2024

Counseling Oppression

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INTRODUCTION

Public defenders mediate systemic injustices every time they counsel a client. They act as intermediaries who navigate clients through the differences in the perception of the law versus its actual, flawed reality.[1]

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[1] "Lawyers bear some responsibility for the gulf between how we talk about our society and how it is." Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 254 (2015).

Lawyers translate the law, as well as the reality of its implementation, to clients in every decision they frame.[2] This includes translating for clients the unspoken rules[3] of the system that entrench the visible and invisible inequities whereby oppression often operates.[4] Thus lawyers reinforce and perpetuate systemic injustices in the criminal legal system through the counseling process,[5] often despite their best efforts to the contrary.[6]

Critical scholarship has engaged with how attorneys[7] and movements[8] navigate this contradictory aspect of defender-client relationships. Public defenders have questioned whether their expertise and power can further client autonomy[9] within a system that is inherently unjust[10]

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[2] The ethical rule defining 'advice,' and the rule's attendant comments, make clear how essential the very framing of decisions and scope of consideration is to an attorney's counseling role. MODEL RULES OF PROF'L CONDUCT 2.1.

[3] "[T]he court record documented the formal rules of practice that contradicted the logics and norms of the interpretive aspects of the law. The defense lawyers were the translators[...]." NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY 173 (2017).

[4] "[O]ppression refers to the vast and deep injustices some groups experience as a consequence of often unconscious assumptions and reactions of well-meaning people in ordinary interactions." Iris Marion Young, "Five Faces of Oppression", OPPRESSION, PRIVILEGE, & RESISTANCE 5 (2014).

[5] GONZALEZ VAN CLEVE *supra,* note 3 (describing how public defenders sort clients into those "deserving" of justice and those "deserving" of punishment based on the attorney's perceptions and fears of how the criminal legal system will treat their client).

[6] An example is the trial penalty, the mechanism by which the system incentivizes pleas by imposing higher sentences for accused individuals who exercise their due process rights. See Brian Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019). The trial penalty thrives because of a variety of formal rules such as charging discretion and sentencing ranges, but also due to norms in the legal culture surrounding plea bargaining, trials, and appellate rights. NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, at 5 ("The trial penalty cannot be attributed to any single cause. Rather, many shortcomings across the criminal justice system combine to perpetuate this injustice."). It falls on a defender to weave these together to advise their client of the consequences of pursuing a trial since the effect will be borne by their client. *Id*. at 10-12. But advising about the trial penalty perpetuates its purpose in coercing more pleas, no matter how thoughtful or client-centered the counseling.

[7] Andrew Crespo, *Subversive Lawyering: No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999 (2022); Robin Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245 (2014).

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

[9] Kathryn Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375 (2021) (discussing how the illusion of choice in the system is perpetuated by defenders, masking the systemic issues that constrain clients and obscuring the options of certain tactics such as client-led resistance).

[10] Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 449

and shaped by societies' fundamental racial inequities.[11] This tension at the heart of counseling has led some to conclude that the defender-client relationship is an impediment to the collectivist action necessary for beneficial transformation[12] or carceral abolition.[13] Proposals have examined how to recalibrate positions of power in public defender - client relationships and challenge the forms of knowledge that are given priority, such as through collectivist action,[14] client selection of defenders,[15] and client-centered representation.[16]

But what is the role of a lawyer counseling clients in systems defined by and steeped in injustice?[17] What ability, or even obligation, does a public defender have to acknowledge, confront, and mitigate the systemic injustices they replicate in their counseling during direct client representation? Examining these questions at the heart of counseling can reveal how defenders and movements can navigate the contradiction of lawyering in a carceral system.

The myopic, traditional view of counseling has aided and abetted

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(2022) (detailing the contradiction that while defenders are understandably taught to be client-centered and preserve client autonomy, "[t]he history behind the rise of choice and the way that choices are actually structured in criminal proceedings means that, all else remaining constant, enhancing defendant choice will likely deepen the very inequalities that criminal law already exacerbates.").

[11] Michael Pinard, *Race Decriminalization and Criminal Legal System Reform*, 85 N.Y.U. L. REV. ONLINE 119 (2020) (noting that to be have any hope of change "efforts must reach beyond the four corners of the system—indeed, they must reach outside the system—to grasp and incorporate how Blacks are perceived, interpreted, responded to, devalued, stigmatized, and dehumanized from the moment they are born.")

[12] By focusing on individual representation on a case-by-case basis, "*Gideon* obscures [mass incarceration's] reality, and in this sense stands in the way of the political mobilization that will be required to transform criminal justice." Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L. J. 2176, 2178 (2013);

[13] Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159 (2021) (discussing the contradictions and challenges that arise when defenders work within the carceral system despite holding the view that the system should be abolished).

[14] Jocelyn Simonson, *The Place of 'the People' in Criminal Procedure*, 119 COLUMBIA L. REV. 1 (2019).

[15] Alexis Hoag-Fordjour, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493 (2021).

[16] Katherine Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL LAW REVIEW 501 (2006). *But see*, Ahmed, *supra,* note 10.

[17] A form of these tensions exist for attorneys counseling in various legal systems defined by racism, economic inequality, and other injustices. Thus, while focused on public defenders and criminal law, much of this conversation applies to advocates in immigration defense, family defense, housing, government benefits, etc.

mass incarceration.[18] And far from shielding public defenders or clients, this narrow view is a self-inflicted wound, as a narrower scope of representation lowers the bar for adequate defense[19] and results in fewer resources to support an expansive version of counseling. Others have written on the need for movement lawyering more broadly.[20] I seek to orient how this framework can amplify the public defender – client relationship if it is brought into the very core of the counseling relationship.

This paper examines how oppressive systems operate within the defender – client counseling relationship but also how this tension provides a rare opportunity for clients and attorneys to peel back the layers of those dynamics. In the counseling space, attorneys can gain access to new epistemes[21] and can provide clients with valuable insider information that is otherwise obfuscated by the legal system. As such, the counseling dynamic that often limits change can instead form the basis to critically examine and eventually disrupt the oppressive systems that operate within it.

The ways in which oppression operates can often become more visible during counseling because explaining options and the pressures that shape them provides an opportunity to elucidate those invisible, or unconscious, powers.[22] Likewise, the counseling process provides an opportunity for lawyers to learn about client's lived experiences as well as extra-legal power that they actually play a role in disincentivizing through their individualized counsel on a legal case.[23]

I use the term robust counseling to refer to the dialogue and discussion that occurs when defenders embrace the contradictions of their role. Robust counseling is not my creation, it already occurs though sporadically and

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[18] Karakatsanis, *supra* note 1.

