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Bargaining for Abolition

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BARGAINING FOR ABOLITION

Zohra Ahmed*

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INTRODUCTION

What if instead of seeing criminal court as an institution driven by the operation of rules, we saw it as a workplace where people labor to criminalize those with the misfortune to be prosecuted? Early observers of twentieth century urban criminal courts likened them to factories.¹ Since then, commentators often deploy the pejorative epithet “assembly line justice” to

* Assistant Professor, University of Georgia School of Law. This Essay was prepared for the Colloquium entitled *Subversive Lawyering*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 15–16, 2021, at Fordham University School of Law. The ideas in this piece emerged out of conversations with Rachel Foran, Puck Lo, Pilar Weiss, Andrea Ritchie, and Mariame Kaba. In 2020, Rachel Foran, Puck Lo, and I catalogued examples of direct action that could further abolitionist struggles, including the United Teachers of Los Angeles’s strike that I discuss here. See *Community Justice Exchange*, DIRECT ACTION FOR PRISON ABOLITION, <https://directactionzine.communityjusticeexchange.org> [<https://perma.cc/KA9Z-D4TD>] (last visited Mar. 4, 2022). I am grateful to John Pfaff for sharing his time explaining his empirical analysis. Thank you to the *Fordham Law Review*, the Center on Race, Law and Justice, and the Louis Stein Center for Law and Ethics for organizing the Colloquium and to Julia Hatheway, Luis del Rosario, and Mary Hornak for their excellent editorial assistance.

1. See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 81–82 (2018) (cataloging the various nicknames given to criminal courts, particularly misdemeanor courts, including assembly line processing, “McJustice,” or a supermarket, the term used by Malcolm Feeley).

describe criminal court's processes.² The term conveys the criticism of a mechanical system delivering a form of justice that is impersonal and fallible. Perhaps unintentionally, the epithet reveals another truth: criminal court is also a workplace, and it takes labor to keep it running. But beyond a metaphor, how might a sustained analysis of labor in criminal courts enhance our power of observation?

The social theorist who pioneered labor as a prism of analysis was Karl Marx.³ For Marx, human labor was the source of all value and the engine for world historical change.⁴ Marx's labor theory of value formed the building block to his philosophy of history: dialectical historical materialism.⁵ It is not abstract ideas that drove historical progress but rather the creative energy that humans poured into their efforts.⁶ But a person does not approach the world as an artist before a blank canvas.⁷ Rather, people live in a particular time in history and face specific limits that mediate their creative energies.⁸ It is from that dialectical alchemy of engaged human effort and historically contingent material conditions that an existing or an entirely new social

2. Matthew Clair points out that the term "assembly line justice" comes from Abraham Blumberg's 1967 book entitled *Criminal Justice*, in which he described how the courts administered "assembly line justice." See MATTHEW CLAIR, *PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT* 13 (2020). The U.S. Supreme Court used this term in *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

3. Marx adapted his theory of labor from David Ricardo and developed it in *Capital, Volume I*. See generally 1 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (Samuel Moore & Edward Aveling trans., Frederick Engels ed., 2018) (1887).

4. See generally Karl Marx, *Theses on Feuerbach*, in 1 MARX/ENGELS SELECTED WORKS 28 (1986).

5. See KARL MARX & FRIEDRICH ENGELS, *THE HOLY FAMILY, OR CRITIQUE OF CRITICAL CRITICISM* 116 (Richard Dixon & Clement Dutts trans., 1975) ("History does *nothing*, it 'possesses *no* immense wealth', it 'wages *no* battles'. It is *man*, real, living man who does all that, who possesses and fights; 'history' is not, as it were, a person apart, using man as a means to achieve *its own* aims; history is *nothing but* the activity of man pursuing his aims."); Letter from Friedrich Engels to J. Bloch (Sept. 21, 1890), https://www.marxists.org/archive/marx/works/1890/letters/90_09_21.htm [<https://perma.cc/NW47-MGHM>] ("According to the materialist conception of history, the *ultimately* determining element in history is the production and reproduction of real life.").

6. See KARL MARX & FREDERICK ENGELS, *THE GERMAN IDEOLOGY* 47 (C.J. Arthur ed., 1970) ("Morality, religion, metaphysics, all the rest of ideology and their corresponding forms of consciousness, thus no longer retain the semblance of independence. They have no history, no development; but men, developing their material production and their material intercourse, alter, along with this their real existence, their thinking and the products of their thinking. Life is not determined by consciousness, but consciousness by life.").

7. See KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 6 (Saul K. Padover trans., 2d ed. 1852) ("Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living.").

8. See Marx, *supra* note 4, at 29. Marx rejected a view of human effort that was uniquely individual: "[T]he human essence is no abstraction inherent in each single individual. In its reality it is the ensemble of the social relations." *Id.* As Graeber puts it, "one that sees society as arising from creative action, but creative action as something that can never be separated from its concrete, material medium." DAVID GRAEBER, *TOWARDS AN ANTHROPOLOGICAL THEORY OF VALUE: THE FALSE COIN OF OUR OWN DREAMS* 54 (2001).

structure can emerge.⁹ Inherently, Marx's theory of history held open the possibility for social transformation because of the weight he afforded to human agency. Because Marx wrote about a system—capitalism—in a way that he hoped could be useful to those working to overthrow it, it seems particularly apt to invoke his work in a colloquium dedicated to thinking about subverting legal systems.¹⁰

Although Marx developed his labor theory of value to elucidate the real dynamics animating commercial exchange, anthropologists like David Graeber have adapted his insights to other spheres of life.¹¹ Institutions, including legal ones, Graeber argues, are only as powerful and valuable as the human effort behind them.¹² Just as Marx scrutinized the dynamics of commodity exchange to discover the true source of economic value, Graeber encouraged scholars to study institutions and cultural practices as practical philosophies where people enact their “conceptions of what is ultimately good, proper, or desirable in human life.”¹³

With Graeber and Marx in mind, I offer three different ways to think about labor in criminal court: (1) labor as a source of sociological value, (2) labor as an input that generates certain measurable outcomes, and (3) labor as a vehicle to advance abolitionist reforms.

First, through their quotidian activities, criminal courts' workers enact a practical philosophy that communicates lessons about who and how we value each other. Drawing on ethnographic accounts, I argue that criminal courts' actors—prosecutors and judges, among others—engage in “violence work.”¹⁴ The violence is not only physical but also social and structural. Their labor weakens social bonds and entrenches group-level hierarchies, expressed as race, class, and ability.

Second, labor is an input that determines the size of the criminal punishment system. The addition of more prosecutors and their increased productivity lie at the heart of the historic growth in prison admissions at the

9. See MARX & ENGELS, *supra* note 6, at 47.

10. See Marx, *supra* note 4, at 30 (“The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it.”).

11. See GRAEBER, *supra* note 8, at 60–63.

12. Marx explains:

The chief defect of all hitherto existing materialism—that of Feuerbach included—is that the thing . . . , reality, sensuousness, is conceived only in the form of the *object* . . . or of *contemplation* . . . , but not as *human sensuous activity, practice*, not subjectively. Hence it happened that the *active* side, in contradistinction to materialism, was developed by idealism—but only abstractly, since, of course, idealism does not know real, sensuous activity as such.

Marx, *supra* note 4, at 28; see GRAEBER, *supra* note 8, at 60 (discussing the wisdom of structuralism developed by French psychologist Jean Piaget, “which starts from action, and views ‘structure’ as the coordination of activity”).

13. GRAEBER, *supra* note 8, at 1.

14. MICOL SEIGEL, VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE 11 (2018).

turn of the twentieth century.¹⁵ In turn, as advocates devise reforms to dismantle mass criminalization, shrinking prosecutors' offices may be the key to true transformation.

Third, labor is also a vital site for struggle. The labor lens illuminates the promise of a specific strategy: building social movement labor unionism in public defenders' offices. Unionized public defenders are uniquely positioned to leverage their working conditions as a platform to advocate for abolitionist reforms that benefit society more broadly: they can demand reductions to prosecutors' offices to reduce their caseloads and shrink the size of the criminal punishment system. Such a tactic subverts not only the continued operation of criminal courts but also traditional expectations of lawyers as experts leveraging their rarified skills. Instead, the lawyers position themselves as workers and members of the organized labor movement.

I. LABOR AS A SOURCE OF VALUE

In this part, I pay attention to criminal law's practitioners, the way they carry out their work, and the value they generate through their labor. Examining criminal court as a workplace offers a grounded material view of the institution. As Robert Cover explains, "the normative world building which constitutes 'Law' is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line."¹⁶ David Graeber strikes a similar note in his rough approximation of Marx's theory of value in noneconomic spheres: "[T]he value [of] . . . institution . . . is the proportion of a society's creative energy it sinks into producing and maintaining it."¹⁷ Graeber makes the obvious but perhaps clarifying point: the law is people and their "human-sensuous activity," as Marx would put it.¹⁸ The criminal process does not mechanically enact itself. Rather, coordinated human activity enlivens it. The form and the fruits of this concentrated human effort merit close scrutiny.

As criminal law's primary actors, and as the protagonists of criminal court, prosecutors and judges embody the law's characteristics. To build criminal law's moral universe, they deploy violent means and pursue violent ends acting on the bodies and lives of individuals accused of crimes.¹⁹ Prosecutors and judges, along with court officers, police officers, and corrections officers perform "violence work," to borrow Professor Micol Seigel's term.²⁰ They

15. JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 129 (2016).

16. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1605 (1986).

17. GRAEBER, *supra* note 8, at 55.

18. Marx, *supra* note 4, at 29.

19. Whether we adapt a retributivist or utilitarian view of punishment, both converge in their assessment that punishment is painful. See Kent Greenawalt, *Punishment*, in JOSHUA DRESSLER, *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1282, 1283 (Joshua Dressler ed., 2d ed. 2002) ("Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification.").

20. SEIGEL, *supra* note 14, at 11.

calibrate, rationalize, and allocate state coercion.²¹ Judges and prosecutors dispense physical violence most obviously at sentencing when they impose a stint in jail or prison.²² But sociologists of criminal court have long illuminated the punitive valence of criminal proceedings even before any trial has occurred, a conviction is obtained, and a person is sentenced. Indeed, more than forty years ago, Professor Malcolm Feeley declared this process to be punishment.²³

To extend the assembly line metaphor, if police place the person arrested on a conveyor belt, then prosecutors crank the pulley, keeping the process in motion to eventually ensure that a judge imposes some kind of penal discipline down the line.²⁴ Legal adjudication moves the conveyor belt forward—that is, in order for the defendant to progress from one stage to the next, a judge needs to issue a legal ruling. The process only moves forward by compelling the accused’s appearance, either by the threat of or by actual physical coercion in the form of pretrial detention.

