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## Remaking Public Defense in an Abolitionist Framework: Non-reformist Reform and the Gideon Problem

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# REMAKING PUBLIC DEFENSE IN AN ABOLITIONIST FRAMEWORK: NON-REFORMIST REFORM AND THE *GIDEON* PROBLEM

*Eli Salamon-Abrams*\*

“[E]very thirty years or so, as this country’s distinctively intransigent intersection of race, crime, and poverty sparks another round of politicized and international uproar, the right to counsel lurches in a new direction.”<sup>1</sup>

“The idea that legal representation — even free legal representation — will help to reduce this country’s overreliance on criminalization and incarceration is simply a myth.”<sup>2</sup>

Introduction .....	436
I. The Carceral State and the Struggle to Unmake It .....	439
A. Carceral Abolition .....	440
B. Development of the Carceral State .....	442
C. <i>Gideon</i> and the Rise of Public Defense .....	445
D. Public Opinion on Public Defenders .....	449
E. Ideological Underpinnings Weaken .....	450
II. The <i>Gideon</i> Problem and Three Visions for the Future of Public Defense .....	453
A. Public Defense Reform: Expanding <i>Gideon</i> .....	455
B. Teaching Abolition to Public Defenders .....	457

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1. Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1295 (2015).

2. Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 101, 118 (2021).

C. “I Wish They Knew Him like We Know Him.” Participatory Defense and Disrupting the Dehumanizing Routine of Criminal Courts .....	461
III. Can Public Defense Reform be Non-Reformist?.....	464
Conclusion.....	473

## INTRODUCTION

It is not uncommon to hear public defenders say that they hope for a day when their job is unnecessary. Many envision a world in which their clients are not disenfranchised, marginalized, and incarcerated. Aligning the daily work of public defenders with this aspirational vision presents a serious challenge that requires careful thought, collaboration, and conversation among public defenders, the communities they serve, and scholars. This Note contributes to that active dialogue by exploring different proposals for public defense reform, identifying tensions between them, and contemplating how they might be synthesized.

Carceral abolition is the movement to do away with prisons and the ideologies that demand them.<sup>3</sup> It envisions replacing them with non-carceral forms of accountability and a redistribution of resources to communities most affected by mass incarceration.<sup>4</sup> Recently, this concept has penetrated the often-impermeable barrier of mainstream discourse on criminal legal policy.<sup>5</sup> Increased public support for mainstream criminal legal reforms suggests a weakening of the ideological foundation of the carceral state.<sup>6</sup> The sentiments underlying newly widespread pro-reform

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3. *See id.* at 108–09.

4. *See id.* at 115.

5. *See* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1783 (2020).

6. The term “carceral state” refers to the use of jails, prisons, and detention centers, as well as court-ordered supervision such as probation and supervised release, to help impose and maintain a social order predicated on white supremacy in the United States. *See, e.g.*, Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 559–60 (2015). While the carceral state draws its power from the criminal legal system’s unique power to incarcerate and monitor people, it is a much larger apparatus involving numerous powerful systems. *See id.* at 559. These includes electoral, educational, public housing, and social welfare systems, as well as many others. *See id.* Voter disenfranchisement may be the starkest example of the carceral state’s impact outside of prisons, with around 2.5% of the voting-age population unable to vote due to laws stripping the right to vote from individuals with a criminal conviction. Other examples include the presence of police in schools and public housing and the increasing role of local police in immigration enforcement. *See* Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 653 n.5 (2017) (reviewing MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2016)).

attitudes may be limited to reforms that address the carceral system's most obvious harms, but they also reflect a potential split between the physical and ideological platforms of the carceral state.<sup>7</sup> As that gap begins to widen, abolitionists continue to call for the dismantling of our punitive system while pursuing “non-reformist reforms,” or policies that diminish the carceral state without legitimizing it.<sup>8</sup>

Public defense reform may be an effective way to seize on increasing public support for criminal legal reform while simultaneously serving as a transitional change en route to carceral abolition; however, there is legitimate skepticism regarding the capacity for public defense to change how the system operates as a whole. The impact of *Gideon v. Wainwright*, the case guaranteeing the right to counsel in criminal prosecutions where a custodial sentence may be imposed, has been hard to define.<sup>9</sup> Some see the public defense system as a critical, if under-resourced, internal resistance to the carceral state; while others see it as an inherently flawed and underwhelming part of the criminal legal system that cannot truly counteract the racist and classist purpose of that system.<sup>10</sup> Scholars and

7. Professor Ruby Tapia describes the carceral state as:

[T]he formal institutions and operations and economies of the criminal justice system proper, but it also encompasses logics, ideologies, practices, and structures that invest in tangible and sometimes intangible ways in punitive orientations to difference, to poverty, to struggles for social justice and to the crossers of constructed borders of all kinds.

U-M Carceral State Project Symposium, “*What is the Carceral State?*,” YOUTUBE (Oct. 3, 2018), [https://www.youtube.com/watch?v=4aGcm\\_MK3sU](https://www.youtube.com/watch?v=4aGcm_MK3sU) [https://perma.cc/7TV2-WP6Y].

8. See Akbar, *supra* note 5, at 1844 n.286; see also Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/294V-WNXP].

9. 372 U.S. 335, 344 (1963); see also Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 93 (2016) (noting the “present disconnect between widespread celebration of a Supreme Court decision and widespread cynicism about its implementation”). See generally Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465, 468 (2010) (identifying “custodial sentences” as those which involve confinement in a jail, prison, or other type of so-called “correctional” facility).

10. See David E. Patton, *Federal Public Defense in the Age of Inquisition*, 122 YALE L.J. 2578, 2559–600 (2013) (arguing that the federal defender system needs to be revamped to make *Gideon* a robust right and that public defenders are a key component of a fair, adversarial system). But see Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2197, 2202 (2013) [hereinafter Butler, *Poor People Lose*] (arguing that public defenders, while potentially important for individual clients, are not situated to drastically transform the criminal legal system and may legitimize it by providing an aura of fairness to onlookers); see also Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) [hereinafter Butler, *The System Is Working*] (arguing that “many of the problems identified by critics are not actually problems, but are instead integral features of policing and

practitioners alike continue to debate whether the patchwork public defense network carries unrealized potential or primarily serves to help legitimize the criminal legal system.<sup>11</sup> That's the *Gideon* problem.

Raj Jayadev, the creator of participatory defense, argues that public defenders, working with community advocates, can help undo mass incarceration by changing the nature of criminal legal proceedings, shining light on the inhumanity of the system, and pushing for meaningful policy change.<sup>12</sup> Professor Smith Futrell argues that education in abolitionist thought and practice, while inherently in tension with the work of the public defender, can enhance the quality of legal advocacy and mitigate some of its more harmful and legitimizing effects, while helping new defense practitioners better understand how to position themselves in a larger struggle for justice.<sup>13</sup> This Note argues that a synthesis of Raj Jayadev's and Smith Futrell's proposals, along with the establishment of national standards for public defenders consonant with abolitionist values, may be a non-reformist and transitional abolitionist reform, capable of attracting popular support, if properly resourced and carefully designed around abolitionist principles.

Part I will describe the central tenets of carceral abolition, the development of the carceral state's jails and prisons, and the punitive ideologies which demand and sustain them. Part I will also provide an overview of *Gideon* and its subsequent expansion. Part II will outline three views of defense reform, including the expansion of traditional public defense systems, how abolitionist education can improve public defense, and participatory defense. Part III will argue that if public defense reform is to be part of the abolitionist movement, it must be reoriented around abolitionist principles and new community partnerships. Part III further argues that simply funding public defense in its traditional form may hamper efforts to dramatically reduce and eventually abolish the carceral

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punishment in the United States. They are how the system is supposed to work. This is why some reforms efforts are doomed. They are trying to fix a system that is not actually broken"); Smith Futrell, *supra* note 2, at 118 ("No matter how much a defender may be ideologically opposed to the criminal legal system, the simple act of carrying out defense representation can provide a veneer of legitimacy to the entire process.").

11. See Butler, *Poor People Lose*, *supra* note 10, at 2178 ("Poor people lose, most of the time, because in American criminal justice, poor people are losers. Prison is designed for them. This is the real crisis of indigent defense. *Gideon* obscures this reality, and in this sense stands in the way of the political mobilization that will be required to transform criminal justice."); see also Moore et al., *supra* note 1, at 1296.

12. See Moore et al., *supra* note 1, at 1283.

13. See Smith Futrell, *supra* note 2, at 136 ("Law students must be taught how not to just be passive observers who reinforce the system, or mere critics who fail to meaningfully challenge it; rather, they can pursue their work . . . in solidarity to support abolition without co-opting its values.").

state; however, a revamped and better-resourced public defender network may be an attainable and valuable non-reformist reform in the struggle for abolition.<sup>14</sup>

### I. THE CARCERAL STATE AND THE STRUGGLE TO UNMAKE IT

While the carceral state refers primarily to the network of jails, prisons, and immigration detention centers that currently cage more than 2.2 million people, as well as the probation and supervision systems that oversee 4.5 million others, it also reflects and relies on the underlying justifications and rationales for incarcerating and monitoring masses of people.<sup>15</sup> The carceral state is both a policy project, promoted by political leaders across the ideological spectrum, and a force that defines the public's idea of what justice is and how it should be accomplished.<sup>16</sup> For decades, public support

14. See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 97 (2020) (“Organizers are increasingly using the heuristic of non-reformist reforms to conjure the possibility of advancing reforms that facilitate transformational change.”); *id.* at 101 (“Through decades of campaigns against carceral infrastructure, abolitionist campaigns have produced rubrics demarcating an approach to reform focused on reducing the scale, power, tools, and legitimacy of the carceral state.”).

15. See WENDY SAWYER & PETER WAGNER, MASS INCARCERATION: THE WHOLE PIE 2020, PRISON POL’Y INITIATIVE (2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/2FHA-3TSG>]; see also Smith Futrell, *supra* note 2, at 114 (“Abolition recognizes that criminal justice logic works to maintain white supremacy. It is an approach that prompts us to reframe our desire for safety by emphasizing adequate provision of basic human needs rather than a reliance on incarceration. It also challenges the idea that the criminal legal system has produced practices that are effective in responding to offenses.”); John Pfaff (@JohnFPfaff), TWITTER (Oct. 22, 2020, 4:29 PM), <https://twitter.com/JohnFPfaff/status/1319375313550381057?s=20> [<https://perma.cc/6VWH-4Z8V>] (noting that because jails involve a flow of people in and out, “the static one-day jail count misses the real way jail operates”, and therefore, tabulations of jail populations tend to underrepresent the impact of jails); *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/3DR3-5TUV>] (last visited Nov. 23, 2020) (noting that the United States has around 5% of the world’s population and 25% of the world’s incarcerated population. The ACLU highlights the racial disparity in U.S. incarceration, reporting that “one out of every three Black boys born today can expect to go to prison in his lifetime, as can one of every six Latino boys — compared to one of every 17 white boys.” The ACLU also notes that in the United States, women are the “fastest growing incarcerated population”). In this Note, I use “cage” rather than “hold” or “confine” in order to avoid, to the extent possible, sanitizing the nature of how jails and prisons treat the people who are forced to reside within them. Felix Rosado, who is incarcerated, writes, “[t]he day will come when I no longer wake up wishing I hadn’t. I sometimes wonder if when I finally make it home, my dreams will take some time to catch up, if I’ll wake up relieved to be in a bedroom and not a cage.” Felix Rosado, *Even My Dreams Are Behind Bars*, MARSHALL PROJECT (Nov. 15, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/11/15/even-my-dreams-are-behind-bars> [<https://perma.cc/5UY6-AP7X>].

16. See NAT’L RSCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 320 (Jeremy Travis et al. eds., 1st ed. 2014).

for expanding the criminal legal system has increased, partially in response to relentless political messaging about crime rates and drug usage, as well as other similar attempts to enshrine racist and classist ideas as criminal legal policy on both state and federal levels.<sup>17</sup>

### A. Carceral Abolition

Carceral abolitionists call for a radical reimagining of what it means to create public safety, accountability, and justice.<sup>18</sup> In contrast to reformists, who critique the system and advocate for a combination of short- and long-term plans to improve the fairness of the system without holistically restructuring it, abolitionists do not see a path to justice involving the criminal legal system in its current or former iterations.<sup>19</sup> While there is no centralized platform for abolition, abolitionists generally subscribe to the view that the most critical step towards justice that can currently be taken is to dismantle our prisons and jails and reallocate the massive resources needed to sustain them to historically marginalized communities.<sup>20</sup> Abolitionists argue that the current system was designed as a tool of racialized social and class control and to keep power out of historically marginalized communities; thus, a key component of abolition is exposing the reality of the current system, which, by design, operates hidden from the public eye with the intent of obscuring its form and purpose from the general public.<sup>21</sup> The carceral state functions by convincing the public of the need for harsh punishment while carrying that punishment out in a way that allows those not impacted by the system to avoid reckoning with its profound inhumanity.