[19] Systemic barriers will undoubtedly exist even if defenders try to broaden their scope. But the friction that will result from exposing the contradiction of counseling will be worthwhile, and interrogating why courts and state funders may seek to limit this will be elucidating itself, and a basis for iterative work to continue to refine what it means to counsel in a carceral system. See *infra*, section III.B.

[20] "We define movement lawyering as the use of integrated advocacy strategies, inside and outside of formal lawmaking spaces, by lawyers who are accountable to mobilized social movement groups to build the power of those groups to produce or oppose social change goals that they define." Susan Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO J. LEGAL ETHICS 447, 452 (2018).

[21] *See* Olúfémi O. Táíwò, *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, 108 THE PHILOSOPHER 4 (2020) (discussing standpoint epistemology and some of its complications); *see also* discussion *infra,* section I.D.

[22] Young, *supra* note 4.

[23] "[T]he animating ethos of criminal defense work stands in sharp tension with a collectivist campaign . . ." Crespo, *supra* note 7 at 2023.

spontaneously. This happens because public defenders naturally become informed by, and radicalized by, the injustices that they reinforce.[24] In the process of explaining disparities to clients, and hearing from their clients what led them to court and what the consequences will be, the counseling dynamic reveals "where the law lives" and actually works.[25] As such this counseling dynamic, at times, becomes the location where defenders and impacted individuals can understand where the law can be undone and remade.[26] When these conversations happen, the defender and client trace back the root cause of the issue together and offer their complementing knowledge and power to brainstorm solutions outside of the predetermined menu of criminal court options.[27] These currently informal moments where defenders and clients clarify the reality of oppressive systems should form the blueprint for a principled and intentional form of counsel that demystifies the oppression of the system to allow mobilization against the root issues. By embracing the contradictions of their role and explicitly counseling about oppression, defenders remediate the ways in which their counseling would otherwise further oppression.

This paper does not focus on client resistance or on criminal court as a site of oppression, although this paper's analysis of preferring certain sources of power and knowledge implicates both. But others have already described how resistance works as a tactic and how the system dissuades it.[28]

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[24] "Our personal realities are patchworks of things we've seen, been exposed to, and potentially come to understand, bound together by belief." KELLY HAYES AND MARIAME KABA, LET THIS RADICALIZE YOU: ORGANIZING AND THE REVOLUTION OF RECIPROCAL CARE (2023) at 44.

[25] Amna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L. REV. 8, 2497, 2563 (2023) [Hereinafter: *Non-Reformist Reforms*].

[26] *Id.*

[27] Offices that engage in an interdisciplinary, holistic defense model already often expand the scope of representation and some have even gravitated to bringing in political considerations. See Runa Rajagopal, *Diary of a Civil Public Defender: Critical Lessons for Achieving Transformative Change on Behalf of Communities*, 46 FORDHAM URB. L. J. 876 (2019) (describing a client interfacing with community organizers through the Bronx Defenders as part of her representation). In my experience consulting with various offices through the Center for Holistic Defense, this phenomenon whereby counseling is expanded occurs naturally in public defense offices around the country, likely because the nature of counseling in such systems is that it builds consciousness and awareness about deep-seated systemic issues. But that expansion is often met with skepticism and restriction by offices who fear overstepping their ethical bounds, as discussed more, *infra*, sections II.A and B.

[28] Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, 100 SOC. FORCES 1, 194 (2021) (detailing how clients are misconstrued as powerless when in reality attorneys and judges silence accused individuals who act to resist unfair practices).

Likewise the role of criminal court systems in enforcing compliance[29] is only mentioned in passing although it is a significant factor in why counseling operates as it does. In later papers I will examine this version of robust counseling in the context of how legal epistemology and court systems through judges, prosecutors, and administrative court agencies shape and constrain choices[30] as well as define the parameters to exclude client sources of knowledge and power.[31] For now I focus on how the counseling relationship, in spite of all of its problems, can result in the more equitable sharing of various types of knowledge as well as the brainstorming for different types of power and tactics.

This paper analyzes how counseling is construed now and how the scope of counseling is defined. I determine that the established ethical rules of professional conduct, far from being an impediment, already obligate a lawyer advising clients in these contexts to expand the scope of their counseling beyond that of "traditional" counseling.[32] To satisfy the requirements at the heart of counseling, a lawyer must draw on client's knowledge about racial and other systemic injustice, be explicit with clients about the limits of the legal system, and bring in to the discussion suggestions for forums outside the case where a client, the lawyer, or others can intervene to address systemic issues, even if it will not directly benefit the individual client's criminal case.[33] Defenders should discuss these broader issues with

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[29] Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CAL. L. REV. 1, 6 (2022) ("[C]riminal courts not only function to legitimate police and funnel people into carceral spaces but also contribute their own unique forms of violence, social control, and exploitation.").

[30] Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1487 (2005) (discussing how the legal system is structured to silence people accused of crimes).

[31] Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 7 (2022) (discussing how pretrial release algorithms prioritize carceral system actor knowledge at the expense of "community knowledge sources").

[32] The ethical rules support an expansion of the scope of counsel in defender-client relationships partly because the attorney-client relationship, "confers upon the client the ultimate authority to determine the purposes to be served by legal representation." MODEL RULES OF PROF'L CONDUCT 1.2. The ethical rules envision such a dialogue to extend beyond pure legalism. "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT 2.1. *See* Section II.C *infra*, for a further discussion.

[33] What does or does not benefit a case can be subjective. Invariably a client's priorities must have preference but are not always attainable, which makes it challenging to create an objective assessment of outcomes. Client-centered lawyering views a worthwhile goal as the

clients, listen to any concerns that go beyond their case, and both inform and learn from clients of avenues for change that reach the heart of the issues.

Even an expansion of robust counseling still constitutes mere tinkering with the current criminal legal system, yet hopefully it can bridge the gap between the current system and a better future.[34] By pulling back the veil on what is really going on with a client's case, robust counseling reveals the underlying mechanisms of actual injustice and can facilitate broader change by allowing for consciousness, dialogue, and resistance to develop through the agonism the robust counseling process encourages.[35] Counseling in this manner can be part of the praxis of a radical reimagining of the future of the criminal legal system.[36] As such this proposal is an attempt to answer the call that others have raised to reimagine the spirit of the law as it relates to client counseling.[37]

This paper does not offer solutions other than contrasting how client counseling currently unfolds differently depending on whether these tensions at the heart of counseling are made explicit or continue to be ignored. It concludes that this form of robust counsel where the tensions are made explicit results in benefits to clients, defenders, as well as helping reshape

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empowerment and autonomy retained by a client through the process, even if a certain outcome is not achieved. Miller analyzes how that may be an illusion that prevents engagement with the larger systemic issues that actually impact a client's potential outcomes. Miller, *supra* note 9.

