1712

    1. *Navigating Politics and Practicalities* . . . . . 1712

    2. *Responding to Underfunding and Its Cascading Effects* . . . . . 1716

    3. *Grappling with the Tension* . . . . . 1718

CONCLUSION . . . . . 1720

INTRODUCTION

On May 1, 2023, Jordan Neely, a thirty-year-old Black man in mental and emotional distress, was choked to death by a white twenty-four-year-old United States Marine veteran, Daniel Penny, on a New York City subway.<sup>1</sup> Though Mr. Neely may not have posed an actual physical threat to anyone, his behavior made passengers feel everything from mild discomfort to downright fear.<sup>2</sup> Before Mr. Penny approached him from behind, placed him in a chokehold, and took him to the ground, Mr. Neely yelled out, naming his plight: “I don’t have food; I don’t have a drink; I’m fed up. I don’t mind going to jail and getting life in prison. I’m ready to die.”<sup>3</sup> In fact, he was dead within minutes.<sup>4</sup>

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<sup>1</sup> Maria Cramer, Hurubie Meko & Amelia Nierenberg, *What We Know About Jordan Neely’s Killing*, N.Y. TIMES (May 13, 2023), <https://www.nytimes.com/2023/05/05/nyregion/jordan-neely-chokehold-death-subway.html> [<https://perma.cc/2Y3M-EDYC>].

<sup>2</sup> According to witnesses, prior to his fatal encounter with Mr. Penny, Mr. Neely threw garbage at other passengers on the subway. Adam Iscoe, *The System that Failed Jordan Neely*, NEW YORKER (May 10, 2023), <https://www.newyorker.com/magazine/2023/05/22/the-system-that-failed-jordan-neely> [<https://perma.cc/G2RC-ANBB>].

<sup>3</sup> Conor Friedersdorf, *Notes on the Jordan Neely Subway Tragedy*, THE ATLANTIC (May 10, 2023), <https://www.theatlantic.com/newsletters/archive/2023/05/notes-on-the-jordan-neely-subway-tragedy/674018> [<https://perma.cc/7R4J-XFKX>].

<sup>4</sup> Marlene Lenthag, *What We Know About the Chokehold Death of Jordan Neely on a NYC Subway*, NBC NEWS (May 5, 2023), <https://www.nbcnews.com/news/us-news/jordan-neely-chokehold-death-what-we-know-so-far-rcna83102> [<https://perma.cc/H2VX-ED54>] (explaining that Mr. Neely died after being held in a chokehold for fifteen minutes).

After Mr. Neely's death, the public gained a deeper understanding of his life. He was a street performer.<sup>5</sup> He was unhoused.<sup>6</sup> He grappled with a history of mental illness.<sup>7</sup> He experienced unspeakable tragedy in his youth.<sup>8</sup> His mother was found dead on the side of a highway in the Bronx, New York, when he was just fourteen years old.<sup>9</sup> A former boyfriend was later convicted of strangling her to death.<sup>10</sup> And he had a criminal record, one that reportedly included forty arrests and a pending assault charge.<sup>11</sup>

As a public defender, I never represented Mr. Neely. But the story of his life is familiar. While not all of my clients endured as much as he did, nearly every one of them had to contend with structural phenomena beyond their control, tainted by a culture of injustice, manifesting as a seemingly endless cycle of crises. The culture—rooted in white supremacy—was one comprised of forces that conflated race, fear, socioeconomic status, and criminality.<sup>12</sup> It fostered a presumption of

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<sup>5</sup> Moses Harper, as told to Nicole Lewis, *My Friend Jordan Neely Was Homeless and in Mental Distress. But He Was Not Expendable*, MARSHALL PROJECT (May 26, 2023), <https://www.themarshallproject.org/2023/05/26/daniel-penny-deadly-chokehold-on-jordan-neely.html> [<https://perma.cc/8SCM-PQ4L>]; Bridget Read, 'I Was Always in Awe Seeing Him Dance', N.Y. MAG. (May 4, 2023), <https://www.curbed.com/2023/05/jordan-neelys-life-as-a-michael-jackson-impersonator.html> [<https://perma.cc/9W88-95XM>]; Angelina Chapin, *The Man Who Killed Jordan Neely Has Been Indicted*, N.Y. MAG. (June 15, 2023), <https://www.thecut.com/article/jordan-neelys-death-what-we-know.html> [<https://perma.cc/8UP9-CGDJ>].

<sup>6</sup> See Chapin, *supra* note 5.

<sup>7</sup> Iscoe, *supra* note 2.

<sup>8</sup> See Chapin, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Some ground their explanations of criminality in the culture, family structure, and pathologies of those who have traditionally been subjected to criminal sanctions. United States Senator Daniel Patrick Moynihan's 1965 report on poverty and the Black family is the quintessential example, advancing the argument that Black people were victims of a "tangle of patholog[ies]" caused by poverty and the breakdown of the family structure as a result of enslavement. DANIEL P. MOYNIHAN, OFF. OF POL'Y PLAN. AND RSCH., U.S. DEP'T OF LAB., *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 29* (1965). Arguments like these—including those advanced by Senator Moynihan—have shaped public policy and fed mass incarceration and mass criminalization. See Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246> [<https://perma.cc/3YHH-GZ3Q>] (tracing the roots of mass incarceration and mass criminalization to views of Black people as unequal and criminal, arguments advanced in Senator Moynihan's report); Ta-Nehisi Coates, *Moynihan, Mass Incarceration, and Responsibility*, THE ATLANTIC (Sept. 2015), <https://www.theatlantic.com/politics/archive/2015/09/moynihan-mass-incarceration-and-responsibility/407131> [<https://perma.cc/AJ5W-M3JY>] (same). My claim here is not that a cultural pathology afflicts those targeted by the criminal system, leading to their circumstances. See Ruha Benjamin, *Cultura Obscura: Race, Power, and "Culture Talk" in the Health Sciences*, 43 AM. J.L. & MED. ETHICS 225, 238 (2017) (explaining that cultural

dangerousness and guilt to be applied to Black and Brown people that drove unfair, unjust, and unequal treatment.<sup>13</sup> Ordinarily, that culture consumed the structures and institutions that governed my clients' lives. It was also intertwined with a set of interlocking crises that too often pulled my clients into the criminal legal system. The crises flowed from intergenerational trauma, a series of institutional shortcomings, and a host of systemic failures. Unstable housing. Unattended mental health concerns. Employment discrimination. Economic deprivation. Residential segregation. Substandard education. Substance abuse. Abject poverty. All were rooted in or exacerbated by racial injustice. The combined forces of culture and crisis were responsible for the unfathomable depths of the difficulties faced by those ensnared in the criminal system. For the people I represented, the criminal case was yet another catastrophe with which to contend. Far too often, it was the inevitable culmination of seemingly intractable forces.

Mr. Neely's last words spoke to those challenges. His declaration that incarceration—life in prison, as he put it—was a desirable alternative to the life he was living was as troubling as it was revelatory. I cannot explain Mr. Neely's thoughts or feelings in that moment, beyond the distress he expressed. But he gave voice to the ways our society has transformed the criminal system—and its jails and prisons—into a perverse social safety net. Mr. Neely's life was spiraling. At least jail would provide some semblance of a respite—stable housing, food, and healthcare. He was inhabiting a role that the criminal system had repeatedly forced him into over the course of his life in order to access the help he needed, a role reflective of the cultural dynamics that transformed his race and identity into a threat warranting the use of lethal force.<sup>14</sup>

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explanations of that sort “stifle a fair and accurate depiction of the crises facing subjugated populations”). Indeed, to the extent the notion of culture illuminates anything, it is the motivation of those doing the targeting. My point is that larger cultural forces shape our collective response to our definition of criminal behavior.

<sup>13</sup> Among the cultural forces driving this unequal treatment is the fact that “[o]ur society applies a presumption of dangerousness and guilt to young [B]lack men, and that’s what leads to wrongful arrests and wrongful convictions and wrongful death sentences . . . . It’s a direct line from slavery to the treatment of [B]lack suspects today . . . .” Jeffrey Toobin, *The Legacy of Lynching, on Death Row*, NEW YORKER (Aug. 15, 2016), <https://www.newyorker.com/magazine/2016/08/22/bryan-stevenson-and-the-legacy-of-lynching> [<https://perma.cc/ULD2-NUKZ>] (quoting Bryan Stevenson).

<sup>14</sup> Fear, conflated with skin color, criminality, and dangerousness, plays an outsized role in that process. See Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383 (2006) (arguing that because Blackness is associated with criminality, “in cases involving a white victim, the more stereotypically Black a defendant is perceived to be, the more likely that person is to be sentenced to death”);

You may be asking yourself why I would begin an Article about public defense and abolition with a focus on a victim's story. After all, Mr. Penny is the one accused of a crime and entitled to a defense. I begin here not to traffic in the spectacle of a tragedy, but as an invitation to grapple with all that plagued Mr. Neely's life and the lives of so many others touched by the criminal system. Long before his death, Mr. Neely lived as a target of the same criminal legal system tasked with vindicating his life. Mr. Neely defied the blunt categories that the criminal system assigns to people—victim, threat, perpetrator, criminal. Moving beyond those simple labels forces a nuanced engagement with the sorts of crises, cultural presumptions, and structural inequalities that fuel criminal injustice.

That sort of engagement—with the complexity and contradictions that shaped this awful episode—was notably limited in the public conversation that followed Mr. Neely's death. Instead, the aftermath was defined by a pathological obsession with carceral logics.<sup>15</sup> Was Mr. Penny a hero, or should he be charged with a crime? Never mind that he was a military veteran<sup>16</sup> concerned about the safety of his fellow passengers—what degree of homicide should he be charged with? What about the passengers who did not step in to stop Mr. Penny? How should the criminal system deal with them? What about Mr. Neely? Surely the police should have been called to take him away and lock him up—they are supposed to provide safety; Mr. Neely threatened that.

The instantaneous turn to the criminal system as a balm distracted the public's focus from a much needed conversation about

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*see generally* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2018) (explaining how Black men and boys are disproportionately mistreated by the criminal legal system); Bryan Stevenson, *A Presumption of Guilt*, N.Y. REV. BOOKS (July 13, 2017), <https://www.nybooks.com/articles/2017/07/13/presumption-of-guilt> [<https://perma.cc/NSN2-53ER>] (explaining the race-based presumption of guilt that flows from the assumption that Black people are guilty and dangerous). Notably, at the time of Mr. Neely's death, much of the conversation about New York City subways centered on the pervasive dangers that defined the city. *See* Emma Bowman, *After Jordan Neely's Death, Homeless Advocates Blame NYC's 'Dehumanizing' Policies*, NPR (May 6, 2023), <https://www.npr.org/2023/05/05/1174192713/jordan-neely-death-homeless-nyc> [<https://perma.cc/3JDF-9KNN>] (discussing the rhetoric of New York leaders regarding crime in the subway system).

<sup>15</sup> *See, e.g.*, Hurubie Meko, Chelsia Rose Marcius & Jonah E. Bromwich, *No Arrest in New York Subway Chokehold Death, and Many Want to Know Why*, N.Y. TIMES (May 4, 2023), <https://www.nytimes.com/2023/05/04/nyregion/subway-chokehold-arrest-decision.html> [<https://perma.cc/2JR5-W6WX>]; Edward Helmore, *Outrage in New York After the Killing of Jordan Neely on a Subway Train*, THE GUARDIAN (May 3, 2023, 8:40 PM), <https://www.theguardian.com/us-news/2023/may/03/jordan-neely-death-new-york-city-subway> [<https://perma.cc/7FN9-GAS4>]; Arnold Davick, *City Officials Call for Justice on the Killing of Jordan Neely*, SPECTRUM NEWS NY1 (May 6, 2023, 2:53 PM), <https://ny1.com/nyc/manhattan/public-safety/2023/05/06/city-officials-for-justice-on-the-killing-of-jordan-neely> [<https://perma.cc/P3GJ-SLY5>].

<sup>16</sup> *See* Chapin, *supra* note 5.

how to best support the housing needs, health concerns, and general welfare of those who have been cast aside by society, left to live—and survive—at the margins. As a handful of advocates and political leaders pointed out, Mr. Neely “was on a list informally known as the Top 50, a roster of people in a city of eight million who stand out for the severity of their troubles and their resistance to accepting help.”<sup>17</sup> A city councilwoman explained: “Our city knew exactly who Jordan was, where he was and what his history was. And yet we failed him.”<sup>18</sup> Here was a person facing profound challenges. The criminal system intensified those problems. The conversation about what would have helped never happened. It still has not. And yet, that is the conversation that we need to have.

My public defender training taught me to grapple with such complicated concerns. I came of age as a public defender in the era of holistic defense. The holistic model encouraged me to think beyond my client’s criminal case in order to address the crises that ushered them into the criminal system. I was taught to look at the whole person and, in accordance with their wishes, figure out what I could do to shepherd them through the criminal process, address their most immediate needs (including those beyond the criminal charges), and work to help them avoid ever coming into the system’s grips again. And while I think that my clients were well served by that orientation, frustration tempered any satisfaction I got from my representation. That is because I felt like there was very little I was able to do to address the forces that brought my clients into contact with a system defined by rank brutality, rampant inequality, racial injustice, and everyday unfairness. I often felt like a well-intentioned chaperone to clients traversing a gauntlet.

But my clients needed more than a chaperone. They needed to live in a society that respected their dignity and was structured accordingly. And yet my work left me wondering whether public defenders can do anything more than make a terrible system operate more efficiently, lending a veneer of legitimacy to an institution that is illegitimate by design.<sup>19</sup> Helping individual clients navigate crises left me wanting to take on the structural challenges—the culture, as it were—that fueled their criminal system involvement. I found myself asking, then and

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<sup>17</sup> Andy Newman, *Jordan Neely Was on New York’s ‘Top 50’ List of Homeless People at Risk*, N.Y. TIMES (May 15, 2023), <https://www.nytimes.com/2023/05/13/nyregion/jordan-neely-top-50-mental-illness.html> [<https://perma.cc/TM3E-ZKK8>].

<sup>18</sup> *Id.*

<sup>19</sup> See Vincent M. Southerland, *The Master’s Tools and a Mission: Using Community Control and Oversight Laws to Resist and Abolish Police Surveillance Technologies*, 70 UCLA L. REV. 2, 9–11 (2023) [hereinafter Southerland, *The Master’s Tools*] (discussing the histories of enslavement and Jim Crow in the origin of the carceral state).

now, what more public defenders—and, by extension, the institution of public defense—can or should do.

I understand that public defense cannot, on its own, transform the criminal system or the world in which it operates. But it can serve as a tool to implement a transformational vision. Carceral abolition is one such vision.<sup>20</sup> In my previous work, I have applied an abolitionist lens to laws designed to provide community control over police surveillance technologies.<sup>21</sup> There, I looked to public defender’s offices as one entity that could help to implement community control laws.<sup>22</sup>

I expand on that approach in this Article by contending that the institution of public defense can and should adopt an abolitionist ethic.<sup>23</sup> In doing so, I focus on abolition of the prison-industrial complex, which is most commonly defined as “a political vision with the goal

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<sup>20</sup> Abolition has become increasingly popular in recent years, garnering sustained attention from advocates and scholars alike. See, e.g., Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199 (2022) [hereinafter Morgan, *Abolition Anxieties*]; Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 245 (2023) (“America is now home to a burgeoning prison abolitionist movement.”); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1476–77 (2016) (highlighting abolition as a central component of a “Third Reconstruction”); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161–63 (2015) (introducing the idea of the “prison abolitionist ethic” and defining the term); I. India Thusi, *The Racialized History of Vice Policing*, 69 UCLA L. REV. 1576, 1579–80 (2023) (describing “organizing principles underlying abolitionist thought”); Trevor G. Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1717–18 (2023) (describing goals and theories of penal abolitionists); Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1547 (2022) (noting how “movements have popularized prison abolition as a framework for wholesale transformation”); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1783–84 (2020) [hereinafter Akbar, *Abolitionist Horizon*] (“The turn to abolitionist horizons among today’s left social movements and racial justice activists and organizers has emerged as one of the most significant political developments since the Ferguson and Baltimore rebellions.”); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6 (2019) [hereinafter Roberts, *Abolition Constitutionalism*] (noting that “a nationwide network of activists is organizing to abolish the prison industrial complex and to build a society that has no need for prisons”); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 811 (2021) (noting the “incredible momentum” of the “push for police accountability” driven by contemporary movements for abolition).

<sup>21</sup> Southerland, *The Master’s Tools*, *supra* note 19, at 78.

<sup>22</sup> *Id.* at 80.

<sup>23</sup> Professor Allegra McLeod’s efforts to define a prison abolitionist framework and a prison abolitionist ethic is helpful. See McLeod, *Prison Abolition and Grounded Justice*, *supra* note 20, at 1161–62. A prison abolitionist framework is “a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement.” *Id.* at 1161. A prison abolitionist ethic focuses on “ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force.” *Id.* at 1162. For a more robust discussion of abolition, see *infra* Section II.B. Professor McCleod has described five pillars



of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment.”<sup>24</sup> Accordingly, abolition is both deconstructive and constructive. Its deconstructive character encourages a steady shrinking of the criminal legal system and the carceral state—including the practical, physical, and psychic space they occupy.<sup>25</sup> Abolition’s constructive, “affirmative”<sup>26</sup> dimension requires building the sort of society that will allow individuals to thrive and can alleviate the need for the criminal system.<sup>27</sup> Doing so includes creating institutions that build power to foster self-determination among those who are oppressed and marginalized by operation of the criminal system.<sup>28</sup> Abolition focuses on the logics of racial inequality that undergird the criminal legal system, and it therefore “identifies more completely the dehumanization, violence, and racial degradation of incarceration and punitive policing.”<sup>29</sup>

Although reform is necessary to advance an abolitionist ethic, the types of reforms sought by abolitionists are radical: They seek to reduce the power and reach of the carceral state, rather than re-make it anew or improve or enhance its operation.<sup>30</sup> That means “advanc[ing] short-term measures that expand the capacity to fight for longer-term abolitionist objectives rather than improv[ing] systems of imprisonment.”<sup>31</sup> Finally, an abolitionist ethic draws in a diverse array of actors, groups, and communities—especially those closest to the harms of the system—“to address the problems that haunt criminal law administration.”<sup>32</sup>

With that framing of abolition as context, I set out to explain what a reorientation of public defense around an abolitionist ethic might mean.<sup>33</sup> Fundamentally, the features of a public defender’s abolitionist

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that comprise an abolitionist ethic. McLeod, *Prison Abolition and Grounded Justice*, *supra* note 20, at 1207–17 (describing the pillars of an abolitionist ethic).

<sup>24</sup> *What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision/not-so-common-language> [https://perma.cc/G7QV-5DP3].

<sup>25</sup> *Id.*

<sup>26</sup> RACHEL HERZING & JUSTIN PICHÉ, *HOW TO ABOLISH PRISONS* 25 (2024).

<sup>27</sup> CRITICAL RESISTANCE, *supra* note 24.

<sup>28</sup> HERZING & PICHÉ, *supra* note 26, at 23.

<sup>29</sup> McLeod, *Prison Abolition and Grounded Justice*, *supra* note 20, at 1207.

<sup>30</sup> *Id.* at 1207; HERZING & PICHÉ, *supra* note 26, at 26. For an extended discussion of such reforms, see *infra* note 299.

<sup>31</sup> HERZING & PICHÉ, *supra* note 26, at 28.

<sup>32</sup> McLeod, *Prison Abolition and Grounded Justice*, *supra* note 20, at 1217.

<sup>33</sup> One scholar has explored the intersection of public defense and abolition in a clinical setting, while a student note has engaged with the reformist nature of public defense. See Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159 (2021) (discussing the tension between abolition and public defense in a clinic setting and beyond); Eli Salamon-Abrams, Note, *Remaking Public Defense in an Abolitionist Framework: Non-Reformist Reform and the Gideon Problem*, 49 FORDHAM URB. L.J. 435 (2022) (questioning the transformative power of public

ethic combine retail-scale zealous criminal defense with wholesale structural change aimed at dismantling harmful systems and building a better world. This reorientation is a bridge between the individual representation essential to public defense and structural advocacy to advance broader change. It begins with a public defender's consciousness of the criminal legal system informed by Critical Race Theory (CRT).<sup>34</sup> A CRT lens situates the forces that animate the criminal legal system and the outsized part it plays in maintaining an unjust racial caste regime. It helps us to understand that the system is not broken but operating as designed. The injustice and unfairness of the criminal system are features, not bugs.<sup>35</sup> From that vantage point, and with that context, public defenders can look to a new horizon, one that incorporates the zealous defender's holistic commitment to their individual clients, but stretches beyond it. Public defenders who abide by an abolitionist ethic must work to resist and dismantle the criminal legal system, while engaging in the positive aspect of the abolitionist project: the building of new systems and institutions that serve the needs of clients and their communities. With these goals in mind, attention to the power of social movements and the practice of movement lawyering to advance social change<sup>36</sup> round out the contours of a public defender's abolitionist ethic.

Although infusing public defense with an abolitionist ethic may seem futile, the past is prologue. Public defense is an ever-evolving institution. The public defender's role has shifted over time in response to problems germane to the criminal legal system. As our understanding

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defense from an abolitionist perspective). My effort here builds on Professor Smith Futrell's engagement with abolition in a criminal defense clinic by encouraging public defenders to embrace abolition as an organizing vision and strategy.

<sup>34</sup> Critical Race Theory is a framework that "interrogate[s] the role of race, its relationship to power, and the influence of both phenomena on the law." Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 531 (2021) [hereinafter Southerland, *Intersection of Race and Algorithmic Tools*]. For a more detailed discussion of the tenets and pillars of critical race theory, see generally Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593, 1609 (2011) [hereinafter Carbado, *Critical What What?*]; I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 24–25 (2019); Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEGAL EDUC. 44, 47–53 (2016); Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 184 (2013); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

<sup>35</sup> Southerland, *Intersection of Race and Algorithmic Tools*, *supra* note 34, at 494; see generally ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019).

<sup>36</sup> Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2801 (2014) (describing "renewed interest in researching the relationship between social movements and lawmaking among legal scholars and practitioners on the left").

of those problems has changed, so too has the work, focus, and mission of the public defender.<sup>37</sup> In keeping with the natural progression of that historical arc, now is the time for another update of public defense—one that re-defines the role anew by building on the past to meet the abolitionist sensibilities of today and tomorrow.<sup>38</sup> Public defense is not, by nature, an abolitionist endeavor. But it can serve as an instrument to advance abolitionist work.

A few points unique to the intersection of public defense and abolition are worth surfacing. First, when it comes to public defense, the individual client is paramount. Holistic representation and zealous defense of the accused, grounded in resistance lawyering,<sup>39</sup> is at the heart and core of a public defender's work. The dynamics of defending a person against the prosecutorial and carceral power of the state make resistance—from harm reduction to outright defiance—essential. The resistance that informs criminal defense is part of abolition's agonistic spirit.<sup>40</sup> Working to extract someone from the tentacles of the criminal system can be some of the most abolitionist work that a public defender can do, even when the compromises one must make to do so can feel like they reinforce the system (and often do exactly that).<sup>41</sup> To the extent those compromises produce a tension, the tension highlights a

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<sup>37</sup> See SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* 9 (2020) [hereinafter MAYEUX, *FREE JUSTICE*] (arguing that throughout history, public defenders “periodically redefined what they meant by the public defender, and what goals they imagined that public defenders might achieve”).

<sup>38</sup> Scholars have called on defenders to define their role so that it is not done for them by people who do not share their political orientation or public defense experience. See, e.g., Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 *FORDHAM L. REV.* 1461, 1487 (2003) [hereinafter Taylor-Thompson, *Gideon's Trumpet*]. While this Article focuses on defenders, the diverse range of professional identities that occupy a public defender's office—and the communities defenders serve—are entitled to a say in defining the defender's role.

<sup>39</sup> See Daniel Farbman, *Resistance Lawyering*, 107 *CALIF. L. REV.* 1877, 1880 (2019) (“A resistance lawyer engages in a regular, direct service practice within a procedural and substantive legal regime that she considers unjust and illegitimate. Through that practice, she seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.”).

<sup>40</sup> See Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 *Nw. U. L. REV.* 1609, 1614 (2017) [hereinafter Simonson, *Democratizing Criminal Justice*] (describing agonism as “a politics that respects conflict and adversarialism, but seeks to channel it through democratic channels”); PHILIP GOODMAN, JOSHUA PAGE & MICHELLE PHELPS, *BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE* 8, 13 (2017) (advancing an “agonistic” perspective contending that struggle drives penal change and that it does so through perpetual conflict).

<sup>41</sup> See Orisanmi Burton, *The Long Revolt*, *INQUEST* (Oct. 31, 2023), <https://inquest.org/the-long-revolt> [<https://perma.cc/76NX-G86E>] (describing the “productive tension” that exists between measures taken to reduce harm and efforts to “abolish[] broader systems of oppression”); Jamelia Morgan, *Abolition in the Interstices*, *LPE PROJECT BLOG* (Dec. 14, 2023), <https://lpeproject.org/blog/abolition-in-the-interstices> [<https://perma.cc/38QH-ZWRA>] (describing the abolitionist dilemma of pursuing reforms that may improve the lives of those

problem with the criminal system that eclipses the defender's work. It is the sort of productive tension that clarifies the target(s) of advocacy in other fora.<sup>42</sup>

Second, no single public defender's office or individual defender can abolish anything on their own. Abolitionist work is movement- and coalition-oriented work to create the world as it should be, rather than just modifying what it is.<sup>43</sup> It demands a connection to communities and broader social and political movements.<sup>44</sup> It requires that public defenders engage strategies and tactics familiar to organizers, movement lawyers, and advocates for social and political change. Those efforts foster relationships with people and build power on the ground, ultimately yielding sustainable, durable change backed by coalitions of parties with common interests, which serve as the engine of social movements.<sup>45</sup>

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under carceral control and further entrench the carceral state, while simultaneously pursuing reforms that seek to abolish it).

<sup>42</sup> See Burton, *supra* note 41.

<sup>43</sup> See Guinier & Torres, *supra* note 36, at 2758 (explaining how social movements produce new horizons because even failed movements provide insights on “lawmaking [by] bring[ing] to the fore conceptions of substantive justice, not just procedural fairness” and “help narrate new social meanings, often through their interaction with, and resistance to, more conventional understandings”). See also CRITICAL RESISTANCE, *supra* note 24 (describing abolition as a political vision with the goal of eliminating the carceral state, creating alternatives to imprisonment and punishment, and building a future where carceral institutions and logics are unnecessary); Morgan, *Abolition Anxieties*, *supra* note 20, at 1202 (“The ‘what’ of abolition involves imagining and creating a new world.”); Barkow, *supra* note 20, at 270–71 (noting that “[t]he abolitionist paradigm requires a complete dismantling of core aspects of American society as it currently exists” and an investment in building a new society with “communism or socialism as the governing model”); Thusi, *supra* note 20, at 1580 (describing “possibility” as an organizing principle of abolitionist thought that “focuses on looking at what is possible in society and is not limited by current understandings and structures” and “encourages imagination and looking beyond the current world to construct a new ideal”); Akbar, *Abolitionist Horizon*, *supra* note 20, at 1845 (noting that abolitionist organizers “are turning to reform as a tool to build a different world, rather than tinkering with this one”); Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/TE9C-CU8M>] (“People like me who want to abolish prisons and police, however, have a vision of a different society, built on cooperation instead of individualism, on mutual aid instead of self-preservation.”); DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 11 (2021) (“Rather than waiting for comforting answers to every potential harm ahead of us, let’s plan. Run. Dream. Experiment. And continue to organize, imagine, and transform this society toward freedom and justice without police and violence.”).

<sup>44</sup> See Guinier & Torres, *supra* note 36, at 2804 (describing how social movement actors engaged in political protest and public-consciousness-raising work “transformed the ‘thin paper’ of democracy to the ‘thick action’ of government of, by, and for the people”).

<sup>45</sup> See *id.* at 2796, 2799 (explaining how social movements advance change); Simonson, *Democratizing Criminal Justice*, *supra* note 40 (highlighting the importance of community participation in democratizing criminal justice); Amna A. Akbar, Sameer M. Ashar & Jocelyn

Finally, abolition is as much an organizing vision and strategy as it is a goal.<sup>46</sup> As noted earlier, the objective extends beyond destroying a harmful criminal legal system. It includes—indeed requires—building systems and institutions to replace those being dismantled.<sup>47</sup> For public defenders, that means supporting and working alongside those engaged in the transformation and creation of housing, education, employment, healthcare, and other systems that foster positive and productive lives to build a world where the criminal system is rendered obsolete.

This shift in orientation is fraught with challenges. In many places across the country, decades of deliberate indifference toward indigent communities and the underfunding of public defense have left defender offices struggling to provide even the most basic representation to the accused.<sup>48</sup> For defenders in those offices, abolition can feel like a pipe dream. Inadequate funding, layered on top of local dynamics or institutional attitudes, can anchor the work in the here and now, limiting it to the narrow but important confines of defending the accused against criminal charges and little else.

Public defenders with abolitionist ambitions also face strong headwinds. Those headwinds have many causes. For one, political hostility to transformative change can flow more often than it ebbs, and the criminal legal system is an especially stubborn target.<sup>49</sup> Public defenders also suffer a power deficit vis-à-vis other institutional

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Simonson, *Movement Law*, 73 STAN. L. REV. 821, 824–25 (2021) (emphasizing importance of solidarity between legal scholars and movements for social change).

<sup>46</sup> Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, MEDIUM (Oct. 30, 2020), <https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894> [<https://perma.cc/D25L-FNH5>] (“Prison industrial complex (PIC) abolition is a political vision, a structural analysis of oppression, and a practical organizing strategy.”).

<sup>47</sup> Simonson, *supra* note 20, at 809–10 (describing how power-shifting analysis “makes abolition possible” by “creating space for visions that would divest from policing altogether through noncarceral methods of providing security” and, in doing so, “promotes a more inclusive vision of the possible ways that the state can promote public safety”); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 108 (2003) (“To reiterate, rather than try to imagine one single alternative to the existing system of incarceration, we might envision an array of alternatives that will require radical transformations of many aspects of our society.”); Kaba, *Yes, We Mean Literally Abolish the Police*, *supra* note 43.

<sup>48</sup> See Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 401–05 (2012) (emphasizing that “court-assigned defense lawyers are overworked, underpaid, and, far too commonly, unable to perform even the most basic tasks which are essential to effective lawyering,” such as performing out-of-court factual investigations and interviewing witnesses).

