

PUBLIC DEFENDERS AND COLLECTIVE ACTION

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ABSTRACT

It is clear that American carceral policy is excessively harsh, but it is unclear how to bring about the dramatic transformations required to fix it. Prosecutors, police, and other carceral interests have outsized influence on law and policy. Collective action problems prevent the group with the greatest interest in systemic reform—those directly targeted by carceral interests—from seriously challenging those interests. Neither incrementalist reformers nor abolitionists have offered plausible solutions for this structural impediment to systemic reform. This Article contends that the solution lies with public defenders. They are uniquely situated to advance systemic reform in the legal, policy, and political arenas. More than any other existing institution with potential influence in those arenas, public defenders’ interests align with those directly impacted by carceral policy. Public defenders have been overlooked as systemic reformers because they are traditionally seen as serving an individual defendant’s parochial interest in avoiding conviction. Sixth Amendment jurisprudence has idealized and entrenched this narrow framing of the defenders’ role. This framing misconceives both the nature of the State’s carceral power and public defenders’ potentially critical role in constraining it. Scholars, policymakers, and activists should reject the narrow framing and make defender empowerment the centerpiece of their reformist agendas.

	INTRODUCTION.....	276
I.	THE MISSING AGENT OF SYSTEMIC REFORM	281
	A. <i>Scholarship’s Normative Lacunae</i>	281
	1. <i>Incrementalism and Technocracy</i>	281
	2. <i>Radical grassroots politics</i>	283
	B. <i>Advancing Suspects’ Collective Interests</i>	285
	1. <i>Carceral policy as skewed interest competition</i>	286
	2. <i>Public defenders and Suspects’ interests</i>	290
II.	HEROIC INDIVIDUALS VERSUS CARCERAL JUGGERNAUTS	292
	A. <i>Individualized Ideal of Public Defense</i>	293

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<i>B. Carceral Juggernauts</i>	297
1. <i>Making policy in the street and in court</i>	297
2. <i>Legislative action</i>	301
3. <i>Shaping public opinion</i>	303
III. REIMAGINING PUBLIC DEFENSE	305
<i>A. Defenders As Systemic Reformers</i>	307
<i>B. Expanding Defenders' Role</i>	311
CONCLUSION	314

INTRODUCTION

Scholars agree that American carceral policy has generated mass incarceration, racial disparity, and gratuitous violence among other systemic harms¹—all this without satisfactorily controlling crime.² Progressive incrementalists and radical abolitionists have offered competing visions for how to control the harms without increasing crime. But neither group offers a plausible account of how to get from our overly-carceral present to a decarceral future, or who will get us there. Public defenders do not feature meaningfully in these accounts. Presented as beleaguered advocates scrambling at the system's backend, they are cast as quixotic heroes at best, or complicit cogs in the machinery of injustice at worst.

This framing of public defenders misses their critical importance as agents of systemic reform. This Article contends that public defenders are uniquely positioned to advance the collective interests of those directly impacted by carceral policy. Advocating for this group's collective interests in the legal, policy, and political arenas is key to sustaining systemic reform. There is no plausible institutional actor other than public defenders who can play that role at scale. A robust system of public defense is the condition of possibility for a democratically responsive and just carceral system.

The shortcomings of incrementalist and radical visions of systemic reform are increasingly apparent. For example, “progressive prosecutors” have been incremental reformists’ darlings, but less so of late.³ Progressive prosecutors won office on the promise to prosecute less,

1. See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 3-7 (2015).

2. See Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RESEARCH CENTER (Oct. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area/> [perma.cc/35HV-EKJN].

3. See Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Practice*, 69 UCLA L. REV. 164, 179-81 (2022).

promote alternatives to incarceration,⁴ and make greater use of therapeutic and restorative techniques.⁵ The problem is that all of this plays out on the margins of what remains a carceral project. Progressive intentions cannot eliminate the bureaucratic and political imperatives that impel that project. No prosecutor, however progressive, is prepared to surrender her office's budget to shrink the State's carceral footprint.⁶ Nor can progressive prosecutors expect to stay in office if they refuse to use carceral power to allay public worries about criminal victimization.⁷

The practical hurdles confronting radical decarceral visions are even starker. Radical scholars posit that grassroots activism is the key to change but do not address how these efforts might scale up to secure the broad political traction required for broad-based systemic change. The ebb and flow of the public's anxiety about crime is unpredictable, even in ostensibly progressive jurisdictions.⁸ Victimological swells are politically inevitable even if they are not as steady and pronounced as in past decades.⁹ For example, the "defund movement" hit a crescendo in 2020 after police killed George Floyd, but it was quickly suffocated by public fears over homicide spikes in American cities.¹⁰ Calls to

4. See, e.g., Eric Ting, *Is San Francisco's Chesa Boudin Really the Most 'Radical' District Attorney in America?*, SFGATE (Mar. 24, 2022), <https://www.sfgate.com/politics/article/Is-Chesa-Boudin-most-radical-17018398.php> [<https://perma.cc/D377-PKF4>]; Zayra Rodriguez, "Philly D.A.": Larry Krasner's First Term, *Under a Lens*, THE MARSHALL PROJECT (June 5, 2021), <https://www.themarshallproject.org/2021/06/05/philly-d-a-larry-krasner-s-first-term-under-a-lens> [perma.cc/5C2L-NAHY].

5. See Godsoe, *supra* note 3, at 179.

6. *Id.* at 173.

7. *Id.* at 167-69, 180-81, 187, 198.

8. See Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html> [<https://perma.cc/KR8X-PV8V>].

9. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 11-12 (2001).

10. See Parker & Hurst, *supra* note 2.

defund gave way to calls to increase funding.¹¹ This happened before ambitious reforms could gain traction, let alone become operationalized.¹²

Public defenders are critical to sustaining systemic reform through political headwinds. Political science literature on collective action helps identify the ways in which public defenders are uniquely situated to advance the collective interests of those directly impacted by carceral policy and practice—“Suspects” for short. “Suspects” is used here and throughout as a colloquial description of the large, amorphous group of individuals who find themselves in the State’s carceral crosshairs for any reason.

Suspects have little ability to influence the forces that target them precisely because they are a large, amorphous group. In his classic account of collective action, Mancur Olson showed that these kinds of groups are least likely to influence law and policymaking.¹³ Their size and fragmentation make it impossible to sustain the kinds of coordination required to wield influence.¹⁴ Those targeted most intensively—i.e., those convicted of felony convictions—are often denied the right vote, dramatically blunting their political influence.¹⁵

Suspects’ influence is further compromised by the fact that they tend to belong to poor communities of color.¹⁶ These communities, even if inclined to indirectly represent Suspects’ interests, are often

11. See *id.*; Emma G. Fitzsimmons & Ashley Southall, *Adams Unveils Ambitious Plan to Confront Rising Gun Violence*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/nyregion/adams-crime-nypd-shooting.html> [perma.cc/LL7C-Z33B]; Jon Jackson, *America’s Biggest Cities To Invest \$450M In Police Following 2020 Defund Movement*, NEWSWEEK (Dec. 29, 2021, 8:00 AM), <https://www.newsweek.com/americas-biggest-cities-invest-450m-more-police-following-2020-defund-movement-1663599> [perma.cc/5XCD-7Z8Z]; John Byrne & Gregory R. Pratt, *Chicago Mayor Unveils \$16 Billion Budget, Which Boosts Police Spending and Relies on Pandemic Relief Money to Fill Revenue Holes*, CHICAGO TRIBUNE (Sept. 20, 2021, 11:09 PM), <https://www.chicagotribune.com/2021/09/20/chicago-mayor-unveils-16-billion-budget-which-boosts-police-spending-and-relies-on-pandemic-relief-money-to-fill-revenue-holes/> [https://perma.cc/7665-NVBZ].

12. See, Zoë Jackson, *How Charter Commission Kept Minneapolis Police Reform off November Ballot*, MINN. STAR TRIBUNE (Sept. 1, 2020, 3:36 PM), <https://www.startribune.com/how-charter-commission-kept-minneapolis-police-reform-off-november-ballot/572285651/> [perma.cc/JHV8-VGAC].

13. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 35 (1965). Olson’s account of collective action has shaped scholarly discourse around this question for more than a generation. See FRANK R. BAUMGARTNER & BETH L. LEECH, *BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND POLITICAL SCIENCE* 65 (1998).

14. OLSON, *supra* note 13, at 35.

15. Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 820 (2010).

16. See, e.g., Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1409 (2017); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 343-44 (2004); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. Chi. LEGAL F. 197, 210 (1998).

politically weak.¹⁷ What power does exist in these marginal communities is unevenly distributed to Suspects' disadvantage.¹⁸ Recent scholarship has, for example, suggested the role poor communities of color played in advocating for the tough-on-crime approaches that have produced mass incarceration.¹⁹

In contrast to Suspects, police, prosecutors, and other carceral interests have outsize influence on law and policymaking.²⁰ They dominate the legal, political, and policy environments in which they operate.²¹ This is because collective action's cost-benefit calculus favors small, well-resourced groups with strong, shared preferences.²² Carceral interests epitomize this.²³ They derive authority and prestige from sluicing human beings into the carceral machinery en masse. There is no incentive for carceral interests to reverse course on their own.²⁴ This tends to make carceral policymaking pathologically one-sided.

Public defenders are uniquely positioned to represent Suspects' collective interests in opposition to carceral interests. Public defenders' first (and most obvious) advantage is that they exist in substantial numbers and in forms that lend to collective action.²⁵ Second, defenders' orientation towards carceral interests is decidedly oppositional. Third, defenders have granular knowledge of how these interests operate to Suspects' disadvantage in criminal courts and on the streets. Because the most aggressive criminal enforcement occurs in poor,

17. See, e.g., David Garland, *Penalty and the Penal State*, 51 *CRIMINOLOGY* 475, 507-08 (2013); Weaver & Lerman, *supra* note 15, at 817-18.

18. See SUDHIR VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* 72-73 (2006).

19. See, e.g., JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 10 (2017); MICHAEL JAVEN FORTNER, *THE BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* 5-6 (2015).

20. There are other carceral interests like prison guard unions, private prison companies, and victim's rights groups that aggressively pursue policy agendas. See GOTTSCHALK, *supra* note 1, at 14-15; Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 *VAND. L. REV.* 71, 93-98 (2016).

21. See, e.g., LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 95, 98, 103 (2008); Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 727-28 (2005).

22. See, e.g., KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 9-10 (2012); BAUMGARTNER & LEECH, *supra* note 13, at 101-02; OLSON, *supra* note 13, at 22, 35; E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 34-35 (1960).

23. See MILLER, *supra* note 21, at 95, 98, 103. Carceral interests have what political scientists have called a "policy monopol[y]." See FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* 5-6, 15 (2nd ed. 1993).

24. See WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 173 (2011); Garland, *supra* note 17, at 509.

25. See BUREAU OF JUSTICE STATISTICS, *SELECTED FINDINGS, CENSUS OF PUBLIC DEFENDER OFFICES, 2007*, TABLE 1 (2009), <https://bjs.ojp.gov/content/pub/pdf/pdo07st.pdf> [<https://perma.cc/P3TJ-H3XJ>].

minority communities, defenders' clients' experiences will often be broadly revealing of how carceral interests operate.²⁶

Ironically, the Sixth Amendment's framing of indigent defense as an individual right has led reformers to overlook public defenders as advocates for systemic reform. *Gideon v. Wainright* plays a Janus-faced role in the account here—it is responsible for defenders' pervasiveness but also cabins their significance.²⁷ *Gideon* idealized defenders as tireless guarantors of individualized justice. The opinion emphasized that the defender stands between the State and accused, holding the former to a high standard and ensuring that the latter is not railroaded into conviction.²⁸ This heroic casting of the defender as a courtroom pugilist conjoined two American ideals: rugged individualism and adversarial justice.²⁹ But the idealized vision did not jive with the history of indigent defense nor with the realities of criminal practice.³⁰

The individualized ideal misrepresents the nature of the State's carceral power and understates defenders' potentially critical role in constraining it. Academic and popular commentary about public defense relentlessly recirculates the individual ideal. It is the reference point for what commentators have long cast as the central problem for indigent defense: the State's failure to adequately fund it.³¹ Anemic funding means that defendants endure long waits and unjust outcomes. For defenders, it means high caseloads, inadequate compensation, and low professional esteem.³² Better funding might take the edge off these problems, but it cannot solve them entirely. Improving the quality of individual representation in a system that is decidedly not individualized can only do so much.