[34] A central feature of such projects is that they seek to move "beyond legalism," and as such "[c]ampaigns for non-reformist reforms then rely on 'inside' and 'outside' strategies. This entails a combination of legal and extralegal strategies and tactics. [. . .] These strategies disrupt the rules and institutions of formal law and politics and make new pathways possible." Akbar, *Non-Reformist Reforms*, *supra* note 25, at 2562; *see* discussion section III C, *infra*.

[35] "[N]on-reformist reforms require a 'modification of relations of power,' in particular 'the creation of new centers of democratic power.'" Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 101 (2020) (citing ANDRE GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967)).

[36] Amna A. Akbar, Sameer M. Ashar, & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 845 (2021).

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> Law review articles, as long and cumbersome as they may be, do powerful work. They can legitimize the existing architecture of the law and legal interpretation by confining arguments within existing understandings of the world, or they can help articulate a contrasting 'nomos' that cannot be reconciled with our current arrangements, a different understanding of our ethical commitments to each other with which the academy and the law must then contend.

Id. (quoting Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 1, 4, 6 (1983).

power to allow for transformative change. If this counsel is implemented more widely it will allow clients and attorneys and movements to engage with systems of oppression and do the work to challenge that system in ways that I cannot currently imagine.

Rather than guessing at what solutions would come out of a true reckoning with counsel's contradictions, I instead describe some instances where defenders have embraced that tension to lay it bare rather than obfuscating or justifying it. When defenders are explicit with their clients, and themselves, about how they perpetuate mechanisms of oppression through their counseling, they can help turn the counseling location into a site where the tensions are examined honestly by clients and defenders working together, each contributing their own knowledge, power, and tools. [38] Such an approach can be the difference between advising a client about an unjust reality and reinforcing that injustice.

Part 1 details how a public defender's counseling invariably perpetuates oppression, including a definition for oppression and an examination of how it operates in this context. This section draws from my experiences as a public defender in the Bronx for over a decade. Part 2 describes the informal ways by which defender-client counseling spaces work through this problem, proposes a principled version of this more robust counseling, and discusses the benefits of such an approach. Again, this section draws from my experiences, including as training director of a holistic public defender office and the opportunity it provided to interrogate how defenders engage in counseling work. Part 3 addresses various possible objections to this version of counseling, including ethical and structural issues. Finally, Part 4, rather than providing a novel solution, examines two examples of the already extant robust counseling. The first, the amicus brief of the Black Attorneys of Legal Aid, et al. in *Bruen,*[39] was an example of public defenders meeting clients where they are, sharing knowledge between them, and using client stories in a lawyer-led brief to agitate for change. The second is a sample dialogue that, while fictionalized, includes real and recurring issues in counseling within the carceral system. This case study

[38] This fits the heuristic of non-reformist reforms seeking to expose structural issues and alter fundamental power dynamics to further transformative change, even through minor changes in aspects of the existing system. *See Non-Reformist Reforms*, *supra* note 25 at 2563.

[39] *New York State Rifle and Pistol Association v Bruen.,* 597 U.S. ___ (2022), Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners [Hereinafter Black Attorneys of Legal Aid Amicus].

provides a concrete example of what it looks like for the counseling conversation to stay true to an individual client while aiding the acceleration of movement-based change. In both case studies, clients who faced oppressive systems in criminal court diverted to other avenues where their stories could be heard as part of broader coalitions for change that succeeded in altering fundamental aspects of the criminal legal system.

PART 1: COUNSELING *AS* OPPRESSION

A. Traditional Counseling

I was a young public defender in the Bronx at the height of stop and frisk. In that role I met predominantly Black and brown clients at arraignment who had been stopped numerous times, but just now arrested for the first time because the previous stops had not resulted in any charges. However often this Nth stop had resulted in a possession charge because an officer found marijuana, or in a trespass charge when an officer questioned why my client was "loitering" in a public housing unit or in a park, or perhaps even in a resisting arrest or assault charge when my client had expressed well-warranted frustration about this Nth stop and been met with hostility or violence by the police in response. These cases were overwhelmingly common in the criminal court.[40] In 2011, about 74% of the cases in criminal court were misdemeanors,[41] and overwhelmingly they were for such quality-of-life offenses.[42]

I grappled with my role in counseling clients about these cases. My clients understandably were frustrated from the injustice, tired of recurring abuse, and scared of what they could face. But most of all they were vulnerable, in a forum where they were on the defensive and could at best end up without more harm, and at worst could face jail time or be branded with a record for life, along with the various associated collateral consequences. I quickly learned there was no outcome in criminal court that

[40] From 1980 – 2011, despite the number of violent crimes dropping from 150,000 to 35,000 per year, New York City saw a massive increase in arrests, driven by an increase in arrests for quality-of-life crimes. Misdemeanor arrests increased from 64,000 to almost 250,000 in 2010. Arrests for marijuana possession increased greatly, hitting a peak of 27.3% of misdemeanor arrests in 2000. Arrests for transportation fare payment evasion peaked at 23.8% of misdemeanor arrests. Arrests for simple possession of drugs other than marijuana peaked at 29.9% of misdemeanor arrests in 1989. Arrests for trespass peaked at 8.8% of misdemeanor arrests. Meredith Patten, et al., *Trends in Misdemeanor Arrests in New York, 1980 to 2017* (2018).

[41] Becca Cadoff, Erica Bond, Preeti Chauhan, & Allie Meizlish, *Criminal Conviction Records in New York* City (1980-2019) (2021) at 8.

[42] Patten et al., *supra*, note 40.

would get them anything resembling justice.

The tension in counseling for those cases seemed clear at the time. To have any chance of affirmative benefits and possible justice through a civil lawsuit or an administrative finding of police wrongdoing, we would have to win the criminal case at trial or get it dismissed. But that came with the risk of losing and my client getting a criminal record. Undoubtedly before trial my client would be offered something relatively innocuous, often even a delayed dismissal or non-criminal violation. Those outcomes would lessen any consequences for the criminal case but would often foreclose any relief in other forums. This issue was heightened if being convicted would cause my client to lose employment, public benefits, housing, immigration status, or parental rights. My client would have to weigh all the risks and benefits to make the difficult decision between unsatisfactory options.

Like countless other public defenders, I developed my language around these options very precisely. I learned to counsel clients through this while they prioritized what they valued most and explained the risks and benefits for them to weigh. And I believed that was the beginning and end of my job. This role led to countless clients pleading guilty or accepting a delayed dismissal despite the blatant unfairness underlying their case. In the name of assisting each individual client, this allowed the unfair practices in court procedures, plea bargaining, and policing to continue despite the massive scale of the injustice.[43] This is the traditional counseling role.[44]

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A lawyer directly representing an individual from a vulnerable population often serves the role of a mediator between the law as it is and the

[43] In this view it becomes clear there were 20,000 people at Rikers Island waiting for trial not just because of the NYPD, or the DA, but in part because of and despite my best efforts and that of other dedicated and zealous public defenders. Statistic from VERA, *Greater Justice NY*, available at https://greaterjusticeny.vera.org/nycjail/.

