PARTICIPATORY LIBERATORY RESENTENCING

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Around the country, jurisdictions have begun enacting second-look resentencing statutes that allow individuals serving long prison sentences to seek reduced terms, presenting the opportunity to chip away at mass incarceration. However, implementation has stalled over failures of understanding. In particular, courts and prosecutors have difficulty hearing the experiences of incarcerated petitioners, leading to limited decarceration. Moreover, defense counsels, even if well-meaning, can bring their implicit (and even explicit) biases, privilege, and narrative chauvinism into their relationships with resentencing clients, impeding their ability to effectively present clients' stories to these decisionmakers.

One solution is for defense counsels to embrace a suite of community-based strategies and partnerships that have already been appearing in the pre-sentence context. The disconnect between lawyers and clients can be epistemic, with attorneys at times failing to fully grasp what their clients are telling them, or, if they do understand, struggling to present those stories in a legible way to decisionmakers. This divide can be even more potent in the resentencing context than pre-sentence, when attorneys are representing clients who have spent years behind bars—an experience these lawyers rarely have shared. The power of these interventions, often termed "participatory defense practice," is that they enable attorneys to leverage the expertise of those who know their clients best or with lived experience, helping to overcome these disconnects. The interventions this Article proposes for widespread adoption include (1) utilizing community-prepared mitigation packets during resentencing, (2) calling formerly incarcerated expert witnesses to testify about the experience of incarceration, (3) enlisting the help of peer navigators in reentry, and (4) relying on community-produced resentencing toolkits to present their cases most effectively. By putting these tools into widespread use in second-look resentencing, defense counsels can amplify client voices, improve the informational environment in which resentencings are occurring, and achieve better resentencing results. If brought to bear more broadly, these participatory practices have the potential to transform lawyering, shift common understandings about client life experience, and lead to decarceration.

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Introduction

On February 10, 2025, New York Court of Appeals Chief Judge Rowan D. Wilson gave the annual State of the Judiciary address. Normally a humdrum affair at which the Chief presents a report-back and vision statement on their priorities for the state court system to a group of assembled dignitaries, this year's event looked different than usual. After opening remarks in which Judge Wilson recounted now-familiar statistics about over-incarceration in America, he lamented: "[O]ur criminal justice system isn't working. Maybe it hasn't really ever worked. Prolonged incarceration is very expensive, and it does not make us safer. It entrenches poverty, perpetuates cycles of violence, and harms many of the New Yorkers we are trying to protect and serve."[1] He then threw his support behind a measure proposed in the New York Legislature but not yet passed: a Second Look Act, which would permit those serving long sentences to apply for resentencing.[2] Then, remarkably, Judge Wilson turned the floor over to four people directly impacted by the criminal legal system, two of them presently incarcerated, and all convicted of "very serious crimes."[3] To Judge Wilson, hearing from those who had spent time in New York's prisons, live and in their own words, was essential. They would get to speak on a matter that was key to their own liberation and to our collective liberation from a system that had not "really ever worked."[4]

Yet, rarely do those seeking resentencing get to take center stage. Instead, their stories are mediated through a host of other actors, among them their own attorneys. To some extent, this is necessary and expected; our system of representation is predicated on lawyers

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1 Chief Judge Rowan D. Wilson, Opening Remarks at The State of the Judiciary 2025, at 3 (Feb. 10, 2025), https://www.nycourts.gov/ctapps/news/soj2025.pdf [https://perma.cc/D9XB-86UR].

2 *Id.* at 4; *see* S. 158, 2025–26 Reg. Sess. (N.Y. 2025); Assemb. 1283, 2025–26 Reg. Sess. (N.Y. 2025). Second-look acts of various types have been emerging across the nation as a way to chip away at extreme sentencing, with the basic definition being "[l]egislation authorizing judges to review sentences after a person has served a lengthy period of time." Becky Feldman, The Sentencing Project, The Second Look Movement: A Review of the Nation's Sentence Review Laws 4 (2025). Resentencing is not typically predicated on a finding of legal error but rather on a revisiting of the ongoing "integrity" of the sentence for a host of reasons. *See* Kay L. Levine & Ronald F. Wright, *Between Cooperation and Conflict in Second Look Review*, 25 Cardozo J. Conflict Resol. 289, 292 (2023) ("Unlike the conviction integrity units that have become institutional fixtures in many prosecutors' offices over the past two decades, attorneys working on resentencing matters rarely address concerns about the legal integrity or factual accuracy of the conviction itself.").

3 Wilson, *supra* note 1, at 4. Judge Wilson also noted that his 2024 State of the Judiciary address had been "unorthodox" in that he invited to speak several people who had been accused of crimes and diverted into alternatives-to-incarceration programs. *Id.* at 1.

4 *Id.* at 3.

translating client narratives into forms they believe will give their clients the best chance of obtaining relief or otherwise meeting their goals. In fact, ethics rules,[5] not to mention the Fifth Amendment,[6] might counsel doing so. But as Part I of this Article will explore after a brief overview of the second-look resentencing landscape, even when advancing their clients' interests to achieve resentencing, defense lawyers[7] risk individual-level silencing and hampering the growth of the episteme.[8] Epistemic injustice theory posits, in part, that the reason a powerful person cannot understand a marginalized person's background is not necessarily because the powerful person is actively intending to silence the marginalized individual but rather because whole realms of the less powerful party's experience simply have

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[5] For example, Rule 1.2(a) of the American Bar Association Model Rules of Professional Conduct dictates that while lawyers "shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued," other than a handful of enumerated key decisions—whether to plead guilty, waive a jury, or testify—reserved to the client, lawyers have substantial leeway when it comes to determining the strategy to achieve a client's goals. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (A.B.A. 2023).

[6] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[7] For purposes of this Article, "defense lawyers" typically refers to public defenders or other assigned counsel since they handle most criminal case representation in the United States. *See* MAREA BEEMAN & CLAIRE BUETOW, U.S. DEP'T OF JUST., GIDEON AT 60: A SNAPSHOT OF PUBLIC DEFENSE SYSTEMS AND PATHS TO SYSTEM REFORM, at v (2023) ("The majority of people accused of crime in the United States are unable to afford a lawyer and so require assistance by government-paid counsel."); DISMANTLING MASS INCARCERATION: A HANDBOOK FOR CHANGE 150 (James Forman, Premal Dharia & Maria Hawilo eds., 2024) ("[A]pproximately 80 percent of people charged with crimes are indigent."). For people who are currently incarcerated and seeking counsel, there is often a presumption of eligibility for assigned counsel. *See, e.g.*, OHIO ADMIN. CODE 120-1-03(B)(3) (2025) (establishing presumption of eligibility for defendant confined to state prison); In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Crim. and Juv. Delinq. Cases, ADKT No. 411 (Nev. Sup. Ct. 2008), https://nvcourts.gov/__data/assets/pdf_file/0027/19575/adkt_411_order_01-04-08.pdf [https://perma.cc/V93E-BMSP] (establishing presumption of eligibility for defendants who are "currently serving a sentence in a correctional institution"); MICH. COMP. LAWS SERV. § 780.991(11)(3)(b) (LexisNexis 2026) (same); IDAHO CODE § 19-6011(2)(c) (2026) (same); LA. STAT. ANN. § 15:175(A)(1)(b) (2025) (same).

[8] Alexandra Natapoff has "diagnos[ed]" the problem of defendant silencing, noting that while there are real risks to those accused of crimes of speaking—which the Fifth Amendment right attempts to guard against—major harmful effects flow from this "right" as well, including "on principles of expressive dignity, democratic responsiveness, and social empowerment" for groups that are targeted by the criminal legal system and thus already marginalized; this silence is "both legally protective and personally undermining" for attorneys' clients. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1455, 1470 (2005). In her view, attorneys are functionaries in this structure that systematically silences defendants, "ero[ding] normative principles of human dignity and participation" and "exclu[ding] . . . defendants from the national dialogue on criminal justice." *Id.* at 1457.

not been conceptualized, as the disempowered party has only "ill-fitting meanings to draw on in the effort to render the[ir experiences] intelligible."[9] Defense lawyers, though they are their clients' partisans, nonetheless occupy positions of power, not to mention serve as repeat players in an oppressive system that expects their cooperation. Accordingly, they help shape this information ecosystem, both as members of a privileged class[10] with its own experiential and attendant informational gaps, and as the funnel for evidence, narratives, and case theories making their way before decisionmakers. As scholars such as Matthew Clair, Nicole Gonzalez Van Cleve, Alexandra Natapoff, and Alexis Hoag-Fordjour have noted, because defense counsels do not always share and cannot necessarily comprehend their clients' experiences, and because their clients do not necessarily have the tools for translation, defense attorneys are at risk of, at worst, replicating entrenched power dynamics,[11] and, perhaps only slightly less nefariously, continuing the silencing.[12]

But defense lawyers are also situated to break this cycle and might, in fact, be uniquely positioned to promote liberation—both literal, through release from incarceration, and metaphorical, in the form of having system actors understand, validate, and synthesize their clients' stories in ways that are more responsive to their life experiences. Specifically, defense lawyers can pursue this disruption during second-look resentencing. Initially, ethical rules and client-centered lawyering frameworks provide some clues as to how this change can be accomplished, gesturing toward client empowerment and autonomy. In Part II, I examine existing ethical frameworks, ultimately concluding that while they are vague on the question of how attorneys can maximally represent clients at resentencing, they signal toward attorneys promoting client autonomy as well as bringing

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[9] Miranda Fricker, Epistemic Injustice: Power and the Ethics of Knowing 148 (2007).

[10] *See infra* Section I.C.1.

[11] *See generally* Matthew Clair, Privilege and Punishment: How Race and Class Matter in Criminal Court (2020) (documenting how defendants with more race and class privilege tend to get along more smoothly with their attorneys and fare better overall in criminal court, and conversely that those with less privilege tend to "withdraw[]" and accordingly fare worse); Nicole Gonzalez Van Cleve, Crook County: Racism and Injustice in America's Largest Criminal Court (2016) (observing how defense attorneys become complicit in the racialized abuse of their clients).

[12] *See* Natapoff, *supra* note 8, at 1457 ("This system . . . limits the ability of individual attorneys to overcome the silencing pressures stemming from their own roles."); Clair, *supra* note 11, at 7 (describing how a lack of understanding between disadvantaged defendants and attorneys leads to silencing). *See generally* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. Rev. 1493 (2021) (arguing for an expanded Sixth Amendment right to counsel of choice, especially as applied to indigent Black defendants).

in community support that will help themselves and the system best be able to hear their clients' stories. It is those emerging models of representation and community empowerment, working synergistically with more traditional forms of representation, that might hold the key not only to successful resentencing but also to widening the aperture of knowledge in that a broader range of life experiences makes its way into decisionmakers' field of vision. As one set of authors writing about participatory defense, a community-based advocacy tool that has been used largely pretrial but has application to the post-sentence context too, has noted, with "[e]ight out of ten of the roughly 2.5 million people currently incarcerated . . . eligible to receive public defense representation[,] [i]mproving public defense is arguably the least discussed, yet most promising, way to challenge mass incarceration."[13]

Other theorists have examined the potential of participatory defense practice to augment defense lawyers' capacity, among them Jocelyn Simonson, Raj Jayadev, and Cynthia Godsoe.[14] Participatory defense posits that rather than ceding power to system actors such as lawyers and courts, the family and friends of those accused of crimes—typically non-lawyers—should use community organizing strategies to bring their power to bear, advocating for their individual accused family members *and* for systemic change.[15] However, these models have primarily been documented and explored in the pretrial context. In this Article, I make the following contributions. First, I note instances of community-inclusive models' use in the post-conviction space and explore their potential as applied to second-look resentencing of the type championed by Judge Wilson. Second, in Part III, I propose that, to maximize these models' efficacy and liberatory potential, defenders embrace widespread use of a suite of tools I term "liberatory resentencing practice." Third, I draw conclusions about counsels' ethical obligations to utilize these tools,

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13 Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 Alb. L. Rev. 1281, 1287 (2015) (internal citation omitted).

14 *See generally* Jocelyn Simonson, Radical Acts of Justice: How Ordinary People Are Dismantling Mass Incarceration (2023) (cataloging community-led challenges to mass incarceration, principally bail funds, alternate city budget proposals, courtwatching, and participatory defense); Raj Jayadev, Protect Your People: How Ordinary Families Are Using Participatory Defense to Challenge Mass Incarceration (2024) (describing the evolution of participatory defense as a nationwide movement and the relationship between practitioners and public defenders); Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 Mercer L. Rev. 716 (2018) (contending that ethical practice compels criminal defense lawyers to adopt participatory principles and shift power to their clients).

15 *See* Godsoe, *supra* note 14, at 716 (describing participatory defense).

grounding them in the ethics rules and scholarly debates around narrative and client autonomy.[16]

Finally, in Part IV, I consider challenges. Being a public defender is difficult work—even more so where under-resourcing and heavy caseloads are typical.[17] Asking defense lawyers to engage in community outreach and organizing on top of an already-demanding job is unrealistic and unreasonable. Thus, I maintain, as I have argued in prior work, resentencing should be a process with easily administrable criteria and simplified hearings; the burden on applicants to achieve resentencing should be minimal.[18] Ministerial resentencing might also avoid the inevitable problem of listening issues persisting among discretionary decisionmakers.[19] However, to the extent resentencing regimes impose more complicated pleading requirements and hearings, this Article makes two recommendations. First, defense lawyers should embrace the roles that community members[20] can play in resentencing. Second, funding should accompany the various ways in which the community might be involved in the litigation process. With these methods in use, greater rates of decarceration, and, in the process, greater understanding of the life experiences of those undergoing incarceration can ideally be achieved.

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16 *See*, *e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435–41 (1989) ("Stories . . . . will often provide the most effective means of overcoming otherness, of forming a new collectivity based on the shared story."); Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1335–63 (1998) (describing race as it intersects with defense advocacy and social harm); Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1597–99 (1999) (critiquing Alfieri's rhetoric as "not mak[ing] a case that the lawyering conduct in any of the cases he examines causes real, tangible harm").

17 *See*, *e.g.*, JUST. POL'Y INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 6–16 (2011) (reporting that the "majority of public defender offices and systems have excessive caseloads," and that a "lack of resources limits the ability to prepare and investigate"). Further, these problems are themselves exacerbated by mass criminalization, which itself taxes the public defender system. *See* Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2256 (2014) ("Over-criminalization and over-enforcement lead to crushing caseloads; crushing caseloads strain resources; strained resources mean cases are triaged instead of tried.").

18 *See* Katharine R. Skolnick, *A Second Look at Second Look: Promoting Epistemic Justice in Resentencing*, 100 N.Y.U. L. REV. 1, 50–54 (2025) (identifying approaches to resentencing that "would remove the onus from individual incarcerated persons to prove their worthiness").

19 *See generally id.* at 18–20, 25–29, 50–54 (discussing the pitfalls that attend broad judicial discretion, including epistemic injustice; and proposing a mandatory sentencing regime that avoids resort to stereotypes and credibility discounting).

20 The concept of "community"—how it is defined, and who constitutes it—can be interrogated. *See infra* notes 278–79 and accompanying text. But I argue that bringing in the expertise of non-lawyers who might be able to represent the life experience of clients can have tangible benefits for resentencing practice.

I
Missed Opportunities for Liberatory Defense Lawyering in Second-Look Resentencing

In recent years, two primary models for second-look resentencing have emerged, one initiated by prosecutors (or, at times, judges or prison officials), and the other by petitioners. In this Part, I explore some of the pitfalls associated with both types, as well as lay the groundwork for defense counsels hoping to implement a statutory regime with maximally liberatory results drawn from each. Specifically, as I will discuss below, while the prosecution-initiated form can suffer from a miserliness that leads to limited impact, it nonetheless points the way toward a collaborative process in which multiple stakeholders weigh in. The petitioner-initiated one holds more promise for impact, measured not just in the number of people reached but also in how it enables those affected by incarceration to shape the epistemic environment and to participate in the process of achieving their own liberation—but defense lawyers must be willing to listen and take action so that they can bring about this freedom.

A. Second-Look Laws: A Primer

The story of how the United States became the world's great incarcerator is by now familiar, but I recount it here in brief. Over the final decades of the last century and into the early decades of this one, tough-on-crime policies were the watchword, and included not only criminalizing additional acts but also imposing sentences with mandatory minimums, long terms, and even life caps for homicide and non-homicide offenses alike.[21] As a result, people continue

[21] *See, e.g.*, Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, The Brennan Ctr. for Just. (Sep. 9, 2019), https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice [https://perma.cc/7DX6-MFSC] (detailing how laws such as the Anti-Drug Abuse Act of 1986 and especially the Violent Crime Control and Law Enforcement Act of 1994 drove mass incarceration by incentivizing states through block grants to create additional categories of offenses, build prisons, and create "truth-in-sentencing" regimes of determinate—and elevated—terms). For one example of a life-capped homicide sentence, see N.Y. Penal Law §§ 70.00(2)(a), 125.25(5) (McKinney 2026) (authorizing a life-capped sentence for a class-A felony, and categorizing second-degree murder as such a felony). And for an example of a life-capped non-homicide sentence, see *id.* § 70.08 (imposing indeterminate terms with life maximums for those convicted of three violent felonies within the statutory period). New York also allows judges to exercise their discretion to impose life sentences for those who have multiple prior felonies that are not necessarily categorized as violent but for whom they determine "extended incarceration and life-time supervision will best serve the public interest." *See id.* § 70.10.

to serve long sentences, and the prison population is aging.[22] Yet, researchers have pointed out that locking up older adults has little effect on public safety.[23] Parole remains a mechanism for release but is highly discretionary and often within the control of political actors.[24]

In response, legislatures have begun to enact second-look acts, which permit judges to review long sentences and substitute, under certain circumstances, revised ones.[25] Many of these laws have centered on those individuals who committed their crimes as youth and emerging adults.[26] Other jurisdictions have focused on specific populations, such as aging adults at the time of the resentencing application,[27] domestic violence survivors,[28] or military veterans.[29] In the federal system, Congress has enacted a catch-all subject-matter provision, with the

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22 *See* FELDMAN, *supra* note 2, at 4 (noting that, as of 2020, over 200,000 people continue to serve life sentences, and nearly one-third of that group is over fifty-five).