Abolitionists envision a world where communities, particularly BIPOC and poor communities, are safer because of the absence, rather than

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17. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 42 (2010); see also German Lopez, *Nixon Official: Real Reason for the Drug War Was to Criminalize Black People and Hippies*, VOX (Mar. 23, 2016, 6:05 PM), <https://www.vox.com/2016/3/22/11278760/war-on-drugs-racism-nixon> [<https://perma.cc/28E2-KR98>] (discussing President Nixon's domestic policy chief's admission that the Drug War was a tool of racial and social control, rather than a genuine effort to reduce drug usage or any associated social problems).

18. See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019).

19. See *id.* at 1616.

20. See generally *id.* See also *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INITIATIVE (Feb. 6, 2017), <https://eji.org/news/mass-incarceration-costs-182-billion-annually/> [<https://perma.cc/FQV2-ZN44>].

21. See ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 15 (Greg Ruggiero ed., 1st ed. 2003); see also McLeod, *supra* note 18, at 1615.

presence, of police and prisons.<sup>22</sup> Abolitionists believe that the resources expended to develop the primary mechanisms purported to create public safety — namely police, jails, and prisons — would be better applied in uplifting communities that have been denied opportunity, equity, and social and political power.<sup>23</sup> This vision is in part rooted in an understanding that the circumstances that lead individuals to commit crimes — particularly poverty, addiction, and political disenfranchisement and marginalization — are more invidious than those individuals ever could be.<sup>24</sup> Abolitionists believe in humanity, accountability, and redemption over punishment. Abolitionists also understand that social harms, codified as crimes, are inevitable in society and have advocated for a variety of different mechanisms of accountability including restorative justice processes designed and led by communities rather than governments.<sup>25</sup> With respect to victims and survivors of crimes, abolitionists assert that the current system fails to offer justice and that restorative justice and other methods can better serve those who have been harmed. Nonetheless, more work

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22. See McLeod, *supra* note 18, at 1615. BIPOC stands for “[B]lack, Indigenous and people of color.” See, e.g., Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), [<https://perma.cc/4L63-E6VL>] (defining the term BIPOC as “[B]lack, Indigenous and people of color”). *But see* Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 118 (2021) (“While language is key to anti-subordination, BIPOC damages those efforts rather than being helpful, especially among those searching for new language addressing contemporary issues or race and racism.”).

23. See, e.g., McLeod, *supra* note 18, at 1615.

24. These factors are emphasized here to reflect common traits among people who end up being arrested, charged, and prosecuted. See ALEXANDER, *supra* note 17, at 224–25. As discussed in the next Section, racialized mass incarceration is not a response to a disproportionate level of criminal activity by Black, Latino, or poor people. Indeed, evidence indicates that people of all races and social backgrounds use drugs at similar rates, and that rates of violent crime among Black and Latino people are exaggerated in the FBI’s statistical analysis and in the media. See ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. FOR JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 3 (2018). Racialized mass incarceration instead stems from a series of enforcement strategies and decisions designed to disenfranchise and control Black and Latino people as a way of maintaining white supremacy. *Id.* at 2–3.

25. See McLeod, *supra* note 18, at 1617–19 (citing several abolitionist scholars and explaining abolitionist goals); see also Shailly Agnihotri & Cassie Veach, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 326–29 (2017) (noting that restorative justice is a broad term encompassing numerous practices in different settings. Restorative justice may describe “victim-offender mediation,” which is an increasingly prominent tool in court-mandated mediation promoted as an alternative to incarceration by reformists. Abolitionists and other advocates may also use the term to describe community-driven responses and remedies to violent and non-violent harm that exist entirely apart from the criminal legal system).



remains to be done to discern how to address the often unique needs of individual survivors and victims.<sup>26</sup>

### B. Development of the Carceral State

The carceral state, in both its physical and ideological forms, developed over the course of several decades and was realized by intentional political efforts to build and expand it. Beginning in the late 1960s, when the incarcerated population was about 330,000,<sup>27</sup> both the Democratic and Republican parties began focusing political messaging on crime and an apparent need for increasingly stern governmental responses. In 1968, President Johnson rejected policy recommendations by the Kerner Commission, which advocated for investment in Black education, employment, and housing as a last ditch effort to avoid rendering the United States a country with “two societies, one [B]lack, and one white — separate and unequal” for the foreseeable future.<sup>28</sup> Instead, Johnson doubled down on his 1964 call for a “war on poverty” and his 1965 declaration of a “war on crime” in response to the Black Civil Rights movement, anti-war protests, and increasing poverty rates.<sup>29</sup> Johnson opted

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26. See McLeod, *supra* note 18, at 1642. McLeod notes the racial disparities in rape prosecutions, and how racialized and misogynistic law enforcement practices often re-traumatize sexual assault survivors without delivering convictions, the system’s primary mechanism of offering justice. McLeod argues that the system’s treatment of sexual abuse survivors deters many from trusting or utilizing it. *Id.* at 1638 n.158; see also Camonghne Felix, *Aching for Abolition*, CUT (Oct. 1, 2020), <https://www.thecut.com/2020/10/aching-for-abolition.html> [<https://perma.cc/9L4A-CN8L>]. Felix writes about her experience as a survivor of sustained sexual violence, and how the criminal proceedings against her abuser failed to provide her a sense of relief or justice while compounding her trauma. *Id.* Felix laments the rigidity of our criminal legal system and wonders whether restorative or other practices would have helped her process the trauma of her sexual abuse. *Id.* Felix expresses a desire to have had a voice and influence in the process that was supposedly meant to deliver her justice. *Id.*

27. See JUST. POL’Y INST., *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM* (2000), [https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/punishing\\_decade.pdf](https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/punishing_decade.pdf) [<https://perma.cc/86SS-K3JZ>].

28. Steve M. Gillon, *This Government Report Showed How Racism Was Dividing America 50 Years Ago. Its Prediction Is Haunting*, TIME (Mar. 1, 2018, 11:00 AM), <https://time.com/5180266/kerner-commission-report-anniversary/> [<https://perma.cc/9X8U-4TQ7>]; see also Daniel Geary, *What the Kerner Report Got Wrong About Policing*, BOS. REV. (May 19, 2016), <http://bostonreview.net/us/daniel-geary-kerner-report-got-policing-wrong> [<https://perma.cc/3EGF-A4MQ>] (reporting that while the Kerner Commission identified the harmful impacts of anti-Black racism by white people, it failed to do so with precision and while it promoted investment in Black communities, its recommendations fell far short of the scope of investment advocated by civil rights leaders at the time. Further, Geary notes the way in which the commission minimized the Black Power movement and generally overlooked the harmful impacts of class division on poor Black and white people).

29. See Olivia B. Waxman, *Trump Declared Himself the ‘President of Law and Order.’ Here’s What People Get Wrong About the Origins of That Idea*, TIME (June 2, 2020, 12:27

for punitive responses to social problems and built a rhetorical frame around those responses to make them appear necessary.<sup>30</sup>

Johnson's so-called wars on poverty and crime began the modern trend of U.S. presidents targeting social and economic problems with calls to expand law enforcement using militaristic language.<sup>31</sup> In 1971, President Nixon declared a "war on drugs," identifying the expansion and funding of law enforcement and prisons as central to winning the war against the public health problems of addiction and substance abuse.<sup>32</sup> While drugs were painted as the enemy to the public, private communications between Nixon and his advisors suggested that directing public and law enforcement attention to drugs was a way of instituting policies of racial and social control.<sup>33</sup> As that effort continued into the 1980s, President Reagan accelerated the development of the modern carceral state by re-emphasizing severe anti-drug messaging and passing legislation to support the idea that drug use and trafficking should be primarily, and harshly, dealt with by the criminal legal system.<sup>34</sup> During Reagan's tenure, the incarcerated population doubled from about 474,000 to about 1 million.<sup>35</sup>

It was during Reagan's presidency that racial disparities in incarceration also surged exponentially, setting the stage for a system that would come to increasingly and disproportionately cage Black men, women, and children.<sup>36</sup> President Clinton continued to focus discourse on crime and incarceration, passing severe anti-drug and sentencing laws, and further

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PM), <https://time.com/5846321/nixon-trump-law-and-order-history/> [<https://perma.cc/4KPP-6RFR>].

30. See Michael W. Flamm, *From Harlem to Ferguson: LBJ's War on Crime and America's Prison Crisis*, ORIGINS (Feb. 2015), [https://origins.osu.edu/article/harlem-ferguson-lbjs-war-crime-and-americas-prison-crisis?language\\_content\\_entity=en](https://origins.osu.edu/article/harlem-ferguson-lbjs-war-crime-and-americas-prison-crisis?language_content_entity=en) [<https://perma.cc/A5XN-KNJX>] (noting Johnson's use of the term "war" to garner political support for unprecedented expansions of law enforcement).

31. See Waxman, *supra* note 29.

32. See *A Brief History of the Drug War*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/brief-history-drug-war> [<https://perma.cc/PE2Y-ANK9>] (last visited Jan. 5, 2022).

33. See *id.*

34. See *id.*

35. See JUST. POL'Y INST., *supra* note 27.

36. See Butler, *Poor People Lose*, *supra* note 10, at 2182. Prior to Reagan's presidency, the Black/white disparity in incarceration was about two to one, a significantly disproportionate representation in the system. See *id.* Today, that disparity is seven to one, with much of the growth occurring during the Reagan era or as a result of Reagan-era policies. See *id.* The increase of this racial disparity was further compounded by Clinton-era criminal justice policy, particularly the 1994 Violent Crime Control and Law Enforcement Act. See German Lopez, *The Controversial 1994 Crime Law That Joe Biden Helped Write, Explained*, VOX (Sep. 29, 2020), <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration> [<https://perma.cc/5M36-H7A6>].

swelling the incarcerated population to just under 2 million by the end of the 1990s.<sup>37</sup> As the overall population of the United States grew about 50% between 1960 and 2010,<sup>38</sup> the incarcerated population grew 700%.<sup>39</sup>

These so-called “wars” were accompanied by an attitudinal shift towards crime and punishment as the carceral state’s ideological project set in. Public support for “tough on crime” approaches grew steadily between 1965, when punitive ideas of justice had less than a majority of public support, and the mid-1990s when that support peaked around 71%.<sup>40</sup> Professor Peter Enns asserts that public levels of punitiveness towards criminal justice issues have been a determinant in mass incarceration.<sup>41</sup> While the role of those attitudes in causing or enhancing mass incarceration is subject to debate, the rise in punitive beliefs regarding criminal justice between the 1960s and mid-1990s is pronounced.<sup>42</sup> Studies comparing the public’s *perception* of the crime rate to the *actual* crime rate appear to undermine the possibility that punitive attitudes increase as a result of increasing crime.<sup>43</sup> Nonetheless, until the mid-1990s, punitive attitudes continued to rise as the incarcerated population rose.<sup>44</sup>

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37. See JUST. POL’Y INST., *supra* note 27; see also Lopez, *supra* note 36 (noting then-Senator Biden’s role in passing the 1994 crime bill, which helped expand the capacity of police, prosecutors, and prison officials to grow the incarcerated population on both state and federal levels).

38. See U.S. CENSUS BUREAU, A LOOK AT THE 1940 CENSUS, [https://perma.cc/SZA8-K2PG] (last visited Jan. 19, 2021).

39. See Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, SENT’G PROJECT (Sept. 17, 2019), <https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/> [https://perma.cc/L36E-EYR7].