Police, prosecutors, and other carceral interests pump Suspects into the carceral machinery en masse. Once there, the repetitive, assembly-line nature of criminal courts militates against the individual ideal. Malcolm Feeley observed that lower caseloads and better working conditions did not make for more pugnacious defenders.³³ Criminal courts' non-adversarial, bureaucratic hum tends to drown out *Gideon's*

26. These practices have been described at length in both popular and scholarly media. For a summary, see *Floyd v. City of New York*, 813 F. Supp. 2d 417, 422-37 (S.D.N.Y. 2011).

27. *Gideon v. Wainright*, 372 U.S. 335 (1963).

28. *Id.*

29. See SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* 110-13 (2020).

30. See Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, 1997 ANN. SURV. AM. L. 891, 909, 912-13 (1997).

31. See Ronald Wright & Jenny Roberts, *Expanded Criminal Defense Lawyering*, 6 ANN. REV. CRIMINOLOGY 241, 244 (2023).

32. See Janet Moore & Andrew L.B. Davies, *Knowing Defense*, 14 OHIO ST. J. CRIM. L. 345, 362 (2017).

33. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 270-77 (1979).

trumpet, however clearly blown. Increased funding can only change this if it empowers public defenders to advance Suspects' collective interests in the legal, policy, and political environments.

This Article proceeds in four parts. Part I shows that scholars and reformers have failed to offer a plausible account of who can sustain systemic reform of carceral practice and policymaking. It then shows that public defender agencies are best positioned to advance Suspects' collective interests in the legal, policy, and political arenas. Part II explains how the individualized ideal of indigent defense that dominates law scholarship is fundamentally disconnected from the realities of America's carceral policy and practice. Drawing on examples of innovative defender experiments from around the country, Part III identifies prescriptions that follow from the analysis in Parts I and II.

I. THE MISSING AGENT OF SYSTEMIC REFORM

There is scholarly consensus that American carceral policy is excessively harsh, but little clarity on how to reform it. Legal scholars have advanced nuanced descriptive accounts of America's carceral excesses but faltered when it comes to prescription. Scholars consistently fail to identify a plausible mechanism by which their reformist visions might come to pass. Ambitious visions of *what* must change consistently fail to answer *who* might plausibly bring it about. Part A reveals this by surveying recent legal scholarship.

Part B draws on political science literature to argue that public defenders offer the best answer to the *who* question. They are uniquely positioned to overcome the collective action problem that stymies Suspects from challenging carceral interests' dominance of carceral policymaking.

A. *Scholarship's Normative Lacunae*

Legal scholars can be roughly lumped into two groups. The first group favors incremental, technocratic reform. These scholars hope to skirt majoritarian politics because they view it as having driven carceral harshness. This however leaves unaddressed how their preferred reforms would remain insulated from the majoritarian forces responsible for harshness in the first place. The second more radical group, sometimes working under the mantle of "abolitionism" abjures incremental reform in favor of grassroots-led upheaval and remaking. These scholars fail to explain how radical grassroots action will overcome inevitable problems of scale and countermovement.

1. *Incrementalism and Technocracy*

Incremental reformist consists of scholars preoccupied with public choice and institutional design questions who tend to share the view

that carceral policy is “pathological.”³⁴ This owes to the voting public’s reflexive punitiveness, strong skew toward middle-class preferences/biases, and the stickiness of tough-on-crime policy.³⁵

Scholars take voters’ reflexive punitiveness as a defining feature of modern carceral politics.³⁶ Beginning in the mid-twentieth century, “tough on crime” rhetoric found deep traction with voters due to increasing crime rates.³⁷ This was a kind of structured overreaction, underwritten by race and class bias.³⁸ The poor and people of color—African Americans in particular—have been cast as inherently disposed toward criminality since the nineteenth century.³⁹ The idea of intrinsic Black criminality was reinforced through political, scientific, and popular media discourse since the end of the First Reconstruction.⁴⁰ The trope was readily available for politicians to exploit, which they did. For example, the Republican party’s so-called “Southern Strategy” successfully fear-mongered around crime in the 1960s to appeal to white suburban voters, many of whom had come to view the civil rights movement as having gone too far.⁴¹ By the mid-twentieth century, “crime” was a highly effective tool for speaking to disaffected middle-class voters.

Scholars have suggested that middle-class voters’ vindictiveness is owed to their insulation from criminal enforcement’s harsh effects. These voters tend to be highly sensitive to unpredictable, non-representative, high-profile incidents.⁴² Harsh criminal laws and carceral policy are a response to the public’s punitive demands.⁴³ The late Professor Stuntz attributed much of the carceral system’s dysfunction to white suburban voters drowning out the voices of poor, minority city dwellers who he thought would embrace more modulated positions on criminal enforcement.⁴⁴ Recent historical work suggests a more complicated story. Scholars such as James Forman and Michael Javen-

34. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533-34 (2001).

35. *Id.*

36. See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 161 (2017).

37. See STUNTZ, *supra* note 24, at 236-41.

38. See GARLAND, *supra* note 9, at 147-48.

39. See STUNTZ, *supra* note 24, at 236-38; KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 5-8 (2010).

40. *See id.*

41. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 43-44 (2010).

42. See PFAFF, *supra* note 36, at 169-70.

43. *Id.* at 161-62; STUNTZ, *supra* note 24, at 173.

44. See STUNTZ, *supra* note 24, at 249-51.

Fortner have documented how urban, minority voters clamored for more aggressive crime control in the late twentieth century.⁴⁵

Harshness tends to be a one-way policy ratchet.⁴⁶ Ebbs in the electorate's punitiveness also tend to be short and partial. For example, even when voters come to favor less harsh consequences for offenders, it may be limited to non-repeat offenders or non-serious offenses.⁴⁷

Carceral interests, like police and prosecutors, accumulate power as laws become harsher.⁴⁸ Carceral interests also have considerable sway over carceral policymaking and practice by virtue of their institutional prestige and repeat player status in the policy and legal arenas.⁴⁹ Prosecutors in particular have significant influence on state and federal criminal legislation.⁵⁰ These legislative arenas tend to be impermeable to all but the best organized and most focused interest groups.⁵¹ Prosecutors in particular have sway in the legislative arena because they are perceived as uniquely competent.⁵²

Incremental reformists' dim view of carceral politics counsels in favor of non-majoritarian, technocratic reforms. But it is unclear how such reforms will avoid cooptation by the pathological forces that animate harsh carceral policy in the first place. As discussed in the Introduction, progressive prosecutors offer a case study.⁵³ Another example may be found in Rachel Barkow's ambitious proposal to create new administrative agencies to supervise prosecutors and police. She proposes that these new experts would review prosecutors' and police's policy choices while remaining immune to the carceral incentives created by our pathological politics.⁵⁴ It is however terribly unclear how one could extract such a hyper-rationale bureaucracy from the same political muck it is supposed to clean up. Even if such an entity magically sprung from Zeus' head, it would be unclear how to insulate it

45. These voters viewed criminal enforcement as a way to secure the state's attention for the problems besetting their neighborhoods. See, e.g., FORMAN, *supra* note 19; FORTNER, *supra* note 19.

46. See PFAFF, *supra* note 36, at 161-62; Donald Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice or Why Don't Legislatures Give a Damn About the Rights of the Accused*, 44 SYR. L. REV. 1079, 1082-84 (1993).

47. GOTTSCHALK, *supra* note 1, at 165-66 (describing the "non non nons").

48. See RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 8 (2019); PFAFF, *supra* note 36, at 161-62; see also Dripps, *supra* note 46, at 1082-83.

49. See BARKOW, *supra* note 48; PFAFF, *supra* note 36, at 161-62; see also Dripps, *supra* note 46, at 1082-83.

50. See Carissa Byrne Hessick, Ronald F. Wright, & Jessica Pishko, *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143, 159 (2023).

51. See MILLER, *supra* note 21, at 10-11.

52. See *id.* at 71, 80, 103-05.

53. See *supra* notes 3-8 and accompanying discussion.

54. See BARKOW, *supra* note 48, at 10, 165-69.

from the incentives that interfere with dispassionate regulation generally.⁵⁵

2. *Radical grassroots politics*

A growing universe of scholars argues that incremental reformism is not just ineffective but actually perpetuates the carceral state.⁵⁶ By treating the carceral state as fixable, incremental reformists mystify and legitimate it. Under the banner of “abolition,” some radical scholars argue that justice requires doing away with the carceral state whole cloth.⁵⁷ Abolitionists propose to remake the State in welfarist terms.⁵⁸ Their hope is that radical praxis will, over time, obviate carceral institutions by eliminating the economic and social circumstances that prompt criminal misconduct.⁵⁹

Radical scholars posit that leftist, grassroots’ activism is the central agent of transformation.⁶⁰ It is through successive waves of what Amna Akbar has called “non-reformist reforms” that society will move toward an “abolitionist horizon.”⁶¹ Activist groups materialize as local responses to carceral practices taking shape, including practices like cop-watching, court-watching, and community bail funds, among others.⁶² This activism is not intended to reform so much as to confront.⁶³ The fiercer and more relentless the confrontation, the greater potential there is for transformative effect, even if that is not strictly speaking the point.⁶⁴

Radical scholars suggest that grassroots activism’s effects may, in the short term, look a lot like incremental reforms but that they are different by virtue of their underlying motivation to restructure power

55. See *infra* Part II.A; Cf. Robert Samuels, *The War on Cities*, NEW YORKER (Aug. 4, 2023), <https://www.newyorker.com/news/annals-of-crime/the-war-on-cities> [https://perma.cc/5UE9-JWSZ] (describing how national and local politics upended the careful technocratic work of the D.C. Criminal Code Reform Commission which had been tasked with redrafting criminal code to improve its clarity and specificity).

56. See Amna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L. J. 2497, 2505-06 (2023).

57. See, e.g., *id.* at 2537-38; Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1617-20 (2020); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 11-13 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615-17 (2019).

58. See Akbar, *supra* note 56, at 2567.

59. See *id.* at 2572; McLeod *supra* note 57, at 1633.

60. See Akbar, *supra* note 56, at 2534; Simonson, *supra* note 57, at 1615.

61. See Akbar, *supra* note 56, at 2565.

62. See Simonson, *supra* note 57, at 1617-20; see also K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 705-09 (2020) (describing efforts to secure control of policing in Oakland, California).

63. See Simonson, *supra* note 57, at 1617-20.

64. See *id.* at 1621; Akbar, *supra* note 56, at 2539-41.

relations.⁶⁵ These scholars take faith that if grassroots efforts are successful (whatever that may mean), ever wider swathes of the public will come along in a felicitously self-reinforcing cycle.⁶⁶ This seems optimistic.

Little explanation is offered as to how grassroots activism will overcome the collective action problems that beset other political movements.⁶⁷ Achieving broad-based transformation through politics requires the broad-based mobilization of people. Beyond some smaller-scale, local activism, claims of organically representing “community” interests become tenuous.⁶⁸ It is unclear that radical left positions have deep traction in poor, communities of color let alone among others. The universe of people impacted negatively by carceral practice is diverse and often overlaps with those impacted by crime. Voices calling for less harshness will thus overlap and intermingle with those calling for greater harshness in an ever-shifting fugue.⁶⁹ This poses no less serious a problem for radical politics as it does for any other politics.

It is also unclear how, without organized institutional interests at work inside policymaking environments, successful left activism will resist counter movements from the right. Those counter movements may themselves be community-based as suggested by the upsurge in rightwing, grassroots mobilization of late.⁷⁰ Rightwing groups propose their own radical remaking of the State and are in some instances eager to use violence to achieve it. These groups will not quiescently dissolve into the abolitionist horizon’s warm glow.

Carceral interests will also fight back. Those institutions’ counterstrikes may be violent.⁷¹ In the battle for public support, carceral interests wield considerable experience in waging rearguard action to stymie progressive change.⁷² Without empowered interest actors who can fight back in policy, political, and legal arenas, it is unclear how radical activism will produce lasting institutional change at scale. Radicals no less than incrementalists seem to need an institutional

65. See Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 823-24 (2021).

66. See Akbar, *supra* note 56, at 2539-41.

67. For a detailed description of the collective action problem, see *infra* Part I.B.1.

68. See John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 739 (2020).

69. See FORMAN, *supra* note 19; FORTNER, *supra* note 19.

70. See CHIP BERLET & MATTHEW N. LYONS, *RIGHT-WING POPULISM IN AMERICA* 345 (2d ed. 2021); Chip Berlet & Spencer Sunshine, *Rural Rage: The Roots of Right-Wing Populism in the United States*, 46 J. PEASANT STUD. 480, 482-83 (2019).

71. See Charles Bethea, *Can “Cop City” be Stopped at the Ballot Box*, NEW YORKER (Aug. 12, 2023), <https://www.newyorker.com/news/letter-from-the-south/can-cop-city-be-stopped-at-the-ballot-box> [<https://perma.cc/F4QU-Z965>].