23 *See, e.g.*, MATTHEW R. DUROSE & LEONARDO ANTENANGELI, U.S. DEP'T. OF JUST., BUREAU OF JUST. STATS., RECIDIVISM OF PRISONERS RELEASED IN 34 STATES IN 2012: A 5-YEAR FOLLOW-UP PERIOD (2012–2017) 5 (2021) (noting decreasing rearrest rates with age, and lowest rates for those released at age sixty-five or older); KIM STEVEN HUNT & BILLY EASLEY II, U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 3 (2017) (noting powerful effect of age on recidivism rates, with older people less likely to face new arrest, reconviction, and reincarceration compared with younger, and indicating that the trend held for those released from both state and federal custody).

24 *See* FELDMAN, *supra* note 2, at 4; Alexis Watts & Edward E. Rhine, *The Human Cost of Politicized Parole Consideration*, ROBINA INST. OF CRIM. L. & CRIM. JUST. (Apr. 16, 2018), https://robinainstitute.umn.edu/articles/opinion-human-cost-politicized-parole-consideration [https://perma.cc/GU99-8RYY] (arguing that parole boards should be able to make their decisions insulated from political considerations, and focused not on the nature of the crime but on a forward-oriented look at the person seeking release); Edward E. Rhine, Joan Petersilia & Kevin R. Reitz, *Improving Parole Release in America*, 28 FED. SENT'G REP. 96, 96 (2015) (recommending appointment of parole commissioners by independent commissions instead of governors directly).

25 *See generally* FELDMAN, *supra* note 2, at 4–6 (summarizing current resentencing laws throughout the United States). In addition, resentencing availability has emerged from court decisions, notably Supreme Court rulings limiting the application of juvenile life without parole (JLWOP). *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (finding JLWOP sentences unconstitutional for non-homicide offenses); Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding a mandatory JLWOP sentence for homicide convictions unconstitutional).

26 *See* FELDMAN, *supra* note 2, at 14–16 (surveying laws).

27 D.C. CODE § 24-403.04 (2023) (allowing for compassionate release for those over sixty who have served fifteen years or seventy-five percent of their sentence and meet one of four conditions relating to their own or a family member's serious illness or disability).

28 *See, e.g.*, N.Y. PENAL LAW § 60.12 (McKinney 2026); N.Y. CRIM. PROC. LAW § 440.47 (McKinney 2026); OKLA. STAT. ANN. tit. 22, §§ 1090.1–.5 (West 2026); 735 ILL. COMP. STAT. ANN. 5/2-1401 (West 2026).

29 *See, e.g.*, CAL. PENAL CODE § 1170.91 (West 2026) (allowing for resentencing if applicant experienced trauma or a mental health condition resulting from military service and that history was not accounted for at sentencing).

First Step Act permitting "compassionate release"[30] for "extraordinary and compelling reasons";[31] commentators have noted the wide discretion judges have to grant relief under these provisions,[32] and the Sentencing Commission itself has adopted amendments codifying court decisions that grant resentencing for circumstances such as extremely long terms, medical condition of the applicant, sexual abuse in prison, and more.[33] Laws have also permitted some crime-specific resentencings, such as for felony murder.[34]

Most resentencing applications are petitioner-initiated. However, a few jurisdictions have experimented with petitions that judges, correction officials, or prosecutors commence.[35] Notably, while these laws disallow defendants from filing their own petitions, they largely contain few offense exclusions, no minimum time served requirements, and no age limitations.[36] In California, if a corrections official, a district

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[30] *See* U.S. Sent'g Comm'n, Adopted Amendments to the Sentencing Guidelines 6–7 (Nov. 1, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf [https://perma.cc/SNU2-798Q].

[31] U.S. SENT'G GUIDELINES MANUAL § 1B1.13(a)(1)(A) (U.S. SENT'G COMM'N 2023).

[32] *See, e.g.*, FREDERIC BLOCK, A SECOND CHANCE: A FEDERAL JUDGE DECIDES WHO DESERVES IT 94–100 (2024) (noting the lack of specific guidance as to what constitutes "extraordinary and compelling" circumstances and pointing to the Second Circuit's direction that resentencing judges have "broad" discretion); *Proposed Amendments to Compassionate Release Policy: Hearing Before the U.S. Sent'g Comm'n* (2023) (statement of Erica Zunkel, Clinical Professor of L. & Assoc. Dir., Univ. of Chi. L. Sch.'s Fed. Crim. Just. Clinic), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/Zunkel.pdf [https://perma.cc/698P-UKS3] (lamenting that to date the First Step Act's compassionate release provisions have been applied in too constrained a manner and urging adoption of more capacious standards to ensure the Act's purposes are fulfilled).

[33] *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b) (U.S. SENT'G COMM'N 2023).

[34] *See* CAL. PENAL CODE § 1172.6 (West 2026) (allowing those convicted of felony murder under an accomplice theory to petition for resentencing and, if deemed guilty only of the predicate offense, to have their murder conviction vacated and receive a new sentence on the underlying offense alone).

[35] *See, e.g.*, *id.* § 1172.1(a)(1) (authorizing the court to make a motion for resentencing upon recommendation of the secretary of the Department of Corrections and Rehabilitation, the Board of Parole Hearings, a county correctional administrator, a district attorney, or the Attorney General if the Department of Justice originally prosecuted the case); 725 ILL. COMP. STAT. ANN. 5/122-9(b) (West 2026) (authorizing the State's Attorney to petition for resentencing); MINN. STAT. ANN. § 609.133 (West 2026) (authorizing the prosecutor to commence a proceeding to adjust the sentence); OR. REV. STAT. ANN. § 137.218(1)(a) (West 2026) (authorizing someone sentenced for a felony offense other than aggravated murder and district attorney to jointly petition for resentencing); WASH. REV. CODE ANN. § 36.27.130(1) (West 2026) (authorizing the prosecutor to petition for resentencing).

[36] *See* CAL. PENAL CODE § 1172.1(a)(1) (West 2026); 725 ILL. COMP. STAT. ANN. 5/122-9(b) (West 2026); MINN. STAT. ANN. § 609.133(2) (West 2026); WASH. REV. CODE ANN. § 36.27.130 (West 2026). Oregon does prohibit resentencing for those with aggravated murder convictions. OR. REV. STAT. ANN. § 137.218(1)(a) (West 2026).

attorney, or the Attorney General initiates the petition, there is even a presumption in favor of resentencing.[37]

Generally, these laws contain eligibility criteria, which might present threshold legal questions, followed by a judicial exercise of discretion.[38] The latter, in particular, will often be based on documentary and testimonial evidence put before the judge, and the testimony might be lay or expert.[39] As at an initial sentencing, the judge may consider myriad factors both mitigating and aggravating.[40] The key difference between a sentencing and a resentencing, of course, is that the applicant will have spent time incarcerated in the interim. Though incarceration touches many in the United States,[41] the experience of being locked up is not completely knowable to those who have not experienced it. Incarceration can entail periods of deep soul-searching, or the chance to get a meaningful post-secondary education—but it can also mean suffering extreme brutality, being captive and wholly reliant on others to provide often substandard medical care, or undergoing psychological torture while in solitary confinement. Explaining that period, which might span years to decades, will be critical to the success of the petition since it is the primary changed circumstance between the initial sentencing and resentencing.

As I have argued, second-look acts, designed correctly, can be a potent and dignity-preserving tool in unwinding mass incarceration.[42]

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37 CAL. PENAL CODE § 1172.1(b)(2) (West 2026).

38 *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-39(a) (West 2026) (granting judge authority to reduce sentence "for good cause shown"); D.C. CODE ANN. § 24-403.03(a)(2) (West 2026) (directing the court to reduce a sentence if, inter alia, "the interests of justice" warrant).

39 *See, e.g.*, D.C. CODE ANN. § 24-403.03(b)(1)–(2) (West 2026) (permitting applications to include "affidavits or other written material" and authorizing judges to "direct the parties to expand the record by submitting additional testimony, examinations, or written materials related to the motion"); Skolnick, *supra* note 18, at 39–45 (recounting New York state courts' skepticism of lay and expert testimony presented by petitioners for resentencing under the Domestic Violence Survivors Justice Act).

40 *See, e.g.*, People v. Fern, 723 N.E.2d 207, 209 (Ill. 1999) ("The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age."); State v. Roth, 471 A.2d 370, 383–84 (N.J. 1984) (describing the range, based on evaluation of mitigating or aggravating factors, that judges may impose under New Jersey's presumptive imprisonment scheme).

41 *See* Wendy Sawyer, Brian Nam-Sonenstein & Peter Wagner, *Mass Incarceration: The Whole Pie 2026*, PRISON POL'Y INITIATIVE (Mar. 11, 2026), https://www.prisonpolicy.org/reports/pie2026.html [https://perma.cc/E4EP-7AWV] (noting that 1.9 million people today are currently incarcerated, 4.9 million are formerly incarcerated in state or federal prison, 19 million have been convicted of a felony, and 113 million have a family member who has been to prison or jail).

42 *See* Skolnick, *supra* note 18, at 35–54; *see also* MARTA NELSON, SAMUEL FEINEH & MARIS MAPOLSKI, VERA INST. JUST., A NEW PARADIGM FOR SENTENCING IN THE UNITED STATES 7 (Feb. 2023), https://vera-institute.files.svdcdn.com/production/

However, several actors threaten to gatekeep. In my prior work, I discuss how discretion of judges can impose one such limitation on the imperative to resentence, as they are prone to "credibility discounting" because, among other reasons, the person before them asking for a benefit has been convicted and is incarcerated.[43] As I will discuss in Section I.B, *infra*, prosecutor-gated resentencing laws—while well-intentioned and, in some currently enacted iterations, even broader in their eligibility criteria than certain petitioner-initiated resentencing laws (though that state of affairs reflects a normative choice, not a required one)—also serve an improper gatekeeping function. Nonetheless, examining the applications of prosecutor-initiated laws points to the ways in which involving community groups can provide important lessons for an ungated model.

B. Prosecutor-Initiated Resentencing Initiatives, While Inadequate, Nonetheless Point to Opportunities for Cooperation

As discussed, one resentencing model that has gained traction is second-look resentencing that prosecutors initiate. As of 2025, five states have enacted these laws.[44] In all instances, law enforcement controls

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downloads/publications/Vera-Sentencing-Report-2023.pdf [https://perma.cc/4BEN-T4AE] (contending that reducing incarceration by close to eighty percent will better serve the ends of justice and safety). Moreover, existing strategies that do not include resentencings will be insufficient to ensure adequate decarceration. According to a 2018 estimate, policy changes to reduce prison admissions and sentence lengths, which led to some reductions in prison population in the teens, would take, at their current pace, seventy-five years to lead to a halving in size. NAZGOL GHANDNOOSH, SENT'G PROJECT, CAN WE WAIT 75 YEARS TO CUT THE PRISON POPULATION IN HALF? 1 (Mar. 2018), https://www.sentencingproject.org/app/uploads/2022/08/Can-we-wait-75-years-to-cut-the-prison-population-in-half.pdf [https://perma.cc/BA3D-2E8U]. Accordingly, if policymakers are serious about meaningful reversal of mass incarceration, a more aggressive portfolio of strategies—including ending incarceration for drug crimes and reducing it for violent felonies—will be necessary. *See id.* at 2, 4.

[43] Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017); *see also* Skolnick, *supra* note 18, at 15–20 (describing the problems of discretion in the criminal legal system); *id.* at 39–45 (considering the exceptionally high standard applicants are held to by judges during discretionary resentencing hearings); *id.* at 49–50 (noting that discretionary resentencing laws place undue emphasis on the applicant's credibility, compared to sentencing reforms that carry a strong presumption in favor of a reduced sentence).

[44] FELDMAN, *supra* note 2, at 24 (noting laws in California, Illinois, Minnesota, Oregon, and Washington). Louisiana also passed a law allowing vacatur and amendment of a person's "conviction, sentence, or habitual offender status" upon agreement of the petitioner and district attorney, with approval of the court. LA. CODE CRIM. PROC. ANN. art. 930.10(B) (2025). This statute was challenged and struck down on separation-of-powers grounds, with the court finding this mechanism to be a usurpation of the governor's exclusive pardon power. State v. Lee, 370 So. 3d 408, 410 (La. 2023). However, because the case in which the court so found involved a modification of both the conviction and sentence, and not just

whether to review sentences, the relevant criteria for resentencing, and what cases to prioritize for review.[45]

Any time saved off a sentence is a net positive. Prosecutors deserve credit for their willingness, where they exercise it, to revisit decisions to seek harsh sentences they made years ago and to address their own role in driving mass incarceration.[46] However, there are reasons for skepticism that these approaches will decarcerate effectively. Instead of reaching the vast numbers of people serving extreme sentences for serious crimes, evidence of these laws' implementation to date suggests they are targeting just the "easy" cases, such as those involving the most sympathetic incarcerated persons or non-violent drug felonies.[47] At worst, these laws risk entrenching prejudices and setting back the cause for many who could present compelling resentencing claims if, in the laws' implementation, limited success is celebrated, thereby reifying the notion that only a few incarcerated people deserve resentencing. As Alexandra Harrington notes in describing the patchwork of resentencings that have occurred in these jurisdictions, while "[s]everal offices have taken advantage of these new laws and applied for resentencing in dozens of cases," most cases "have come from the same few, urban prosecutors' offices."[48] Moreover, "even those offices . . . [with] so-called 'progressive prosecutors' at the helm[] have rarely used their resentencing power to re-examine

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the sentence, see *id.* at 410, whether courts retain a sentence modification power under the statute remains an open question.

45 For the People, Advancing Prosecutor-Initiated Resentencing: A Guide for Prosecutors, Policymakers, and Advocates 9 (Sep. 2022), https://www.fortheppl.org/s/FTP-National-Guide-2025.pdf [https://perma.cc/T2D2-8DJT].

46 *See, e.g.*, *Joint Statement on Sentencing Second Chances and Addressing Past Extreme Sentences*, Fair & Just Prosecution (Apr. 2021), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf [https://perma.cc/4CMZ-J3DU] (acknowledging lack of empirical support for harsh sentencing promoting public safety, and calling for a series of reforms to bring about the unwinding of such harsh sentences, including sentencing review mechanisms; internal sentence-review units within prosecutors' offices; and expanded compassionate release for elderly, ill, or disabled incarcerated individuals, or those with family care obligations).

47 The Executive Director of For the People, an organization which advocates for prosecutor-initiated resentencing laws, estimated that as of March 2024, about one thousand people had been resentenced pursuant to these laws across five states, including California. *See* Hillary Blout, *One Simple Criminal Justice Reform Could Solve the Prosecutor Shortage Crisis*, Slate (Mar. 20, 2024, at 10:00 ET), https://slate.com/news-and-politics/2024/03/criminal-justice-reform-prosecutor-shortage-resentencing.html [https://perma.cc/GQ4J-L3RJ]. In 2023, California had the nation's second-largest prison population, excluding the federal Bureau of Prisons, at 96,225. *Appendix: State and Federal Prison Populations 2019-2023 and Sources*, Prison Pol'y Initiative, https://www.prisonpolicy.org/data/prison_pops_2019_2023_sources.html [https://perma.cc/MGA6-62V2] (last visited June 13, 2026).

48 Alexandra Harrington, *Second Look Myopia: State Sentencing Reform and the Local Prosecutorial Response*, 114 J. Crim. L. & Criminology 827, 832 (2025).

cases involving murder, manslaughter, sex offenses, or other serious, violent crimes."[49]

Furthermore, though perhaps an obvious point, anyone convicted and sentenced in a jurisdiction that vests the authority to seek resentencing exclusively with the prosecutor—an elected official—will be subject solely to the whims and good intentions (or lack thereof) of that prosecutor. There is no mandate to seek resentencing for anyone, and prosecutors have sole discretion to determine whether someone can reach the courthouse door. In many Washington State counties, for example, this full gatekeeping appears to be happening: Within about four years of the law's enactment, prosecutors' offices appeared to have submitted just around forty-two motions, disproportionately concentrated in three counties, including King (Seattle) and Pierce (Tacoma); in most counties, prosecutors had submitted none.[50] There is also little incentive to revisit past work or undo prior decisions of one's own office that were considered correct at the time. Other barriers also exist, such as cost, philosophical opposition to overturning a sentence

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[49] *Id.* In California, for instance, researchers found that while prosecutors were recommending resentencing in cases involving crimes against persons, they were still doing so at rates less than the number of people incarcerated for these offenses from subject counties. *See* Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders & Jeremy N. V. Miles, RAND Corp., Evaluation of the California County Resentencing Pilot Program: Year 2 Findings 5 (2023), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA2100/RRA2116-3-v2/RAND_RRA2116-3-v2.pdf [https://perma.cc/B5PC-6BER] (examining resentencing implementation in nine pilot counties, covering urban, suburban, and rural settings and finding that prosecutors overwhelmingly chose to screen out people convicted of serious crimes). Moreover, the study concluded seventy-five percent of those whom prosecutors referred for resentencing scored "low-risk" on risk-assessment instruments. *Id.* at 22–23. Harrington identifies another key reason that prosecutors often decline to consider resentencing: that the candidate pleaded guilty, resulting in the perception that they already received a "benefit." Harrington, *supra* note 48, at 830–31. In a system where most cases are disposed of by plea, this perception, coupled with prosecutorial gatekeeping, is likely to limit relief substantially. *See* Thea Johnson, A.B.A. Crim. Just. Section, Plea Bargain Task Force Report 6 n.2 (2023), https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/reports/plea-bargain-tf-report.pdf [https://perma.cc/56XY-ZRP8] (citing statistics on the paucity of criminal trials in recent years: less than two percent in the federal system; less than three percent in states such as New York, Pennsylvania, and Texas; and none in some jurisdictions).

[50] *See* Katherine Beckett & Allison Goldberg, Prosecutor-Initiated Resentencing in Washington: The Impact of SB 6164, at 11 (2024), https://lsj.washington.edu/sites/lsj/files/documents/research/Prosecutor%20Initiated%20Resentencing%20%28SB%206164%29%20Report_6.5.24_final.pdf [https://perma.cc/U6LK-FJSG]. Harrington documents a similar phenomenon across New York in her analysis of resentencings under its Domestic Violence Survivors Justice Act, a 2019 law that permits a second look at sentences for those who can show a nexus between a history of abuse and their crime. Though it is not a prosecutor-initiated law per se, she shows how having the consent of the prosecutor is often critical to the outcome, and that prosecutors more freely give consent in some counties than in others. *See* Harrington, *supra* note 48, at 856–60.

imposed by a coordinate branch of government, or fear of voter disapproval.[51]

Assuming, however, that prosecutors will review old cases and identify at least some potential candidates, a typical ill of discretion—bias—can rear its head. In California, where implementation of the prosecutor-initiated resentencing law has been studied, researchers concluded that "additional investigation" was needed to draw conclusions about how the race of those referred for resentencing measured up against overall rates of Black and Hispanic[52] incarceration in the target counties.[53] Yet there is reason to suspect that bias infects who benefits from these laws.[54]

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51 *See* Matt Nadel & Charlie Lee, *Prosecutors in These States Can Review Sentences They Deem Extreme. Few Do.*, Marshall Project (Oct. 31, 2023, at 10:30 ET), https://www.themarshallproject.org/2022/11/11/prosecutors-in-these-states-can-review-sentences-they-deem-extreme-few-do-it [https://perma.cc/6K97-7W2R]. For a full overview of the implementation challenges in the several states that have passed prosecutor-initiated resentencing laws, see Harrington, *supra* note 48, at 842–47.