40. See Peter K. Enns, *The Public’s Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 864 (2014). Political scientist Enns controls for the actual rate of violent crime, and illicit drug use in his analysis. *Id.* at 866. Enns does so to account for the possibility that increasingly punitive attitudes are simply a response to increased crime. *Id.* at 874. While Enns focuses his analysis on the determinative role public opinion played in the development of mass incarceration, his research also reflects that increasingly punitive attitudes have a cause other than the rates of violent crime or illicit drug use. See *id.* at 857.

41. See *id.* at 857. Enns argues that if the public’s opinion on punitiveness stayed constant at its mid-1970s level, there would be about 20% fewer incarcerated people today. *Id.*

42. See *id.* at 864.

43. See *id.* at 869. Gallup polls indicate that in 1965 the rate of *fear* of violent crime was about double the rate of *actual* violent crime. See Emily Widra, *Actual Violent Crime Has Nothing to Do With Our Fear of Violent Crime*, PRISON POL’Y INITIATIVE (May 3, 2018), <https://www.prisonpolicy.org/blog/2018/05/03/gallup-fear/> [https://perma.cc/QB24-TMJG]. In 1992, when the violent crime rate peaked, *fear* of violent crime was about 15% lower than the *actual* crime rate. See *id.* Widra describes the relationship between the public’s fear of violent crime and the actual violent crime rate as “tenuous . . . at best” but notes that the

### C. *Gideon* and the Rise of Public Defense

The evolution of the carceral state, in both its physical and ideological forms, has been accompanied by the development of what is purported to be one of its most significant formal constraints: the right to counsel. However, while mass incarceration advanced as an intentional project, driven by legislation and increasing public support, the fragmented public defense system developed slowly and without the institutional backing or resources afforded to prosecutors' offices, jails, prisons, or police.<sup>45</sup>

Until 1963, there was no guaranteed right to assistance of counsel in criminal proceedings in state court, where most criminal cases take place. In the unanimous 1963 decision *Gideon v. Wainwright*, the Supreme Court reversed precedent and held that, in criminal cases, the Sixth and Fourteenth Amendments guaranteed the right to the assistance of counsel in both state and federal court.<sup>46</sup> Whether this reversal was primarily aimed at increasing efficiency in the courts — diverting from the previous standard requiring extra hearings to determine eligibility for assigned counsel in “special circumstances” — or was an expression of the liberal ideological bent of the Warren Court, it has been widely considered an important step towards fairness for those accused of crimes.<sup>47</sup>

While *Gideon* represented a major shift in criminal legal precedent and established a groundbreaking right for people accused of crimes, it did not prescribe a method of establishing a public defense system or set out specific requirements for doing so.<sup>48</sup> Indeed, in 1960, three years before *Gideon*, there were 96 public defender offices in the United States.<sup>49</sup> By 2007, there were 957 public defender offices nationwide, operating on the county, city, state, and federal levels.<sup>50</sup> Those offices were assigned about

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Gallup data doesn't account for regional variability and economic influences in crime rates. *Id.*

44. See Enns, *supra* note 40, at 864. See generally JUST. POL'Y INST., *supra* note 27 (showing a general increase in incarcerated populations).

45. See BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT RESOURCE PARITY 1 (2019).

46. See 372 U.S. 335, 343 (1963); see *cf.* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1285 n.171 (2001) (noting that the Supreme Court has interpreted the Sixth Amendment to limit the right to counsel to instances where criminal judicial proceedings have been initiated).

47. See Peter W. Fenton & Michael B. Shapiro, *Looking Back on Gideon v. Wainwright*, NAT'L ASS'N CRIM. DEF. LAWS. (June 2012), <https://www.nacdl.org/Article/June2012-LookingBackonGideonv-Wainwriigh> [<https://perma.cc/P549-586K>].

48. See *id.* at 29.

49. See FURST, *supra* note 45, at 5.

50. See DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 1, 3 (2007).

6 million cases in 2007 alone, 56% of which were misdemeanors.<sup>51</sup> The growth of that system occurred in piecemeal fashion, with individual jurisdictions left to comply with the Supreme Court's mandate in *Gideon* without particular guidance or a clear set of standards from either the Court, federal government, or other centralized authority.<sup>52</sup> Today, indigent defense is also supplied through the use of assigned counsel, private practitioners who take on a number of cases based on conflicts of interest and local rules, and contract counsel, private counsel who contract with a jurisdiction to cover some or all of its cases.<sup>53</sup> Even today, when the public defense network is at its most robust, there continues to be pronounced inconsistencies in quality and effectiveness of public defenders from county to county and state to state.<sup>54</sup>

Public defenders continue to be overworked and underpaid relative to their prosecutorial adversaries and are generally not afforded the institutional and administrative support needed to provide high-quality representation to each client.<sup>55</sup> The most passionate defenders often do not have the requisite time or resources they need to do their best work for every client, and many defenders and public defense offices have succumbed to a culture that prioritizes efficiency over zeal.<sup>56</sup> Implicit bias against clients, who are disproportionately Black and Latino, is a serious

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51. *See id.* at 1–3. This is the most recent national data on public defender caseloads. That no updated data is available underscores the complexities of monitoring and standardizing practices across the hundreds of public defender offices across the country.

52. *See* FURST, *supra* note 45, at 5.

53. *See id.* at 5–6. Contract counsel are usually the lowest bidders for all or part of a county's or state's indigent defense cases, a practice with a demonstrably negative effect on quality of representation. *Id.* at 6. Compounding this effect, many jurisdictions negotiate a flat-fee contract, which involves a private attorney representing an "unlimited number of clients" for a total, set fee. *Id.* Similarly, assigned counsel are subject to fee caps in about half of states. *Id.* Fee caps have been shown to disincentivize thorough work despite the ethical obligation to provide zealous representation. *Id.*

54. *See id.* at 5; *see also* Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, *GUARDIAN* (June 17, 2015, 7:30 AM), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked> [<https://perma.cc/4UHP-CPRF>] (noting that around 80% of people charged with crimes are now represented by public defenders).

55. *See* FURST, *supra* note 45, at 1 (noting that "only 27 percent of county-based and 21 percent of state-based public defender offices have enough attorneys to adequately handle their caseloads" and that "[i]n addition to better funding, there are numerous structural advantages a prosecutor holds that worsen the resource disparity . . . [including] harsh mandatory minimums and widespread pretrial incarceration create conditions in which people have essentially no choice but to accept whatever plea deal the prosecutor offers").

56. *See id.* at 3.

problem among public defenders and is exacerbated by underfunding and extreme caseloads.<sup>57</sup>

When public defenders, and defense attorneys in general, deliver subpar representation, their clients have limited options for recourse. In *Strickland v. Washington*, the Court held that to prove defense counsel provided ineffective assistance in violation of the Sixth Amendment, an individual must show that counsel's representation was below an "objective standard of reasonableness."<sup>58</sup> Someone seeking relief under *Strickland* must show that defense counsel was subpar and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>59</sup> Conduct found not to violate this standard includes defense counsel sleeping during trial,<sup>60</sup> regularly being drunk during trial,<sup>61</sup> and injecting cocaine during a trial recess.<sup>62</sup> Thus, individuals claiming that defense counsel violated their right to the effective assistance of counsel must meet a high burden of proof and, indeed, rarely do.<sup>63</sup> Professor Paul Butler argues that courts are likely applying the *Strickland* test correctly but that the standard itself simply fails to control against the numerous ways in which defense attorneys can fall short of meaningfully representing their clients.<sup>64</sup> *Strickland* ultimately minimizes the options for recourse that individuals have when they are dissatisfied with, or harmed by, their attorney's performance on any

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57. See L. Song Richardson & Phillip Atiba Goff, *Implicit Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2636 (2013) (noting the likelihood that implicit biases negatively impact the way public defenders treat their Black clients).

58. 466 U.S. 668, 687–88, 694 (1984).

59. *Id.* at 694.

60. See *United States v. Petersen*, 777 F.2d 482, 484 (9th Cir. 1985) (holding that although defense counsel may have slept during trial, he did not do so for a "substantial portion" of the trial and was thus not ineffective under *Strickland*).

61. See *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989) (holding that the substantial factual record showing defense counsel was drunk during many, if not all, of the days of a capital murder trial did not establish that he was ineffective under *Strickland*).

62. See *State v. Coates*, 786 P.2d 1182, 1187 (Mont. 1990) ("However, absent any specific errors or conduct identified in the trial that affected the trial's outcome, Mr. Goldman's cocaine abuse is irrelevant to the issue of ineffective assistance of counsel."), *overruled on other grounds by*, *Porter v. State*, 60 P.3d 951 (Mont. 2002).

63. See Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 427 (1996).

64. See Butler, *Poor People Lose*, *supra* note 10, at 2187. Butler posits that the *Strickland* test, and the difficulty of satisfying it, evinces an understanding among judges that defense attorneys, whether sober, meticulous, or neither, are not likely to actually earn an outcome other than a conviction for most of their clients. *Id.* at 2186.

number of levels and has helped make it incredibly difficult to hold defense attorneys accountable to their clients through the courts.<sup>65</sup>

Studies attempting to prove the efficacy of public defenders have been inconclusive. A 2013 study of the impact of public defenders in Florida found that overall, people represented by public defenders are more likely to be detained pretrial and convicted than those with retained counsel.<sup>66</sup> Further, these individuals are less likely to have their charges dismissed than people with retained counsel.<sup>67</sup> A 2007 study of the Clark County Public Defender's Office, in Las Vegas, found significant discrepancies in the outcomes that individual public defenders were able to obtain for their clients, with some public defenders getting their clients' average sentences 82% shorter than those earned by their peers.<sup>68</sup> A 2012 study of public defenders in Philadelphia found that, compared to appointed counsel, public defenders reduce the murder conviction rate for their clients by 19% and reduce the frequency that life sentences are imposed by 62% for their clients.<sup>69</sup> This study found that overall, public defenders, compared with appointed counsel, reduce prison time served by their clients by 24%.<sup>70</sup> To the individual client, a sentence reduction of 24% or a much lower chance of being sentenced to life is meaningful and reflects the value that public defenders can provide despite the many inherent challenges associated with the work.<sup>71</sup>

Nonetheless, these data also reveal the limitations of the systemic impact that public defenders can make with their current capacity, as even a 24% sentencing reduction for all people convicted of crimes would do little to dismantle the carceral state or necessitate a significant reduction in the

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65. *Id.* at 2187 n.49.

66. See Marian R. Williams, *The Effectiveness of Public Defenders in Four Florida Counties*, 41 J. CRIM. JUST. 205 (2013). Retained counsel is not available to most people; indeed, that is why *Gideon* was such a significant departure from the legal landscape where those who could not afford counsel had to represent themselves. See Mayeux, *supra* note 9.

67. See Williams, *supra* note 66.

68. See David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1166 (2007). This study's comparison of attorney ability accounted for variables such as the types of cases each attorney was assigned. *Id.* at 1154. The study found that attorney age and race were the most significant factors in an attorney's ability, with Latino and more experienced attorneys outperforming their co-workers on average. *Id.* at 1145. This study also controlled for variables such as clients' criminal histories. *Id.* at 1157.

69. See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 159 (2012).

70. See *id.*

71. See Butler, *Poor People Lose*, *supra* note 10, at 2187.

incarcerated population.<sup>72</sup> Further, as Butler and Smith Futrell argue, the existence of a public defense system may help legitimize the carceral system, making it harder to demonstrate its marked unfairness and perhaps hindering efforts to gather the political will to change or dismantle it.<sup>73</sup>

#### D. Public Opinion on Public Defenders

Although the ability of public defenders to have an impact on the incarcerated population or nature of the criminal legal system is unproven, research suggests that the public favors public defense work and sees it as an important part of a fair criminal legal system.<sup>74</sup> A national 2016 study, conducted by the Right to Counsel National Campaign (R2C), asked participants to rank the importance of several public assistance programs for poor people and found that access to public defense, while ranked fifth of six options, was ranked above rental assistance and just below food stamps.<sup>75</sup> Eighty-five percent of respondents thought it important for the government to provide public defenders to those who need them.<sup>76</sup> Sixty-one percent of respondents found it “very convincing” that the quality of justice a person receives should not be determined by wealth.<sup>77</sup>

While there appears to be public support for the role of the public defender, data indicate that public defenders are not currently seen as effective by half those surveyed, particularly by Black people and people who have had close contact with public defenders.<sup>78</sup> In R2C’s 2016 study, 47% of respondents thought public defenders were generally effective, while a third of survey respondents considered public defenders underqualified, and 44% viewed public defenders as being inexperienced.<sup>79</sup>

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72. *See id.* (“But even with a 24% reduction in every sentence, American criminal justice would remain the harshest and most punitive in the world. The poor, and especially poor people of color, are its primary victims.”).