72. See *id.*; *infra* Part II.B.

agent to help advance the changes they seek. Neither group is forthright about this, let alone clear in identifying who that agent might be.

B. *Advancing Suspects' Collective Interests*

Public defenders are the best answer to the missing agent question. They are uniquely positioned to advance Suspects' collective interests in the political, policy, and legal arenas. Section 1 draws on political science literature to explain why carceral policy is stacked against Suspects. Because Suspects are numerous, diffuse, and stigmatized, they cannot coordinate to effectively advance their own interests. Suspects need a surrogate to do this on their behalf. Section 2 argues that public defenders are the best positioned institutional actor to take up the task.

1. *Carceral policy as skewed interest competition*

Carceral interests have considerable policymaking sway because they do not consistently confront countervailing forces. Suspects have obvious interest in resisting carceral interests.⁷³ As with most any policy, carceral policy relies on contestable distributive choices at both the legislative and enforcement stages. For example, prohibitions on controlled substances, process offenses,⁷⁴ and status offenses like disorderly conduct,⁷⁵ seek to deter behaviors that are not intrinsically wrong.⁷⁶ Scholarly commentators rightly ask whether criminal sanction is an appropriate cost to impose on people who engage in such behaviors and, more pressingly, whether prohibitions are designed to reproduce relations of class and race dominance.⁷⁷ Contestable distributive questions similarly pervade police's and prosecutors' enforcement choices. Not everyone who violates criminal laws is subject to criminal sanction. Police and prosecutors have broad discretion to distribute criminal enforcement as they see fit and Suspects are the most immediate "losers" of these distributive choices.

One might expect fierce contestation over carceral policy given its stakes and the prevalence of interest competition in American

73. Political scientists have understood what constitutes an "interest" broadly. See BAUMGARTNER & LEECH, *supra* note 13, at xxii, 22-30; OLSON, *supra* note 13, at 118-19 (quoting Arthur Bentley for assertion that "group" and "interest" are synonymous). It is any value potentially affected by public officials' choices. See BAUMGARTNER & LEECH, *supra* note 13, at 24 (quoting JOHN P. HEINZ ET AL., *THE HOLLOW CORE: PRIVATE INTERESTS IN NATIONAL POLICYMAKING* 24-25 (1993)); see also MILLER, *supra* note 21, at 24-25. See also Brown, *supra* note 16, at 345-48.

74. See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L. J. 1435, 1439 (2009). The argument may be also found in 21 AM. JUR. 2D *Criminal Law* § 25.

75. See Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1646-47 (2021).

76. See 21 AM. JUR. 2D *Criminal Law* § 25.

77. See Morgan, *supra* note 75, at 1646-48.

politics.⁷⁸ Commentators have long celebrated and bemoaned interest politics, sometimes in the same breath.⁷⁹ For example, in the mid-twentieth century, the dominant thinking in political science celebrated interest groups as the engine of American democracy.⁸⁰ These scholars assumed that interest groups would arise organically once there was a critical mass of people who shared an interest.⁸¹ Over time, groups would have size-proportionate sway in advancing their interests.⁸² No one group could or would dominate policymaking for long, thus ensuring that politics would be broadly representative over the medium to long term.⁸³ This take on interest competition proved far too rosy.⁸⁴

Political scientists have come to agree that interest competition is stacked in favor of small groups with well-defined interests and low coordination costs.⁸⁵ In small groups, individuals can readily identify one another and create relationships marked by “social pressure” that militates against free riding. The intensity of these dynamics vary in direct relation to a group’s concentration and wealth.⁸⁶ Both public and private groups can satisfy these criteria, blurring any neat distinction between interest group and bureaucracy.⁸⁷

Police, prosecutors, and other carceral interests typify concentrated, entrenched groups. State and federal legislative arenas tend to be impermeable to all but the best organized and most focused interest groups.⁸⁸ Prosecutors satisfy this key criterion, frequently forming statewide organizations to advance their legislative goals.⁸⁹ Carceral

78. Madison worried about unchecked factions in Federalist Papers #10 and proposed a system of checks and balances to ensure to reign them in. See Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL’Y REV. 553, 587-93 (1997).

79. See *id.* at 587-88.

80. These were the so-called “pluralists.” See OLSON, *supra* note 13, at 122-23. They also believed that a thick layer of politically insulated, rationalized bureaucracy should implement the preferences that emerged from political interest competition. See DAVID SKLANSKY, *DEMOCRACY AND THE POLICE* 18-21 (2008).

81. See OLSON, *supra* note 13, at 122-23.

82. See BAUMGARTNER & JONES, *supra* note 23, at 20; OLSON, *supra* note 13, at 126.

83. See BAUMGARTNER & LEECH, *supra* note 13, at 48; OLSON, *supra* note 13, at 124.

84. See OLSON, *supra* note 13, at 111-12.

85. See, e.g., SCHLOZMAN ET AL., *supra* note 22, at 9-10; BAUMGARTNER & LEECH, *supra* note 13, at 101-02; OLSON, *supra* note 13, at 22; SCHATTSCHNEIDER, *supra* note 22, at 34-35. In small groups, individuals can readily identify one another and create relationships marked by “social pressure” that militates against free riding. See OLSON, *supra* note 13, at 62.

86. See SCHATTSCHNEIDER, *supra* note 22, at 35.

87. See Schuck, *supra* note 78, at 559-62.

88. See MILLER, *supra* note 21, at 10-11.

89. See MILLER, *supra* note 21, at 96-97. Those groups might be created and dominated by the largest D.A.’s office(s) in the jurisdiction. *Id.* Olson noted that in some small groups with unequal distributions of resources and power, the most powerful had sufficient

interests enjoy what political scientists would characterize as a policy monopoly in the carceral “policy subsystem.”⁹⁰ A policy subsystem describes an institutional arrangement in which dominant interests create policy to their advantage with little interference from the public.⁹¹ Carceral policymaking is dominated by carceral interests with little opposition from Suspects.⁹²

Suspects typify the kind of large, diffuse group for whom successful collective action is impossible. Mancur Olson explained that numerosity can be a weakness for large groups.⁹³ Coordination costs are high for large groups, and individual defections generally go unnoticed.⁹⁴ Collective benefits are non-excludable, and any individual’s share is small.⁹⁵ Because Suspects include those who will be targeted in the future, some members of the group are literally unidentifiable. Even if one limited the group to those in custody, in 2020 alone, there were over five million people under correctional supervision in the United States.⁹⁶ There were over twenty million police-initiated encounters with civilians in 2020.⁹⁷ Suspects’ shared interests will vary based on countless circumstances, not least of which are the crimes of which they are suspected; whether they were arrested or charged; their prior criminal history; and so on. Mutual identification—let alone coordination—are obviously impossible for such a varied group.⁹⁸

Compounding the collective action problem is that those subject to the most intensive forms of criminal targeting tend to be poor and socially marginal.⁹⁹ They have few resources to devote to collective action

individual incentives to be willing to pursue collective interests without others’ cooperation. OLSON, *supra* note 13, at 34, 36, 143 (noting examples of oligopolistic industries and municipalities of varying sizes that cannot exclude the public from receiving a benefit).

90. See BAUMGARTNER AND JONES, *supra* note 23, at 5-6.

91. A policy subsystem tends toward stasis because it is dominated by a single interest group or a constellation of them in equipoise. See *id.* at 18-20. There are various mechanisms by which a policy subsystem can be destabilized. For instance, drawing new actors into a conflict, see SCHATTSCHEIDER, *supra* note 22, at 4-8, or energizing previously apathetic groups can have that effect. See BAUMGARTNER AND JONES, *supra* note 23, at 170-71.

92. See MILLER, *supra* note 21, at 115-17. What challengers there are, tend to be single-issue groups that focus on matters other than representing suspects’ interests per se. See *id.*

93. OLSON, *supra* note 13, at 53.

94. See *id.* at 63.

95. See *id.* at 63-64.

96. See BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 303184, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020 – STATISTICAL TABLES 4 (Mar. 2022), <https://bjs.ojp.gov/content/pub/pdf/cpus20st.pdf> [perma.cc/VWB6-DPMF] (Table 1: Number of persons under the supervision of adult correctional systems in the United States, 2010–2020).

97. See BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 304527, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2020 1 (Nov. 2022), <https://bjs.ojp.gov/media/document/cbpp20.pdf> [perma.cc/NF4Q-2AXX] (indicating that 10% of the population over the age of 16 had a police-initiated encounter in 2020).

98. See OLSON, *supra* note 13, at 62.

99. See Weaver & Lerman, *supra* note 15, at 817.

of any kind.¹⁰⁰ Related, poor people have fewer network connections to those with political power.¹⁰¹ Poor people's interests are thus generally underrepresented in American politics.¹⁰²

Carceral policy helps secure the terms of its own possibility by corroding the kinds of social connections required for coordinated legal and political action. Defendants convicted of felonies typically lose the right to formal participation in the political community—approximately 4.4 million people.¹⁰³ But even less stigmatizing encounters with carceral interests generate anomie,¹⁰⁴ negatively correlating with civic engagement and participation.¹⁰⁵ “Suspect” is a “spoiled identity”—one that most people will recoil from rather than embrace as basis for social connection.¹⁰⁶ Unsurprisingly then, those who are regularly treated as Suspects by the police tend to distrust public institutions and avoid them.¹⁰⁷

The emerging universe of organizations committed to criminal policy reform are imperfect interest representatives for Suspects. These organizations tend to be focused on specific issues—e.g., police abuse, bail reform, reintegration, and so on—with the aim of improving the fortunes of groups other than Suspects *per se*—e.g., African-Americans,¹⁰⁸ families of the incarcerated,¹⁰⁹ or communities generally.¹¹⁰ As Lisa Miller has documented, such organizations tend to be most active in local politics, but lack the capital required to influence policymaking at the state and federal levels.¹¹¹

100. See SCHLOZMAN ET AL., *supra* note 22, at 174.

101. See SCHATTSCHNEIDER, *supra* note 22, at 102-06.

102. See *id.*

103. See CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 2 (2022), <https://www.sentencingproject.org/app/uploads/2024/03/Locked-Out-2022-Estimates-of-People-Denied-Voting.pdf> [perma.cc/9GCP-7C7P].

104. See MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 69 (1980); Weaver & Lerman, *supra* note 15, at 824, 827, 831.

105. See Weaver & Lerman, *supra* note 15, at 824, 827, 831.

106. See LOIC WACQUANT, URBAN OUTCASTS: A COMPARATIVE SOCIOLOGY OF ADVANCED MARGINALITY 30-37, 180 (2008).

107. See Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOCIO. REV. 339, 353-54 (2009).

108. See *About Black Lives Matter*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about> [https://perma.cc/VFX9-LUW5] (last visited Aug. 15, 2024).

109. See, e.g., FAMILIES AGAINST MANDATORY MINIMUMS, <https://famm.org> [perma.cc/NZ7Y-B9A5] (last visited Aug. 22, 2024) (representing families); PARTNERSHIP FOR SAFETY AND JUSTICE, <https://safetyandjustice.org> [perma.cc/3BMC-BNH2] (last visited Aug. 22, 2024) (“[B]uilding public safety and criminal justice systems that better serve survivors of crime, people convicted of crime, and the families and communities of both”); ALLIANCE FOR SAFETY AND JUSTICE, <https://asj.allianceforsafetyandjustice.org> [perma.cc/XFD7-TMDM] (last visited Aug. 22, 2024) (representing survivors and those with old criminal records).

110. See *id.*

111. See MILLER, *supra* note 21, at 121-23, 139, 145, 176.

Electoral politics affords even poorer representation for Suspects. Some scholars have noted that poor communities of color where Suspects are concentrated have more political influence than they once did.¹¹² These scholars contend these communities' preferences fairly account for Suspects' interests.¹¹³ But this is almost certainly not true. First, poor communities of color are divided on issues of criminal policy.¹¹⁴ The concerns expressed to officials by these communities will tend to reflect the priorities of those who have civic standing.¹¹⁵ Those voices may undervalue Suspects' interests.¹¹⁶ Second, carceral interests are not necessarily responsive to local electoral communities.¹¹⁷ Legislative contests over carceral policy are often at higher levels of government that are relatively less accessible to Suspects.¹¹⁸

2. Public defenders and Suspects' interests

Public defenders are the best substitute for the kind of membership-based organizations that Suspects might create were it not for all the barriers to collective action described above. Defenders are uniquely positioned to advance Suspects' collective interests through political and legal action because they are numerous, their occupational orientation aligns with Suspects' collective interests, advocacy is their core skill, and they have unique access to information about how criminal enforcement policy impacts Suspects.