Prosecutors perform the lion’s share of the adjudicative labor, making them the system’s most powerful actors.²⁵ Their charging decisions orchestrate the path of the case. Prosecutors determine whether a case will go to trial or be resolved with a plea.²⁶ One labor-saving maneuver that prosecutors consistently deploy is to charge the defendant with the highest possible offense to secure a plea and avoid a labor-intensive trial.²⁷ But they do not work simply to extract convictions. Professor Issa Kohler-Hausmann shows that assistant district attorneys in New York City use their charging power to bring the urban underclass under court supervision.²⁸ The district attorneys’ offices in New York City tend to assign quality-of-life cases to their new recruits, where they learn their craft by practicing on the lives of

21. *See id.*

22. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 27–37 (2019) (discussing the violence inside prisons and jails and demonstrating that confinement is not rehabilitative).

23. *See generally* MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (outlining the range of costs that individuals prosecuted in misdemeanor court in New Haven, Connecticut, incur when they contest their charges, including the costs of retaining counsel, lost wages, stress, and time).

24. *See generally* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2009).

25. *See generally* EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 *STAN. L. REV.* 1211 (2004); David A. Sklansky, *The Problems with Prosecutors*, 1 *ANN. REV. CRIMINOLOGY* 451 (2018).

26. PFAFF, *supra* note 15, at 130–32.

27. *Id.* at 133.

28. Kohler-Hausmann shows how even the most lenient disposition in criminal court—a deferred dismissal—still provides judges, police, and prosecutors with a tool to manage a huge pool of New Yorkers. *See* ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 72–74 (2018).

Black and Latinx New Yorkers.²⁹ The cases are often indistinguishable from one another; their pleadings mirror the boilerplate language in the police paperwork, which is itself reflective of the stubborn persistence of police quotas.³⁰ Kohler-Hausmann shows that district attorneys' offices pursue cases despite the fact that few will result in convictions.³¹ Some cases will even be dismissed by design or by neglect.³² But the cost of processing the case is displaced onto defendants who each have to return to court multiple times. For defendants, it means repeated court dates, lost wages, and lost time that court actors systematically devalue.³³

For each court date, to enter these courtroom's physical spaces, nonlawyers must endure a set of humiliating rituals. Every morning, even before the session begins, a long line of people with court dates hugs the corner of the building—in rain, snow, or shine.³⁴ The patient attendees wait, only to be greeted by court officers guarding the cold metal detectors. After they take off their outer garments and empty their pockets, those with court dates can expect a brisk pat down. Then, the interminable wait begins, before the court officer finally announces their cases. And, as prosecutors progress through their thick piles of case files, defendants endure repeated trips to court until their case is finally closed. Meanwhile, as the case is pending, the defendant's life hangs in the balance: even the seemingly benign mark of an open criminal case is apparent to employers, landlords, creditors, and school admissions officers who are given cause to deny a hopeful application.³⁵ When it finally comes down to resolving the case, prosecutors determine the ultimate disposition for quality-of-life offenses, based not on the strength of the case but rather on the accused's misfortune of being previously arrested for something else.³⁶

Although prosecutors are the most powerful violence workers in criminal court, they tend to minimize the amount of power they exercise over people's lives, "placing that responsibility onto other systems out of or beyond their control."³⁷ The defense attorney has an ambiguous relationship to this

29. See generally Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239 (2019).

30. See KOHLER-HAUSMANN, *supra* note 28, at 40–42; NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 69 (2016); Ahmed, *supra* note 29, at 271–72.

31. See KOHLER-HAUSMANN, *supra* note 28, at 68–69.

32. See *id.* at 150.

33. See VAN CLEVE, *supra* note 30, at 29.

34. See William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), <https://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html> [<https://perma.cc/73ES-G8B7>] ("The problems [in Bronx Criminal Court] are visible even before entering the courthouse on 161st Street, where the line to get inside often stretches down the block and around the corner.")

35. See KOHLER-HAUSMANN, *supra* note 28, at 66, 144–45, 267.

36. See *id.* at 72.

37. Alexandra L. Cox & Camila Grip, *The Legitimation Strategies of "Progressive" Prosecutors*, SOC. & LEGAL STUD. 1, 14, 17 (2021) ("The prosecutors' strategies of legitimation through displacement of responsibility and blame revealed the power that they

violence work. At their most powerful, defense attorneys can slow down the conveyor belt and create off-ramps to mitigate the work of their adversaries. However, defense attorneys cannot expect to disrupt the entire operation through their legal practice. At worst, the defense attorney legitimizes carceral control by providing the illusion of due process.³⁸

Prosecutors, as they apply the criminal law, narrow the court's attention to the singular individual act. Their prerogative to blame obfuscates the conditions outside of the individual's control that makes criminalization almost inevitable.³⁹ Prosecutors blindfold themselves to the structural conditions that shape who the police place on the assembly lines. But their adherence to the myth of personal responsibility conflicts with the evidence. Sociologists ascribe urban interpersonal violence, like homicide, to conditions of extreme segregation.⁴⁰ But criminal law focuses primarily on the person who pulls the trigger. Even when prosecutors consider mitigation, they still operate within the bounds of retributive justice, applying the defendant's social history as a discount against the accused's blameworthiness.⁴¹ Their work minimizes state failure and emphasizes personal responsibility. Indeed, prosecutors are the cult of personal responsibility's most faithful practitioners.

This methodological individualism entrenches group-level differences. In Chicago's Cook County, sociologist Nicole Gonzalez Van Cleve captures the tenor of the conversation between courtroom insiders as they negotiate case

have to shape the meaning of 'fairness' in the context of their cases. For them, a fair or neutral approach to cases is one that was not only 'race blind' but also neutral with respect to the facts of a case.'").

38. See FEELEY, *supra* note 23, at 290 (arguing that constitutional rights for defendants in criminal proceedings "may function largely as hollow symbols of fairness or at best as luxuries or reserves to be called upon only in big, intense, or particularly difficult cases."); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2201 (2013) ("[P]rocedural rights [such as the right to counsel] may be especially prone to legitimate the status quo, because 'fair' process masks unjust substantive outcomes and makes those outcomes seem more legitimate. In contrast, a right to a minimum wage, while it may legitimate unequal distribution of wealth, substantively improves the condition of the least well-off in material ways.").

39. See Barbara H. Fried, *Beyond Blame*, BOSTON REV. (June 28, 2013), <https://bostonreview.net/forum/barbara-fried-beyond-blame-moral-responsibility-philosophy-law> [<https://perma.cc/S9JH-QB2B>].

40. See generally Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PENN. L. REV. 1203 (1995).

41. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1459 (1997) ("The notion that a defendant's crime stems entirely from his evil makeup and that he therefore deserves to be judged and punished exclusively on the basis of his presumably free, morally blameworthy choices is rooted in a longstanding cultural ethos that capital jurors (like most citizens) have been conditioned to accept uncritically. Add to this the well-documented tendency of most people to commit . . . the 'fundamental attribution error' As a result, the typical juror's preexisting framework for understanding behavior is highly compatible with the basic terms of the typical prosecutorial narrative."); VAN CLEVE, *supra* note 30, at 62.

resolutions.⁴² Van Cleve shows how the discourse of crime and its attendant discourse of personal responsibility serves as the civil way to launder discussions of racial hierarchies in racially neutral ways.⁴³ Defendants' ascribed personal characteristics feature prominently.⁴⁴ Van Cleve traces the logical and linguistic slippages in courtroom actors' negotiations: the defendant's poverty becomes ascribed to their laziness.⁴⁵ A past trauma solicits fear rather than empathy.⁴⁶ The lawyers broker deals by trading on pseudosociological tropes: broken families, absent fathers, and dependent mothers.⁴⁷ White courtroom insiders awkwardly appropriate African-American vernacular to speak about Black defendants.⁴⁸ These ways of speaking parallel the pervasive racial discrimination that taints every aspect of the court system.⁴⁹ In this way, criminal legal processes play a critical role in constructing racial hierarchy. Prosecutors and judges reserve their more punitive criminal court sanctions for Black defendants, all other things being equal, particularly in drugs and weapons prosecutions and in the juvenile justice system.⁵⁰ The latter has the effect of "creating a cumulative record of disadvantage over the life course."⁵¹

Other state-produced vulnerabilities become liabilities in court. Criminal courts are public institutions that almost exclusively regulate the poor and the working class.⁵² This is not a coincidence: policy makers in the 1970s anticipated prison constructions based on the number of men who were

42. See VAN CLEVE, *supra* note 30, at 5.

43. See *id.* at 53–62; Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through "Colorblind" Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQUIRY 406, 407 (2015) ("Operating together, they produce and promote the illusion of racial neutrality in criminal justice research while exacerbating racial disproportionality in practice."). See generally Rebecca Richardson Dunlea, "No Idea Whether He's Black, White, or Purple": Colorblindness and Cultural Scripting in Prosecution, CRIMINOLOGY (forthcoming 2022) (finding that prosecutors in Florida seek to approach their cases without accounting for racial disparities).

44. Malcolm Feeley similarly documents that the accused's personal characteristics feature prominently in plea negotiations. See FEELEY, *supra* note 23, at 162.

45. See VAN CLEVE, *supra* note 30, at 65.

46. See *id.* at 111.

47. See *id.* at 91.

48. See *id.* at 60.

49. See Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. (forthcoming 2022) (manuscript at 13 nn.72–73) (on file with authors) (discussing the research on racial bias in criminal court).

50. See Allen J. Beck & Alfred Blumstein, *Racial Disproportionality in U.S. State Prisons: Accounting for the Effects of Racial and Ethnic Differences in Criminal Involvement, Arrests, Sentencing, and Time Served*, 34 J. QUANT. CRIMINOLOGY 853, 877–78 (2018); KATHERINE J. ROSICH, AM. SOC. ASS'N, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM 10 (2007) ("There is consensus among researchers that the most widespread forms of racial discrimination in the American justice system occur in the treatment of juvenile offenders.").

51. ROSICH, *supra* note 50, at 1, 9.

52. See Press Release, Prison Pol'y Initiative, Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html> [<https://perma.cc/QKZ7-HKBD>].

unemployed.⁵³ Yet, despite the overrepresentation of poor people in criminal court, being poor systematically disadvantages defendants and undermines their cases in court.⁵⁴ Court fines and fees, incarceration, and lost wages further immiserate defendants.⁵⁵ Criminal courts' processes and the punishment that they dispense also frequently weaponize expressions of neurodivergence, transforming neurocognitive differences into disabilities.⁵⁶

Criminal courts' violence is thus not just physical but also structural.⁵⁷ To borrow scholar Ruth Wilson Gilmore's formulation, the criminal punishment system's practitioners "exploit and renew *fatal* power-difference couplings."⁵⁸ Gilmore elaborates: "There is no difference without power, and neither power nor difference has an essential moral value. Rather, the application of violence—the cause of premature deaths—produces political power in a vicious cycle."⁵⁹ Gilmore draws attention to the legal and extralegal processes, such as racism, ableism, and classism that produce group-level hierarchies.⁶⁰ Criminal procedure participates in these processes, exploiting and reconstructing differences that stratify individuals with life-altering consequences.⁶¹ The criminal punishment system shortens people's lives and inflicts psychological and emotional pain.⁶²

Criminal law's physical and structural violence weakens social bonds. But that disintegration is also a cause: it is precisely the lack of social solidarity that makes this multidimensional violence possible. When prosecutors make charging decisions, they stigmatize defendants as blameworthy and castigate them as unruly, harmful, or dangerous. They inherently assign value to

53. See RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 72 (2007) ("If NAIRU [Non-Accelerating-Inflation Rate of Unemployment] explains the systemic existence of the relative surplus population in the most abstract neoclassical macroeconomic terms, its sociological presence is bounded by the fatal coupling of power and difference, which resolves relationally according to internally dynamic but structurally static racial hierarchies."); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 175 (2016) (arguing that, although policymakers, law enforcement officials, and scholars working for the Nixon administration justified increased prison construction by citing to high rates of reported crime, the "incarceration rates had little relationship to actual crime rates" and that "[i]nstead, incarceration rates correlated directly to the number of black residents and the extent of socioeconomic inequality within a given state").