<sup>49</sup> See Megan T. Stevenson, *Cause, Effect, and the Structure of the Social World*, 103 B.U.L. REV. 2001, 2031 (2023) (reviewing empirical evaluations of efforts to engineer change in the criminal system and explaining that “most interventions don’t work, and the ones that do tend not to replicate well in other settings”).

actors.<sup>50</sup> Moreover, abolition itself remains controversial inside and outside of public defender's offices—it is seen as unrealistic and naïve—despite growing acceptance in some quarters.<sup>51</sup> And even a public defender who is working toward an abolitionist horizon cannot ensure an end to harms of the sort done by Daniel Penny, or guarantee the end of experiences like Jordan Neely's. Indeed, the entrenched nature of inequality—racial and otherwise—ensures that those types of experiences will persist.

Yet something about public defense must change, because the status quo is untenable for the people caught in the jaws of the criminal system and those who represent them. America is in “the era of punitive excess,”<sup>52</sup> and “society's need to marginalize the poor and people of color through criminalization and punishment has become a stubborn social fact.”<sup>53</sup> Half measures cannot upend that reality. The current state of affairs demands that we leverage public defense to help us advance toward an abolitionist horizon. In explaining what that might mean, I toggle between individual defenders and their offices. I do so because an ethic can be deployed by an individual defender or an office. The circumstances, political dynamics, resource constraints, and tactics at play will determine who does what, when, where, and how to advance an abolitionist agenda. I also embrace the nuance that a new orientation will require, including the tensions that exist in the pursuit of results for clients that may be at odds with an abolitionist ethic and the range of challenges that such an orientation may entail.<sup>54</sup> I begin in Part I by exploring the evolution of public defense from its origins to

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<sup>50</sup> See Smith Futrell, *supra* note 33, at 183 (noting that police officers, prosecutors, and judges wield significant power and discretion in shaping how the criminal legal system operates, often leaving public defenders in a “reactive mode, forced to respond to and mitigate the actions of these other actors”).

<sup>51</sup> See Barkow, *supra* note 20, at 248–57 (predicting that abolitionism “will be rejected in the broader political sphere”).

<sup>52</sup> Jeremy Travis & Bruce Western, *Conclusion: The Era of Punitive Excess*, in *EXCESSIVE PUNISHMENT: HOW THE JUSTICE SYSTEM CREATES MASS INCARCERATION* 338, 338 (Lauren-Brooke Eisen ed., 2024).

<sup>53</sup> *Id.*

<sup>54</sup> See Smith Futrell, *supra* note 33, at 183 (detailing reasons why one might resist bringing an abolitionist perspective to public defense, including that defenders are beholden to the client's goals, that defense work is entrenched in the criminal system and can legitimize it, that defenders may need to deploy harmful narratives in service of their clients, and that defenders can become complicit in fostering systemic harm). Even as abolition has its problems, “it could nevertheless bring about positive political changes by being part of the societal conversation about crime and the harm caused by prisons.” Barkow, *supra* note 20, at 251. “It mobilizes people to fight injustices in the administration of punishment and opens the policy space for greater reforms.” *Id.* at 252. Beyond that, it has the benefit of “educating the public and policymakers about the structural forces that lead to crime and the criminogenic effects and brutality of prison in America.” *Id.*

its current form. In Part II, I turn to the components of an abolitionist public defense ethic, drawing on examples of work being done by public defenders in offices across the country. I close in Part III by addressing the challenges of such an ethic, explaining why, despite those challenges, a new orientation remains possible and necessary.

## I

### THE EVOLUTION OF PUBLIC DEFENSE

Throughout history, public defense has been shaped by the prevailing social and political winds, informed by the contemporary understanding of the ills of the criminal legal system.<sup>55</sup> A review of that history reveals three significant waves of public defense.

At the inception of public defense, when the dominant perception of the criminal system was that it was flawed but amenable to repair and reform, public defense was considered an institution that could drive reform and help the system operate more efficiently. In the second evolutionary wave, when Jim Crow injustice and procedural unfairness defined the American criminal legal system, public defenders served as guardians and guarantors of constitutional rights whose existence and role distinguished America's criminal legal system from that of its geopolitical rivals. And in the most recent wave, as the size, scale, and scope of the criminal system exploded, visiting an ever-expanding range of harms on a growing number of people, the institution of public defense adjusted to address the root causes of criminal system involvement and to intervene in ways that would help those individuals avoid future entanglement with the criminal system.

Focusing on these waves is instructive. Examining them through an abolitionist lens shows us that public defense has never sought, as one of its primary aims, to dismantle or displace the criminal system. Instead, it has operated as a legitimating and stabilizing force, first helping the criminal system to operate more efficiently, then serving as a marker of fairness, and, finally, functioning as a means of extracting people from the criminal system with the hope of keeping them out of its clutches for good. Public defense and individual defenders have constantly had to adjust and calibrate according to the politics and priorities of the day. That historical precedent makes the task of reorienting public defense slightly less daunting. In the following Sections, I recount these waves.

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<sup>55</sup> See Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 160 (2004) (“Defender experimentation with approaches outside of the conventional individualized practice strategies . . . seems to flow directly from experience with the current environment.”).

I focus on the broad arc of public defense, concluding by homing in on the gap between the orientation of public defense today and an abolitionist horizon.<sup>56</sup>

A. *Public Defense 1.0: The Public Defender as Reformer*

At the end of the nineteenth and beginning of the twentieth century, America's criminal system was understood as flawed but amenable to repair.<sup>57</sup> Public defense was part of the solution. As Professor Sara Mayeux explains in her seminal account of the history of the public defender, public defense at its inception was “a reform project touted as the key to making American courts more just, trials more fair, and the law more equal.”<sup>58</sup> The institutional defender was envisioned as an aider and abettor—a corrective for a dysfunctional and unfair criminal legal system. Their task: to help the system operate more efficiently, fairly, and, in turn, more justly.<sup>59</sup>

Twentieth-century conceptions of crime, courts, and the criminal system help explain the emergence of public defenders as accomplices to such reform. Reformers thought of crime as a “collective responsibility” driven by societal failures.<sup>60</sup> The criminal law, adjudicated through the courts, was a “lever for social order” that could eliminate crime.<sup>61</sup> Reformers and advocates alike saw the potential criminal courts held to address societal shortcomings and root out causes of crime, even as dysfunction and inefficiency too often defined the way they operated.<sup>62</sup> The gap between potential and reality was vast. Manhattan's criminal courts and the downtown jail provide a ready example, operating as “a free-for-all bazaar where money changed hands in exchange for freedom, rights, privileges, decisions of law, and verdicts of innocence.”<sup>63</sup> Descriptions of the experiences of people arrested and jailed in those early years convey

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<sup>56</sup> For an exhaustive account of the history of the public defender, see generally MAYEUX, *FREE JUSTICE*, *supra* note 37.

<sup>57</sup> See Matthew Clair, *Unequal Before the Law: How Did We End up with Our Current System of Public Defenders?*, *THE NATION* (Dec. 14, 2020), <https://www.thenation.com/article/society/sara-mayeux-free-justice-public-defenders> [<https://perma.cc/Q8ZS-2V6K>].

<sup>58</sup> *Id.* at 5.

<sup>59</sup> Not every early proponent of public defense was averse to an adversarial orientation. In fact, there was a fulsome embrace of an adversarial public defender by early, important proponents of indigent defense. See *infra* notes 77–81 and accompanying text.

<sup>60</sup> MAYEUX, *FREE JUSTICE*, *supra* note 37, at 35–36.

<sup>61</sup> *Id.* at 35.

<sup>62</sup> See *id.* at 31–32 (describing how, in 1890s Manhattan, certain lawyers navigated a dysfunctional criminal court system).

<sup>63</sup> *Id.* at 31.



a sense of confusion, abuse, treachery, and chaos, where injustice was the norm.<sup>64</sup>

The system drew widespread criticism. Lawyers who advocated for the poor criticized the exceeding effectiveness of courts to convict and punish.<sup>65</sup> The existence of “unchecked and overzealous prosecutors,” unskilled appointed counsel, and inadequate support from the private bar added to the mounting list of concerns raised by the administration of criminal law.<sup>66</sup>

Against this backdrop was a growing acceptance of sociology and criminology as theoretical frameworks to explain the connections between individuals and society, including what drove people to crime.<sup>67</sup> Public defense developed as part of the “modern criminal justice bureaucracy.”<sup>68</sup> It served as a response to a suite of well-worn problems.<sup>69</sup>

Divergent views materialized about the role of public defenders as cure-alls.<sup>70</sup> One vision situated the defender as “a counterweight and a mirror image to the public prosecutor, with similar hiring standards, resources, and duties.”<sup>71</sup> They were duty-bound to seek justice, rather than to serve as an agent for a client.<sup>72</sup> Their role was cooperative: to defend the innocent and ensure the just administration of criminal law, while securing the best sentences possible for the guilty.<sup>73</sup> As state officials who would be paid regardless of the outcome or the length of time it took to resolve a case, they had no pecuniary interest in trying cases where conviction was certain.<sup>74</sup> At best, such an approach would dramatically reduce the number of criminal trials and even obviate the need for constitutional protections for the accused.<sup>75</sup> Undoubtedly, a world “in which prosecutors and defenders collaborated to uncover

<sup>64</sup> *Id.* at 31–32 (describing the corruption and chaos that defined the experiences of those arrested and taken to jail, who would “encounter a confusing array of so-called ‘runners,’ ‘steerers,’ ‘drummers,’ ‘shyster lawyers,’ and ‘straw bondsmen’ touting their services”).

<sup>65</sup> *Id.* at 33 (“Advocates for immigrants and the poor . . . indicted the courts as all too effective at convicting and punishing defendants.”).

<sup>66</sup> Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEGAL HIST. 173, 175–76 (2010).

<sup>67</sup> See MAYEUX, *FREE JUSTICE*, *supra* note 37, at 34–35.

<sup>68</sup> *Id.* at 35.

<sup>69</sup> See *id.* at 36–37 (discussing the view that public defense was a solution to a market system disadvantaging poor defendants).

<sup>70</sup> See Sarah A. Seo, *Reimagining the Public Defender*, N.Y. REV. BOOKS (Dec. 2, 2021), <https://www.nybooks.com/articles/2021/12/02/reimagining-the-public-defender> [<https://perma.cc/XC48-T9MJ>] (discussing the differing views, from the Progressive era onward, of bureaucratic versus adversarial public defenders).

<sup>71</sup> MAYEUX, *FREE JUSTICE*, *supra* note 37, at 37–38.

<sup>72</sup> *Id.* at 38.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 39.

<sup>75</sup> *Id.* at 39, 46–47.

objective truth displayed a remarkable degree of faith in the state as a benevolent social force.”<sup>76</sup> Yet with the exception of a smattering of jurisdictions, that was the world in which early public defenders operated.

At the other end of the spectrum was the adversarial public defender, who provided tenacious representation and worked against prosecutors.<sup>77</sup> Adversarial public defenders “would fight zealously for their clients and take cases to trial,”<sup>78</sup> deploying trial skills to represent the accused in the same way an attorney in private practice paid to defend the accused would.<sup>79</sup> They would serve as a check on prosecutors who sought convictions rather than justice.<sup>80</sup> This conception of a public defender also situated the defender as a legitimating force in the criminal system, vindicating the belief in equal justice for the rich and poor alike.<sup>81</sup>

The role of the public defender as helpmate to the criminal system dominated early on.<sup>82</sup> The United States Supreme Court—responding to the sociopolitical landscape—prompted the next evolution in public defense from helpmate to adversarial zealous advocate.

### *B. Public Defense 2.0: The Public Defender as Adversarial Guardian of Constitutional Rights*

The evolution of the public defender from criminal system helpmate to zealous advocate for the accused and adversary of the prosecution in the mid-twentieth century was animated by the intersection of American constitutional law and global politics. Race played a central role,<sup>83</sup> as did

<sup>76</sup> *Id.* at 42.

<sup>77</sup> *Id.* at 29.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 42.

<sup>80</sup> *Id.* at 29. This vision of a public defender was realized with the establishment of the first public defender’s office in Los Angeles County in 1914. It was replicated in just a smattering of jurisdictions—Connecticut; Rhode Island; Cook County, Illinois; and Shelby County, Tennessee. *Id.* at 30.

<sup>81</sup> *Id.* at 43–44.

<sup>82</sup> See *supra* notes 59–60 and accompanying text.

<sup>83</sup> See Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1170–71 (2019) (“Race animated the development of indigent defense before the Sixth Amendment right to counsel jurisprudence helped spur legal aid apparatuses across the country.”). Race has always played a central role in the manifest injustice of the criminal system. The difference in this era was that the racial injustice concerns aligned with a geopolitical reality, ultimately resolved by the Supreme Court. Interest convergence explains how. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) [hereinafter Bell, *Interest-Convergence*] (explaining that progress for a subordinate group happens when the interests in progress converge with the interests of the dominant group). “Application of the interest convergence paradigm reveals that these cases were contradiction-closing cases

the Fourteenth Amendment's imposition of procedural fairness on state criminal proceedings and the Sixth Amendment right to counsel.<sup>84</sup> Two cases—*Powell v. Alabama* (the Scottsboro Boys Case)<sup>85</sup> and *Gideon v. Wainwright*<sup>86</sup>—fleshed out the constitutional rights at play.

In the face of Jim Crow injustice—show trials that amounted to legal lynchings—defense counsel served as an indicator of procedural fairness. *Powell v. Alabama*, involving the wrongful convictions of nine Black teenagers stemming from false allegations of rape made by two white women, was emblematic of the Jim Crow-era racism countenanced by the criminal system. The *Powell* Court overturned the convictions and, in doing so, recognized an affirmative right to counsel in capital cases, highlighting the critical importance of counsel to defend the indigent accused.<sup>87</sup>

Just over three decades later, *Gideon v. Wainwright*<sup>88</sup> extended the reasoning of *Powell* beyond capital cases to ensure the appointment of counsel for anyone accused of a crime who could not afford to pay for a lawyer.<sup>89</sup> While race drove *Powell*, *Gideon* was propelled by race and an additional factor: the anticommunist fervor of the Cold War and contempt for sham trials as paradigmatic of Soviet “totalitarian justice,”

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decided in times of great friction, both domestically and internationally.” Lahny R. Silva, *Ringling the Bell: The Right to Counsel and the Interest Convergence Dilemma*, 82 Mo. L. REV. 133, 148 (2017).

<sup>84</sup> MAYEUX, FREE JUSTICE, *supra* note 37, at 69, 75.

<sup>85</sup> 287 U.S. 45 (1932).

<sup>86</sup> 372 U.S. 335 (1963).

<sup>87</sup> 287 U.S. at 69, 79 (1932). See Sam Natale & John Sadek, *The Socialist Origins of Public Defense*, JACOBIN (June 25, 2019), <https://jacobin.com/2019/06/tiffany-caban-public-defender-socialism> [<https://perma.cc/U2QB-UQM5>] (discussing *Powell* in the context of the origins of the right to counsel). The nine were indicted six days after the alleged crime. 287 U.S. at 49. They were arraigned the same day, entered pleas of not guilty, and were tried a week later in a series of one-day trials. *Id.* at 49, 53; Ellis Cose, *The Saga of the Scottsboro Boys*, ACLU (July 27, 2020), <https://www.aclu.org/issues/racial-justice/saga-scottsboro-boys> [<https://perma.cc/S9PA-7NY5>]. Eight of the nine were convicted and sentenced to death. *Id.* None were afforded counsel at any point—from their arrest through sentencing. See *Powell*, 287 U.S. at 49–50. In reversing the convictions, the Court famously explained that despite intelligence and education, laypeople were not skilled attorneys; they could not challenge a criminal charge, object to the admission of evidence, or adequately prepare a defense. *Id.* at 69. The Court asserted that “the guiding hand of counsel” was critical to avoid a wrongful conviction because the accused lacked legal skills. *Id.* The situation was more dire for “the ignorant and illiterate, or those of feeble intellect.” *Id.*

<sup>88</sup> 372 U.S. 335 (1963). Clarence Gideon famously was accused and convicted after trial of a felony burglary. *Id.* at 336–37. He asked for counsel, explaining that he was too impoverished to hire a lawyer to represent him. *Id.* at 337. Florida law limited the right to appointed counsel to those accused of a capital offense. *Id.*

<sup>89</sup> See MAYEUX, FREE JUSTICE, *supra* note 37, at 99. The journey from *Powell* to *Gideon* was disrupted by *Betts v. Brady*, 316 U.S. 455 (1942). *Gideon* overruled *Betts*, a case in which the Supreme Court had ruled that the Sixth Amendment right to appointment of counsel was not a right fundamental to a fair trial. *Betts*, 316 U.S. at 473.

in contrast to America's "elaborate protections for the accused," described as "democratic justice."<sup>90</sup> Indeed, "[a]t the level of rhetoric and culture, a commitment to fair criminal trials became defined as a core feature of liberal democracy and intertwined with American national identity."<sup>91</sup> Amid a geopolitical narrative battle, *Powell* and *Gideon* marked America's commitment to freedom and equality.<sup>92</sup> Counsel to represent and defend the indigent accused—as an advocate rather than a criminal system co-conspirator—became a critical component of a fair trial.

*Gideon*'s guarantee was a watershed moment. The *Gideon* Court grounded its declaration in "an obvious truth": that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."<sup>93</sup> The result was the birth of the modern public defender: a government-funded zealous advocate for the accused. Public defenders were viewed as "a mechanism for extending to everyone the benefits of all-American adversarial justice."<sup>94</sup> Accordingly,

[t]he Cold War public defender was combative, standing up for the lonely against the state. . . . The criminal courtroom was set apart from the rest of American life as an exceptional realm in which rich and poor should stand on equal footing, with the implication that socialized provision was neither necessary nor desirable in any other realm.<sup>95</sup>

*Gideon* was aimed at enhancing the administration of criminal law and reforming the criminal system, not ending or even transforming it. The public defender was one guarantor of a reformed criminal system.<sup>96</sup>

Although what *Gideon* said was important, its omissions were of equal import to the evolution of public defense.<sup>97</sup> The Court provided no

<sup>90</sup> MAYEUX, *FREE JUSTICE*, *supra* note 37, at 89.

<sup>91</sup> *Id.*

<sup>92</sup> See Silva, *supra* note 83, at 148 (noting how *Powell* and *Gideon*, both celebrated for their commitment to equality, were decided in geopolitically contentious contexts).

<sup>93</sup> 372 U.S. at 344.

<sup>94</sup> MAYEUX, *FREE JUSTICE*, *supra* note 37, at 89.

<sup>95</sup> *Id.* at 113.

<sup>96</sup> Indeed, that sentiment is central to the Supreme Court's "two main purposes" in deciding *Gideon*: "(1) protecting the innocent from conviction; and (2) protecting African Americans from Jim Crow injustice." Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2247–48 (2013).

<sup>97</sup> Several scholars have questioned *Gideon*'s efficacy. E.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2180–81 (2013) (arguing that, in the context of increased and more racially disparate incarceration in the decades following *Gideon*, risk of incarceration "has much to do with class and race and . . . little to do with the quality of the indigent defense system"); Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*,

guidance to states about how they might fulfill its bold pronouncement, setting the stage for decades of woeful underfunding as states raced to the bottom to implement *Gideon*'s letter while ignoring its spirit.<sup>98</sup> A wealth of scholarship and commentary has both highlighted how caseloads have increased at a rate that has long eclipsed indigent defense funding and observed how inadequate funding remains a massive barrier to fulfilling *Gideon*'s mandate.<sup>99</sup> The patchwork of indigent defense, and divergent mechanisms for structuring and funding it, is further evidence of the problem.<sup>100</sup> Accordingly, “[s]ince the 1980s, the phrase ‘indigent defense crisis’ has functioned on two levels: as a description of observed conditions and as a conceptual paradigm for

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78 ALB. L. REV. 1281, 1296 (2015) [hereinafter Moore, Sandys & Jayadev, *Make Them Hear You*] (considering whether the right to counsel guaranteed under *Gideon* is merely “a redistribution of assets to one set of lawyers (defenders) that makes life easier for other lawyers (prosecutors and judges) through a pro forma greasing of the carceral state’s machinery”); 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, 971–72 (2013) [hereinafter Steinberg, *Heeding Gideon’s Call*] (arguing that *Gideon* “silenced the field of ‘poverty law’ as conceived in the 1960s by creating a separate stream of government funding exclusively for indigent criminal defense”); Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2679 (2013) (pondering whether individuals whose court-appointed attorneys provided ineffective assistance of counsel “really were better off because of *Gideon*”).

<sup>98</sup> See Jonathan Gross, *Reframing the Indigent Defense Crisis*, HARV. L. REV. BLOG (Mar. 18, 2023), <https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis> [<https://perma.cc/SD2Z-DFR2>] (noting how the right to counsel is routinely violated in a number of states); Anthony C. Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 719–20 (2013) (“States and the courts have consistently demonstrated a willingness to tolerate . . . minimal level of representation.”); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 183–89 (2008) (detailing structural failures that have led New Orleans public defense to be under resourced); Taylor-Thompson, *Gideon’s Trumpet*, *supra* note 38, at 1484–85 (explaining how *Gideon*’s lack of clarity on the right to counsel has led to states’ failures).

<sup>99</sup> See, e.g., Gross, *supra* note 98; Thompson, *supra* note 98, at 718; Steinberg, *Heeding Gideon’s Call*, *supra* note 97, at 984 (noting that “many public defender offices around the country” must deal with “crushing caseloads” and “funding challenges”); Chemerinsky, *supra* note 97, at 2683 (quoting ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENSE, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 7 (2004)) (arguing that “[q]uality legal representation cannot be rendered unless indigent defense systems are adequately funded” and that “excessive caseloads” negatively impact public defenders’ “ability to represent their clients effectively”); Eve Brensike Primus, *Defense Counsel and Public Defense*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 121 (Erik Luna ed., 2017) (“A lack of sufficient funding forces public defenders to handle caseloads that no one could effectively manage.”).

<sup>100</sup> See Thompson, *supra* note 98, at 731 (critiquing the practice of funding public defenders through a per-case basis bidding system); Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207 (2023); MAYEUX, FREE JUSTICE, *supra* note 37, at 176–77 (describing how, in the past, some public defenders obtained funding through grants from the Law Enforcement Assistance Administration).

all discussions of indigent defense policy.”<sup>101</sup> Public defense was broken and broke from the beginning.

Nor did the Court provide real guidance about the substance of the public defender’s role, leaving it to others to define what qualified as effective quality representation, from investigation and counseling to advocacy at the trial and sentencing stages.<sup>102</sup> The Warren Court’s focus on the dilemma of the person facing criminal charges, and on the individual rights of the criminally accused, produced an individuated model of criminal defense.<sup>103</sup> Defense counsel’s concerns were limited to the four corners of a criminal case and little more.<sup>104</sup> Burgeoning public defender’s offices followed *Gideon* and the Warren Court’s vision for

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<sup>101</sup> Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 84 (2016); see also Brooks Holland & Steven Zeidman, *Progressive Prosecutors or Zealous Defenders, from Coast-to-Coast*, 60 AM. CRIM. L. REV. 1467, 1485 (2023) (highlighting the indelible bond between the concept of crisis and indigent defense). The permanence of underfunding of public defense is at odds with the term “crisis,” which connotes a temporary problem amenable to an immediate solution. Ellen C. Yaroshefsky, *Duty of Outrage: The Defense Lawyer’s Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System Is Unjust*, 44 HOFSTRA L. REV. 1207, 1207 n.1 (2016) (referencing the dictionary definition of “crisis” to argue that “crisis” is a misnomer for the longstanding problem of inadequate defense services).

<sup>102</sup> See Taylor-Thompson, *Gideon’s Trumpet*, *supra* note 38, at 1461–63, 1481 (detailing the Supreme Court’s failure to define the public defender’s role). Other entities, including the American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, and the National Legal Aid and Defender Association, attempted to define the substance of the role in the wake of *Gideon*. STANDING COMM. ON LEGAL AID & INDIGENT DEFENSE, AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 17 (2023) [hereinafter AM. BAR ASS’N, 2023 PRINCIPLES], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-ten-princ-pd-web.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-ten-princ-pd-web.pdf) [<https://perma.cc/ZX73-AZ4J>]; see also Mark H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, 29 N.Y.U. REV. L. & SOC. CHANGE 83, 91 (2004) (“The goal of public defense, generally accepted without controversy, is to provide indigent defendants with legal representation. What this simple phrase leaves out, however, is a clear idea about the quality of the representation to be provided, and who is to be the judge of that quality.”).

<sup>103</sup> Taylor-Thompson, *Gideon’s Trumpet*, *supra* note 38, at 1463.

<sup>104</sup> *Id.* *Gideon* was not the last word from the Supreme Court on indigent defense. In 1972, the Court decided *Argersinger v. Hamlin*, holding that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at their trial.” 407 U.S. 25, 37 (1972). *Argersinger* extended *Gideon*’s pronouncement beyond felony charges. In doing so, the Court spoke to the injustices that pervaded misdemeanor court. *Id.* at 35–37. The Court also left it to the states to implement its ruling, providing little guidance beyond explaining that “[w]e do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement.” *Id.* at 38. Several years later, in *Scott v. Illinois*, the Court limited its rulings in *Gideon* and *Argersinger* to guarantee counsel only for indigent people accused of crimes for which incarceration was a possibility. 440 U.S. 367, 373–74 (1979) (“We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”).

decades thereafter.<sup>105</sup> Defenders were “decidedly adversarial,” focused on safeguarding constitutional rights and “zealously providing a voice to a client who might otherwise suffer at the hands of the government in the prosecution’s rush to convict.”<sup>106</sup>

That was the dominant state of affairs in the post-*Gideon* world until the next evolution of public defense began to take shape. In 2002, the American Bar Association promulgated the Ten Principles of a Public Defense Delivery System.<sup>107</sup> Those principles provide a helpful snapshot of the individuated orientation of public defense in *Gideon*’s wake.<sup>108</sup> They focus entirely on the structure necessary to ensure robust, vigorous, and zealous defense of individuals accused of crimes. Absent from the frame was any real concern with the extent to which the tentacles of the criminal system stretch into the lives of the accused, their families, and communities.<sup>109</sup> Over time, other models and methods developed, chipping away at this individuated orientation.

### C. *Public Defense Today: Holistic Defense to Meet the Rise of the Carceral State*

In the post-*Gideon* era, public defense is best defined by holistic representation.<sup>110</sup> Holistic defense widened the gaze of *Gideon*’s individuated defender, pressing the defender to address the underlying causes of “criminal behavior” to reduce both the impact the criminal

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<sup>105</sup> Taylor-Thompson, *Taking It to the Streets*, *supra* note 55, at 163–64. This approach was in keeping with the Supreme Court’s jurisprudence during the “Due Process Revolution” of the 1960s, during which the Court “resorted to adversarial procedural safeguards and judicially created per se rules to limit the state, to constrain police discretion, to protect peoples’ freedom, and to preserve criminal defendants’ liberties.” Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash”*, 87 MINN. L. REV. 1447, 1476 (2003).

<sup>106</sup> *Id.* at 163–64.

<sup>107</sup> AM. BAR ASS’N, 2023 PRINCIPLES, *supra* note 102, at 1 (updating the ABA’s original 2002 Ten Principles).

<sup>108</sup> See, e.g., Norman Lefstein, *Time to Update the ‘ABA Ten Principles’ for the 21st Century*, 40 CHAMPION 42, 42–43 (2016) (noting the staying power of the 2002 document but highlighting the opportunity to revisit recommendations to better reflect a growing focus on community-oriented service provision in criminal defense); Mark Pickett, *New ABA-Led Initiatives Highlight Need for Public Defense Reform*, 38 CRIM. JUST. 58, 59 (2024) (explaining that the ABA principles arose after *Gideon* to provide the fundamental criteria for an effective public defense delivery system).

<sup>109</sup> The need for public defense only grew exponentially, as “[t]he country embarked on a fifty-year, insatiable war on crime in which jails, prison[s], and other mechanisms of law enforcement became the central engine driving American inequality, caging and banishing young Black men and devastating whole communities.” Abbe Smith, *Defending Gideon*, 26 U.C. DAVIS SOC. JUST. L. REV. 235, 247 (2022).

<sup>110</sup> I use the term holistic defense and holistic representation interchangeably because they have the same meaning in the context of public defense.

system has on the accused and its negative consequences, including but not limited to arrest, prosecution, conviction, and sentencing.<sup>111</sup> Holistic defense aims to change the life trajectory of clients, driving public defenders to fight on fronts beyond the courtroom.<sup>112</sup> It necessitates working with the client not only to resolve the current criminal case but also to avoid future involvement with the criminal system.<sup>113</sup>

Thus, holistic representation extends beyond the criminal case and requires that defenders address the root causes of criminal system contact and the array of interconnected institutional forces that keep the indigent locked in.<sup>114</sup> That demands a nuanced understanding of how the criminal system stretches into the lives of the accused, their families, and their communities. It also includes a consciousness about the racial and economic dynamics that can lead one into the criminal system.<sup>115</sup> Public defenders are to meet client needs by providing access to legal and nonlegal resources, engaging in dynamic, multidisciplinary communication, and supporting clients with advocates who possess an interdisciplinary skill set. That means the involvement of those whose expertise falls outside the traditional

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<sup>111</sup> Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 631 (2020).

<sup>112</sup> See Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1071 (2004) [hereinafter Pinard, *Broadening the Holistic Mindset*] (“[T]he holistic mindset recasts the defense role by considering the social, psychological and socioeconomic factors that often underlay such cases. . . . [It pushes defenders to] provid[e] a comprehensive solution to the underlying factors that led to the client’s involvement with the criminal justice system.”); Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625 [hereinafter Steinberg, *Beyond Lawyering*], 633–34 (2006); Steinberg, *Heeding Gideon’s Call*, *supra* note 97, at 984–1002 (analyzing The Bronx Defenders as an object lesson in the promise of holistic defense applied at scale in a public defense institution).

<sup>113</sup> Taylor-Thompson, *Gideon’s Trumpet*, *supra* note 38, at 1505.

<sup>114</sup> See Steinberg, *Beyond Lawyering*, *supra* note 112, at 630 (explaining that clients need therapy, housing assistance, and other types of interventions in addition to help with the criminal case); Brian J. Ostrom & Jordan Bowman, *The Evolving Character of Public Defense: Comparing Criminal Case Processing Effectiveness and Outcomes Across Holistic Public Defense, Traditional Public Defense, and Privately Retained Counsel*, 30 S. CAL. INTERDISC. L.J. 611, 617 (2021) (“The holistic defense model arose partly in response to widespread criticism of existing systems for delivering defense services to indigent clients and partly as a component of the larger problem-solving movement taking hold in the criminal justice system over the past two decades.”); Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215, 1216 (2015) (describing the rise of holistic defense as driven in part by efforts to solve underlying social and environmental problems that may have led to a client’s criminal system involvement); *id.* at 1231 (“Holistic defense is also designed to improve clients’ lives by mitigating direct and collateral penalties for criminal conduct, as well as by meeting social service needs.”).