52 The study itself uses the terms "Black" and "Hispanic."

53 Davis et al., *supra* note 49, at 14. Other observers of the California implementation efforts noted that women had largely been left out by initial screening criteria. *See, e.g.*, Issie Lapowsky, *Prison Reform Left Them Behind. Then Prosecutors Stepped In*, N.Y. Times (June 13, 2025), https://www.nytimes.com/2025/06/13/headway/prison-reform-women-california-prosecutors.html [https://perma.cc/Z2LC-VQY6] (documenting that while ninety percent of the California prison population is male, criteria for prosecutor-initiated resentencing nonetheless screened out many women who might otherwise have been good candidates). Programs in six counties have since stepped in to correct this perceived unfairness. *See id.*

54 First, prosecutors, like all people in this society, are susceptible to implicit bias, and commentators have noted that implicit bias can infect their work. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1593–1602 (2006) (detailing four forms of cognitive bias that can lead even well-meaning prosecutors to make discretionary decisions informed by beliefs that are "imperfect and resistant to change"); Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 Denv. L. Rev. 457, 489–90 (2021) (describing how the pervasiveness of the association of Blackness with criminality can infect prosecutorial decisionmaking). Moreover, what Nicole Gonzalez Van Cleve describes in the Chicago courthouses, which she studied for years, is "an entrenched culture ruled by racial violence," with the prosecutors often acting as "ringleaders" while claiming to be post-racial. Van Cleve, *supra* note 11, at 131–32. This makes it difficult to credit that prosecutorial culture is not, in at least some places, steeped in practice that targets only certain members of the community while leaving others unscathed. There are also significant institutional biases and pressures toward upholding convictions; in fact, best practices in conviction integrity units emphasize that they must be independent of appellate units for that very reason. *See* Fair & Just Prosecution, Conviction Integrity Units and Internal Accountability Mechanisms 4 (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf [https://perma.cc/S7TJ-YJ7Y] (noting offices that have had conviction integrity units report to prosecutorial appellate units "have encountered difficulties with the appellate unit being much more oriented toward protecting the underlying conviction, as opposed to the open and searching mindset required for effective conviction review").

Those who believe in the potential of these models see limitations arising from how defense counsels might function in this ecosystem. As Kay Levine and Ronald Wright describe, when faced with the prosecutorial tendency to cherry-pick only the "easiest cases," defense attorneys might default to an adversarial role, gumming up the works of a process that can be more successful when collaborative.[55] Yet, Levine and Wright also recognize that this arises from prosecutorial "sting[iness]," or at least defense counsel perception of a mismatch between how prosecutors involved in prosecutor-initiated resentencings describe their programs and in how they approach resentencings under these regimes.[56] Moreover, they note the tension for defense counsels who understand that their role is not simply to praise the generosity of the prosecutors who might file a motion on behalf of only defendants deemed good enough.[57] And what "collaborative" means is up for debate, with defense attorneys remarking it often is a stand-in for "whatever [the prosecutor] says goes."[58]

Nonetheless, Levine and Wright highlight one potential feature of a regime in which the prosecution and the defense share a goal: a collaboration with the aim of bringing about resentencing, which can "serve broader community interests."[59] In an ideal scenario, defense counsels drop their typical adversarial posture, furnishing information about their clients' life stories through a "kind of reverse 'open-file policy'" whereby prosecutors are able to learn information about their clients' pre-prison life, time incarcerated, and post-incarceration plans.[60] This can also create space for an expansive view of relevance and for non-lawyer actors to contribute information. Levine and Wright highlight one example in Vermont involving a community group-led effort to introduce information about applicants' reentry plans into the discussion.[61] This cooperative stance can lead to a broader view of whose interests resentencing and decarceration might serve; for example, during the pandemic, prosecutors and defense attorneys alike understood that thinning out prison populations was in the interest of safety.[62]

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55 Levine & Wright, *supra* note 2, at 295.

56 *Id.* at 295, 319–20.

57 *Id.* at 317–18.

58 *Id.* at 320.

59 *Id.* at 320–21. This approach has been pioneered in other post-conviction contexts, such as conviction integrity, where at times prosecutors and defense attorneys engage in joint reinvestigation, file sharing, media strategy, and approaches to take with the courts. *Id.* at 301.

60 *Id.* at 315–16.

61 *Id.* at 316.

62 *Id.* at 321. At least in Vermont, for a time between 2020 and 2022, attorneys involved in resentencing reported that this ethos governed. *Id.*

Perhaps because of this collaborative spirit, parties might be less likely to retreat to their corners when things do not go as planned. Levine and Wright cite the example of two people released pursuant to prosecutor-initiated resentencings in Seattle committing serious crimes afterwards.[63] Instead of immediately shutting down its resentencing program, the district attorney's office chose to invest in and work with community organizations dedicated to reentry support.[64] The office's commitment to resentencing along with its deep network appears to have allowed it to continue advancing the work of decarceration, and to dedicate the resources to do so in a thoughtful way that would lead to other releasees' successful reintegration. Furthermore, because some of the typical boundaries among defense, prosecution, and community had fallen away during the resentencing process, there was more openness to problem-solving rather than a retreat to adversarialism.

This is where potential lies. Where traditional role boundaries become blurred and non-lawyer actors may contribute to a more holistic understanding of the common good, there is space for progress toward better resentencing outcomes.

C. The Tensions Between Counsel and Client During Resentencing

There are thus lessons to take from prosecution-initiated resentencings on the value of collaboration with a workgroup, and defense counsels should take note. However, I believe that the better path lies in counseled motions initiated by *petitioners*, as these motions allow resentencings to reach a broader range of individuals and give counsels and clients more power to shape the narrative. This narrative-reshaping power is best deployed when defense counsel and client are on the same page.

Yet, there are myriad reasons that defense counsels and clients can experience tension or simply be on different wavelengths during a representation. For some lawyers and clients experiencing conflict, the dispute is over incompatible case theories. For other attorneys, the issue is illegibility of their clients' experiences, which have been shaped, in most instances, by an environment so different from their own. Ultimately, these disputes occur on the terrain of worldview, with attorneys potentially unable to see their clients' perspectives in full when they fail to completely understand their clients' context.

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63 *Id.* at 312.
64 *Id.*

This Section catalogs some of the primary sites of conflict between client and attorney in general, and in particular identifies where they might arise during a resentencing representation. While existing literature has explored how finding the right balance of decisionmaking power between clients and attorneys can create conflict during the pre-sentence posture,[65] with some recent scholarship examining post-conviction practice,[66] no one has yet considered how these tensions might play out during the resentencing posture, typically while a client is serving a sentence of incarceration and seeking a reduction that will lead to release. The following discussion seeks to fill that gap.

1. Defender Privilege

Both legal scholars and sociologists have discussed troubling outcomes that can occur for defendants represented by public defenders, often focusing on racial dynamics.[67] They offer varying and related explanations for why defense attorneys have not been able to fulfill obligations to their clients, many of them focused on the privileged positions that defense attorneys hold in contrast to their clients.

Nicole Gonzalez Van Cleve, a sociologist who embedded in the Cook County (Chicago) courthouse for ten years, found that the problem lay in defense counsels becoming generally complicit in the culture of racialized abuse of their clients.[68] Even if defense lawyers were sympathetic to their clients, she found they often operated "within the boundaries of a racialized court culture," while saving resistance and zealous representation only for those whom they deemed the

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[65] *See, e.g.*, Alma Magaña, *Public Defenders as Gatekeepers of Freedom*, 70 UCLA L. REV. 978, 1003–18 (2023) (discussing case study of New York Legal Aid Society lawyers deciding whether to seek bail for their clients, often over client wishes); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 529–52 (1994) (describing differences of opinion between legal clinic participants and client over trial theory, including what role racism played in theft accusations against client that led to disorderly conduct and resisting arrest charges).

[66] *See, e.g.*, Rachel T. Goldberg & Estelle M. McKee, *Transforming Indigent Appellate Advocacy*, 114 GEO. L.J. 643 (2026) (critiquing legal-centric model of appellate representation as unduly limited and urging adoption of client-centered and participatory defense practices); Alexis Hoag-Fordjour, Response, *Client Counseling in Post-Conviction*, 104 B.U. L. REV. 1966 (2024) (advocating for "critical counseling," a model of criminal defense representation that treats clients as collaborative partners and acknowledges the oppressive features of the criminal legal system).

[67] This is not to say that public defender representation leaves clients worse off than private representation; in fact, results are much more mixed, and "public defenders" might only stack up unfavorably against retained counsel when the former includes a mix of institutional defenders and assigned counsel in private practice. *See* Jenny Roberts & Ronald Wright, *Expanded Criminal Defense Lawyering*, 6 ANN. REV. CRIMINOLOGY 241, 252–54 (2022) (reviewing studies).

[68] VAN CLEVE, *supra* note 11, at 157.

deserving few.[69] Those few bore "[m]iddle-class markers" or were "outside the . . . construct of degenerate, lazy, and undeserving," a default state for people of color but one that white defendants had to prove themselves to be.[70] In her finding, defense lawyers generally seemed to have accepted the assumption of the wider ecosystem of court personnel that the majority of defendants being processed were engaged in hustling or deception—rather than simply fighting for their lives or otherwise ignorant of what information they might have to share to help their lawyers best represent them.[71] But Van Cleve also does not attribute blame solely to them: For those lawyers who did attempt to step out of line by fighting harder for their hapless clients, punishment was swift, often in the form of harsher sanctions for their clients and retribution through abuse or "marginaliz[ation]" of the lawyers themselves.[72]

At times, the divide between clients and attorneys was expressly about race. Van Cleve notes that most of the professionals working in the Chicago court were white, whereas most of the defendants and their families were Black and Brown, with the visibility of this divide heightened by the separate courthouse entrances each group used.[73] Such "boundaries," in her observation, had the potential to entrench dynamics of difference and a sense that members of the in-group wanted to avoid association with the out-group, whose experience in

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[69] *See id.* at 12–13, 157–58, 160–61. In one striking example, a defense attorney volunteered that he did not need an interpreter to speak with his client, who said on the record that he spoke only a "[l]ittle bit" of English when the judge asked, telegraphing that the client's full participation and voice were not really needed. *Id.* at 75–76. The lawyer had colluded unnecessarily in denying his client due process to keep the process running smoothly and communicate his own "insider" status. *Id.* at 76.

[70] *Id.* at 65, 174.

[71] *Id.* at 167–69. In one telling example, Van Cleve cites a document titled, "Making Sense of 26th Street: A Guide for Law Clerks of the Cook County Public Defender," which warned new law clerks about their clients: "Do not be naïve . . . Do not encourage their flirting or other BS they may try to pull on you." *Id.* at 168 (citing manual).

[72] *Id.* at 84. On the other hand, she notes troubling examples of defendants representing themselves, and the swift alliance that seemed to occur among the professionals in the courtroom against the layperson, with defense counsel joining others in lavishing contempt upon the erstwhile client for throwing a wrench in the gears; efficient processing and professional identification appear, in such circumstances, to supersede the ideal of a best outcome for that client. *See id.* at 177–80.

[73] *Id.* at 16–17 (noting separate entrances for visitors and court personnel, and citing STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE (2005), for the statistic that as of the early 2000s, sixty-nine percent of public defenders were white). The National Association for Law Placement has also published data on hiring for public defender jobs among recent law graduates. Between 1991–2021, the percentages of those jobs held by white graduates hovered between 68.6% and 78.4%. *The Demographics of Jobs from 1991-2021*, NAT'L ASS'N L. PLACEMENT (Mar. 2023), https://www.nalp.org/0323research [https://perma.cc/BP3F-AZPD].

court was characterized by "abuse, humiliation, and harassment."[74] As Alexis Hoag has noted, "[t]he existence of anti-Black bias among defense counsel is well-documented," with numerous studies confirming implicit anti-Black biases among defense counsels in a variety of practice contexts.[75]

For others, this distinction in treatment of clients is refracted through the category of "privilege" more generally. Matthew Clair, another sociologist, studied the attorney-client relationship in the Boston criminal court system.[76] He found that the relationship "*reproduce*[d] race and class inequalities" in that for "disadvantaged" clients, "a relationship with a lawyer often result[ed] in coercion, silencing, and punishment," whereas for the "privileged, a relationship with a lawyer often result[ed] in leniency, ease of navigation, and even some rewards."[77]

Specifically, Clair observed that defendants with class (and often racial and educational) privilege often had a smooth working partnership with their attorneys, which he attributed to them "finding cultural commonalities with their lawyers," which in turn fostered trust.[78] In addition, because many of these individuals were encountering the criminal legal system for the first time, they had no prior knowledge of the system and were primed to rely on their lawyers for guidance.[79] As a result, these relationships were characterized by "delegation," with clients generally deferring to their attorneys, creating less friction during the courtroom process, promoting freer flow of information between client and attorney, and generally resulting in more favorable outcomes.[80]

By contrast, those Clair characterizes as "disadvantaged," meaning "working class and poor, especially racial minorities," "with high levels of punitive police surveillance and . . . routine (and often negative) experiences with the legal system, limited social ties with empowered people, and limited access to financial resources," had little trust for their attorneys, causing their resistance or disengagement.[81] This lack of trust stemmed from a sense that an assigned attorney was too busy,

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74 Van Cleve, *supra* note 11, at 23–24.

75 Hoag, *supra* note 12, at 1497–98 (collecting literature).

76 *See generally* Clair, *supra* note 11 (documenting dynamics that emerge between defendants with varying degrees of race and class privilege, and the attorneys who represent them).

77 *Id.* at 7.

78 *Id.* at 109, 113.

79 *See id.* at 116–20.

80 *Id.* at 104, 121, 123–24, 126–27, 175.

81 *Id.* at xvi, 3, 7, 64–66, 90.

not interested, working within the system, and underpaid; at times these impressions transcended race, with clients reporting feeling that their attorneys did not have their best interests at heart even where both client and attorney were Black.[82] As a result, the disadvantaged faced worse outcomes because their lawyers had no information about their preferences, or experienced direct punitive retaliation or silencing.[83]

Sometimes there are clashes over knowledge or expertise, with formally educated lawyers refusing or being unable to see their clients as bringing real knowledge to bear.[84] In one example, Van Cleve recounts a story of an accused individual asking his public defender, Kevin, why he had been charged with a felony while his co-defendants in the car the police had pulled over were charged with misdemeanors, using a term, "possession of stolen property," to describe the charge against him.[85] Kevin replied, "possession of stolen property" was not "a real charge," and merely "street law."[86] In other words, the client's legal consciousness was dismissed as unsophisticated and not particularly relevant, gleaned only from what he had learned from growing up on the "streets," never mind that it had resulted in a real differential in exposure since he was facing a felony in comparison to his co-defendants' misdemeanors.[87] Rather than engage on his client's terms, Kevin had dismissed his client's concern as predicated on a discredited form of knowledge.

Such interactions might occur at the level of the implicit, too, but nonetheless have consequences that can reverberate throughout the life of a case: As L. Song Richardson and Phillip Atiba Goff, writing of

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[82] *Id.* at 71, 74–75. Alexis Hoag, however, theorizes otherwise. In proposing that there ought to be counsel of choice for low-income defendants, and in particular Black defendants so that they can receive culturally competent attorneys, she notes, "Black lawyers often have the experiential knowledge of what it is like to move through the world with the social meaning attached to Blackness and thus, firsthand knowledge of the corresponding treatment and dangers," conferring an ability to provide what she terms "embodied empathy," such that they can "understand and empathize with the stressors and circumstances that resulted in the criminal charges their clients face, and . . . recognize the humanity in their clients." Hoag, *supra* note 12, at 1498, 1532. She posits that the ability to opt for "racial congruency and cultural competency when selecting representation" might have several benefits, notably around improving attorney-client communication, which is predicated on trust. *Id.* at 1532, 1535–38. Trust, moreover, is what greases the wheels of the relationship and thereby makes the adversary system itself function properly. *Id.* at 1495–96 (citing Morris v. Slappy, 461 U.S. 1, 21 (1983) (Brennan, J., concurring)). By contrast, failure of trust can amount to effective denial of counsel. *Id.*

[83] CLAIR, *supra* note 11, at 69, 94, 139, 155, 183.

[84] *Id.* at 77 ("[D]efendants' expertise may not be legible to professionals, whose expertise is shaped by the professionalized norms of the law schools where they studied and the expectations of the courtrooms where they practice.").

[85] VAN CLEVE, *supra* note 11, at 163.

[86] *Id.* at 164.

[87] *Id.*

how implicit biases can affect public defenders, note, during an initial client meeting, "attorneys will inevitably make judgments about client credibility. If lawyers do not credit their clients' version of events, they may not follow up on leads or may forgo possible motions to suppress government evidence."[88] And at least one study has shown that implicit bias can infect defense attorney behavior during plea-bargaining, too: Isolating factors such as defender belief that juries are more likely to convict or be racist, researchers showed that counsels were many times more likely to recommend that a fictional Black client accept a deal with a jail sentence than a similarly situated white client.[89] Alexis Hoag contends that this could be mitigated through counsel of choice, and specifically through allowing low-income Black clients to choose Black lawyers, who "may be able to more readily see, hear, and understand their Black clients"; similarly, "and, as importantly, Black clients [might] tend to more readily see, hear, and understand their Black lawyers."[90] As the theory goes, this occurs because each has a presumptive competence to speak about race and racism not shared by their white counterparts.[91] But without such a system, disconnects continue to occur.

This matters at later case stages too, because a theory for resentencing is only as good as the information the lawyer can learn from the client. As in capital or any sentence mitigation, at this stage, the lawyer is tasked[92] with presenting a full picture of the client to the

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[88] L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2636 (2013).

[89] Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. & HUM. BEHAV. 413, 422–24 (2011).