73. *See id.* at 2178. Butler argues that the presence of public defenders gives the appearance of fairness and makes compelling and accurate critiques of the system less impactful, writing, “*Gideon* makes it . . . more difficult . . . to make economic and racial critiques of criminal justice . . . It creates a formal equality between the rich and the poor because now they both have lawyers.” *Id.* at 2197; *see also* Smith Futrell, *supra* note 2, at 118 (“No matter how much a defender may be ideologically opposed to the criminal legal system, the simple act of carrying out defense representation can provide a veneer of legitimacy to the entire process.”).

74. *See* NAT’L PUB. OP. SURV. CONDUCTED FOR RIGHT TO COUNS. NAT’L CAMPAIGN, AMERICANS’ VIEWS ON PUBLIC DEFENDERS AND THE RIGHT TO COUNSEL 6 (2017) [hereinafter RIGHT TO COUNS. NAT’L CAMPAIGN].

75. *Id.* at 10.

76. *See id.* at 20.

77. *Id.* at 24.

78. *See id.* at 17–18.

79. *Id.* at 17.



Forty-five percent of respondents said public defenders were dedicated to their clients.<sup>80</sup> Among Black respondents, only 28% found that public defenders were dedicated to their clients.<sup>81</sup> Sixty-seven percent of Black respondents and 61% of people previously represented by a public defender or who had a close friend or relative represented by a public defender said public defenders provide inadequate representation to their clients.<sup>82</sup>

Still, respondents saw improving the quality and availability of public defense as a way to increase fairness in the criminal legal system. While many, particularly people of color and those with firsthand or proximate experience with public defenders, saw public defenders as providing inadequate representation, 80% of respondents in R2C's survey said public defenders have too little time to devote to each case.<sup>83</sup> Fifty-five percent of respondents believed that public defenders were under-resourced in their work.<sup>84</sup> Sixty-six percent of respondents supported using tax dollars for public defense, and 61% favored using tax dollars to improve public defense in their home states.<sup>85</sup> Support for improving the public defender system was higher among Black respondents, 85% of whom favored the implementation of national standards for public defense work and providing the resources necessary to realize those standards.<sup>86</sup>

#### E. Ideological Underpinnings Weaken

Public support for expanding and improving the public defense system is part of the overall trend of broader support for criminal legal reform. A study comparing attitudes about the criminal justice system in 1994 and 2001 shows a significant shift in public opinion regarding the system's fundamental purpose.<sup>87</sup> In 1994, a year when the incarcerated population was over 1 million, 42% of the public favored a tougher approach to crime, while 48% favored a tougher approach to the root causes of crime.<sup>88</sup> Seven years later, in 2001, when the incarcerated population first exceeded 2 million, 32% of the public favored a tougher on crime approach, while 65%

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80. *Id.*

81. *Id.* at 18.

82. *Id.*

83. *Id.* at 17.

84. *Id.*

85. *Id.* at 12–13.

86. *Id.* at 15.

87. See PETER D. HART RSCH. ASSOCS., OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM I (2002) [hereinafter CHANGING PUBLIC ATTITUDES].

88. *Id.*

avored a tougher approach to the root causes of crime.<sup>89</sup> So, as the incarcerated population approached its peak, the portion of the population holding the punitive attitudes consistent with that growth declined by 10%.<sup>90</sup> At the same time, the number of people holding attitudes suggestive of a less punitive mindset and approach grew by about 17%.<sup>91</sup>

In recent years, that trend has continued as activists call to reform or rebuild the criminal legal system have begun to garner mainstream attention and popularity. A 2018 poll conducted by the Vera Institute for Justice indicated that 67% of Americans believe that building more prisons does not reduce crime.<sup>92</sup> The same poll showed that 62% of Americans do not believe that adding more prisons “would improve their quality of life in their communities.”<sup>93</sup> A 2020 poll conducted by the *Associated Press* indicated that 40% of people residing in the United States believe that the criminal legal system needs “major changes,” while an additional 29% said it needs a “complete overhaul.”<sup>94</sup> A 2017 study by the American Civil Liberties Union (ACLU) found that 91% of people residing in the United States agreed that the criminal legal system has problems that need fixing, and 71% said it was important to reduce the prison population and that incarceration is counterproductive to public safety.<sup>95</sup> Enns found that in 2010, punitive attitudes were held by fewer than 60% of people residing in the United States and trending downwards, a significant departure from their peak of over 71% in 1998.<sup>96</sup> These data indicate that as punitive attitudes decline, support for non-carceral and non-punitive modes of

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89. *Id.* at 1–2.

90. See DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 (2016); see also CHANGING PUBLIC ATTITUDES, *supra* note 87, at 2.

91. CHANGING PUBLIC ATTITUDES, *supra* note 87, at 3.

92. Matthew Clarke, *Polls Show People Favor Rehabilitation over Incarceration*, PRISON LEGAL NEWS (Nov. 6, 2018), <https://www.prisonlegalnews.org/news/2018/nov/6/polls-show-people-favor-rehabilitation-over-incarceration/> [<https://perma.cc/47GX-2MCJ>]. Clarke uses the term “Americans.” *Id.* Specifically, the poll queried people living in the United States. *Id.* Polls discussed *infra* also use the term “Americans” and were conducted among people residing in the United States.

93. *Id.*

94. Colleen Long & Hannah Fingerhut, *AP-NORC Poll: Nearly All in US Back Criminal Justice Reform*, ASSOCIATED PRESS (June 23, 2020), <https://apnews.com/article/ffaa4bc564afcf4a90b02f455d88fd03> [<https://perma.cc/X43Y-T58K>]. This poll was conducted in June 2020, in the midst of the George Floyd uprisings. *Id.* These uprisings had a demonstrable effect on public discourse surrounding criminal legal policy. See Akbar, *supra* note 5, at 1783.

95. Press Release, ACLU, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds/> [<https://perma.cc/BN4H-MJUL>].

96. See Enns, *supra* note 40, at 864.

accountability increases. This trend cuts against the dominant political narratives that have come to characterize mainstream politics on criminal justice in the era of mass incarceration.

In the summer of 2020, ideas once considered radical entered mainstream discourse about justice following widespread protests responding to the murder of George Floyd by the Minneapolis Police Department.<sup>97</sup> Professor Amna Akbar notes the significant and rapid rise of general awareness of abolitionist ideas and the way that shift in discourse had immediate policy and social implications.<sup>98</sup> Chokeholds were quickly banned in dozens of cities across the country, Confederate monuments were destroyed or removed, and police funding was thrust into the heart of city budget debates.<sup>99</sup> Whether abolitionist ideas take hold and lead to significant, widespread policy changes remains to be seen and is an important consideration for those wary of political leaders' efforts to placate protestors and organizers while moving slowly, if at all, towards transformational change.<sup>100</sup> In the wake of the 2020 elections, Democratic politicians have openly debated the impact of the slogan "defund the police" and whether it had negative electoral consequences.<sup>101</sup> However, the presence of abolitionist ideas in mainstream political, social, and media

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97. See Akbar, *supra* note 5, at 1783. Akbar, a legal scholar focusing on social movements, policing, and race, notes that the rapid rise of mainstream attention on the movement to defund and abolish police in 2020 built on past "rebellions and protests" in response to police violence. See *id.* at 1791, 1846.

98. *Id.* at 1783–86. Akbar highlights successful campaigns to cut police budgets and remove police from schools in Minneapolis, Columbus, and Oakland. *Id.* at 1827 n.204. Other campaigns to cut police budgets, like the one in New York City, for example, were not entirely successful but were closely contested and saw some reductions in police funding. See Dana Rubinstein & Jeffrey C. Mays, *Nearly \$1 Billion Is Shifted From Police in Budget That Pleases No One*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/06/30/nyregion/nypd-budget.html> [<https://perma.cc/4X4Y-F2P9>].

99. See Derrick Johnson, *The George Floyd Uprising Has Brought Us Hope. Now We Must Turn Protest to Policy*, GUARDIAN (June 30, 2020, 6:27 AM), <https://www.theguardian.com/commentisfree/2020/jun/30/black-lives-matter-protests-voting-policy-change> [<https://perma.cc/NC2S-ZZEH>]; cf. Derecka Purnell, Opinion, *The George Floyd Act Wouldn't Have Saved George Floyd's Life. That Says It All*, GUARDIAN (Mar. 4, 2021, 10:15 AM), <https://www.theguardian.com/commentisfree/2021/mar/04/the-george-floyd-act-wouldnt-have-saved-george-floyds-life-thats-says-it-all> [<https://perma.cc/7QAM-HR7Z>] (noting that George Floyd was not killed by a chokehold and highlighting how numerous police reforms adopted in the wake of his death did not address the fundamental issues that led to it).

100. See Purnell, *supra* note 99 (criticizing Kamala Harris, Nancy Pelosi, and Joe Biden for opting for symbolic gestures rather than passing substantive legislation).

101. Brianna Bierschbach & Liz Navratil, *Democrats Debate How Minneapolis' 'Defund the Police' Movement Played in Elections*, STAR TRIB. (Nov. 14, 2020, 8:30 PM), <https://www.startribune.com/democrats-debate-how-minneapolis-defund-the-police-movement-played-in-elections/573079441/> [<https://perma.cc/AF3A-NLBB>].

discourse may prove a significant step towards abolitionist changes, particularly in terms of achieving non-reformist reforms, and could be evidence of the weakening ideological base of the carceral state.<sup>102</sup>

## II. THE *GIDEON* PROBLEM AND THREE VISIONS FOR THE FUTURE OF PUBLIC DEFENSE

As non-punitive and less-punitive criminal legal beliefs and policies become more prevalent, the ideological foundation of the carceral state may start to diminish.<sup>103</sup> However, any weakening of the ideological structure of the carceral state does not suggest that the entirety of the abolitionist platform has become widely supported nor that it will be in the near future.<sup>104</sup> Indeed, it is generally characterized as a radical perspective.<sup>105</sup> Often, abolition is looked at as an intentionally extreme position taken by those whose real goals are to achieve reforms that already have popular support but are yet to be realized on a broad scale, such as sentencing reform, improved prison conditions, and a decreased racial

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102. See Johnson, *supra* note 99.

103. See Peter K. Enns, *The Importance of Shifting Public Opinion About Criminal Justice and America's Prison Boom*, SCHOLARS STRATEGY NETWORK (Sept. 20, 2017), <https://scholars.org/brief/importance-shifting-public-opinion-about-criminal-justice-and-americas-prison-boom> [<https://perma.cc/3Y2C-9UFH>] (arguing that “[i]f the public was a critical factor in the rise of mass incarceration, shifting public attitudes also have the power to encourage reduced incarceration” and “[w]hen activists identify promising steps to reform criminal justice, informing the public is just as important as contacting politicians”); see also Gottschalk, *supra* note 6, at 561 (noting that “[f]or those seeking to dismantle the carceral state, the key challenge is . . . figuring out how to create a political environment that is receptive to such reforms”).

104. To be clear, abolitionists do not condition their platform or goals on what is likely to accrue public support. Indeed, part of the abolitionist strategy is to challenge deeply held beliefs about what justice is. Nonetheless, as abolitionists pursue non-reformist reforms, analysis of which reform efforts may most immediately capitalize on changing attitudes towards justice, may be an important strategic consideration.