<sup>115</sup> See Lee, Ostrom & Kleiman, *supra* note 114, at 1231.



criminal defense lawyer's toolkit<sup>116</sup> and collaboration with an array of stakeholders, professionals, and community members to serve clients.<sup>117</sup>

History explains the expansion of the public defender's role post-*Gideon*. Since the 1970s, America's criminal legal system has become synonymous with punitive excess, mass criminalization, and mass incarceration.<sup>118</sup> The incarceration rate today stands at five times what it was in 1970, with the United States among the world's leaders in imprisoning people.<sup>119</sup> Tough-on-crime rhetoric underscored harsh criminal legal system policies—such as mandatory minimum sentencing regimes and three-strikes laws—and increased spending on law enforcement, jails, prisons, and prosecution. The criminalization of poverty, mental health, and substance use expanded the net to increase the share of those caught in the criminal system. Austerity measures of the 1980s and 1990s, underwritten by the dismantling of the welfare state, compounded the crises of mass incarceration and mass criminalization. Cuts to social services and the social safety net left quality-of-life gaps that were filled by carceral logics, particularly

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<sup>116</sup> See Taylor-Thompson, *Taking It to the Streets*, *supra* note 55, at 166.

<sup>117</sup> See *id.* (“This expanded view of representation does not require the lawyer to become all things to each client. Some of the client's needs may reach well beyond the defender's area of expertise. But this form of advocacy does push defenders to collaborate with other professionals to address each client's needs comprehensively.”).

<sup>118</sup> A wealth of sources have recounted the rise and growth of the criminal system and incarceration since the 1970s. See, e.g., Taylor-Thompson, *Taking It to the Streets*, *supra* note 55, at 171–72 (providing an overview of the “revolutionary changes in the criminal law” that took place in the 1990s and 2000s); Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 965–74 (detailing the “dramatic shift in our country's approach to crime” over the past several decades); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 426–36 (2013) (describing causes and harms of mass incarceration); Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1956 (2019); Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1124–26 (2021); Brandon Hasbrouck, *Reimagining Public Safety*, 117 Nw. U.L. REV. 685, 696–97 (2022); Travis & Western, *supra* note 52, at 338; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POL'Y INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html> [<https://perma.cc/B8R9-BWA6>]; ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); EXCESSIVE PUNISHMENT: HOW THE JUSTICE SYSTEM CREATES MASS INCARCERATION, *supra* note 52. See generally DAVID GARLAND, CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2002); MICHELLE ALEXANDER, THE NEW JIM CROW 75–120 (10th anniversary ed. 2020) (detailing the legal regime and conditions that drove the rise of mass incarceration).

<sup>119</sup> Sawyer & Wagner, *supra* note 118; Ristroph, *supra* note 118, at 1956 (“[T]he U.S. incarceration rate . . . increased rapidly during the last three decades of the twentieth century, and [it] remains about five times higher than it was in 1970.”).

during the period of rising violent crime and perceived social disorder<sup>120</sup>:

During the most significant period of welfare retrenchment in the 1980s, when programs serving the marginalized groups sustained substantial financial cuts, the incarcerated population exploded. It was also during this period that both the carceral and social welfare systems increasingly revoked their rehabilitative missions to embrace punishment. Disproportionately comprised of low-income Black and Latino men, the carceral system has increasingly replaced the welfare state with consequences significantly burdening people of color living in poverty.<sup>121</sup>

The result of this history was the massive and rapid expansion of the carceral state, and with it, the population of those facing and experiencing some form of carceral control. The suite of burdens felt by people targeted by the criminal system grew exponentially. The criminal case no longer stood alone as the client's sole concern. The growth of collateral consequences attached to criminal convictions expanded the range of challenges that confronted people acquired by the system.<sup>122</sup> Public defense adapted to deal with the ever-expanding array of problems that flowed from criminal system contact.<sup>123</sup> Public defenders' roles had to expand because their clients needed more support than ever before.

As that history unfolded, holistic defense began to take hold, eventually emerging as the gold standard for public defense in the modern era.<sup>124</sup> Signs of a turn to a consensus around holistic defense are

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<sup>120</sup> See Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, THE ATLANTIC (Apr. 15, 2016), <https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408> [<https://perma.cc/T85W-H5DP>] (explaining that a common response to crime was to hire more police officers).

<sup>121</sup> Hasbrouck, *supra* note 118, at 696–97.

<sup>122</sup> See Pinard, *Broadening the Holistic Mindset*, *supra* note 112, at 1069.

<sup>123</sup> Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 965–74.

<sup>124</sup> See, e.g., Ostrom & Bowman, *supra* note 114, at 613. Community-oriented defense and client-centered defense models emerged in the late 1970s and early 1990s respectively, though holistic defense has overtaken both as the ideal modality for delivery of indigent defense services. Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 975–84. For a fulsome discussion of community-oriented and client-centered defense models, see *infra* notes 133–43 and accompanying text. Holistic defense predates *Gideon*. The report of a commission established to review the defense system in Washington, D.C. concluded that a holistic approach was required for defense. As the Commission wrote in 1958, “[l]egal aid clients sometimes have economic, medical, and social problems requiring other kinds of assistance, which must be referred, and frequently such problems are so intertwined with the legal problems that coordinated assistance is indicated.” COMM’N ON LEGAL AID, BAR ASS’N OF D.C., REPORT OF THE COMMISSION ON LEGAL AID OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA 46 (1958). The Report further described the work of the Social

reflected in the 1999 to 2001 Executive Session on Public Defense.<sup>125</sup> Developed at Harvard University's Kennedy School of Government, the Executive Sessions convened academics and practitioners to find solutions to pressing public problems.<sup>126</sup> The Executive Session on Public Defense, funded by the Department of Justice's Bureau of Justice Assistance, was "designed to confront the persistent indigent defense crisis in states and counties and redefine the role of public defense within a changing criminal justice system."<sup>127</sup>

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Services Department at the Chicago Legal Aid Bureau as a positive example of support. *See id.* at 46–47. "Many, if not most, defender organizations today would view themselves as practicing some version of holistic defense, although a comparatively small number have implemented the staffing, training, and organizational changes" to implement an idealized vision of the practice. James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 826 (2019); *see also* Lee, Ostrom & Kleiman, *supra* note 114, at 1216 (describing holistic defense as "the most comprehensive statement to date of what defines the effective assistance of counsel for criminal defendants").

<sup>125</sup> *See* Cait Clarke, *Introduction*, 29 N.Y.U. REV. L. & SOC. CHANGE 3, 3–4 (2004).

<sup>126</sup> Participants included a diverse array of people from across the political spectrum, from the heads of public defender's offices, academics, and social justice advocates to police commissioners and prosecutors. *Id.* at 4–5.

<sup>127</sup> *Id.* at 4; *see also id.* at 3–5 (outlining history of the Executive Session on Public Defense (ESPD) process since its inception in 1998). The scholarship that emerged from the ESPD explored everything from client-centered, community-oriented, and holistic defense to strategies that defenders can deploy to reduce crime. *See* Nancy Gist, *Foreword*, 29 N.Y.U. REV. L. & SOC. CHANGE 1 (2004) (providing background on the inspiration for the first ESPD); Tony Fabelo, *What Policy-Makers Need to Know to Improve Indigent Defense Systems*, 29 N.Y.U. REV. L. & SOC. CHANGE 135, 135–36 (2004) (calling on policymakers and researchers to collaborate on gathering data to assess existing state-level indigent defense systems and developing criteria for improving those systems based on a careful consideration of why such systems are necessary); Taylor-Thompson, *Taking It to the Streets*, *supra* note 55 (examining the challenges and benefits of community-oriented public defense); Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping Gideon's Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203 (2004) (outlining the history of and comparing American and Israeli public defense systems); Cait Clarke & James Neuhard, *"From Day One": Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11 (2004) (highlighting the ethical concerns public defenders may face while "problem-solving" for clients and advocating for defenders to embrace and focus more on shaping sentencing alternatives such as treatment and probation programs); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123 (2004) (examining values of "traditional" versus "client-centered" public defenders and providing suggestions as to how to transform traditional public defender's offices into more holistic operations); Cait Clarke & Christopher Stone, *Bolder Management for Public Defense: Leadership in Three Dimensions*, 29 N.Y.U. REV. L. & SOC. CHANGE 113 (2004) (examining how managers of indigent defense services can more effectively lead their offices by establishing a clear vision for the work, collaborating with others in the criminal legal system on reform efforts, and popularizing the idea of public defense as a crucial form of crime prevention); Mark H. Moore, Michael P. Judge, Carlos J. Martinez & Leonard Noisette, *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57 (2004) (advocating for public defenders to focus more on crime prevention as a way to

The notes delineating consensus among this gathering of academics, practitioners, and criminal system stakeholders reflect, in part, where the evolution of public defense left off and what it last aspired to do. The attendees called for a redefinition of the public defender's role, one in which defenders define the role for themselves, rather than allowing others—such as courts, prosecutors, politicians, or the media—to do so.<sup>128</sup> They urged public defenders to deploy holistic representation alongside zealous defense, collaborate across disciplines, listen to community voices, and play a role in reducing crime.<sup>129</sup> They pressed defenders to work with communities to produce positive outcomes in those communities, improve economic outlooks, and strengthen families.<sup>130</sup> Those gathered at the Executive Sessions pushed public defenders to expand their focus—and their work—into the world beyond the walls of the courtroom.<sup>131</sup> The presence of public defender leaders and criminal system stakeholders helped drive the implementation of the consensus view to offices nationwide as they returned to their respective jurisdictions.

I was fortunate enough to bear witness to the aftershocks of this shift to holistic defense. I spent my formative years in the mid-2000s as a public defender working at The Bronx Defenders, an office that deploys a holistic defense philosophy.<sup>132</sup> In practice, holistic defense incorporated and synthesized two lawyering models that developed in the post-*Gideon* era: client-centered lawyering and community-oriented defense.<sup>133</sup> Client-centered lawyering was a dramatic departure from the traditional, paternalistic model of lawyering in the *Gideon* era, which situated the client as a passive participant who delegated decisions to their lawyers.<sup>134</sup> Client-centered lawyering emphasizes

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more effectively advocate for their clients and align themselves with community interests in public safety); Moore, *supra* note 102 (outlining popular strategies in public defense, issues with public perception of the value and role of public defenders, and suggestions for ways defenders can become more politically active, more engaged with the broader defense bar, and more focused on the provision of holistic services).

<sup>128</sup> Clarke, *supra* note 125, at 6.

<sup>129</sup> *Id.* at 6–7.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 963.

<sup>133</sup> See Orihuela, *supra* note 111, at 628–36 (2020) (detailing the advent of holistic defense, community-oriented defense, and client-centered representation in criminal defense lawyering); see also Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 974–75 (explaining how holistic defense synthesizes elements of client-centered lawyering and community-oriented defense). For a comprehensive history of community-oriented public defense, including the challenges that public defender's offices face in implementing such a vision, see generally Taylor-Thompson, *Taking It to the Streets*, *supra* note 55.

<sup>134</sup> See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 506 (1990).

the expertise of the client as equal, if not superior, to the lawyer. It privileges the client's decisionmaking over the lawyer's judgment and requires the lawyer to understand and respect the client's perspective and values.<sup>135</sup> It therefore obligates the defender to recognize the client's autonomy, understand that there is more to a client's life than the legal aspects of their criminal case, and consider that broader context when providing representation.<sup>136</sup> A resolution that leaves a client with a criminal record but otherwise preserves their housing or employment might not seem optimal to counsel, but from the perspective of a client battling against a history of housing and employment instability, it may be ideal.<sup>137</sup>

The second lawyering model, community-oriented defense, "generally refers to a public defender office with strong ties to, and knowledge of, the community it serves."<sup>138</sup> Community-oriented defenders are often physically located in the community and have partnerships with schools, churches, and nonprofit organizations in the community.<sup>139</sup> They leverage neighborhood partnerships to serve their clients, obtaining the sorts of services and resources necessary to address the challenges that may have driven them into the criminal system.<sup>140</sup> Community-oriented defense "is predicated on the belief that low-income communities have assets, which they can contribute to public defender's offices and their advocacy efforts."<sup>141</sup> Defenders in these offices "build[] ties with the people, activists, support groups, and service providers in [their] clients' communities" to "rethink . . . the problems their clients encounter" and to inform the strategies that they might pursue as defenders.<sup>142</sup> These defenders also advocate for policies

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<sup>135</sup> See Jonah A. Siegel, Jeanette M. Hussemann & Dawn Van Hoek, *Client-Centered Lawyering and the Redefining of Professional Roles Among Appellate Public Defenders*, 14 OHIO ST. J. CRIM. L. 579, 584–85 (2017).

<sup>136</sup> Client-centered lawyering "shifts the focus from cases to clients, emphasizing clients' stories and encouraging lawyers to assess clients' legal needs within the broader context of their lives." *Id.* at 585; see also Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 877–78 (1998) (describing methods of promoting client decisionmaking and justifications for emphasizing client autonomy).

<sup>137</sup> See Siegel, Hussemann & Van Hoek, *supra* note 135, at 585.

<sup>138</sup> See Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 981–82; Taylor-Thompson, *Taking It to the Streets*, *supra* note 55, at 173–74.

<sup>139</sup> Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 981–82; see also Taylor-Thompson, *Taking It to the Streets*, *supra* note 55, at 176–78 (discussing the importance of both community input and boundaries on community interaction).

<sup>140</sup> See Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 981–82.

<sup>141</sup> *Id.* at 982.

<sup>142</sup> CMTY. JUST. INST., BRENNAN CTR. FOR JUST., *TAKING PUBLIC DEFENSE TO THE STREETS 2* (2000).

to address broader systemic inequities and discriminatory practices that plague the communities they serve.<sup>143</sup>

At the vanguard of the holistic defense movement that merged these two lawyering models was the Neighborhood Defender Service of Harlem (NDS). A forerunner of The Bronx Defenders, NDS was created by the Vera Institute of Justice in the summer of 1990 as a “five-year demonstration project of ‘action research’” to “develop new techniques for the public provision of legal representation to indigent criminal defendants.”<sup>144</sup> The goal of the project was to “demonstrate that, by restructuring the manner in which legal representation for poor people is delivered, public defender organizations can provide better services to their clients in ways that improve the quality of criminal justice generally.”<sup>145</sup> A 1991 report on the first five hundred cases opened by NDS explains that the office was “structured around three basic principles that distinguish[ed] it from virtually all other defender services” at the time.<sup>146</sup> NDS was a community-oriented defender, “operating from the community where its clients reside rather than from the courthouses where they are prosecuted.”<sup>147</sup> NDS’s representation was also team-based, “providing representation through teams of lawyers, paralegal investigators (called ‘community workers’), and administrative assistants” in an effort to “bring[] the benefits of many minds to each case.”<sup>148</sup> Finally, its approach was “client-centered

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<sup>143</sup> *Id.* at 4. Boston’s Roxbury Defenders Committee and Chicago’s Criminal Defense Consortium of Cook County were forerunners to the community-oriented model. See generally Roderick L. Ireland, *The Roxbury Defenders Committee: Reflections on the Early Years*, 95 MASS. L. REV. 153 (2013) (recounting the early history and work of the Roxbury Defenders). These offices hinted at what a community-oriented model could deliver alongside legal representation, such as a twenty-four-hour legal hotline; a community newsletter; a community legal education program; and regular community meetings to address crime, policing, and other relevant matters. Steinberg, *Heeding Gideon’s Call*, *supra* note 97, at 979–81. The Seattle Defender Association’s Racial Disparity Project (RDP) developed strong connections with their clients’ community to shape the Project’s litigation and advocacy priorities. See Taylor-Thompson, *Taking It to the Streets*, *supra* note 55, at 183–84 (describing RDP’s consultations with community organizations). NDS also exemplified community-oriented defense. See SUSAN SADD & RANDOLPH GRINC, VERA, *THE NEIGHBORHOOD DEFENDER SERVICE OF HARLEM: RESEARCH FROM THE FIRST TWO YEARS 4–5* (1993) (explaining how the office sought to restructure its deployment of resources around a community-oriented model to improve indigent defense services). The office represented anyone arrested within its geographic “catchment area” and used its connections to Harlem and local resources to meet client needs in a comprehensive, community-specific manner. Steinberg, *Heeding Gideon’s Call*, *supra* note 97, at 978–79.

<sup>144</sup> SADD & GRINC, *supra* note 143, at 4–5.

<sup>145</sup> *Id.*

<sup>146</sup> THE NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, INTAKE: THE FIRST 500 CASES, REPORT FOR DECEMBER 1990 THROUGH MARCH 1991, at i.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

rather than case-centered,” allowing it to “represent[] its clients in any proceedings related to their criminal charges, including proceedings concerning parole, immigration, housing, forfeiture, and termination of parental rights.”<sup>149</sup> These guiding principles allowed NDS to put a pioneering vision of holistic defense into practice.

The Bronx Defenders built on NDS’s legacy. There, I experienced how the fusion of client-centered lawyering and community-oriented defense models shaped the work of a holistic public defender’s office and its individual defenders’ function.<sup>150</sup> Four pillars of holistic defense, which remain prominent today, guided the work. First is “seamless access to legal services and nonlegal services under one roof.”<sup>151</sup> That sort of access allows an office to address the legal and nonlegal needs that, if unresolved, can push someone back into the criminal system.<sup>152</sup> It necessitates interdisciplinary training, cooperation, and collaboration with civil attorneys and social workers who can provide support and guidance to address matters that extend beyond the contours of the criminal case.<sup>153</sup>

Second, holistic defense requires interdisciplinary communication among the client’s legal, advocacy, and social services teams and between each team and the client.<sup>154</sup> Robust, regular communication enables team members to obtain insights about their clients’ lives, strategize effectively, and do the work of addressing the causes and potential for future criminal legal system involvement.<sup>155</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> See Lee, Ostrom & Kleiman, *supra* note 114, at 1219 (“The Four Pillars of Holistic Defense . . . maintain a dual focus on interdisciplinary, team-based representation of individual clients and the agency’s connection to the community in which its clients live.”). Prior to creating The Bronx Defenders, Robin Steinberg served as an executive director at NDS. See Scott H. Greenfield, *Cross: Robin Steinberg, The Bronx Defender*, SIMPLE JUSTICE: A CRIMINAL DEFENSE BLOG (May 18, 2016), <https://blog.simplejustice.us/2016/05/18/cross-robin-steinberg-the-bronx-defender> [<https://perma.cc/7KLP-7MQP>]. She founded The Bronx Defenders in 1997, building on her experiences at NDS. *Id.* Though it is beyond the scope of this Article, The Bronx Defenders and four other New York City trial-level indigent defense providers grew out of “a four day strike of Legal Aid Society staff attorneys in 1994, ultimately result[ing] in a dialectical restructuring of the indigent defense system.” Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917–1998*, 1997 ANN. SURV. AM. L. 891, 893, 979, 997 (1997). The City’s efforts to eliminate the Legal Aid Society led to requests for proposals for alternative defense providers, including The Bronx Defenders. See *id.* at 893, 997.

<sup>151</sup> Steinberg, *Heeding Gideon’s Call*, *supra* note 97, at 963 (emphasis removed).

<sup>152</sup> *Id.* at 987–88.

<sup>153</sup> See *id.* at 987–90 (outlining the interdisciplinary partnerships necessary to provide seamless access).

<sup>154</sup> *Id.* at 991.

<sup>155</sup> See *id.* at 991–92 (describing The Bronx Defenders’ interdisciplinary communication model).

Third, holistic defense demands that advocates develop an interdisciplinary skill set, through training and experience, to identify and address the range of challenges that clients may present.<sup>156</sup> Beyond trial advocacy, those skills include connecting clients with social services; assisting clients with access to housing, employment, education, and other stabilizing forces; assisting with reentry following criminal system contact; and advising clients on the collateral consequences of criminal system involvement.

Finally, holistic defense requires and values ties to the community that the office serves, in keeping with community-oriented defense, for purposes of advocacy, litigation, and the types of strategic interventions described above.<sup>157</sup>

Holistic defense was a significant improvement on indigent defense following *Gideon*. Its expansive scope offers a “means to reduce unnecessary and unproductive punishment.”<sup>158</sup> Evaluations of the effectiveness of holistic public defense, while limited,<sup>159</sup> bear that out.<sup>160</sup> The most comprehensive study to date analyzing indigent defense in the Bronx found that holistic defense reduces the chances of a custodial sentence, increases the likelihood of pretrial release, and does not have any noticeable effect on recidivism.<sup>161</sup> In other words, holistic defense saves time for, and reduces the harm to, those enmeshed in the criminal system and saves money for taxpayers who foot the bill for our sprawling carceral state.<sup>162</sup>

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<sup>156</sup> *Id.* at 995.

<sup>157</sup> *See id.* at 997–98.

<sup>158</sup> Anderson, Buenaventura & Heaton, *supra* note 124, at 824.

<sup>159</sup> *See id.* at 829 (explaining that current evaluations “are limited in scope, do not adequately address the possibility that observed outcomes might represent influences other than the type of representation, and come to conflicting conclusions regarding the efficacy of the approach”).

<sup>160</sup> *See id.* at 883 (explaining that holistic defense reduces the likelihood of a custodial sentence and the expected sentence length, pointing to a “dramatically superior indigent defense service”).

<sup>161</sup> *Id.*

<sup>162</sup> *See id.* at 823 (finding in a ten-year study in the Bronx that holistic defense reduced the likelihood of a custodial sentence by sixteen percent, expected sentence length by twenty-four percent, custodial punishment sentences by nearly 1.1 million days, and housing costs for incarcerated people by \$165 million). The same study also found that while holistic defense increased the chances of pretrial release, it did not “dramatically reduce recidivism, but it does appear to offer considerable potential to reduce incarceration without adversely impacting public safety.” *Id.* There are plenty of worthy critiques of this study, among them the notion that the Legal Aid Society, New York City’s largest provider of indigent defense services, is not sufficiently holistic but nevertheless constituted the control group for the study. Despite the critiques, the point remains that holistic defense resulted in better outcomes for clients.



Despite its comprehensive benefits, holistic defense has not been uniformly adopted or fully embraced by public defender's offices.<sup>163</sup> There are several reasons why that may be the case. Some offices are mired in the entrenched crisis of underfunding, leaving them treading water and, far too often, drowning.<sup>164</sup> Other offices are populated by defenders who may view holistic defense as inappropriately expanding what they consider the traditional public defender's role.<sup>165</sup> Still other attorneys may feel the practice is not effective, despite evidence to the contrary.<sup>166</sup>

Nevertheless, holistic defense is widely considered the model for delivering public defense services in the modern era.<sup>167</sup> The American

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<sup>163</sup> See *id.* at 883 (explaining that while defender organizations claim the holistic defense mantle because they “take into account a range of client needs and outcomes both within and outside of the criminal justice system in their advocacy,” they have “not substantially adjusted their personnel mix, disciplinary training, approaches for staffing cases, or communication methods from what might be typical in a traditional defender office”); Eli Hager, *The Courts See a Crime. These Lawyers See a Whole Life*, MARSHALL PROJECT (Nov. 12, 2018, 7:00 AM), <https://www.themarshallproject.org/2018/11/12/the-courts-see-a-crime-these-lawyers-see-a-whole-life> [<https://perma.cc/Z9ZY-5V5Q>] (“Many public defender’s offices around the country have claimed to be ‘holistic’ (it’s become something of a buzzword), but few have the actual staffing and training to back it up.”).

<sup>164</sup> See, e.g., Nia Prater, *106 Cases, Three Jobs, One Lawyer*, N.Y. MAG. (Mar. 7, 2023), <https://nymag.com/intelligencer/2023/03/nyc-public-defenders-face-a-funding-crisis.html> [<https://perma.cc/BW3X-9QM8>] (describing funding crises at Legal Aid and other New York defender offices); Hager, *supra* note 163 (“Justine Olderman, executive director of The Bronx Defenders, acknowledged in an interview that her organization’s demonstrated effectiveness is possible in part because of the robust funding dispensed by the city of New York as well as the philanthropic donations available there.”); see also Jonah E. Bromwich, *Hundreds Have Left N.Y. Public Defender Offices over Low Pay*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/nyregion/nyc-public-defenders-pay.html> [<https://perma.cc/MEG5-GYTW>] (same); Jane Fox & Winston Berkman-Breen, *Public Service Loan Forgiveness? How Improvements to a Student Debt Cancellation Program Can Help to Deliver Gideon’s Promise*, 31 J.L. & POL’Y, no. 2, 2023, at 1, 20–28 (discussing how low pay and lack of access to student debt relief measures has made it difficult to recruit public defenders in rural jurisdictions); Zhu Wu, *‘The System Is Not Designed for You to Win’: Underfunded Public Defender System Penalizes Mississippians*, MISS. TODAY (Oct. 31, 2022), <https://mississippitoday.org/2022/10/31/public-defender-system-underfunded> [<https://perma.cc/3CBG-4RJA>] (describing funding discrepancies between prosecutor and defender officers in Mississippi).

<sup>165</sup> See, e.g., Steinberg, *Heeding Gideon’s Call*, *supra* note 97, at 1002–03 (discussing and dismissing concerns that holistic defense will increase workloads because a holistic public defender may hire more “ancillary staff and fewer lawyers” and because attorneys will have to take on additional duties such as community outreach).

<sup>166</sup> See, e.g., *id.* at 1006–07, 1006 n.120 (discussing and rejecting criticisms that holistic defenders avoid robust trial advocacy); Anderson, Buenaventura & Heaton, *supra* note 124, at 822 (providing an empirical evaluation supporting the effectiveness of holistic indigent defense work despite the “[s]keptics [who] . . . argue that diverting resources and attention from criminal advocacy may lead to worse case outcomes”).

<sup>167</sup> See, e.g., Anderson, Buenaventura & Heaton, *supra* note 124, at 826 (explaining that a significant number of defender organizations view themselves as practicing holistic defense, even in the absence of making changes to staffing, structure, and training required to do so).

Bar Association's 2023 Principles of a Public Defense Delivery System confirm as much.<sup>168</sup> The 2023 Principles updated those issued in 2002.<sup>169</sup> Entitled "Essential Components of Effective Representation," Principle 9 posits the use of a multidisciplinary team of professionals to assess and address a client's needs, guided by the client's desires and goals, as essential to public defense.<sup>170</sup> That is holistic defense at its core. The 2023 principles also call for other characteristics of public defense that will improve the delivery of defense services to the accused, such as independence, training and supervision, control of workloads, and adequate funding.<sup>171</sup> In addition, the 2023 principles speak to the need to "prioritize diversity and inclusion" in recruitment and retention to ensure that the public defender's office is as diverse as the community it serves.<sup>172</sup> They press defender offices to collect demographic data to ensure that defense providers "are meeting the needs of a diverse clientele."<sup>173</sup> And they recommend providing training to defenders so that they can deliver culturally competent representation that is free from bias, serves clients "affected by poverty, racism, and other forms of discrimination," and allows defenders to advance "legal challenges based on racial and other forms of discrimination."<sup>174</sup> In a nod to the concerns raised by broader systemic change, the 2023 principles suggest that public defense providers should be consulted when stakeholders

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<sup>168</sup> See AM. BAR ASS'N, 2023 PRINCIPLES, *supra* note 102. While nonbinding, ABA principles are key indicia in the legal profession, serving as a point of reference for ineffective assistance of counsel claims. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.").

<sup>169</sup> AM. BAR ASS'N, 2023 PRINCIPLES, *supra* note 102, at 1. To read the 2002 principles, see STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) [hereinafter AM. BAR ASS'N, 2002 PRINCIPLES].

<sup>170</sup> See AM. BAR ASS'N, 2023 PRINCIPLES, *supra* note 102, at 6 (encouraging public defense providers to adopt a holistic, client-centered approach to representation, "based around understanding a client's needs and working with them to achieve their goals"). Principle 9 also calls for the inclusion of "investigators, social workers, mitigation specialists, experts, and other specialized professionals necessary to meet public defense needs" and suggests that defenders can "offer direct assistance with such issues or establish collaborations with, or provide referrals to civil legal services organizations, social services providers, and other lawyers and non-lawyer professionals." *Id.* This represents a marked shift from the last set of principles promulgated in 2002, right around the same time as the Executive Sessions on Public Defense. The 2002 principles make no mention of holistic defense and are focused on the criminal case alone. See AM. BAR ASS'N, 2002 PRINCIPLES, *supra* note 169. The 2002 Principles also suggest that defenders "should participate as an equal partner in improving the justice system." *Id.* at 3.

<sup>171</sup> See AM. BAR ASS'N, 2023 PRINCIPLES, *supra* note 102, at 3–6 (Principles 1, 2, 3, and 7).

<sup>172</sup> *Id.* at 3 (Principle 1).

<sup>173</sup> *Id.* at 4 (Principle 4).

<sup>174</sup> *Id.* at 6 (Principle 7).

consider legal system reforms and should be considered “legal system partners.”<sup>175</sup>

What is missing from the modern vision? Nothing speaks to dismantling the criminal system from within.<sup>176</sup> Nor is there any discussion of building new systems and institutions to replace or displace the criminal apparatus. Even in the modern vision of public defense, the system is situated as early public defense advocates viewed it—broken but amenable to repair, rather than broken by design.<sup>177</sup> Echoing sentiments of the past, public defenders are to play a reparative and legitimizing role vis-à-vis the system. The notes of consensus from the Executive Sessions, though from an earlier era, put a finer point on it: “Public defenders have a role to play in protecting due process rights . . . [The] [p]ublic defender role here is key to [the] public believing in the system!”<sup>178</sup> History, politics, and our current conditions suggest it is long past time for that to change. Public defenders should divest from fostering public belief in the system and invest in dismantling it. In the next Part, I explain why.

## II

### INFUSING PUBLIC DEFENSE WITH AN ABOLITIONIST ETHIC

#### A. *Why Public Defense Should Embrace Abolition*

I want to offer two reasons why public defense should embrace an abolitionist ethic. First, abolition orients public defense toward much-needed transformative change, by extending the lessons learned in individual cases to work at a wholesale structural level. That is because an abolitionist ethic encourages defenders to deploy a broader range of tools and tactics alongside holistic defense to address the structural, systemic, and institutional forces that drive people into the criminal system. By pursuing abolition, public defenders expand the opportunity to remake the world for the better.

Second, public defenders are uniquely positioned to carry out an abolitionist agenda. Throughout history, defenders have always searched for ways to do their work as they implement a specific mission. Infusing public defense with an abolitionist ethic is not all that different from

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<sup>175</sup> *Id.* at 7 (Principle 10).

<sup>176</sup> The ABA did promulgate principles aimed at reducing mass incarceration in 2022. *See* WORKING GRP. ON BUILDING PUB. TRUST IN THE AM. JUST. SYS., AM. BAR ASS’N, TEN PRINCIPLES ON REDUCING MASS INCARCERATION (2022) [hereinafter AM. BAR ASS’N, REDUCING MASS INCARCERATION]. Those principles reference public defense once, in the context of a principle aimed at discouraging imprisonment due to one’s indigency. *See id.* at 15.