[44] It is somewhat ironic to refer to this as traditional counseling as it is a progressive view of counseling that replaced earlier versions that were more attorney focused. Client-centered counseling was revolutionary when it began in the 70s. *See*, Kruse, *supra* note 16. It was an acknowledgement of the role of clients in shaping their own decisions more fundamentally than had been historically the situation. And holistic defense built on this further and expanded the scope of counseling. But even holistic defense is 30 years old, and has become widespread enough to have reshaped and been incorporated into the currently "traditional" form of counseling. *See* J. McGregor Smyth, '*Collateral' No More — The Practical Imperative for Holistic Defense in a Post-Padilla World … Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS UNIV. PUB. L. REV. 139 (2011).

ideal of the law as it should be.[45] The lawyer's role in this context is to advise a client of the reality of their situation, which involves limited options and rights due to the injustices of the legal system. Informing a client about the reality is a necessity because a client making a decision based on incomplete information would be making a choice without an accurate assessment of the risks and benefits. A public defender's advice goes far beyond rote law and encompasses the often ugly realities of judicial decision-making, racially biased institutions, and legal systems that have motivations beyond merely "doing justice" in a particular case.[46] Thus, for instance, a lawyer advises a client that a judge is likely to impose a trial penalty if the client does not abandon due process rights,[47] challenges a client to consider how jury selection is actually performed,[48] or educates a client on how substantive legal concepts may prevent certain considerations, such as how the law on pretextual stops may lead a judge to still admit evidence obtained through racially biased policing.[49]

When the realities that a defender describes include such injustices, the counseling role makes a lawyer complicit in the oppression of their clients.[50] In explaining reality to their client, the lawyer normalizes the degradation as part of how the system operates, creates a private outlet for their client's reaction, and ultimately masks any broader reckoning with the

[45] Karakatsanis and Butler both speak of the facade that public defense serves to shroud the crumbling edifice of criminal law. Butler, *supra* note 12; s*ee also*, Karakatsanis, *supra* note 1.

[46] Brian J Ostrom & Roger Hanson, EFFICIENCY, TIMELINESS, AND QUALITY: A NEW PERSPECTIVE FROM NINE STATE CRIMINAL TRIAL COURTS (1999) (detailing the interplay between process and the other priorities of a court system to find they are often in conflict and require a balance).

[47] "While the judge publicly stated that she would not hold his rejection of the offer against him during trial, the subtext of the culture was that during sentencing she would. In this context, justice was a place of confusion and paradox – a place where the court record documented the formal rules of practice that contradicted the logics and norms of the interpretive aspects of law." GONZALEZ VAN CLEVE, *supra* note 3, at 172.

[48] Jasmine B. Gonzales Rose, *Color-blind but Not Color-deaf: Accent Discrimination in Jury Selection*, 44 N. Y. U. REV. OF L. AND SOCIAL CHANGE 309 (2020) (describing how linguistic discrimination of jurors leads to racially and ethnically unbalanced juries).

[49] Stephen Rushin & Griffin Sims Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021) (discussing how the Constitutional acceptance of pretextual stops increases racial profiling and makes profiling difficult to challenge through suppression in a criminal case).

[50] "The defense attorneys were the translators who 'warned' defendants about [the court's] culture, thereby conditioning them into compliance." GONZALEZ VAN CLEVE, *supra* note 3, at 172.

injustices by resolving individual cases in a particular client's best interest.[51] While hope exists for radical transformation, is a public defender working within the system left with no choice but to accept their complicity or abandon individual representation?

Public defenders have been in this catch-22 because there is a supposedly intractable tension between direct counseling and a consideration of larger cause-based or movement advocacy.[52] The conventional wisdom is that lawyers represent individuals, and if they shift their focus to systemic issues at all, they risk giving improper advice to a client that is not centering this client's best interest in the direct matter.[53] Certainly, the role of a lawyer must always be to counsel clients about their courses of action and explain the legal system so a client can make an informed choice in their case.[54] The importance of this counseling role cannot be overstated.[55] Lawyers translate the law, as well as the reality of its implementation, to clients in every decision they frame.[56] This framing may make all the difference in what option a client decides to pursue and as such must be honest and straightforward.[57]

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[51] "The criminal legal process depends on the fact that defenders will take on the role of conditioning clients into acquiescence. [... W]ithout conscious consideration of the vulnerabilities of the institutional role and the defender's own biases and potential for complicity there is a danger that defenders provide a conduit for sustaining the harms the system creates." Smith Futrell, *supra* note 13, at 119.

[52] Sterling, *supra* note 7. *See also* Jonathan Rapping, *Implicitly Unjust: How Defenders can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1016 (2013) (discussing "the potential tension between what is coined 'cause-lawyering' and a more traditional model of unwavering fidelity to the goals of the individual client.").

[53] Rapping, *supra* note 52. *See also* Razya Goldsmith, *Is It Possible To Be an Ethical Public Defender?*, 44 N.Y.U. REV. L. & SOC. CHANGE 13 (2020).

[54] "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROF'L CONDUCT 1.4.

[55] "The relationship between clients and defense attorneys is one of the most sacred in our legal system. Trust between the two contributes to the legitimacy of the criminal process. In theory, public defenders speak for their client." Thea Johnson, *Measuring the Creative Plea Bargain*, 92 INDIANA L. J. 901, 917 (2017). Although this relationship also "invests the criminal justice system with a veneer of impartiality and respectability that it does not deserve." Butler, *supra* note 12, at 2179.

[56] MODEL RULES OF PROF'L CONDUCT 2.1.

[57] The model rule on the attorney advisor role is brief, but the comments recognize the extent of this framing power in how delicately it must be balanced.

> "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client

But this framing occurs in the context of the unjust realities of society and the court system,[58] results-oriented capricious judicial determinations,[59] and the limits of personal rights.[60] This counseling work is necessary because a client is entitled to learn about risks and benefits of a course of action.[61] But as it currently exists, this counseling also perpetuates these systems and allows the mechanisms that create inequity to thrive. As many have already discussed, lawyers in these systems act as safety valves that allow the inequality and injustice to continue.[62] Many of the mechanisms that enforce systemic inequality are not named in open court, and cannot be easily enforced by a judge or a prosecutor without the defender's role as enabling intermediary.[63]

The predominant model of public defender client counseling is that an attorney's singular obligation to their client requires putting aside systemic issues entirely.[64] Such a view holds that a public defender must do everything

> may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

MODEL RULES OF PROF'L CONDUCT 2.1, Comment 1.