54. See CLAIR, *supra* note 2, at 13.

55. See Clair & Woog, *supra* note 49, at 15–18 (cataloging criminal courts' economic predation).

56. See generally Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, UCLA L. REV. (forthcoming 2022).

57. See Paul Farmer, *On Suffering and Structural Violence: A View from Below*, 125 DÆDALUS 261, 274 (1996).

58. Ruth Wilson Gilmore, *Fatal Couplings of Power and Difference: Notes on Racism and Geography*, 54 PRO. GEOGRAPHER 15, 16 (2002).

59. *Id.*

60. *See id.*

61. *See id.*

62. See Sandhya Kajeepeta, *Community Spread*, INQUEST (Dec. 9, 2021), <https://inquest.org/community-spread/> [<https://perma.cc/H27J-EJJY>].

persons and behaviors, identifying who deserves our collective wrath and who merits our solidarity. Their adjudication instructs not only those directly entangled in criminal courts but also the public at large.

Criminal law's practitioners engage in physical, structural, and social violence: they force people into cages or, at least, they threaten to; they exacerbate and reconfigure group-level differences that put those who are criminalized at a distance from the levers of social, economic, and political power; and they undermine social solidarity by erecting fault lines between guilty and innocent.⁶³ Taking a step back and opening the aperture, criminal courts' workers communicate lessons about who and what society ought to value. These moral lessons are not always explicit or consistent, and they exist only in human action. In turn, to erect a different theory of value would thus require criminal court actors to perform their work differently, or to stop altogether.

II. LABOR AS MATERIAL INPUT

Quantitative analysis confirms the qualitative picture above: greater investment in labor, specifically in violence workers, played a critical role in the historic explosion of the U.S. criminal punishment system.⁶⁴ Yet, surprisingly few reform efforts recognize the relationship between the size, scope, and power of the criminal punishment system and the number of violence workers it employs.⁶⁵ Although the scale and intensity of carceral institutions provoked a consensus that something is terribly wrong about the American criminal punishment system, the solutions implemented have produced mixed results: while the number of people who are incarcerated has decreased, the net of carceral supervision has also extended to new domains.⁶⁶ Popular reforms purporting to address the crisis of mass incarceration often select a narrow set of metrics to diagnose the size, scope,

63. See Gilmore, *supra* note 58, at 16.

64. See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1241 (2013).

65. See CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS IN POLICING, https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf [https://perma.cc/KS8Z-DFZA]; see also CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT (2021), http://criticalresistance.org/wp-content/uploads/2021/02/CR_abolitioniststeps_antiexpansion_2021_eng.pdf [https://perma.cc/2A6P-AGSC]. Critical Resistance is a prison abolitionist advocacy group, founded in 1997, that pioneered arguments explaining why reformers ought to aim for reforms that shrink the size, scope, and power of police departments, rather than those that deliberately or inadvertently expand their power. CRITICAL RESISTANCE, <http://criticalresistance.org/> [https://perma.cc/EX36-CNYC] (last visited Mar. 4, 2022).

66. For example, as an apparent solution to aggressive drug prosecutions, jurisdictions around the country embraced drug courts; yet, these alternative mechanisms have widened the net of surveillance by criminal courts. See Scott H. Decker, *A Systematic Analysis of Diversion: Net Widening and Beyond*, 13 J. CRIM. JUST. 207, 207 (1985); Morris B. Hoffman, *The Rehabilitative Ideal and the Drug Court Reality*, 14 FED. SENT'G REP. 172, 172 (2001–2002). See generally Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004).

and power of the system.⁶⁷ This misaccounting rests in a misrecognition of labor power. Efforts in Seattle, Washington, however, stand out as an exception; there, advocates have called for reductions in the number of violence workers employed in the city's misdemeanor courts.⁶⁸

A. Prosecutors' Labor Power Fueled Mass Incarceration

At any given moment, the number of people accused of crimes and the number of criminal cases pending in a courthouse depend, in part, on labor power, particularly the labor power of police and prosecutors. How much they work and how intensely they perform their labor controls the number of arrests, filings, and the power of carceral institutions.

Professor John Pfaff has established that more prosecutors and more productive prosecutors played a significant role in fueling prison admissions during the historic incarceration boom at the turn of the twentieth century. As reported crime rates rose sharply between the 1970s and the 1990s, including a 100 percent increase in the reported rate of violent crime, prosecutors' offices hired approximately 3,000 more prosecutors nationally to reach a total of about 20,000 on staff—representing a 17 percent increase in staffing levels.⁶⁹ As crime fell between 1990 and 2007 by 35 percent, another 10,000 prosecutors were hired, swelling their ranks to 30,000.⁷⁰ As the number of reported crimes decreased, arrests decreased too; but as Pfaff shows, with more staff, prosecutors could invest more time and attention to a smaller case load than before.⁷¹

The result: prosecutors filed more felony charges per arrest than they ever had before.⁷² Prosecutors used their glut of resources to ratchet up charges. Pfaff shows that it was precisely the increase in felony filings per arrest that drove up prison admissions, making prosecutors the protagonists in the story of mass incarceration. Their offices' capacities to hire more prosecutors and, in turn, those prosecutors' decisions to file charges, and specifically to file

67. I borrow this materialist heuristic size, scope, and power analysis from a recent piece written by Rachel Foran, Mariame Kaba, and Katy Naples-Mitchell on abolitionist approaches to prosecutor organizing. See Rachel Foran et al., *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. C.R. & C.L. 496, 518 (2021).

68. 2022 SOLIDARITY BUDGET 2 (2021), <https://docs.google.com/document/d/1LK2XaZQPJsvOQbdA18lulUa3FnbanrW5D4LwEym6zEI/edit#heading=h.77hx6w52engx> [<https://perma.cc/Z3JY-GZBJ>] (“Seattle’s historic overinvestment in policing and punishment as a response to social problems began a long-overdue reversal in 2020. This year, we demand that the divestment from SPD continue, and that Seattle commit to shrink other parts of the policing pipeline by defunding the municipal court and the criminal division of the City Attorney’s office.”); see *infra* Part II.C.

69. See PFAFF, *supra* note 15, at 129.

70. *Id.*

71. *See id.*

72. *See id.*

felony charges, best explains prison growth.⁷³ Pfaff explains, “Even if individual prosecutors were no more aggressive than prosecutors in the past, the increase in staff size would lead to more cases even as crime declined.”⁷⁴ His data suggests that reforms aiming to change the culture of aggressive prosecutions within prosecutors’ offices are taking aim at the wrong target if they do not simultaneously address funding and staffing levels.⁷⁵ The most significant increases in staff took place in urban settings where prison populations have been declining since the beginning of the twenty-first century.⁷⁶

Pfaff’s conclusions demonstrate that labor is critical to understanding the development of the American penal system. And although Pfaff himself never recommends this,⁷⁷ his empirical analysis suggests that reducing staff levels and labor hours in prosecutors’ offices may be a fertile starting point for reformers seeking to reduce prison admissions and the number of people under carceral supervision. Yet, despite Pfaff’s findings and their intuitive appeal, the size of the labor force participating in criminal court is rarely the object of reformers’ scrutiny.

B. *The Misaccounting of Size*

In the past decade, across the country, a wide swath of the political spectrum has converged to decry mass incarceration and, to a lesser extent, mass criminalization. From the so-called bipartisan consensus on criminal justice reform to the abolitionist left, these voices draw our attention to nearly two million people in confinement and six million under some form of carceral supervision.⁷⁸ In turn, reformers have argued for shrinking the system so that it harms fewer people, although their reasons and tactics

73. See generally John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (Jan. 23, 2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508 [<https://perma.cc/P5W7-ZJW4>]. Pfaff runs through various possible explanations for the United States’s prison growth, including longer sentences, more arrests, and more crime, but through a process of elimination, Pfaff finds that prison admissions closely track felony filings, an output that the prosecutor controls. See *id.* at 3 (“Prison admissions grew by approximately 35% between 1994 and 2008, even while the crime rate and the total number of arrests fell. But during that same time, felony filings rose by approximately 35% as well, but admissions per filing remained flat.”).

74. PFAFF, *supra* note 15, at 130.

75. For an example of culture change reforms, see ETHAN LOWENS ET AL., PROSECUTORIAL CULTURE CHANGE: A PRIMER (2020), <https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5f5172984adc463c0254bb65/1599173273238/IIP+Prosecutorial+Culture+Change+FINAL.pdf> [<https://perma.cc/49UT-MADP>] (offering “recommendations designed to encourage prosecutors to think critically about the history of their institutions and foster in-depth conversations about current policy and ways to bring about sustainable change”).

76. See JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. FOR JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 12 (2017) (juxtaposing the continuing rise in jail populations in rural counties against the decline in urban counties).