<sup>177</sup> *See generally* AM. BAR ASS’N, 2023 PRINCIPLES, *supra* note 102; Clarke, *supra* note 125.

<sup>178</sup> Clarke, *supra* note 125, at 7.

what has happened in the past, when public defense has been aimed at reform, directed exclusively at the challenges of an individual's criminal case, or broadened in reach to address the concerns that include and extend beyond a criminal case. That does not make adopting an abolitionist ethic any less difficult, but it does highlight how a mission informs the work of an institution. Public defense and abolition also can be seen as complementary, notwithstanding the sorts of challenges I explore in Part III. That is because public defense is grounded in the sort of productive tensions that can enhance the effectiveness of abolitionist efforts, by infusing the idealism of the abolitionist vision with real world, present-day concerns. I take each of these reasons in turn.

My perspective on abolition is informed by my experiences as a defender in the criminal system. For the better part of the last two decades, I was a state public defender, a civil rights lawyer focused on race and the criminal system, and a federal public defender. I continue to engage in advocacy, litigation, and public education at the intersection of race and the criminal legal system. As a clinician, I train law students who aim to become public defenders.<sup>179</sup> Thanks to those experiences, I have spent my career focused on the criminal system and the people whose lives it touches. In that time, my work has been grounded in holistic defense. I have defended countless individuals caught up in the gears of the criminal system.<sup>180</sup> I have seen the lines of Black and Latine people waiting to enter criminal courthouses, all of whom have been anchored to the criminal system as a witness, a victim, the accused, a concerned citizen, a family member, or a loved one. I have sat in visiting rooms at jails and prisons and observed the stark race, class, and gender lines that define the accused and convicted and those who visit them behind bars. I have represented clients who reluctantly decided to plead guilty at their initial appearance in court, minutes after I met them.<sup>181</sup> They chose to suffer the carceral consequences of their guilty plea to avoid an outcome that would potentially cost them more of their freedom. I have seen the ways that courts, the criminal process, and the actors in the system feed on “harmful narratives about race, culture,

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<sup>179</sup> By the time they have gotten to me, they have worked out for themselves “which side [they] want to be on at this moment in history.” Abbe Smith, *Progressive Prosecution or Zealous Public Defense? The Choice for Law Students Concerned About Our Flawed Criminal Legal System*, 60 AM. CRIM. L. REV. 1517, 1538 (2023) (comparing reasons for joining a progressive prosecutor's office to reasons for joining a client-centered defender's office).

<sup>180</sup> Professor Smith Futrell rightly points out how the defense function is “situated within the machinery of the criminal legal system.” Smith Futrell, *supra* note 33, at 117.

<sup>181</sup> This is consistent with Professor Smith Futrell's observation that while defenders may be committed to challenging the criminal process, “ultimately the defender's job involves helping the client navigate within what is usually a limited and undesirable set of options.” *Id.* at 117.

gender, sexual orientation, [and] ability.”<sup>182</sup> And I have too often felt like a cog in the machinery of criminal injustice, “provid[ing] a veneer of legitimacy” to the system.<sup>183</sup>

What I have witnessed while working “in the shadows of suffering”<sup>184</sup> is brutality, injustice, and a denial of dignity for the overlapping identities of the people enmeshed in the criminal system.<sup>185</sup> The criminal system, in my experience, does not provide any measure of justice or safety. Indeed, I share Bryan Stevenson’s view that “mass imprisonment has littered the national landscape with carceral monuments of reckless and excessive punishment and ravaged communities with our hopeless willingness to condemn and discard the most vulnerable among us.”<sup>186</sup>

Holistic defense alone cannot change that. Indeed, even as holistic defense informs a defender’s efforts to help individual clients, it is not focused on upending the structural arrangements that feed on carceral logics. I return here to the example of Jordan Neely, offered at the outset. Holistic defense, even at its best, could only do so much for him, because what he really needed was to live in a society built on a different set of supportive structural arrangements. Holistic defense is akin to the Underground Railroad during the era of enslavement. It is absolutely essential, in that it aims to extract people from a harmful institution and cut off the supply of human capital that feeds it. But as indispensable as that work is, it is not a direct, frontal assault aimed at ending that institution. Bold, additional action is needed to curb the harms the criminal system visits on all of us, particularly the most vulnerable. Criminal injustice is a stubborn foe. It has proven impervious to reforms

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<sup>182</sup> *Id.* at 118.

<sup>183</sup> *Id.*

<sup>184</sup> Daniel S. Harawa, *In the Shadows of Suffering*, 101 WASH. U. L. REV. 1847, 1853–54 (2024) (arguing that reform, abolition, and minimalism projects all have value in relieving the suffering of mass incarceration).

<sup>185</sup> People entangled with the criminal justice system do not fit neatly into the categories to which they are assigned by the system. My clients and their family members—who were overwhelmingly people of color and always indigent—occupied multiple identities at once. They were often the accused, but they were also witnesses to, and victims of, crimes themselves. *See, e.g.*, Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 553 (2014) (referencing the multiple roles played by those who encounter the criminal system). They came from the same impoverished, racially segregated, and over-policed communities. *See, e.g.*, Janet Moore, *G Forces: Gideon v. Wainwright and Matthew Adler’s Move Beyond Cost-Benefit Analysis*, 11 SEATTLE J. FOR SOC. JUST. 1025, 1025 (2013) (referencing the ways in which “poor people and people of color encounter crime and criminal justice systems disproportionately and in multiple roles”).

<sup>186</sup> BRYAN STEVENSON, JUST MERCY 313 (2014). *See also* Smith Futrell, *supra* note 33, at 120 (explaining how defenders’ observations of the criminal legal system’s failings can contribute to the work of abolitionists).

and policy interventions.<sup>187</sup> Efforts to make the system operate more fairly or efficiently have not changed its basic character. The criminal system's excesses and harms demand that public defenders work beyond the status quo. An abolitionist horizon is a different path forward.

To be clear, I am not suggesting that public defense discard or even move away from holistic representation. It marks an evolutionary step forward that has undoubtedly benefited clients caught up in the system.<sup>188</sup> Today, it is among the foundational motivations that drive many people to become public defenders.<sup>189</sup> Holistic public defense work grounded in helping clients to obtain employment, housing, education, and to overcome drug use, mental health concerns, physical ailments, or any other barrier that fostered criminal legal system involvement is essential. But the uncomfortable truth is that if public defense only focuses on "fixing" the person who has been acquired by the criminal system, it risks replicating the individuated vision of the past, failing to address the broken institutional arrangements that bring clients into contact with the criminal system and ensure their return.<sup>190</sup> To revisit an analogy I employed to open this Article, it gets at the crisis but does little to address the culture. Holistic representation of this sort too often feels like a half measure against a criminal legal system that a racial justice lens tells us is designed to perpetuate the status quo and entrench racial inequality.<sup>191</sup> An abolitionist ethic broadens

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<sup>187</sup> Professor Dorothy Roberts, in making the case for abolition of the child welfare system, has advanced a similar claim that has equal applicability to the criminal system: that the efforts to reform it have reduced neither the scope of the system nor the harms it imposes. See Dorothy Roberts, *Why Abolition*, 61 *FAM. CT. REV.* 229, 230 (2023) (noting that while Roberts "participated in numerous reform efforts to reduce the system's racial disparities, population size, and harm[,] [n]one rendered a significant blow to the system's fundamental design, which is centered on accusing, investigating, and regulating families in marginalized communities and putting their children in state custody").

<sup>188</sup> See *supra* notes 157–62 and accompanying text detailing the benefits of holistic defense for clients.

<sup>189</sup> Scholars, including former public defenders, have explored a host of motivations driving public defenders. Service to clients is one common thread highlighted by commentators. See, e.g., Barbara A. Babcock, *Defending the Guilty*, 32 *CLEV. ST. L. REV.* 175, 177–78 (1983–84) (offering several justifications for becoming a public defender); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 *HARV. L. REV.* 1239, 1242–43 (1993) (suggesting empathy and heroism as essential to zealous representation); 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, 1208 (2004) (arguing that respect, dedication to craft, and a sense of outrage sustain public defenders).

<sup>190</sup> In this way, the holistic vision responds to one of the concerns underlying the origins of public defense, namely the "congealment of race, poverty, and incompetence" of clients that made them vulnerable to the criminal system (and to being preyed on by unsavory private defense lawyers), leaving them in need of a public defender. Ossei-Owusu, *supra* note 83, at 1175.

<sup>191</sup> A host of scholars have demonstrated that the criminal legal system is operating as designed. See, e.g., Roberts, *Abolition Constitutionalism*, *supra* note 20, at 42–43

the purview of public defense to include and extend beyond the crises endured by an individual client to structural concerns masquerading as culture. It includes and complements holistic defense, by channeling increased attention toward root cause targets, opening up possibilities for transformative change.<sup>192</sup>

Public defenders also have something valuable to offer to the abolitionist project.<sup>193</sup> Their proximity to the realities of the criminal system can balance the utopian vision that abolition offers with a pragmatism that serves as a rejoinder to its detractors.<sup>194</sup> They bear witness to the ways that structural deprivation feeds the harmful behaviors targeted by the criminal system. Those practical benefits are compounded as the ranks of public defenders are replenished by those coming to the work with a sense that the criminal system needs to be dismantled<sup>195</sup> and replaced with some constellation of institutions and structures that can help people thrive.

Public defenders today are influenced by the social movement activity of the last decade—from Occupy Wall Street to the #StopCopCity campaign.<sup>196</sup> That activity has reframed the challenges

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(“[T]he prison industrial complex works effectively to contain and control black communities as a result of its structural design.”). See generally Radley Balko, *There’s Overwhelming Evidence that the Criminal Justice System Is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system> [<https://perma.cc/NW62-NXA5>]; KARAKATSANIS, *supra* note 35, at 9 (“[T]he punishment system . . . has functioned throughout its history as a mechanism of preserving white supremacy and the distribution of economic wealth and control.”); PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 5 (2017) (“[T]he system is broke on purpose.”); ALEXANDER, *supra* note 118, at 13 (“[M]ass incarceration operates . . . to ensure the subordinate status of a group defined largely by race.”); ISSA KOHLER-HAUSSMAN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS* POLICING 5 [hereinafter KOHLER-HAUSSMAN, *MISDEMEANORLAND*] (discussing how criminal law operates as a form of social control).

<sup>192</sup> The holistic mindset encourages the sort of imaginative expansion of the defense role that complements an abolitionist ethic. See Pinard, *Broadening the Holistic Mindset*, *supra* note 112, at 1068 (“The holistic mindset is an ever-searching one; it critiques the traditional and contemporary practice methods, searches for improved delivery of defense services and constantly presses for role reformation.”).

<sup>193</sup> See Southerland, *The Master’s Tools*, *supra* note 19, at 80–86 (suggesting public defenders act as an institutional actor able to advance an abolitionist agenda in light of the office’s proximity to the community and specialized legal skill set).

<sup>194</sup> See Southerland, *Intersection of Race and Algorithmic Tools*, *supra* note 34, at 563–64 (describing abolition as a steady and piecemeal project).

<sup>195</sup> Even the American Bar Association, in 2022, adopted the Ten Principles on Reducing Mass Incarceration, “urg[ing] federal, state, local, territorial, and tribal legislative and other governmental bodies to adopt policies consistent” with their guidelines. AM. BAR ASS’N, *REDUCING MASS INCARCERATION*, *supra* note 176, at 1. While not all principles are abolitionist by nature, many are aimed at reducing the role of the criminal system in people’s lives. See *id.*

<sup>196</sup> See Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2511–15 (2023) [hereinafter Akbar, *Non-Reformist Reforms*] (detailing the social movement activity of the last ten years).

posed by the criminal system and its connections to racial capitalism.<sup>197</sup> It has also ushered in a new understanding of social movements as catalysts for social and political change.<sup>198</sup> Defenders today, like their predecessors, are prepared to deploy a different set of tools aimed at a more expansive set of targets.

That dynamic is again reflective of history. Throughout the evolution of public defense I described in Part I, defenders constantly sought ways to do their work that responded to the problems the criminal system presented. Today's social movements have identified the criminal system itself as the problem. Connecting public defense to those larger, cohesive social movements is consistent with history.<sup>199</sup>

So what does it mean for a public defender to adopt an abolitionist ethic? In the following Sections, I offer a few thoughts about the core commitments of a public defender's abolitionist ethic, describing lawyering tools that align with those commitments and providing examples of the work being done by public defenders in offices nationwide.

## *B. How Public Defense Can Embrace an Abolitionist Ethic*

### *1. Adopt a Racial Justice Orientation to the Criminal System*

A racial justice orientation is essential to a public defender's abolitionist ethic because abolition demands a deep and persistent engagement with the racial dynamics that define and shape the criminal system.<sup>200</sup> Critical Race Theory (CRT) demands this engagement

<sup>197</sup> Scholar Cedric Robinson first developed the concept of racial capitalism, which highlights the inextricable link between capitalism, race, and racism. *See generally* CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (1983); Olufémi O. Táíwò, *A Framework to Help Us Understand the World*, HAMMER & HOPE, Winter 2023 (highlighting the mutually supportive relationship between racism and capitalism); Akbar, *Non-Reformist Reforms*, *supra* note 196, at 2513 (explaining how social movements have become conscious of, and increasingly targeted at, the symbiotic relationship between capitalism, racism, and colonialism, “mark[ing] the radicalization, a reemergence, or a growth, of a left flank of racial-justice organizing and of a socialist left in the United States”).

<sup>198</sup> “Social movements may expand the capacity of previously excluded or marginalized members of a polity to narrate constitutional meaning despite their numerically or politically weak position in a majoritarian democracy.” Guinier & Torres, *supra* note 36, at 2756 (explaining that “[t]he power of social movements stems from their ability to mount collective challenges by drawing on social networks, common purposes, and shared cultural frameworks”). They can do so through continuous engagement with the law and the formal institutions where law is made, such as courts and legislatures. *Id.*

<sup>199</sup> Farbman, *supra* note 39, at 1949 (explaining how abolitionist lawyers connected their work with broader social and political movements).

<sup>200</sup> “As prison abolitionists describe their objective as dismantling systems rooted in slavery, they often frame their work as a continuation of the struggle waged by black freedom fighters and abolitionists during the slavery era.” Roberts, *Abolition Constitutionalism*, *supra* note 20, at 48; *see also* Morgan, *Abolition Anxieties*, *supra* note 20, at 1203 (explaining that



from its adherents by focusing sustained attention on the relationship between race, law, and power—phenomena that fuel inequality and criminal injustice.<sup>201</sup> CRT asserts that race and racial inequality cast an infinite shadow over all of American life.<sup>202</sup> It situates racism as a permanent phenomenon woven into the nation’s fabric.<sup>203</sup> Thus, race is the line that divides and shapes all of us in myriad ways.<sup>204</sup> Although socially constructed,<sup>205</sup> it is an outcome-determinative variable in the criminal system.<sup>206</sup> Police, prisons, and incarceration are “pillars” of that system; “all have roots in racialized chattel slavery.”<sup>207</sup> That positions “the modern carceral state [as] a descendant of the racial caste system

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abolitionist analysis requires understanding that the modern prison industrial complex is an outgrowth of enslavement, racial capitalism, colonialism, land theft propagated against Native people, and ableist eugenicist policies); Smith Futrell, *supra* note 33, at 182–83 (explaining how abolitionist clinical teaching provides a race-conscious historical context for understanding the criminal system). Notably, the 2023 ABA Principles encourage public defenders and their offices to be concerned with race, poverty, diversity, and cultural competency in ways that align with an abolitionist ethic. AM. BAR ASS’N, 2023 PRINCIPLES, *supra* note 102, at 3, 4, 5–6 (Principles 1, 4, and 7).

<sup>201</sup> See Kimberlé Williams Crenshaw, *This Is Not A Drill: The War Against Antiracist Teaching in America*, 68 UCLA L. REV. 1702, 1710 n.13 (2022) (pointing to Critical Race Theory “as a prism for understanding why racial inequalities are so enduring” and comprising of a commitment to change “the vexed bond between law and racial power”) (internal citation omitted); see also *supra* notes 34–35 and accompanying text.

<sup>202</sup> Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373–74 (1992). See also *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 600 U.S. 181, 393 (2023) (Jackson, J., dissenting) (“History speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.”).

<sup>203</sup> Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 573 (1993) [hereinafter Bell, *Racism Is Permanent*] (“[R]acism is not going to go away. Rather, racism is an integral, permanent, and indestructible component of this society.”); see also Bell, *Racial Realism*, *supra* note 202 (advocating for policies rooted in an understanding that Black people will always be subordinated in America). To be clear, the permanence of racism does not lead inexorably to despair. Instead, that fact can inform efforts to account for, and overcome, its effects echoing the righteous struggles that those subjected to racial inequality have engaged in for centuries.

<sup>204</sup> See Bell, *Racism Is Permanent*, *supra* note 203; Bell, *Racial Realism*, *supra* note 202.

<sup>205</sup> See, e.g., ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 24–25 (2020) (describing race as a social construct); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 108–09 (3d ed. 2015) (explaining that racial formation is a “sociohistorical process by which racial identities are created, lived out, transformed, and destroyed”) (emphasis omitted). Law constructs race by “employ[ing] race as a basis for group differentiation, entrenching the idea that there are ‘in fact’ different races.” Carbado, *Critical What What?*, *supra* note 34, at 1610. Law crafts the racial categories that we assign to people, posits the rules that determine those categories, assigns social meaning to race, and deploys those meanings “to structure hierarchical arrangements.” *Id.* The artificially constructed racial hierarchy acts as a self-fulfilling prophecy, justifying unjust, unfair, and inequitable treatment along racial lines. *Id.*

<sup>206</sup> See Southerland, *Intersection of Race and Algorithmic Tools*, *supra* note 34, at 489–90 nn.3–4.

<sup>207</sup> Roberts, *Abolition Constitutionalism*, *supra* note 20, at 20.

established with the birth of American enslavement.”<sup>208</sup> The criminal system, therefore, operates as designed; racial injustice is chief among its defining features.<sup>209</sup>

The idea that race and the criminal legal system are inextricably bound is not novel. For decades, the relationship between the two has been documented by scholars, advocates, activists, system actors, and the people (including families and communities) who have endured the system.<sup>210</sup> Criminal laws, practices, and policies too often unfairly burden Black people and other people of color.<sup>211</sup> Racial injustice persists as one moves through the criminal system, from arrest to reentry.<sup>212</sup> Our jails, prisons, and other forms of punishment are defined by racial inequality.<sup>213</sup> The Black Lives Matter movement, alongside other justice-focused movements, underscores the racial dynamics that animate policing and the operation of the criminal system more broadly.<sup>214</sup>

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<sup>208</sup> Southerland, *The Master's Tools*, *supra* note 19, at 10; *see also* Roberts, *Abolition Constitutionalism*, *supra* note 20, at 19–20 (discussing how the roots of the criminal legal system can be traced back to chattel slavery).

<sup>209</sup> *See* Southerland, *Intersection of Race and Algorithmic Tools*, *supra* note 34, at 494 (emphasizing that racial inequality is woven into all American institutions).

<sup>210</sup> *See supra* note 191 and accompanying text.

<sup>211</sup> *See, e.g.*, Aamra Ahmad & Jeremiah Mosteller, *After 35 Years, Congress Should Finally End the Sentencing Disparity Between Crack and Powder Cocaine*, THE HILL (Oct. 27, 2021), <https://thehill.com/blogs/congress-blog/politics/578693-after-35-years-congress-should-finally-end-the-sentencing> [<https://perma.cc/88QR-FAF5>] (emphasizing the continued impact of sentencing disparity between crack and powder cocaine); CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ROBERT STEWART, THE SENTENCING PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION (2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights> [<https://perma.cc/J3YW-FVWS>] (describing disproportionate disfranchisement of Black people due to felony conviction).

<sup>212</sup> SUSAN NEMBARD & LILY ROBIN, URBAN INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM 1 (Aug. 2021), <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf> [<https://perma.cc/NAA5-8M8>] (observing that there are racial disparities at every decision point in the criminal legal system); Balko, *supra* note 191 (compiling studies documenting racial bias).

<sup>213</sup> *See* Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities> [<https://perma.cc/7G6A-PJRS>] (summarizing key statistics).

<sup>214</sup> *See* Zackary Okun Dunivin, Harry Yajoun Yan, Jelani Ince & Fabio Rojas, *Black Lives Matter Protests Shift Public Discourse*, PROC. NAT'L ACAD. SCI., Mar. 2022, at 1 (analyzing the effects of Black Lives Matter protests on public awareness of the Black Lives Matter movement's vision of social change); Char Adams, *A Movement, a Slogan, a Rallying Cry: How Black Lives Matter Changed America's View on Race*, NBC NEWS (Dec. 29, 2020), <https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434> [<https://perma.cc/X8KJ-VMR6>] (discussing the broader cultural impact of the Black Lives Matter movement).

A comprehensive racial justice lens grounded in CRT has several demonstrable benefits in the context of an abolitionist ethic.<sup>215</sup> At a basic level, it has explanatory power. It helps us understand why the current system looks and operates as it does. It shows us how our centuries-long conflation of race, fear, dangerousness, and criminality shapes criminal legal system policy and practice.<sup>216</sup> It allows us to see the criminal system for what it often is: a tool wielded by those in power to maintain power, privilege, and the status quo.<sup>217</sup>

It also informs strategic interventions by public defenders and their offices. It suggests that colorblindness perpetuates racial inequality, while race consciousness can upend it.<sup>218</sup> Thus, defenders should raise race and confront it, breaking from practices of the past.<sup>219</sup> At a minimum, that means evaluating the role that race plays

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<sup>215</sup> See Vanita Gupta, *Critical Race Lawyering in Tulia, Texas*, 73 *FORDHAM L. REV.* 2055, 2071–72 (2005) (discussing the importance of presenting counter-narratives that challenge the notion that the criminal legal system is racially neutral and bias-free).

<sup>216</sup> See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (tracing the development of the notion of Black criminality in both the North and South); Corey G. Johnson, *Bryan Stevenson on Charleston and Our Real Problem with Race*, MARSHALL PROJECT (June 24, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/06/24/bryan-stevenson-on-charleston-and-our-real-problem-with-race> [<https://perma.cc/KV2P-9EK3>] (quoting Bryan Stevenson, who describes how America “has failed to overcome a lie of racial difference and white supremacy” that perpetuates the continued narrative that one’s “race makes you presumptively dangerous and guilty”).

<sup>217</sup> Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331, 1350–54 (1988) (discussing how antidiscrimination law has been used to legitimize racial oppression); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 *MICH. L. REV.* 946, 967–68 (2002) (“[T]he Supreme Court’s . . . Fourth Amendment cases legitimize[] and reproduce[] racial inequality in the context of policing.”); Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 *YALE L.J.* 923, 942–43 (1988) (reviewing DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) and arguing that the Constitution maintains an appearance of fairness while perpetuating inequality).

<sup>218</sup> T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 *COLUM. L. REV.* 1060, 1078 (1991) (“[C]olorblind strategies are likely to deny or fail to appreciate the contribution that race-consciousness can make in creating new cultural narratives that would support serious efforts aimed at achieving racial justice.”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 *STAN. L. REV.* 1 (1991) (examining the Supreme Court’s colorblind approach to constitutionalism and its perpetuation of white supremacy); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 *MICH. L. REV.* 2128, 2137–43 (1989) (discussing how race neutrality facilitates racial subordination).

<sup>219</sup> See Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court’s Criminal Jurisprudence*, 110 *CALIF. L. REV.* 681, 720 (2022) (urging lawyers to raise and center race in criminal jurisprudence to “lead to more robust and conscientious decision-making”); Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 *GEO. L.J.* 923, 978 (2022) (arguing that there is “little excuse for lawyers to ignore the racialized aspects of police-citizen contacts in the Fourth Amendment context, especially when litigating on behalf of a client of color”); Walker Sterling, *supra* note 96, at 2264 (describing how recent social

at every stage of a criminal proceeding, assessing its influence, and taking proactive steps to reduce and eliminate that influence.<sup>220</sup> A growing compendium of resources<sup>221</sup> provides comprehensive guidance about how to do so in counseling clients,<sup>222</sup> providing representation at arraignments,<sup>223</sup> engaging with the prosecution,<sup>224</sup>

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science and empirical research shows that raising race “reduces reliance on stereotypes,” thus making “explicit discussion of race” a “prudent litigation strategy”); Brief for Center on Race, Inequality, and the Law et al. as Amici Curiae Supporting Petitioner 3–4, *Knights v. United States*, 142 S. Ct. 709 (2021) (No. 21-198) (raising race as a consideration for purposes of a seizure analysis under the Fourth Amendment); *United States v. Davis*, 793 F.3d 712, 721 (7th Cir. 2015) (lowering the standard for obtaining discovery in a selective prosecution case related to government use of fake stash houses to arguably disproportionately target Black and Latine people); Eduardo R. Ferrer & Kristin N. Henning, *Critical Clinical Frames: Centering Adolescence, Race, Trauma, and Gender in Practice-Based Pedagogy*, 30 *CLINICAL L. REV.* 113, 127–31 (2023) (describing how to deploy a racial justice lens to shift the dominant narrative about a case); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 *U.C. IRVINE L. REV.* 843, 866–69 (2015) (arguing that raising race through the jury selection process can combat implicit bias in the criminal courtroom); *Impact Litigation*, THE BRONX DEFS., <https://www.bronxdefenders.org/programs/impact-litigation> [<https://perma.cc/HRN7-J65B>] (describing the Impact Litigation Practice as “challeng[ing] . . . systemic violations and injustices that affect larger groups of our clients, including racially-discriminatory policing”). At a bare minimum, public defender’s offices must acknowledge the role that race and racism plays in the operation of the criminal legal system.

<sup>220</sup> While there is undoubtedly value in exploring how defenders should engage with race in the course of their work, such a discussion is beyond the scope of this essay, though ripe for future scholarship. My aim here is to encourage defenders to prioritize undertaking this work at multiple levels.

<sup>221</sup> *Race and Public Defense*, NAT’L ASS’N OF CRIM. DEF. L. (Nov. 29, 2022), <https://www.nacdl.org/Content/Racial-Disparity-and-Public-Defense> [<https://perma.cc/NZ3Q-WN5F>] (compiling resources on race and public defense); *Racial Disparity Resources*, NAT’L ASS’N OF CRIM. DEF. LAWS. (Sept. 27, 2023), <https://www.nacdl.org/Content/RacialDisparityResources> [<https://perma.cc/9AYA-UCYF>] (list of resources on racial justice for public defenders); see generally 30 *THE ADVOCATE* 1 (2008), <https://dpa.ky.gov/wp-content/uploads/2020/10/Litigating-Race-Issues.pdf> [<https://perma.cc/J5Q6-RLNP>] (compiling training materials to litigate race in criminal defense practice).

<sup>222</sup> See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33, 41, 49 (2001) (offering a framework for crosscultural competent lawyering that acknowledges, among other things, differences in race); Kristin A. Henning, *Race, Paternalism and the Right to Counsel*, 54 *AM. CRIM. L. REV.* 649, 681–86 (2017) (discussing techniques defenders can use to combat their own implicit racial bias).

<sup>223</sup> Brandon Buskey & Andrea Woods, *Making Sense of Pretrial Risk Assessments*, *CHAMPION*, June 2018, at 18 (describing strategies for combatting the racial bias embedded in pretrial risk assessment tools); GEORGETOWN JUV. JUST. CLINIC & INITIATIVE & NAT’L JUV. DEF. CTR., *YOUTH DEFENSE RAISING RACE CHECKLIST: RACIAL JUSTICE FOR YOUTH: A TOOLKIT FOR DEFENDERS* (Aug. 2021) [hereinafter, *RACIAL JUSTICE FOR YOUTH*], <https://www.defendracialjustice.org/wp-content/uploads/toolkit-files/Case-Advocacy/Raising-Race-Checklist-Updated-August-2021.pdf> [<https://perma.cc/KS4D-SSCV>].

<sup>224</sup> See Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 *J. CRIM. L. & CRIMINOLOGY* 93, 130–40 (2020) (describing strategies for practitioners engaged in plea bargaining).

reviewing discovery and conducting investigations,<sup>225</sup> litigating pretrial motions,<sup>226</sup> preparing for trial,<sup>227</sup> conducting voir dire,<sup>228</sup> examining witnesses,<sup>229</sup> and at sentencing.<sup>230</sup> In both individual cases and broader challenges to the criminal system, it means highlighting the range of ways race plays a part in a criminal case, including the racial disparities that define policing, prosecution, punishment, and life afterward. It means viewing the criminal system through a racial justice lens and proceeding accordingly.<sup>231</sup>

Other dimensions of CRT can help defenders make sense of their place in a senseless system. Interest convergence—the idea that those in power will only advance the interests of the oppressed when doing so is in the interests of the powerful—illuminates the myriad tensions and tradeoffs that plague the representation of individuals accused of

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<sup>225</sup> See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2635–48 (2013) (explaining how implicit bias negatively affects public defender judgments on evidence and offering practical solutions).

<sup>226</sup> See *State v. Sum*, 511 P.3d 92, 97 (Wash. 2022) (holding that race and ethnicity matter in interactions with law enforcement); Brief for Center on Race, Inequality, and the Law et al. as Amici Curiae Supporting Petitioner, *Knights v. United States*, 142 S. Ct. 709 (2021) (No. 21-198) (arguing that race impacts interactions with police).

<sup>227</sup> See Walter I. Goncalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer's Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. SOC. JUST. 333 (2020); NACDLvideo, *Race, Class and Attorney Client Privilege Webinar*, YOUTUBE (March 31, 2021), <https://www.youtube.com/watch?v=opJaAvW2S10> [<https://perma.cc/EC2W-6FP9>] (hosting discussion with Stanford Assistant Professor of Sociology Dr. Matthew Clair, Travis County Chief Public Defender Adeola Ogunkeyede, and Bronx Defenders Supervising Attorney Porsha-Sha'fon Venable); L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 885–92 (2017).

<sup>228</sup> See Eric J. Davis, *Race and Voir Dire*, NAT'L ASS'N OF CRIM. DEF. L. (Jan. 10, 2019), <https://www.nacdl.org/getattachment/cd19fea6-e507-483a-9248-3913fcf75e9f/race-and-voir-dire.pdf> [<https://perma.cc/7MJF-PVWS>] (offering advice on conducting voir dire for racial bias).

<sup>229</sup> See Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243 (2018).

<sup>230</sup> See Nancy L. McGunn, *Sentencing: Practice*, NAT'L ASS'N OF CRIM. DEF. L. (Sept. 15, 2017), <https://www.nacdl.org/Media/SentencingPracticeNancyLMcGunn> [<https://perma.cc/8UXC-JSF3>] (offering advice on addressing race in sentencing practice).