[58] Clair, *supra* note 28 (detailing how attorneys and judges silence accused individuals).

[59] Angelo Petrigh, *Judicial Resistance to New York's 2020 Criminal Legal Reforms*, 113 J. CRIM. L. & CRIMINOLOGY 109 (2023) (describing the way judges use routine powers to circumvent reforms meant to reduce pretrial incarceration and increase defense access to discovery).

[60] Miller, *supra* note 21 (detailing how the common advice that clients have autonomy of choice is an illusion that disguises the limited rights and options of accused individuals).

[61] MODEL RULES OF PROF'L CONDUCT 2.1, Comment 1. Despite the potential unfairness of this coercion, it is widely acknowledged that the "defense lawyer has an absolute obligation not only to convey the offer, but also to accurately and analytically advise as to the potential penalty if the offer is declined and the client is ultimately convicted." Norman Reimer and Martin Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FEDERAL SENTENCING REPORTER 4, 215-221 (2019).

[62] *See* Butler, *supra* note 12, at 2204 ("*Gideon* bears some responsibility for legitimating these developments [leading to mass incarceration] and diffusing political resistance to them.").

[63] ABA Standards and other guidance suggest that it is unethical for a prosecutor or judge to explicitly threaten a trial penalty. "The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere." ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, 14-1.8(b). *See also*, Johnson, *supra*, note 6 at 50 (discussing how trial penalties that incentivize guilty pleas can evade review because of the nature of charging decisions and how bargaining occurs).

[64] Sterling *supra* note 7.

possible within a criminal case for a client, whatever the systemic causes that led them there and whatever the effect outside of the case may be. This results in "a tension between what is commonly called 'cause-lawyering' and fidelity to the individual client that may present itself when criminal defense counsel is faced with an opportunity to combat racial bias."[65] Thus in this dominant, traditional model, a public defender is obligated to take part in plea bargaining if it benefits a client, to use criminal convictions of prosecution witnesses against them, or to use more "effective" strategies rather than strategies that expose broader issues.[66] It would be improper to consider if those discrete actions may harm past or future clients or reinforce systems that hurt other potential clients. This view considers discussions of such issues with clients and work outside of a criminal case as potential conflicts or a betrayal of the zealous singular duty to a client.

This conversation has occurred in the context of bringing systemic issues into the criminal courtroom, which is a worthwhile goal that should be pursued.[67] This can take the form of challenges to racist police practices in motions to suppress and motions to dismiss, among other methods of intra-system resistance.[68] The complication is that often times the best choice for a client, or the one the client chooses despite how the issue is framed, is one that continues the inequity.[69] For instance, the client who is close to prevailing on a motion to suppress may be offered a plea deal that is too good to turn down, or a case that may actually expose an unfair practice can be dismissed by the district attorney to prevent creating bad law. Systemic issues can continue to replicate unabated with these minor diversions preventing a broader scrutiny of their practices. The criminal court is a poor venue for accused individuals to address the underlying issues that constrain their choices.[70]

These client counseling conversations do not systematically involve a discussion about why the dynamics exist, which turns a lawyer into the mere

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[65] *Id.* at 2263.

[66] *Id.*

[67] *Id*. (detailing several proposals to bring goals aligned with movements into a courtroom to effect broader change, even if the actions fail in individual cases).

[68] *Id*.

[69] *See* discussion *infra* Section II A.

[70] "Our liberal constitutional order focuses on individualized process and individualized remedy; it is absolutely insufficient for dealing with the structured injustice in which we live. Procedural protections distract from the structural problems with overcriminalization, mass incarceration, and the criminal justice system's eclipse of the social welfare state." Amna Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 363 (2015).

enforcer of a client's oppression. Even if there is a discussion of the dynamics, limiting it to the options of a criminal case will not accomplish much. To return to the trial tax example, "[a] guilty plea entered at gun point is no less involuntary because an attorney is present to explain how the gun works."[71] Simply describing the problem does not move forward the possibility of addressing the source of coercion. Indeed the criminal forum itself will never be able to do so.[72]

There are solutions to this catch-22 that do not require public defenders to compromise the sanctity of the counseling role. A lawyer can continue translating the unspoken rules that constrain client choices. But a lawyer can and must also elucidate the underlying mechanisms as they explain to a client and then aid clients in joining those already mobilizing against such mechanisms.[73] This mediation that a defender does between the legal system and the client must be expanded in the other direction to find ways to serve the client's interest by pushing back against the system, instead of only being used to advance the system's interest by overcoming the will of the client. A defender must continue to tell clients about the reality of the law's implementation in a case, but they must also draw from client's knowledge to find tactics that allow them to push back against that reality.

B. Defining Oppression

There is already another dynamic at play in this mediation that a lawyer performs between the law and reality. Public defenders naturally become informed by, and radicalized by, the injustices that they often reinforce. In the process of explaining the disparity to clients, and hearing from their clients what led them to court and what the consequences will be,

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[71] Albert Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea* 47 U. OF COLO. L. REV. 1, 55 (1975).

[72] Clair & Woog, *supra* note 29 at 6. ("[C]riminal courts not only function to legitimate police and funnel people into carceral spaces but also contribute their own unique forms of violence, social control, and exploitation.")

[73] "We should proliferate our understanding of where law takes shape and in relation to what, who acts on it, who it acts on, who benefits, who loses, and who resists—and how resistance individual and collective reshapes law. The aim should be more ambitious than to understand sociologically the life of the law—of where the law lives and the myriad ways it works—but to understand all the places where it can be undone and remade."

Akbar, *Non-reformist Reforms*, *supra* note 25, at 2563.

this counseling dynamic reveals "where the law lives" and works.[74] This counseling dynamic also, at times, becomes the location where defenders and impacted individuals can understand where the law can be undone and remade.[75]

This occurs because the ways in which oppression operates can often become more visible in the counseling process. The process of explaining options and the pressures that shape them provides an opportunity to elucidate those invisible, or unconscious, powers.