[90] Hoag, *supra* note 12, at 1538.

[91] *Id.* (citing RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 11 (3d ed. 2017)); *see also* Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J. L. & PUB. POL'Y 1, 5–6 (2008) (arguing legal services organizations should have African-American attorneys on staff to be most effective for reasons of improved communication, trust-building, and legitimacy). That said, others have contended that lawyers sharing a racial identity with a client can complicate the representation, freighting the relationship with expectations that might not exist where lawyers and clients have different identities. *See* Julie D. Lawton, *Am I My Client? Revisited: The Role of Race in Legal Representation*, 22 MICH. J. RACE & L. 13, 35–50 (2016).

[92] In Part II, I explore some of the ethical parameters that accompany counsels' obligations, and touch on how the Sixth Amendment provides minimum standards for representation as well. *See* Strickland v. Washington, 466 U.S. 668 (1984) (holding that the Sixth Amendment guarantees reasonably effective assistance of counsel and establishing minimum constitutional standards for attorney performance); *see also* Williams v. Taylor, 529 U.S. 362, 396–97 (2000) (finding counsel ineffective for failing to investigate and introduce mitigation before capital sentencing jury). What defense lawyers are required to do to be considered effective at resentencing is similar: investigate and present mitigating evidence. *See, e.g.*, Jackson v. Commonwealth, No. 2012-CA-002062-MR, 2014 WL 2631277,

court so that the court can determine whether to exercise leniency. If lawyers cannot fully see their clients for reasons of bias, even if implicit,[93] or if privilege erects a barrier to full communication and a relationship of trust, then clients will not receive the representation they are due. What is more, this proceeding is almost by definition occurring while the client is incarcerated, a low point for client credibility.[94] Thus, it is perhaps even *more* important that the lawyer be able to present their client at this stage in a way that conveys their full humanity to decisionmakers.

Finally, and perhaps most critically in the resentencing context since most clients seeking second-look resentencing are doing so during long periods of incarceration, in all but a few rare instances, incarceration is not something that most defense attorneys have themselves undergone[95] and can relate to in understanding and

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at *3–4 (Ky. June 13, 2014) (reversing and remanding for new resentencing hearing where counsel failed to present mitigation, an error that could have prejudiced Jackson); People v. Burbine, 106 Cal. App. 4th 1250, 1265–66 (2003) (applying ineffective assistance test at resentencing and finding no defective performance or prejudice). In any event, these rules simply set forth minimal obligations, not what ideally attorneys might do to fulfill the full promise of their role as advocates for their clients.

93 *See* Richardson & Goff, *supra* note 88, at 2631 (noting that public defenders work in precisely the sort of information environment and under the sort of conditions of "cognitive[] deplet[ion], anxi[ety], or distract[ion]" in which implicit bias can flourish and finding that, in fact, it does (internal citations omitted)).

94 *See* Skolnick, *supra* note 18, at 22.

95 Fortunately, for privacy reasons, criminal history information for those admitted to the bar is not public. *See* Allen Arthur, *Clearing a Path from Prison to the Bar Exam*, REASONS TO BE CHEERFUL (June 21, 2021), https://reasonstobecheerful.world/formerly-incarcerated-people-pass-bar-exam [https://perma.cc/3JS8-H9JM]. Therefore, no comprehensive data is available on how many formerly incarcerated or justice-involved attorneys there are in practice and, specifically, involved in criminal defense. As a general matter, data show that stability in employment for those with past incarceration remains elusive. *See* Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POL'Y INITIATIVE (Feb. 8, 2022), https://www.prisonpolicy.org/blog/2022/02/08/employment [https://perma.cc/S3VE-V8YJ] (estimating a joblessness rate of sixty percent and frequent movement among jobs for formerly incarcerated individuals within the prior four years, extrapolating from Bureau of Justice Statistics data). For those who wish to become lawyers, successfully progressing through a gauntlet of law school admissions, law school completion, and bar admissions, where candidates face obstacles such as questions about arrest and conviction history at each stage of the process to become an attorney, therefore, likely remains the exception rather than the rule. *See*, *e.g.*, *Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York*, N.Y. STATE BD. OF LAW EXAM'RS, https://www.nybarexam.org/Admission/B-Bar_Admissions-Questionaire.pdf [https://perma.cc/KU4Z-QL3T] (last visited May 31, 2026); James M. Binnall & Lauren M. Davis, *Do They Really Ask That? A National Survey of Criminal History Inquiries on Law School Applications*, 32 STAN. L. & POL'Y REV. ONLINE 1, 6, 15 (2021) (upon conducting a nationwide survey, finding that 195 of 196 law schools surveyed made at least "some inquiry into an applicant's criminal history," and noting that criminal history inquiries can lead to application attrition). There are exceptional examples

translating the client's experience. Attorneys might have been around incarceration through clients or even their own family members, but rarely is it something they can relate to their clients over at the most visceral and direct level.[96] While this does not mean attorneys are inherently ineffectual, legally ineffective, or unempathetic, an epistemic gap can open up between them and their clients around the experience of incarceration itself.

2. Dueling Narratives

For lawyers advancing clients' causes, narrative is essential,[97] and litigation becomes "a contest about epistemology."[98] Narrative frames the case, giving shape to the fundamental question: What is this case about? Moreover, narrative is constructed and reflects choices,[99] and it can be a site where hegemonic understandings of the world gain purchase. In an infamous example, lawyers representing the officers accused of assaulting Rodney King were able to appeal to suburban jurors' preexisting prejudices about race, crime, and cities to depict King as a representative of an out-of-control Los Angeles and in need of the order that the heroic officers were called in to impose—notwithstanding the video of King's vicious beating by several

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of those who self-disclose as formerly incarcerated who become attorneys, often bringing to bear their experience as jailhouse lawyers to advocate for those who are inside. *See* Arthur, *supra* note 95 (recounting Phil Miller's transition from aspiring CIA officer to jailhouse lawyer while serving a lengthy prison sentence); *see also* Christopher Zoukis, *Former Prisoners Become Attorneys: From Breaking the Law to Practicing Law*, Prison Legal News (Feb. 4, 2019), https://www.prisonlegalnews.org/news/2019/feb/4/former-prisoners-become-attorneys-breaking-law-practicing-law [https://perma.cc/25WK-ES66]. But their numbers are small, and how many additional defense attorneys there are with their own undisclosed criminal histories is likely also small, given the challenges noted above.

96 It would thus be difficult, as a practical matter, for a counsel-of-choice program similar to the one Hoag proposes, but around the experience of incarceration, to exist.

97 *See, e.g.*, Muneer I. Ahmad, *The Ethics of Narrative*, 11 Am. U. J. Gender Soc. Pol'y & L. 117, 122 (2002) ("Narrative, or storytelling, is the primary means by which we as lawyers advance our clients' causes."); Ty Alper, Anthony G. Amsterdam, Todd E. Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 Clinical L. Rev. 1, 4–9 (2005) (cataloging the ways in which narrative is critical to litigation, among them that it is a primary means by which humans understand the world, including what is "normal," and how stories should end). What is more, seeking out narrative heuristics to understand the world is a deeply human endeavor. *See* Conway, *supra* note 54, at 469–70 (arguing that stock stories are particularly persuasive because they draw on listeners' existing experiences and worldviews); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 Geo. L.J. 281, 286–88 (2013) (describing how storytelling elements contribute to meaning-making, with explanatory potential for trial).

98 Alper et al., *supra* note 97, at 48.

99 *See* Ahmad, *supra* note 97, at 122.

Los Angeles Police Department officers right before those jurors' eyes.[100] It worked, with the officers effectively acquitted.[101]

Narrative theory scholarship has explored how narrative control becomes a site for the exercise of power. Richard Delgado, a narrative theorist, has written of how a frame for a case can either reinforce hegemony or disconfirm dominant narratives and, thus, power structures.[102] An illustrative example from my practice as a post-conviction public defender comes to mind. Among the cases I handled were petitions under New York's Domestic Violence Survivors Justice Act ("DVSJA"), which permitted petitioners to seek reduced sentences if they could show their crimes had been motivated by having survived domestic abuse.[103] Not infrequently, my clients had endured childhood abuse, serial abusive romantic relationships, or some combination of the two. In cases where they had acted with retaliatory violence toward a partner, the relationship with that romantic partner was often complicated, and could be characterized by emotions like jealousy and love even as my client experienced fear and coercive control. The narrative that the prosecution typically tried to push was one of jealousy alone: To them, my client had acted possessively when they saw their partner straying from the relationship. By contrast, I tried to share a narrative of greater complexity, often enlisting experts to support the conclusion that trauma, demonstrable social science about the behavior of survivors of domestic violence, and other complicated realities of someone living under these conditions could lead to a toxic stew that resulted in tragedy. I was not always successful, and I wondered how much ground we had covered in helping our clients earn release or even tell their stories in resonant ways, let alone in advancing modern understandings of how domestic violence operates.

In Delgado's view, the "cure" for the oppression of the outgroup is for it to engage in more "counter-storytelling."[104] Telling stories serves as a counterweight to the dominant group's version and expands the narrative pool to include a broader version of truth; it builds community by "open[ing] new windows into reality, showing us that there are possibilities for life other than the ones we live."[105] Counter-stories, in relation to standard stories, are also dialectically destructive in that

100 *See* Alper et al., *supra* note 97, at 16–17.

101 *Id.* at 3 & n.6 (noting that for one defendant, the jury deadlocked on a lesser count, and also noting that in the later federal criminal civil rights trial, two officers were convicted).

102 Delgado, *supra* note 16, at 2412–15.

103 *See* N.Y. Penal Law § 60.12 (McKinney 2026); N.Y. Crim. Proc. Law § 440.46 (McKinney 2026).

104 Delgado, *supra* note 16, at 2414.

105 *Id.*

they remind listeners when it might be time to discard their previously held beliefs for being overly cruel or exclusionary.[106]

While Delgado's argument is not about the tension that arises between client and attorney per se, it illustrates that the story that shapes a litigation can determine the outcome. (In the DVSJA example, which "version" the court accepted—jealousy or trauma—often dictated the case's outcome.) Thus, the terrain on which a case is presented can have profound implications for how it gets decided, and for who has the power to shape the worldview that it advances.

Perhaps for that reason, Delgado emphasizes the critical importance of "outgroup" members continuing to tell their stories. For them, it is psychically necessary to self-preserve through putting on display the version of events that corresponds to their experience. In addition, however, their sharing potentially affects the dominant group, which, through listening, gains "morally and epistemologically."[107] Lawyers, though on their clients' team, might be members of the dominant group,[108] and therefore unable to fully see their clients' humanity without hearing frequent "counter-stories" from them and, thus, gaining a broader view of how clients might be moving through the world. A few examples of the common ways in which these narrative conflicts manifest are discussed in Sections I.C.2.a–b.

a. Defenses Can Clash with Anti-Oppressive Ideology

A dilemma can arise for defense attorneys when a case theory they are advancing conflicts with their own politics, and more specifically with the personal desire to promote anti-oppression. Muneer I. Ahmad explores this tension, posing the question of whether legal ethics "permit, or even require, lawyers to strategically deploy racist, sexist or homophobic narratives that will advance their clients' interests."[109] Narrative tropes (such as, in Ahmad's example, a rape accuser being a "crack whore," a racialized and gendered designation laden with credibility discounts[110]) can fit into familiar, easily recognizable frames that decisionmakers have; thus, such terms can be effective and advance the cause of zealous representation, an ethical duty that lawyers have to their clients.[111] But invoking these harmful stereotypes can perpetuate

106 *Id.* at 2415.
107 *Id.* at 2435–37.
108 *See supra* Section I.C.1.
109 Ahmad, *supra* note 97, at 117.
110 *See* Tuerkheimer, *supra* note 43, at 3 (arguing that "credibility discounting" is characterized by an "unwarranted failure to credit an assertion where this failure stems from prejudice").
111 Ahmad, *supra* note 97, at 118–23.

subordination that props up structures like the criminal legal system in the first place.[112] And to the extent lawyers have obligations to third parties and society as a whole, pursuing defenses that could advance the client's interests at the expense of society's could potentially be unethical, notwithstanding the zealousness mandate.[113] On the other hand, what constitutes the public interest is a subjective determination.[114]

Ahmad suggests a way that lawyers can navigate these ethical thickets: discussing with their clients the potential harms to others from raising these defenses.[115] This echoes a proposal charted by Binny Miller in her article critiquing both "traditionalists," who determine case theory by "element-crunching," or studying the relevant legal sources and then gathering facts that will help prove each element, and "critical lawyers," who overcorrect for the shortcomings of traditionalists by painting their clients as saints rather than as complex human beings with the agency to decide if and how to present their own stories.[116] She also argues that a client-centered approach, while admirable for identifying flaws in the conceptualization of the ends-means dichotomy in client-versus-attorney decisionmaking, is insufficient because, in so doing, it treats with abstraction the idea of case theory.[117] She contends, instead, that case theory construction must marry an appreciation of the client's lived reality and context with the lawyer's expertise in crafting a narrative they know will be legible for a factfinder.[118]

During resentencing, these issues of clashing narratives or ways of thinking about case theory can arise. Returning to the DVSJA context from my practice, I think about how, frequently, we would paint a client's abuser as a sadist, a brute, a tormentor. This sat uncomfortably with me, as I could easily see myself representing that

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112 *Id.* at 123–24 ("What if we believe, as I do, that criminal defense lawyers are, by virtue of their structural position in the criminal justice system, daily engaged in a battle against the subordination of the state against poor people and against people of color?").

113 *See id.* at 124 (discussing, among other rules and considerations, MODEL CODE OF PRO. CONDUCT r. 2.1 (A.B.A. 1983) (contemplating a lawyer's advice taking into account extra-legal considerations such as "moral, economic, social and political factors"), r. 1.16(b)(4) (allowing a lawyer to withdraw from representation if the client insists on the lawyer taking an action the lawyer considers "repugnant" or "with which the lawyer has a fundamental disagreement")). Ahmad cites to 1983 versions of these rules, but the current versions are largely unchanged. In addition, other Model Rules contemplate duties to others, such as Rules 4.1–4.4 (describing obligations in dealings with third parties), or Rule 6.1 (describing a duty of all lawyers to provide pro bono services). MODEL RULES OF PRO. CONDUCT r. 4.1–4.4, 6.1 (A.B.A. 2019).

114 Ahmad, *supra* note 97, at 125.

115 *Id.*

116 Miller, *supra* note 65, at 499, 525.

117 *Id.* at 506–11.

118 *Id.* at 553–75.

very person (rather, someone like them, given conflict-of-interest rules) on a non-DVSJA case, and seeing their circumstances quite differently from a different angle: They would have their own difficult history that had brought them to the point of engaging in abuse. In the context of a representation, there might be little room for such nuance, though, especially when the task is getting someone released from prison.

While there might be ways to mitigate some impacts of these tensions—for example, through intensive counseling, as commentators such as Ahmad and Miller suggest—the choices are still defined with reference to the *lawyer's* ethical universe. While the lawyer might—and ideally should—take into account the client's goals, ultimately the framework that these narrative choices present is about helping clients consider social impacts the lawyer deems important versus consider solely the variety of personal harms to clients themselves. While lawyers might be able to work with their clients to reach a point of agreement, whether lawyers are substituting their own judgment for others' considerations remains debatable.

b. Paternalism Can Override Client Autonomy

Another way in which tensions over control of the story can arise during a representation occurs when a defense lawyer decides they must act protectively toward a client, and in so doing, disregards the client's true wishes. This often occurs on the terrain of narrative, but it can have profound implications for the client, impacting liberty and dignitary interests.[119]

In her article on bail applications, or lack thereof, Alma Magaña describes how this tension plays out pretrial—to such a degree that public defenders become their clients' "gatekeepers."[120] The specific conflict that occurs is around whether to challenge pretrial detention through bail litigation; gatekeeping can involve "vetoing an individual's wish to continue litigating bail, declining to discuss

[119] For instance, in discussing the experiences of domestic violence survivors who go to court to seek protection, Leigh Goodmark describes the psychological impact of an attorney editing a client's story to omit protective or retaliatory violence against an abuser, even if such elisions are strategic: "[T]hat lie—that she is the passive, weak, dependent stereotypical victim—contradicts the actions that she has taken to protect herself and can undermine her self-image and self-worth as well as her standing in her community." Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 118–19 (2008). "[T]he reframing simply cannot contain the client's lived experience." *Id.* at 122.

[120] Magaña, *supra* note 65, at 981 (defining "gatekeeping" as defenders substituting their own judgment for their clients' without providing sufficient information for clients to make informed decisions, and in a way that "materially impact[s] their clients' interests").

nonfrivolous bail options, and failing to challenge bail determinations because of adherence to professional norms."[121] The proffered defense attorney rationale might be that keeping a client detained pretrial will enable them to avoid rearrest or another bad decision like jumping bail, thereby limiting their exposure to further legal consequences and an ultimately worse bargaining position for disposition on the underlying offense.[122] However, in pushing back on clients' wishes that they pursue release through bail litigation, attorneys become literal gatekeepers. And what is at stake more broadly is a "struggle over 'narrative social power' in which the experiences of those targeted by criminal laws are ignored and devalued."[123] Instead, defense attorneys are able to substitute their judgment of what they think might be protective without considering what might be valuable for judges or prosecutors to know about the experience of being jailed, unable to afford bail, or entangled in the criminal legal system. On a more basic level, fewer bail cases are litigated or subject to appellate review, impoverishing bail jurisprudence.[124]

Plea bargaining is another site where defense attorneys tend to substitute their own judgment, often with the stated intention of trying to protect a client.[125] For example, one attorney urged a client to take a plea, noting, "I believe you, but the judge may not," at which point the judge will "wonder why you didn't take the [deal]."[126] Such efforts might be "well intentioned" in that they are aimed at reducing the "costs that can result from the exercise of certain legal rights," but to their clients, they often feel like "punishment," or being "ignore[d], silence[d], or even coerce[d]."[127]

In fact, the outcomes that accused individuals feel pressured to accept can conflict with what they feel might be in their best interest. Matthew Clair, who studied lawyer-client relationships in the Boston criminal courts, describes one telling example in which defendants express preferring serving short prison sentences rather than long

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121 *Id.* at 982.

122 *Id.* at 1005, 1008–09. As Magaña points out, though, this assumption runs counter to the evidence that accused persons tend to fare better when they can fight their cases from outside of jail. *Id.* at 1007 & n.155.