<sup>231</sup> The Yolo County Public Defender's Office in California, for example, explains that it “acknowledge[s] that racism, racial disparities, and bias pervade the criminal legal system and have profound and reaching effect on our clients” and that it is “devoted to dismantling and ending systemic racism and bias in our local criminal legal system and achieving better outcomes for clients by pursuing each case with commitment, professionalism and teamwork.” *About Us*, YOLO CNTY., <https://www.yolocounty.org/government/general-government-departments/law-justice/public-defender/about-us> [<https://perma.cc/Y8LZ-PR3A>] (discussing how the Yolo County Public Defender's Office approaches its work with a racial justice lens).

crimes in a system grounded on racism and unfairness.<sup>232</sup> For example, the criminally accused may stand to save years of incarceration, supervision, or other forms of punishment in exchange for a guilty plea. The resolution of a criminal case through a plea bargain has benefits for the government, too—saving it time, energy, and resources that would otherwise be used to prosecute.<sup>233</sup> That is interest convergence at work.

There are also valuable insights to be drawn from the idea that racism is a force so embedded in our society as to be permanent, a view most prominently advanced by Professor Derrick Bell.<sup>234</sup> First, this idea clarifies the public defender's targets. While all empires must fall,<sup>235</sup> the ideas behind them endure.<sup>236</sup> The civil rights activist W. Haywood Burns summed up the challenge succinctly: "It is unreasonable to think that in a racist society the law or any institution, can completely transcend that racism. Changing the law involves changing America."<sup>237</sup> Given Professor Bell's assertion about the permanence of racism, it is useful to draw on his guidance about what to do in the face of such difficult odds. Professor Bell suggests that "[w]e must first recognize and acknowledge (at least to ourselves) that our actions are not likely to lead to transcendent change and, may indeed, despite our best efforts, be of more help to the system we despise than to the victims

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<sup>232</sup> Bell, *Interest-Convergence*, *supra* note 83, at 523 (explaining concept of interest convergence).

<sup>233</sup> See Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 *FORDHAM L. REV.* 1999, 2005–06 (2022) (explaining how guilty pleas save prosecutorial costs); see also Martin Sabelli, *The Trial Penalty*, in *EXCESSIVE PUNISHMENT: HOW THE JUSTICE SYSTEM CREATES MASS INCARCERATION*, *supra* note 52 (discussing the risks defendants take in turning down a plea bargain and the coercive effects of the plea bargaining system).

<sup>234</sup> See Bell, *Racism Is Permanent*, *supra* note 203; DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, ix (1992) [hereinafter BELL, *FACES AT THE BOTTOM OF THE WELL*]; see also Robin Steinberg, *Addressing Racial Disparity in the Criminal Justice System Through Holistic Defense*, *THE CHAMPION*, July 2013, at 51 (explaining that the ingrained nature of racial inequality makes it impossible for public defenders to eliminate racism, even as they should address racially discriminatory practices when they arise).

<sup>235</sup> Professor Michelle Alexander agrees with Professor Bell's view that racism is woven into America's DNA and thinks that it is "unlikely that [Americans] will ever do what is necessary to uproot the racism that is embedded in our political and economic systems and attempt to remedy it." Michelle Alexander, *The Society We Want*, in *CARVING OUT A HUMANITY* 316 (Janet Dewart Bell & Vincent M. Southerland eds., 2020). Yet, she further believes that "revolutionary change is possible, because no empire lasts forever." *Id.*

<sup>236</sup> See BELL, *FACES AT THE BOTTOM OF THE WELL*, *supra* note 234, at ix (identifying racism as "an integral, permanent, and indestructible component of this society").

<sup>237</sup> Haywood Burns, *Can a Black Man Get a Fair Trial in This Country?*, *N.Y. TIMES* (July 12, 1970), <https://www.nytimes.com/1970/07/12/archives/cans-a-black-man-get-a-fair-trial-in-this-country-can-a-black-man.html> [https://perma.cc/2VM8-7L9V].

of that system whom we are trying to help.”<sup>238</sup> That recognition can produce advocacy efforts that underscore a steadfast commitment to change—a sense of the advocate’s determination that can demoralize the oppressor.<sup>239</sup> For Professor Bell, there is value in struggle, for what it expresses and for its potential to produce change: “Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor.”<sup>240</sup>

Thus, the idea that racism is permanent suggests that defenders, rather than toiling away at the impossible task of eliminating racism, fight while focused on the systems and institutions animated by pernicious forces that are being brought to bear against clients. It suggests that resistance, in and of itself, has value.<sup>241</sup> Both of these views, explored below, animate the other dimensions of an abolitionist public defense ethic.

Despite the value of deploying a racial justice lens, a word of caution is in order. Advancing racial justice, while critical, also demands that defenders be strategic and do so in consultation with clients facing criminal charges. That is because clients may have different goals and unique aims that have less to do with a frontal assault on racial injustice and more to do with escaping the clutches of the criminal system. While it may be satisfying to call out a racist prosecutor, judge, or police officer, that feeling of satisfaction must yield to the client’s goals.

The racial justice lens this Article envisions has additional implications for a public defender’s work. It reminds defenders to privilege a view of the world and the criminal system from the perspective of the oppressed and dispossessed.<sup>242</sup> That standpoint grounds policy and practice choices with those at the bottom.<sup>243</sup> It forces attention to the question of what someone like Jordan Neely would have needed to thrive. It highlights multiple vectors of a client’s identity that, in combination, serve as targets for unjust treatment under the

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<sup>238</sup> Bell, *Racism Is Permanent*, *supra* note 203, at 587.

<sup>239</sup> *See id.*

<sup>240</sup> *Id.*

<sup>241</sup> *See* Bell, *Racism Is Permanent*, *supra* note 203, at 587 (“[T]he imperative of action is [not] dependent on a certainty of eventual victory. . . . The evil of racism is ours to define. Its challenge awaits our commitment. Our triumph is assured at the moment we rise to that challenge.”).

<sup>242</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987) [hereinafter Matsuda, *Looking to the Bottom*] (“When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge.”).

<sup>243</sup> *Id.* at 359–60.

law.<sup>244</sup> And it encourages the use of data and empirics to underscore how racial inequality operates.<sup>245</sup>

Different dimensions of the work being done by public defenders exemplify what it means to deploy a racial justice lens. The work can be internally or externally focused; it can inform practice and shape policy. Sometimes, for a defender or their office, it is as simple as clearly stating the office's duty to advance racial justice. Brendon Woods, the Alameda County Public Defender, is explicit about the responsibility his office has to fight the racialized harms of the criminal system.<sup>246</sup> He does so while speaking to his own identity and experiences:

I bring my personal perspective and experience as a Black man in America to this work and to my vision for the future of this office. I witnessed first-hand the havoc the criminal legal system wreaked on members of my own family growing up, so I understand deeply the injustices that face all people, but particularly Black and [B]rown people, in the legal system. Addressing this is part of my mission as the Public Defender.<sup>247</sup>

The Legal Aid Society of New York's Racial Justice Unit (RJU) works to ensure that racial justice is fully integrated into the office's work and that Legal Aid's "organizational policies, practices and systems fit within a racial equity framework."<sup>248</sup> The RJU "raises critical awareness of the systemic oppression that communities of color experience through the use of research, policy advocacy, impact litigation, community engagement and strategic communication."<sup>249</sup> The King County Department of Public Defense in Washington State, meanwhile, "work[s] with partners to address racial disproportionality in the criminal legal system[, t]he collateral consequences of system

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<sup>244</sup> Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991) (explaining that her "focus on the intersections of race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed"); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (1989) (advocating for a rethinking of the antidiscrimination framework to incorporate the unique intersection of race and gender identity).

<sup>245</sup> See Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WIS. L. REV. 443 (2016).

<sup>246</sup> Brendon Woods: *A Message from the Public Defender*, ALAMEDA CNTY. PUB. DEFS., <https://publicdefender.acgov.org/MeetYourPD.page> [<https://perma.cc/98BA-GY56>].

<sup>247</sup> *Id.*

<sup>248</sup> *Racial Justice Unit*, THE LEGAL AID SOC'Y, <https://legalaidnyc.org/programs-projects-units/racial-justice-unit> [<https://perma.cc/A2ZZ-VF DU>].

<sup>249</sup> *Id.*



involvement[, and o]ther structural and systemic issues that harm [their] clients.”<sup>250</sup>

Racial justice work can also lead defenders or their offices to advance arguments that challenge the racialized enforcement of the law. In 2021, a collection of New York public defender’s offices and Black public defenders filed an amicus brief<sup>251</sup> in *New York State Rifle & Pistol Ass’n v. Bruen*,<sup>252</sup> highlighting the disproportionate burden felt by their Black and Latine clients in the enforcement of gun control laws against communities of color.<sup>253</sup> From 2014 to 2018, a coalition comprised of the Federal Defender Program for the Northern District of Illinois, private criminal defense attorneys, law professors, and the University of Chicago School of Law’s Federal Criminal Justice Clinic litigated motions to dismiss a series of so-called “stash house” sting cases.<sup>254</sup> The motions, filed on behalf of forty-three people in a dozen cases, alleged that federal law enforcement engaged in racially selective enforcement by targeting communities of color for arrest and prosecution.<sup>255</sup> The result was time served or otherwise substantially reduced sentences for all forty-three clients and improved access to discovery about race and police conduct for future litigants in several other federal circuits.<sup>256</sup>

Confronting race and racism in public defense also means looking inward. That includes hiring with diversity in mind—from experience to identity to racial justice expertise—at all levels, from staff to leadership.<sup>257</sup> It involves engaging with substantive training that improves advocacy

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<sup>250</sup> *Public Defense*, KING CNTY., <https://kingcounty.gov/en/legacy/depts/public-defense> [<https://perma.cc/4JBC-AQJX>].

<sup>251</sup> Brief of the Black Att’ys of Legal Aid as Amici Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1 (2022) (No. 20-843).

<sup>252</sup> 597 U.S. 1 (2022).

<sup>253</sup> Brief of the Black Att’ys of Legal Aid as Amici Curiae in Support of Petitioners, *supra* note 251, at 3–4. For a discussion of the public defenders’ brief, see Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449 (2022). For a discussion of the Court’s invocation of race in *Bruen*, see Daniel S. Harawa, NYSRPA v. Bruen: *Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163, 164 (2023).

<sup>254</sup> *Stash House Impact Litigation: Fighting Racially Selective Law Enforcement*, U. CHI. L. SCH., <https://www.law.uchicago.edu/clinics/mandel/fcjc/racially-selective-law-enforcement> [<https://perma.cc/NV9W-EUSV>]. See also Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 1024–25 (2021) (highlighting changes set in recent case law that enabled the clinic to proceed).

<sup>255</sup> U. CHI. L. SCH., *supra* note 254.

<sup>256</sup> *Id.*

<sup>257</sup> See Walter I. Gonçalves, Jr., *Outsider Public Defenders as Organic Intellectuals*, 32 BERKELEY LA RAZA L.J. 1, 2–4 (2022) (arguing for “the recruitment, hiring, and investment of lawyers of color,” termed “outsiders,” in public defense); see also Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1499 (2021) (arguing for cultural competency and racial consciousness in client’s choice of defense counsel).

and addresses the internal dynamics of public defender's offices that can too often inhibit racial justice.<sup>258</sup> While detailing every training, conference, and convening is beyond the scope of this Article, a few examples stand out as models to replicate.

In 2014, for example, the Contra Costa Public Defender's Office formed its Racial Justice and Diversity Committee.<sup>259</sup> The Committee was formed following protests by the office in support of the Black Lives Matter movement.<sup>260</sup> The local district attorney's response to these protests—"claim[ing] that his office's filing decisions and the criminal justice system are color blind"—ultimately sparked the creation of the Committee.<sup>261</sup> The Committee, comprised of office staff—from attorneys to investigators—is dedicated to advancing racial justice in the Contra Costa criminal legal system while also supporting work to reduce their own biases in service of clients.<sup>262</sup> The reach of the Committee's work was extended by its connection to a national racial justice committee, as well as a Bay Area collaborative of public defenders dedicated to advancing racial justice.<sup>263</sup>

Additionally, the Public Defender Service of Washington, D.C. created an internal racial justice working group, tasked with implementing "anti-racist policies and principles" across the office.<sup>264</sup> In 2021, the National Legal Aid and Defender Association (NLADA), "America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford

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<sup>258</sup> The racial homogeneity of the legal profession informs the racial makeup of public interest organizations, including public defender's offices. *See generally* Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law*, 12 CALIF. L. REV. ONLINE 1 (2021). At the same time, "segments of public interest law often get a pass on questions of race because it is a field of law that is genuinely concerned with marginalized communities." *Id.* at 2. Those dynamics work in combination to produce "racial oversights" that can show up in hiring, strategy, leadership, organizational mission, the delivery of legal services, and the failure to detect racial bias and racial injustice. *Id.* Public defenders are not immune to these forces. *See* Anthony Naro, *Can Public Defenders Be Racist? Yes.*, WE THE PEOPLE BLOG, (Aug. 3, 2020), <https://gideonssoldiers.com/can-public-defenders-be-racist> [<https://perma.cc/YS2P-2FPN>] (describing how public defenders can be unaware of their own anti-Black biases); *see generally* Richardson & Goff, *supra* note 225 (explaining how implicit bias negatively affects public defender judgments).

<sup>259</sup> *Specialty Areas: Racial Justice*, CONTRA COSTA PUB. DEFS., <https://www.cocpublicdefenders.org/racial-justice> [<https://perma.cc/4KWH-QQ54>].

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Aasha Rajani, *A Public Defense Perspective: An Interview with Heather Pinckney, Director of Public Defender Service for the District of Columbia*, 60 AM. CRIM. L. REV. 1, 7 (2023) (describing the internal racial justice group as providing advances in community engagement beyond just one client).

counsel,”<sup>265</sup> launched its Racial Equity Initiative.<sup>266</sup> The Initiative is “a three-year campaign designed to build the resources and capacity within the client community and civil legal aid and public defender organizations to advance anti-racist practices aimed at dismantling racial inequities in America.”<sup>267</sup> Central to the campaign is training leaders to advance racial equity, working to ensure that NLADA members adopt and deploy anti-racist practices, and fostering collaboration and partnerships to advance racial equity.<sup>268</sup>

And the National Association for Public Defense (NAPD), founded in 2013, “engages all public defense professionals into a clear and focused voice to address the systemic failure to provide the constitutional right to counsel, and to collaborate with diverse partners for solutions that bring meaningful access to justice for poor people.”<sup>269</sup> The NAPD hosted its fourth annual Racial Justice Conference, which examined individual defender biases, “racial equity and fairness” in defender offices, and strategies to litigate race, “with a focus on challenging racial bias and discrimination wherever we encounter it.”<sup>270</sup> These examples of racial justice at three levels—internal, external, and substantive—are the sort of engagement that defenders and their offices need to undertake racial justice.

Other efforts focus specifically on the challenges and choices faced by defenders of color. In 2017, a collection of Black attorneys at the Legal Aid Society of New York formed the group Black Attorneys of Legal Aid to address concerns grounded in equality, inclusion, and diversity at Legal Aid.<sup>271</sup> The Black Public Defender Association (BPDA), a section of the NLADA, was founded in 2018 to “improve the quality of defense provided to low-income communities across the United States by creating and maintaining a national network of skilled Black public defenders that identify with and are committed to the populations they serve.”<sup>272</sup> Critically, the BPDA was founded to support defenders who

<sup>265</sup> NAT’L LEGAL AID & DEF. ASS’N, <https://www.nlada.org> [<https://perma.cc/GB2W-FZAX>].

<sup>266</sup> *Support the Campaign*, NAT’L LEGAL AID & DEF. ASS’N, <https://nladarei.org/support-the-campaign> [<https://perma.cc/3CWY-P5L6>].

<sup>267</sup> *Racial Equity Initiative*, NAT’L LEGAL AID & DEF. ASS’N, <https://www.nlada.org/issues-and-initiatives/racial-equity-initiative> [<https://perma.cc/D32D-B6LH>].

<sup>268</sup> NAT’L LEGAL AID & DEF. ASS’N, *supra* note 265.

<sup>269</sup> *Mission*, NAT’L ASS’N. FOR PUB. DEF., <https://publicdefenders.us/mission> [<https://perma.cc/GAF7-HELRL>].

<sup>270</sup> *NAPD – Racial Justice Conference Montgomery 2023*, MICH. STATE APP. DEF. OFF. & CRIM. DEF. RES. CTR., <https://www.sado.org/Calendar/Details/764> [<https://perma.cc/9CC9-VB6Z>].

<sup>271</sup> *See BALA – Black Attorneys of Legal Aid*, FACEBOOK, <https://www.facebook.com/groups/blackattysoflegalaid> [<https://perma.cc/SNE3-T6G6>].

<sup>272</sup> *About Us*, BLACK PUB. DEF. ASS’N., <https://blackdefender.org/about-us> [<https://perma.cc/VMU3-28M9>].

“identify with and come from the communities most disproportionately impacted by the criminal legal system” as essential to the fight against mass incarceration.<sup>273</sup>

These are just a few examples of how public defenders, as individuals and institutions, can employ a racial justice orientation in their work. Adopting such an orientation—whether to shape client representation, inform affirmative litigation, animate policy advocacy, explain the (dys)function of the criminal system, examine the internal dynamics of public defender’s offices, or some combination thereof—is essential to the infusion of an abolitionist ethic in public defense.

## 2. *Deploy a Client-Centered, Holistic Defense Mindset Informed by Resistance Lawyering*

Defenders must treat the carceral state “like a social cancer: . . . fight to eradicate it but never stop treating those affected by it.”<sup>274</sup> Thus, the core work of a public defender vis-à-vis their individual clients is grounded in zealous holistic defense and demands fighting the criminal case and all that comes with it.<sup>275</sup> Such work can rightfully be characterized as harm reduction, which is “embedded into abolitionist practice.”<sup>276</sup> At its heart, the work of public defenders on behalf of their clients must focus on reducing, to the maximum extent possible, the role of the carceral state in their clients’ lives. Public defenders must engage in the short-term (and sometimes long-term) work of reducing harm, treating it as absolutely essential, even as they make sweeping demands for radical change.<sup>277</sup> Heather Pinckney, Director of the Public Defender Service for the District of Columbia, has explained,

Your primary job is to represent the client and you must be careful to not allow one’s personal agenda to overtake that responsibility. I have seen some young people struggle because they come into this work

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<sup>273</sup> *Id.*

<sup>274</sup> Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

<sup>275</sup> See generally ANTHONY G. AMSTERDAM & RANDY HERTZ, TRIAL MANUAL 7 FOR THE DEFENSE OF CRIMINAL CASES (2022) (detailing the core functions of a criminal defense lawyer).

<sup>276</sup> Morgan, *Abolition Anxieties*, *supra* note 20, at 1215 (explaining that “[a]dopting a harm-reduction approach serves to ensure that abolitionists do not end up so concerned with the *theory* of abolition that they fail to consider the *practice* of abolition”); Morgan, *Abolition in the Interstices*, *supra* note 41 (“Abolitionists working within and alongside movements constantly have to grapple with one important reality: that the radically reconfigured world abolitionists seek is not the world abolitionists have now.”).

<sup>277</sup> Morgan, *Abolition Anxieties*, *supra* note 20, at 1214 (“Abolitionists demand radical reform generated through collective struggle and building power over the long term, but they are equally committed to reducing harm in the short term.”).

and while rightly attacking the actors in the system, they get caught up personally and forget how to connect with the needs of the person that they are representing. I see the criminal legal system as a building that is on fire. Public Defenders however, are working to try and rescue all those still stuck inside the building before it is finally burned to the ground. There is space for both those things to coincide together.<sup>278</sup>

That description of the work is focused on the precise needs of the client caught in the clutches of the criminal system: to loosen the system's grip on the client's life. It is an ethic that prioritizes meeting the crisis of the moment—often a crisis that is a symptom of a larger set of a client's challenges.<sup>279</sup>

Resistance is the other essential component of the abolitionist public defender's mindset.<sup>280</sup> Resistance itself is an abolitionist practice. Defenders must be the sand in the gears of the criminal legal system,

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<sup>278</sup> Rajani, *supra* note 264, at 1, 13. Professor Abbe Smith provides an apt description of the role: "Good defenders fight for our clients, enable them to have a voice, and hold the government's feet to the fire—all of which is important in a system bent on crushing those we have a duty to defend. We push back against the unthinking, unfeeling processing of human beings and the destruction of individual human potential." Smith, *supra* note 109. Professor Smith describes the need for building trust with clients, investigating their case, filing pretrial motions to challenge the state, and engaging in trial advocacy as key to "interrupt[ing] and impeded[ing] the government on the inside as others work to change things fundamentally on the outside." *Id.*

<sup>279</sup> Some have compared the work of a public defender to that of an emergency room doctor, where the nature of the problems demands triage. See Richardson & Goff, *supra* note 225, at 2632 ("Similar to hospital emergency rooms, PD offices face demands that far outpace their resources."); see also Giana Magnoli, *Jail Diversion Programs, Criminal Justice Reforms Take Spotlight at Community Forum*, NOOZHAWK (Nov. 21, 2021, 8:25 PM), [https://www.noozhawk.com/jail\\_diversion\\_programs\\_criminal\\_justice\\_reforms\\_community\\_forum\\_20211121](https://www.noozhawk.com/jail_diversion_programs_criminal_justice_reforms_community_forum_20211121) [<https://perma.cc/Y3BV-2AUP>] (describing the County of Santa Barbara Public Defender's holistic defense approach); *Holistic Defense, Defined*, THE BRONX DEFS., <https://www.bronxdefenders.org/holistic-defense> [<https://perma.cc/MX5U-K425>] (providing an overview of holistic defense, which includes "seamless access to services that meet legal and social support needs"); *The Mission, STILL SHE RISES TULSA*, <https://stillsherises.org/our-mission> [<https://perma.cc/SU4W-2UZ3>] (providing holistic representation for indigent mothers).

<sup>280</sup> See Farberman, *supra* note 39, at 1943 ("A threshold requirement for resistance lawyering is that the lawyer uses the tools of a system in order to oppose or dismantle that system."). Of course, resistance is not zero-sum. Defenders have to pick their battles, which is where lofty ideals can so often run aground against the shores of reality. Professor Farberman recognizes this, pointing out that resistance lawyers of today may resist in covert ways, a characteristic that can have its own drawbacks, including limiting public support for resistance-focused efforts and muting the political clarity that can bolster and rejuvenate individual defenders. See *id.* at 1934–35. See also Yaroshefsky, *supra* note 101, at 1222 (explaining that even if defense counsel had an ethical duty to speak truth to power, where that duty conflicts with what is best for the client, it would have to give way to the client's needs).

deploying every tool in their advocacy toolbox<sup>281</sup> to frustrate the system's inherent desire to mark, sort, control, and punish.<sup>282</sup> That means resistance lawyering: “engag[ing] in a regular, direct service practice within a procedural and substantive legal regime that [one] considers unjust and illegitimate.”<sup>283</sup> Stretching beyond the work of zealous defense lawyering, in which a lawyer deploys legal tools to reach a particular outcome from the legal process, resistance lawyering uses legal tools to “*dismantle the process itself*.”<sup>284</sup> It involves viewing the courtroom and the criminal system as a “site of political struggle.”<sup>285</sup> Such practice allows one “to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.”<sup>286</sup>

When holistic defense meets resistance lawyering, public defenders and their offices are doing all they can to free their clients from the grips of the criminal system while working to dismantle that system. That sort of dynamic work requires meeting the client's needs as the client defines them and as determined by the case before the court. Sometimes, that means litigating every legal issue on the way to a trial and beyond.<sup>287</sup> In

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<sup>281</sup> See Farbman, *supra* note 39, at 1945 (describing the range of tools that defenders can deploy to keep their clients out of prison, from “delay” to “engaging in procedural legerdemain and muddling”). The defender's tools can “be understood both as the product of zealous advocacy and sometimes as the product of a more explicit political project aimed at an unjust procedural regime.” *Id.* See also Smith Futrell, *supra* note 33, at 178–79 (explaining that defenders can advance abolitionist goals by “standing on the front lines and working with their clients to resist the infliction of institutional harm”); Walker Sterling, *supra* note 96, at 2264–71 (describing how defenders can use pretrial motions and trial practice to resist the criminal process and combat racial bias).

<sup>282</sup> KOHLER-HAUSSMAN, *MISDEMEANORLAND*, *supra* note 191, at 61, 79–85 (describing steps of the penal system to further surveil and punish individuals).

<sup>283</sup> Farbman, *supra* note 39, at 1880.

<sup>284</sup> *Id.* at 1933. (“The zealous advocate accepts the rules of the game and seeks to play within them to win. The resistance lawyer sees the game as rigged and tries to destroy it from within.”).

<sup>285</sup> *Id.* at 1948. Throughout history, advocates and the accused have used the courtroom to highlight the injustice of the criminal system. See Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589, 599 (2013) (analyzing the trials of the accused who advanced a resistance defense that “sought to compel acknowledgment of the procedural and substantive shortcomings of the law that failed to account for their stories and by extension, their existence”); Joel Whitney, *Angela Davis Exposed the Injustice at the Heart of the Criminal Justice System*, JACOBIN (Apr. 1, 2023), <https://jacobin.com/2023/04/angela-davis-arrest-trial-acquittal-history-criminal-justice> [<https://perma.cc/CX2J-NNVJ>].

<sup>286</sup> Farbman, *supra* note 39, at 1880; see also Smith Futrell, *supra* note 33, at 179 (“Defenders contribute to the work that abolitionists do when they highlight engrained assumptions, expose the failures of policing, overload the system's functioning, and illustrate the social and economic unsustainability of carceral approaches.”).

<sup>287</sup> It may also include helping clients navigate the web of systems that work in concert with the criminal system to erect barriers in a client's life, such as housing, education, family welfare, immigration, and social services benefits. See Elvia Malagón, *Cook County Program Providing Legal Help for Immigrants Starts Taking Cases*, CHI. SUN TIMES (May 9, 2022, 3:21 PM), <https://chicago.suntimes.com/2022/5/9/23063840/>

other instances, it means doing all in a public defender's power to shift the case out of the criminal system through diversion, restorative justice practices, or other alternatives to prosecution and incarceration that can include providing supportive services for every aspect of one's life.<sup>288</sup> At other times, it may require leveraging broader case patterns and trends as the basis of impact litigation that can help disentangle a class of clients from the system or put a halt to particular law enforcement practices.<sup>289</sup>

An abolitionist ethic also informs dimensions of the defender's counseling and communications with their client.<sup>290</sup> A defender deploying an abolitionist ethic might choose to talk with their client about the ordinary injustice that defines the system or the broader political orientation that informs their approach to public defense. The defender can discuss the ways that structures and forces beyond the client's control have produced untenable choices and unfair outcomes. And a defender can connect the client's concerns with broader policy and advocacy efforts to upend harmful systems. These conversations can open up avenues that clients may want to pursue in their own case to resist the criminal system's logic, while affirming the sense that they may already have that the system is unjust.

A holistic mindset and an animating spirit of resistance at every turn can be cold comfort when unmoored from the realities of day-to-day operations in the criminal system. There is a wide chasm between lofty ideals about abolition and life in the bowels of the criminal system that can be demoralizing and undermine any sense of progress in the long struggle against criminal injustice. It is impossible to overemphasize how exceedingly difficult that work can be, particularly when faced with clients accused of terrible crimes. One need look no further than the first few minutes of any local news broadcast to get a sense of the devastation

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chicago-cook-county-public-defender-immigration-court-immigrants-deportation-bond-attorney-legal [https://perma.cc/LE87-PLTF] (describing Cook County public defenders' efforts to provide free legal services for immigrants).

<sup>288</sup> See *Social Services*, DEF. ASS'N OF PHILA., <https://phillydefenders.org/social-services> [https://perma.cc/4M66-B5TY] (emphasizing the importance of viewing a client as a complete person).

<sup>289</sup> See Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 42 (2022) (describing potential resistance lawyering tactics by public defenders, such as "hundreds of motions filed in one day challenging illegal pretrial confinement on unaffordable bail," where the motions "ha[ve] strong legal grounds for immediate individual relief and would also frustrate the normal court and jail operations").

<sup>290</sup> Professor Brendan Roediger has described part of abolitionist practice as demystifying and delegitimizing the legal system, explaining what the legal system actually does and why it operates the way that it does. Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 215 (2021); see also Smith Futrell, *supra* note 33, at 168.

that some can visit upon others. In short, people harm one another, they rob, they kill, and they use substances in ways that can hurt those around them and themselves. Public defenders are duty-bound to defend all of them, too—sometimes multiple times, often alongside dozens of other people accused of all manner of crimes. And the fact that nearly all criminal cases—upwards of 98 percent—end with some sort of guilty plea<sup>291</sup> can generate a sense that the defender is little more than a cog in the machinery of assembly-line injustice—certainly a feeling I often grappled with throughout my time as a public defender.<sup>292</sup>

Despite those feelings and challenges, the amalgam of holistic defense, zealous representation, and resistance lawyering is an essential pillar of the abolitionist public defender ethic.<sup>293</sup> It is at the core of what public defenders do.<sup>294</sup>

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<sup>291</sup> See *2023 Plea Bargain Task Force Report Urges Fairer, More Transparent Justice System*, ABA (Feb. 22, 2023), <https://www.americanbar.org/news/abanews/aba-news-archives/2023/02/plea-bargain-task-force> [<https://perma.cc/KW3T-75H2>]; THEA JOHNSON, AM. BAR ASS'N, *PLEA BARGAIN TASK FORCE REPORT 6* (2023), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf> [<https://perma.cc/EN8X-R5L9>] (noting that plea bargaining is the primary way of resolving criminal cases); see also Sabelli, *supra* note 233, at 71 (“The modern criminal legal system operates as an assembly line of guilty pleas following a weakened, unrecognizable parody of an adversarial process.”).

<sup>292</sup> Defenders have recognized, with increasing urgency, the toll the work of public defense takes on their mental health. See Brandon Vogel, *Vicarious Trauma Is Real...and Really, Really Common with Lawyers*, N.Y. STATE BAR ASS'N (July 22, 2020), <https://nysba.org/vicarious-trauma-is-realand-really-really-common-with-lawyers> [<https://perma.cc/YLB8-P32B>]; Beatrice Ferguson, *The Relentless Mental Toll of Public Defense*, SLATE (Jan. 4, 2023, 5:55 AM), <https://slate.com/technology/2023/01/public-defender-mental-health-trauma.html> [<https://perma.cc/Y93Y-BMVX>]. Though mental healthcare and self-care are critical, changing the structural and institutional dynamics of public defense are necessary steps on the road to addressing those challenges. See, e.g., Shelly Bradbury, *Colorado Prosecutors, Public Defenders Talk About Need for Funding Mental Health: “This Work Takes a Heavy Toll”*, DENVER POST (Apr. 24, 2022, 6:00 AM), <https://www.denverpost.com/2022/04/24/prosecutors-public-defenders-mental-health-funding-bill-colorado> [<https://perma.cc/J5QP-5V4C>] (discussing funding for mental health programs and services).