77. See PFAFF, *supra* note 15, at 185–210.

78. See LAURA M. MARUSCHAK & TODD D. MINTON, BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2017–2018, at 1 fig.1 (2020).

vary.⁷⁹ There is a lack of clarity and agreement about the best metric to evaluate the system's size:⁸⁰ Is it the number of people confined? Is it the number of people arrested? Or is it the amount of public money it absorbs? Most tend to focus on the number of people under penal control, and to some extent, the intensity of their criminalization.⁸¹ While some reforms have reduced the number of people who are incarcerated, others have widened the net of carceral supervision, allowing people to remain in society but requiring them to submit to surveillance outside of prison.⁸²

Furthermore, although the size of the American penal system has attracted national condemnation, for reformers, it is not the system's only vice. Reformers have devised proposals that purport to address other concerns: its racial disproportion,⁸³ its predation,⁸⁴ its harsh retributive edge,⁸⁵ and the lack of due process,⁸⁶ to name a few. Many proposals directed at criminal court that purport to address these criticisms are in fact agnostic about size,

79. See Taylor Pendergrass, *We Can Cut Mass Incarceration by 50 Percent*, ACLU (July 12, 2019, 10:00 AM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/we-can-cut-mass-incarceration-50-percent> [https://perma.cc/6PZZ-HYF8]; *About*, RIGHT ON CRIME, <https://rightoncrime.com/about> [https://perma.cc/UEC3-PZZW] (last visited Mar. 4, 2022) (“We want a prison system that incapacitates dangerous offenders and career criminals but which is not used in such a way that makes nonviolent, low-risk offenders a greater risk to the public upon release than before they entered.”). *But see* Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent> [https://perma.cc/44P7-DJUK] (“Though there is a strong bipartisan movement for sentencing reform, discomfort with allowing violent criminals to avoid prison time or to serve much shorter sentences has left prominent conservatives reluctant to echo the call to ‘Cut50’ [percent of the prison population].”). For the abolitionist left, size is not the only criticism or even the most important one leveled at the carceral state, but rather the focus is on its very existence. See JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUST., *HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED?* 7 (2016) (“[A]n estimated 39 percent (approximately 576,000 people) are incarcerated with little public safety rationale. They could be more appropriately sentenced to an alternative to prison or a shorter prison stay, with limited impact on public safety.”); *c.f.* *Analysis & Vision*, SURVIVED AND PUNISHED, <https://survivedandpunished.org/analysis> [https://perma.cc/ZB7R-9958] (last visited Mar. 4, 2022) (identifying that “nearly 60% of people in women’s prison nationwide, and as many as 94% of some women’s prison populations, have a history of physical or sexual abuse before being incarcerated” and calling for the “immediate release of survivors of domestic and sexual violence and other forms of gender violence who are imprisoned for survival actions.”).

80. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 302–08 (2018).

81. See *id.* There is also a great amount of focus on overcriminalization. *Id.*

82. See *id.*

83. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 221–63 (2012).

84. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1099 (2015) (describing how “lower criminal courts are being reconceptualized and repurposed as revenue sources”).

85. See generally FEELEY, *supra* note 23; SERED, *supra* note 22, at 27–37; see also JOSEPH MARGULIES & LUCY LANG, INST. FOR INNOVATION IN PROSECUTION AT JOHN JAY COLL., *PROSECUTORS AND RESPONSES TO VIOLENCE 2* (2019).

86. See *id.*

or they expand the size, scope, and power of the system in new ways.⁸⁷ Many direct more resources to the institutions staffing criminal court.⁸⁸ Shrinking the system has been an elusive and inconsistently pursued goal.

For example, consider the bail reform movement: although organizers have challenged monetary bail, pretrial supervision remains firmly entrenched.⁸⁹ In their appraisal of national bail reform efforts, the abolitionist groups Critical Resistance and the Community Justice Exchange observed that, instead of eliminating or shrinking the legal grounds for pretrial supervision, new bail legislation has substituted one form of supervision with another.⁹⁰ For example, the new laws replace cash bail with electronic monitoring, social service monitoring, or even preventative detention.⁹¹ Reforms have not only widened the net of pretrial supervision; they have or will foreseeably increase the labor force in criminal courts—for instance, by hiring more staff to operate pretrial services and additional judges to adjudicate bail hearings.⁹² Efforts in Illinois are the exception: legislation passed in 2020 eliminated cash bail, constrained judges’ authority to impose pretrial detention, and facilitated opportunities for release.⁹³

87. See, e.g., BRENNAN CTR. FOR JUST. & THE JUST. COLLABORATIVE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 4 (2018), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [<https://perma.cc/3W5L-TLXL>] (encouraging prosecutors to make diversion their default practice when handling cases by designing programs that “keep people in the community instead of locked up”).

88. Critical Resistance has most clearly articulated the importance of paying attention to objective material indicators, like the size and amount of resources, when assessing the merits of reforms to policing and prisons. See *Reformist Reforms or Abolitionist Reforms?: How to Chip Away at the PIC*, CRITICAL RESISTANCE, <http://criticalresistance.org/resources/abolitionist-tools/> [<https://perma.cc/YT5W-BG2K>] (last visited Mar. 4, 2022).

89. I am a consultant to the Community Justice Exchange. See CRITICAL RESISTANCE & CMTY. JUST. EXCH., ON THE ROAD TO FREEDOM: AN ABOLITIONIST ASSESSMENT OF PRETRIAL AND BAIL REFORMS 16–17 (2021).

90. See *id.* at 17.

91. See *id.* at 18.

92. In New Jersey,

[t]he 2017 legislation added significant resources to the state’s pretrial services system, including creating an entire department to oversee the new law and hiring new Superior Court judges to implement it. In 2018, the state’s new pretrial services department had to seek additional state funding beyond the court filing fees that had originally been designated to cover its budget.

Id. at 17. In California, bail reform “increased funding to probation departments for increased surveillance.” *Id.* at 28. In Harris County, the lawsuit settlement that brought about changes to rules regulating pretrial detention added “funding to the PIC [prison industrial complex] to create and oversee the new release and supervision system.” *Id.* at 38. In New York State, “[b]ecause ‘release under non-monetary conditions’ is now baked into state law, counties that previously only used ROR and bail will need to create pretrial supervision programs, and some counties will likely rely on existing supervision programs like probation.” *Id.* at 46. In San Francisco, the policy of the District Attorney’s Office “did not lead to a decrease in funding or resources for the prosecutor’s office itself, the judiciary or courts, or pretrial services.” *Id.* at 52.

93. See Sharlyn Grace, *Organizers Change What’s Possible*, INQUEST (Sept. 23, 2021), <https://inquest.org/organizers-change-whats-possible> [<https://perma.cc/4TKU-K7YY>].

Legislatures have also contemplated rewriting their discovery and speedy trial statutes to ensure that the defense gets adequate notice before a trial or a plea and that cases are resolved in a timely manner.⁹⁴ Ultimately, these efforts are indifferent to scale. Such changes could lead to fewer cases in the system: with more onerous requirements to pursue a case, prosecutors may need to be more selective about which cases to charge. However, these rule changes do not prohibit prosecuting offices from seeking and receiving more funding to comply with the more demanding process. This is exactly what occurred in New York State after the defense bar secured these legislative wins.⁹⁵

Alternatives to incarceration have been widely embraced as a solution to the problem of mass incarceration.⁹⁶ Problem-solving courts have proliferated to ostensibly address issues like substance dependency, mental health struggles,⁹⁷ and some of the unique challenges that veterans⁹⁸ and trafficking survivors endure.⁹⁹ These problem-solving courts attempt to engage individuals in therapeutic interventions, backed by the threat of criminal sanction.¹⁰⁰ Professors Aya Gruber, Amy Cohen, and Kate Mogulescu call these interventions a form of “penal welfare.”¹⁰¹ Social workers, case managers and not-for-profit agencies are enlisted in the service of providing alternatives to incarceration and in monitoring and reporting individuals who fail to accept their services.¹⁰² Prosecutors’ offices and

94. See N.Y. CRIM. PROC. LAW § 245.10 (McKinney 2021) (new discovery rules effective May 3, 2020); id. § 30.30 (speedy trial rules effective January 1, 2020).

95. In New York State, for example, after these two reforms were implemented in 2019, the District Attorneys Association of the State of New York requested additional funding from the legislature to hire more staff to guarantee compliance with the new laws. See David Hoovler, President, District Att’y’s Ass’n of the State of N.Y., Codes Implementation of Pretrial Discovery Reform Before the New York State Senate Standing Committee (Sept. 9, 2019), https://www.nysenate.gov/sites/default/files/public_hearing_09_09_2019_testimony_1_of_2_1.pdf [<https://perma.cc/G8DS-F96X>]; Karen Dewitt, *NY’s DA’s Say They Need More Money For Reforms*, WAMC (Nov. 9, 2019, 12:00 PM), <https://www.wamc.org/new-york-news/2019-11-09/nys-das-say-they-need-more-money-for-reforms> [<https://perma.cc/C6CR-KPZD>].

96. See PUB. OP. STRATEGIES & THE MELMAN GRP., PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA (2012); *Protecting Communities and Building Trust by Reforming Our Criminal Justice System*, DEMOCRATS, <https://democrats.org/where-we-stand/party-platform/protecting-communities-and-building-trust-by-reforming-our-criminal-justice-system/> [<https://perma.cc/7YA5-6YBL>] (last visited Mar. 4, 2022).

97. See BAZELON CTR. FOR MENTAL HEALTH L., THE ROLE OF MENTAL HEALTH COURTS IN SYSTEM REFORM (2018).

98. See NIJ’s *Multistate Evaluation of Veterans Treatment Courts*, AM. UNIV., <https://www.american.edu/spa/jpo/nij-multisite-evaluation.cfm> [<https://perma.cc/DKR9-59RV>] (last visited Mar. 4, 2022).

99. See Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1337 (2016).

100. See *id.*

101. *Id.*

102. See Leah Wang & Katie Rose Quandt, *Building Exits Off the Highway to Mass Incarceration: Diversion Programs Explained*, PRISON POL’Y INITIATIVE (Jul. 20, 2021), <https://www.prisonpolicy.org/reports/diversion.html> [<https://perma.cc/232N-M83Q>].

courts have also hired their own social workers and case managers to coordinate supervision and monitor compliance.¹⁰³ These tend to expand rather than shrink the labor pool of those contributing to the criminal punishment system.¹⁰⁴

Another common proposal for reform is enhancing funding for public defense to hire more staff and enhance their capacity for zealous representation.¹⁰⁵ A recent study shows that holistic defense—specifically, representation that focuses not only on the criminal case but also on its collateral consequences—can reduce the future likelihood of a custodial arrest and shave off jail time for people prosecuted in Bronx Criminal Court.¹⁰⁶ But the study revealed that holistic representation had no impact on conviction rates.¹⁰⁷ So far, even in relatively well-resourced jurisdictions, like New York City, where the study took place, individual representation is not a countervailing force sufficient to shrink the criminal punishment system.

When it comes to prosecutors, Pfaff, for example, advocates for reforms that limit prosecutors' power in plea negotiations.¹⁰⁸ With those restraints, defendants might be more likely to take a case to trial, potentially forcing prosecutors to reduce their caseload. But nothing stops prosecuting offices from hiring more staff to absorb the expanded trial docket. Other recommendations that he offers, such as drafting enforceable guidelines that compel prosecutors to dismiss cases¹⁰⁹ and creating incentives that orient

103. For example, in 2016, the Manhattan District Attorney created the “Alternatives to Incarceration Unit” and hired social workers who were tasked with screening defendants seeking alternatives to incarceration. *See About the Office: Bureaus and Units*, DIST. ATT'Y OF N.Y. CNTY., <https://web.archive.org/web/20211220140535/https://www.manhattanda.org/about-the-office/bureaus-and-units/> (last visited Mar. 4, 2022) (“Created by District Attorney Vance in 2016, our Alternatives to Incarceration Unit is the first of its kind of [sic] in New York City. Our ATIU reduces unnecessary prosecution and incarceration by identifying community-based diversion and supervision options in appropriate cases, following up with defendants to check on their progress in the community, and sharing data on the effectiveness of these alternatives.”).