Public defenders' ability to advance Suspects' collective interests is, in Olson's terms, the "by-product" of their individual representation role.¹¹⁹ Olson noted that large, disorganized groups do not inevitably succumb to the collective action problem.¹²⁰ Sometimes, institutions develop for one specific purpose that ends up overlapping with a large group's collective interests. Under the right circumstances, the institution might advance the latter as a by-product of its original

112. See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis Of Criminal Procedure*, 86 GEO. L. J. 1153, 1161-63, 1182 (1998).

113. See *id.* But see Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 508-14 (2003) (criticizing Kahan and Meares).

114. See, e.g., Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1005, 1010 (2003); David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L. J. 1059, 1086 (1999) ("[O]nce one looks beyond romanticized invocations of 'the community,' it becomes apparent that no community is united on these issues.").

115. See VENKATESH, *supra* note 18, at 72 (noting that those with "social clout" dominated neighborhood community policing meetings).

116. See *id.*

117. See MILLER, *supra* note 21, at 176.

118. See *id.* The broader electorate to which these entities are responsive also tend to be more hostile to Suspects. See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2003-04 (2008).

119. See OLSON, *supra* note 13, at 143.

120. See *id.* at 132.

purpose.¹²¹ Olson noted how the by-product account explains why interest representatives arose for large groups like farmers, the professions, and labor.¹²² Public defenders fit this model.

Among defender agencies' greatest virtues is simply that they exist—a prerequisite for Olson's by-product theory. There are more than 15,000 public defenders employed by nearly 1000 agencies across the United States.¹²³ By virtue of their legal training and deep immersion in criminal practice, they will possess the basic skills required to navigate the policy environments in which carceral interests tend to hold sway.

Defenders' institutional interests also align more closely with Suspects' than any other institution that operates in the carceral arena. Defenders' orientation towards carceral interests is, by definition, oppositional. Defenders tend to imagine their role in terms of holding the State to task, as opposed to vindicating clients' innocence.¹²⁴ They are inclined to view the criminal enforcement enterprise as unfair and corrupt.¹²⁵ Defenders' oppositional orientation also extends to the police.¹²⁶ Defenders are tasked with challenging police search and seizure practices in the lead up to criminal cases.¹²⁷

Defenders possess unique access to information about Suspects' circumstances and carceral interests' policies and practices. Defenders are keenly aware of prosecutors' choices—defenders can directly observe their effects on individual clients. Defenders will readily ascertain patterns regarding prosecutors' priorities, charging practices, and plea practices. Defenders' clients also afford a stream of information about police enforcement policy and practices in the street. Clients will have accounts of police tactics and abuse. Some of those accounts could become the bases for suppression motions. Clients' accounts may also be broadly representative of police practices in poor communities.¹²⁸ It is for this reason that the Supreme Court has effectively assigned

121. *ee id.* at 143.

122. *See id.* at 159. The “by-product” metaphor suggests something that is inferior to a membership-based organization. But the gap may be less significant than initially appears. Membership organizations became increasingly rare over the twentieth century. *See* THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* 127 (2003). Even nominally membership-based organizations tend to be top-down and dominated by management. *See id.* at 224.

123. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 228538, *SELECTED FINDINGS, PUBLIC DEFENDER OFFICES, 2007 - STATISTICAL TABLES 1* (Nov. 2009), <https://bjs.ojp.gov/content/pub/pdf/pdo07st.pdf> [<https://perma.cc/S533-PD29>].

124. *See* LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 145 (1987).

125. *See id.* at 145-47.

126. *See id.* at 148.

127. *See infra* Part III.A.

128. The practices have been described at length in both popular and scholarly media. For a summary, see *Floyd v. City of New York*, 813 F. Supp. 2d. 417, 422-37 (S.D.N.Y. 2011).

defense attorneys the responsibility for advancing third-party constitutional interests through their clients' criminal cases.¹²⁹

It is when defenders operate as part of a consolidated agency that they will have the greatest opportunity for coordinated action.¹³⁰ The existence of an organization solves the coordination problem that ordinarily bedevils large groups.¹³¹ The existence of an organization also creates unique political leverage including, most dramatically, the power to halt carceral processing in the criminal courts through work stoppage.¹³² An agency also creates opportunities for systematic collection of the kinds of information described above: specialization in advocacy skills like lobbying and public relations, and sufficient economies of scale to permit resources to be directed to such advocacy. An organization can sustain a critical mass of professionals committed to Suspects' collective interests. Those committed to "cause lawyering" are more likely to self-select for public defender organizations that are committed to systemic reform.¹³³ It is these lawyers who are likely to generate creative ideas about how to advance Suspects' collective interests.

That public defenders would take up Suspects' collective interests finds rough precedent in the civil context. The plaintiffs' bar has aggressively advocated for laws and policies designed to keep courts open for future tort plaintiffs.¹³⁴ For example, the plaintiffs' bar has resisted legislative efforts to constrain the availability of class actions and limit aggregate tort remedies.¹³⁵ This is unsurprising given that plaintiffs' attorneys' economic incentives align with these advocacy projects.¹³⁶ These efforts regularly, although not inevitably, align with the interests of large, diffuse groups that consist of unidentifiable, future harm

129. Fourth Amendment suppression, equal protection challenges for discriminating against potential jurors, and claims to a public trial are all illustrative. This thesis is developed fully in Nirej Sekhon, *Representative Defendants*, 81 OHIO ST. L.J. 19, 21 (2020).

130. See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2420-21 (1996).

131. See OLSON, *supra* note 13, at 44.

132. See, e.g., Mirsky, *supra* note 30, at 942 (describing Legal Aid strike); Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999 (2022).

133. See Kim Taylor-Thompson, *Taking it to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 157 (2004).

134. See Jonathan D. Glater, *To the Trenches: The Tort War is Raging On*, N.Y. TIMES (June 22, 2008), <https://www.nytimes.com/2008/06/22/business/22tort.html?searchResultPosition=7> [<https://perma.cc/BR45-885K>].

135. See *id.*

136. See Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2096-97 (2004).

victims.¹³⁷ But their incentives are not purely economic as many plaintiffs' lawyers self-identify as "cause lawyers."¹³⁸

II. HEROIC INDIVIDUALS VERSUS CARCERAL JUGGERNAUTS

This section argues that the individual ideal of public defense that dominates legal and popular consciousness is at cross purposes with advancing Suspects collective interests. The individual ideal posits defenders as heroically standing between Leviathan and the accused, litigating just as fiercely as private counsel would. *Gideon v. Wainright* sanctified this individualized, market-inflected ideal of public defense. This romantic vision presupposes an individualized model of criminal enforcement and adjudication which ours is mostly not. Carceral interests are juggernauts that sluice people into the State's carceral machinery en masse. There is a chasm separating this reality from the individualized ideal of indigent defense.

Part A contends that the individualized ideal of public defense is a whorl of mystifications that obscures the nature of carceral policy and practice. Part B describes the (decidedly not individualized) forces that defenders are up against: carceral juggernauts that, through legal and political maneuver, funnel people into America's carceral machinery.

A. Individualized Ideal of Public Defense

The individualized ideal of public defense posits it as a vigorous, trial-centered substitute for private attorneys. Jurisdictions do not live up to the ideal, with some failing more spectacularly than others.¹³⁹ Commentators have long identified governments' parsimony as one of the greatest impediments to the ideal.¹⁴⁰ No doubt this is true, but the market-based, individual ideal is as much the problem as stinginess. The ideal cannot be realized on its own terms. It functions more as a mystifying gloss than a meaningful aspiration. Even with dramatic increases in funding, there would be little chance of most poor defendants receiving the procedurally elaborate protections associated with an individualized defense, not least of which is trial by jury.

Indigent defense was not originally conceived as individualized. Defenders served as charity workers, collaborating with prosecutors to ensure that criminal courts hummed efficiently, quickly disposing of

137. See Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489, 531-32 (2020).

138. See Erichson, *supra* note 136, at 2097-99.

139. The quality of indigent defense is determined by funding level, how it is organized, and other structural features. See Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 241-243 (2023); Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 144-45, 156-157 (2020).

140. See Wright & Roberts, *supra* note 31, at 4.

most cases by plea, but flagging those that warranted sympathy.¹⁴¹ The earliest defender offices in cities like Los Angeles, New York, and Chicago arose in the early twentieth century.¹⁴² These early incarnations of public defense were privately financed adjuncts of civil legal services agencies.¹⁴³ The progressive era reformers who created these proto-defender agencies did not imagine them as adversarial protectors of defendants' rights.¹⁴⁴ Rather, prosecutors were supposed to worry about defendants' rights—a task that would be compromised if defenders were adversarial.¹⁴⁵ In this “charitable model” of public defense, both prosecutors and defenders assumed that most poor defendants were guilty.¹⁴⁶

Gideon rhetorically repudiated the charitable model,¹⁴⁷ fusing ideals of free-market individualism with due-process romanticism.¹⁴⁸ *Gideon* cast indigent defense as a substitute for the private representation that those with means paid for.¹⁴⁹ When accused of a crime, the *Gideon* Court noted that one stands alone against Leviathan. The adversarial system's various procedural hurdles and protections are supposed to level the field, preventing police and prosecutors from running roughshod over accused persons' rights. Those procedural protections lie fallow without skilled defense counsel.¹⁵⁰ A fierce and loyal advocate who challenges the State's prosecution at every turn ensures that convictions are had with great effort and are thus reliable.¹⁵¹ Defense counsel also ensures that clients are afforded the respect and dignity consistent with the “presumption of innocence” that theoretically anchors criminal proceedings.¹⁵²

Gideon bears the deep etch of the United States' competition with the Soviet Union.¹⁵³ America's adversarial, individualized justice was presented in stark contrast to the summary Soviet fast track to the gulag.¹⁵⁴ The *Gideon* Court reasoned that defense counsel was fundamental to realizing the virtues of America's adversarial system of justice.¹⁵⁵ And here is where *Gideon*'s internal contradiction seems most

141. See MAYEUX, *supra* note 29, at 59-63.

142. See MCINTYRE, *supra* note 124, at 31; Mirsky, *supra* note 30, at 896-97.

143. See MAYEUX, *supra* note 29, at 49-50; Mirsky, *supra* note 30, at 896-97.

144. See Mirsky, *supra* note 30, at 897.

145. See MCINTYRE, *supra* note 124, at 44; Mirsky, *supra* note 30, at 896-97.

146. See Mirsky, *supra* note 30, at 897-98.

147. See *id.* at 902-03.

148. See *id.*

149. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

150. See *id.*

151. See *id.* at 344-45.

152. See *id.*

153. See *id.*; MAYEUX, *supra* note 29, at 89.

154. See MAYEUX, *supra* note 29, at 89.

155. See *Gideon*, 372 U.S. at 344.

naked. *Gideon* arose in response to structural failures of the American system. The American system presupposed a private market for legal services that failed to provide for the poor, those who are most frequently caught up in the criminal justice system.¹⁵⁶ Those least able to afford counsel are those who most desperately need it.

Private ordering of the attorney client relationship, then and now, underwrites the individualized ideal of the American legal system. The private market is supposed to guarantee both client choice and incentivize attorney loyalty. Consumer choice is a hallmark of personhood in American society. “Choice” thus features prominently in American ideals of the attorney-client relationship. Market incentives also serve to bind attorneys to their clients. While attorneys are bound to honor ethical standards of representation, the promise of financial reward incentivizes hard work to advance their clients’ interests. *Gideon* did not answer how these market features were to be reproduced in the context of indigent defense.

The Court has not read the Sixth Amendment to require that poor defendants have an attorney of their choice. Nor does the Constitution oblige states to create financial incentives for defenders that mirror those prevailing between paying clients and their attorneys. This is not just a question of how much compensation individual defenders receive. Even if states funded indigent defense such that attorney compensation was comparable to that of private attorneys, it would still be the State (not the individual clients) paying.¹⁵⁷ This is to pit the State against itself and was among the earliest objections to the basic concept of a public defender.¹⁵⁸

Gideon could not (and did not) resolve these contradictions. The Court requires free counsel for the indigent whenever “actual imprisonment” is to be imposed,¹⁵⁹ but has left it to states and localities to sort out the pesky details of how to organize and finance indigent defense.¹⁶⁰ Most jurisdictions have opted to comply with their constitutional obligations through means other than a dedicated defender agency.¹⁶¹ In places that already had a public defender, politicians and agency managers simply recast existing practices grounded in the charitable model using *Gideon*’s gloss.¹⁶²

156. See *id.* at 344-45.

157. See MAYEUX, *supra* note 29, at 12-13.

158. See *id.*

159. See *Alabama v. Shelton*, 535 U.S. 654, 662 (2002).

160. See Primus, *supra* note 139.

161. See *id.*

162. See Mirsky, *supra* note 30, at 908, 915. Practices consistent with that model continue to shape defender culture. See Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1800 (2016).