<sup>293</sup> Partners for Justice (PFJ), a nonprofit organization, works with public defender’s offices to engage in what it calls “collaborative defense.” See Sue Halpern, *How a New Approach to Public Defense Is Overcoming Mass Incarceration*, NEW YORKER (Oct. 5, 2023), <https://www.newyorker.com/news/daily-comment/how-a-new-approach-to-public-defense-is-overcoming-mass-incarceration> [<https://perma.cc/H5PE-DAHA>]. PFJ does so by embedding advocates in public defender’s offices “to take on tasks that would boost a client’s chances for a good outcome, not just in court but in life.” *Id.* Advocates are trained to employ persuasive storytelling methods to “write a persuasive account of a defendant’s circumstances,” to assist clients in obtaining social services, housing, and public benefits, and to engage in work that will otherwise help to “stabilize their lives.” *Id.* At its core, PFJ is providing the sorts of supports that transform a traditional public defender’s office, concerned only with the client’s criminal case, into a holistic office.

<sup>294</sup> See Smith Futrell, *supra* note 33, at 178.



### 3. *Support Social Movements, Practices, and Policies to Shrink Scale, Scope, and Reach of the Criminal Legal System*

Defenders must draw on the tactics, strategies, and goals of movement lawyering to advance broader systemic change. At its core, movement lawyering requires that lawyers “who are accountable to politically marginalized constituencies” work to build the power of social movements and advance movement goals.<sup>295</sup> Movement lawyers view law as a “form of politics” to advance social movement objectives, encouraging direct action, pressuring policymakers to change the law, and empowering individuals to assert their rights.<sup>296</sup>

I do not expect public defenders to transform themselves into movement lawyers en masse; the tactics of each cohort may need to differ dramatically from case to case and scenario to scenario. Indeed, some defenders may feel that the best way to use their skills is in service of defending an individual client facing a criminal charge, leaving it to those who have greater expertise in political advocacy or a deeper interest in social movements to engage in the work that suits them. However, even these defenders have something to offer social movements. They can bear witness to the harms of the criminal system to inform or affirm social movement goals. Their experience in the courtroom can be helpful to craft a comprehensive strategy around the implementation of policies and the effects that changes in the law might have on the lives of their clients. That work can help those engaged in a broader movement differentiate between policies and practices that will shrink the system or create a new set of challenges that ultimately sustain it.

Defenders who choose to work with the same mentality as movement lawyers can do so by explicitly supporting social movements aimed at changing the material conditions for clients, the dynamics that bolster the criminal legal system, and the system’s underlying logic.<sup>297</sup>

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<sup>295</sup> Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1690 (2017) (emphasis omitted).

<sup>296</sup> *Id.* at 1690–91.

<sup>297</sup> Why should a defender office get in the business of supporting social movements? The answer lies in a simple truth: Social movements bring about systematic change. ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* 35, 37 (2016) (describing the importance of social movements as engines of systemic change); Guinier & Torres, *supra* note 36, at 2744–46 (same). Of course, there are contrasts between movement lawyering and criminal defense that can make the two models “appear to be in tension, if not irreconcilable.” Orihuela, *supra* note 111, at 651. Those tensions are worth recognizing but can be overcome. Movement lawyering is more than just supporting mobilized communities. *See id.* It also includes “capacity-building practices, such as connecting clients or their families to community organizations.” *Id.* at 652. This is precisely the sort of work that a public defender’s office can take on.

That means working in true partnership with organizers and community members to build power, shift public consciousness, and help to change the calculus of what is possible.<sup>298</sup> From an abolitionist policymaking perspective, it means advocating to reduce the footprint of the criminal system.<sup>299</sup>

This pillar of the abolitionist public defense ethic presses defenders to march, protest, serve as legal observers, and defend those advocating in the streets. But it also encourages defenders to take other actions when those efforts are inadvisable. It suggests that public defenders engage the media, legislative bodies, litigation, and more in order to support and advance broader social movements. It pushes defenders to think of the courtroom as not only a place to adjudicate a criminal case but also as a space for movement organizing and fostering solidarity among those targeted by the system.<sup>300</sup> Above all else, perhaps, it insists

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<sup>298</sup> See Sharlyn Grace, ‘Organizers Change What’s Possible’, INQUEST (Sept. 23, 2021), <https://inquest.org/organizers-change-whats-possible> [https://perma.cc/8JBL-WVRF] [hereinafter Grace, ‘Organizers Change What’s Possible’].

<sup>299</sup> In the context of abolition, these are advocacy efforts aimed at shrinking the carceral state — “unravel[ing] rather than widen[ing] the net of social control through criminalization.” Akbar, *Non-Reformist Reforms*, *supra* note 196, at 2530 (quoting RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 232 (2007)). One of the central tenets of abolition is advancing what are termed non-reformist reforms. Ultimately, non-reformist reforms “aim to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons. They seek to redistribute power and reconstitute who governs and how.” *Id.* at 2507. The distinction among reforms is not always easy to grasp, and ideological purity is difficult to adhere to in practice. It can be especially challenging to map this framework onto changes in the criminal legal system, where reforms that may bolster the carceral state can relieve immediate pain and suffering for clients in the here and now. For example, an overhaul of the pretrial system may reduce the incarcerated pretrial population. But the implementation of that overhaul may necessitate increased funding for pretrial services, judicial decisionmaking, and client supports—a resource expense that accompanies a carceral reduction. Reality demands that those who adhere to an abolitionist vision understand the spirit of the non-reformist reform heuristic but do not let strict adherence to it undermine an opportunity to reduce and eliminate immediate suffering while pursuing other measures that shrink the criminal system and creating a world where the criminal legal system is unnecessary. Morgan, *Abolition in the Interstices*, *supra* note 41. To put it more pointedly, public defenders must have the capacity to hold both concepts at once and to adopt a “dualist approach” that calibrates to the time, place, and manner of the conflict they are facing. See Fanna Gamal, *What Does Critical Race Theory Teach Us About Non-Reformist Reforms?*, L. & POL. ECON. PROJECT BLOG (Nov. 29, 2023), <https://lpeproject.org/blog/crt-non-reformist-reforms> [https://perma.cc/L22Y-U84E] (citing Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, WOMEN’S RTS. L. REP., Spring 1989, at 8).

<sup>300</sup> Amna A. Akbar, *Justice from Below*, N + 1, (Fall 2023), <https://www.nplusonemag.com/issue-46/politics/justice-from-below> [https://perma.cc/AB2K-WQ3B]; see also Victoria Kim, *Small Doses Podcast: Lawyer and People’s Advocate Olayemi Olurin on Fighting the Racist Prison System*, NEWSONE (Oct. 27, 2023), <https://newsone.com/4772652/small-doses-podcast-olayemi-olurin-prison-system> [https://perma.cc/FY5M-SH4X] (using role as a public

that defenders defer to the wisdom and expertise of those who bring to bear skills, tools, and experiences that they do not have, whether they are community organizers, legislative policy experts, members of the community, or some combination of identities.

Participatory defense, a practice “in which people collectively create agency in situations—criminal court cases—where they ordinarily feel alone” is emblematic of that work.<sup>301</sup> As a methodology, it combines individual advocacy in defense of the accused, community organizing and empowerment, and systemic change.<sup>302</sup> It does so by bringing together a participatory defense hub—community groups, families, friends, allies, and supporters of the accused—in partnership with defenders to provide substantive case advocacy, ranging from fact investigation to preparing sentencing mitigation videos to packing courtrooms to support the accused.<sup>303</sup> The work does not end with individual cases; indeed “the aim is to combine collective advocacy in individual cases with the building of power to change public conversations and policies” in an effort to upend mass incarceration and mass criminalization.<sup>304</sup> Participatory

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defender to build toward movement organizing); *see generally* JOCELYN SIMONSON, *RADICAL ACTS OF JUSTICE* (2023) [hereinafter SIMONSON, *RADICAL ACTS*].

<sup>301</sup> SIMONSON, *RADICAL ACTS*, *supra* note 300, at 95; *see also* MARIAME KABA, *WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 110, 118 (Tamara K. Nopper ed., 2021) [hereinafter KABA, *WE DO THIS 'TIL WE FREE US*] (describing participatory defense as an “important strategy to secure the freedom of criminalized people” and as “grassroots efforts to pressure authorities, attend to prisoner needs, and raise awareness and funds”). For a robust exploration of participatory defense by one of its creators, *see generally* Raj Jayadev, *Protect Your People: How Ordinary Families are Using Participatory Defense to Challenge Mass Incarceration* (2024).

<sup>302</sup> *See* Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 *COLUM. L. REV.* 249, 268–69 (2019) [hereinafter Simonson, *The Place*] (describing how participatory defense brings together communities and allies of the accused to support their defense while also working more broadly to “end . . . mass incarceration through ‘chang[ing] the landscape of power . . . in the criminal justice system’” (citations omitted)); *see also* Moore, Sandys & Jayadev, *Make Them Hear You*, *supra* note 97, at 1289 (describing the power that derives from working in partnership with communities to confront the criminal system in support of the accused through participatory defense); Mariame Kaba, *Free Us All: Participatory Defense Campaigns as Abolitionist Organizing*, *THE NEW INQUIRY* (May 8, 2017), <https://thenewinquiry.com/free-us-all> [<https://perma.cc/76DH-KP6G>].

<sup>303</sup> Simonson, *The Place*, *supra* note 302, at 268–69; *see also* Moore, Sandys & Jayadev, *Make Them Hear You*, *supra* note 97, at 1283–85. For example, the Defender Association of Philadelphia’s Participatory Defense Hub utilizes “[t]rained volunteers and facilitators [to] give participants a deeper understanding of the justice process, what is expected from them at each stage, and suggestions to help them prepare for meetings with their attorney, court dates, and other steps of the process.” *Participatory Defense Hubs*, *DEF. ASS’N OF PHILA.*, <https://phillydefenders.org/participatory-defense> [<https://perma.cc/PU38-6SPF>]. In doing so, Philadelphia’s participatory defense hubs “prepare and empower people navigating the criminal justice system and offer community support to help clients achieve just outcomes.” *Id.*

<sup>304</sup> SIMONSON, *RADICAL ACTS*, *supra* note 300, at 105; *see also* *Participatory Defense: A Community Organizing Model*, *PARTICIPATORY DEF.*, <https://www.participatorydefense.org/>

defense transforms the courtroom, the criminal case, and the criminal legal system into a site “of democratic contestation in which ordinary people’s visions of justice are placed on equal ground with those of elected prosecutors or judges.”<sup>305</sup> It is the essence of what Professors Lani Guinier and Gerald Torres call “demosprudence”: “[L]awmaking as the work of mobilized citizens in conjunction with, not separate from, legal professionals.”<sup>306</sup> In the context of social movements, it “integrate[s] lawyers not as leaders but as fellow advocates.”<sup>307</sup> It aligns with a defender’s obligation to work alongside and in support of clients and their communities. And it is aligned with the sort of “contestatory participation” that is “crucial for democratic justice.”<sup>308</sup>

Participatory defense is not the only means of doing this type of work. Defender offices across the country are engaging in other efforts that advance the goals of broader justice movements. Specialized units in public defender’s offices, for example, have grown in significance as the role of the public defender has expanded.<sup>309</sup> Those units are engaged in affirmative litigation and policy advocacy, informed by the needs of the communities and clients their offices serve.<sup>310</sup> The Defender Association of Philadelphia’s Police Accountability Unit (PAU), founded in 2016, deploys data collection and analysis as part of its efforts to “improve outcomes for Defender clients, aid trial attorneys in their representation of clients with police-related issues, and effectuate

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about [<https://perma.cc/K2RZ-8VYU>] (describing the potential for systemic impact that flows from partnerships between communities and public defenders).

<sup>305</sup> Simonson, *The Place*, *supra* note 302, at 287–88; *see also* Akbar, *supra* note 300 (“Lower courts are among the spaces that determine and deflect how class is lived through the modalities of race, gender, immigration status, and disability.”).

<sup>306</sup> Guinier & Torres, *supra* note 36, at 2743; *see also* Simonson, *The Place*, *supra* note 302, at 287–88.

<sup>307</sup> Guinier & Torres, *supra* note 36, at 2749.

<sup>308</sup> Simonson, *The Place*, *supra* note 302, at 287–88.

<sup>309</sup> *See* Steinberg, *Heeding Gideon’s Call*, *supra* note 97, at 973–74 (2013) (describing the need for specialized civil practice in public defender’s offices); Ingrid Eagly, Tali Gires, Rebecca Kutlow & Eliana Navarro Gracian, *Restructuring Public Defense After Padilla*, 74 STAN. L. REV. 1, 31 (2022) (describing the growth in immigration units after the Supreme Court’s decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010)); Andrés Dae Keun Kwon, *Defending Criminal(ized) “Aliens” After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1078–79 (2016) (highlighting the work of The Bronx Defenders and calling for greater specialized units in immigration consequences).

<sup>310</sup> Special litigation units of this sort have proven integral to public defense. For example, the Legal Aid Society of New York has a wealth of projects, units, and initiatives focused on concerns ranging from employment, consumer protection, and housing to digital forensics, wrongful convictions, government benefits, and disability. *See, e.g., Digital Forensics Unit, THE LEGAL AID SOC’Y*, <https://legalaidnyc.org/programs-projects-units/digital-forensics-unit> [<https://perma.cc/EH7R-TLJ3>].

policy and legal changes related to systemic police misconduct.”<sup>311</sup> The PAU’s data analysis was essential to the passage of the Driver Equality Act,<sup>312</sup> the “first law of its kind in a major US city” that “bars police officers from pulling over drivers solely for certain low-level motor vehicle offenses.”<sup>313</sup> Companion legislation requires the collection and maintenance of a public-facing dataset of traffic stops.<sup>314</sup>

While racial disparities in traffic stops remained a year after the law’s passage,<sup>315</sup> stops associated with targeted offenses dropped by nearly fifty-four percent, a reduction of sixteen thousand interactions between police and civilians.<sup>316</sup> Given how often such interactions are pathways into the criminal system and sources of police violence,<sup>317</sup>

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<sup>311</sup> *Police Accountability Unit*, DEF. ASS’N OF PHILA., <https://phillydefenders.org/practice-units/police-accountability> [<https://perma.cc/4BKT-A98A>].

<sup>312</sup> PHILA., PA., TRAFFIC CODE ch. 12-1700 (effective Feb. 24, 2022).

<sup>313</sup> DEF. ASS’N OF PHILA., *supra* note 311; *see also, e.g.*, Maya Brown & Emma Tucker, *Philadelphia to Become First Major US City to Ban Police from Stopping Drivers for Low-Level Traffic Violations*, CNN (Oct. 30, 2021, 6:26 PM), <https://www.cnn.com/2021/10/30/us/philadelphia-driving-equality-bill/index.html> [<https://perma.cc/27H4-CJFJ>]; *Philadelphia to Become First Major City to Ban Minor Traffic Stops*, NBC NEWS (Nov. 4, 2021), <https://www.nbcnews.com/now/video/philadelphia-to-become-first-major-city-to-ban-minor-traffic-stops-125418565596> [<https://perma.cc/LL2Q-W27V>]; Nigel Roberts, *Philadelphia to Prohibit Cops from Enforcing Minor Traffic Infractions to End Driving While Black Incidents*, BET (Nov. 1, 2021, 1:53 AM), <https://www.bet.com/article/ozupif/philadelphia-police-ban-drivers-minor-infraction-law> [<https://perma.cc/64AB-SMA2>]; TaRhonda Thomas & Maia Rosenfeld, *Driving Equity Bill Addresses Racial Disparities in Philadelphia Traffic Stops*, ABC 6 ACTION NEWS (Oct. 14, 2021), <https://6abc.com/traffic-stops-racial-disparities-policing-inequity/11126493> [<https://perma.cc/NYZ5-7C72>].

<sup>314</sup> *See* PHILA., PA. TRAFFIC CODE § 12-201 (effective Oct. 27, 2021).

<sup>315</sup> The reduction in stops for Black and white motorists was roughly the same, while Black people continue to represent a disproportionate share of traffic stops. Sammy Caiola, *Data Shows Philly Traffic Stops Involving Black Men Are Down 54%*, WHY? (Mar. 6, 2023), <https://why.org/articles/philadelphiadriving-equality-act-data-traffic-stops-black-men-reduction> [<https://perma.cc/3MGY-G37D>].

<sup>316</sup> Anna Orso, Chris Palmer & Kasturi Pananjady, *Philadelphia’s Driving Equality Law Reduced Traffic Stops but not Racial Disparities in Its First Year*, PHILA. INQUIRER (Mar. 3, 2023, 3:21 PM), <https://www.inquirer.com/news/philadelphia-driving-equality-legislation-one-year-results-20230303.html> [<https://perma.cc/E2XS-K4EJ>]; Caiola, *supra* note 315.

<sup>317</sup> *See, e.g.*, Bernd Debusmann Jr., *Why Do So Many Police Traffic Stops Turn Deadly?*, BBC (Jan. 31, 2023, 5:41 PM), <https://www.bbc.com/news/world-us-canada-64458041> [<https://perma.cc/2GKD-KWV8>]; David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html> [<https://perma.cc/4AT3-VKSP>]; Thaddeus Johnson & Natasha Johnson, *If We Want to Reduce Deaths at Hands of Police, We Need to Reduce Traffic Stops*, TIME (Feb. 3, 2023, 1:36 PM), <https://time.com/6252760/reducing-fatal-police-encounters-traffic-stops> [<https://perma.cc/5JXU-8XMG>]; Derek Epp & Megan Dias, *Police Traffic Stops Can Alienate Communities and Lead to Violent Deaths Like Tyre Nichols’—Is It Time To Rethink Them?*, THE CONVERSATION (Feb. 3, 2023, 8:30 AM), <https://theconversation.com/police-traffic-stops-can-alienate-communities-and-lead-to-violent-deaths-like-tyre-nichols-is-it-time-to-rethink-them-181546> [<https://perma.cc/G7QW-KCLQ>]; Sam McCann, *Low-Level Traffic Stops Are Ineffective—and Sometimes Deadly. Why*

the system-shrinking results flowing from the law are commendable. The publicly available data dashboard that the PAU plans to launch “will help policymakers, legal practitioners, and community members understand patterns in car stops since Philly’s Driving Equality law was enacted, identify policing trends and systemic issues across the city, and challenge the effective legality of racial profiling in car stops.”<sup>318</sup> The dashboard “will be automatically updated with the most current data available, will illustrate the intensity of police activity in neighborhoods across the city and show disparities in police stops by race, gender, and age.”<sup>319</sup>

Work like this can help reduce the reach of police and law enforcement while providing communities with the tools to empower them to act on their lived experiences. It can also serve as proof of concept for a downsized, less active system of policing, narrowing their range of responsibilities. Successes like these can be leveraged to make the case for abolition.

Shrinking the criminal system also includes holding law enforcement accountable for their conduct. The Cop Accountability Project (CAP) of New York’s Legal Aid Society is part of the office’s Criminal Defense Practice Law Reform and Special Litigation Unit.<sup>320</sup> The unit “empowers organizations and communities across New York City to hold police accountable for human rights violations.”<sup>321</sup> CAP does so by fostering transparency for police misconduct and, in turn, strengthening accountability.<sup>322</sup> CAP maintains a publicly accessible database of law enforcement misconduct records available to defenders, civil rights lawyers, and community members.<sup>323</sup> Since its internal launch in early 2018, the database has become a national model for tools used to ensure transparency and accountability

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*Are They Still Happening?*, VERA (Mar. 29, 2023), <https://www.vera.org/news/low-level-traffic-stops-are-ineffective-and-sometimes-deadly-why-are-they-still-happening> [<https://perma.cc/87CP-3VKL>]; Sam Levin, ‘It Never Stops’: Killings by US Police Reach Record High in 2022, GUARDIAN (Jan. 6, 2023, 6:00 AM), <https://www.theguardian.com/us-news/2023/jan/06/us-police-killings-record-number-2022> [<https://perma.cc/K22H-WK3E>]; Jamiles Lartey, *How Police Traffic Stops May Change After Tyre Nichols’ Death*, MARSHALL PROJECT (Feb. 11, 2023, 12:00 PM), <https://www.themarshallproject.org/2023/02/11/police-tyre-nichols-traffic-stop> [<https://perma.cc/9Z9F-JMWT>].

<sup>318</sup> *Defender Association Selected for the Catalyst Grant Program*, DEF. ASS’N OF PHILA., <https://phillydefenders.org/catalyst-grant-2022> [<https://perma.cc/3QX6-R92D>].

<sup>319</sup> *Id.*

<sup>320</sup> *The Cop Accountability Project*, THE LEGAL AID Soc’y, <https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project> [<https://perma.cc/DD9T-EC2N>].

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *See Law Enforcement Lookup*, THE LEGAL AID Soc’y, <https://legalaidnyc.org/law-enforcement-look-up> [<https://perma.cc/H2XG-ALFN>].

among law enforcement.<sup>324</sup> The Legal Aid Society's Law Enforcement Lookup (LELU) was publicly launched in late 2022 and includes nearly half a million records involving misconduct by New York City Police Department and New York City Department of Corrections officers.<sup>325</sup> CAP was also instrumental in legislative advocacy that repealed a state law that concealed the disciplinary records of police, shielding reports of official misconduct.<sup>326</sup> In addition to the transparency fostered by LELU and legislative advocacy aimed at exposing instances of police misconduct, CAP engaged in targeted interventions to strengthen accountability for law enforcement misconduct.<sup>327</sup> In 2020, the unit opened a clinic to assist New Yorkers in navigating the civilian complaint review process and to help New Yorkers initiate litigation against the city for police misconduct and file affirmative litigation to challenge police abuse, excessive use of force, and discriminatory policing.<sup>328</sup>

Beyond challenging the behavior of criminal legal system actors and defending clients against the atomized harms of the system,<sup>329</sup>

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<sup>324</sup> Fern E. Gillespie, *Legal Aid Society Cautious About NYPD Neighborhood Safety Teams Program*, OUR TIME PRESS, <https://ourtimepress.com/legal-aid-society-cautious-about-nypd-neighborhood-safety-teams-program> [<https://perma.cc/VYF8-TULA>] (stating that “the [CAP] database has become a national model for defenders collecting police misconduct materials”). See, e.g., Fred Mouniguet, *NACDL to Utilize Legal Aid's CAPstat to Create National Police Misconduct Database*, THE LEGAL AID Soc'y (Sept. 25, 2020), <https://legalaidnyc.org/news/nacdl-legal-aid-capstat-national-police-misconduct-database> [<https://perma.cc/YXZ9-WKM7>]; *NACDL Report Demonstrates Impact of Tracking Police Misconduct and Urges Every Defender to Join the Movement*, NAT. ASS'N OF CRIM. DEF. LAWS. (Sept. 15, 2003), <https://www.nacdl.org/newsrelease/NACDL-Report-Demonstrates-Impact-of-Tracking-Polic> [<https://perma.cc/63T7-RT6Z>] (noting the key role that independent transparency initiatives play in enhancing police accountability outcomes).

<sup>325</sup> Edward Ongweso, Jr., *There's a New, Massive Database of NYPD Misconduct with 450,000 Records*, VICE (Oct. 5, 2022), <https://www.vice.com/en/article/wxn4e9/theres-a-new-massive-database-of-nypd-misconduct-with-450000-records-you-can-search> [<https://perma.cc/VNC7-XVPU>].

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> See, e.g., *NYC Defenders Outline 2022 Legislative Priorities*, THE LEGAL AID Soc'y, <https://legalaidnyc.org/news/nyc-defenders-outline-2022-legislative-priorities> [<https://perma.cc/Z6N9-SMPU>]; Jessica Albert, *Parents and Advocates Question Conditions for Juveniles at Baltimore County Detention Center*, WJZ News (Mar. 21, 2023, 10:06 PM), <https://www.cbsnews.com/baltimore/news/parents-and-advocates-question-conditions-for-juveniles-at-baltimore-county-detention-center> [<https://perma.cc/5TR4-AJPV>] (describing advocacy by the Baltimore County Public Defender's Office on behalf of children placed in adult jails after being charged with crimes); Eric Berger & Mark Berman, *After St. Louis Jail Unrest, Inmates' Advocates Allege Desperate Conditions While Officials Defend Pandemic Response*, WASH. POST (Feb. 8, 2021, 8:06 PM), [https://www.washingtonpost.com/national/after-st-louis-jail-unrest-inmates-advocates-allege-desperate-conditions-while-officials-defend-pandemic-response/2021/02/08/3acfbc52-6a53-11eb-9f80-3d7646ce1bc0\\_story.html](https://www.washingtonpost.com/national/after-st-louis-jail-unrest-inmates-advocates-allege-desperate-conditions-while-officials-defend-pandemic-response/2021/02/08/3acfbc52-6a53-11eb-9f80-3d7646ce1bc0_story.html) [<https://perma.cc/NL4J-498S>] (describing efforts by ArchCity Defenders to create a hotline for incarcerated

public defender's offices nationwide have engaged in policy advocacy aimed at shrinking the carceral state and throwing sand in its gears.<sup>330</sup> Some have called for the closure of jails<sup>331</sup> or opposed the construction of new ones.<sup>332</sup> Some have worked to implement laws and ordinances imposing local control over law enforcement acquisition and deployment of technological tools.<sup>333</sup> Other offices have supported legislative reforms to reduce incarceration, such as limiting the use of pretrial detention. For example, in 2021, after years

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people to report jail conditions and describing impacts of poor conditions on incarcerated people).

<sup>330</sup> See *Criminal Defense Practice Law Reform Team*, THE LEGAL AID SOC'Y, <https://legalaidnyc.org/programs-projects-units/criminal-defense-practice-law-reform> [<https://perma.cc/66X9-93VS>] (discussing various initiatives designed to address systemic injustice wrought by the carceral system); see also, e.g., Grace, 'Organizers Change What's Possible', *supra* note 298 (describing the successful campaign to end money bail in Illinois). In New York, defender organizations have supported a policy platform called the Justice Roadmap. See *Endorsers*, JUST. ROADMAP, <https://justiceroadmapny.org> [<https://perma.cc/L4R5-H2SY>]. The Justice Roadmap brings together advocates, coalitions, and directly impacted people to advance legislative reforms aimed at ending the criminalization of immigrants and Black and Brown communities. See *More Powerful Together.*, JUST. ROADMAP, <https://justiceroadmapny.org/about> [<https://perma.cc/5HUU-8PBE>]. Since its formation in 2018, the coalition has worked to pass legislation to end the suspension of driver's licenses due to the inability to pay fines, prevent Immigration and Customs Enforcement officers from arresting a person for a civil violation while attending or leaving court in the absence of a warrant or court authorization, decriminalize the possession and sale of syringes, curtail police harassment of transgender New Yorkers, provide an avenue to reduce sentences for domestic violence survivors whose offenses relate to their abuse, and limit the use of cash bail in the pretrial system. See *id.*

<sup>331</sup> See, e.g., Allison Kite, *For-Profit Kansas Prison an Understaffed 'Hell Hole' of Violence, Death and Drugs*, KAN. REFLECTOR (Oct. 7, 2021, 9:35 AM), <https://kansareflector.com/2021/10/07/for-profit-kansas-prison-an-understaffed-hell-hole-of-violence-death-and-drugs> [<https://perma.cc/2WLF-V37G>].

<sup>332</sup> See, e.g., Smith Futrell, *supra* note 33, at 120–21 n.80 (citing The Bronx Defenders' opposition to the planned construction of several jails as part of a plan to close the notorious Rikers Island); Letter from Anita Khandelwal, Interim Dir. Pub. Def. of the King Cnty. Dep't Pub. Def., & Christie Hedman, Exec. Dir. of the Wash. Def. Ass'n, to Hon. Dow Constantine, Exec. of King Cnty., Wash. (July 16, 2018) (on file with author) (opposing the construction of a youth jail); Sharon H. Chang, *Protestors Won't Stop Fighting King County's New Multi-Million Dollar Youth Jail*, SOUTH SEATTLE EMERALD (Feb. 23, 2020), <https://southseattleemerald.com/2020/02/23/perspective-protestors-wont-stop-fighting-king-countys-new-multi-million-dollar-youth-jail> [<https://perma.cc/BS4S-B76T>]. This decarceral advocacy has generated tangible wins, such as in King County, where a coalition of public defenders and community organizations successfully shut down a youth jail. See *VICTORY: Less Than a Year After Opening, County Announces Plans to CLOSE the Jail!!!*, #NoNewYouthJail (July 21, 2020) <https://nonewyouthjail.com/2020/07/21/victory-less-than-a-year-after-opening-county-announces-plans-to-close-the-jail> [<https://perma.cc/2S7Z-36L6>] (celebrating King County Executive's Decision to close youth jail by 2025).

<sup>333</sup> See Southerland, *The Master's Tools*, *supra* note 19, at 80–86 (describing actual and potential work by public defender's offices to enforce laws designed to provide community control over law enforcement surveillance technologies).



of organizing and advocacy by a dedicated coalition of grassroots organizations and communities, Illinois enacted the Pretrial Fairness Act<sup>334</sup> which eliminated cash bail and reduced pretrial detention.<sup>335</sup> The former Cook County Public Defender, Amy Campanelli, was an early supporter of the campaign to abolish cash bail and reduce pretrial detention.<sup>336</sup> Her successor, Sharone Mitchell, led an organization that was a vital member of the coalition that helped get the Pretrial Fairness Act passed.<sup>337</sup> As the Cook County Public Defender, Mr. Mitchell was unwavering in his opposition to cash bail and wealth-based pretrial detention, and he welcomed the passage of the Pretrial Fairness Act.<sup>338</sup> Sharlyn Grace, who joined the Cook County Public Defender as a senior policy adviser in 2021, launched a community bail fund in 2016 that later “became a founding member and driving force” within two coalitions that helped pass the Pretrial Fairness Act.<sup>339</sup> Public defender’s offices in New York and the Office

<sup>334</sup> Pretrial Fairness Act, 725 ILL. COMP. STAT. 5/110-1 (2021).

<sup>335</sup> *Pretrial Fairness*, ILL. NETWORK FOR PRETRIAL JUST., <https://pretrialfairness.org> [<https://perma.cc/GST3-BWEU>]; see Sharlyn Grace, *From Reformism to Revolution*, INQUEST (Aug. 15, 2023) [hereinafter Grace, *From Reformism to Revolution*], <https://inquest.org/from-reformism-to-revolution> [<https://perma.cc/V8FR-ML8D>] (describing the road to reform leading to the passage of the Pretrial Fairness Act in Illinois); Kiran Misra, *The Battle Against Money Bonds*, S. SIDE WEEKLY (Feb. 20, 2018), <https://southsideweekly.com/cook-county-battle-money-bond-bail> [<https://perma.cc/7LJE-RWQN>] (describing early years of advocacy).