123 M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 501 (2021).

124 Magaña, *supra* note 65, at 1022–23.

125 Under the Model Rules of Professional Conduct, whether to plead guilty is a decision left to the client. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to the plea to be entered . . . ."). However, attorneys can place their thumb on the scale during the advisal process, which the rule expressly contemplates that they undertake.

126 VAN CLEVE, *supra* note 11, at 171.

127 CLAIR, *supra* note 11, at 3.

probationary terms, the latter being characterized by surveillance and an ongoing feeling of a threat hanging over them.[128] A short and predictable incarceratory term was preferable, but it went against the defender dogma of any jail time being too much.

Clair also notes that those facing down the criminal legal system have other goals too. As he recounts, "[m]any defendants wanted more than to simply avoid harsher legal outcomes. They also wanted to express their dissatisfaction with the legal system, contest the characterization of their alleged criminal behaviors, litigate the validity of police work, and clear their name. Some even wanted more meaningful reconciliation with their victims."[129] These aims, too, are not necessarily accounted for when defense attorneys simply bargain for the least amount of incarceration.

This paternalism can operate at sentencing and resentencing, too. A perennial issue is the question of silence versus speech. Though accused individuals have the right to testify, trials are rare,[130] and sentencing might be the time when those facing sanction in the criminal legal system are most likely to speak.[131] As Alexandra Natapoff notes, this is both the moment when defendants might feel most free to express their feelings about what happened at trial and about their backgrounds—whether that version jibes with the way their lawyers have presented them or not—and when the mismatch between "socially disadvantaged defendants" and judges with the "fetters of their middle-class backgrounds" becomes most evident.[132] As a result, the consequences for defendants can be extreme.[133] Defense counsels attempt to manage the high stakes by dissuading their clients from allocuting, especially if they perceive that a judge will not receive their client well; while protective, this can also be disempowering.[134]

At resentencing, one way this dynamic can manifest is around how to handle a client's prison record. When I was representing people during resentencing proceedings, it was not uncommon to see disciplinary records featuring infractions, and my usual response was

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128 *Id.* at 87–90.

129 *Id.* at 143.

130 "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Missouri v. Frye, 566 U.S. 134, 143 (2012) (internal citation omitted).

131 *See* Natapoff, *supra* note 8, at 1465.

132 *Id.* at 1465–66 (internal citation omitted).

133 *Id.* at 1466.

134 *Id.* This move can both preempt client agency and exclude valuable information. Evelyn Lia Malavé, *Distorted Narratives in the Treatment Program Complex*, 93 FORDHAM L. REV. 843, 858 (2024).

to look for an explanation to craft into a narrative. Was the person having trouble adjusting during the early part of their incarceration? Were they struggling with addiction? Had they attracted the notice of a particular corrections officer, whose negative attention was now trained on them? Were recent charges self-sabotage, the product of anxiety about potentially getting out of prison after many years? All of these stories could be true, but I did not always ask my clients to tell me what they thought was going on. And, if I am honest with myself, I can admit that I might have struggled with what to do had their narratives conflicted with the way I hoped to present my clients, which was always in the most sympathetic possible light. While I cannot fault myself for the protective impulse, I do wonder in retrospect whether this was the most authentic presentation, or whether allowing for the broader range of human messiness to be visible to judges might have, over time, allowed them to see my clients—both the ones directly in front of them and others who might appear in the future—more fully. Might the experience of incarceration and of having one's every move policed have come into sharper relief?

Another issue that arises at resentencing is whether to bring the petition at all. Under petitioner-driven regimes, there might be triage that defense counsels have to do about the order in which to bring cases, or which cases to bring at all. There is the risk that they could begin to cherry-pick the politically easy cases, just as under a prosecutor-driven regime. Making decisions based on ease might not represent the most equitable approach, or the most client-driven approach. The next two Parts will consider how best to deal with these disconnects and tensions at resentencing.

II
Ethics Rules Provide Only General Guidance, but Might Help to Overcome Epistemic Disconnects

A. Ethics Rules and Debates Furnish Only General Guidelines

The series of tensions described in Part I exists in the background as defense lawyers litigate resentencing petitions, and a question for attorneys is how best to navigate them while optimally situating their clients to achieve resentencing. Specifically, how will attorneys explain to decisionmakers the experience of incarceration in a way that will help them understand the client experience and why release is now appropriate? An obvious place for attorneys to look to understand their obligations to clients at resentencing is the variety of existing ethical standards. Several sources provide guideposts, including the Model Rules of Professional Conduct of the American Bar Association

("ABA") and their state-based equivalents,[135] and the ABA's Criminal Justice Standards.[136]

Within the Model Rules, not one speaks specifically to the context of post-conviction proceedings, but several cover power-sharing between client and attorney. Primary among them is Rule 1.2, which allocates authority between client and counselor. In criminal cases, the rule commands, "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."[137] This enumerated list is considered exhaustive, with the remaining decisions reserved to the attorney.[138] The rule does not mention whether to seek resentencing nor the specific parameters of a resentencing application. But *goals* are exclusively defined by the client, and the rules require lawyers to consult with their clients about how they will achieve those objectives. There have been long-running scholarly ethics debates about whether lawyers ought to orient themselves exclusively toward the clients before them or toward a broader sense of "community." On one side of the debate, Anthony Alfieri, for example, has argued that in cases where race is implicated, lawyers invoking stigmatizing racialized stereotypes of their clients in the name of winning at trial can be unethical for reinforcing

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135 These are not specifically discussed herein because of their numerousness, but they are another source attorneys can look to in understanding obligations.

136 Notably, too, the Constitution has something, albeit little, to say about what lawyers must do following sentencing. In *Jones v. Barnes*, the Supreme Court set forth the minimum standard for effective assistance of counsel on appeal, holding that appellate counsel need not press every non-frivolous issue the client desires, provided counsel is exercising professional judgment. 463 U.S. 745, 751 (1983). In the capital context, defense lawyers have affirmative obligations at sentencing: Specifically, failing to conduct a "'requisite, diligent' investigation" into a capital client's background when faced with the prospect of having to present a potential mitigation case to a jury is deficient performance. Wiggins v. Smith, 539 U.S. 510, 522–23 (2003) (internal citation omitted). While all sentencing is not capital sentencing, and while sentencing is not *re*sentencing, these constitutional standards suggest that investigating mitigation evidence and putting the onus on defense lawyers to do what they can to achieve a good result for their clients post-conviction is a baseline expectation of competence. Presumably, post-conviction attorneys have considerable constitutional leeway under *Jones* to decide which statutory questions of eligibility they will take on, as well as how to present the client's case for a discretionary exercise by the judge, and will not be found ineffective if they choose only stronger over weaker claims. However, ethics and good practice have always been separate questions from minimum standards of effective assistance, and there should be room to take into account other considerations, including client goals and client voice—and to invoke a set of community-based tools during resentencing because they are helpful and available, as will be discussed in Part III, *infra*.

137 Model Rules of Pro. Conduct r. 1.2(a) (A.B.A. 2026).

138 *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 751 (1983) (finding that, while the client ultimately gets to decide whether to plead guilty, waive a jury, testify, or take an appeal, counsel need not pursue every nonfrivolous claim unrelated to those issues that the client wants them to pursue).

essentialized ideas about Blackness and thus causing social harm.[139] Abbe Smith, on the other side of the debate, has critiqued this argument for privileging concern about abstract ideas of harm to the community that might flow from speech that invokes deleterious stereotypes over specific ideas of what might actually result to communities—and, more importantly, specific clients—from that speech.[140]

But what the rules clearly require is counseling before decision points so clients can make informed choices, including potentially about what theory they want to pursue.[141] The rule also expressly mentions that by taking on the representation, "including . . . by appointment," the lawyer does not endorse "the client's political, economic, social or moral views,"[142] thereby leaving open space for a gap between the worldview of an attorney and a client. Lawyers may also bring in, through their duties as advisors, non-legal factors—"moral, economic, social, and political"—when counseling a client;[143] space therefore exists for lawyers to offer their own opinions and invite client participation in discussions of non-legal considerations. Similarly, *clients* are free to prioritize these non-legal considerations, and attorneys are empowered under the ethics rules to raise them with clients.[144]

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139 Alfieri, *supra* note 16, at 1344–63.

140 Smith, *supra* note 16, at 1597–99.

141 Of course, the boundaries within which counseling occurs can be interrogated. Angelo Petrigh has noted that what he calls "[t]raditional counseling" can "further[] oppression" of the criminal legal system by "fram[ing] every choice through the restrictive lens of legal epistemic authority, prioritizing this dominant perspective over viewpoints that prioritize clients, movements, communities, or other laypeople . . . . [and] reinforc[ing] this scope of counsel as the only appropriate one." Angelo Petrigh, *Counseling Oppression*, 104 B.U. L. Rev. 1895, 1911 (2024). Accordingly, he offers an alternative model, "critical counseling," or having express conversations with clients about the "aspects of oppression" implicated in decisions they are being called upon to make in their cases, and inviting a two-way exchange of information; as a result, clients can consider whether they want to seek dispositions that let them "escape court with minimal harm but allow[] the police, prosecutors, and courts to continue the practices that led them there" or engage in broader movement or advocacy work. *Id.* at 1923, 1925–26. And all that the Model Rules require is "reasonabl[e]" consultation with a client "about the means by which the client's objectives are to be accomplished," Model Rules of Pro. Conduct r. 1.4(a) (A.B.A. 2026), and explanations "reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* r. 1.4(b). "Reasonableness," and its malleability as a standard, has been critiqued for its illusory homogeneity, with scholars calling for its modification to accommodate non-hegemonic perspectives. *See, e.g.*, Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 Am. U. L. Rev. 1513, 1518–19, 1541–60 (2018) (urging adoption of a modified "reasonableness" standard in Fourth Amendment jurisprudence for Black children encountering the police given the relations between police and Black communities, implicit bias, and adolescent brain development).

142 Model Rules of Pro. Conduct r. 1.2(b) (A.B.A. 2026).

143 *Id.* r. 2.1.

144 *See* Petrigh, *supra* note 141, at 1915 (arguing that attorneys have the ethical imperative to raise such considerations with their clients).

Perhaps more relevant to the present discussion are the Criminal Justice Standards, which offer specifics for the resentencing context. These standards are hortatory and aspirational,[145] not mandatory, but they provide critical guidance to criminal defense lawyers, including those undertaking post-conviction efforts. Initially, defense counsels have an obligation to evaluate the impact of decisions in the case on "post-conviction review," suggesting that this is a critical case stage during which client and attorney will continue to discuss goals and theory.[146] In fact, several Standards cover the sentencing, appeal, and post-conviction phases.[147] At sentencing, counsels are encouraged to investigate mitigation and to present it to decisionmakers,[148] which should include learning information from their clients, who have specialized knowledge about their own lives and experiences that can be relevant.[149] Defense lawyers also have a duty "[i]n every case where a client is detained" to "discuss with the client . . . the client's custodial or release status and determine whether release, a change in release conditions, or less restrictive custodial conditions, should be sought."[150] Counsels are also called upon to familiarize themselves with applicable statutes that govern release mechanisms and less restrictive alternatives.[151] While the standard application of this rule might be to pretrial detention,[152] there is no reason it could not apply to post-conviction incarceration, requiring conversations between attorneys and clients about whether to petition for resentencing to achieve "less restrictive custodial conditions."[153]

Like the Model Rules, the Criminal Justice Standards speak to allocation of decisional authority. Though they do not leave many more decisions to the client than do the ones in the Rules, the Standards do include language that encourages counsel to give "great weight" to clients' "strongly held views," and they enumerate additional decisions left to the client relevant to the instant discussion,

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145 CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION Standards 4-1.1(b), (c) (A.B.A. 2017).

146 *Id.* Standard 4-1.3(f).

147 *See id.* Standards 4-8.3 to 9.6.

148 *See id.* Standard 4-8.3(d).

149 *See* Hoag-Fordjour, *supra* note 66, at 1969.

150 CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION Standard 4-3.2(a) (A.B.A. 2017).

151 *Id.*

152 The order of the rules as well as the reference to changed circumstances suggest as much. However, there is no textual limitation within the rule to the pretrial context.

153 CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION Standard 4-3.2(a) (A.B.A. 2017). Additional subsections of Standard 4-3.2 also call upon counsel to investigate, make overtures to the prosecutor for release, apply to the court in the event the prosecution does not cooperate, and continually revisit release options over time, requiring active and strategic participation of a defense lawyer in the question of decarceration. *See id.* Standards 4-3.2(b), (c), (d), (g).

such as "whether to speak at sentencing."[154] In addition, while the general rule remains that strategy decisions are for counsel, counsel is encouraged to consult with clients about tactics, including on matters such as "what and how evidence should be introduced," "where feasible and appropriate."[155]

Also relevant to the questions at hand are express provisions gesturing at outward-facing roles for defense lawyers. For example, Standard 4-1.2(f) contemplates that counsel will "be available to assist . . . groups in the community in addressing problems that lead to, or result from . . . perceived flaws in the criminal justice system."[156] In Part III, I discuss ways that community members are becoming and can become involved in resentencing efforts. Rather than resisting these collaborations, this Standard suggests that lawyers should embrace these partnerships; they might be part of community-driven efforts to address the harm the criminal legal system has wrought. Similarly, Standard 4-3.2(a) encourages lawyers investigating options for release from custody to "investigate community and family resources that might be available to assist in implementing" any "alternatives less restrictive than full institutional detention."[157] Similarly, vis-à-vis sentencing, the Standards encourage lawyers to "be fully informed regarding available sentencing alternatives and with community and other resources which may be of assistance in formulating a plan for meeting the client's needs . . . [and to] consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate."[158]

Finally, a defense attorney has the affirmative duty to eliminate express and implicit biases, "with particular attention to historically persistent biases like race, in all of counsel's work."[159] This exceptional exhortation asks lawyers not only to interrogate their own behavior for evidence of biased conduct but also to affirmatively seek out ways to "mitigate any improper bias or prejudice when credibly informed that it exists within the scope of defense counsel's authority."[160] It calls upon counsel to work actively and thoughtfully. Given the documented biases

154 *Id.* Standards 4-5.2(a), (b)(vii); *see also id.* Standard 4-8.3(f) ("Defense counsel should alert the accused to the right of allocution[,] . . . [and] consider with the client the potential benefits of the judge hearing a personal statement from the defendants as contrasted with the possible dangers of making a statement that could adversely impact the sentencing judge's decision . . . .").

155 *Id.* Standard 4-5.2(d).

156 *Id.* Standard 4-1.2(f).

157 *Id.* Standard 4-3.2(a).

158 *Id.* Standard 4-8.3(a).

159 *Id.* Standard 4-1.6(b).

160 *Id.* Standard 4-1.6(a).

that defenders bring to their work,[161] this standard might call attention to something they might rather not see. Nonetheless, if prejudices are successfully examined and discarded, there might be more space for seeing and hearing clients more fully. Similarly, the standard that urges recruitment, selection, promotion, and retention of defender office staff that "reflect[s]" the community in which the office is located aims to maximize the chance that clients will have their experiences validated by their counselors.[162]

These standards can offer guidance to attorneys trying to understand their obligations to clients. Appellate lawyers, for example, are encouraged to consider "whether there might be any potential grounds for relief using other post-conviction remedies" besides a direct appeal while preparing the appeal, and are also urged to act if they become aware after the direct appeal concludes that a client has been "wrongfully convicted or sentenced."[163] And, as the debates between Smith and Alfieri show, there is capaciousness within the rules to encompass different versions of an ethical lawyer who nonetheless has divergent views of the relative roles they and their client play.[164]

However, the rules do not necessarily address *how* resentencing petitions should be styled—*i.e.*, what theories to advance, or whether defense lawyers are able to hear their clients well enough to get stories that they can translate into viable claims in court. The Standards contemplate interviews—in the conclusory number of "as many times as necessary for effective representation"[165]—but that fuzzy mandate provides little guidance to attorneys needing to understand how to listen to their clients so that they can present their resentencing cases to courts effectively.

B. Involving the Community Might Offer a Way Forward

Perhaps what these disparate rules and standards amount to is an exhortation to attorneys to take on discretionary resentencings, to counsel clients carefully about how best to present their narratives to the court (which might or might not involve making their own statements in court), and to endeavor to do so in a way that actively promotes anti-bias.

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161 *See supra* Section I.C.1.

162 CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION Standard 4-1.13(b) (A.B.A. 2017).

163 *Id.* Standards 4-9.3(k), 4-9.4(a).

164 Similarly, Angelo Petrigh seeks to reconceptualize client counseling toward a "critical" model, whereby the attorney engages their client in conversations about the informal and formal "externalities" that affect the case, such as "policing practices, prosecutorial discretion, sentencing laws, and more." *See* Petrigh, *supra* note 141, at 1912–13.

165 CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION Standard 4-3.3(b) (A.B.A. 2017).

But what the above discussion ignores is that simply balancing power between attorney and client does not necessarily facilitate attorneys asking the right questions to elicit the client's story in the first place. Cynthia Godsoe, writing of participatory defense—which can involve inviting in third parties to the attorney-client relationship, making some defense attorneys legitimately uncomfortable—notes that the ethical imperative of zeal counsels in favor of this practice, as it allows lawyers to better serve their clients by enlisting others who might be situated to flesh out the full picture of their clients.[166] She cites the example of an attorney who, upon making a social biography video alongside a participatory defense group, learned about her client and grew to see him in a different light than she otherwise would have, infusing her work with more "creativ[ity]."[167]

Consistent with what I believe to be the ethical landscape, in Part III I develop some interventions that aim to expand the field on which both clients and attorneys are able to communicate and operate, ideally leading to more expansive presentations of client experience, improved epistemic environments, and better resentencing outcomes.

III
Liberatory Resentencing Practice: Seeking Liberation Through Community

Notwithstanding the tensions described in Part I, defense attorneys are well situated to promote their clients' liberation through resentencing. They are, by orientation,[168] ethical mandate,[169] and nature of the role they play in the system, set up to fiercely protect and advance their clients' interests, however clients choose to define what those are. Defenders might also be regularly steeped in "movements to change the law, scrutinize courts, and reform police practices."[170] Accordingly, they, more than any other actor in the criminal legal system, are positioned to create the ideal conditions for maximal liberation for those seeking resentencing, which I describe in Section III.A, *infra*. But, because of some of the disconnects identified in Part I, they might need to draw on outside resources. Those synergistic partnerships,

166 Godsoe, *supra* note 14, at 726, 731–33.

167 *Id.* at 733 (citing *South Carolina Attorney Reflects on Power of Making Social Biography Video!*, Albert Cobarrubias Just. Project (Jan. 30, 2015), https://acjusticeproject.org/2015/01/30/south-carolina-attorney-reflects-on-power-of-making-social-biography-video [https://perma.cc/N8YR-WSPN]).