Legal scholars have cast the failure to fund indigent defense as the central problem of the *Gideon* model.¹⁶³ Increased funding would undoubtedly improve the quality of indigent defense in many places,¹⁶⁴ but that does not speak to the deeper contradictions outlined above. Conceptualizing defenders as a substitute for private counsel misapprehends the nature of criminal enforcement and case processing practices. This conception takes criminal cases to be episodic, individualized, and trial-driven responses to egregious misconduct. *Gideon*, for example, emphasized the legal skills associated with trial practices.¹⁶⁵ This is how popular culture continues to depict the criminal process and how the middle and upper classes imagine it.

The market-based, individualized ideal of indigent defense always has been in structural tension with state and local criminal courts' high-volume, assembly-line nature.¹⁶⁶ The political economy of criminal adjudication discourages trials at every turn. High-volume criminal court dockets create pressure for prosecutors, judges, and defenders to summarily clear cases.¹⁶⁷

Even with additional funding, public defenders would remain lodged in a mass processing ecosystem.¹⁶⁸ For most defenders, it is impossible to independently investigate all their cases consistently with the individualized ideal, let alone to try them.¹⁶⁹ That load presupposes summary resolution of most cases – one simply cannot try that many cases. These pressures will operate even in those jurisdictions where public defenders are reasonably well funded and reputed for being aggressive advocates. Increasing defender funding and reducing caseload may help ensure that pleas are better counseled and less perfunctorily taken than would otherwise be true. But this remains vastly different from the individualized ideal's requirement of independent investigation followed by criminal trial.

163. See, e.g., Wright & Roberts, *supra* note 31, at 4; Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 222 (2004).

164. The scale of improvement would of course depend on how poor the situation was to begin with. See Allison Frost, *Critical Shortage of public Defenders Reaches into all Corners of Oregon's Criminal Justice System*, OR. PUB. BROAD. (Dec. 9, 2022, 1:55 PM), <https://www.opb.org/article/2022/12/09/oregon-criminal-justice-system-publid-defender-shortage-crisis> [<https://perma.cc/35V7-V5DC>].

165. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

166. Cf. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 99 (1980) (noting the impossibility of satisfying individual representation mandate for legal aid attorneys).

167. See FEELEY, *supra* note 33, at 270-77.

168. *Id.*

169. Broadly cited caseload recommendations issued by the National Advisory Commission on Criminal Justice Standards and Goals in 1973 suggested annual caseloads of 400 misdemeanors or 150 felonies. See Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 OHIO ST. J. CRIM. L. 403, 412 (2017). Contemporary standards tend to be more humane but still recommend caseloads in the hundreds. See *id.* at 423.

Commentators have noticed the limitations inherent in an individualized representation framing of the defender function. Kim Taylor-Thompson, for example, has identified public defenders as “institutional players” who can use that fact to generate leverage to achieve systemic change.¹⁷⁰ She addressed systemic procedural and evidentiary issues that arise within criminal courts.¹⁷¹ In a more radical riff on the institutional leverage theme, commentators have suggested that public defenders collectively refuse to enter pleas to stall criminal courts.¹⁷² This act of creative destruction would supposedly help bring about new institutional arrangements that better approximate the individual model of justice. The problem with collective action of this nature is that it must be reconciled with the interests of each individual defendant caught in the system.¹⁷³ Defenders would have to persuade clients to forgo their short-term individual interests in the hopes of achieving long-term benefits for Suspects (or just disregard client’s preferences).

None of this should be taken to mean that defenders look askant on *Gideon*. *Gideon*’s idealized vision of defense counsel resonated with activist defenders who, contrary to the charitable model, believed that they should fight aggressively for all clients’ interests.¹⁷⁴ *Gideon* propelled the vision of defenders as lone, heroic pugilists into rhetorical prominence such that it came to define their occupational self-concept.¹⁷⁵ That self-concept, for example, finds expression in the high premium defenders place on autonomy from supervisory control.¹⁷⁶ Autonomy does not however mean that defenders are able to affect *Gideon*’s individual ideal for their clients.¹⁷⁷ There is little reason to think that is possible given what defenders are up against.

B. Carceral Juggernauts

The individual ideal’s contradictions are starkest when held alongside the carceral interests they oppose. As suggested in Part I and developed further here, police, prosecutors, and other carceral interests’ advance their agenda through policymaking, legislative advocacy, and public relations. This advocacy operates to Suspects’ detriment en

170. See Taylor-Thompson, *supra* note 130, at 2449.

171. See *id.* at 2419.

172. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1097-99 (2013); see also Crespo, *supra* note 132.

173. See Taylor-Thompson, *supra* note 130, at 2457-61.

174. See Mirsky, *supra* note 30, at 912-15.

175. See *id.*; Taylor-Thompson, *supra* note 130, at 2421 (noting how deeply entrenched the individualized role of the public defender is among defenders).

176. See MCINTYRE, *supra* note 124, at 121. Defenders typically enjoy more unsupervised discretion to make decisions in their cases than prosecutors do. See *id.*

177. Freedom from supervision might well engender indifference to client outcomes among some defenders. See Primus, *supra* note 162, at 1789, 1800.

masse. The individualized ideal of public defense offers no response to this.

1. *Making policy in the street and in court*

Police agencies and prosecutors' policy choices create pools of Suspects in ways not readily visible, let alone challenged in individual criminal cases.

Police. Where, when, and how police agencies direct their attention determines who flows into the criminal processing machinery. Those choices' costs and benefits are distributed asymmetrically. Fiscal costs are footed by taxpayers,¹⁷⁸ but the dignity and liberty costs are borne by Suspects. There are additional costs for the families and communities of those subject to criminal enforcement.¹⁷⁹ The chief benefit of criminal enforcement is public safety, which is notoriously difficult to measure. There is little to suggest that police departments and prosecutors do particularly well balancing these costs and benefits—particularly within minority neighborhoods.¹⁸⁰ The absence of reliable technocratic measures makes it urgent that all affected interests have an opportunity to influence policymaking.¹⁸¹

The distributive consequences of the police's policy-making discretion are most pronounced (and problematic) with preventive policing—policing designed to interdict harms rather than respond to them after the fact.¹⁸² Preventive policing—a salient feature of policing since the mid-twentieth century¹⁸³—rewards officers for initiating adversarial contacts with civilians. Increasing such contacts imposes costs on communities.

Embracing a broad new theory of deviance can have serious distributive consequences. For example, beginning in the 1990s, New York and other large American cities embraced “quality of life policing.”¹⁸⁴ This was a preventive theory positing that the key to reducing serious crimes was aggressively enforcing against low-level offenses like subway turnstile jumping, sidewalk obstruction, and marijuana possession. Accordingly, the department created incentives for uniformed

178. See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2164-66 (2002).

179. See Brown, *supra* note 16, at 345-48.

180. See, e.g., TRACEY MEARES & DAN KAHAN, *When Rights Are Wrong: The Paradox of Unwanted Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 3, 21 (Joshua Cohen & Joel Rogers eds. 1999); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 696-702 (1998).

181. Cf. Brown, *supra* note 16, at 352-5857.

182. ROBERT M. FOGELSON, *BIG-CITY POLICE* 231-32 (1977).

183. See *id.*

184. See Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. Chi. L. Rev. 271, 272 (2006).

patrol officers to engage in more adversarial encounters with civilians.¹⁸⁵ The consequence of these policy shifts has been well documented—the number of misdemeanor prosecutions increased.¹⁸⁶ The policy targeted such policing at low-income communities of color, creating predictable demographic consequences for suspects.¹⁸⁷

The individual criminal cases that quality-of-life policing generated were poor vehicles for challenging the policy. Individual criminal cases afford little procedural latitude for challenging systemic rights violations. Criminal cases do not usually permit aggregation of similar rights violations or the far-ranging discovery typical in civil cases.¹⁸⁸ For example, in a typical suppression hearing, a criminal court focuses on the facts surrounding a single defendant's interaction with the police, like whether the facts reported by the officer amounted to reasonable suspicion or probable cause that a crime occurred.¹⁸⁹

Challenging the unfair distribution of criminal enforcement is similarly difficult. It is an open question whether there is any remedy for selective enforcement in violation of the Equal Protection Clause in a criminal case.¹⁹⁰ However, the question is largely academic since it is nearly impossible to satisfy the stringent requirements for demonstrating a substantive violation.¹⁹¹ Examples of equal protection challenges in criminal cases are rare and successful ones are nearly nonexistent.¹⁹²

More granular police policymaking can also have significant distributive consequences. Choices about tactics and deployment shape the frequency of adversarial contacts in the street and the composition and flow of arrestees into the system. For example, the N.Y.P.D. created incentives for patrol officers to use stop and frisk intensively in conjunction with its “quality-of-life” campaign.¹⁹³ The tactics were used

185. See Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQ. 171-175 (1999).

186. See *id.*

187. See generally BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001).

188. See Nirej Sekhon, *Mass Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 445 (2017).

189. See *id.* at 446.

190. See *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996) (noting the absence of authority regarding the availability of a remedy for equal protection violations in criminal cases).

191. The legal standard makes it difficult to demonstrate a violation even upon deeply troubling facts. See *United States v. Brown*, 299 F. Supp. 3d 976, 998 (N.D. Ill. 2018).

192. Cf. *id.*

193. See Press Release, *Mayor de Blasio Announces Agreement in Landmark Stop-And-Frisk Case*, NYC (Jan. 30, 2014), <https://www.nyc.gov/office-of-the-mayor/news/726-14/mayor-de-blasio-agreement-landmark-stop-and-frisk-case#/0> [<https://perma.cc/NC2Q-K6Q9>].

most intensively against men of color, foisting additional costs upon them for inhabiting public space.¹⁹⁴

Another example can be seen in police departments' use of stings and decoys to generate so-called "clean arrests"—arrests that cannot be easily challenged in suppression or at trial.¹⁹⁵ Using stings and decoys to address street crime generated more arrests and convictions per hour of officer labor than routine patrol ever could.¹⁹⁶ Reassigning patrol officers to such units can substantially increase aggregate arrests.¹⁹⁷ But the tactics most glaring deficiencies are not easily challenged in the criminal cases that they generate.¹⁹⁸ These operations may sometimes increase crime.¹⁹⁹ These tactics were also used most intensively against those the police perceived to be inclined to criminality; race and class inevitably shaped these perceptions and tended to be self-reaffirming.²⁰⁰

Prosecutors. Prosecutors indirectly influence street policy by prioritizing (or de-prioritizing) categories of misconduct. While they do not have direct supervisory control over the police,²⁰¹ prosecutors shape the occupational value of arrests to the police.²⁰² Police agencies'

194. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. OF L. & SOC. CHANGE 271, 282 (2009).

195. See Street Crime in America (The Police Response); Hearings before the House Select Committee on Crime, 93rd Cong., pt. 1, at 11, 13, 125, 543 (1973). Because stings and decoys do not constitute a "search" within the meaning of the Fourth Amendment, they are nearly immune to suppression. They are similarly immune to evidentiary challenge because suspects affirmatively approach the decoy and are arrested red handed. See *id.*

196. See *id.*

197. See Street Crime: Reduction Through Positive Criminal Justice Response, H.R. Rep. No. 93-358, The Select Committee on Crime, at 47 (June 29, 1973).

198. See GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 126-27 (1988); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 166-67 (2009). Entrapment is the most obvious legal challenge that could be brought against a sting or decoy. It is, however, a weak defense. See Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107, 118 (2005); Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 114-117 (1981). Because it is an affirmative defense that requires a showing of the defendant's good character, it creates opportunities for the State to introduce evidence of a defendant's prior bad acts. See *Jacobson v. United States*, 503 U.S. 540, 549 (1992). This is power incentive not to argue entrapment.

199. See MARX, *supra* note 201, at 177-79. For example, so-called "fencing stings" where the police impersonated fences may well have induced more petty thefts than would otherwise have occurred. Increasing the frequency and intensity of adverse police-civilian encounters also generated more violence. See *id.* at 154, 177-179.

200. See J. Kelly Strader & Lindsey Hay, *Lewd Stings: Extending Lawrence v. Texas to Discriminatory Enforcement*, 56 AM. CRIM. L. REV. 465, 469-70 (2019) (describing targeting of LGBTQ persons); see also Jason Meisner, *Federal Judge Finds ATF Drug Stash House Stings Distasteful but Not Racially Biased*, CHI. TRIBUNE, (May 31, 2019, 9:05 PM) <https://www.chicagotribune.com/2018/03/13/federal-judge-finds-atf-drug-stash-house-stings-distasteful-but-not-racially-biased/> [<https://perma.cc/RPG4-N7HE>].