105. See Richard Luscombe, *James Clyburn: 'Defund the Police' Slogan May Have Hurt Democrats at Polls*, GUARDIAN (Nov. 8, 2020, 3:01 PM), <https://www.theguardian.com/us-news/2020/nov/08/james-clyburn-defund-police-slogan-democrats-polls> [<https://perma.cc/SDR6-EBEG>]. Representative James Clyburn, a Democrat from South Carolina and the House Majority Whip, criticized progressive Democrats who expressed support for or utilized the slogan “defund the police.” *Id.* He argued that such slogans slow progress because they are unlikely to earn the support from most Americans and may dissuade them from supporting related political messages. *Id.* Representative Alexandria Ocasio-Cortez, a progressive Democrat from New York, contested Clyburn’s assertion, arguing that progressive ideas, including defunding police, are essential to Democratic political success and suggesting that the popularity of such ideas is generally underestimated by moderate Democrats and other mainstream actors. *Id.* While it remains to be seen if Representative Clyburn is correct, his opinion is indicative of the way many abolitionist ideas are characterized as radical in mainstream discourse.

disparity in the criminal legal system.<sup>106</sup> While most, if not all, abolitionists look beyond such reforms to a transformed world, and offer a variety of ideas and plans regarding how justice and accountability will look once the current system is abolished, a survey of mainstream media coverage of abolition focuses primarily on the abolitionist call to do away with the current system.<sup>107</sup>

Few carceral abolitionists claim that dismantling the carceral state will happen immediately and often pursue transitional policy goals as a way to pave the road to abolition.<sup>108</sup> Carceral abolitionists have been instrumental in achievements that do not immediately involve dismantling the entire system but instead lessen its overall capacity and help prevent its expansion.<sup>109</sup> In general, abolitionists pursue systemic changes that help reduce the incarcerated population and shed more light on the system's flaws rather than changes that make the system appear fairer.<sup>110</sup> Akbar describes this as pursuing "non-reformist reforms," which, in this context, are policies consistent with abolitionist principles designed to support the needs of people harmed by incarceration and government supervision.<sup>111</sup> For carceral abolitionists, such reforms may take shape in policies that significantly impact the incarcerated population without expanding the

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106. See Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> [https://perma.cc/56MQ-H2PE].

107. See *id.* Abolitionists strongly emphasize the primary importance of deconstructing the current system, rather than their own specific plans to avoid getting locked in a debate that allows the current system to persist. To abolitionists, the time to prove new modes of accountability is when those modes can be evaluated in a context free from the violence of the carceral state. See McLeod, *supra* note 18, at 1615–16.

108. See Kaba, *supra* note 8; see also Aaron Ross Coleman, *Police Reform, Defunding, and Abolition, Explained*, VOX (July 16, 2020, 8:00 AM), <https://www.vox.com/21312191/police-reform-defunding-abolition-black-lives-matter-protests> [https://perma.cc/9UFQ-F4MV] (noting Mariame Kaba and other abolitionists' calls to immediately defund the police in response to the murders of George Floyd and Breonna Taylor, as well as countless others, while framing total police abolition as the ultimate goal).

109. See Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [https://perma.cc/JN9F-79YQ]. Carceral abolitionists led a campaign to remove a punitive district attorney (DA) in Chicago in 2016 and helped Larry Krasner, a candidate for Philadelphia DA whose platform was focused on reducing the impact of the criminal legal system on communities of color. *Id.* These efforts do not immediately work to abolish the system. Indeed, DAs, even progressive ones, are a central component of the system's operation. Instead, these moves seek to diminish the capacity of the system to operate at its current rate. See *id.*

110. See *id.*

111. See Akbar, *supra* note 5, at 1884 n.286 (noting the debate among abolitionists as to the limits of non-reformist reforms); see also Berger et al., *supra* note 109 (highlighting Mariame Kaba's apparent support for non-reformist reforms).

systems of parole or probation or which otherwise reduce the contact between the criminal legal system and communities of color.<sup>112</sup>

### A. Public Defense Reform: Expanding *Gideon*

Advocates of public defense reform argue that fixing the public defense system is a key component of creating a fair criminal legal system. A 2019 report by the Brennan Center for Justice stresses the resource disparity between public defenders nationwide and their prosecutorial adversaries.<sup>113</sup> The report also notes the structural advantages afforded to prosecutors, including the harshness of mandatory minimum and other sentencing laws, and the rates of pretrial detention, which have been shown to increase conviction rates.<sup>114</sup> The report identifies high caseloads, which limit public defenders' ability to provide zealous representation, and low salaries, which may disincentivize comprehensive preparation.<sup>115</sup>

Advocates of expanding and improving public defense systems have offered several recommendations to strengthen public defenders' ability to provide high-quality representation to all of their clients. These include establishing statewide indigent defense providers to improve consistency and allow for oversight, increased funding from reliable sources such as state general funds, and greatly improving the quality and availability of training for public defenders.<sup>116</sup> The Brennan Center has also recommended paying public defenders salaries that are more competitive with prosecutors' salaries to prevent prosecutorial work from being more financially attractive to attorneys.<sup>117</sup> The Brennan Center also recommends policies that limit the number of people entering the criminal legal system who require public defenders by removing incarceration for crimes that carry relatively shorter carceral sentences.<sup>118</sup>

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112. Smith Futrell discusses the “Attrition Model” towards abolition, which involves three primary steps: moratorium, decarceration, and excarceration. Smith Futrell, *supra* note 2, at 115. Moratorium simply “means the halting the construction of new [jails] and prisons.” *Id.* Decarceration is the reduction of the incarcerated population through a variety of means. *Id.* Excarceration involves reducing the flow of individuals into the carceral system. *Id.*

113. See FURST, *supra* note 45, at 1.

114. See *id.*; see also Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 205 (2018) (showing a 6–13% increase in convictions, depending on jurisdiction, primarily in the form of guilty pleas, when the person charged is detained pretrial rather than released).

115. See FURST, *supra* note 45, at 3.

116. See *id.* at 11.

117. See *id.*

118. See *id.* at 12. In *Scott v. Illinois*, the Supreme Court held that the Sixth and Fourteenth amendments “require only that no indigent criminal defendant be sentenced to a

Research suggests that these reforms, or similar reforms, would have significant support from the public. In R2C's 2016 study, respondents expressed broad support for developing better supervisory systems, implementing national practice standards, and providing more resources to public defenders.<sup>119</sup> Black respondents in the R2C study were the most supportive of each of the reforms evaluated.<sup>120</sup> When asked for qualitative feedback regarding their support for reforms, respondents emphasized that consistency, quality, and resource parity with prosecutors would help improve fairness and equality within the criminal legal system.<sup>121</sup> The respondents supported the reforms they associated most with fairness and equality.<sup>122</sup>

These reforms are aimed at the problems that frequently make zealous defense work impracticable.<sup>123</sup> Increasing funding, resources, and establishing and enforcing standards for quality all serve to enhance the ability of public defenders to perform their current duties.<sup>124</sup> These reforms are designed to minimize, if not remove, the inconsistency in the quality of defenders' representation that often exists from county to county or state to

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term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. 367, 374 (1979). So, under *Scott*, the Brennan Center's recommendation would see fewer cases involving custodial sentences, and therefore decreased demand on public defenders. While removing incarceration as a punishment for crimes could help lower both incarceration and public defenders' caseloads, incarceration is not the only type of punishment that can have ruinous consequences for people convicted of crimes.

119. See RIGHT TO COUNS. NAT'L CAMPAIGN, *supra* note 74, at 21. Ninety percent of respondents supported developing a supervisory system for public defenders to ensure they are serving the interests of the people they represent. *Id.* Support for setting national standards for public defenders was also broad, with 86% of respondents agreeing that there should be a minimum level of resources available to public defenders, and 77% in favor of setting national standards of qualification for public defenders. *Id.* Eight-four percent supported providing public defenders equal resources, including time per case, to prosecutors, and requiring states to assign an attorney to meet with those who cannot afford an attorney within three days of being arrested. *Id.* Respondents' favor for a supervisory system holding public defenders accountable to the interests of "people who need them" declined from 90% to 85% when the phrase "people who need them" was replaced with "low-income people accused of a crime" *Id.* at 20.

120. *Id.* at 23.

121. *Id.* at 20–21.

122. *Id.* at 24.

123. See *id.* at 20; see also Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/D3VM-UJ3C>] (highlighting the impact that high caseloads and insufficient resources can have on public defenders' ability to provide zealous advocacy to all of their clients).

124. See FURST, *supra* note 45, at 11.

state.<sup>125</sup> They do not fundamentally alter the criminal legal system but are designed to give people accused of crimes more capable representation with the goal of that representation entailing better outcomes or at least outcomes that are not determined by inherently unfair proceedings.<sup>126</sup> Eyeing the potential limitations of such reforms within the context of the criminal legal system, Butler writes, “[t]he reason that prisons are filled with poor people, and that rich people rarely go to prison, is not because the rich have better lawyers than the poor. It is because prison is for the poor, and not the rich.”<sup>127</sup> Indeed, a more robust public defender network would likely provide better outcomes for individuals. However, it may also obscure the harms of the system to the broader public without advancing the type of transformational changes needed to dismantle the system’s vast architecture.

### B. Teaching Abolition to Public Defenders

Abolitionists and other legal scholars have argued that there is tension between public defense work of any caliber and working towards a genuine justice.<sup>128</sup> Smith Futrell encountered this tension while teaching abolitionist students in a criminal defense clinic who questioned some of the practices and strategies they were learning.<sup>129</sup> Smith Futrell notes that defense attorneys struggle to actively combat the system writ large, asking, “[h]ow does an attorney advocate for their client in an inherently racist criminal legal system without subscribing to that system? Is it possible for defenders to play a role in undoing the system . . . representing . . . the clients who stand before us?”<sup>130</sup> Smith Futrell alludes to the many daily

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125. *See id.*

126. *See id.* at 15–16.

127. Butler, *Poor People Lose*, *supra* note 10, at 2178.

128. *See* Smith Futrell, *supra* note 2, at 106 (arguing that abolitionist ethics can be integrated into public defense work but that there are still inherent limitations imposed by defenders’ responsibilities and procedural restraints). *But see* Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2263 (2014) (arguing that the tension is overstated given that individual clients stand to benefit from efforts to change the system writ large and, thus, that the defender can pursue broader advocacy directed towards the system as well as client-oriented advocacy on an individual level).

129. *See* Smith Futrell, *supra* note 2, at 103. Smith Futrell highlights an exchange between students and a guest speaker, a practicing public defender, who taught the students how to cross-examine a government witness using that witness’s criminal history as a way of undermining the witness’s credibility. *Id.* The students pushed back, arguing that this practice was anti-abolitionist and called for the jury to make the type of character assumptions about the witness that a defense attorney would usually vehemently protest if made about her client and which reinforced the narrative that people can be defined by the crimes they commit. *Id.*

130. *Id.* at 104.



tasks public defenders must perform and their inherent tensions.<sup>131</sup> Such tasks include negotiating plea deals with prosecutors that result in monitoring and incarceration and advising clients to waive their right to trial to avoid the compounded sentencing risks known as “the trial penalty.”<sup>132</sup> A public defender motivated to abolish the carceral system will find herself, on a daily basis, taking part in the process of filling its cots and cages.<sup>133</sup> She may do so with a deeper understanding of that system and find unique ways to challenge it, but she will not avoid sustaining it.<sup>134</sup>

Smith Futrell contends that public defenders are ideologically complicit within the structure of the criminal legal system, often unwittingly.<sup>135</sup> Noting the relatively powerless position of public defenders, Smith Futrell writes, “even in this difficult posture, public defenders do have agency and decision-making power in how they manage their cases, and harm can occur when defenders play into racialized ideas about their clients.”<sup>136</sup> Many public defenders continue to unknowingly contribute to the harm the system causes their clients due to the influence of their own racial, class, and gender biases.<sup>137</sup> Even when attempting to give their clients realistic expectations about what to expect in the racist legal system, public defenders may be “conditioning clients into acquiescence,” thus allowing the system to continue to function with minimal interruption.<sup>138</sup>

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131. *See id.* at 117.

132. *See id.*; *see also* David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 777 (2013) (noting the way custodial sentences for a given crime are often significantly longer for individuals convicted at trial than for those who take plea deals and how this dynamic deters individuals going to trial).

133. *See* Smith Futrell, *supra* note 2, at 118.

134. Some have argued that if hundreds of thousands of individuals charged with crimes refused to plea and demanded trials, the system would “crash.” Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html%20Futrell%201> [<https://perma.cc/F6S7-79VJ>]. This novel approach to challenging the system could be effective, but it also highlights the tension between criminal defense advocacy and pursuing systemic change. The individual charged with a crime has the right to go to trial. However, a defense attorney may also be ethically compelled to at least caution against this for any number of reasons including the trial penalty, the strength of the government’s evidence, and the availability of a relatively favorable plea offer. So, while the defense attorney must ultimately accept her client’s decision to go to trial as a form of collective action, she may at least temporarily be put in the position of counseling against such action. *See* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1094 n.21 (2013).