168 *See* Petrigh, *supra* note 141, at 1917 ("Public defense often draws attorneys that are skeptical of the criminal legal system and view it as deeply flawed.").

169 *See supra* Part II.

170 Petrigh, *supra* note 141, at 1922.

described in Section III.B, *infra*, are what might provide the recipe for transformative change.

In fact, not only do these interventions have the potential to benefit individual petitioners by enabling them to have their stories more accurately reflected by their attorneys but they also will benefit the system. Specifically, judges and prosecutors will gain a fuller understanding of the experiences of those who face the prospect of sentence reductions, the shared collective resource for understanding life experiences (and specifically incarceration) having been expanded. These third-party benefits are discussed in Section III.C, *infra*.

A. Opportunities for Long-Term Trust-Building and Community Collaboration

As Alexis Hoag-Fordjour notes, "[W]ith over one million people serving prison sentences of more than one year, post-conviction defense accounts for a substantial portion of criminal defense representation and therefore warrants robust analysis."[171] I could not agree more. I also believe that this stage of a representation provides unique challenges and particular opportunities, which might be put in heightened relief in the context of a second-look resentencing application.

On the challenges front, there is potentially the widest epistemic gap between long-incarcerated clients and "outside" attorneys. With rare exceptions,[172] attorneys have not spent time incarcerated in state or federal prison; accordingly, there exists potential for silencing and epistemic injustice[173] in the attorney-client relationship. This possibility might be even greater than for attorneys representing clients pretrial. Though there might be similar differences across race, class, gender, educational attainment, disability, and more that these dyads must navigate in both pre- and posttrial contexts, the client experience of incarceration is either nonexistent if the client is out on pretrial bail, or, if they are not, at least more recent, with civilian life within the client's grasp. Thus, the ability of clients and attorneys to relate to each other across that axis might be a bit easier in the pretrial context. There is also the risk that, for a group of would-be petitioners who have been literally distanced from the courthouse and any legal proceedings, there

171 Hoag-Fordjour, *supra* note 66, at 1966.

172 *See supra* note 95.

173 *See* Natapoff, *supra* note 8, at 1452–53 (explaining that various structural considerations as well as legal and constitutional doctrines have contributed to the silencing of criminal defendants); Fricker, *supra* note 9, at 1 (defining epistemic injustice as the harm done to someone in their capacity as a knower through deflation of their value as a credible speaker or because their social experiences are not generally cognizable such that they are disadvantaged in making sense of those experiences).

can be additional "psychological distance" from legal proceedings by virtue of their lawyers not having much incentive or pressure to ensure their clients' understanding of what has gone on in their case thus far.[174]

For public defenders, the "history of distrust"—born of a sense that these lawyers were often the bearers of bad news if not part of the carceral "apparatus" itself—might carry forward into the post-conviction context, too.[175] For individuals who are in prison and seeking resentencing relief, chances are they have been through a series of lawyers at that point, and chances are also they have not had much success in court to date; accordingly, their views of post-conviction attorneys are likely to be dim, or at least skeptical.[176]

On the other hand, appellate and post-conviction defenders often have long relationships with their clients given the time scale of post-sentencing proceedings.[177] Though length of relationship is not a necessary or sufficient condition for trust-building, it certainly gives attorneys the luxury of time to spend attempting to cultivate a relationship with their clients and the chance to get to know them and their families. Similarly, appellate practices are often less voluminous than trial practices, conferring more potential time for relationship development.[178] In the resentencing posture, moreover, attorneys are not, like during direct appeals, entirely record-bound,[179] granting them the potential to transcend the stories that have been told about their clients to this point; and appellate attorneys are known for their "considerable rhetorical power," which they can bring to bear in shifting those narratives.[180]

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174 *See* Natapoff, *supra* note 8, at 1494.

175 JAYADEV, *supra* note 14, at 13–14.

176 *See* Hoag-Fordjour, *supra* note 66, at 1972 (identifying likelihood of multiple losses as a reality that post-conviction attorneys must navigate with their clients).

177 In fact, in some jurisdictions, appellate public defense providers become the obvious choice for additional post-conviction counsel assignments as well, meaning that the same set of attorneys can work with clients through their direct appeals and collateral proceedings such as resentencings when those come with a right to counsel.

178 *See* Hoag-Fordjour, *supra* note 66, at 1971–72 (comparing caseloads of trial and post-conviction attorneys and noting respective impact on client relations).

179 During resentencing, the record can be reopened and developed, enabling a fuller presentation of evidence than occurred during the original trial and sentencing. In fact, the idea behind "second look" is to develop a new understanding of the candidate at a later point in time and to assess the equities in favor or against a reduced sentence at that moment. *See* Noah Powelson, *Something 'Needs to Be Done' About Sentencing Reform, NY's Top Judge Says*, QUEENS DAILY EAGLE (Dec. 15, 2025), https://queenseagle.com/all/2025/12/15/something-needs-to-be-done-about-sentencing-reform-nys-top-judge-says [https://perma.cc/4RHK-AZ6J] (citing N.Y. Chief Judge Wilson discussing proposed second look statute, which would enable judges to "look at the facts as they are now" rather than rely on the "prediction" they made at sentencing decades ago).

180 Goldberg & McKee, *supra* note 66, at 684.

Finally, defense attorneys at this stage might represent a measure of hope or improvement in circumstances for would-be petitioners, whereas at the trial phase there is significant tension in awaiting a potential conviction and circumstances potentially becoming much worse. While the psychology of traveling through the resentencing process is complicated and not monolithic, and while raising hopes can be a perilous endeavor, having a general starting point predicated on optimism instead of fear can create space for a more relaxed and fruitful partnership.[181]

B. Expansion of Narratives Through Novel and Creative Evidentiary Presentations

As the actors situated between clients and decisionmakers, defense lawyers will be the ones charged with translating client experience into comprehensible formats and putting forth their clients' best efforts at being heard (and, in most instances, obtaining relief). There are several key tactics they can employ or promote consistent with an ethic of listening, hinted at by the ethics rules but only fully realized through invoking a model of defense that looks outward to notions of expertise not traditionally recognized within the confines of the criminal legal system. Nonetheless, these tactics are gaining ground, and decisionmakers are starting to take notice, even as their implementation proceeds in fits and starts.

1. Participatory Defense-Based Mitigation Packets

Resentencing presentations provide an opportunity to expand notions of who constitutes the community, and who benefits from decarceration. Abolitionist theory has long called for a reorientation in our understanding of what constitutes public safety.[182] Removing

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[181] *See* Hoag-Fordjour, *supra* note 66, at 1972 (noting that the client's distress might be more pronounced pre-conviction; for that reason and limited attorney time, the client-attorney relationship can suffer during the earlier phase).

[182] *See, e.g.*, DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 121–22, 124, 127, 145, 167, 272–84 (2021) (calling for a program that involves eliminating "root causes of violence, like capitalism, patriarchy, militarism, and ableism" and building a society in which people can feel safe before emergencies happen, predicated on principles of mutual aid, a robust safety net, community investment, demilitarization, and meaningful accountability); Stefano Harney & Fred Moten, *The University and the Undercommons*, *in* THE UNDERCOMMONS: FUGITIVE PLANNING AND BLACK STUDY 42 (2013) ("What is, so to speak, the object of abolition? Not so much the abolition of prisons but the abolition of a society that could have prisons . . . and therefore not abolition as the elimination of anything but abolition as the founding of a new society."). Community organizers have also helped foreground alternative notions of what people believe promotes safety, countering the standard law enforcement-centric version. For instance, the "Night

someone who is a beloved sister, mother, uncle, or child for decades might fray community fabric rather than strengthen it. And there is a growing recognition that defense lawyers have a role to play in this shift.[183]

The example that Ronald Wright and Kay Levine provided from Vermont, where both parties briefly agreed that it would be in everyone's interest to empty out prisons during the COVID-19 pandemic,[184] points to a broadened idea of public safety. There, the focus shifted off the individual and toward the collective. COVID-19, of course, presented the ultimate safety threat to large swaths of people: serious physical injury or death.[185]

There are other ways that defense lawyers might better reflect the collective in their representation of resentencing clients. A primary way is to keep an ear to the ground to ensure they are aware of participatory defense efforts that might support their clients.

Participatory defense is a movement that has been growing in recent years. As Raj Jayadev, a founder of Silicon Valley De-Bug, a participatory defense "hub," and a main theorist of the movement, put it, "[p]articipatory defense is a strategic practice for families and communities to intervene in and ultimately positively impact the outcome of court cases, transforming the landscape of power in the courts."[186]

Out for Safety and Liberation" events, which originated in Oakland and now happen in cities nationwide, publicize people's responses to the question of what keeps them safe, and while responses vary, including such things as healthcare and housing, no responses mention incarceration. *See* SIMONSON, *supra* note 14, at 5. And these discussions are now occurring at a time at which crime rates are reaching historic lows, *see* Jeff Asher, *It's Not Just Murder That's Likely at Historic Lows*, JEFF-ALYTICS (June 23, 2025), https://jasher.substack.com/p/its-not-just-murder-thats-likely [https://perma.cc/KC7L-MJ6X] (analyzing Real-Time Crime Index data); Press Release, Fed. Bureau of Investigation, FBI Releases 2024 Reported Crimes in the Nation Statistics (Aug. 5, 2025) (on file with the New York University Law Review) (detailing reductions between 2023 and 2024 in major crime categories), notwithstanding stubborn public perceptions that crime remains a pervasive problem. *See, e.g.*, Isabelle Taft & Kate Selig, *The Number of Murders Kept Falling This Year, but Fear of Crime Persists*, N.Y. TIMES (Dec. 30, 2024), https://www.nytimes.com/2024/12/30/us/murders-decline-crime-concerns.html [https://perma.cc/S5VP-248S].

183 *See* Roberts & Wright, *supra* note 67, at 242 (noting that for defense lawyers "there is room to reassess the use of criminal law and the judicial system to advance public safety—and to acknowledge that these blunt tools can instead undercut such safety" and detailing the myriad ways in which they are shifting their practices to become more client-centered and participatory).

184 Levine & Wright, *supra* note 2, at 321.

185 As of May 2026, 1.25 million people had died of COVID-19 in the U.S., with the preponderance of deaths occurring from 2020–22. *See Provisional COVID-19 Mortality Surveillance*, CTR. FOR DISEASE CONTROL NAT'L CTR. FOR HEALTH STATS., https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm [https://perma.cc/K65P-DDXC] (last visited May 31, 2026).

186 JAYADEV, *supra* note 14, at 3.

The move is additive and supplementary; "[n]o one [i]s trying to be a pseudolawyer; we [a]re just bringing to bear our experience, intelligence, and resources."[187] In other words, participatory defense recognizes that non-lawyers from the community have unique "collective, cumulative intelligence" to contribute in service of liberation.[188] Moreover, simply by being present, a collective can help counter the inherent alienation that stems from the individualized form of representation that currently exists and that fuels the notion that, if someone has a lawyer, "then surely the fight must have been fair."[189]

What the community does takes different forms, including investigating case facts, acting as notetakers and observers during hearings and trial, and developing multimedia mitigation presentations for sentencing hearings.[190] It measures its successes in time in jail or prison saved.[191] In terms of the substance, how these packets might differ from the mitigation documents put together by attorneys or social workers within a defender organization is that they do not necessarily use the language that the court system is used to; their "reference points" are "bigger, [and] more honest," and therefore tell a story that might not fit the standard one that decisionmakers are used to hearing.[192] But this move is not made without context. One important gesture participatory defense makes is perceptual: It forces judges and prosecutors to see the justice-involved person as "part of a supportive community . . . invested in the person's future and well-being."[193] These documents also have helped broaden conceptualizations of public safety and social harms associated with punishment as a response to crime. Instead of just focusing on the impact on the defendant facing incarceration, the aperture widens to include others; in one example, a participatory defense hub in Philadelphia wrote sentencing letters that spoke to the effect that a parent's incarceration would have on the children they would be leaving behind.[194]

Principally, this has been a movement that has emerged to support people pretrial, as it involves showing up to challenge the court system—which is empowered to take away someone's liberty—to

187 *Id.* at 11.

188 *Id.*

189 *See* SIMONSON, *supra* note 14, at 108–09 (commenting that focusing on the right to counsel and its fairness can ignore the massive systemic forces and structural inequalities that exert influence on any criminal system contact, including attorney representation).

190 *See* JAYADEV, *supra* note 14, at 25–53; SIMONSON, *supra* note 14, at 95–105, 111–12.

191 JAYADEV, *supra* note 14, at 9; SIMONSON, *supra* note 14, at 99.

192 JAYADEV, *supra* note 14, at 26.

193 *Id.* at 7.

194 *Id.* at 50.

take "responsibility" for "truly knowing" the people upon whom it is passing judgment.[195] But it is not by its nature or practice limited to that stage of litigation or a person's life. As Jayadev noted, the tactics have been effective even post-conviction, "when a family made a compelling argument that their loved one deserved to be resentenced and returned to the community."[196] There have also been examples of organizing campaigns to bring home, for instance, incarcerated survivors of domestic violence, such as one that has occurred in and around New York's Bedford Hills Correctional Facility.[197] Similar themes emerged there as in other participatory defense campaigns: community support for individuals facing the system, the hope that working on individual cases can build collective power, and the need to work with lawyers even as there might be tension with them.[198]

To be sure, lawyers (let alone legal academics) cannot be the ones to *drive* participatory defense efforts; by definition they must organically arise from the community, and a main movement tenet is that it comprises change agents, not service recipients.[199] But lawyers can foster participatory defense by being open rather than resistant to collaboration.[200] Though the sweep of prosecutor-initiated resentencings has been limited,[201] defense lawyers can borrow a page

195 *Id.* at 25. *See generally id.* at 79–105 (discussing participatory defense at "bail and pretrial detention" stages).

196 *Id.* at 10.

197 SIMONSON, *supra* note 14, at 117.

198 *See id.*; *#SurvivedAndPunished: Survivor Defense as Abolitionist Praxis*, SURVIVED & PUNISHED, https://survivedandpunished.org/defense-campaign-toolkit [https://perma.cc/B7YY-VYPL] (last visited May 31, 2026).

199 *See* JAYADEV, *supra* note 14, at 21; *see also* Liana Pennington, *An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office*, 14 OHIO ST. J. CRIM. L. 603, 625–27 (2017) (noting after reviewing findings that there are potential pitfalls of a defender-led participatory defense initiative, which does not necessarily do enough to upend traditional power structures; and hypothesizing that the ideal might be defenders serving as allies to organically arising community-based organizations).

200 Both Simonson and Jayadev describe defender skepticism, citing fear of family management taking away their time from working on the case, JAYADEV, *supra* note 14, at 12, 72, or that outsiders not familiar with the legal system could interfere with the "normal" course of defending a case. SIMONSON, *supra* note 14, at 97 (describing an instance of community members showing up to an attorney's office to ask questions about a case, only to be met with the response, "What are you all doing? You need to get out"). And community organizers have identified other barriers to working with lawyers, such as attorneys fearing harm to their relationships with prosecutors and judges, or lawyers and organizers having different goals (individual representation versus building community power). *See #SurvivedAndPunished: Survivor Defense as Abolitionist Praxis*, *supra* note 198, at 16–17. However, they also describe how in certain instances attorneys came to realize that participatory defense efforts could dovetail with their own, providing valuable information that they themselves did not know, and allowing them to more effectively work with clients through utilizing their existing social networks. *See* JAYADEV, *supra* note 14, at 12–13, 148–49.

201 *See supra* Section I.B.

from the constructive, "open-file" ethos that did enable some successes in those jurisdictions, embracing the potential for collaboration with those outside of their own offices. And, as noted, Cynthia Godsoe has argued that embracing participatory efforts where they exist might be a defense attorney's ethical imperative.[202] Attorneys can therefore endorse mitigation packets, giving them legitimacy before hegemonic actors such as courts. They can also collaborate, listening for themes that dovetail with existing case theories. A theme that emerges in participatory defense literature is the importance of clients and community members having voice and sharing their specific knowledge,[203] and lawyers can play a role in ensuring those voices are heard.

2. *Retaining and Calling Directly Impacted Experts to Speak to the Experience of Incarceration*

In some ways, what this Article boils down to is a call for shifting notions of expertise. To be sure, lawyers bring specialized knowledge to bear and can serve a translation function for their clients.[204] Public defenders, especially, are repeat players who develop familiarity with the jurisdiction and system in which they practice.[205] But undoubtedly those who have traveled through the criminal legal system have specialized knowledge that even the most seasoned defense attorney[206] does not; at the most basic level, clients are "the experts of our own lives."[207] Moreover, those accused and convicted of crimes tend to

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202 Godsoe, *supra* note 14, at 731 (arguing that a framework under which "empowered . . . defendants" work with counsel is consistent both with zealous advocacy and the power dynamic envisioned by the Model Rules of Conduct).

203 *See, e.g.*, JAYADEV, *supra* note 14, at 54–58, 110, 130–31, 145.

204 *Cf.* SIMONSON, *supra* note 14, at 111 (describing the benefits that defense attorney expertise offers to participatory defense hubs, including trainings and helping to transform the understandings of the broader public). There has been some empirical work on the effectiveness of non-lawyer advocates in contrast to lawyers, for instance, with lawyers thought to make strategic choices and provide procedural and substantive knowledge. *See, e.g.*, Anna E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023, 1023–25, 1038–54 (2017) (collecting research hypothesizing about the effectiveness of a party having a lawyer and the potential reasons for that relative effectiveness, and documenting results of a comparative study of the effectiveness of lawyers and non-lawyers in unemployment insurance appeals).

205 SIMONSON, *supra* note 14, at 111. This is a theme that participatory defense picks up on: Hubs can "see patterns over time," leveraging their collective knowledge into future ways to build power and help their community members. *See id.* at 103.

206 This excludes those lawyers who themselves are formerly justice-involved, the number of whom is unknowable but whose ranks, ideally, are growing. *See* Arthur, *supra* note 95, and Zoukis, *supra* note 95 (providing statistics and anecdotes about formerly incarcerated people who have become lawyers).