104. *See supra* notes 89–103 and accompanying text.

105. *See, e.g.*, BRYAN FURST, BRENNAN CTR. FOR JUST., *A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY* (2019).

106. In a ten-year study of over half a million cases comparing case outcomes between two providers—one a holistic defense provider (the Bronx Defenders) and the other a traditional defender (the Legal Aid Society), which operate side-by-side in the same court system—the researchers found that holistic representation did not affect or lower conviction rates, but rather reduced the likelihood of a custodial sentence by 16 percent and expected sentence length by 24 percent, leading to nearly 1.1 million fewer days of custodial punishment. *See* James Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 823 (2019). As the study points out, there is a dearth of empirical research to determine what works in indigent defense. *See generally id.*

107. *See id.* at 823. Paul Butler, Alexandra Natapoff, and others have argued that representation has rarely proven sufficient to counteract the forces of criminalization. *See* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1057 (2013). *See generally* Butler, *supra* note 38.

108. *See* PFAFF, *supra* note 15, at 212.

109. *See id.*

prosecutors toward the most serious offenses,¹¹⁰ might change the kinds of cases that prosecutors pursue. However, they do not guarantee a reduction in the number of people affected by criminal courts. Rather, these reforms try to equalize the playing field between the defense and the prosecution.

In a different vein, recently, candidates for state and district attorney offices have successfully campaigned on the promise of shrinking the jail and prison populations. State's Attorney for Cook County, Illinois, Kim Foxx, ran for office on the promise of lightening the touch of the criminal punishment system.¹¹¹ A few years later, her office released data showing that it had filed fewer felony charges than her predecessor's had.¹¹² Philadelphia District Attorney Larry Krasner has similarly reduced the number of people in the local jail and pursued fewer cases.¹¹³ In homicide cases, Krasner vowed not to always charge the highest grade of murder.¹¹⁴ Yet, his office has also asked for more funding to hire more staff.¹¹⁵ By contrast, in the 2021 Manhattan District Attorney race, several candidates promised to cut funding to their office following public pressure.¹¹⁶ The victor, Alvin Bragg, promised "to reduce his staff in accordance with falling crime rates, and to stop requesting more money for the DA's budget every

110. *See id.* at 213 (advocating, inter alia, that defendants serve time in county jails rather than state facilities so that county-funded prosecutors see the fiscal impact of their charging and plea bargaining decisions).

111. *See* Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county> [<https://perma.cc/UJR7-H4MC>].

112. *See id.*

113. *See* Joshua Vaughn, *The Successes and Shortcomings of Larry Krasner's Trailblazing First Term*, APPEAL (March 22, 2021), <https://theappeal.org/the-successes-and-shortcomings-of-larry-krasners-trailblazing-first-term/> [<https://perma.cc/J2XE-MTGA>]; Michael D'Onofrio, *Krasner Fights Impending \$8.7M Budget Cut to DA's Office*, PENN. CAP.-STAR (June 9, 2020, 7:36 AM), <https://www.penncapital-star.com/criminal-justice/krasner-fights-impending-8-7m-budget-cut-to-das-office/> [<https://perma.cc/E8XE-PYL8>] ("The first-term district attorney proposed a more than \$43 million budget, up 11% over last year's budget, to pay for 27 new positions, including detectives, and other initiatives, like replacing the office's aging case management system. The hires are critical for his office and would ensure prosecutions and the courts function properly, Krasner said.").

114. *See* Samantha Melamed & Chris Palmer, *When Is Killing 'Murder'? Philly DA Larry Krasner Rethinks Homicide Prosecutions*, PHILA. INQUIRER (Nov. 14, 2018), <https://www.inquirer.com/philly/news/larry-krasner-murder-cases-philadelphia-district-attorney-20181114.html> [<https://perma.cc/MEC9-A834>].

115. Chris Palmer, *Philly DA Larry Krasner Asks City Council for 13% Funding Increase*, PHILA. INQUIRER (Apr. 24, 2018), <https://www.inquirer.com/philly/news/crime/philadelphia-district-attorney-larry-krasner-city-council-13-percent-funding-increase-mayor-kenney-20180424.html> [<https://perma.cc/EED9-42EV>].

116. *See* FIVE BORO DEFENDERS, MANHATTAN DA RACE 2021 (2021) (evaluating candidates according to the harm that they pose, including whether they are willing to defund their own offices).

year,” but has also suggested that he will need more money to prosecute domestic violence offenses.¹¹⁷

Organizers Rachel Foran, Katy Naples-Mitchell, and Mariame Kaba have remarked on the campaigns pushing for reform-minded prosecutors: these campaigns make the prosecutor indispensable to reform, thus affording their office the ability to claim more resources.¹¹⁸ Pfaff’s data suggests that it is precisely the institutional and legal power that prosecutors enjoy that created the crisis of mass criminalization.

Many reforms, like those directed at discovery, speedy trials, and prosecutor charging practices, are agnostic about the size of and resources directed toward the criminal punishment system. Others, like alternatives to incarceration and pretrial detention, replace one form of supervision with another, focusing narrowly on the number of people confined.¹¹⁹ Reforms directed at the defense and prosecution try to improve due process. Still, others deepen the system’s dependency on violence workers to fix the problems they created. Few address the drivers of the system’s growth: the labor power of violence workers. While it is too soon to comprehensively assess the merits of reforms attempted in the last decade, current efforts have made only a modest dent thus far. The criminal punishment system is not in significant retreat: it would take sixty-five years to cut the prison population in half.¹²⁰ The number of people who are incarcerated,¹²¹ under probation

117. *Id.* at 22; *see also* Taylor Blackston & Sojourner Rivers, Opinion, *To Confront Sexual Violence, We Don’t Need Better Prosecutors—We Need to Abolish Them*, TRUTH OUT (June 17, 2021), <https://truthout.org/articles/to-address-gender-based-violence-first-defund-the-prosecutors> [https://perma.cc/5UKE-NMZJ].

118. Foran, et al., *supra* note 67, at 518.

119. *See supra* notes 90–93, 96–102 and accompanying text.

120. *See* NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, U.S. PRISON DECLINE: INSUFFICIENT TO UNDO MASS INCARCERATION (2020) (“At the pace of decarceration since 2009, averaging 1% annually, it will take 65 years—until 2085—to cut the U.S. prison population in half. Clearly, waiting over six decades to substantively alter a system that is out of step with the world and is racially biased is unacceptable.”).

121. I rely on the Prison Policy Initiative’s spreadsheet compiling incarceration population information from state prisons, local jails, and federal prisons from between 1925 and 2020. *See* PRISON POL’Y INITIATIVE, STATE PRISONS, LOCAL JAILS AND FEDERAL PRISONS, INCARCERATION RATES AND COUNTS, 1925–2020, <https://www.prisonpolicy.org/data/> [https://perma.cc/HM9N-EXVY] (spreadsheet linked under “National data”). In 1970, the rates of incarceration per 100,000 were eighty-five, ten, and seventy-nine for state prisons, federal prisons, and local jails, respectively. *Id.* In 1979, the rates of incarceration per 100,000 were 123 and ten for state prisons and federal prisons, respectively. *Id.* The Prison Policy Initiative does not have data for local jails for 1979. *Id.* In 2008, the rates of incarceration per 100,000 were 447, 60, and 258 for state prisons, federal prisons, and local jails, respectively. *Id.* In 2016, the rates of incarceration per 100,000 were 397, 53, and 229 for state prisons, federal prisons, and local jails, respectively. *Id.* In terms of absolute numbers, in 2016, the number of people incarcerated in state and federal jails and prisons amounted to 2,187,343, down from a peak in 2008 of 2,333,275. *Id.* In 1970, the number was 325,630, and in 1979, the number was 301,470. *Id.* Using the Federal Bureau of Investigation’s Uniform Crime Reporting Program, in 2019, there were 10,085,207 arrests. *See* 2019 Crime in the United States Table 29, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-29> [https://perma.cc/9K4R-H6YX] (last visited

supervision,¹²² and charged¹²³ today still does not approximate levels in the 1980s. This is not to suggest that reaching pre-1980s numbers is desirable but rather to illustrate that any reductions in the number of people entangled in the criminal punishment system have been limited. The United States remains an outlier internationally.¹²⁴ Given the sluggish pace of change, might it be time to consider a resource-explicit strategy?

C. Defunding Violence Work: Seattle's Solidarity Budget

Organizers in Seattle, Washington, pioneered a resource-explicit strategy and developed a budget proposal that demands funding cuts to the violence workers overseeing the city's misdemeanor prosecutions. The document, entitled *Seattle Solidarity Budget* ("Solidarity Budget"), describes its effort as a "collective call toward a city budget that centers the needs of the most marginalized and vulnerable Seattle residents, responds with funding that is commensurate with the crises we are facing, and prioritizes collective care and liberation."¹²⁵ The Solidarity Budget not only demands the decriminalization of misdemeanor offenses¹²⁶ but also calls for "defunding

Mar. 4, 2022). In 2016, there were 10,662,252 arrests. *See 2016 Crime in the United States Table 18*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-18> [<https://perma.cc/8UJQ-RYNZ>]. In 2008, there were 14,005,615 arrests. *See 2008 Crime in the United States Table 29*, FED. BUREAU OF INVESTIGATION, https://www2.fbi.gov/ucr/cius2008/data/table_29.html [<https://perma.cc/GP3D-YM2F>] (last visited Mar. 4, 2022). In 1995, there were 15,119,800 arrests. *See* FED. BUREAU OF INVESTIGATION, 1995 CRIME IN THE UNITED STATES § IV, at 208 (1996).

122. *See* Peter Wagner, *Probation: The Leading Type of Correctional Control*, PRISON POL'Y INITIATIVE (2015), https://www.prisonpolicy.org/graphs/probation_and_correctional_control.html [<https://perma.cc/2UAW-2QP4>].

123. To make this claim, I draw on a few data points. Since 2009, according to data compiled by the Conference of State Court Administrators and the National Center for State Courts, in 2018, there has been a 17 percent decrease in criminal caseloads (excluding traffic offenses and those charged in juvenile court) across the country, averaging about 2 percent per year. CT. STAT. PROJECT, STATE COURT CASELOAD DIGEST: 2018 DATA 6 (2020). In 2018, there were 17 million incoming cases. *Id.* at 7. In 2008, there were 21.3 million. CT. STAT. PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 25 (2009). In 1994, there were 14 million incoming cases. *See* BRIAN J. OSTROM & NEAL B. KAUDER, CT. STAT. PROJECT, EXAMINING THE WORK OF STATE COURTS, 1994: ANNUAL REPORT 7 (1996). Pfaff cautions against using the dataset for comparisons before 1994 because of changes in data gathering. *See* Pfaff, *supra* note 64, at 1243. In 1979, there were 10.6 million criminal cases filed in trial courts. NAT'L CTR. FOR STATE CTS., STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1979, at vi (1984).

124. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/4SU9-ZXVQ>].