135. *See* Smith Futrell, *supra* note 2, at 119.

136. *Id.* at 124.

137. *See id.*

138. *See id.* at 119.

Given these tensions, Smith Futrell analyzes whether the abolitionist ethic can, or should, be incorporated into a setting where law students are educated to be defense practitioners in a way that does not undermine abolitionist principles.<sup>139</sup> Smith Futrell reports that an increasing number of current and aspiring public defenders are beginning to identify as abolitionists and raises questions as to how thoroughly practicing public defenders can apply an abolitionist ethic in their daily work.<sup>140</sup> Smith Futrell cautions that adoption of abolitionist rhetoric and ideas without accordant action leads to cooption, and possibly the dilution of a movement that is growing in stature but which remains controversial in the mainstream.<sup>141</sup> Focusing her analysis on pedagogical and clinical settings, Smith Futrell argues that decarceral and abolitionist principles should be woven into legal education and clinical legal practice but cautions that limitations will always exist given the inherent tension between public defenders, who work within the system, and abolitionists, who want to do away with it.<sup>142</sup>

In a series of proposals, Smith Futrell details how to infuse abolitionist principles and practices into pedagogical and clinical settings.<sup>143</sup> Her proposals begin with critical readings to establish historical perspectives on criminal legal policy and carceral abolition.<sup>144</sup> Smith Futrell also advocates for an analysis of policy proposals and impact litigation that pushes students to determine whether a specific reform is reformist in nature or if it is part of a decarceral or abolitionist plan and whether it appropriately engages with people most directly impacted by the criminal legal system.<sup>145</sup> Further, Smith Futrell encourages students to contemplate how they interact with clients and understand their clients' stories relative to the historical and social context of the criminal legal system.<sup>146</sup> Part of Smith Futrell's rubric includes educating students to find ways to expand the scope of their approach as lawyers and to identify their biases to

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139. *See id.* at 117.

140. *See id.* at 106, 124.

141. *See id.* at 119.

142. *See id.* at 113.

143. *See id.* at 127.

144. *See id.* at 120.

145. *See id.* at 121.

146. *See id.* at 123. This practice is designed to help students see the ways in which the criminal legal system functions as a crude tool to deal with social problems such as poverty, addiction, and mental health struggles, as well as helping students provide more compassionate and thorough advocacy. *See id.*

proactively counteract them.<sup>147</sup> Much of Smith Futrell’s vision for doing so involves discussion, education, and critical analysis of both current practices and possible ways of reorienting the role of the defense lawyer.<sup>148</sup> The platform also encourages students to consider how different forms of advocacy — including trial and appellate work, policy advocacy, and community education — interact with the struggle for abolition.<sup>149</sup>

Smith Futrell also notes that the primary motivations for law students hoping to become public defenders may have shifted from ideals of empathy, professional pride, and heroism to “a broader vision of individual and collective liberation” in recent years, partially because of the social movements responsive to the repeated and public murders of Black people by police.<sup>150</sup> With that in mind, Smith Futrell posits the potential for teaching abolition in a clinical setting as a way of providing a guiding philosophy for students who have lost faith in the potential to reform the criminal legal system but who still see the importance of working within it as public defenders given the urgent legal needs of people facing criminal charges.<sup>151</sup>

Aside from her pedagogical analysis, Smith Futrell identifies direct ways students can leverage clinical power and legal training to support abolitionist goals. Highlighting mutual aid, Smith Futrell asserts that students should become familiar with, and work to support, mutual aid efforts designed to produce new forms of social relations that create safety, provide access to essential resources, and undo harm imposed by broader forces such as the criminal legal system.<sup>152</sup> Mutual aid to support people directly affected by the criminal legal system may take shape in community bail funds or through participatory defense, which brings together families and communities to intervene in criminal proceedings by making bail arguments, offering community-based diversion programs, and influencing plea bargains.<sup>153</sup> Contributing to mutual aid helps students directly channel

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147. *See id.* at 121–22; *see also id.* at 119 (emphasizing the paramount importance of effective and responsible legal work for practitioners trying to incorporate abolitionist principles into their defense advocacy).

148. *See id.* at 120.

149. *See id.* at 128–29.

150. *See id.* at 126.

151. *See id.*

152. *See id.* at 129 (noting that bail funds perform decarceral work by collecting the resources necessary to bail people out of jail); *see also* *What Is Mutual Aid?*, BIG DOOR BRIGADE, <https://bigdoorbrigade.com/what-is-mutual-aid/> [<https://perma.cc/EH56-GTZA>] (last visited Nov. 22, 2021) (describing mutual aid as “when people get together to meet each other’s basic survival needs with a shared understanding that the systems we live under are not going to meet our needs and we can do it together RIGHT NOW”).

153. *See* Smith Futrell, *supra* note 2, at 135; *see also* Moore et al., *supra* note 1, at 1281.

their enthusiasm for abolition and teaches them to think more broadly about how lawyers can assist movements for justice.<sup>154</sup>

While Smith Futrell's proposals are nuanced and responsive to the urgent needs of the communities most impacted by the carceral state, as well as the limitations of public defense work, they are focused on a limited setting and may be hard to put into widespread practice. Smith Futrell's proposals targeted the law school clinical setting, where many future defense practitioners may be trained.<sup>155</sup> Law school clinics are designed to have low caseloads and often superlative resources to allow students a thorough educational experience free from the resource limitations that frequently hinder public defenders.<sup>156</sup> And, while Smith Futrell's proposals for abolitionist education are detailed, they also depend on the availability of faculty who have a deep understanding of the tension between defense work and carceral abolition, and a desire to address that tension in their clinical pedagogy.<sup>157</sup> Smith Futrell can implement these practices based on her own perspective and experience as a clinical instructor; however, others may do so with lesser degrees of care for, or awareness of, the risk of "empty co-option of the principles of abolition."<sup>158</sup> Still, publication of Smith Futrell's analysis is hugely important and may begin to enable others to adopt and build upon her proposals in clinical and other settings.

### **C. "I Wish They Knew Him like We Know Him."<sup>159</sup> Participatory Defense and Disrupting the Dehumanizing Routine of Criminal Courts**

Participatory defense, "a grassroots response to the public defense crisis," modifies traditional legal advocacy by promoting the voices of those most directly impacted by criminal charges, along with their families and communities, in an effort to disrupt the assembly-line process of criminal courts.<sup>160</sup> The cold process of criminal courts often leaves family members of those charged with or convicted of crimes lamenting, "I wish they knew him like we know him."<sup>161</sup> To those people, participatory defense proposes solutions.

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154. See Smith Futrell, *supra* note 2, at 135.

155. See *id.* at 101.

156. See *id.* at 116.

157. See generally *id.*

158. See *id.* at 119.

159. See Moore et al., *supra* note 1, at 1286 (quoting a common response from families after their loved ones are sentenced).

160. See *id.* at 1281.

161. See *id.* at 1286.

Participatory defense operates in and out of the courtroom to consolidate community power and direct it towards the system while also strengthening the ability of community members to support each other interpersonally and as legal advocates.<sup>162</sup> Outside of the courtroom, participatory defense involves the creation of community support centers, where those who have been through the system can support and educate those currently facing it. Lawyers are not invited to these community support centers, out of a concern that their presence may undercut the openness, trust, and safety fostered in these environments.<sup>163</sup> Participatory defense also empowers communities to step into the role of legal advocate traditionally occupied by lawyers. Volunteer participatory defenders learn techniques for powerful advocacy and storytelling, including video presentations detailing the life of a person charged with a crime designed to compel judges to reckon with the humanity of each person who enters their courtrooms.<sup>164</sup> The participatory approach has already been impactful and has led to cases being dismissed, charges being reduced, and life sentences being taken off the table.<sup>165</sup>

The movement developed in response to the severity and racism of the criminal legal system, as well as the frequent disconnect between public defenders and their clients due to different life experiences and ideas of how to approach advocacy.<sup>166</sup> To bridge this gap, participatory defenders work in direct partnership with public defenders, particularly those practicing in a holistic model.<sup>167</sup> Participatory defense is rooted in the understanding that public defenders operating under holistic and client-centered practice models may be trained to try to humanize their clients to courts but are not as capable of doing so as those accused of crimes, their

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162. *See id.*

163. *See id.* at 1285.

164. *See id.* at 1286.

165. *See id.* at 1287. In 2015, the participatory defense movement calculated its impact in terms of years of incarceration prevented by participatory intervention over the seven years of the movements' existence at that point. In that time, the movement saved individuals a total of 1,800 years of incarceration. *See id.*

166. *See id.* at 1283.

167. *See id.*; *see also* James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 820–21 (2019) (describing holistic defense, a modern paradigm of public defense advocacy positioning defenders to address not only their clients' legal cases but the consequences of misdemeanor or felony charges and convictions such as loss of parental rights, housing, or immigration status). The holistic model also pushes defenders to analyze the broader racial and socio-economic circumstances that may have contributed to their clients being arrested, charged, and prosecuted. Holistic defense requires an interdisciplinary team of civil and criminal lawyers, social workers, and investigators, and has been shown to reduce the "likelihood of a custodial sentence by 16% and expected sentence length by 24%." Anderson et al., *supra*, at 823.

families, and communities.<sup>168</sup> Thus, the participation of those most impacted “reciprocate[s] and strengthen[s]” efforts of public defenders attempting to disrupt the racism, biases, and de-individualized processes of courts, where efficiency eclipses thoroughness and false, moralistic narratives about people who have committed crimes are endemic.<sup>169</sup>

Advocates of participatory defense argue that a public defense system can be a powerful force against mass incarceration if public defense work is reshaped to collaborate with and center the people and communities most affected by criminal charges.<sup>170</sup> Raj Jayadev, the creator of participatory defense, argues that the relationships between public defender organizations and participatory defenders can be critical to systemic change.<sup>171</sup> Jayadev described an episode when a community group questioned the local public defender organization about why there were no public defenders at misdemeanor arraignments.<sup>172</sup> The defender organization informed the community group that they simply did not have the resources to do so, despite their desire to appear at a critical stage in misdemeanor proceedings.<sup>173</sup> In response, the community quickly organized and, along with local civil rights activists, successfully pressured local authorities to increase funding to the public defender organization to provide representation at misdemeanor arraignments.<sup>174</sup>

So, while participatory defense often takes shape in a courtroom or in support for those who have recently been inside of one, it can also help mobilize advocacy in a way that simultaneously empowers communities and the public defender organizations that work with them.<sup>175</sup> The symbiotic relationship envisioned in participatory defense makes public defenders a resource to communities, and allows communities to help

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168. See Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 587 (2011) (“The basic guiding principle underlying client-centered representation is to value and enhance the client’s autonomy, both within the lawyer-client relationship and within society.”); see also Moore et al., *supra* note 1, at 1289. One goal of participatory defense is the redefinition of the lawyer’s role. While participatory defense is collaborative and flexible, it generally encourages participants to be as fully integrated into defense advocacy as possible while encouraging defense attorneys to use their legal knowledge to be a supporting resource to those directly affected and their loved ones. Moore et al., *supra* note 1.

169. Moore et al., *supra* note 1, at 1283.

170. See *id.*

171. See *id.* at 1289.

172. See *id.* at 1288.

173. See *id.*

174. See *id.*

175. See *id.*

strengthen the quality of public defenders, thus enabling them to more meaningfully combat mass incarceration than they currently can.<sup>176</sup>

In addition to likely requiring substantial resources, broader implementation of participatory defense will require navigating significant practical challenges for defense attorneys. Some have cautioned that participatory defense carries the potential to disrupt the already fraught nature of defense advocacy.<sup>177</sup> For example, lawyers are duty bound to keep information learned while representing an individual client confidential. That confidentiality may be severed when a third party, here a participatory defender, is present during a conversation between a defense attorney and a person she represents.<sup>178</sup> In many ways, confidentiality is the bedrock of the attorney-client relationship; without it, it may be challenging for a defense attorney to adequately advise, gather information from, and ultimately advocate for her clients.<sup>179</sup> Participatory defenders, in an effort to humanize the people they advocate for, may inadvertently disclose information that courts can use against those very same people.<sup>180</sup> Participatory defenders may also impact the ability of defense attorneys to navigate the legal strategy of their clients' cases, which in turn could result in negative consequences for the people facing charges.<sup>181</sup> These challenges are redressable but must be accounted for if participatory defense is to feature more prominently in defense advocacy without impacting people's access to high quality and ethically sound legal representation.