207 JAYADEV, *supra* note 14, at 74.

be members of marginalized groups who have not historically been listened to or had institutions shaped around their experiences as often as their lawyers have.[208]

One tool that has started to take hold in courtrooms is qualifying those with certain types of lived experience as experts. This is a way to "infus[e] . . . community knowledge [in]to a defense strategy" and to take on the absurdity of "lawyers and court-certified 'experts' talking about a community they never experienced."[209] Where this has occurred, it has generally been at hearings and trial, and has typically centered around gang affiliation.[210] Police officers, following short trainings, are frequently proffered as experts and typically pass muster, with their ensuing testimony rarely ever *excluding* someone as a gang member, which often has the effect of terrifying a jury.[211] To counter the one-sided narrative they present, defense attorneys have begun enlisting the help of gang experts who are themselves formerly gang-involved or from the communities where these groups exist.[212] Attorneys have offered them to be qualified at trial or have used them as background analysts and consultants.[213] Their knowledge does not necessarily come

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208 *See supra* Section I.C.

209 JAYADEV, *supra* note 14, at 54–55.

210 *Id.* at 55; *see also* Julie Reynolds Martinez, *Who Qualifies as a Gang Expert?*, IMPRINT (Jan. 31, 2022, at 2:38 ET), https://imprintnews.org/justice/juvenile-justice-2/who-qualifies-as-a-courtroom-gang-expert/62294 [https://perma.cc/AG6Q-UCM4] (describing program, the Loyola Law School's Center for Juvenile Law and Policy's Independent Forensic Gang Expert College, to train formerly gang-involved individuals to become experts who can testify in court to counter law enforcement narratives that paint young people of color as "criminal masterminds," instead explaining what drives "lost kids finding an identity, looking for a support system," to join gangs (internal quotation omitted)). An open question and one that calls for further research is how widespread this practice is. Jayadev and Simonson document examples of the defense calling such experts to combat attempts to impose statutory gang enhancements in California, and specifically efforts in Fresno and Santa Clara County. Loyola's program operates in Southern California and appears to have been founded in direct response to a California law, the California Street Terrorism Enforcement and Prevention Act, that enhances a sentence if proven to have been committed on behalf of a gang. *See Gang Experts Trained by Our Grantee Are Changing the Juvenile Justice System from Within*, CAL. WELLNESS FOUND., https://www.calwellness.org/stories/independent-forensic-gang-expert-college [https://perma.cc/8WWA-JVLN] (last visited May 31, 2026) (describing the harms posed by the California Street Terrorism Enforcement and Prevention Act).

211 JAYADEV, *supra* note 14, at 55–56. Prosecutors often use such experts in cases where gang activity is alleged. *See, e.g.*, Jeffrey T. Wennar, *Gang Prosecution: The Need for Qualifying Law Enforcement Officers as Expert Witnesses*, 42 PROSECUTOR J. NAT'L DIST. ATT'YS ASSOC. 30, 31 (2008) (encouraging prosecutors to call law enforcement officers as experts in gangs and detailing resources that they can draw on to do so). This practice has been criticized. *See, e.g.*, Fareed Nassor Hayat, *Preserving Due Process: Require the Frye or Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196, 201–03 (2021) (calling for "gang expertise" qualification to be subject to *Frye* or *Daubert* admissibility standards).

212 *See* JAYADEV, *supra* note 14, at 56–57.

213 *See id.*

from the traditional sources relied on to qualify someone as an expert, such as degrees received, papers written, or presentations given, but rather from their "invaluable experiential knowledge."[214] Getting to speak, and being in a position to have decisionmakers have to listen, can be powerful. As Marcel Woodruff, one expert, recounted, "I knew that I had a level of understanding and insight that the courtroom needed. It felt liberating and empowering to speak of the community's truth in a space that often makes us feel voiceless and powerless."[215] But the real impact came when Woodruff started to notice the prosecutor and judge take note of his testimony, registering the defendant on whose behalf he was testifying as a "human instead of a terrorist."[216]

I propose that this concept be applied widely to those who have lived through incarceration and who can educate decisionmakers on what it is like to survive that experience. The foundation requirements for qualifying an expert witness typically are that the evidence offered is beyond the ken of a layperson but would be helpful to the factfinder, and based on special knowledge, skill, training, or education known to the expert that allows them to form an opinion, which may then be given at the hearing.[217]

In most instances, judges will need the help of experts with lived experience to bridge the epistemic gap that exists between them and resentencing petitioners, who have been living a life that few judges have themselves known. Jayadev recounts an example of a formerly incarcerated individual, Andre Simms, who testified at sentencing on behalf of a young man who had been in solitary confinement, speaking to Simms's own experience there years earlier.[218] Initially, what was noteworthy was that the idea for the testimony—and to present it as *expert* rather than fact testimony—had originated with Simms, not with the attorney. But the attorney had been willing to listen and to attempt Simms's "plan."[219] Simms was able to leverage certain markers

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214 *Id.* at 58. Or, "expertise" might be "backed up by a master's degree," but might "center[] around . . . personal experiences in a gang, doing violence prevention work, and engaging in participatory defense," as in the case of Marcel Woodruff, an example of someone who has begun challenging traditional notions of expertise and thereby expanded the hermeneutic universe, revealing knowledge that might not necessarily have made its way in front of decisionmakers in the past. SIMONSON, *supra* note 14, at 165–67.

215 JAYADEV, *supra* note 14, at 62.

216 *Id.* at 62–63. Indeed, the story ended well: The young man received a juvenile disposition and eventually went to work at Woodruff's organization. Woodruff credits the defense lawyer's willingness to work with him as part of the success. *Id.* at 63.

217 *See, e.g.*, CAL. EVID. CODE § 801 (West 2026) (describing the requirements for expert witness testimony); FED. R. EVID. 702–04 (same).

218 JAYADEV, *supra* note 14, at 64–70.

219 *Id.* at 66–67.

of court culture—such as a suit and the names of universities at which he currently worked—to earn intelligibility and credibility, at which point he was able to gain admission, Trojan Horse-like, to the witness box.[220] Once inside Troy's gates, he was able to speak directly to the judge, who "seemed to be learning a lot" from this first "meaningful conversation with someone who'd served time before," including that solitary confinement was torture and that "[p]rison is prison," no matter the facility.[221]

In other jurisdictions, efforts appear to be underway to qualify those who have been to prison as experts in, for instance, prison conditions, though it is difficult to say how widespread the practice is or how successful litigants have been in using it. In some instances, expert testimony drawn from personal experience has been leveraged at sentencing. For instance, John Keith Irwin, a sociologist who himself had spent time in prison decades earlier and who developed academic expertise, testified as far back as the 1980s at a penalty phase of a capital trial as "an expert on prison culture and conditions."[222] More recently in California, John Vasquez—himself formerly incarcerated for a homicide of a rival gang member he committed at sixteen and released after twenty-five years, much emotional processing and community-building, and earning several associate's degrees with honors—was called upon to opine in the case of a man, Miguel, with a similar profile: sentenced to decades in prison for a crime committed at eighteen, and having spent twenty-six years making significant transformations.[223] Vasquez reviewed Miguel's "social history investigation report, disciplinary reports, psychological evaluation, character letters, rehabilitative and educational achievements, relapse prevention plan, and parole plan," and interviewed Miguel before submitting a report and appearing in court to testify.[224] Upon reviewing Vasquez's materials, the judge agreed with the defense that Miguel required no further incarceration. A few appellate courts have weighed in, reviewing adverse decisions to defendants. Because courts tend to have discretion to admit expert testimony on relevance grounds,[225]

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220 *Id.* at 66–68.

221 *Id.* at 69.

222 *See* People v. Ayala, 1 P.3d 3, 44–46 (Cal. 2000); People v. Masters, 365 P.3d 861, 879–80, 892 (Cal. 2016) (noting Dr. Irwin had similarly been permitted to testify during a penalty phase about prison culture and conditions). *But see Masters*, 365 P.3d at 890–93 (finding no abuse of discretion for court to exclude Irwin's expert testimony on same during guilt phase of capital trial).

223 JAYADEV, *supra* note 14, at 161, 163–64, 166.

224 *Id.* at 166–67.

225 *See, e.g.*, *Masters*, 365 P.3d at 890–93 (excluding prison conditions expert as irrelevant, but noting that this was so during the *guilt* phase, not the penalty phase of the instant capital

and because appellate courts will hesitate to invade the discretion of trial courts,[226] these cases have not necessarily turned out favorably to the defense. For example, in *Lett v. State*, a Texas case, the court did not decide the merits of the question of whether the trial court had erred in excluding a formerly incarcerated prison conditions expert at sentencing because it found any error harmless.[227] And in *People v. Brown*, an appeals court found the court below did not abuse its discretion in concluding that a formerly incarcerated expert witness's proffered testimony on racialized violence in prison would not be beyond the ken of the average factfinder.[228]

On the other hand, the Eleventh Circuit recently did reverse convictions after the trial court had excluded the testimony of a formerly incarcerated and well-credentialed expert on three grounds: (1) relevance, (2) whether he was usurping the jury's function by speaking to the question of whether the defendants were, in fact, in a gang, and (3) his expertise.[229] This was not a sentencing-related use, but that the appeals court there was willing to ratify the experience of a defense-proffered expert who was himself directly impacted suggests there is potential for the model of bringing in those with lived experience to enlighten factfinders on relevant matters. In that case, Dr. Jesse de la Cruz was both a former member of a gang himself and had studied organizations like the one he had been in academically as well. He had also worked as a program director of an organization that worked with those on parole who were at risk of re-joining a gang. In other words, his experience was broad and deep, and during the proffer de la Cruz noted he had been qualified as an expert consultant on the subject of gangs in hundreds of federal cases.[230]

While academic credentials are not essential—though they might serve to make the notion of a "directly impacted expert" more legible to a decisionmaker, at least until the notion of such experts takes hold more widely—this testimony should be offered as expert rather than as lay evidence. A resentencing petitioner offering their own observations about their subjective experience, while potentially persuasive, will be laboring under the credibility deficits that often attach to a person who is incarcerated and potentially is a member of one or

case). *See generally, e.g.*, Hollingsworth v. Norfolk S. Ry. Co., 689 S.E.2d 651, 653 (Va. 2010) (noting wide discretion trial courts have to qualify expert witnesses).

226 *See Masters*, 365 P.3d at 891–92 (reviewing the trial court's decision to exclude a defense expert witness for abuse of discretion).

227 Lett v. State, No. 13-22-00333-CR, 2023 WL 7870627 (Tex. Crim. App. Nov. 16, 2023).

228 People v. Brown, No. D083030, 2025 WL 2425947 (Cal. Ct. App. Aug. 22, 2025).

229 United States v. Graham, 123 F.4th 1197, 1265–66 (11th Cir. 2024).

230 *Id.* at 1265.

more additional marginalized and disfavored groups.[231] Moreover, petitioners themselves have not received the imprimatur of "expert." But someone who has been granted expert status to speak about, for instance, the experience of solitary confinement in a more global sense, and to offer opinion evidence relating to it—while still imbued with the knowledge of having been through solitary themselves—potentially can offer evidence that is doubly powerful.[232] The doctrinal support should exist for allowing these experts to testify at resentencing, where a great deal of matters *are* relevant to petitioners' claims, just as courts may consider a broad swath of information at sentencing, provided it is reliable.[233] Therefore, the question is whether defense lawyers will heed the call to listen, being willing to proffer testimony from experts who might not look like those they are used to calling. If they do, "[t]hose who are harmed or neglected by the system, especially if they are members of racially or economically subordinated groups," might "bring us knowledge that is missing," and might "demand[] that we change the questions we're asking" about what constitutes true public safety: Is it based on arrest rates and punishment, or on whether "the state is working toward creating the conditions where people will harm each other less?"[234]

3. Enlisting Peer Navigators to Help with Resentencing and Reentry

Another promising trend that has emerged in recent years is directly impacted people helping each other through the difficult experience of encounters with the carceral state. One role that formerly incarcerated individuals have played is as "peer navigators" for others.

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231 *See* Skolnick, *supra* note 18, at 20–24 (describing how various marginalized groups face credibility deficits due to their identity).

232 To be sure, there is reason to believe that decisionmakers could discount the opinions of these experts, who are themselves formerly incarcerated and, most likely, have some of the same disfavored identity characteristics that will make them likely to suffer from epistemic injustice. But anecdotal evidence, such as the experiences of Simms and Woodruff, *see supra* notes 215–16, 218–21 and accompanying text, suggests that judges have, even if begrudgingly, sat up, taken notice, and even ruled in defendants' favor when such witnesses have come before them.

233 *See, e.g.*, Townsend v. Burke, 334 U.S. 736, 740–41 (1948) (holding sentencing information, to form the basis of a person's sentence, must not be "materially untrue" to comport with due process); State v. Dumont, 507 A.2d 164, 167 (Me. 1986) ("The guiding principle is that a sentence must be based on reliable factual information."); State v. Robinson, 438 P.3d 35, 40 (Utah Ct. App. 2018) (noting that reliability of sentencing information is the legal standard); State v. Granger, 508 P.3d 335, 340 (Idaho Ct. App. 2022) (noting reliability is touchstone of information presented at sentencing).

234 SIMONSON, *supra* note 14, at 168–69.

In a 2023 article, Anthony Graves, himself an exoneree from death row and the President and CEO of the Peer Navigator Project,[235] described the origin of the concept of "peer navigator" and why it is important.[236] First, he noted, capital defenders have often brought in death row survivors to work with clients either facing potential death sentences or even the "better" alternative at the penalty phase of life imprisonment, or to work with exonerees or others who received relief after being on death row to ease the transition to life outside; this practice can exist in other areas of criminal practice as well.[237] Second, he points to the similar practice of peer support in substance abuse/mental illness and recovery spaces, where the model is often for those with experience of having worked through addiction and recovery, for example, to support others in an earlier stage of their journey.[238] In fact, peer navigators have long been involved in health care work, helping, for instance, newly diagnosed cancer patients traverse a new and challenging landscape.[239] In the model Graves describes, a peer navigator is someone who visits pretrial clients to give them comfort and who can relate to the particular experience of facing serious criminal charges.[240]

To Graves, these support networks are important for several reasons. First, while capable of relating to clients, "[t]he average practicing lawyer has only spent time in jails or prisons as a visitor" and thus is limited in their understanding of the experience that their client is going through.[241] Second, lawyers might not be trained to connect on a personal level with their clients, even if they "want to be good communicators" with those clients.[242] Peer navigators can step into the breach. As he describes it, they can function much like social workers, visiting clients regularly, providing moral support, and bringing information to both the client's family and the lawyer alike.[243] This is especially useful where the pretrial process is long.[244] Accordingly, he

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235 *Board of Directors*, PEER NAVIGATOR PROJECT, https://peernavigatorproject.org/board-of-directors [https://perma.cc/DP2V-6TYE] (last visited June 6, 2026) (listing Anthony Graves as such).

236 *See* Anthony C. Graves, *Peer Navigators: A Tool for Effective Representation*, 38 CRIM. JUST. 22 (2023).

237 *Id.* at 22–23.

238 *Id.* at 23.

239 *See* Shannon Portillo, Victoria Goldberg & Faye S. Taxman, *Mental Health Peer Navigators: Working with Criminal Justice-Involved Populations*, 97 PRISON J. 318, 320 (2017).

240 Graves, *supra* note 236, at 23.

241 *Id.*

242 *Id.* at 25.

243 *Id.* at 26.

244 *Id.*

encourages public defender offices to make use of peer navigation; while a few offices have, this practice could, in his view, become much more widespread, to the benefit of clients and lawyers alike.[245]

While what Graves describes has been pioneered in pretrial work,[246] peer navigation is a practice that defense attorneys should widely embrace in resentencing work as well. As Graves notes, this practice in fact originated in capital mitigation work, where navigators who had survived incarceration worked with others who were themselves experiencing incarceration, and the dyads worked together toward a relationship that could serve mitigation efforts.[247] Resentencing, like capital sentencing, would involve an attorney presenting mitigating information to the court, and that attorney could receive support from a peer navigator who was communicating effectively with the client—through shared language and understanding—about their experience in prison. Furthermore, developing these relationships while someone is incarcerated and potentially working toward reentry means they will have the greater potential to feel empowered and hopeful at the vulnerable moment of leaving prison.[248] Given the "growing body of evidence that shows positive outcomes for organizations and individuals who work with peer navigators," at least in the healthcare context,[249] there is reason to be optimistic about the potential of peer navigators as a tool in the criminal legal system as well. They can provide valuable additional resources to overburdened defense attorneys and, additionally, might grant defenders and their organizations more legitimacy through their translation and support function.[250] Finally, on a practical level, an attorney being able to present to a court that a client is working with a mentor who has successfully navigated reentry might give the judge confidence to consider returning that person to their community.

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245 *Id.*

246 There appear to be some prosecutor-led initiatives, too, with prosecutors dismissing charges in certain drug cases after a defendant completes a diversion program that includes a peer navigator component. *See* Sabrina Margaret Bierer, *Bettering Prosecutorial Engagement to Reduce Crime, Prosecutions, and the Criminal Justice Footprint*, 32 FED. SENT'G REP. 212, 215–16 (2020). That said, while peer navigator use is fairly widespread in health care, it is still relatively rare in criminal justice. *See* Portillo et al., *supra* note 239, at 321.

247 Graves, *supra* note 236, at 22–23.

248 *See* Portillo et al., *supra* note 239, at 336. There is also synergy between peer navigator programs and the move to qualify formerly incarcerated individuals as experts. Darlene Luca, for example, was trained at the Loyola Independent Forensic Gang Expert College as an expert who can speak to the experience of why a young person might join a gang *and* runs a program for peer navigators supporting reentering young people. *See Gang Experts Trained by Our Grantee Are Changing the Juvenile Justice System from Within*, *supra* note 210. Luca is herself formerly incarcerated and has brought to bear her experience in both settings. *Id.*

249 Portillo et al., *supra* note 239, at 336.

250 *See id.*

4. Relying on Community-Produced Toolkits

"Toolkits" that emerge out of collaborations between lawyers and incarcerated individuals or out of collectives of directly impacted people appear to be another emerging trend. These can be defined as a set of practical resources intended to improve legal representation. The audience for these toolkits can vary, but might include the incarcerated person themself, the lawyer, or the community supporting the person who is experiencing a legal representation.

A few examples exist, in particular for survivors of gender-based violence, and written by those who have experienced intersecting forms of social marginalization, such as race, class, gender identity, sexuality, disability, and incarceration status. Accordingly, they provide those who have less access to social power with the opportunity to speak in their own voices.