125. SEATTLE SOLIDARITY BUDGET, <https://www.seattlesolidaritybudget.com/> [<https://perma.cc/4N95-6RWF>] (last visited Mar. 4, 2022).

126. Decriminalization can take a range of forms. In Seattle, for example, organizers call for the city attorney to exercise discretion to "eliminate all filings that currently result in referrals to Community Court. The kinds of cases currently ending up in Community Court are the most straightforward candidates for elimination from the criminal legal system." 2022 SOLIDARITY BUDGET, *supra* note 68, at 18.

the misdemeanor punishment arm of the municipal court and the criminal division of the City Attorney's office by 50% by eliminating courtrooms and shrinking the number of cases prosecuted."¹²⁷ The proposal aims to shape legal practice by constraining legal institutions financially.¹²⁸ The hope is then that these budgetary constraints force prosecutors to shift how they apply their discretion.¹²⁹ Reductions in the court budget cement those changes by limiting judicial resources to entertain misdemeanor cases. Unlike other proposals discussed in Part II.A, Seattle aims to pair legal changes with budgetary ones to compel permanent institutional change.¹³⁰

The Seattle proposal aims to counteract the mixed results discussed above, where one form of penal control has replaced another. In Seattle, in the name of progressive reform, the municipal court and city attorneys prosecuting misdemeanor offenses have embraced therapeutic alternatives to incarceration.¹³¹ The Solidarity Budget, however, rejects this move as a false solution.

[C]ourt [sic] and prosecutors are not social service agencies, and should not be the gateway to housing and treatment. Just as responses to mental health crises belong in community hands . . . courts and prosecutors should not be funded to provide the basic support and programming people need. Right now, the criminal legal system, of which the Municipal Court and prosecutors are a part, excels at two things: incarcerating and achieving convictions. If we are moving away from arresting, incarcerating, and convicting the disproportionately poor and BIPOC communities cycling through Municipal Court, then continued investments in these systems no longer make sense.¹³²

Significantly, the Solidarity Budget recognizes the connection between labor power and the size, scope, and power of the criminal punishment system.¹³³ It builds on a growing literature developed by abolitionist organizers that distinguishes between reform efforts that preserve the legitimacy and power of the criminal punishment system and those that create the conditions for its abolition.¹³⁴ This literature adopts a materialist approach to assessing social change: the power of institutions lies in the resources it commands, the legal authority it enjoys, and its overall size.¹³⁵

127. *Id.* at 2.

128. *Id.*

129. *Id.* at 17–20.

130. *See generally id.*

131. *Id.* at 2.

132. *Id.* at 18.

133. *See generally id.*

134. *What Is the PIC?: What Is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language> [https://perma.cc/9B56-9VMA] (last visited Mar. 4, 2022) (“[Prison Industrial Complex] abolition is a political vision with the goal of eliminating imprisonment, policing, and surveillance and creating last alternatives to punishment and imprisonment.”).

135. *See* Marbre Stahly-Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives 4–5* (unpublished manuscript) [https://perma.cc/6A24-H87Y].

Rachel Foran, Mariame Kaba, and Katy Naples-Mitchell offer a sober assessment of abolitionist methods for engaging with prosecutors' offices. They explain: "As abolitionists, we see a future without prosecutors and prosecution. Simply put, that is our orientation to prosecutor organizing. We focus on structural and systemic changes that lessen the power, size, and scope of the prosecuting office, and on running campaigns that build the size and strength of abolitionist movements."¹³⁶ To that end, they outline a set of principles and strategies for organizing: "(1) base-line tactics of base-building, mutual aid, and narrative shift; (2) strategies focused on the prosecuting office; and (3) strategies focused on shrinking structural power."¹³⁷ In the second category, the authors identify demands to reduce the budgets, staff, and scope of power of prosecuting offices.¹³⁸ In a forthcoming piece, Matthew Clair and Amanda Woog echo this analysis by arguing for criminal courts' abolition.¹³⁹ Because of its endemic deference to law enforcement, the coercive social control it imposes, and the forms of predation it inflicts on those who are criminalized, they argue that the courts are beyond redemption.¹⁴⁰ In turn, Clair and Woog endorse reforms to defund the criminal court without going into the mechanics.¹⁴¹ Foran and her coauthors underscore the manifold forms that abolitionist interventions can take, but they avoid prescribing a particular roadmap.¹⁴² I try to take up that challenge: in Part III, I build on these authors' insights about the material sources of power in criminal court to tease out a thought experiment about a possible campaign.

III. LABOR AS A SOURCE OF (TRANSFORMATIVE) POWER

So far, I have discussed labor as a source of value and as an input. But a materialist approach offers more than descriptive clarity; it also has prescriptive implications. If people make their realities, they also make their own futures, albeit not under conditions of their own choosing. For Marx, "[t]he coincidence of the changing of circumstances and of human activity can be conceived and rationally understood only as *revolutionising practice*."¹⁴³ In other words, social transformation becomes possible with coordinated human activity that strategically intervenes in the social order.

136. Foran et al., *supra* note 67, at 518. These principles are distilled in a separate document as well. See CMTY. JUST. EXCH., ABOLITIONIST PRINCIPLES & CAMPAIGN STRATEGIES FOR PROSECUTOR ORGANIZING (2020), <https://www.communityjusticeexchange.org/en/abolitionist-principles> [<https://perma.cc/R5WC-A23V>].

137. Foran et al., *supra* note 67, at 520.

138. *See id.*

139. *See generally* Clair & Woog, *supra* note 49.

140. *See generally id.*

141. *See generally id.*

142. Foran et al., *supra* note 67, at 520–33.

143. Marx, *supra* note 4, at 29.

For Marx, workplace exploitation was the defining characteristic of European industrial capitalism in the mid-nineteenth century.¹⁴⁴ Thus, factory workers, by virtue of their experience of exploitation at the heart of the social order, held the power for political economic transformation.¹⁴⁵ Although reality fell short of Marx's prognostications, labor economists and historians demonstrate the decisive role that organized labor played in Western industrial states, in mitigating class inequality, and in enhancing democracy for the working class.¹⁴⁶ In the United States, labor unions sought to accomplish these goals broadly in two ways: enlisting the government to regulate private employers and compelling the redistribution of privatized wealth for social wages.¹⁴⁷ They accomplished these gains by leveraging their power to strike.¹⁴⁸

Translating this organizing model to criminal court, however, is not self-evident. Criminal court, like the factory, reproduces the stratification endemic to twenty-first century neoliberalism.¹⁴⁹ It is thus also a site for class struggle. But, unlike the factory, it is not a workplace for everyone involved. The oppression that defendants experience does not occur through their employment but rather through the compulsory process. Furthermore, defendants' leverage to disrupt criminal court to extract concessions is constrained. The risks they incur for disruptive collective action are years in prison, not only lost wages.

When journalists and organizers have focused on labor power in the criminal punishment system, police unions have attracted their attention.¹⁵⁰ But this focus overstates the role of police unions, at least in criminal court. There, prosecutors reign supreme.¹⁵¹ Furthermore, as Professor Benjamin Levin argues, this recent wave of scrutiny directed at police unions misses

144. See generally KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (Samuel Moore trans., Penguin Classics 2002) (1848).

145. See generally KARL MARX & FRIEDRICH ENGELS, *Bourgeois and Proletarians*, in *THE COMMUNIST MANIFESTO* 219 (Samuel Moore trans., Penguin Classics 2002) (1848).

146. See Dierk Herzer, *Unions and Income Inequality: A Panel Cointegration and Causality Analysis for the United States*, 30 *ECON. DEV. Q.* 267 (2016); Henry S. Farber et al., *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, 136 *Q.J. ECON.* 1325 (2021).

147. See Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 76–77 (2016).

148. See generally JOE BURNS, *REVIVING THE STRIKE: HOW WORKING PEOPLE CAN REGAIN POWER AND TRANSFORM AMERICA* (2011).

149. See GILMORE, *supra* note 53, at 77; Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/TN5D-6554>]; Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/N98B-NTHA>].

150. See, e.g., Adam Serwer, *The Authoritarian Instincts of Police Unions*, ATLANTIC (June 22, 2021, 11:43 PM), <https://www.theatlantic.com/magazine/archive/2021/07/bust-the-police-unions/619006/> [<https://perma.cc/DZY8-DK9D>]; POLICE UNION PLAYBOOK, <https://policeunionplaybook.org/> [<https://perma.cc/T86T-EP7W>] (last visited Mar. 4, 2022) (“Police unions—organizations that represent police officers—are one of the most powerful forces standing in the way of efforts to hold police accountable for violence and misconduct and to transform the criminal justice system. . . . This site exposes their playbook.”).

151. See *supra* notes 19–21 and accompanying text.

the mark.¹⁵² It tends to confuse the problem of policing with a problem with labor protections.¹⁵³ Hoping to restrict the political power of police forces by shrinking their collective bargaining rights could inadvertently weaken labor protections for all.¹⁵⁴

Given these pitfalls and constraints, public defenders' unions may offer a convenient, receptive vehicle for change to criminal court.¹⁵⁵ Because their working conditions are contingent on prosecutors' resources, public defenders' unions are uniquely positioned to bargain for reductions to prosecutors' budgets. They hold the power to strike and to bring criminal court to a halt. Their proximity to the person accused gives them insight into the crisis of criminal court. Prosecutors shape both their labor conditions and the intensity of their clients' oppression. While I provide the context and contours for such an action, because of space constraints, I do not address all aspects of its implementation nor the likely impediments.

This proposal draws on two trends present in the labor movement in the last decade. First, in the past few years, publicly employed public defenders have formed unions,¹⁵⁶ and a few have shown an inclination to social

152. See Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1337 (2020).

153. See *id.*

154. See *id.*

155. According to the U.S. Bureau of Labor Statistics, a little over 10 percent of the workforce is unionized. See Economic News Release, U.S. Bureau of Labor Statistics, Union Members Summary (Jan. 20, 2022), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/U9GS-DT9K>]. The union membership rate for public-sector workers is 33.9 percent, which is more than five times higher than the rate of private-sector workers, at 6.1 percent. See *id.* At this point, I have not been able to find data on the total number of public defenders or the number of those who are public employees. Many public defenders are employed by not-for-profits that receive government funding to deliver constitutionally required representation. See, e.g., THE BRONX DEFENDERS, <https://www.bronxdefenders.org/> [<https://perma.cc/FVY6-FG7A>] (last visited Mar. 4, 2022). A 2007 Bureau of Justice Statistics survey of 957 public defender offices in forty-nine states and the District of Columbia found that these agencies employed more than 15,000 full-time equivalent litigating attorneys. See LYNN LANGTON & DONALD J. FAROLE, JR., PUBLIC DEFENDER OFFICES, 2007 STATISTICAL TABLES BUREAU OF JUSTICE STATISTICS (2010).