### III. CAN PUBLIC DEFENSE REFORM BE NON-REFORMIST?

The impacts of *Gideon* and the post-1963 expansion of the public defense system are hard to define. It remains to be seen whether *Gideon* has primarily served to legitimize the system or if it still carries potential to be an important component of undoing mass incarceration and preventing

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176. *See id.* at 1289.

177. *See* Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 716 (2018).

178. *See id.*

179. *See id.*

180. *See id.* at 727 (noting how informing a judge that a person has a history of substance abuse, as a way of contextualizing that person's actions, could lead a judge to impose incarceration or supervision to comply with court-mandated counseling).

181. *See id.* at 728 ("One example of this is the tension between individual case outcomes, such as pleading guilty for various personal and pragmatic reasons, and the movement's explicit focus on systemic change, which may entail challenging the police and prosecution at trial, potentially bringing a sentencing 'trial penalty' . . ."); *see also* Abrams, *supra* note 132, at 777.

future efforts to replicate it.<sup>182</sup> Raj Jayadev writes, “a cynic might explain the idiosyncratic constitutional mandate to provide government-funded criminal defense attorneys as a redistribution of assets to one set of lawyers (defenders) that makes life easier for other lawyers (prosecutors and judges) through a pro forma greasing of the carceral state’s machinery.”<sup>183</sup> Jayadev also writes, “[i]mproving public defense is arguably the least discussed, yet most promising, way to challenge mass incarceration.”<sup>184</sup> While Jayadev conditions his optimism for the potential of public defense on his proposed expansion of participatory defense, he acknowledges the unique institutional position public defenders hold and identifies the opportunity to leverage that position against the carceral state.<sup>185</sup> Professor John Pfaff has argued similarly that public defenders, in their current procedural role, will struggle to make broad systemic impacts solely by representing individual clients but can play an important part in change making as watchdogs and lobbyists.<sup>186</sup>

The expansion of the public defense system in its traditional form does not directly address one of the carceral state’s central pillars: its ideology. Public defenders operate within the confines of the system and its logic.<sup>187</sup> They can try to prove a client’s factual innocence at trial or work to mitigate the length and type of a sentence imposed through plea bargaining or at sentencing.<sup>188</sup> Public defenders are generally restricted from directly attacking the system’s cruelty by ethical rules and strategic concerns.<sup>189</sup> Often, public defenders are required to emphasize the legitimacy of the system’s punitive purpose while arguing that their client is not deserving of what would otherwise be an appropriate punishment.<sup>190</sup> In general, public

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182. See Butler, *Poor People Lose*, *supra* note 10; see also Smith Futrell, *supra* note 2, at 104.

183. Moore et al., *supra* note 1, at 1296.

184. *Id.* at 1287.

185. See *id.*

186. See John Pfaff, *Why Public Defenders Matter More than Ever in a Time of Reform*, APPEAL (Apr. 18, 2020), <https://theappeal.org/why-public-defenders-matter-more-than-ever-in-a-time-of-reform-9b018e2184fe/> [<https://perma.cc/PCK9-TWVZ>]. Professor Pfaff, noting the impact that prosecutors and their lobbyists have had on criminal legal policy, argues that defenders can turn their institutional knowledge and presence within the system into effective policy advocacy. See *id.*

187. See Smith Futrell, *supra* note 2, at 110.

188. See *id.* at 117.

189. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2117 (2003) (noting that in federal court, “[c]riminal defense lawyers who persist in aggressive litigation tactics, even when those tactics are fundamentally truth-seeking in nature, are chastised for being lawless and without integrity”).

190. See *id.* at 2103 (noting that a defense attorney’s aggressive advocacy at sentencing in federal court may result in a harsher sentence for her client, and that it is likely better for



defenders are constrained to arguments and strategies that do not push boundaries — a norm which inherently undercuts defenders' ability to point out broader systemic flaws or address the need for systemic change while advocating for individual clients.<sup>191</sup> While criminal defense advocacy looks different from lawyer to lawyer, county to county, and across the country, it has traditionally worked to manipulate the system to the extent possible in favor of individuals, not to change the system itself.

Strengthening traditional public defense practice by increasing funding to public defenders and establishing standards of practice, as advocated by R2C and the Brennan Center, as well as other advocacy groups, would enhance the impact public defenders are able to make for many individual clients.<sup>192</sup> Data discussed in Part II of this Note indicate that, despite being under-resourced, public defenders have made a positive difference for many individuals facing the criminal legal system.<sup>193</sup>

However, as Butler argues, even widely improving individual outcomes does not inherently undermine the carceral state, which has a demonstrated ability to adapt to reforms meant to limit its scope and power, including the post-*Gideon* expansion of state and federal public defense systems.<sup>194</sup> Further, as Jayadev contends, even the most thoughtful and zealous public defenders are not often as effective as impacted communities in challenging the formality and inhumanity of the criminal legal process.<sup>195</sup> With these limitations, even a reinvigorated network of public defenders, trained in traditional or even holistic advocacy models, are unlikely to be able to stop the churn of the carceral state.<sup>196</sup> While many individuals would receive meaningfully better outcomes if there were more, better-resourced public defenders in every jurisdiction, a heavy investment in traditional public defense may actually further legitimize the system and make it harder to deconstruct.<sup>197</sup> Thus, such a change would not be inherently non-reformist and may endanger efforts to expose and

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the client if his defense attorney makes narrower arguments within statutorily defined boundaries).

191. *See id.* at 2172.

192. *See* Butler, *Poor People Lose*, *supra* note 10, at 2186 (“I want to be careful not to discount the difference that an excellent defense attorney can make, and how much this matters for individual clients. At the same time, I don’t want to overclaim . . . that full enforcement of *Gideon* would bring anything remotely resembling equality to American criminal justice.”).

193. *See* Williams, *supra* note 66, at 205; *see also* Abrams & Yoon, *supra* note 68, at 1176; Anderson & Heaton, *supra* note 69, at 154.

194. *See* Butler, *Poor People Lose*, *supra* note 10, at 2182.

195. *See* Moore et al., *supra* note 1, at 1285–86.

196. *See generally* Smith Futrell, *supra* note 2.

197. *See* Butler, *Poor People Lose*, *supra* note 10, at 2201.

undermine the architecture of the system.<sup>198</sup> So, while providing people charged with crimes more effective public defenders who have the resources to fight each case thoroughly and win more dismissals, not guilty verdicts, and shorter sentences will benefit those individuals, the cumulative effect of those improvements may fall short of significantly reducing the incarcerated population or the impact of the carceral state on communities of color and poor communities.<sup>199</sup> Thus, expanding the public defense system, without addressing its core purpose, may actually aggravate Butler's concern that public defenders make it harder to achieve transformational change by playing a role in legitimizing the system.<sup>200</sup>

To make public defense part of the process of dismantling the carceral state, it must be reoriented around abolitionist goals, and it must be better connected with the communities that most frequently need public defenders. If intended to be a non-reformist reform capable of making systemic impact, public defense reform should involve a combination of Smith Futrell's abolitionist education for criminal defense practitioners and the supporting role for public defenders envisioned in Jayadev's participatory defense model. Smith Futrell argues that law students in a criminal defense clinic can bring abolitionist principles into their work and that doing so does not inherently lead to a cooption of the abolitionist ethic if practitioners are thoroughly educated and conscientious.<sup>201</sup> While Smith Futrell analyzed this tension in a clinical setting with a mixture of abolitionist and non-abolitionist students, her findings can be applied in public defender offices given that clinical settings in many ways replicate professional offices.<sup>202</sup> Indeed, many public defender offices promote continuing legal education on a broad array of topics within their offices,

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198. See Akbar, *supra* note 5, at 1844. This is not to suggest that it is inherently anti-abolitionist to try and improve conditions within the system; however, doing so without also limiting the system's overall ability to monitor and incarcerate millions of people does not advance the goal of creating a world without prisons.

199. See Butler, *Poor People Lose*, *supra* note 10, at 2187 ("But even with a 24% reduction in every sentence, American criminal justice would remain the harshest and most punitive in the world. The poor, and especially poor people of color, are its primary victims."); see also SAWYER & WAGNER, *supra* note 15, at 4 ("Every year, over 600,000 people enter *prison* gates, but people go to *jail* 10.6 million times each year . . . . At least 1 in 4 people who go to jail will be arrested again within the same year — often those dealing with poverty, mental illness, and substance use disorders, whose problems only worsen with incarceration.").

200. See generally Butler, *The System Is Working*, *supra* note 10.

201. See generally Smith Futrell, *supra* note 2.

202. See *id.*

ranging from trainings on specific legal issues and tactics to broader developments in the landscape of defense work.<sup>203</sup>

Public defenders can, and indeed should, be trained and educated in abolitionist thought. While many capable defense attorneys, particularly those working in a holistic model, already try to bring a fuller picture of their clients' lives and circumstances into the courtroom to force courts to grapple with more than the individual acts charged, many fall short due to a lack of resources, motivation, or training.<sup>204</sup> Abolitionist principles provide a strong framework for closing that gap.<sup>205</sup> Attorneys trained in abolitionist principles, who understand the critical importance of analyzing the totality of their clients' lives as well as the criminal charges they face, will more seamlessly collaborate with participatory defenders working to disrupt the assembly-line approach prevalent in most courtrooms.<sup>206</sup> This is important to the successful expansion of participatory defense, given the practical tensions between participatory and traditional defense that Godsoe identifies.<sup>207</sup> Indeed, public and participatory defenders anticipating regular collaboration may well be able to navigate those risks more effectively when public defenders are deeply familiarized with the participatory model and its ideological roots. Public defenders trained in abolition will also have a basis to better understand the value of community-based models and their role in the larger struggle for justice, which at times may be markedly different from their traditional, procedural role as legal advocates.<sup>208</sup> Smith Futrell's recommendations would help public defenders recognize how to work towards a world without the criminal legal system while utilizing their institutional knowledge and social power as lawyers to the benefit of people currently entangled within that system.<sup>209</sup>

R2C and the Brennan Center offer structural frameworks that may be useful in transforming the nature of public defense work as envisioned by Jayadev and in working to reconcile its tension with abolitionist principles

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203. See, e.g., Adele Bernhard, *Raising the Bar: Standards-Based Training, Evaluation, and Supervision*, 75 MO. L. REV. 831, 844 (2010).

204. See Anderson et al., *supra* note 167, at 832.

205. See generally Smith Futrell, *supra* note 2.

206. See Moore et al., *supra* note 1, at 1287.

207. See Godsoe, *supra* note 177, at 716. If public defender organizations and participatory defense groups have more structured, longstanding relationships in general, risk related to confidentiality and in-court presentations discussed previously could be more easily be avoided. See *id.* at 727. In that context, it would be easier for both groups to communicate about how to collaborate effectively and mitigate or avoid the risks inherent in such collaboration. See *id.*

208. See generally Moore et al., *supra* note 1; Smith Futrell, *supra* note 2.

209. See Smith Futrell, *supra* note 2, at 106.

through education as outlined by Smith Futrell.<sup>210</sup> R2C and the Brennan Center advocate for expanding funding and resources available to public defenders so they can provide more vigorous, traditional legal advocacy.<sup>211</sup> However, R2C and the Brennan Center's proposals favoring national standards, consistency between offices, and increased resources can be modified to support abolitionist training and improve and expand holistic models that are most suitable to collaboration with participatory defenders.<sup>212</sup> National standards would strengthen this new mode of public defense work and prevent inconsistencies from county to county and state to state from undercutting the potential for public defenders to advance abolitionist goals. This new approach, shaped around the perspectives and demands of the communities most affected by the criminal legal system and implemented with the goal of destabilizing and doing away with the carceral state, holds promise.<sup>213</sup>

Funding to public defenders, and especially to participatory defenders who currently work as volunteers, would strengthen the ability of advocacy teams on an individual level and possibly push prosecutors and the system to task to the extent of disruption.<sup>214</sup> While the system can likely cope with a better funded public defense system pursuing traditional defense advocacy, it may struggle to maintain its current capacity when faced with a reinvigorated public defense network buoyed by commitment to, and partnerships with, impacted communities, determined to the upend status

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210. See generally *id.*; Moore et al., *supra* note 1.