201. Cf. EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 25 (1970).

202. See Stephen D. Mastroski, *The Prospects of Change in Police Patrol: A Decade in Review*, 9 AM. J. POLICE 1, 46 (1990).

interest in arrests is related to prosecutors' interest in prosecuting them. For example, some "progressive prosecutors" have elected not to prosecute marijuana and other low-level offenses to discourage police enforcement.²⁰³ Conversely, prosecutors incentivize arrests by signaling their commitment to prosecute.²⁰⁴

Prosecutorial policymaking determines who is funneled into the criminal courts. For example, prosecutors have considerable policy-making authority over diversion, deferred prosecution, and other rehabilitative alternatives to detention.²⁰⁵ These programs shunt off a swathe of arrestees from conviction or even prosecution.²⁰⁶ Creating more programs like this has been another hallmark of progressive prosecutors' campaigns.²⁰⁷ Prosecutorial policymaking extends beyond substantive judgments about harshness and leniency. Administrative choices have significant bearing on who becomes a defendant and the outcomes they confront. For example, Wright and Miller showed that prosecutors' aggressive use of front-end case screening is likely to result in more early dismissals.²⁰⁸ Forgoing early screening means there will be more convictions because cases are sorted through plea bargaining, with weak cases receiving significant charge and/or sentencing discounts.²⁰⁹

203. See Ting, *supra* note 4; Rodriguez, *supra* note 4; see also Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 751-52 (2020) (characterizing as a form of lenity).

204. See Green & Roiphe, *supra* note 206, at 751-52 (noting progressive prosecutors' commitment to prosecuting some crimes harshly); Kay Levine, *The State's Role in Prosecutorial Politics*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 31, 39 (John L. Worrall and M. Elaine Nugent-Borakove eds. 2008); Mark Binelli, *She Took on Atlanta's Gangs. Now She may be Coming for Trump.*, N.Y. TIMES MAG. (Feb. 3, 2023), <https://www.nytimes.com/2023/02/02/magazine/fani-willis-trump.html> [<https://perma.cc/EE9Z-XW7W>] (noting Fulton County prosecutors' influence on the Atlanta Police Department to increase anti-gang arrests).

205. See Ting, *supra* note 4 (noting that progressive prosecutors have consistently embraced diversion).

206. These programs allow individuals who meet certain criteria—e.g., those charged with low-level offenses, first-time offenders, and so on—to avoid prosecution in exchange for satisfying certain conditions. See Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 338 (2021); Kay L. Levine, *Victims' Rights in the Diversion Landscape*, 74 SMU L. REV. 501, 506-07 (2021).

207. See Godsoe, *supra* note 3, at 179-81; Ting, *supra* note 4.

208. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 49, 67-68 (2002) (noting that early screening means that case defects are evaluated as part of the choice to prosecute).

209. See *id.*

2. Legislative action

Prosecutors, police, and other carceral interests shape legislation through political action.²¹⁰ These actors' interests are not necessarily coterminous, but they all tend to work toward expanding the State's carceral footprint to Suspects' collective detriment.²¹¹ As discussed earlier,²¹² prosecutorial influence is pervasive in state and federal legislatures.²¹³ But they are not alone.

Police, corrections, and victims' rights groups also seek to influence lawmaking, nudging it towards harshness.²¹⁴ Miller, for example, documented how police appeared at legislative hearings to attest to the scope of social problems and to the efficacy of their enforcement techniques.²¹⁵ Police representatives often ask legislatures to make additional tools—material resources, legal authorization, or otherwise—to enable enforcement.²¹⁶ Similarly, prison guard unions tend to advocate for increased harshness to maintain jobs and benefits.²¹⁷

Victims' rights groups are the rare example of public membership-based groups that have had a significant impact on increasing criminal laws' harshness.²¹⁸ The most effective victims' rights groups have tended to be single-issue organizations, like Mothers Against Drunk Drivers, that focus on the victimization of women and children.²¹⁹ Membership-based citizen groups have a higher sheen of legitimacy—politicians and the public have been particularly eager to speak to and for crime victims for decades.²²⁰

210. See, e.g., MILLER, *supra* note 21, at 95, 98, 103 (noting that in Pennsylvania, “representatives of criminal justice agencies are ubiquitous” in legislative hearings on crime related matters and have “unfettered access to legislators”); Barkow, *supra* note 21, at 728; STUNTZ, *supra* note 24.

211. See Hessick, Wright, & Pishko, *supra* note 50.

212. See *supra* notes 48-54, 87-94, and accompanying discussion.

213. See MILLER, *supra* note 21, at 95 (using frequency of appearances at hearings). Miller's measure likely understates prosecutorial influence because it fails to capture their behind-the-scenes influence on agenda setting. See Hessick, Wright, & Pishko, *supra* note 50. There is also considerable informal interaction between prosecutors and legislators for which there are no good proxies. See MILLER, *supra* note 21, at 105.

214. See Barkow, *supra* note 21, at 729.

215. See MILLER, *supra* note 21, at 141-42 (describing police testimony in the context of proceedings about narcotics and firearms enforcement).

216. See *id.* Police may play an active role in creating legislation in some localities. See Brenner M. Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561 (2024).

217. See Joshua Page, *Prison Officer Unions and the Perpetuation of the Penal Status Quo*, 10 CRIMINOLOGY & PUB. POL'Y 735, 736-37 (2011); *infra* notes 245-251 and accompanying discussion.

218. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 24 (2007).

219. See MILLER, *supra* note 21, at 115-17.

220. See SIMON, *supra* note 221, at 94-100.

Size and coordination costs stymie organizations representing Suspects.²²¹ Those that do exist tend to do so only indirectly by, for example, representing the families of those incarcerated or poor, minority crime victims.²²² These groups' interests will not always align with those of Suspects. And even when they do, these groups tend to be small, poorly resourced, and correspondingly operate in less consequential, local political environments.²²³

Groups that have greater access to state and local legislatures, like the ACLU and NAACP, tend to focus on criminal enforcement reform as an incident of their core interests—civil liberties and racial equity respectively. Neither the ACLU nor the NAACP is exclusively devoted to advancing criminal reforms. Their agendas may even sometimes be inconsistent with criminal reforms. For example, NAACP chapters supported tough on crime initiatives in the late twentieth century.²²⁴

Professional organizations like the National Association of Criminal Defense Attorneys (NACDL) and the National Legal Aid and Defender Association (NLADA) do legislative and policy advocacy. This includes lobbying work opposing new laws that disadvantage defendants. These important efforts might serve as a model but are limited in scope and range given the organizations' primary mission of advancing the advancing defense lawyers' professional interests.²²⁵

3. *Shaping public opinion*

Prosecutors, police, and other carceral interests actively shape public opinion to support harshness. Chief prosecutors are usually elected officials and thus secure their positions by extolling the office's virtues. These appeals inevitably equate public safety with the prosecutorial function. For most of the twentieth century, that meant presenting oneself as "tough on crime."²²⁶ So-called "progressive prosecutors" have

221. See *supra* Part I.B.2. See also Barkow, *supra* note 21, at 729; Garland, *supra* note 17, at 509.

222. See, e.g., FAMILIES AGAINST MANDATORY MINIMUMS, <https://fam.org> [perma.cc/9CU9-MB5X] (last visited Aug. 22, 2024) (representing families); PARTNERSHIP FOR SAFETY AND JUSTICE, <https://safetyandjustice.org> [perma.cc/4BN3-32VV] (last visited Aug. 22, 2024) ("[B]uilding public safety and criminal justice systems that better serve survivors of crime, people convicted of crime, and the families and communities of both); ALLIANCE FOR SAFETY AND JUSTICE, <https://asj.allianceforsafetyandjustice.org> [perma.cc/WL5L-RYE5] (last visited Aug. 22, 2024) (representing survivors and those with old criminal records).

223. See MILLER, *supra* note 21, at 115-17.

224. See FORTNER, *supra* note 19, at 5-6.

225. See NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, <https://www.nlada.org/become-a-member> [perma.cc/L6EE-LGRG] (last visited Aug. 22, 2024); NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, <https://www.nacdl.org/Landing/membership-has-its-benefits> [perma.cc/X5GG-5497] (last visited Aug. 22, 2024).

226. See SIMON, *supra* note 221, at 43.

staked a claim to being the antidote to tough-on-crime's excesses.²²⁷ But no less than their predecessors, progressive prosecutors must assure the public of their effectiveness in vindicating criminal harms.²²⁸ Even if they advocate for a lighter touch with minor crimes,²²⁹ progressive prosecutors cannot afford to come across as too soft.²³⁰ Many propose to redirect resources from minor crimes to serious ones.²³¹ Justifying claims to the municipal budget, appeasing the police and other carceral stakeholders, and staying in office all demand public relations savvy.²³²

Larger police departments also rely on public relations to mold public opinion.²³³ The precise relationship between policing and crime suppression is often unclear.²³⁴ The public must thus be sold on the idea that police are essential to keeping them safe.²³⁵ In this vein, police press conferences are a staple technique for touting crime-control successes, whether with news of a big seizure or a future initiative to stem crime.²³⁶ But police agencies also try to proactively control the informational environment in more subtle ways, like through strategically selective information sharing.²³⁷ Media accounts of crime often originate with the police.²³⁸ Local media are hungry for such content and police can offer it at low cost to reporters.²³⁹ The symbiotic relationship between the media and police tends to reinforce themes of police efficacy and legitimacy.

Other carceral interests also use public relations to mold public opinion against Suspects' interests. Victims' rights groups, for instance, are uniquely situated to persuade. Once upon a time, victims' rights groups appeared as disruptive, outside interests seeking to

227. See Godsoe, *supra* note 3, at 175, 182.

228. See GARLAND, *supra* note 9, at 109-10.

229. See Godsoe, *supra* note 3, at 178-80.

230. See *id.* at 167, 198.

231. See, e.g., Ting, *supra* note 4 (noting that progressive prosecutors have consistently embraced diversion).

232. See Parker & Hurst, *supra* note 2.

233. O.W. WILSON, POLICE ADMINISTRATION 217 (2d ed., 1963).

234. See Jarret S. Lovell, Media Power & Information Control: A Study of Police Organizations & Media Relations (May 2001) (unpublished manuscript) (on file with U.S. Dep't of Justice).

235. See, e.g., S.R. Purdue, *By Our Own Bootstraps*, THE POLICE CHIEF, Apr. 1954 at 10; Lou Smyth, *How the Public Sees Us as Police Executives and Police Officers*, POLICE CHIEF'S NEWS LETTER, June 1946, at 4.

236. See Steven Chermak & Alexander Weiss, *Maintaining Legitimacy Using External Communication Strategies: An Analysis of Police-Media Relations*, 33 J. CRIM. JUST. 501, 510 (2005).

237. See *id.*

238. See *id.*

239. See *id.*

influence criminal policy. Criminal justice policy had erstwhile not focused on victims.²⁴⁰

Victims' rights groups agenda-setting activism thrust victims to the center of criminal policy making.²⁴¹ This reshaped the criminal policy subsystem, engendering new constraints and practices. For example, victim impact statements during sentencing, public victim compensation funds, and legal obligations for prosecutors to communicate with victims became common.²⁴² By putting a sympathetic human face on victimhood, victims' rights groups created powerful incentives for the public to cathect and, ultimately, identify with victims.²⁴³ Jonathan Simon has argued that foregrounding deeply sympathetic survivors was central to inducing the late twentieth century's victimological zeitgeist and laid the groundwork for criminal harshness.²⁴⁴

Because they are membership based, victims' rights groups have a kind of per se legitimacy. This has led to co-optation by institutional carceral interests. For example, the prison guards unions in California created victims' rights groups as a front for opposing popular reform initiatives in the early 2000s.²⁴⁵ In a recent case study, Joshua Page revealed how the California prison guards union defeated California voter referenda 66 and 5.²⁴⁶ Referendum 66 proposed to limit California's three strikes law while Referendum 5 proposed to release low-level, non-violent offenders from prison.²⁴⁷ Both initiatives were popular and early polling suggested they were likely to pass.²⁴⁸ The prison guards union formed a carceral coalition with prosecutors, police, and victims' rights groups and successfully advanced a "vote no" campaign promoting the claim that the initiative would increase crime.²⁴⁹ Page argues that the campaign contributed to the narrow defeat of both initiatives.²⁵⁰ Page's account suggests the headwinds that progressive reforms must overcome.²⁵¹

240. See Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OH. ST. J. CRIM. L. 611, 612-13 (2009).

241. See SIMON, *supra* note 221, at 77; GARLAND, *supra* note 9, at 11.

242. See GARLAND, *supra* note 9, at 169.

243. See SIMON, *supra* note 221, at 75-78.

244. See *id.* at 74-76, 94-100.

245. See Page, *supra* note 220, at 742-43.

246. See *id.*

247. See *id.* at 743-44. That the proposals were put to the public as initiatives in and of itself reflected the prison unions success at thwarting decarceration reforms in the State legislature. *Id.* at 744 n.6. It was only after repeat failures there that three strikes' opponents pursued a popular initiative. *Id.*

248. See *id.* at 748-50.

249. See *id.*

250. See *id.* at 742-43, 749-50.

251. See *id.* at 736. The Drug Policy Alliance, a progressive advocacy group, was a driving force behind Proposition 5. Donors like George Soros also generously funded their campaign.