Iris Marion Young explains that justice, aside from merely implicating distribution of resources, must also encapsulate "the institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation."[76] I rely on this conception of justice, and her countervailing description of oppression, to explain the phenomenon at play in counseling ordinarily and also to set the parameters for more robust counseling discussed below. In this view, "oppression refers to the vast and deep injustices some groups experience as a consequence of [. . .] the normal processes of everyday life."[77]

This conception of oppression involves different facets that affect different groups in different ways.[78] These groups are messy and overlapping, and likewise there is also not always a clear monolithic oppressing group.[79] It is not possible to "eliminate this structural oppression by getting rid of the rulers or making some new laws, because oppressions are systematically reproduced in major economic, political, and cultural institutions."[80] This conception of oppression informs my description of the way in which the dominant counseling relationship furthers oppression by reinforcing dominant group perspectives. For Young "cultural imperialism" is one facet of oppression by which the oppressed group's identity is defined "by a network of dominant meanings they experience as arising from elsewhere, from those with whom they do not identify, and who do not identify with them."[81] This renders the oppressed group's own knowledge, perspectives,

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[74] *Id.*
[75] *Id.*
[76] Young, *supra* note 4, at 3.
[77] *Id.* at 5-6.
[78] To Young oppression is "a family of concepts and conditions, which divide into five categories: exploitation, marginalization, powerlessness, cultural imperialism, and violence." *Id*. at 4.
[79] *Id*.
[80] *Id*. at 6.
[81] *Id.* at 52.

and lived experiences invisible. [82] Traditional counseling frames every choice through the restrictive lens of legal epistemic authority, prioritizing this dominant perspective over viewpoints that would prioritize clients, movements, communities, or other laypeople. It also then reinforces this scope of counsel as the only appropriate one.

This consideration of how oppression operates reveals the power of more robust counseling, as it goes beyond information sharing or valuing certain epistemic sources. It is a recalibration of the very mechanism that furthers this oppression: the prioritization of certain knowledge and power that unconsciously limits opportunities for real engagement with the mechanisms of oppression. It is a means to interrupt one of the sites for the reproduction of systems of inequity by crystallizing the underlying issues, and allowing individuals within groups to recognize what is at stake.[83] The mere recognition and articulation of this dynamic can increase class consciousness and other forms of group identity that will then allow the collaboration and collectivist action necessary for true change.

C. A question of scope

Some defenders already take the view that criminal courts are sites of injustice, where the law legitimizes police violence and coercion, and uses incarceration and supervision to enforce social control.[84] An attorney who hold such views may or may not already incorporate clients' views as well as their own views into the role of counseling. Even that may still prioritize traditional counseling if they view their work within the system as inherently complicit, and separate from their work without the system.

But taking the view of power as well as the professional ethical rules seriously means that this view of counsel is inherent to the role, independently of what an attorney feels about the legal system. A public defender should discuss with clients any of the externalities that constrain a client's options in their criminal case or that influence the outcome either formally or informally, whether that be policing, prosecutorial discretion, sentencing laws, etc. Public defenders often already know what those

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[82] *Id.*

[83] Akbar, Non-reformist Reforms, *supra* note 25.

[84] "Criminal courts are the legal pathway from an arrest to a prison sentence, with myriad systems of control in between. They are sites where the cruel minutiae of the carceral system is perpetrated and legalized, allowing the millions of stops, searches and arrests by police each year to become 2.3 million people imprisoned [. . .]" Clair & Woog, *supra* note 29 at 6.

mechanisms perpetuate. Indeed that is what makes them counselors, capable of understanding what is at play that constrains a client's choices. But the difference is whether to discuss those constraints openly with clients and wherever that may lead or narrow the conversation to focus on the more immediate effects for a criminal case.

Even the "fundamentals" of the counseling role loos very different if the general dialogue acknowledges and confronts how the origin and purpose of racially biased policing, prosecution, and court systems[85] continue to influence every aspect of the criminal legal system.[86] A lawyer may disagree in the cause or solution, but that the legal system disproportionately punishes people of color is undeniable.[87] Public defenders may see it as an issue beyond consideration in their role as counselors and impossible to fix within the legal system.[88] When forward thinking and creative lawyers have brought such challenges in court, they have faced limited success given how tumultuous any real acknowledgment of racial bias would be.[89] But revealing the limitations of defender power allows clients to engage with other challenges.

Robust counseling requires a lawyer to be confronted with potential injustices that perhaps they have become acclimated to, given their proximity to the legal system.[90] Being open to discussions of areas for potential change will allow conversations with clients, and potential interface with external actors for change.

Of course some discrete individual issues may be considered by the system, certain actors, or even the lawyer, to be intentional and worthwhile,

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[85] "White supremacy is foundational to the criminal courts' violence and social control function." *Id.* at 12.

[86] Pinard, *supra* note 11 (discussing how any reforms to the criminal legal system must address the roots of racial criminalization to have any success).

[87] "Police stop Black and Latino drivers at 4 times the rate as white drivers, although they find contraband twice as often on the stopped white drivers. Blacks are incarcerated at state prisons at a rate 5.1 times that of white defendants." Elizabeth Hinton, LeShae Henderson, & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* (2018).

[88] Pinard's proposal is an assessment of how the status quo fails because of its focus on changes within the legal system and instead "efforts must reach beyond the four corners of the system—indeed, they must reach outside the system—to grasp and incorporate how Blacks are perceived, interpreted, responded to, devalued, stigmatized, and dehumanized from the moment they are born." Pinard, *supra* note 11, at 132.

[89] When the Supreme Court in *McClesky v Kemp* failed to take action despite the clear and compelling evidence of the racist practice of death penalty sentencing found in the Baldus study, the dissent noted that they feared "too much justice." *McCleskey* v. *Kemp*, 481 U.S. 279, 339 (1987) (Brennen, J., dissenting).

[90] Karakatsanis, *supra* note 1.

such as the trial penalty serving the system's interest in efficiency.[91] But this elucidation through the counseling role then will simply allow earnest conversation outside the case itself about the costs and benefits of such a practice to occur, rather than reinforce the practice mindlessly in a forum where it is not subject to scrutiny.[92] Even for issues that are settled, this can allow a renewal of a debate in political forums if and when it becomes appropriate.

Some broader issues may seem counter to others. At the most extreme end, the movements that support a client in a particular case may be connected to white supremacy, men's rights, heteronormativity, etc. First, defenders already have to navigate such dynamics within the counseling relationship as it pertains to advise on the direct case itself. But more importantly, those uncommon positions fall outside of this robust counseling model because there is no systemic oppression for the attorney to consider and elucidate.

Iris Young's conception of oppression provides clarity as to when a defender is in fact reinforcing systems of oppression and has to explore that tension. More realistically than a fringe white supremacist, the real challenge will be in the overlapping and messy manners of oppression, and how some may benefit or desire interventions that conflict with other potential coalition members.[93] This tension is part of the process, not counter-productive to it, if one seeks to build expansive coalitions even when they are not united in every view. As Akbar states, "[o]ne advantage of the heuristic of non-reformist reform is precisely that it does not require a completely shared vision for the future. In its capaciousness, it allows for diverse coalitions to come together who share some goals or agree to take some steps together."[94]

These hypothetical challenges are manageable considerations and the dialogue may oftentimes requires minimal attorney action and can instead lead to avenues that involve social and political factors, and even morality, as the ethical rules explicitly envision.[95] If no feasible version of systemic

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[91] *See* Johnson, *supra* note 6, at 348 ("This poses the question whether expediency is a valid purpose of punishment or whether, as Darbyshire argued, the trial tax represents a 'stunning hypocrisy' for a legal system that 'trumpets the right to trial.'") (citing Penny Darbyshire, *The Mischief of Plea Bargaining and Sentencing Rewards*, CRIMINAL LAW REVIEW, 895–910 (2000)).