156. Larry Dorman, *State Public Defenders Got Their Union. Now They Have a Contract*, COUNCIL 4, AM. FED'N OF STATE, CMTY. & MUN. EMPS. (Mar. 18, 2019), <https://www.council4.org/news-8/state-public-defenders-got-their-union-now-they-have-contract> [<https://perma.cc/PP4N-VCG4>] (“Local 381 President Elisa Villa, who serves as a Supervisory Assistant Public Defender, said ‘Our salary, benefits and working conditions needed to be improved so we could continue to effectively represent our clients. That’s why we unionized in the first place.’”); Alex Rose, *County Files Exception to State Labor Ruling*, DEL. CNTY. DAILY TIMES (Sept. 16, 2021, 10:15 PM), <https://www.delcotimes.com/2021/09/16/county-files-exceptions-to-state-labor-ruling> [<https://perma.cc/QH3W-FFB8>]; Carter Walker, *Lancaster County Public Defenders Show Support for Black Lives Matter Movement*, LANCASTER ONLINE (June 9, 2020), https://lancasteronline.com/news/local/lancaster-county-public-defenders-show-support-for-black-lives-matter-movement/article_40e70006-a9d2-11ea-b8ea-33b2c5614550.html [<https://perma.cc/QG92-3742>]; *Why We Formed MDU*, MD. DEFENDERS’ UNION, <https://www.afscmemd.org/maryland-defenders-union/learn-more-about-mdu> [<https://perma.cc/T88L-RVKC>] (last visited Mar. 4, 2022) (describing their decision to form in 2020).

movement unionism, a model of labor organizing in which members of the unions push for changes that reflect their position not only as workers but also as members of a community.¹⁵⁷ In particular, these unions have signaled their alignment with movements for prison abolition, including the Black Lives Matter movement.¹⁵⁸ Second, in Chicago, New York City, and Los Angeles, teachers' unions have pioneered a model of collective bargaining known as "Bargaining for the Common Good" (BCG). I describe the efforts of the teachers' union in Los Angeles and the way it has leveraged its labor power as a means of pushing back against school privatization, policing, and austerity. I suggest that public defenders could learn to do the same, in order to meaningfully shrink the imprint of the carceral state. It has been said that public defenders are not able to address the root causes of criminalization through their representation.¹⁵⁹ But many public defender organizations yearn to do so.¹⁶⁰ Budget battles—the typical site for defund strategy—are not generally in lawyers' wheelhouse. Lawyers may still have a role to play, however—not as legal experts but as legal workers. Bargaining for the common good strategy offers that outlet in a potentially transformative way by targeting the source of criminalization. While teachers and public defenders occupy different positions in relation to the people they serve, there are lessons to draw from teachers' organizing that could strengthen public defenders' organizing.

A. *United Teachers Los Angeles and Bargaining for the Common Good*

In the past decade, teachers' unions have gone on strike with broad public support, sometimes bargaining not just for themselves but for their entire communities.¹⁶¹ Through their organizing, teachers have not only shown

157. See Sam Gindin, *Beyond Social Movement Unionism*, JACOBIN (Aug. 17, 2016), <https://www.jacobinmag.com/2016/08/beyond-social-movement-unionism> [<https://perma.cc/CL8Y-B8DW>].

158. See, e.g., Walker, *supra* note 156 ("About a dozen attorneys with the Lancaster County Public Defender's Office, including Chief Public Defender Chris Tallarico, protested in solidarity with the movement The attorneys held signs that read 'Black Lives Matter to public defenders' and chanted 'no justice, no peace[']"); Los Angeles County Public Defender Union—Local 148, FACEBOOK (Apr. 21, 2021), <https://www.facebook.com/LApubdefunion/posts/550287156360301> [<https://perma.cc/AP7J-X9AM>].

159. ("Policing, as we know it, is racist and cannot be reformed. We will not be satisfied until we abolish the systems that continue to terrorize communities & kill Black people."); *Why We Formed MDU*, *supra* note 156 ("In the summer of 2020, in the midst of the pandemic, we came together to form the Maryland Defenders Union (MDU), a union of attorneys, social workers, and support staff at OPD. . . . We were also disappointed that OPD had not moved more quickly in support of the Black Lives Matter movement. OPD's town hall meetings had unintentionally been a wake-up call").

159. See generally Butler, *supra* 38; Natapoff, *supra* note 107.

160. See *supra* note 158.

161. The wave of strikes and mobilizations began with the teachers' strike in Chicago in 2012. *Direct Action for Prison Abolition*, CMTY. JUST. EXCH. (2020), <https://directactionzine.communityjusticeexchange.org/actions/labor-strikes/bus-drivers/bus-drivers.html> [<https://perma.cc/8Z6M-PKCY>]. The Chicago Teachers Union pioneered the bargaining for the common good strategy. *Id.* Since then, there has been a surge in walkouts,

how their working conditions implicate struggles that affect students, teachers, and entire communities, but they have also used their collective bargaining as a tool to incorporate demands that extend beyond the workplace. Their mobilizations accomplished two feats: (1) showing that what happens in the classroom has implications for the wider public and (2) connecting struggles outside the school to dynamics in the classroom.¹⁶² In reframing collective bargaining agreements as beneficial not just for workers but for society more broadly, BCG invites the public to care about union power. Critically, the strategy requires unions to partner closely with community groups.¹⁶³ In a publication I coauthored, *Direct Action for Prison Abolition*, I described the import of the United Teachers Los Angeles (UTLA) strike in 2019 and the way UTLA executed the BCG strategy:

[R]ecently, the Los Angeles Unified School District teachers and their union, United Teachers Los Angeles (UTLA) led a historic strike that ended in January 2019. Their focus was not just to get better wages, but to improve the quality of public education for their students, parents and their neighborhoods. As one commentator described, UTLA members “were swimming against the tide as unions narrowed their focus and tried to stay alive by avoiding risks. The teachers instead wanted their union to aim higher, to build power in the workplace and the larger community.”¹⁶⁴

Educators came together with parents, students, school staff, and community organizations to develop a shared vision for what needed to change.¹⁶⁵ The teachers did not simply build a short-term coalition in anticipation of a strike but rather aimed for deep alignment that could sustain long-term mobilization.¹⁶⁶ UTLA tried to build deep and authentic relationships with parents and communities.¹⁶⁷ For example, parents

sickouts, and wildcat strikes in Arizona, Kentucky, Oklahoma, and West Virginia, particularly in the spring of 2018. See Josh Eidelson, *Could Wildcat Teachers' Strikes Spread to Other States?*, BLOOMBERG: QUINT (Mar. 6, 2018, 4:56 AM), <https://www.bloomberquint.com/onweb/could-west-virginia-s-wildcat-teachers-strike-spread> [https://perma.cc/34EJ-35YV] (“The end goal is funding for public education and our core services, and if it takes us closing down schools to do that, then we are prepared and willing to do so,” said Alicia Priest, president of the Oklahoma Education Association.”); Josh Eidelson, *Teacher Strikes Are Spreading Across America with No End in Sight*, BLOOMBERG (Apr. 2, 2018, 2:58 PM), <https://www.bloomberg.com/news/articles/2018-04-02/teacher-strikes-are-spreading-across-america> [https://perma.cc/W59Y-CEBL].

162. See Diane Reddy, *Labor Bargaining and the “Common Good,”* LPE PROJECT (July 29, 2021), <https://lpeproject.org/blog/labor-bargaining-and-the-common-good/> [https://perma.cc/AZ4X-UGAU].

163. See *id.*

164. *Direct Action for Prison Abolition*, *supra* note 161 (citing Barbara Madeloni, *L.A. Teachers Win Big and Beat Back Privatizers*, LABOR NOTES (Jan. 24, 2019), <https://www.labornotes.org/2019/01/la-teachers-win-big-and-beat-back-privatizers> [https://perma.cc/P7GG-ZBN6]).

165. Interview by Zohra Ahmed with Samir Sonti (July 1, 2020).

166. See *id.*

167. See *id.*

themselves worked as organizers for the teacher's union.¹⁶⁸ Meanwhile, many teachers in the union identified with their students' parents over their shared Latinx heritage and identity.¹⁶⁹ As one teacher-member explained, "I see myself in my students in both the literal and metaphorical sense."¹⁷⁰

As UTLA prepared for negotiations, they crafted their demands in partnership with the community.¹⁷¹ As a result, when UTLA went on strike, a much larger community—parents, students, neighborhood members, and community-based organizations—mobilized to lend support to the picket line.¹⁷² With this support, built on long-term, deep organizing, the union leadership had the mandate to strike a hard bargain.¹⁷³

The UTLA's demands extended beyond a narrow conception of working conditions and addressed their students' and their students' families' social conditions. Besides traditional demands such as classroom size, the teachers extracted other concessions, including the creation of an immigrant defense fund for their students' families (many of whom are undocumented and at risk for removal) and the creation of more green spaces in their neighborhoods.¹⁷⁴ They successfully pressured the mayor of Los Angeles to endorse a statewide initiative to challenge a regressive cap on property taxes enshrined in California's constitution.¹⁷⁵ In the past ten years, labor strikes from teachers' unions, UTLA included, have shown how workplace grievances can connect to wider struggles for community reinvestment.

It took over five years of deliberate planning to build this coalition.¹⁷⁶ Samir Sonti worked for UNITE HERE!, one of the unions supporting UTLA efforts.¹⁷⁷ He explains that, as early as 2014, UTLA hired a full-time parent organizer.¹⁷⁸ Community members formed the coalition Reclaim Our Schools Los Angeles to articulate their demands for educational reform.¹⁷⁹ Among other things, the coalition coauthored a shared vision to resist school privatization, and through training and political education, they disseminated

168. *See id.*

169. *Direct Action for Prison Abolition*, *supra* note 161.

170. Alia Wong, *The Unique Racial Dynamics of the L.A. Teachers' Strike*, ATLANTIC (Jan. 14, 2019), <https://www.theatlantic.com/education/archive/2019/01/why-los-angeles-teachers-are-striking/580360/> [<https://perma.cc/G89Y-AENX>].

171. *See id.*

172. *See id.*

173. *See id.*

174. *See* UNITED TCHRS. L.A., SUMMARY OF TENTATIVE AGREEMENT/UTLA AND LAUSD (2019).

175. *See* Steve Gorman, *After Strike, Los Angeles Teachers Aim at California Tax Reform*, REUTERS (Jan. 24, 2019, 7:32 PM), <https://www.reuters.com/article/us-usa-education-california-taxes-idUSKCN1PJ01U> [<https://perma.cc/W4MH-CEAJ>] (discussing Proposition 13, a 1978 ballot initiative in California that capped real estate levies and resulted in a steep decline in public spending per pupil in California and stating that repealing Proposition 13 could generate \$10 billion a year or more in new revenue and allow the state to afford to spend nearly \$2,000 a year per student statewide, which covers nearly half of the current expenditure gap for K–12 public schools).