Summary. The individualized ideal of indigent defense is intractably contradictory in a mass justice context. The contradiction cannot be answered by increasing defender funding—although the contradiction is made more severe by its lack. The public defender agency devoted to the ideals of individualized representation is fundamentally mismatched against the carceral juggernauts it must oppose. Those institutions affect Suspects’ interests en masse through advocacy in the legal, policy, and political spheres. If Suspects’ interests are to be effectively represented, public defenders must be empowered to challenge carceral interests in all the spheres in which they operate.

III. REIMAGINING PUBLIC DEFENSE

Reimagining public defense in terms of Suspects’ collective interests will improve their lot and modulate criminal policymaking overall. The first and most important prescriptive note is for activists and progressive reformers. Creating and supporting public defenders should be at the top of their agendas – to assure that there is an empowered agent capable of advancing systemic reform against political headwinds which will blow strongest during periods of public fear or apathy. Even though significant swathes of the public are less vengeance-primed than their twentieth-century predecessors,²⁵² voters are fickle. Their passions ebb and flow, sometimes unpredictably.²⁵³ Carceral actors can dodge popular reformist pressure by waiting out the political cycle.

Police reform presents a recent example of this pattern. A steady flow of high-profile instances of police killings culminated in a reformist crescendo following George Floyd’s death.²⁵⁴ In many cities, calls to dramatically reform, even abolish, the police gained serious political traction. In Minneapolis, the site of Floyd’s death, the city council seemed poised to dismantle the police agency.²⁵⁵ That initiative however ran aground on the municipal charter’s rocky shoals.²⁵⁶ Political

See Corey Ordoñez & Stephanie Schiele, *Proposition 5: Nonviolent Offenders Rehabilitation Act of 2008*, 2008 CAL. INITIATIVE REV. 1, 17 (2008). As is typical for anti-carceral activity, however, these interests were single-issue, anti-narcotics advocates, not broadly representative of Suspects as a class.

252. *See* Simon, *supra* note 221, at 43; Stuntz, *supra* note 118, at 2014.

253. *See* Simon, *supra* note 221, at 43.

254. *See* Liz Navratil, *Minneapolis Charter Commission holds hearing on its police proposal*, THE MINN. STAR TRIB. (July 28, 2020, 10:35 AM), <https://www.startribune.com/minneapolis-charter-commission-holds-hearing-on-its-police-proposal/571926212> [perma.cc/XA7H-U2BR]; Krithika Varagur, *After George Floyd, Who Will Police Minneapolis?*, N.Y. REV. (July 17, 2020), <https://www.nybooks.com/online/2020/07/17/after-george-floyd-who-will-police-minneapolis/> [perma.cc/Y3L3-SL6S].

255. *See id.*

256. *See* Liz Navratil, *Working Group Recommends Keeping Minneapolis Police Charter Change Off November Ballot*, MINN. STAR TRIB. (July 29, 2020, 3:30 PM), <https://www.startribune.com/working-group-recommends-keeping-minneapolis-police-charter-change-off-november-ballot/571938762> [perma.cc/BY4B-MDGB].

momentum slowed around the country and, in less than a year, was subsumed by fears of rising crime.²⁵⁷ Politicians that previously supported dramatic police reform did an about face, increasing police funding and supporting aggressive crime control.²⁵⁸ That political cycle suggests the perils of taking on a deeply entrenched, politically hardened carceral interest like the police.

What if, at the peak of their momentum several years ago, activists and reformers had demanded funding to empower defenders rather than for defunding police agencies? The former would have appeared to be a more modest demand and might have been more readily realizable for that reason. If the analysis in Part II is correct though, there might have been important long-term impacts from empowering defenders in this way.

In many jurisdictions, there is no defender agency to begin with. In those sadly numerous places, the account developed above offers another reason for creating them. Defender agencies provide more effective individual representation than do the other types of indigent defense modalities.²⁵⁹ More directly relevant to the argument here, institutional actors are a critical prerequisite for systemic reform and for influencing carceral policymaking.²⁶⁰ That is borne out by concrete examples of defender initiatives to advance Suspects' collective interests, a selection of which is described below.

A. *Defenders As Systemic Reformers*

Some of the country's more notable defender agencies have creatively leveraged their individual representation roles to advance Suspects' collective interests. Some have done so under the guises of "holistic" and "community" defense.²⁶¹ "Holistic defense" expressly recognizes that systemic factors account for poor client outcomes and encourages impact litigation and policy advocacy.²⁶²

Defenders have been at the forefront of the bail reform movement, using individual litigation, community partnerships, and political action to advance change. Bail's consequences are felt most acutely by poor defendants for whom it can often be outcome determinative

257. See, e.g., Fitzsimmons & Southall, *supra* note 11; Jackson, *supra* note 11; Byrne & Pratt, *supra* note 11.

258. See Fitzsimmons & Southall, *supra* note 11; Jackson, *supra* note 11; Byrne & Pratt, *supra* note 11.

259. See Primus, *supra* note 139, at 249.

260. See *supra* Part II.B.2.

261. See Robin Steinberg, *Heeding Gideon's Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 974 (2013); Taylor-Thompson, *supra* note 133, at 181; Melanca Clark & Emily Savner, *Community Oriented Defense: Stronger Public Defenders*, BRENNAN CTR. FOR JUST., 12 (2010).

262. See Steinberg, *supra* note 264, at, 974, 999-1000.

rather than just an inducement to appear at court hearings.²⁶³ Plea bargains that promise early release are uniquely attractive to poor defendants in custody because they cannot post bail.²⁶⁴ The Bronx Defenders was an early advocate of bail reform, pioneering a revolving bail fund to pay “low-end bails.”²⁶⁵ Carceral actors tried to kill the initiative, but Bronx Defender attorneys coordinated with local legislators to advance state legislation authorizing nonprofit bail funds.²⁶⁶ This laid the groundwork for the community bail model in New York State and beyond.²⁶⁷ In California, the San Francisco Public Defender took a more litigation-focused approach, successfully challenging the constitutionality of imposing bail beyond a defendant’s ability to pay,²⁶⁸ creating a new individualized procedural mechanism for bail statewide.²⁶⁹ The Philadelphia Defender Association relied on political advocacy, urging the district attorney and city council to eliminate cash bail absent reliance on algorithmic risk assessment.²⁷⁰

Defender agencies’ systemic advocacy has not been limited to defendants’ interests and included non-client Suspects. This is particularly urgent for police accountability. Most adverse police-civilian encounters likely do not generate a criminal case or otherwise subject to judicial review. While police violence is highly salient politically, most police abuse is low visibility. Defenders are well positioned to generate information about police abuse. For example, the Legal Aid Society of New York (“LAS”), through its “Cop Accountability Project,” seeks to correct that invisibility.²⁷¹ The LAS collects and makes police misconduct records readily available through its website.²⁷² It does so by collaborating with activist groups to lobby the state legislature to rescind

263. See THE BRONX FREEDOM FUND, ONE YEAR REPORT 2 (Nov. 2014), https://www.bronxdefenders.org/wp-content/uploads/2014/12/One-Year-Report_FINAL.pdf [<https://perma.cc/8C4G-8JDB>].

264. See *id.*

265. See Robin Steinberg et al., *Freedom Should Be Free: A Brief History of Bail Funds in the United States*, 2 UCLA CRIM. JUST. L. REV. 79, 92-93 (2018).

266. See *id.* at 93.

267. See *id.*

268. See *In re Humphrey*, 482 P.3d 1008, 1018 (Cal. 2021); KQED News Staff and Wires, *S.F. Man Whose Case Upended California’s Bail System Wins Release*, KQED (May 4, 2018), <https://www.kqed.org/news/11666269/s-f-man-whose-case-upended-californias-bail-system-wins-release> [perma.cc/5DTQ-3K2R].

269. See Elizabeth Munisoglu, *Redefining Money Bail Post Humphrey II*, L.A. LAW. 14, 15-16 (July/Aug. 2021).

270. See Samantha Melamed, *Philly Leaders Want to End Cash Bail. Can They Agree on How?*, PHILA. INQUIRER (May 7, 2019, 5:00 AM), <https://www.inquirer.com/news/philadelphia-end-cash-bail-black-mamas-community-bail-fund-20190507.html> [perma.cc/F8XP-YZAX].

271. See *The Cop Accountability Project*, LEGAL AID SOC’Y, <https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project/> [perma.cc/UV5Q-QTVJ] (last visited Aug. 28, 2024).

272. See *id.*

laws prohibiting disclosure of police officers' disciplinary records.²⁷³ LAS also had to overcome police unions' efforts to enjoin LAS from making its database available over its website.²⁷⁴

The LAS example suggests how broadly consequential tracking and compiling information can be. Even a modest, internal version of the exercise could have an impact. Clients' accounts of their experience with the police could in the aggregate suggest patterns of abuse and constitutional violations. Defenders' unique access to information creates the basis for challenging police practices and influencing policy-making. For example, the Bronx Defenders, along with other groups, served as class counsel and helped identify plaintiffs for a class action challenge against stop and frisk practices.²⁷⁵ The agency kept track of their clients who were subjected to stop and frisk but whose criminal cases were dismissed.²⁷⁶ In addition, years of working with clients subjected to the N.Y.P.D.'s tactics meant that attorneys in the office had deep familiarity with the patterns of police abuse and their broad effects on the community.²⁷⁷

It was accumulated information regarding the N.Y.P.D.'s gun interdiction efforts in New York City that prompted various New York defender agencies to file an amicus brief supporting the petitioner in *New York State Rifle & Pistol Association v. Cortlett*.²⁷⁸ Based on their clients' experiences,²⁷⁹ the brief documented how New York's restrictive firearm laws enabled the abusive policing of people of color.²⁸⁰ Maryland's State Office of the Public Defender has regularly sought to influence the Baltimore Police Department's policy and practices based on its clients' experiences. For example, the OPD sought to influence the terms of the consent decree between the Department of Justice and

273. See Jennvine Wong, *Holding the NYPD Responsible in the Cop Accountability Project*, THE LEGAL AID SOC'Y (Dec. 2, 2021), <https://legalaidnyc.org/stories/holding-the-nypd-responsible-in-the-cop-accountability-project/> [perma.cc/X6K7-TTYS]. But see C.J. Ciaramella, *New York Repealed its Police Secrecy Law Two Years Ago. Departments are Still Trying to Hide Misconduct Files*, REASON (Dec. 5, 2022, 1:20 PM), <https://reason.com/2022/12/05/new-york-repealed-its-police-secrecy-law-two-years-ago-departments-are-still-trying-to-hide-misconduct-files/> [perma.cc/88BP-2KDM] (documenting continuing litigation around various departments' compliance with new law).

274. See Ciaramella, *supra* note 276.

275. See Katherine E. Kinsley, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219, 220-21 (2014).

276. See *id.* at 247-48.

277. See *id.*

278. Brief of the Black Attorneys of Legal Aid et al., as Amici Curiae in Support of Petitioners, *New York State Rifle & Pistol Assoc., Inc. v. Cortlett*, 2021 WL 4173477 (2d Cir. July 20, 2021) (No. 20-843).