[92] *Id*. *See also* Akbar, *supra* note 39.

[93] Young, supra note 4.

[94] Akbar*, Non-Reformist Reforms, supra* note 25, at 2531.

[95] "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's

injustice exists, such as for accused individuals drawing on white supremacist norms or men's rights arguments, there is no oppressive system to account for and therefore there is no tension to be explored in counseling oppression. But this robust counseling can be a way to change commitments to clients and lead to alterations of power dynamics. Again that is because the broader benefit is the shifting of groups as well as the fact that "[c]ampaigns for non-reformist reforms seek to create social conflict among and between classes in order to build class consciousness and force people to pick a side."[96]

Given the nature of policing and prosecution, there is clear synergy between the legal system's oppression and certain larger movements, for instance in the Movement for Black Lives or the New York Immigration Coalition among others.[97] But there is no list, however expansive, that can account for all areas or issues that potentially must be counseled. The counseling role must be expanded to allow this dynamic to play out and prevent the lawyer from gatekeeping solutions and obfuscating the cost of the status quo.[98]

The current myopic view of counseling has led to defense lawyers' abdication of their responsibility.[99] Racial injustice, mass incarceration, and carte blanche to law enforcement through the whittling away of 4th and 5th amendment rights has continued precisely because attorneys have allowed themselves to be blind to obvious inequity that is glossed over through individual representation.[100] As discussed further *infra* in Section III, the ethics surrounding the counseling role therefore requires that lawyers pull back to see, acknowledge, and confront this larger picture.

Kathryn Miller suggests that the focus on individual client autonomy

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situation." MODEL RULES OF PROF'L CONDUCT 2.1. The scope of representation "may exclude actions that . . . the lawyer regards as repugnant or imprudent." MODEL RULES OF PROF'L CONDUCT 1.2, Comment 6.

[96] Akbar*, Non-Reformist Reforms, supra* note 25, at 2564.

[97] "It will 'frequently be the case' that the client's individual goals and criminal defense counsel's systemic goals will be aligned." Sterling, *supra* note 7, at 2263–65 (quoting Rapping, *supra* note 52, at 1019).

[98] Butler, *supra* note 12.

[99] > It is the responsibility of lawyers to ensure our fidelity to neutral principles — to ensure that our legal system does not allow practices to develop or to persist because of who they are happening to, and to ensure that the magnitude of grievous harm is witnessed and weighed regardless of the bodies and minds on whom that harm is visited. We have not done that.

Karakatsanis, *supra* note 1, at 256.

[100] *Id. See also* Butler, *supra* note 12.

obfuscates the systemic injustices that actually shape outcomes.[101] Public defenders become agents that smooth over the friction of the system and allow continued oppression through a presentation of limited choices disguised as actual autonomy. She writes of how in the counseling role

> "the defender passes along the [autonomy rights] myth to the client, suggesting falsely that the system presents opportunities for narrative expression and meaningful choice that simply do not exist. The emphasis on opportunities to 'have your day in court' or 'tell your story' can supplant conversations about the structural limitations and white supremacist realities of the criminal legal system, favoring a harm reduction approach."[102]

Miller and others have suggested the solution is to shift the attorney-client relationship in earnest. She proposes accepting client resistance, both to the system and to the public defender's expertise, as a means to break out of this cycle.[103] These observations also force a reckoning with the traditional view of the counseling role. Attorneys must engage with their own limitations with clients, expand the universe of options they bring to or consider from clients, and support client acts of resistance, along with other actions external to the criminal case itself.[104]

This expanded counseling obligation stems from the model rules allocation of authority between an attorney and a client which "confers upon the client the ultimate authority to determine the purposes to be served by legal representation."[105] A client must determine the purpose of representation, even if that purpose is contrary to what a lawyer would view as a good outcome in a criminal case. This has been used to further holistic, client-centered counseling where a client prioritizes outcomes in venues besides the criminal case, such as where a client would accept an otherwise avoidable conviction to secure a better outcome for immigration or housing

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[101] Miller, *supra* note 21.

[102] *Id.* at 440.

[103] "[U]nlike rights-based autonomy, resistance involves agency that occurs not because of the law but in reaction to the law." *Id*. at 440.

[104] *Id*.

[105] MODEL RULES OF PROF'L CONDUCT 1.2.

or a custody case.[106] The same is true for outcomes outside those venues as well, such as community organizing, public policy, and impact litigation outcomes. In fact the model rules explicitly state, in its very limited words about counsel, that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[107] A client can choose to prioritize those outcomes or not, balancing how various options in and out of the criminal case will interact. They can certainly decide to ignore political and economic considerations that are relevant to why they have a case and how they may again in the future. But they should be advised about these possibilities and be allowed to raise them with their attorney in order to make such choices, and the conversation between client and attorney must be broad enough to allow such decisions.[108]

The dominant view of counseling improperly ignores this obligation and guides lawyers to limit the choices explained to a client to those within the criminal case or, if the office is holistic, possibly to some other legal venues.[109] This view improperly abandons the attorney's requirement that they be accountable to a client, and serve the client's desires as an assistant, because it leads to attorneys obscuring options from clients. While there exists a basis in the model rules for limiting scope of representation or tactics, it is a narrow exception and assumes a discussion of the representation occurs first and that the decision to limit is intentionally made either by a client due to cost or by an attorney due to a belief the tactic is "repugnant or imprudent."[110] The current counseling role occurring in most practices does not engage in this analysis.[111] It is not that a lawyer has disregarded community organizing or social movements as imprudent, but rather that a lawyer either is unaware of what exists, cabins in the universe of options to

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[106] *See* Smyth, *supra* note 30.

[107] MODEL RULES OF PROF'L CONDUCT 2.1.

[108] In many ways this is the issue Karakatsanis highlights as a failing. He finds that public defenders have limited their clients' options in a way that wealthy clients would not face. Karakatsanis, s*upra* note 1.

[109] Depending on what consequences a client faces, many offices offer "defensive" holistic consultation for immigration, housing, employment, benefits, and parental rights. But some offices are also increasing the sorts of "offensive" holistic counseling they offer, such as for policy work, community organizing, and impact litigation. *See Explore Holistic Defense,* The Bronx Defenders (last visited Oct. 19, 2023), https://www.bronxdefenders.org/who-we-are/how-we-work/ Whether that counseling is part of the initial counseling on a criminal case is a different matter.

[110] MODEL RULES OF PROF'L CONDUCT 1.2, comment 6.