211. See FURST, *supra* note 45, at 1; see also RIGHT TO COUNS. NAT'L CAMPAIGN, *supra* note 74, at 9.

212. See Moore et al., *supra* note 1, at 1300; see also David Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 382 (2017) (arguing that federal public defender organizations may benefit from following the holistic model and demonstrating that resources may be a barrier to major shifts in public defender organizations' ethos and ability to practice in new models).

213. See Moore et al., *supra* note 1, at 1282. Given that 80% of people entering the criminal legal system are represented by public defenders, it may prove important, from an abolitionist perspective, to align those interactions and relationships with abolitionist goals and principles. See Van Brunt, *supra* note 54.

214. See Moore et al., *supra* note 1, at 1301. Traditional public defense organizations already employ a diversity of professionals in addition to lawyers, including paralegals, investigators, and translators. Holistic or client-centered organizations may also employ attorney and non-attorney immigration, housing, social work, and employment specialists. At smaller offices in particular, this work may be performed by contractors. See Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625, 626 (2006). Without suggesting this as the most direct model for funding participatory defense, it is important to consider the ways in which public defender organizations may be able to utilize any increased funding they receive without necessarily enhancing their own institutional power.

quo which has enabled mass incarceration.<sup>215</sup> If public defenders successfully lobby for increased funding and resources with the clear intention to use those resources to advance abolitionist goals, they may be able to avoid the pitfalls that Jayadev articulates when cautioning against reinvesting in traditional public defense.<sup>216</sup>

Professional standards could be applied not only to traditional legal skills that are critical to effective advocacy but to the relationships that public defenders have with impacted communities.<sup>217</sup> While many public defenders may not hold abolitionist beliefs or support them wholeheartedly, there is evidence that public defenders are increasingly aware of the potential for change in this moment and understand that public defenders need to consider other strategies and partners.<sup>218</sup> Public defenders seem to understand, now more than ever, that this change cannot occur exclusively from within and have already begun forming coalitions with other offices and movements, like Jayadev's, to identify and pursue the changes that can make public defenders instrumental to transformational shifts in the criminal legal system.<sup>219</sup> A growing sector of public defenders may thus be primed to reimagine their position in the larger struggle for justice.<sup>220</sup> And, as Smith Futrell has found, many law students hoping to become public defenders are now motivated by broader visions of collectivism and systemic change, a shift that may support a new approach to public defense grounded in abolitionist principles.<sup>221</sup> That approach could see public defenders build stronger bonds with communities based on a deeper

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215. See Butler, *Poor People Lose*, *supra* note 10, at 2202 (noting the ability of the criminal legal system to adapt to reforms, including *Gideon* and related expansions of the public defense system, without sacrificing power).

216. See Moore et al., *supra* note 1, at 1288.

217. These standards should not be defined by lawyers but instead should be driven by community activists who are more in touch with the ways public defenders can benefit, and harm, communities. See Moore et al., *supra* note 1, at 1288. This approach would require public defenders to take on a movement lawyering framework which could help public defenders see outside of their daily work to the larger movement for justice. Movement lawyering is a style of advocacy in which lawyers de-center themselves and become allies, rather than representatives, to historically marginalized communities building social power. See generally Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017).

218. See Moore et al., *supra* note 1, at 1289. Moore describes the Community Oriented Defenders Network, a network of over 100 public defender offices engaging in discussion and sharing ideas on how to reshape defense work, as a significant example of the efforts public defenders are taking to reevaluate their position and think more broadly about how to leverage their institutional power against the system. *Id.*; cf. Smith Futrell, *supra* note 2, at 117–18 (“Many defenders . . . may develop a critique of the process based on their firsthand interactions with court actors and observations about how poorly their clients are treated. However, mere critique of the system alone only goes so far.”).

219. See Moore et al., *supra* note 1, at 1289.

220. See *id.*

221. See Smith Futrell, *supra* note 2, at 103.

understanding of how to support those communities through legal advocacy.

Public opinion indicating support for defense reform suggests that such changes may be an attainable policy goal for abolitionists to pursue as a non-reformist reform.<sup>222</sup> R2C's study indicated significant majority support for improving public defense, and while the types of reforms discussed with respondents did not amount to a transformative reshaping of how public defenders operate, the norms that respondents most favored were fairness and equality.<sup>223</sup> If the public begins to see a new form of defense, rooted in abolitionist principles and meaningful community partnership, as a way of achieving fairness, there may be a broad base of public support for a dramatic change centered around a familiar institutional actor already considered to be valuable and in need of reinforcement.<sup>224</sup> More research should be conducted to ascertain public support, which can be important in driving policy change.<sup>225</sup> The carceral state's punitive ideologies took hold in response to a series of intentional political and policy shifts.<sup>226</sup> To undo those ideologies and change the public's expectations of justice will take a similarly concerted effort, if not a much greater one.

Perhaps the public's sympathy with criminal legal reform is limited, defined in relation to the carceral state's demonstrable inequity and cruelty, but not in defiance of its very existence. However, as Jayadev writes, "[p]artnerships between defenders . . . and people who are facing charges as well as their loved ones and communities . . . are powerful levers for opening up criminal justice systems and getting a good hard look under the hood."<sup>227</sup> In this moment, when abolitionist activists and organizers challenge and further expose the system's inhumanity, and countless people have taken to the streets to protest the police and the carceral state, there may be a unique opportunity for substantial change in how we

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222. See FURST, *supra* note 45, at 1; see also RIGHT TO COUNS. NAT'L CAMPAIGN, *supra* note 74, at 9. *But see* Moore et al., *supra* note 1, at 1288–89 (arguing that a reinvigoration of public defense must involve a change in ethos and greater involvement by those most affected by the criminal legal system if it is to significantly impact the landscape of the carceral system).

223. See RIGHT TO COUNS. NAT'L CAMPAIGN, *supra* note 74, at 20.

224. See *id.* at 21; see also Moore et al., *supra* note 1, at 1316.

225. See generally Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RSCH. Q. 29 (2003) (indicating that public opinion has significant impact on policy change despite the efforts of political organizations and elites. Burstein also cautions that individual policy efforts are subject to idiosyncratic relationships to public opinion, rendering his findings hard to generalize).

226. See Butler, *Poor People Lose*, *supra* note 10, at 2182; see also Waxman, *supra* note 29.

227. Moore et al., *supra* note 1, at 1289.

approach justice in this country.<sup>228</sup> Indeed, the George Floyd uprisings have shown that there is an appetite for larger change and that ideas formerly seen as radical can quickly and forcefully enter the mainstream.<sup>229</sup> Whether an abolitionist reshaping of public defense can be one of those changes remains to be seen.

Analysis of whether even a dramatically reconstituted public defense system oriented around abolitionist principles is a useful, desirable, and non-reformist reform should continue. Would a model built around participatory defenders and their partnerships with public defenders schooled in abolitionist thought be sufficiently at odds with the system to avoid Butler's charges of complicity?<sup>230</sup> Jayadev discusses how participatory defense reimagines and reinvigorates what "the right to be heard" means in practice and suggests that vindicating this right is a powerful step towards undoing mass incarceration.<sup>231</sup> So, while Jayadev seeks to transform the right to be heard by and through counsel into a radical way of bringing truth, context, and dignity into court, his framework may fall short of overcoming Butler's salient critique of rights as applied to *Gideon* and the right to the assistance of counsel.<sup>232</sup> After all, Jayadev's approach does not seek to overhaul the criminal legal system; rather, it creates new ways of challenging the system from within its boundaries.<sup>233</sup> Whether funding participatory defenders and public defenders, while orienting them around abolitionist goals and practices, as envisioned in a clinical setting by Smith Futrell, would be enough to overcome the risk of complicity and cooption depends on the willingness, ability, and commitment of public defenders to avoid the system's demand for compliance.<sup>234</sup> It depends on dedication to abolitionist goals and a

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228. See generally Akbar, *supra* note 5.

229. See *id.* at 1783 ("Then came the 2020 uprisings following the police murder of George Floyd in Minneapolis, among the largest social movement mobilizations in U.S. history. The nationwide protests catapulted prison and police abolition into the mainstream . . ."); see also Coleman, *supra* note 108.

230. See Smith Futrell, *supra* note 2, at 108.

231. See Moore et al., *supra* note 1, at 1292–93 (assessing *Powell* as an important precursor to *Gideon*, and a case which critically emphasizes the need for meaningful communication in the attorney-client relationship); see also *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that the capital convictions of nine Black teenagers convicted of raping two white women must be overturned because the teenagers were not provided individual defense attorneys. The Supreme Court emphasized that the right to due process entailed the right to be heard *by* one's defense attorney as well as the right to be heard *through* that attorney).

232. See generally Butler, *Poor People Lose*, *supra* note 10 (arguing that pursuit of a rights-based framework for justice is insufficient to affect systemic change). See also Moore et al., *supra* note 1, at 1281.

233. See generally Moore et al., *supra* note 1.

234. See Smith Futrell, *supra* note 2, at 119.

renewed focus on justice that stretches beyond the courtroom and into the communities that have been ravaged by police, lawyers, and judges for decades.

So, as public defenders begin to offer a broader array of services to their clients due to the influence of client-centered and holistic practice models, it is critical that they see beyond a system where such services are tied to a criminal case or necessary at all. If public defenders see newer practice models as a solution, rather than a tool to support people trapped in the system while pursuing broader challenges to the system, they will likely continue to fail to make a systemic impact.<sup>235</sup> Under such conditions, the work of public defenders and the efforts of abolitionists may not be harmonious.<sup>236</sup> However, the possibility of partnership among public defenders, marginalized communities, and abolitionist activists may be uniquely powerful and primed for mobilization. The success of such a partnership would depend on public defenders' willingness to work towards their own abolition and to do so with humility, integrity, and drive.

### CONCLUSION

There is no unified vision of how a world without prisons must look. Carceral abolition's central tenets are that the carceral state has imposed incredible harm on Black, Latino, and poor communities, as well as trans people and other marginalized groups.<sup>237</sup> Abolitionists believe that justice does not involve putting humans in cages. Abolitionists envision a world where communities have the resources and autonomy to hold individuals accountable for their crimes in a way that restores survivors of crimes, allows those who cause harm to grow and earn forgiveness, and to begin to undo the trauma of centuries of systemic racism and oppression.<sup>238</sup> Abolitionists foster a vision of justice that is transformative rather than punitive. Abolitionists continue to think deeply and debate passionately about how this world will look, but, in the meantime, work tirelessly to dismantle the current system, its cages, and its walls.<sup>239</sup> Along those lines, abolitionists have pushed for transitional, non-reformist reforms, such as defunding the police and reducing the prison population, that serve to weaken the current system and redirect power and resources to communities and their allies.<sup>240</sup>

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235. See generally Butler, *Poor People Lose*, *supra* note 10.

236. See Smith Futrell, *supra* note 2, at 119.

237. See generally McLeod, *supra* note 18.

238. See *id.*

239. See *id.*

240. See Akbar, *supra* note 5, at 1786.



It remains to be seen whether public defense reform can be one of those powerful, transitional changes; if it is to be, it must be structured in a way that holds abolition as the ultimate goal, or it will inevitably redound to the system's benefit and confer unearned legitimacy. To that end, public defenders should engage with abolitionist thinking and interrogate their own biases. They should consider which elements of their role are beneficial to the individuals and communities they serve and which could be better performed by those directly affected by the carceral state, social workers, and other advocates. Public defenders should apply the tireless spirit they have often shown in their under-resourced legal advocacy to transformative self-reflection, action, and growth. Public defenders will not be alone in this transformation and can find uniquely incisive guidance from their clients and the communities disproportionately targeted and harmed by the criminal legal system.<sup>241</sup> Indeed, collaboration with participatory defenders may be instrumental to identifying the changes public defenders need to make and how to make them in a way that honors the needs, wishes, and vision of the communities they serve.

To the public defenders hoping for the obsolescence of their role, abolition offers a set of principles and practices to apply daily. To those defenders, abolition offers a way to turn dreams into a plan of action which may take time to accomplish but which can begin today.

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241. This is particularly so with respect to participatory defenders, who currently operate from community-based and legal defense positions. *See Moore et al., supra* note 1, at 1287 (arguing “that participatory defense can create a new partnership of community and defender and be a real game-changer nationally”).