279. See *id.* at *16-*31.

280. See *id.* at *5.

the Baltimore Police Department in 2016.²⁸¹ The consent decree arose from the Department of Justice's investigation of the Baltimore Police Department's pattern and practice of Fourth and Fourteenth Amendment violations.²⁸² The OPD has subsequently sought to influence the Baltimore Police Department's policies on use of force,²⁸³ searches, stops, and arrest warrants,²⁸⁴ among others.²⁸⁵ The Legal Aid Society of New York has created a clinic that assists individual victims of police abuse file civilian complaints and seek additional legal assistance.²⁸⁶

Some defender organizations have used civil litigation to challenge the abusive dysfunction of criminal courts, jails, and prisons. The Department of Justice investigation into Ferguson, Missouri revealed how it had converted its municipal, criminal court into a profit generating enterprise that exploited poor people of color.²⁸⁷ The ArchCity Defenders, a purveyor of individual criminal and civil legal services,²⁸⁸ along with other groups, sued Ferguson and other municipalities to force reform.²⁸⁹ The San Francisco Public Defender used litigation to force criminal courts and prison officials to take steps to protect those in custody from COVID-19. The agency sued the criminal courts for

281. See MD. OFFICE PUB. DEF., MARYLAND OFFICE OF THE PUBLIC DEFENDER RECOMMENDATIONS FOR THE CONSENT DECREE BETWEEN THE DEPARTMENT OF JUSTICE AND THE CITY OF BALTIMORE (Sept. 2016), https://www.opd.state.md.us/_files/ugd/868471_d0904edf638543beb1cdc9e2e609954f.pdf [perma.cc/G296-HQ2W].

282. See *id.* at 5.

283. See MD. OFFICE PUB. DEF., *Comments from the Maryland Office of the Public Defender for Baltimore City Draft Use of Force Policy Training Curriculum* (Apr. 2019), https://www.opd.state.md.us/_files/ugd/868471_cea57b5e994347e6bb40e5714290cddf.pdf [perma.cc/QDN8-WJSJ]. See also MD. OFFICE PUB. DEF., *Public Defenders Testify About Police Violence and Misconduct Statewide; Need for Police Accountability, Transparency, and Reform* (Sept. 17, 2020, 1:00 PM), https://www.opd.state.md.us/_files/ugd/868471_fe219daf772345aaa1ae65c0054332ef.pdf [perma.cc/UKS5-S73U].

284. See MD. OFFICE PUB. DEF., *Comments from the Maryland Office of the Public Defender for Baltimore City. Draft Policies for Searches, Stops, Arrests and Warrants* (Sept. 2018), https://www.opd.state.md.us/_files/ugd/868471_9436d8265f7248ceb2252e2051e19e0d.pdf [perma.cc/R2QW-YWKH].

285. For the list of comments to the Baltimore Police Department, see *OPD Comments to the Baltimore Police Department*, MARYLAND OFFICE OF THE PUBLIC DEFENDER, <https://www.opd.state.md.us/copy-of-youth-resources-1> [perma.cc/6WRL-NMHB].

286. See *The Cop Accountability Project*, THE LEGAL AID SOC'Y, <https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project/> [perma.cc/3RFW-8Y8Q] (last visited Aug. 27, 2024).

287. See U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015).

288. See *How We Work*, ARCHCITY DEFS., <https://www.archcitydefenders.org/services/> (last visited Aug. 27, 2024) [perma.cc/BR9L-QFC2].

289. See Beth A. Colgan, *Lessons From Ferguson on Individual Defense Representation as a Tool of Systemic Change*, 58 WM. & MARY L. REV. 1171, 1209-10 (2017).

violating the speedy trial rights of those in pre-trial detention.²⁹⁰ The agency also brought a successful habeas suit on behalf of hundreds of prisoners held at San Quentin prison.²⁹¹ The court found that prison officials failures to release prisoners at risk of contracting COVID-19 caused twenty-nine prisoner deaths and constituted cruel and unusual punishment.²⁹²

Enterprising, relatively well-funded defender organizations have taken on policy advocacy as well. Legislative advocacy might sometimes flow organically from individual representation, as suggested by the Bronx Defenders' bail reform initiative. But identifying strategic opportunities to resist and reverse carceral interests' influence requires different skills than those required for individual criminal litigation.²⁹³ Some agencies have accordingly developed specialized capacity for policy advocacy by hiring trained personnel to that end.²⁹⁴

B. *Expanding Defenders' Role*

Defender funding has not featured prominently in activist and reformers' demands. This may reflect the romantic ideal's deep traction, meaning that it simply does not occur to progressive reformers that defenders might play a significant role in catalyzing systemic change.²⁹⁵ This creates a chicken and egg problem. Where defender organizations have not communicated any interest or capacity to advance systemic reform, there may be little impetus for activists and reformers to demand support for such. This does not require that a defender organization embrace any one of the examples above, let alone all of them. The embrace could be incremental and designed to achieve specific ends as local circumstances require. Some general guiding prescriptions that can be decocted from the discussion above follow.

290. See *San Francisco Public Defender Sues Court Over Trial Delays*, ASSOCIATED PRESS (Sept. 21, 2021, 8:02 PM), <https://apnews.com/article/business-health-trials-lawsuits-coronavirus-pandemic-341daa4f8ec83a34fba30e5bcad2905d> [<https://perma.cc/85S4-XMWZ>].

291. See Press Release, Office of the Public Defender, *Judge Rules CDCR Inflicted Cruel & Unusual Punishment on Incarcerated People at San Quentin During COVID-19 Pandemic*, S.F. PUB. DEF. (Nov. 18, 2021), <https://sfpublicdefender.org/news/2021/11/judge-rules-cdcr-inflicted-cruel-unusual-punishment-on-incarcerated-people-at-san-quentin-during-covid-19-pandemic/> [perma.cc/7GHT-JE5L].

292. See *id.*

293. Cf. *Steinberg*, supra note 264, at 987-88, 995, 997.

294. See, e.g., *Media & Policy*, ARCHCITY DEFS., <https://www.archcitydefenders.org/services/media-policy-advocacy/> [perma.cc/PCJ6-H686] (last visited Aug. 27, 2024); *Policy*, MD. OFF. PUB. DEF., <https://www.opd.state.md.us/policy> [perma.cc/C7U9-FADL] (last visited Aug. 27, 2024); *The Leadership*, S.F. PUB. DEF.'S OFFICE, <https://sfpublicdefender.org/the-leadership> [perma.cc/JP88-RW54] (last visited Aug. 27, 2024) (describing "Confront" function and leadership).

295. See *supra* Part I.A.

Public and community engagement. Defenders might cultivate deeper awareness of their actual (or potential) role in checking carceral interests. In jurisdictions that are inclined toward reformist politics—even if just episodically—defender agencies could more aggressively rely on public relations to emphasize important projects or cases that highlight carceral excess.²⁹⁶ Shifts in media coverage could be critical to disrupting a policy equilibrium that favors carceral interests.²⁹⁷ Baumgartner and Jones have explained that media tends to be focused on only one dimension of policy at a time, favoring those interests that have a policy monopoly.²⁹⁸ When media shifts focus to a different “dimension of the same policy, the tone of the coverage” can change dramatically, disrupting the existing policy monopoly.²⁹⁹

Defenders could promote systemic reform and bolster their own legitimacy by actively shaping how the media covers criminal enforcement policy. This would borrow a page from police history.³⁰⁰ Police administrators in the mid-twentieth century used public relations to bolster their image.³⁰¹ Police developed public relations expertise, feeding stories to the media that underscored the police’s crime-control efficacy.³⁰² The accrued political legitimacy helped police agencies consolidate arrangements that made funding and independence less politically contingent than they had previously been.³⁰³

Like the police, defenders accumulate a wealth of information about criminal enforcement. Defenders’ stories will underscore carceral targeting’s unfairness and illegitimacy. Making a stream of such instances available to the public could disrupt the sensationalist, crime-focused media environment.³⁰⁴ Each media story about police foiling crime might be counterbalanced with one about carceral excess. But PR need not turn on such tit for tat. Robust public relations might entail deep engagement with film makers and other visual artists to

296. See Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL’Y REV. 533, 546 (2007).

297. See BAUMGARTNER & JONES, *supra* note 23, at 107-08.

298. See *id.*

299. *Id.* at 109.

300. See *supra* notes 224-230 and accompanying discussion.

301. See *id.*

302. See *id.*

303. See *id.*

304. See Chermak & Weiss, *supra* note 239, at 510. Russell M. Gold and Kay L. Levine have argued that defenders should make greater use of social media to advance their own interests along with their clients’. Russell M. Gold and Kay L. Levine, *The Public Voice of the Defender*, 75 ALA. L. REV. 157, 166-68 (2023).

build durable public attitudes about the injustice of carceral practices.³⁰⁵

Building Partnerships. Defenders could also engage in coalition building with existing citizen groups and help create new ones. Coalition building can generate the political momentum necessary to disrupt settled policy equilibria.³⁰⁶ It can also serve to legitimize institutional actors.³⁰⁷ This again takes a page from police history.³⁰⁸ Police administrators in the mid-twentieth century recognized that working with community groups would inure to the police's benefit, securing political legitimacy and all the benefits that come with it.³⁰⁹ The same might hold true for defender organizations in at least some jurisdictions. Helping build citizen groups where they do not exist could help create membership-based, decarceral activism.³¹⁰

As the police examples suggest, effective public engagement is critical to both entrenchment and independence. Defender independence is foundationally compromised by their reliance on the public purse.³¹¹ Defenders have historically been leery of advertising their successes for fear of political reprisal.³¹² Many defender agencies avoid public-facing advocacy.³¹³ Some jurisdictions may even limit defenders from engaging in such advocacy as a condition of public funding.³¹⁴ Defender reticence may also reflect the use of "obscurity as a survival technique."³¹⁵ Where the public is reflexively hostile to Suspects, public-facing advocacy may be inflammatory and counterproductive.

Defenders' vulnerability makes it urgent to build up a well of public support as a bulwark against such reprisals. It may be that third-party groups are better positioned to be the face of systemic reform initiatives, whether political or legal. Where that is true, public defender agencies would do well to help cultivate and support such groups.

Building capacity. Ideally, line defenders responsible for individual cases would actively identify ways that their clients' experiences are relevant to systemic reform. Defenders' willingness to reimagine their

305. The San Francisco Public Defender is engaged in such an effort. See ADACHI PROJECT, <https://www.adachiproject.com/> [<https://perma.cc/NA96-RPR6>] (last visited Aug. 21, 2024).

306. See BAUMGARTNER & JONES, *supra* note 23, at 107-08.

307. See WILSON, *supra* note 236, at 273.

308. See *id.*

309. See *id.*

310. See notes 224 and accompanying discussion.

311. See Alex Bunin, *Public Defender Independence*, 27 TEX. J. C.L. & C.R. 25, 43-44 (2021).

312. See *id.*

313. See MCINTYRE, *supra* note 124, at 66-73.

314. See Mark H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, 29 N.Y.U. REV. L. & SOC. CHANGE 83, 103 (2004).

315. See MCINTYRE, *supra* note 124, at 73.

roles will inevitably be uneven. Organizations like those described in Part II.B.4 above already attract cause-oriented lawyers inclined to see connections between individual representation and the broader project of resisting the carceral state. Once present in critical mass, such attorneys are likely to propel systemic reform in a self-reinforcing cycle. Not all (or even most) line defenders need embrace a systemic conception of their jobs for their agency to begin advancing Suspects' collective interests.

Where possible, defender agencies might consider creating specialized capacity to perform tasks other than individual representation. This might, for instance, mean hiring a lobbyist, public relations expert, litigator who works on systemic reform issues, and so on. Where financial and other constraints prevent such hiring, defender agencies might seek out outsiders with expertise in these areas who might devote pro bono assistance to the agency.

Defenders tend to be resource-starved such that providing individual representation is difficult enough.³¹⁶ There is no doubt that line defenders are underpaid for what they already do.³¹⁷ Asking public defenders to advance systemic reform would heap more responsibilities upon an already substantial pile. State funding, largely captured by carceral interests already, will not be organically redirected to defenders. A new ideal for public defense that is collectivist might offer rhetorical and political tools for prodding the State to supply more resources.

CONCLUSION

How far American carceral policy has come seems intractably harsh. This is in part for lack of an agent who has the incentives and expertise to reform it. Public defenders are suited to filling that gap because they are uniquely positioned to advance Suspects' collective interests through systemic reform. This possibility is undercut by the individualized ideal of public defense that has been consecrated in Sixth Amendment jurisprudence and public discourse. The individualized ideal has led scholars, lawyers, and activists to overlook defenders' potential role as agents of collective action. Properly understood and supported, defenders can serve as a broad check on carceral interests in the legal, policy, and political arenas. This would serve to modulate American carceral policy for the benefit of Suspects and the broader political community. Reformists should thus prioritize

316. See Mano Raju, *What Happens When San Francisco and other Cities Drastically Underfund Public Defender Offices*, S.F. EXAM'R (Jun. 27, 2022), https://www.sfexaminer.com/our_sections/forum/what-happens-when-san-francisco-and-other-cities-drastically-underfund-public-defender-offices/article_4fd83662-f498-11ec-9ded-0bb0d4c0b11e.html [<https://perma.cc/Z5UL-PRU8>].

317. See Wright, *supra* note 163, at 222.

empowering defender agencies where they exist and building them where they do not.