<sup>336</sup> See Public Defender Amy Campanelli on Reforming Cook County’s Bond Court, COOK CNTY. JUST. WATCH (Nov. 6, 2015), <https://cookcountyjusticewatch.wordpress.com/2015/11/06/public-defender-amy-campanelli-on-reforming-cook-countys-bond-court> [<https://perma.cc/GV6T-DHJQ>]; Misra, *supra* note 335; Jonah Newman & Michael Korsh, *Cook County Replaced Its Public Defender. But She’s Not Done Fighting Yet.*, INJUSTICE WATCH (Mar. 31, 2021), <https://www.injusticewatch.org/news/2021/amy-campanelli-exit-interview> [<https://perma.cc/2XN6-DTDN>].

<sup>337</sup> See Sharone Mitchell, Jr., Opinion, *Ending Cash Bail Will Improve Public Safety*, CHI. TRIB. (Jan. 27, 2021, 5:31 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-no-cash-bail-pritzker-sharone-mitchell-20210127-d22p2zfcnrditavqlfrzywyikustory.html> [<https://perma.cc/A2LY-XZAR>].

<sup>338</sup> See Josh McGhee, *Cook County’s New Public Defender Seeks More Visibility—and Money—for His Office*, INJUSTICE WATCH (June 4, 2021), <https://www.injusticewatch.org/criminal-courts/public-defenders/2021/sharone-mitchell-public-defender> [<https://perma.cc/T88Q-XU3A>]; Melissa Noel, *Illinois Will Become First State To End Cash Bail, Addressing Disproportionate Impact On Communities Of Color*, ESSENCE (Sept. 13, 2023), <https://www.essence.com/news/illinois-will-become-first-state-to-end-cash-bail> [<https://perma.cc/H3PE-49Y7>] (quoting Mitchell’s description of the cash bail system as “a cousin to slavery”); Hannah Meisel, *Disparately Resourced Public Defenders Prepare for the End of Cash Bail in Illinois*, CAPITOL NEWS ILL. (Sept. 15, 2023), <https://capitolnewsillinois.com/news/disparately-resourced-public-defenders-prepare-for-the-end-of-cash-bail-in-illinois> [<https://perma.cc/7DJ3-CBTG>] (discussing Mitchell’s opposition to cash bail and role in crafting the Pretrial Fairness Act prior to becoming chief defender).

<sup>339</sup> See Grace, *From Reformism to Revolution*, *supra* note 335; Grace, ‘Organizers Change What’s Possible’, *supra* note 298 (providing a robust recounting of how the law was passed and the role that the author, Sharlyn Grace, played in the passage of the law).

of the New Jersey Public Defender were instrumental to advocacy overhauling the pretrial systems in both of those states.<sup>340</sup> These are just a few examples of the types of decarceral policy fights that public defenders and their offices should undertake.<sup>341</sup> Ideally, they

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<sup>340</sup> Eli Hager, *New York City's Bail Success Story*, MARSHALL PROJECT (Mar. 14, 2019, 7:00 AM), <https://www.themarshallproject.org/2019/03/14/new-york-city-s-bail-success-story> [<https://perma.cc/2C8V-5M2U>] (describing how a strong cohort of defenders in the Bronx and Brooklyn fought excessive pretrial detention); *see also* *Bail Reform Initiative*, THE BRONX DEF., <https://www.bronxdefenders.org/programs/bail-reform-initiative> [<https://perma.cc/9R7L-ZLUB>] (explaining The Bronx Defenders' work on bail); Linda Poon & María Paula Mijares Torres, *CityLab Daily: Inside the Success of NYC's Cash Bail Reform*, BLOOMBERG (Aug. 31, 2023, 1:02 PM), <https://www.bloomberg.com/news/newsletters/2023-08-31/citylab-daily-inside-the-success-of-nyc-s-cash-bail-reform> [<https://perma.cc/P7DP-CXVE>]; *The Important Role Public Defense Played in New Jersey Bail Reform w/Joseph Krakora*, PUB. DEFENSELESS (Feb. 2023), <https://www.publicdefenseless.com/episodes/3ydrerxg7sag5z6-2a83l-eyylx-2k75k-xxapk-z9bge-g3hyh-66cr4-btxj8-mlnjp-bdxjb-pmjtp-ps98s-asbdx-mmbmr-372zs-5rk6p-n5eft-s3596-wyhnmm-p36g4-hxxdc-652fh-cbbw5-p8en6-c5pck-b3ct2-93ntx> [<https://perma.cc/SSN5-4SF6>] (describing the New Jersey Public Defender's role in shaping bail reform); *see generally* Peter Sterne, *A (Not So) Brief Guide to New York's Bail Reform Evolution*, CITY & ST. N.Y. (May 5, 2023), <https://www.cityandstateny.com/policy/2023/05/not-so-brief-guide-new-yorks-bail-reform-evolution/385379> [<https://perma.cc/7NKJ-3QQ7>] (providing a history of bail reform in New York). In keeping with its pretrial justice work, The Bronx Defenders created the Bronx Freedom Fund, a nonprofit community bail fund to “disrupt the injustice of cash bail in New York City by posting bail for thousands of low-income New Yorkers incarcerated before trial.” *The Bronx Freedom Fund*, THE BRONX FREEDOM FUND, <https://www.thebronxfreedomfund.org> [<https://perma.cc/5ARM-DZJT>]. *See generally* Daniel Chasin, *Two Steps Forward, One Step Back: How New York's Bail Reform Saga Tiptoes Around Addressing Economic Inequality*, 43 CARDOZO L. REV. 273 (2021) (arguing that New York's bail reforms, although successful along some metrics such as reducing prison populations, fail to resolve the economic inequality in the state's pretrial detention system).

<sup>341</sup> Efforts to transform the pretrial system, eliminate cash bail, and reduce the population of people detained pretrial have garnered a great deal of attention in recent years. *See, e.g.*, Claire Savage & Corey Williams, *Illinois to Abolish Cash Bail, Addressing Disproportionate Impact on Communities of Color*, PBS (Sept. 12, 2023, 9:46 AM), <https://www.pbs.org/newshour/politics/illinois-to-abolish-cash-bail-addressing-disproportionate-impact-on-communities-of-color> [<https://perma.cc/N4SW-W46P>]; Roxanna Asgarian, *The Controversy over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020, 8:30 AM), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained> [<https://perma.cc/527V-UDFE>]; Kennedy Sessions, *Harris County Bail Reform Battle Takes Center Stage at Federal Court*, HOUS. CHRON. (Mar. 31, 2023), <https://www.chron.com/news/houston-texas/article/harris-county-bail-reform-17867466.php> [<https://perma.cc/6H44-BXRL>]. In some instances, those efforts have been the subject of a robust body of valuable critique raising questions about whether particular reform efforts are in fact effective. *See, e.g.*, Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 918–19 (2021) (explaining how the use of algorithmic tools to advance bail reform can “mute the holistic demands of contemporary social movements” that seek bail reform). Rather than wading into that debate here, my point is that public defender's offices have been engaged in larger policy fights that seem to push their criminal systems in a decarceral direction by keeping people out of jails and pretrial detention facilities.

are led and driven by clients and their communities, consistent with the sort of connection that an office should have with the community it serves.<sup>342</sup>

#### 4. *Build a New Society: Advance the Positive Dimension of Abolition*

Abolition is more than deconstructive. It is creative.<sup>343</sup> It is a “positive project of world-building.”<sup>344</sup> That means constructing a

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<sup>342</sup> The notion of community raises challenges. First, community is an imprecise term. See Southerland, *Intersection of Race and Algorithmic Tools*, *supra* note 34, at 48 n.250. For some, community can mean those most impacted by a practice, policy, or injustice. For others, it can be more expansive and include those beyond the directly impacted. When I think of community here, I am most focused on people who have felt the sting of the criminal system, those who might be considered “victims of oppression,” and those who, by dint of that experience, possess “distinct normative insights” that illuminate and inform debates about strategies to address the harms of the criminal system. Matsuda, *Looking to the Bottom*, *supra* note 242. That definition, while more precise, still allows for a community to hold a diversity of views about the appropriate place, if any, of the criminal legal system in a healthy society. Communities are not monolithic. Even those who have been harmed by the criminal system may feel that police, jails, and prisons are tools that advance public safety. See I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 24 (arguing that the harms of racial profiling are compounded by the fact that it is happening “at the same time that crime within minority communities involving minority victims is decidedly underenforced”); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1719 (2006) (setting forth underenforcement as a sociolegal, normative phenomenon with predictable effects and distinctive legal characteristics that have a disparate impact on poor communities of color); RANDALL KENNEDY, RACE, CRIME AND THE LAW 19 (1997) (arguing that the “principle injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws”). Thus, a public defender’s office will need to confront conflicts between the demands of an abolitionist orientation and communities that it serves who do not share such an abolitionist philosophy. See Gardner, *supra* note 20, at 1703 (2023) (arguing that neither criminal justice reform nor abolition can fully satisfy African American interests in security, liberty, and democracy). This challenge is much like the conflict identified by Professor Derrick Bell. He highlighted the conflict between civil rights lawyers who sought to implement *Brown v. Board*’s command to desegregate schools and Black community members who, over time, grew disenchanted with the faltering pace of desegregation; these community members found that their “educational interests . . . no longer accord[ed] with the integration ideals of their attorneys.” Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976). Professor Bell suggested that courts pay closer attention to that second set of voices, while lawyers lean into their ability to “innovate, organize, and negotiate” on the way to remedying the conflict. *Id.* at 512. Professor Kim Taylor-Thompson highlighted and explored the challenges that come with sorting out how much a community’s needs and views can inform a defender office’s mission. See Taylor-Thompson, *Taking It to the Streets*, *supra* note 55, at 174–78. She also discussed the tensions that will arise between a public defender’s office’s mission to defend individuals accused of crimes and the community’s concerns about that work. See *id.*

<sup>343</sup> Roberts, *Abolition Constitutionalism*, *supra* note 20, at 43.

<sup>344</sup> Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019).

“constellation of democratic institutions and practices to displace policing and imprisonment while working to realize more equitable and fair conditions of collective life.”<sup>345</sup> That constructive work requires imagining the world that we want to create.<sup>346</sup> Taking stock of this emphasis on building a new world—one that advances safety and security while eliminating our collective reliance on police, prosecution, and prisons—is essential to the public defender’s abolitionist ethos.<sup>347</sup>

This constructive dimension of abolition aligns with the view that public defenders are essential to public safety and have a role to play in reducing crime, one of the points of consensus that emerged from the Harvard Sessions on Public Defense detailed in Section I.C.<sup>348</sup> Furthermore, it rejects incarceration and the criminal legal system as wholly ineffective public safety tools.<sup>349</sup> Instead, this dimension of abolition builds on the understanding that undergirds holistic defense: that defenders should treat the whole client and attempt to address the concerns that brought the client into contact with the criminal system, thus expanding the defender’s work to address systemic deprivations and structural shortcomings. It foregrounds the root causes of criminal involvement—lack of access to housing, education, employment, and healthcare—and suggests that defenders work to build those pillars of a healthy society. Ultimately, defenders and their offices should avoid a

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<sup>345</sup> *Id.* at 1618; see KABA, *WE DO THIS ’TIL WE FREE US*, *supra* note 301, at 2–5 (describing the positive dimension of abolition); see also W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 189 (1935) (“The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States.”); cf. Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 *UCLA L. REV.* 164, 183 (2022) (describing abolition as “intensely pragmatic” in its focus on addressing the root causes of criminal legal system involvement to prevent harm and foster healing).

<sup>346</sup> Morgan, *Abolitionist Anxieties*, *supra* note 20, at 1202; KABA, *WE DO THIS ’TIL WE FREE US*, *supra* note 301, at 94 (“[S]omebody had to actually first imagine prisons and the police themselves in order to create them. Everything you see in the world—somebody thought of it first. . . . Once things are actualized into the world and exist, you can’t imagine how the world functioned before it.”).

<sup>347</sup> See Morgan, *Abolition Anxieties*, *supra* note 20, at 1203 (“[C]entral to abolitionist praxis is the decoupling of social responses to harm and conflict from the criminal legal system and building nonpunitive and noncarceral systems of accountability and care.”). Implicit in this formulation is the idea that the public defender has a role to play in fostering public and community safety. This view has gained increasing acceptance among defenders. See, e.g., *Reimagining Community Safety #20: The Role of Public Defenders*, HARV. KENNEDY SCH. MALCOLM WIENER CTR. FOR SOC. POL. (Apr. 21, 2021), <https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/news-events/reimagining20-public-defenders> [<https://perma.cc/WN8M-8DZS>].

<sup>348</sup> See *supra* notes 125–31 and accompanying text.

<sup>349</sup> See Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA (July 2017), [https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf) [<https://perma.cc/SXN4-R3YM>].

myopic focus on individual-level obstacles that can obscure the need to pursue structural solutions.<sup>350</sup>

Public defenders with an abolitionist vision should bolster and engage in work to build—and, in some instances, rebuild—the constellation of institutions that foster a healthy democratic body politic. That means supporting housing, education, employment, transportation and infrastructure, environmental justice, food security, and mental and physical health.<sup>351</sup> It also means advancing mutual aid and other efforts independent of the state that help meet the needs of the most vulnerable, in those instances when the state cannot.

To do so, public defenders and their offices can take on work in a retail and wholesale manner, mirroring the same approach taken to resist the criminal system. Reentry is a natural avenue of intervention. Public defense today encompasses efforts to remove the barriers to social integration back into one's community following contact with the criminal system.<sup>352</sup> An abolitionist vision encourages defenders to think even more expansively about reentry at the individual and collective level.<sup>353</sup>

The nature of a person's experiences with the criminal system demands this approach. That is because people have challenges that bring them into contact with the criminal system, which operates as both cause and effect. For example, a person who is unhoused may be harassed by police for loitering, leading to an arrest, prosecution,

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<sup>350</sup> See Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & Soc. INQUIRY 32, 36 (2021) (“Mainstream reentry and rehabilitation programs focus almost exclusively on incarcerated and reentering people rather than critically engaging with, or even considering, the historical, social, political, and economic conditions that have given rise to today’s criminal punishment problems.”).

<sup>351</sup> See SHERRILYN IFILL, LORETTA LYNCH, BRYAN STEVENSON & ANTHONY C. THOMPSON, *A PERILOUS PATH: TALKING RACE, INEQUALITY, AND THE LAW* 63–66 (2018) (describing the value in public institutions); see also Eli Saslow, *A Once Despairing Sandwich Shop Owner Sees ‘a Miracle’*, N.Y. TIMES (Dec. 26, 2023), <https://www.nytimes.com/2023/12/26/us/phoenix-homeless-encampment-zone.html> [<https://perma.cc/7DQW-NHKJ>] (describing the investment the city had to make in housing the unhoused and revitalizing downtown Phoenix).

<sup>352</sup> See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 591 (2006) (“Public defenders, too, have come to recognize that their counseling role may need to broaden to include discussions of reentry concerns.”); cf. Pinard, *Broadening the Holistic Mindset*, *supra* note 112, at 1069 (discussing the need to incorporate collateral consequences and reentry into holistic defense practice).

<sup>353</sup> See, e.g., Bell, *supra* note 350, at 36 (urging an abolitionist view of reentry that extends beyond targeting the individual and instead addresses the structural factors that drive people into the criminal system).

and conviction.<sup>354</sup> The existence of a criminal record may make it more difficult to obtain supportive housing, because the eligibility requirements exclude those with criminal records.<sup>355</sup> In this way, the challenges that bring someone into the system are not erased by that interaction with the system; they are aggravated by it. The housing problem remains, and the system's collateral consequences ensure that people remain locked into the bottom.<sup>356</sup> Examining this problem at two levels—individual and systemic, as I am suggesting—would lead a public defender to work to secure housing for the client, but also to advocate for the expansion of housing opportunities in the client's community and the elimination of disqualifying regulations based on one's criminal record.

That is why the creative dimension of abolition, operationalized by a public defender or their office, can take many forms, including addressing root causes of criminal system involvement for individual clients,<sup>357</sup> opening up opportunities for stabilizing forces like housing, education, and employment,<sup>358</sup> and supporting legislation that diminishes the stigma of coming into contact with the criminal legal system.<sup>359</sup>

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<sup>354</sup> See Eric S. Tars, *Criminalization of Homelessness*, in 2019 ADVOCATES' GUIDE: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS 6–34, 6–34 to –35 (Nat'l Low Income Hous. Coal. ed., 2019) (arguing that policies criminalizing homelessness are ineffective, because the collateral consequences of criminal conviction make it more difficult to obtain or maintain employment, housing, or public benefits).

<sup>355</sup> See Elayne Weiss, *Housing Access for People with Criminal Records*, in 2019 ADVOCATES' GUIDE: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS 6–27, 6–29 (Nat'l Low Income Hous. Coal. ed., 2019) (“[H]ousing providers screen out potential tenants to the point that anyone with a criminal record need not apply.”).

<sup>356</sup> ALEXANDER, *supra* note 118, at 180–89 (explaining how the difficulties of obtaining housing following contact with the criminal system are exacerbated by the racially unjust laws, policies, and practices that undergird housing discrimination).

<sup>357</sup> See, e.g., *Community Defender Division*, CNTY. OF SANTA BARBARA PUB. DEF., <https://www.countyofsb.org/2946/Community-Defender-Division> [<https://perma.cc/VG6A-ZRL6>].

<sup>358</sup> See, e.g., *Community Law*, METRO. PUB. DEF., <https://mpdlaw.com/community-law> [<https://perma.cc/2YB6-Z57Z>] (describing the Community Law division within the Metropolitan Public Defenders); *Redemption Projection*, L. OFFS. OF THE PUB. DEF. OF THE 11TH JUD. CIR. OF FLA., <https://www.pdmiami.com/public-defender/community-engagement/redemption-project.page> [<https://perma.cc/2RUP-RUWS>] (describing the Redemption Project, a volunteer effort designed to assist formerly incarcerated people obtain employment); *Project Victory and Project Independence*, L. OFFS. OF THE PUB. DEF. OF THE 11TH JUD. CIR. OF FLA., <https://www.pdmiami.com/public-defender/community-engagement/project-victory-project-independence.page> [<https://perma.cc/4HP4-KAJJ>] (describing Project Victory and Project Independence, two programs designed to provide work-related experiences for students with disabilities); Mayte Padron, *Miami-Dade Public Defender, Nonprofit Partner to Open Call Center*, LOC. 10 (July 28, 2023, 9:55 PM), <https://www.local10.com/community/2023/07/27/miami-dade-public-defender-nonprofit-partner-to-open-call-center> [<https://perma.cc/8UWF-C7QP>].

<sup>359</sup> See, e.g., *Bronx Defenders Statement on NYC Council Passing of the Fair Chance Act*, THE BRONX DEFS. (June 10, 2015), <https://www.bronxdefenders.org/>

At the wholesale level, the defender's abolitionist work must be informed by the public safety needs of the community their office serves.<sup>360</sup> That can begin with community engagement to define public safety. Such efforts are already underway. For example, in 2022, the Cook County Public Defender's Office partnered with the Black Public Defenders Association, Northwestern University, and Blackroots Alliance to center the voices of Chicago community members best positioned by their lived experiences to define public safety.<sup>361</sup> The work that led to the report also sought to "strengthen relationships between Black public defenders and Black Chicagoans."<sup>362</sup> The report and its findings ultimately aim to "help policymakers, funders, activists and community groups build sustainable public safety reforms built on principles of justice and responsiveness to Black community needs" — in Chicago and in Black communities nationwide.<sup>363</sup> The organizational partners used a combination of interviews and community listening sessions over six months to ask the core question of "what does safety mean to you?"<sup>364</sup>

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bronx-defenders-statement-on-nyc-council-passing-of-the-fair-chance-act [https://perma.cc/HVZ7-GKEK]; Colleen Grablick, *In Debate over Bowser's Record Sealing Bill, Advocates Push for Broader Reforms*, DCIST (Apr. 8, 2021, 2:18 PM), https://dcist.com/story/21/04/08/advocates-push-for-broader-changes-to-dc-record-sealing-laws [https://perma.cc/ERY4-34BC] (describing advocacy by Public Defender Service for the District of Columbia); David Joseph Sutton, *Clean Slate*, CNTY. OF MARIN, https://www.marincounty.org/depts/pd/clean-slate [https://perma.cc/HF8S-PBJZ]; State of N.J. Off. of the Pub. Def., *New Jersey Office of the Public Defender Sues New Jersey State Police over Failure to Timely Expunge the Records of Almost 50,000 New Jerseyans*, VOLUNTEER LAWS. FOR JUST. (Oct. 23, 2023), https://www.vlnj.org/news/2023/23/10/new-jersey-office-of-the-public-defender-sues-new-jersey-state-police [https://perma.cc/GKM9-EVG3]. The Justice Roadmap, detailed *supra* note 330, sets forth several legislative proposals that further align with such a vision, including an unemployment bridge program to provide unemployment compensation to those who are excluded from regular unemployment insurance because of their immigration status or recent release from incarceration, increasing the financial support provided to people upon reentry, and eliminating predatory court fees for probation and parole. See *End Wealth Extraction & Invest in Our Communities*, JUST. ROADMAP, https://justiceroadmapny.org/roadmap/end-wealth-extraction-invest-in-our-communities [https://perma.cc/OTL4-QDUV].

<sup>360</sup> As detailed earlier, *supra* note 342, community is a complex term that includes a range of perspectives and values. I am of the view that engagement with the community, even if their view of public safety differs dramatically from that of the defender office, allows for the sort of dialogue and strategic planning that can satisfy seemingly divergent worldviews.

<sup>361</sup> BLACK PUB. DEFS. ASS'N, NORTHWESTERN UNIV., BLACKROOTS ALL. & COOK CNTY. PUB. DEF., *REIMAGINING PUBLIC SAFETY: COMMUNITY LISTENING SESSIONS WITH BLACK COMMUNITIES AND PUBLIC DEFENDERS* 5 (2023).

<sup>362</sup> *Id.* at 40.

<sup>363</sup> *Id.* at 5.

<sup>364</sup> *Id.* at 5–7. The organizational partners interviewed 103 Black people in Chicago and the surrounding suburbs. *Id.* at 8. The cohort was diverse across the following measurable parameters: housing, employment, education, parent status, age, and gender identity. *Id.* at 9.

The interviews and community listening sessions produced a number of insights about public safety that could serve as a blueprint for a public defender's structural work.<sup>365</sup> Safety was defined not only by absence—such as a lack of concerns about harm—but also by the presence of “freedom, comfort, and peace.”<sup>366</sup> The study found that feelings of danger were fostered by several phenomena. Violence in public spaces—on public transportation or the street—undermined feelings of safety.<sup>367</sup> So, too, did interactions with police, who visited violence upon communities and compounded that harm by failing to provide the sort of protection consistent with their duty.<sup>368</sup> The criminalization and stereotyping that flowed from the conflation of Blackness, dangerousness, and criminality also produced feelings of “unsafety.”<sup>369</sup>

The challenges felt by Black Chicagoans are deep-rooted and difficult to overcome. Three primary solutions emerged from the project: building community, investments in well-being and opportunity, and policing.<sup>370</sup> The community sought more cohesion, built on “how they care for one another, and how they show support for those who are in need.”<sup>371</sup> It also pointed to investments to produce jobs, housing, educational opportunities, and healthcare as fostering public safety.<sup>372</sup> And it lamented abusive and unjust policing while embracing police that were “more responsive, better trained and more fair, and . . . not aggressive or abusive.”<sup>373</sup>

These views provide substantive guidance to a public defender's office looking to the positive dimension of abolition. They invite a public conversation—one that is all too rare—about what public safety entails. The desire to build community and invest in the socioeconomic resources that allow individuals to live healthy and productive lives can guide advocacy efforts. In Chicago—and in any other community where these reflections may prove applicable—a public defender's office would do well to invest in community building, helping to foster the sort of cohesiveness desired by community members to lead to

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<sup>365</sup> *See id.* at 5.

<sup>366</sup> *Id.* at 5, 11.

<sup>367</sup> *Id.* at 19.

<sup>368</sup> *Id.* I say “duty” from the popular perspective of what police are supposed to provide: safety, that is, to protect and serve. That duty may be viewed differently from an abolitionist perspective, but it is one worth acknowledging as popularly conceived.

<sup>369</sup> *Id.* at 24.

<sup>370</sup> *Id.* at 29, 32, 34.

<sup>371</sup> *Id.* at 30.

<sup>372</sup> *Id.* at 33.

<sup>373</sup> *Id.* at 39.



interventions that stop problems before they start.<sup>374</sup> Such an office should also encourage and support structural investments in education, employment, housing, transportation, health, and the environment, all of which allow a community to thrive.

Even where community desires are not aligned with an abolitionist vision, that input has real value.<sup>375</sup> The challenges of unjust policing and the embrace of policing as a tool for public safety—at once familiar to and at odds with an abolitionist view—is a useful case in point. Police and law enforcement are among the institutions and actors that abolitionists seek to render obsolete. A community calling for policing—just not abusive and unjust policing—runs counter to that vision. The benefit, however, is that those countervailing community views can help to calibrate structural interventions and community engagement. It can be a reminder that community-based work requires a deep investment of time and energy and that advancing an abolitionist vision requires meeting people where they are and grappling with the often complicated relationships that communities have with police, who can be an occupying force for some and a provider of safety in the view of others.<sup>376</sup> In this way, the positive dimension of abolition may include helping a community leverage its power to increase control over law enforcement or sort through the roles, if any, police should play.<sup>377</sup> Those power-leveraging skills can be developed as community cohesiveness is built. That power can then be deployed in resource allocation fights to secure investments in resources and opportunities or to support the type of iterative experimentation that grounds abolition.<sup>378</sup>

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<sup>374</sup> See *id.* at 30–32.

<sup>375</sup> There was a general embrace of police as part of the public safety solution. *Id.* at 34–38. Few people expressed willingness to eliminate police, in line with abolition. *Id.* at 39. They did, however, point to the concerns about police budgets and the scope of the role that have been the subject of abolitionist organizing. *Id.* at 39.

<sup>376</sup> See generally PURNELL, *supra* note 43 (describing the process of shifting one’s political orientation from support of police, prisons, and prosecution to an abolitionist vision).

<sup>377</sup> See Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1606 (2022) (“[T]he very mission we, as a society, have assigned the police is misguided. Police are asked to do too much in society, and in their attempt to fulfill these duties, they cause harm. . . . [P]olice simply cannot address the sheer number of problems we dump in their institutional lap.”).

<sup>378</sup> See Allegra M. McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT 109, 109 (2013) [hereinafter McLeod, *Confronting Criminal Law’s Violence*] (“Confronting criminal law’s violence calls for an openness to unfinished alternatives—a willingness to engage in partial, in process, incomplete reformist efforts that seek to displace conventional criminal law administration as a primary mechanism for social order maintenance.”). Experimentation is key to finding workable alternatives to carceral tools to provide public safety. See *Investing in Evidence-Based Alternatives to Policing*, VERA (Aug. 2021), <https://www.vera.org/publications/investing-in-evidence-based-alternatives-to-policing> [<https://perma.cc/9DLH-3U7L>]; Roge

Prior to the release of the Public Safety Report, the Cook County Public Defender's Office began working to provide a useful model for community-led investment in the positive dimension of abolition.<sup>379</sup> The work includes the proposed launch of the Freedom Defense Center.<sup>380</sup> The Center will offer legal and social services, mental health support, and connections to community-based organizations that offer housing and wraparound services.<sup>381</sup> The Center will also help community members navigate interactions with police and the criminal legal system.<sup>382</sup> It was planned by two planning circles—one consisting of community members and leaders and another composed of people incarcerated at the local jail.<sup>383</sup> Those circles advised the public defender's office on “everything from the name of the center, to its mission, to its location, to the cases it will take on and the services that it will provide.”<sup>384</sup>

Public defender's offices can also support legislation, policies, and initiatives contributing to this positive dimension. New York's Legal Aid Society, for example, has supported legislation to expand access to housing.<sup>385</sup> Alameda County Public Defenders participates in the county's ALL IN initiative, designed to address the root causes of poverty through collaboration with government actors and community-based organizations.<sup>386</sup> King County's Department of Public Defense

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Karma, *4 Ideas to Replace Traditional Police Officers*, VOX (June 24, 2020, 7:30 AM) <https://www.vox.com/2020/6/24/21296881/unbundle-defund-the-police-george-floyd-rayshard-brooks-violence-european-policing> [<https://perma.cc/R7GS-TRX2>]; see, e.g., Mark Obbie, *A City Tries to Measure the Violence It's Preventing*, N.Y. TIMES (Apr. 22, 2024), <https://www.nytimes.com/interactive/2024/04/22/headway/gun-violence-intervention-baton-rouge.html> [<https://perma.cc/7VNY-K9UF>].

<sup>379</sup> *President Preckwinkle Announces Details of the Cook County Justice Reinvestment Initiative*, COOK CNTY. GOV'T (Oct. 20, 2023), <https://www.cookcountyil.gov/news/president-preckwinkle-announces-details-cook-county-justice-reinvestment-initiative> [<https://perma.cc/24YM-98R2>].

<sup>380</sup> Maxwell Evans, *Cook County Public Defender Launching Far South Side Legal, Social Services Center*, BLOCK CLUB CHI. (Aug. 18, 2023), <https://blockclubchicago.org/2023/08/18/cook-county-public-defender-launching-far-south-side-legal-social-services-center> [<https://perma.cc/FQY4-R7C6>].

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Keep New Yorkers in Their Homes*, THE LEGAL AID Soc'Y (Aug. 30, 2023), <https://legalaidnyc.org/take-action/campaigns/keep-new-yorkers-in-their-homes> [<https://perma.cc/RTS9-RBB3>].

<sup>386</sup> *Community Involvement*, ALAMEDA CNTY. PUB. DEFS., <https://publicdefender.acgov.org/Community.page> [<https://perma.cc/D8X9-VAQJ>] (describing the participation of the Alameda County Public Defender in the ALL IN initiative). ALL IN's work has addressed issues such as “food insecurity, community engagement and empowerment, workforce and economic development, school readiness, and ensuring children, youth, and families have adequate supports for equitable and sustained health and wellbeing.” *History of ALL IN*, ALAMEDA CNTY., <https://allin.acgov.org/history-of-all-in> [<https://perma.cc/994M-5XD8>].

supported a series of legislative enactments that diminished the harms imposed by the juvenile justice system and encouraged the preservation of family bonds in the child welfare and family court system.<sup>387</sup> Defender offices in cities across the country have been shaping the policy and legislative agenda along these lines.<sup>388</sup> By doing so, they are advancing the positive dimension of an abolitionist ethic.

### III

#### THE CHALLENGES OF INCORPORATING AN ABOLITIONIST ETHIC INTO PUBLIC DEFENSE PRACTICE

##### A. *What Makes It Difficult*

There are a host of challenges that come with the merger of an abolitionist ethic and public defense.<sup>389</sup> In this Section, I catalogue just a few, understanding that others exist and may emerge as defenders or their offices adopt an abolitionist ethic and as debates about abolition unfold in the academy and communities. In the Section that follows, I address the challenges I have raised here.