176. Interview by Zohra Ahmed with Samir Sonti (July 1, 2020).

177. *Id.*

178. *Id.*

179. *Id.*

this vision in their communities.¹⁸⁰ As Sonti describes, “The groundswell of popular support for the strike grew out of that organizing.”¹⁸¹ Other observes remarked that, by linking classroom conditions to redistribution, the teachers and their supporters “pave[d] the way for a broader debate in Sacramento over taxes and education.”¹⁸² Most relevant to this Essay, UTLA demanded an “end to the discriminatory security wandering of students, which made students of color feel criminalized.”¹⁸³ More recently, UTLA has advocated for removing ICE from schools and for the complete elimination of the Los Angeles School Police Department, the agency responsible for policing public schools.¹⁸⁴

B. Bargaining for Abolition

The UTLA strike and BCG strategy demonstrate the potential power that public employees can wield to secure far-reaching changes to government policy. Public defenders who are public employees could emulate this work. They could bargain collectively and demand reductions in spending on prosecution. Doing so would not only reduce public defenders’ caseloads but also reduce criminalization in the communities they serve.

Conceiving public defenders as part of organized labor reveals new sources of leverage—they hold the power to strike and, thus, threaten the daily operation of criminal court. A BCG strategy explicitly builds that leverage by activating workers’ awareness of their own power and by cultivating public support for public defenders’ workplace grievances. Defunding prosecution and policing are demands that may bring together those at risk for criminalization and those who are tasked with its mitigation. Less funding for police and prosecutors likely means fewer cases for public defenders, better working conditions, and better representation.¹⁸⁵ Indeed,

180. *Id.*

181. Samir Sonti, *LA Teachers Show the Way Forward*, JACOBIN (Feb. 4, 2019), <https://www.jacobinmag.com/2019/02/los-angeles-teachers-strike-labor-movement> [<https://perma.cc/Q3SB-K2FF>].

182. See Gorman, *supra* note 175.

183. Eric Blanc, “*This Is a Struggle to Save Public Education*”: *An Interview with Arlene Inouye*, JACOBIN (Sept. 19, 2018), <https://jacobinmag.com/2018/09/los-angeles-teachers-strike-education-reform/> [<https://perma.cc/PE9Y-DLRK>].

184. See Meagan Day, *Teachers’ Unions Are Demanding Police-Free Schools*, JACOBIN (June 16, 2020), <https://www.jacobinmag.com/2020/06/teachers-unions-police-schools-movement-protests> [<https://perma.cc/78HJ-4AUN>]; *Imagine Police-Free Schools with the Supports Students Deserve*, UTLA (June 11, 2020), <https://www.utla.net/news/imagine-police-free-schools-supports-students-deserve> [<https://perma.cc/WX8Q-BMY6>]. University workers in Illinois have advanced similar demands in their unions, calling their approach “abolitionist unionism.” CHELSEA BIRCHMIER ET AL., *TOWARD ABOLITIONIST UNIONISM: RESISTING PANDEMICS, POLICE, AND ACADEMIC AUSTERITY AT THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN* 11–12 (2021).

185. See LYNN LANGTON ET AL., BUREAU OF JUST. STAT., *STATE PUBLIC DEFENDER PROGRAMS 2007* (2010) (finding that the largest share of cases handled by public defender programs were misdemeanor and ordinance violations). Low-level offenses are those in which prosecutors exercise maximal discretion.

crushing caseloads are one of the defining features of public defenders' workplace experience.¹⁸⁶ Typically, the solution is to request more funding to hire more staff to reduce the case count and deliver zealous representation.¹⁸⁷ But fewer cases per lawyer would also alleviate the strains on public defender offices.

Yet, building broad support to demand defunding will require deep political education and the development of an abolitionist analysis of criminal court within public defender offices. That is, public defenders will have to agree that pursuing fewer criminal cases is a desirable outcome. Public defenders' unions are formed for a range of different reasons, but mainly to raise wages and to achieve parity with their adversaries.¹⁸⁸ To make demands to defund will require public defender agencies to emulate the preparations made by UTLA. First, the union must be oriented to such demands and see its strategic benefits. The shift to social movement unionism was deliberate within the teachers' unions as a way to restore their power and legitimacy in the face of growing attacks on teachers' unions, which were seen as the impediment to educational reform.¹⁸⁹ The UTLA's organizing strategy disrupted that portrayal, clarifying the struggle shared by teachers, students, and parents against forces seeking to privatize public education and cut its funding.

One advantage that the UTLA teachers enjoyed in making that shift is that some teachers belonged to the same communities as their students, facilitating trust and the recognition of their interrelated needs.¹⁹⁰ Public defenders in particular settings may be able to build authentic linkages with the communities they serve as the "organic intellectuals."¹⁹¹ Organizations like the Black Public Defender Association, for example, could help support Black public defenders partial to this strategy, and, in turn, build authentic linkages between community organizations, the defenders' organization, and the union.¹⁹²

186. See e.g., DONALD J. FAROLE, JR., BUREAU OF JUST. STAT., A NATIONAL ASSESSMENT OF PUBLIC DEFENDER OFFICE CASELOADS (2010) (finding that approximately "1 in 4 county-based public defender offices had a sufficient number of attorneys to meet caseload standards").

187. See FURST, *supra* note 105.

188. See *Louisville Metro Public Defenders Vote to Unionize Due to "Untenable Working Conditions,"* WLKY (Jan. 24, 2022), <https://www.wlky.com/article/louisville-metro-public-defenders-unionize/38872913> [<https://perma.cc/R7UE-2UH6>].

189. See Reddy, *supra* note 162.

190. See Madeloni, *supra* note 164.

191. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 18 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971).

192. See BLACK PUB. DEF. ASS'N, OUR HISTORY, [https://www.nlada.org/sites/default/files/pictures/BPDA%20History%20_Final%20\(1\).pdf](https://www.nlada.org/sites/default/files/pictures/BPDA%20History%20_Final%20(1).pdf) [<https://perma.cc/YWT7-DPSM>] ("The creation of the Black Public Defender Association is based on the recognition that creating and maintaining a national network of skilled Black public defenders who identify with and come from the communities most disproportionately impacted by the criminal legal system is necessary to fight against and end mass incarceration."); see also Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1532–47 (2021).

The next step in implementing a BCG strategy is identifying targets, the so-called villains. Typically, the scope of collective bargaining focuses on the employer, and the demand is wages and benefits.¹⁹³ BCG expands the scope and identifies issues that “resonate with members, partners and allies and that impact . . . communities.”¹⁹⁴ Those demands “address structural issues, not just symptoms of the problem.”¹⁹⁵ Although unions that have successfully applied the BCG strategy have identified financial and corporate actors as the root cause, public defenders’ unions would likely need to train their sights on the public actors who fund, fuel, and enact the criminal punishment system—namely, legislators, police officers, and prosecutors. Public defenders who are public employees are often bargaining with the same government unit that funds police and/or prosecutors. In Los Angeles, for example, the county funds both the public defender’s office and the prosecutor’s office.¹⁹⁶ In their contract negotiations, the Los Angeles County Public Defenders Union seeks money to deliver services that depend on its adversary’s productivity and output, which is in turn contingent on the funding that it receives from the county.¹⁹⁷ If the Los Angeles County prosecutor’s office decreased its caseload or lost staff, those reductions would have a direct impact on the county public defender’s caseload. The prosecution and defense’s working conditions are intertwined. Although elections, public pressure, and legislation have been the most frequent tools for shifting prosecutors’ practices, public defenders could negotiate funding reductions to prosecutors’ offices to guarantee both a diminished caseload for its attorneys and a weaker criminal punishment for their clients and their communities.

Simultaneously, the union would have to build long-term relationships with the communities it represents, incorporating those voices into their collective bargaining strategy, and developing demands together. Typically, community groups are not privy to the public defenders’ union’s internal conversations.¹⁹⁸ The cooperation is time-bound and limited to specific

193. See Rachel Cohen, *Teacher Unions Are ‘Bargaining for the Common Good,’* THE AM. PROSPECT (June 16, 2016), <https://prospect.org/education/teacher-unions-bargaining-common-good/> [https://perma.cc/C4EU-8ZWL].

194. BARGAINING FOR THE COMMON GOOD, KEY ELEMENTS OF BARGAINING FOR THE COMMON GOOD CAMPAIGNS, <https://www.bargainingforthecommongood.org/wp-content/uploads/2020/04/BCG-Seven-Elements.pdf> [https://perma.cc/MDZ5-GPBR].

195. *Id.*

196. See e.g., CNTY. OF L.A., 2021–22 RECOMMENDED BUDGET (2021), <https://ceo.lacounty.gov/wp-content/uploads/2021/04/2021-22-Recommended-Budget-Book-Volume-One-Final-Online-Version.pdf> [https://perma.cc/2SBB-X686].

197. *See id.*

198. I was a member of the Association of Legal Aid Attorneys (ALAA) UAW Local 2355 from 2014 to 2018 and followed its negotiations closely. ALAA is the oldest union of attorneys and legal advocates in the United States. See *About ALAA*, ASS’N OF LEGAL AID ATT’YS, <https://www.alaa.org/about-alaa> [https://perma.cc/E2SN-ZHQQ] (last visited Mar. 4, 2022). ALAA members are mostly private employees, except for the Federal Defenders of

campaigns. There are no formal ties of accountability. The UTLA template suggests a different arrangement. The union actively cultivated community leadership.¹⁹⁹ Furthermore, it committed to regular meetings with a separate community coalition.²⁰⁰ Over the course of several years, the different constituents hammered out a shared vision.²⁰¹ When the City of Los Angeles balked at demands, teachers went on strike, buoyed by community support.²⁰² The picket line became a makeshift daycare and classroom for students.²⁰³ The UTLA example suggests that there can be significant gains both for the union and for the community if the alliance is more than episodic, but rooted in shared values and commitment.

CONCLUSION

To answer the call of this Colloquium, the kind of subversive lawyering I describe imagines unionized public defenders using collective bargaining negotiations to eliminate staff positions in prosecutors' offices. This could lead not only to reductions in public defenders' caseloads but also to a diminution in the violence meted out by criminal court. While there is not enough space to tease out all ramifications of such a course of action, my hope is to spark a new way of thinking about reforming criminal court that is anchored in its material conditions.

New York. *Chapters*, ASS'N OF LEGAL AID ATT'YS, <https://www.alaa.org/chapters> [<https://perma.cc/ARN7-UGJJ>] (last visited Mar. 4, 2022). ALAA does work in coalition with community groups on specific legislative campaigns; it has not adopted a BCG approach. *Coalitions and Campaigns*, ASS'N OF LEGAL AID ATT'YS, <https://www.alaa.org/coalitions-campaigns> [<https://perma.cc/A8GT-JXJ2>] (last visited Mar. 4, 2022).

199. See *supra* notes 165–73 and accompanying text.

200. See Interview by Zohra Ahmed with Samir Sonti (July 1, 2020).

201. See *supra* notes 165–73 and accompanying text.

202. See Interview by Zohra Ahmed with Samir Sonti (July 1, 2020).

203. See *supra* notes 171–73 and accompanying text.