One, *#SurvivedAndPunished: Survivor Defense as Abolitionist Praxis*, takes an expressly abolitionist stance, and a skeptical approach toward defense lawyers.[251] It encourages those who have been criminalized for acts associated with surviving gender-based violence to take agency over their cases, creating a "defense committee," conceptualized more broadly than a "legal team" in that it might engage in organizing or media campaigns in support of liberation.[252] In its view, the legal case is just one part of a larger constellation of strategies. One of those strategies is educational, with an express aim of eradicating the dichotomy between "criminal" and "survivor" for those who are prosecuted for their actions in challenging an abuser.[253] Another strategy is to provide community and emotional support for the incarcerated survivor,[254] which is empowering and helpful for that person, and will continue to be a source of support if and when they are released from prison.

Another, *Best Practices in Defending Women and Gender Minorities*, addresses defense lawyers as its audience, and it aims to bring the voices of incarcerated women and other genders to the fore in counseling lawyers "defend[ing] women facing extreme sentences" on the special issues that affect them.[255] Written by defense lawyers,

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[251] *See #SurvivedAndPunished: Survivor Defense as Abolitionist Praxis*, *supra* note 198, at 8, 16–17.

[252] *Id.* at 5.

[253] *Id.* at 6–7. Leigh Goodmark refers to criminalized survivors as "imperfect victims" and notes they are often marginalized along one or more identity lines, such as race, gender, gender identity, or sexual orientation. Leigh Goodmark, Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism 2–3, 9 (2023).

[254] *See #SurvivedAndPunished: Survivor Defense as Abolitionist Praxis*, *supra* note 198, at 10–11, 15.

[255] Cornell Ctr. on the Death Penalty Worldwide, Best Practices in Defending Women and Gender Minorities 4 (2025), https://dpw.lawschool.cornell.edu/wp-content/

it features input from incarcerated and formerly incarcerated contributors.[256] Threaded throughout the manual are references to bridging gaps in understanding. For instance, Jhody Polk, one contributor, notes that a function of a defense lawyer might become to promote epistemic justice,[257] as "[t]ranslating the law into a language [a client] understands allows her to grasp the full impact of the harm she endured—and why and how the law should have protected her."[258] Being able to do this will help a lawyer more accurately present that client's claims to the court, too, through improved communication and a shared frame of reference.

Additionally, these toolkits provide strategies for ensuring that lawyers are themselves educated so that they can be as receptive as possible to their clients' narratives and experiences. One recommendation, for example, is for lawyers themselves to retain experts not just for use in court but as consultants in the process.[259] For example, these experts might be directly impacted people retained to advise on conditions of confinement—which can help with the representation itself and for best presenting the client's narrative in court.[260]

These toolkits also have a place in resentencing practice. They can serve as a helpful training tool for defense lawyers in working with populations other than those they might have worked with more regularly, clueing them into specific concerns that might arise for, say, survivors of gender-based violence. They also signal that a person is connected with resources and a community, assistance that a lawyer will not be able to provide. So, while there might be tensions that arise in the goals or orientation of defense counsel in contrast to the community groups, ultimately together they can synergistically provide more support for the incarcerated person and might be more fully able to provide resources to them. Moreover, the work that organizers are doing to shift the informational environment can have positive spillover effects for the substantive arguments that a lawyer hopes to make on behalf of a client in the courtroom.

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uploads/2025/07/Best-Practices-in-Defending-Women-and-Gender-Minorities.pdf [https://perma.cc/THF2-D7D8].

256 *See id.* at 2.

257 What Polk appears to be describing is a textbook example of hermeneutical injustice, whereby a person cannot, because oppression has contributed to an impoverished conceptual environment, describe an experience. *See* FRICKER, *supra* note 9, at 148, 155, 159 (explaining both the definitions and concept of hermeneutical injustice).

258 *See* CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, *supra* note 255, at 23.

259 *Id.* at 64–67.

260 *Id.* at 65.

C. Third-Party Benefits of Liberatory Resentencing

In her work on epistemic injustice, philosopher Miranda Fricker describes the injustice that results when marginalized groups are excluded from the project of knowledge construction; this, too, has the effect of keeping whole realms of experience from being seen or understood.[261] And, as Evelyn Malavé has noted, in criminal court in particular, "the knowledge of criminal defendants" is "devalue[d]."[262] These liberatory resentencing practices have the potential to remedy this injustice. While ideally the most immediate beneficiaries of a shift in defender practices will be their clients, the entire informational system should experience positive spillover effects as well from an emphasis on expanding the narrative pool.

If these practices come into wider use, ideally more information about the experience of incarceration will be before decisionmakers, and it will lead to a broader recognition of resentencing's appropriateness. In some jurisdictions, practices and proposals have started to crop up with the aim of exposing prosecutors and judges more directly to incarceration, and the proposals outlined in this Article would not only help defense lawyers be more responsive to their clients but also would dovetail with those initiatives.

For instance, in New York, Part 17 of the Rules of the Chief Judge was amended in June 2026 following a notice and comment period.[263] The rule seeks to require all judges with criminal and family court jurisdiction to make meaningful and consistent visits to prisons or jails annually.[264] Similarly, the Prosecutors Alliance, an advocacy group whose mission is to "equip[] prosecutors to protect the vulnerable, prioritize healing, and exercise power with integrity and care,"[265] sponsors a prison visit program that brings prosecutors into prisons to "help line prosecutors better understand the experiences of those who are incarcerated and the impact of the decisions they make everyday."[266]

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261 Fricker, *supra* note 9, at 148.

262 Malavé, *supra* note 134, at 859.

263 Press Release, *Rule Changes Will Enhance Judicial Visitation Program, Deepening Understanding and Strengthening Connections*, New York State Unified Court System (June 15, 2026), *available at* https://webfiles.nycourts.gov/public/2026-06/pr26_11.pdf [https://perma.cc/92R5-FWEH]; *Rules of the Chief Judge of New York, Part 17: Judicial Education and Training*, New York State Unified Court System, https://www.nycourts.gov/rules/part-17-judicial-education-and-training [https://perma.cc/5CHL-JL4H].

264 *Rules, Part 17*, *supra* note 263.

265 *Our Mission*, Prosecutors All., https://prosecutorsalliance.org/mission [https://perma.cc/B9NJ-QZ4T] (last visited June 6, 2026).

266 *Prison Visits*, Prosecutors All., https://prosecutorsalliance.org/prison-visits [https://perma.cc/MTP6-TD5D] (last visited June 6, 2026).

While the road to meaningful listening and synthesis of the information that system-impacted individuals are providing about their experiences, especially in the context of seeking release from incarceration, will no doubt be long,[267] these initiatives suggest some openness. Liberatory resentencing practice can seek to capitalize on, or at least seed the ground for, greater understandings of the life experiences of those traveling through the criminal legal system in the hope of more successful resentencings.

IV
Ensuring Fair Implementation of Liberatory Defense Lawyering in Resentencing

Though public defenders might not be the actors in the criminal legal system most responsible for mass incarceration, this Article contributes to the existing critical literature by querying how they can be more accountable to their clients. Training the lens on them is, in a sense, fair; all participants in the criminal legal system who have contributed to its present iteration—even those who consider themselves reformers or bulwarks against the power of the state—should be subject to examination.[268] On the other hand, taking defense attorneys to task is perhaps not as fair as examining the role of actors such as legislatures, police, prosecutors, and courts in feeding and perpetuating mass incarceration, for a variety of reasons.[269] First,

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267 Isis Misdary, by contrast, catalogs some of the backlash to participatory defense that could result from judges and prosecutors. *See* Isis Misdary, *Participatory Defense and Three Pillars of Criminal Injustice*, 25 Nev. L.J. 325, 399–400 (2025).

268 As the editors of a recent volume examining the component parts of the criminal legal system and how each has contributed to mass incarceration, and how each might contribute to its unwinding, note, "[a] core truth about the criminal system is that it isn't a system at all. Instead, it is a series of largely disconnected actors, structures, and bureaucracies, each following their own incentives and logics . . . . [with o]ne feature of our decentralized, disorganized non-system" being "that it resists accountability, allowing its disparate actors to shift blame." Premal Dharia, James Forman Jr. & Maria Hawilo, *Introduction*, *in* Dismantling Mass Incarceration: A Handbook for Change, at xvii (Premal Dharia, James Forman Jr. & Maria Hawilo eds., 2024).

269 At the same time, it is not entirely clear that "full enforcement of *Gideon*" would change the fundamental injustice of America's criminal legal system, as Paul Butler compellingly argues in a symposium essay marking the fiftieth anniversary of that decision conferring the right to counsel in criminal cases. Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J. 2176, 2186, 2196–97 (2013). Rather, Butler contends, while having an "excellent"—and, presumably, well-funded—attorney can affect the outcome in individual cases, "mass incarceration and racial disparities" in the criminal legal system are not fundamentally caused by defense lawyers such that *Gideon* and the right it confers become the well-tailored solution. *Id.* at 2195–96; *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 4–5 (1997) (noting the irony that as the Warren Court expanded criminal procedural rights,

defense attorneys have clients. They have ethical obligations to those clients, who have the constitutional right to present a defense.[270] As (typically) non-government actors, they are operating with less than full information.[271] As Abbe Smith has lamented,

> Of all the political and institutional actors [responsible for the persistence of racism and racial stereotypes in the criminal justice system and larger American society,] why [focus on] us? We did not create the laws calling for greater punishment for poor, black lawbreakers, which have led to the virtual banishment of young African-American men from society. We are not behind the record pace of incarceration, prison construction, or capital punishment, all of which have had a disproportionate impact on racial minorities and the poor. We do not have the power to decide whom to prosecute or what charge to bring, nor do we have the power to determine guilt or innocence, or to formulate a sentence, all of which contribute to the institutional and social status of racial minorities in this country.[272]

These are all valid reasons not to craft recommendations and accountability measures for defense counsels that look the same as the ones for other system actors.

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mass incarceration worsened, in part by creating an incentive structure for targeting poorer defendants with fewer resources to fight factual innocence claims—versus procedural ones—while simultaneously ratcheting up substantive criminalization and sentencing).

270 *See generally* U.S. Const. amends. V, VI, XIV (establishing the right to present a defense under the Due Process and Compulsory Process Clauses); Chambers v. Mississippi, 410 U.S. 284, 294, 302–03 (1973) (noting accused persons possess the rights of confrontation and compulsory process, including evidence of third-party culpability that violated the rules of evidence).

271 Discovery laws, which govern the transfer of case information about a criminal case between parties, largely remain restrictive, with only a small handful of states having moved to "open-file policies." *See* Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 Conn. L. Rev. 771, 773–78 (2017) (noting restrictive default rules and some states' efforts at reform and summarizing implications of more liberal file-sharing regimes); Meghan J. Ryan, *Criminal Justice Secrets*, 59 Am. Crim. L. Rev. 1541, 1559 (2022) ("[O]pen-file discovery remains a minority approach . . . ."). In fact, the Innocence Project, which tracks the leading causes of wrongful convictions nationwide, counts unfair discovery practices and lack of transparency among them, and notes that by contrast discovery reform has had a hand in preventing wrongful conviction. *See* Alyxaundria Sanford, *Commonsense Discovery Reform Is Under Attack: 8 Key Facts You Need to Know*, Innocence Project (Mar. 4, 2025), https://innocenceproject.org/news/discovery-reform-is-under-attack-8-key-facts-you-need-to-know [https://perma.cc/G6JR-UQW5]. Yet, discovery reforms are being rolled back, *id.*, and *Brady v. Maryland*, 373 U.S. 83 (1963), the landmark decision that requires prosecutors to turn over exculpatory evidence in their possession to the defense, to this day continues to be systematically violated. For a comprehensive recent study of *Brady* violations nationwide, see Jennifer Mason McAward, *Understanding Brady Violations*, 78 Vand. L. Rev. 875 (2025). McAward concludes that these violations continue to occur with frequency, more frequently in some jurisdictions, and that the majority occur intentionally, not mistakenly. *Id.* at 880, 927.

272 Smith, *supra* note 16, at 1587–89 (internal citations omitted).

Nonetheless, the idea here is not to scold or invade the attorney-client relationship but to invite consideration of how there can be a dovetailing and maximization of resources, and a shift in sites of power, which might redound to the benefit of communities from which defenders' clients typically come. As Jocelyn Simonson has written in the context of police reform but could be equally true here, "directly impacted people have something important and different to contribute to how we think about policing," and "to invert expertise [by inviting them to be part of the solution] is to begin to reverse the profound power imbalances caused and maintained by . . . the carceral state."[273] This has potential not simply to sink more resources into the system but to achieve a shrinking of the carceral footprint over time, moving toward an abolitionist future. Ultimately, harnessing existing community-based expertise will save resources currently being spent on the criminal legal system or at least shift them toward more productive ends.

In the short term, however, this proposal does ask lawyers to make certain efforts, and that will take resources. Some of these efforts will involve shifts in thinking and attuned listening rather than more time; ultimately, that client-communication work costs little. Other pieces of this proposal, such as engaging experts, do cost money, and those should be accompanied by funding.[274] Yet other components might actually be resource-saving for defense attorneys: By engaging with community members on mitigation investigations, counsels might draw on the good work already being done by those who know the clients best. Of course, cultivating relationships and working with community groups will take time, and a fair critique is that asking already-overworked attorneys to do so is unreasonable.

For that reason, such efforts should be funded, perhaps through dedicated community organizing positions within public defender offices, or decreased case caps to give attorneys the breathing room to develop their networks with community groups so that they have more to draw on when the time comes to develop mitigation packets for their clients. But "[p]reventing an exploration of this role is self-fulfilling, as public defender funding and resourcing is based on what effective representation is deemed to require," and defenders have in the past absorbed shifting notions of what their role must encompass.[275]

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273 Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 854 (2021).

274 That said, I continue to maintain that resentencing efforts should be largely ministerial once people meet eligibility criteria that are simple to administer. *See* Skolnick, *supra* note 18, at 50–54. But in jurisdictions employing a discretionary model, having ready access to expert testimony is crucial and should be funded appropriately.

275 Petrigh, *supra* note 141, at 1940.

There also remains the issue of whether making defense counsels more responsive to the range of experiences that their clients have will make *courts* more responsive to petitioners. Given the stickiness of prejudice and especially implicit bias,[276] the problems of epistemic injustice undoubtedly will persist, and for that reason, in the context of resentencing, I continue to advocate for a ministerial or at least presumptive resentencing regime that avoids a broad grant of discretionary power to courts.[277] But attempting to shift the window of knowledge until a critical point is reached on how to understand an experience is a worthy goal. Additionally, by enabling a practice that can lead to presentation of the multi-faceted nature of their clients, defense counsels can avoid some of the limited imagination that might lurk in prosecutor-initiated resentencings, where only the most obvious candidates, under well-established criteria, are able to benefit from resentencing. As observers such as Raj Jayadev have noted, judges have paid attention when community groups present evidence of lived experience, often reducing sentences as a result.[278] Ideally, with increased opportunities to listen will come greater acceptance by courts of the practice and appreciation of the three-dimensionality of the petitioners appearing before them.

A final note is worth considering, too. Who makes up "the community?" There are surely many ways to constitute "community," whether it be geographic, cultural, familial, or defined in any number of ways. There is no monolithic entity that constitutes the "community," and what its needs and desires are surely varies over time.[279] Moreover, simple appeals to "the community" and what it wants can be slippery, a stand-in for nothing much at all.[280] While resolving these questions is beyond the scope of this Article, what I aim to do here is encourage lawyers representing convicted persons to listen to them and to their

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[276] M. Eve Hanan, *Invisible Prisons*, 54 U.C. Davis L. Rev. 1185, 1227 (2020) ("Given the barriers of implicit biases, power relationships, and empathy deficits, . . . it is not clear whether responsible listening can be achieved.").

[277] *See* Skolnick, *supra* note 18, at 10.

[278] *See* Jayadev, *supra* note 14, at 9–10, 39, 62–63, 68–70, 166–67.

[279] In fact, as Isis Misdary points out, people targeted by the state for prosecution often come from the same communities as those affected by violence, leading some members to advocate for tough-on-crime policies as a solution. Misdary, *supra* note 267, at 405.

[280] *See generally* Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 Utah L. Rev. 343 (2003) (warning about how appeals to what the "community" might want or need within the restorative justice movement might mask important divides). Of course, simply equating the public with "the People" as it is invoked on behalf of policing and prosecutors in criminal prosecutions, one side of the "v" in a criminal case, is also a problematic assumption; defendants and those who support them are also members of the public who are not simply "biased" but should have their interests represented in criminal procedure too. *See* Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 Colum. L. Rev. 249, 253–57 (2019).

advocates, taking cues and drawing on resources within those groups rather than simply directing strategy alone.

Conclusion

As Judge Wilson noted in his remarks to New York's assembled decisionmakers in early 2025, so much about how the criminal legal system has been run has not worked. Revamping it to ensure fairness and safety will undoubtedly require a multi-faceted approach. However, one requirement will be to unwind long sentences, the vast majority of which do not serve those twin goals.[281] The question, though, is whether this unwinding can be maximally impactful, helping system actors avoid repeating the mistakes of the past. As Alexandra Natapoff has noted, "[d]efendant silence . . . maintains the ignorance of institutional players such as judges and prosecutors who never hear the full story about the individuals before them, or indeed about the functioning of the justice system itself."[282] As she also notes, "defense counsel are expected to fill in the narrative gaps about their clients," and this process is occurring "in the context of existing judicial bias and hostility," not to mention "pervasive racial and economic discrimination in sentencing."[283] The need for transformative change is present, and defense attorneys are called upon to ensure that decisionmakers can learn from their clients about what their lives are like.

But defense counsels might need help to do so, as they can experience some of the same epistemic gaps as other system actors who are lawyers. Enlisting the help of community groups might ensure not only that individual clients benefit from more robust presentations that emphasize client subjectivity, but also that the informational environment in which prosecutors and judges are making their decisions shifts towards apprehending the humanity of those encountering judgment. Community members can super-charge defense lawyering at resentencing through these practices, improving counsel communication with their clients to get the best information, helping attorneys present information more fully to decisionmakers, and providing critical buttressing for those getting out of prison. Through these practices, the informational environment in which system actors are operating might start to shift, and the hope of meaningful decarceration through second-look resentencing might start to come into view.

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281 *See, e.g.*, Nelson, Feineh & Mapolski, *supra* note 42, at 37–38 (noting that public safety, retribution, and incapacitation sentencing benefits max out at twenty years, and at fifteen years for crimes committed by people before age twenty-five).

282 Natapoff, *supra* note 8, at 1499.

283 *Id.* (internal citations omitted).