##### 1. *Politics and Practicality*

First up are the political considerations that encompass everything from the resistance that abolition engenders to what many understandably view as its impracticality. Abolition, as a political vision and strategy, has its own real difficulties.<sup>390</sup> It can be a magnet for political opposition, as is any orientation that threatens the status quo.<sup>391</sup> The fact-free, grievance-filled campaign against Critical Race

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<sup>387</sup> Leslie Brown, *DPD and Partners Achieved Historic Victories in 2023 Legislative Session, Though More Work Remains*, FOR THE DEFENSE (Apr. 25, 2023), <https://kcpublicdefense.com/2023/04/25/dpd-and-partners-achieved-historic-victories-in-2023-legislative-session-though-more-work-remains> [<https://perma.cc/5RSK-NDP6>].

<sup>388</sup> See, e.g., *Youth Justice*, BROOKLYN DEFS., <https://bds.org/issues/youth-justice> [<https://perma.cc/2BXK-7AQQ>]; see also *Juvenile Rights Practice Special Litigation and Law Reform Unit*, THE LEGAL AID Soc’y, <https://legalaidnyc.org/programs-projects-units/juvenile-rights-practice-special-litigation-and-law-reform-unit> [<https://perma.cc/6NYT-QEZR>]; NATASHA KHALFANI, MD. OFF. OF THE PUB. DEF., POSITION ON PROPOSED LEGISLATION: HOUSE BILL 232-CHILD IN NEED OF ASSISTANCE- NEGLECT- MARIJUANA USE (2023).

<sup>389</sup> Southerland, *The Master’s Tools*, *supra* note 19, at 80–81, 86 (discussing challenges).

<sup>390</sup> As Professor Rachel Barkow has aptly pointed out, the political dynamics, expense, potential and real backlash, and sheer difficulty of eliminating the carceral state and advancing a positive agenda, among other hurdles, stand in the way. Barkow, *supra* note 20, at 288–305.

<sup>391</sup> *Id.* at 266–67, 287–91 (describing pessimism toward abolition as caused by the political backlash it garners, its absolutist language and amorphous vision, and ideological purism that can cause some abolitionists to overlook viable short-term reforms because they do not align with abolitionist praxis).

Theory, the inane effort to undermine diversity, equity, and inclusion initiatives, and the backlash against the racial justice uprisings of 2020 are ready examples of the forms that opposition can take. Indeed, public defenders have experienced political resistance and backlash firsthand, albeit for different reasons. For example, in the 1990s, New York City Mayor Rudolph Giuliani worked to weaken the Legal Aid Society, the city's largest public defense provider, by cutting its budget and soliciting proposals to replace Legal Aid lawyers who were on strike seeking better wages.<sup>392</sup> Opposition of that sort can be fueled by the history of public defense and the agonistic role of the modern public defender, which positions the defender as a constitutional thorn in the side of the criminal legal system and its actors, including judges, prosecutors, and police. Public defenders are already targets; adopting positions that challenge the criminal system outside the confines of the courtroom will undoubtedly garner everything from critique to threats on funding. Attacks on progressive prosecutors from the political right are a more recent analog.<sup>393</sup> Contemptuous cries of “woke” public defenders, along with calls to further undermine their operation, are sure to follow.

Abolition is also met with derision in some circles, including from within public defense, written off as too far-fetched and impractical. It demands a radical reimagining of the criminal legal system and, along with it, the social order that can extend too far beyond what we already know and are accustomed to.<sup>394</sup> It cannot provide simple or satisfying answers to interpersonal violence, violent crime, or the fear that violence breeds. Nor does it come with a roadmap or clear plan.

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<sup>392</sup> See Alison Mitchell, *City to Replace Aid Attorneys Out on Strike*, N.Y. TIMES (Oct. 4, 1994), <https://www.nytimes.com/1994/10/04/nyregion/city-to-replace-aid-attorneys-out-on-strike.html> [<https://perma.cc/332T-WV2Q>]. For an extensive, detailed history of the Legal Aid Society strike and the mayor's reaction to it, see Mirsky, *supra* note 150, at 942–46.

<sup>393</sup> See Jamiles Lartey, *Battles Over 'Progressive' Prosecutors' Decisions Heating Up*, MARSHALL PROJECT (Aug. 19, 2023), <https://www.themarshallproject.org/2023/08/19/prosecutors-desantis-warren-worrell-krasner-pamela-price> [<https://perma.cc/CD5A-RCXF>]; Jeremy B. White, *Progressive Prosecutors Contend with Backlash Politics*, POLITICO (Aug. 16, 2023, 7:00 PM), <https://www.politico.com/newsletters/politico-nightly/2023/08/16/progressive-prosecutors-contend-with-backlash-politics-00111510> [<https://perma.cc/3DPY-2NBB>]; Eric Tegethoff, *Behind The Right's War on Prosecutors*, THE APPEAL (Aug. 3, 2023), <https://theappeal.org/conservatives-progressive-prosecutors-reform> [<https://perma.cc/S63B-2E2V>]; Benjamin Wallace-Wells, *Why San Francisco Fired Chesa Boudin*, NEW YORKER (June 8, 2022), <https://www.newyorker.com/news/the-political-scene/why-san-francisco-fired-chesa-boudin> [<https://perma.cc/YXS3-6QZS>]; see also Rebecca S. Goldstein, *Toplash: Progressive Prosecutors Under Attack from Above*, 61 AM. CRIM. L. REV. 1157 (2024) (describing resistance to progressive prosecutors by state officials in Florida, Pennsylvania, Texas, Georgia, Mississippi, and Missouri).

<sup>394</sup> See McLeod, *Confronting Criminal Law's Violence*, *supra* note 378, at 113–14 (discussing the richness of the unknown of reimagining incarceration).

## 2. Underfunding and the Challenges of Public Defense

The challenges with abolition are complemented by the burdens that travel with public defense. Some are readily apparent because they are ever-present, regardless of the ethic that informs the work. *Gideon's* mandate is too often honored in the breach, leaving public defenders woefully underfunded.<sup>395</sup> The immediate effect of underfunding is twofold. It is more difficult to defend and counsel clients absent resources to support investigators, social workers, paralegals, experts, and other essential components of a defense team.<sup>396</sup> Battling the criminal system and its effects is tough on its own. Doing so absent adequate resources heightens the difficulty exponentially, leading to a sense of helplessness and despair that can drive defenders out of the office and away from public defense.<sup>397</sup> Funding difficulties also deepen the resource gap between defenders and the law enforcement agencies that target, surveil, arrest, prosecute, imprison, and supervise people.<sup>398</sup> Well-funded law enforcement agencies are able to sweep more people into the criminal system, growing caseloads for already overworked and under-resourced defenders and their colleagues.<sup>399</sup> That dynamic tilts the balance of power in favor of law enforcement, enhancing their leverage and ability to do harm to clients and expanding the reach of

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<sup>395</sup> See Gross, *supra* note 98 (emphasizing that the “indigent defense crisis has persisted for decades” with respect to funding); BRYAN FURST, BRENNAN CTR. FOR JUST., *A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY* (2019) (describing the crisis of underfunding for public defenders).

<sup>396</sup> FURST, *supra* note 395, at 9 (describing the importance of support staff); see Steinberg, *Heeding Gideon's Call*, *supra* note 97, at 988 (“Civil attorneys and social workers, working in partnership with criminal attorneys, are crucial to providing seamless access to services.”). Beyond resource constraints, the structure of an indigent defense provider and its oversight can present similar challenges and concerns about the nature of an office’s work, its effectiveness, and its responsiveness to the community it serves. See generally Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 135–37 (2020) (discussing consequences of oversight models by differing branches of government).

<sup>397</sup> Valerio Bačak, Sarah E. Lageson & Kathleen Powell, “*Fighting the Good Fight*”: *Why Do Public Defenders Remain on the Job?*, 31 CRIM. JUST. POL’Y REV. 939, 942–43 (2020) (describing the challenges public defenders face, including secondary traumatization). See generally Erika Bolstad, *Public Defenders Were Scarce Before COVID. It’s Much Worse Now.*, STATELINE (June 21, 2022, 12:00 AM), <https://stateline.org/2022/06/21/public-defenders-were-scarce-before-covid-its-much-worse-now> [<https://perma.cc/84U5-PH7G>] (describing the crisis of public defenders leaving the job in Oregon and nationwide).

<sup>398</sup> FURST, *supra* note 395, at 8–9 (describing the pay disparity between defenders and prosecutors along with the growth in funding for law enforcement).

<sup>399</sup> Anita Khandelwal & Girmay Zahiray, *Our Public Defender System Is at the Breaking Point*, SEATTLE TIMES (Sept. 15, 2023, 2:09 PM), <https://www.seattletimes.com/opinion/our-public-defender-system-is-at-the-breaking-point> [<https://perma.cc/7585-HVH5>]; Prater, *supra* note 164; Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1770–72 (2016); Rapping, *supra* note 98, at 183–89.

the criminal system.<sup>400</sup> In combination, all of these challenges make the job of being a public defender more difficult than imaginable.

### 3. *Tensions Inherent in Criminal Defense*

Compounding those challenges are the pressures of individual cases and the client's strategic aims, which can and will run counter to an abolitionist ethic. Nestled within those difficulties are the concerns of those who see public defense and defenders as a legitimating force, greasing the wheels of the criminal system to operate more efficiently.<sup>401</sup> I am thinking here of the defender representing a client who would rather plead guilty to resolve their case than contest the allegations and proceed to trial. Or the defender who helps a client actualize their decision to cooperate with law enforcement by becoming an informant or confidential source, reducing the punishment they might face while ensnaring others in the grasp of the criminal system. Under those circumstances, defenders can appear to be mere accomplices to harm. And to the extent that defenders are repeat players in a local criminal system, they may need to maintain credibility and a collegial relationship with prosecutors and judges. Accommodating the sensitivities of the system's actors can render defenders inept or limit their effectiveness.<sup>402</sup>

#### B. *Overcoming the Difficulties*

Given these problems, at first blush, infusing public defense—and its shortcomings—with an abolitionist vision—and its shortcomings—would seem to be a fool's errand. Despite these challenges, there are paths forward.

#### 1. *Navigating Politics and Practicalities*

Upending an institution that functions to maintain America's racial caste system and inequality gap is some of the most difficult work one can undertake. The difficulty actually fosters the sort of creativity and nuance that generates solutions. Indeed, there is no singular fix for the criminal system's wealth of challenges. Instead, it will require trial

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<sup>400</sup> See Simonson, *supra* note 20, at 823–24 (emphasizing the need for power shifting through divestment of law enforcement because existing power for law enforcement is rooted in white supremacy). See generally ALEX S. VITALE, *THE END OF POLICING* 27–28 (2017) (arguing to limit the ability of police to harm people caught up in the criminal legal system).

<sup>401</sup> See *supra* notes 97, 180–83 and accompanying text.

<sup>402</sup> This concern is also reflected in the longstanding challenge to secure independence for public defender's offices, which rely on funding from the very government they are challenging. Independence is of such import that it is the first of the ABA's 2023 Principles. See AM. BAR ASS'N, 2023 PRINCIPLES, *supra* note 102, at 3.

and error, experimentation, and iterative advocacy to work toward an abolitionist horizon.<sup>403</sup> Abolitionists are, after all, working to build a new world—one that has never existed. Given the difficult road ahead, the time to start is now. As Professor Dorothy Roberts puts it:

There is a long way to go between our current destructive system, which upholds an unequal society, and an equal society that has no need for a destructive system. But this is a reason to start the joint project of dismantling the system and creating safer communities now, not to lament the hopelessness of the task.<sup>404</sup>

None of that can or should shield us from the political realities on the ground.<sup>405</sup> The threats of backlash are real and need to be attended to constantly.<sup>406</sup> A public defender's office must engage in strategic thinking about the repercussions of advancing an abolitionist ethic. After all, as noted, offices may face threats to funding, challenges to their mission, and other forms of resistance from the status quo, including systemic retaliation against clients and their causes. Those sorts of concerns may lead the office to temper its public embrace of abolition to defuse concerns from powerful opponents of public defense that offices are engaged in work that extends well beyond their mission. That, in turn, may lead individual defenders (instead of the office) to take up an abolitionist mantle.

A nuanced assessment of the alignment between the individual defender or offices' goals and abolitionist aspirations can also inform the defender's strategy for dealing with political backlash. Work that naturally fits within the defender's institutional mission and the theoretical vision of abolition—such as supporting reentry on an individual and systemic level—is less likely to draw political flack.

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<sup>403</sup> The website One Million Experiments provides a helpful model. See ONE MILLION EXPERIMENTS, <https://millionexperiments.com> [<https://perma.cc/2VUK-H39D>]. The site is a “curated collection of community-based safety projects and a podcast exploring how we define and create wellness and reduce harm in a world without police and prisons.” *About*, ONE MILLION EXPERIMENTS, <https://millionexperiments.com/about> [<https://perma.cc/6X93-YF9A>]. It succinctly encourages the sort of experimentation, iteration, and trial and error that abolition requires, explaining that “[l]iberation is the work and the work is liberation. There is no one answer to how we get free—there are one million.” *Id.*; see also McLeod, *Confronting Criminal Law's Violence*, *supra* note 378, at 131 (explaining how embracing unfinished reforms and alternatives to the current criminal system fosters experimentation and encourages creative, imaginative thought about what is possible).

<sup>404</sup> Roberts, *supra* note 187, at 238.

<sup>405</sup> Barkow, *supra* note 20, at 281–305 (detailing the optimistic and pessimistic views of abolition, along with the lessons to be drawn from the failed deinstitutionalization movement of the 1960s and 1970s).

<sup>406</sup> *Id.* at 287–98 (describing backlash to abolitionist rhetoric and policy proposals, including reactions to the “defund” movement).

Defenders should also be prudent in their public pronouncements about their abolitionist undertakings. Broad, sweeping announcements and bold proclamations may generate good feelings, but they can also draw unnecessary—and unhelpful—attention. Much in the same way that defenders do not announce their trial strategy to the world, they need not waive an abolitionist banner; doing the work while strategizing to account for the backlash is subversive enough.

Defenders also have a wealth of experience to draw from to shape their response to the political dynamics. Public defenders are familiar with controversy, given their obligation to defend anyone who cannot afford to hire counsel. That includes people accused of horrific crimes. The lessons learned in handling those types of cases can inform how an office or defender might proceed when the animating orientation of the work draws unwanted attention.

In jurisdictions where the political climate is more hospitable, defenders can work to bring the tenets of an abolitionist sensibility into the mainstream. Part of that may involve situating abolitionist work within the context of public defense. In keeping with the core of their mission, public defenders work against the state's carceral power. By presenting their work as a natural extension of that central mission, defenders can make the case that the abolitionist vision they are pursuing is more reasonable than the way it is characterized by the opposition. Community engagement is also, in part, an effort to mainstream an abolitionist ethic. The Cook County Public Defender's Office's survey of the community it serves provides a useful example. By engaging those they serve to understand what political constituencies view as necessary for public safety, the office can bolster its public standing and debunk the sense that abolition is unconcerned with crime and safety.

Dealing with resistance and backlash from defenders requires additional strategic thinking, particularly when those defenders are anchored in sensibilities of the past, feel that they do not have the resources to advance an abolitionist ethic, or pose some other challenge. Defenders might begin by looking to the historical arc of public defense, finding comfort in the fact that the push and pull of debates over the scope and animating principles behind a defender's work are a natural part of its evolution. Indeed, resistance to change is a given.<sup>407</sup>

Defender leaders may choose to recruit people who share an abolitionist ethic to join the office.<sup>408</sup> For the skeptics already in the office, defender leaders can articulate the logic behind adopting an

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<sup>407</sup> Rapping, *supra* note 98, at 211 (“[E]fforts to change culture will almost invariably be met with resistance.”).

<sup>408</sup> *Id.* at 212–14.



abolitionist ethic; invite resisters to the table to contribute to, and take ownership of, the vision for the office; and provide them with the training and support they might need to implement it.<sup>409</sup> And to the extent none of that works, defender leaders can create roles or spaces for those who remain unrelentingly committed to a narrow view of the defender's role.<sup>410</sup> After all, an abolitionist ethic does not require defenders to abandon their role as zealous advocates for individual clients. Defenders committed to that orientation can offer training, support, and guidance to colleagues who practice with an abolitionist ethic. And even defenders who do not share an abolitionist vision with their colleagues can likely find reasons—given their own clients' experiences—to support proposals that advance racial justice, reduce the reach of the carceral state, or provide opportunities for their clients to live healthy, thriving lives. While all of the strategies to navigate resistance have their own shortcomings, downsides, and difficulties worth weighing, they are no different than the challenges that prior evolutions of defenders had to face in changing the culture of the profession.<sup>411</sup>

Finally, the racial justice lens I suggested earlier provides a salve of sorts. That lens teaches that struggle on its own—even against intractable odds—has value. As Professor Bell tells us, “[t]he fight in itself has meaning and should give us hope for the future.”<sup>412</sup> The act of resistance—of working toward an abolitionist horizon—reminds the powerful that there are those who refuse to accept the status quo.<sup>413</sup> We do not know, nor can we always anticipate, the pace of change or the effects of our efforts to create it. For example, the end of slavery and the fall of de jure segregation were not inevitable or foreseeable.<sup>414</sup> The end of these regimes instead came after generations of struggle by people who were born and died long before they could witness the fruit of their labor.<sup>415</sup> This sort of orientation is familiar to anyone doing work the

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<sup>409</sup> *Id.* at 215–17.

<sup>410</sup> *Id.* at 217–18.

<sup>411</sup> *See id.* at 211–18.

<sup>412</sup> Bell, *Racial Realism*, *supra* note 202, at 378.

<sup>413</sup> Eric J. Miller, *Republican, Rebellious Reparations*, 63 *How. L.J.* 363, 381 (2020) (“Resistance is a revolutionary act: the act of standing up, . . . of refusing to accept one’s place in the world, to challenge the power, domination, and authoritarianism of American society.”); *see also* Bell, *Racial Realism*, *supra* note 202, at 378.

<sup>414</sup> Sean Wilentz, *American Slavery and ‘the Relentless Unforeseen’*, N.Y. REV. BOOKS (Nov. 19, 2019), <https://www.nybooks.com/online/2019/11/19/american-slavery-and-the-relentless-unforeseen> [<https://perma.cc/C8QA-FAAT>] (describing how the end of enslavement was not inevitable); EQUAL JUST. INITIATIVE, *SEGREGATION IN AMERICA* (2018) (emphasizing the steadfast and widespread resistance to desegregation).

<sup>415</sup> Nikole Hannah-Jones, *Our Democracy’s Founding Ideals Were False When They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG. (Aug. 14,

result of which they may not see—from teachers to civil rights advocates to community organizers. They are doing what they do because of a moral and political commitment, not because they necessarily expect to see results within their lifetime. As we continue to fight, we should draw inspiration from that history, buoyed by those sorts of experiences.

Every so often, fighting for the sake of fighting has the added benefit of producing a win. The perceptible shift in attitudes about the criminal system is another source of inspiration. A little over two decades ago, the mainstream conversation about the criminal legal system accepted it as an institution that functioned poorly but could be reformed to address its idiosyncratic shortcomings. That has changed. More voices than ever before question the fundamentals of the criminal system. That paradigm shift—the work of countless people day in and day out—has created the space for changes once thought impossible. These changes include the legalization of marijuana, the curtailment of cash bail, and the end of mandatory juvenile life without parole sentencing. Each is a marker on the path to a better world, one that public defenders must be a part of creating.

## 2. *Responding to Underfunding and Its Cascading Effects*

Underfunding presents profound challenges for public defenders. For those who embrace an abolitionist ethic, it forces difficult choices. First, it means that we must accept the fact that not every public defender or public defender's office can fulfill every pillar of an abolitionist vision. Resource limits, the political climate and community where a defender operates, and more will not allow for it. And, perhaps more importantly, the responsibility for changing the world does not rest with public defenders alone, nor can it.<sup>416</sup> Instead of taking on that mantle, defenders can drill down on issues of importance or significance as they relate to their work, clients, communities, and unique circumstances. A defender can do so by doing the work to serve the needs of clients and

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2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [<https://perma.cc/YT2D-A7W9>] (“Yet despite being violently denied the freedom and justice promised to all, black Americans believed fervently in the American creed. Through centuries of black resistance and protest, we have helped the country live up to its founding ideals.”).

<sup>416</sup> See *Uprisings Are Just the Beginning*, HAMMER&HOPE (Summer 2023), <https://hammerandhope.org/article/uprisings-2020-george-floyd> [<https://perma.cc/P8FW-VY4U>] (“We need to accept . . . ‘multiple grammars of struggle’ rather than demand political, strategic, or tactical purism. We have to allow for different people to show up in various ways in terms of ideology and struggle; in our protests and movements, we need the widest participation possible to win.”); *A Thank You Letter to the Hammer & Hope Team*, HAMMER&HOPE (Winter 2023), <https://hammerandhope.org/article/issue-1-article-12> [<https://perma.cc/62K6-FW73>] (“Everything worth doing is done with other people.”).

their communities. The evolutionary journey of public defense reveals periods throughout history when the work expanded to meet the needs of clients and communities, allowing defenders to contribute when and where they could.<sup>417</sup> An office or individual defender can step back and assess the local landscape to determine where their strengths and proximity can be most helpful to an overarching abolitionist vision and take on a piece of the fight (as opposed to feeling the need to take on all of it at once).

Some defenders may be able to find creative ways to partner with other organizations to support advocacy efforts by providing the data, prospective plaintiffs, or community voices necessary to file a lawsuit, amplify an issue during a legislative hearing, or shape a policy debate. They can stake out public positions that bolster ongoing policy advocacy campaigns. They can explore the history of race and the criminal system in their jurisdiction to inform the overarching justice narrative. Others may invest their energy into providing top-notch holistic defense or work on decreasing the barriers to reentry for their clients. Still others may choose to deepen their connections to the communities they serve, fostering partnerships and relationships that can eventually blossom into opportunities to make progressive change. Picking a lane and focusing on that—whether it is working in support of communities or social movements—has the potential to expand and increase the public defender’s power in ways that can deepen their impact and ability to deliver on an abolitionist vision against budget constraints.

Defenders can also consider creative ways to expand their leverage and reach, even as resources are less than ideal. Technology, for example, is a force multiplier that can be deployed by defenders to support abolitionist work.<sup>418</sup> It is only becoming more relevant with the proliferation of artificial intelligence, surveillance, and predictive technologies. Digital and traditional media have an expansive reach and can be advanced to push an advocacy agenda.

Extending beyond technological tools, labor organizing is another avenue available to defenders to build power and leverage vis-à-vis other criminal legal system actors.<sup>419</sup> Public defenders have long been the beneficiaries of the labor movement and unionization, winning

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<sup>417</sup> See *supra* Part I.

<sup>418</sup> For example, Philadelphia’s data dashboard or the Legal Aid Society’s Law Enforcement Lookup tool, described *supra* Section II.B.3. Another example is the artificial intelligence tool JusticeText, which analyzes and transcribes law enforcement footage for use by defenders. See JUSTICE TEXT, <https://justicetext.com> [<https://perma.cc/3HC2-WKCB>].

<sup>419</sup> See Natale & Sadek, *supra* note 87.

improved working conditions and pay parity.<sup>420</sup> Of equal import, by amassing the collective power of defenders, unionization both promotes class solidarity and amplifies the defender's voice in debates over substantive reforms that align with client interests.<sup>421</sup>

At bottom, creative resource, energy, and effort allocations are familiar to defenders. One consequence of being underfunded and overworked is that defenders regularly have to weigh how to deploy limited resources, on which arguments to rely, and what will satisfy the needs of their clients.<sup>422</sup> That is the basic nature of public defense work. It is always expanding and evolving to meet the moment and the client. Some clients' problems are more pressing than others. Some avenues for change may appear more or less promising. Defenders must constantly make these kinds of choices. Doing the same in figuring out how best to accommodate an abolitionist horizon is no different.

### 3. *Grappling with the Tension*

The tension that comes from a defender's work with an individual client whose goals or choices are at odds with the larger abolitionist project is not new or novel.<sup>423</sup> It is a productive tension, one that

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<sup>420</sup> See *id.*; see also Hamilton Nolan, *Major Public Defense Nonprofit in New York Is Unionizing*, IN THESE TIMES (May 29, 2020), <https://inthesetimes.com/article/bronx-defenders-nonprofit-union-legal-aid-attorneys> [<https://perma.cc/5NSE-SZB5>] (detailing The Bronx Defenders' intention to unionize for better pay and working conditions).

<sup>421</sup> See Malia Brink, *Trend in Public Defense: Unionization*, ABA (Apr. 20, 2020), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal-justice-magazine/2020/spring/trend-public-defense-unionization](https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/spring/trend-public-defense-unionization) [<https://perma.cc/DY6H-S9MG>] (noting how public defenders' unionization efforts have led to wider reform pushes, like the right to counsel in housing court). The solidarity that unionization can promote allows defenders to speak with a singular voice, amplifying issues of concern among union members and the clients that they serve. See also Zohra Ahmed, *Bargaining for Abolition*, 90 FORDHAM L. REV. 1953, 1978 (2022) (explaining how public defenders, through collective bargaining, could seek and demand reductions in prosecution spending and in turn reduce caseloads and criminalization in the communities they serve).

<sup>422</sup> See NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE & STEPHEN F. HANLON, RAND CORP., NATIONAL PUBLIC DEFENSE WORKLOAD STUDY 5–6 (2023), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RRA2500/RRA2559-1/RAND\\_RRA2559-1.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RRA2500/RRA2559-1/RAND_RRA2559-1.pdf) [<https://perma.cc/CK9L-B7TH>] (explaining how funding shortfalls prevent public defender's offices from hiring enough practitioners, resulting in excessive caseloads that practitioners must "triage" by focusing only on "the most mission-critical, time-sensitive tasks" and minimizing effort "on cases that appear more likely to result in an adverse outcome for the client"). There is a glimmer of hope that some of the burden on public defenders will be diminished. New, data-driven national workload standards can be designed to curb the risk of excessive caseloads. *Id.* at xv.

<sup>423</sup> See Burton, *supra* note 41 (describing the tension between the need for immediate reforms for survival and the simultaneous need for abolishing broader systems of oppression in the prison movement and the Black liberation struggle, stating that "[w]hile ameliorating harm provides essential relief for those enduring it, such relief can have a stabilizing effect

functions like pain in a person's body. It signals to the advocate that attacking the causes of that tension may reveal avenues to advance substantive change. For example, there is a tension that comes from impeaching a witness with a prior criminal conviction and in turn further entrenching the carceral premise that a criminal conviction speaks to one's character or honesty.<sup>424</sup> At trial, the defender should wield the conviction like a weapon and attack the witness's credibility. But the defender can advocate to diminish the importance of criminal convictions in domains outside the walls of a courthouse. Alternatively, a client may be grappling with the choice between resolving their case by way of a guilty plea and mercy at sentencing or contesting the prosecution's allegations at trial and paying a trial tax.<sup>425</sup> An advocate can address that tension by pressing to end policies that undermine the right to a trial.

The critique of the public defender as complicit in the harms of the system is valuable and merits serious attention. As I noted in Section II.A, and in keeping with that critique, throughout my career there have been clients and cases that left me feeling like a cog in the machinery of criminal injustice. Yet abandoning public defense altogether, and with it those in need of a defender, would do more harm in our current context. I understand and encourage a fierce commitment to abolition, but I cannot countenance an obligation to abolition that leaves people defenseless as harm unfolds to consume them. In the absence of an alternative to our adversarial criminal legal system, the best rejoinder to the legitimate abolitionist critique of public defense is not to abandon the enterprise. Instead it is to equip those who undertake the role with the skills, perspective, and political orientation to recognize both the legitimating nature of their work and its radical potential.

Public defense brings with it other challenges as well. The emotional difficulty of public defense is the natural result of work that

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on the predatory systems that generate harm in the first place[, and] . . . those who engage in militant attacks against the system inexorably face the wrath of the state").

<sup>424</sup> See Smith Futrell, *supra* note 33, at 161.

<sup>425</sup> By trial tax, I mean the circumstance faced by those who exercise their constitutional right to a trial and, following a conviction, receive a substantially harsher punishment than they would have received if they had pled guilty. A trial tax is imposed in the criminal system through prosecutors, who extend a plea offer to resolve a criminal case while threatening a more substantial post-trial sentence should the accused decline the offer and proceed to trial. NAT'L ASS'N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 5–6 (2018); see also Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 313 (2019) ("Few defendants exercise their right to trial, however, and those who do tend to receive significantly harsher punishments if convicted. This phenomenon, known as a trial tax or, conversely, as a guilty plea discount, is one of the most profound and consistent findings in the empirical sentencing literature.").

can require proximity to people grappling with intractable challenges and limited options. Some are better suited than others for that part of public defense work. However, expanding the vision of public defense to policy advocacy, community empowerment, or other dimensions of the work that address the atomized concerns of clients can be attractive to advocates who share an abolitionist vision but seek work beyond the direct service provider role of a line public defender. Diversity of work and a sense that one is contributing to a political project consistent with a larger abolitionist vision can reduce burnout and provide a sense of connection to a broader mission that makes the difficulty feel worthwhile.<sup>426</sup>

### CONCLUSION

I have made the case that it is time for public defense to embrace an abolitionist ethic. It can do so by adhering to a racial justice lens; engaging in the zealous, holistic defense of clients grounded in the spirit of resistance lawyering; adopting the sensibilities of movement lawyers to support advocacy that dismantles the carceral state; and joining the work to build a society that has no need for police, prosecutors, prisons, or jails. None of this will be easy. It may even seem impossible. Change, it turns out, “always seems impossible until it is done.”<sup>427</sup>

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<sup>426</sup> Farbman, *supra* note 39, at 1947–49 (explaining that a political commitment to resistance can change practice in the courtroom, reveal connections to political movements, and make the work more sustainable because of its connection to broader social movements). Although it is beyond the scope of this Article, one worthy topic of exploration for future scholarship is how defenders not situated in a public defender’s office might infuse an abolitionist ethic into their work. I have in mind private criminal defense attorneys who serve as counsel for the indigent on a contract, flat fee, or other basis, a critical cohort given how often they are tasked with defending the indigent. Primus, *supra* note 100, at 209–10 (describing different models of indigent defense delivery and noting the frequency with which indigent people are defended by lawyers paid a low hourly rate or a set fee to handle a jurisdiction’s indigent defense cases).

<sup>427</sup> President Barack Obama, Remarks by President Obama at Memorial Service for Former South African President Nelson Mandela (Dec. 10, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/12/10/remarks-president-obama-memorial-service-former-south-african-president-> [<https://perma.cc/P64Y-LEV5>] (describing how the life and work of Nelson Mandela proved seemingly impossible tasks to be possible).