[111] Carle & Cummings, *supra* note 20.

those in the case in order to save time and effort, or is simply replicating what they believe is the correct scope of options based on what they were taught and what their teachers were taught before that.[112]

D. Epistemic deference, epistemic coherence, and moral injury

Ignoring the tension in counseling is also an exacerbating factor in public defender burnout and attrition.[113] Public defense often draws attorneys that are skeptical of the criminal legal system and view it as deeply flawed or as a failed project.[114] Yet the work of public defenders in counseling furthers these worst aspects given the role of lawyers in translating the unspoken inequities and conditioning clients into accepting them.[115] In light of this conflict, public defenders often suffer "moral injury" or the harm that occurs when acting contrary to your own values or beliefs.[116] A common way to protect themselves from the cognitive dissonance that stems from their role in perpetuating injustice is either to grow callous as to the harm inflicted through the work or to justify their role despite the flaws, thereby downplaying the harm.[117] Otherwise, the attorney will continue to endure the moral injury and eventually find the work untenable.[118] This is the way oppression operates, actors justify the actions they take in order to reconcile the reality of injustice with their worldview.[119] Society replicates assumptions about people involved in the criminal legal system, and "[t]hese assumptions create not only justifications for violence, but also a basis for cooperating with violence."[120] But public defenders working directly with the accused can see that those assumptions are flawed, yet are still carried out. They see how the desired aims of the systems are not accomplished in its operation. As a result these defenders exist at a space in the system of

[112] In my capacity as a training director I observed that newer attorneys and clients would naturally gravitate towards conversations of why things were the way they were. That may have been a byproduct of the time and place I was observing, New York City in the 2010s in the midst of the Black Lives Matter movement.

[113] Beatrice Ferguson, *The Relentless Mental Toll of Public Defense*, SLATE (Jan. 4, 2023), https://slate.com/technology/2023/01/public-defender-mental-health-trauma.html.

[114] The author of the Drexel study cited by Ferguson found widespread moral injury among public defenders because their work props up the system they oppose. *Id.*

[115] MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020).

[116] Ferguson, *supra* note 98.

[117] JOANNA FLECK & RACHEL FRANCIS, VICARIOUS TRAUMA IN THE LEGAL PROFESSION: A PRACTICAL GUIDE TO TRAUMA, BURNOUT AND COLLECTIVE CARE (2021).

[118] Ferguson, *supra* note 98.

[119] KELLY HAYES AND MARIAME KABA, *supra* note 24 at 47-48.

[120] *Id.* at 48.

heightened tension and conflict, where its contradictions are made clearest.

This phenomenon is actually an indication of the power inherent at the site of public defender counseling. Lawyers, of diverse backgrounds and experiences certainly, but all steeped in the law and passed through the legal academy, come face to face with 'epistemes from below,' the clients who often impart their knowledge of how the law oppresses and reveal the flaws in the assumptions made by the system of oppression.[121] This contributes to another form of dissonance, what some call "epistemic incoherence,"[122] whereby defenders and defender organizations are confronted with the conflict between their views in the work they aspire to and the work they do.[123] Defenders, as all lawyers, are drilled in the process of legal formalism for years, and then they enter practice and experience the varied ways in which a judge is incentivized to circumvent precedent and clear law in some cases and not in others.[124] Even more strikingly, those defenders who do not share clients lived experiences but came up with the unconscious assumptions that prop up the violence of the system are confronted with the actual humanity of their clients. They see how communities of color are policed, how courts treat people without material wealth or political connections, and how those communities' resistance is obstructed by legal systems.

The key is to not turn away from this epistemic incoherence but confront it head on to be able to find resolutions to the systemic issues underlying it. Defenders have to acknowledge what is happening in order to find ways to overcome it. That will be challenging, especially confronting one's own role in furthering that oppression. But these defenders would do well to follow Miriame Kaba's advice for activists in such a situation, that "[h]ope and grief can coexist, [. . .] let this radicalize you rather than lead you in to despair."[125]

The racial aspects of this dissonance are particularly pronounced. Gonzalez Van Cleve has pointed out that the conditioning of clients on race and class lines is work that is largely accomplished by public defenders,[126]

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[121] *Id.*

[122] Fernando Toro-Alvarez, *Coherence and Dissonance: A New Understanding in Management and Organizations,* 11 PSYCHOLOGY 748-762 (2020) (describing the phenomenon of epistemic coherence and how cognitive dissonance is an indicator of a lack of coherence and a motivator for organizations to find a means to attain coherence).

[123] *Id.*

[124] Petrigh, *supra* note 59.

[125] HAYES & KABA, *supra* note 24 at 18.

[126] GONZALEZ VAN CLEVE, *supra* note 3.

the system's "racialized ambassadors"[127] who are able to pick up on markers of race and class to decide a client's deservingness of attention as well as able to discount clients lived experiences.[128] Ultimately it is often the defenders who sort clients for the system, based on their expertise and experience in how these clients will be treated by the court.[129] This can come from a good place, a desire to spare a client from the negative effects of insisting on due process and being punished.[130] But Gonzalez Van Cleve found defenders also had become oblivious to what they were doing. They often did not explicitly undermine clients but devalued their opinions and knowledge in ways that allowed them to substitute judgement or apply more pressure when client choices did not align with attorney advice.[131] Many defenders even held personal beliefs about the injustice of the system yet perpetuated the injustices, especially in regards to racial coding.[132] She recognized a "disjuncture between perspectives […] and practice" when it came to racial injustice especially.[133] Defenders could "narrate thoughtful critiques of the law and whether it provided justice or not, but practice the law in another manner entirely."[134]

Others have grappled with this phenomenon and proposed that client selection of attorneys may alleviate this dynamic by allowing clients to pick racially similar attorneys or ones who share other aspects of their backgrounds.[135] As a generality, Black public defenders harbor less anti-Black bias and are more understanding of shared lived experiences,[136] but this does not resolve the underlying issues and may not alleviate the dissonance even as it may place an undue burden on Black defenders.[137] It

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[127] *Id.*

[128] "In the same way that the term "ghetto" is used by whites to locate and demean the cultural features of black and Latino' lives, "street law" is a term that undermines the depth and complexity of understanding the law by defendants, the majority of whom were people of color." *Id.*

[129] *Id*.

[130] *Id.*

[131] Defenders "underestimate and undermine their clients' understanding of the legal process by characterizeing it as "street law"—a term that references a type of ghetto bastardization of "real" legal knowledge." *Id*. at 163.

[132] *Id.* at 133.

[133] *Id.*

[134] *Id.*

[135] Hoag-Fordjour, *supra* note 15.

[136] *Id.* at 1533.

[137] *Id*. (discussing the benefits and downsides of a system that allows clients to select defenders of the same race, including an undue burden on Black defenders, though ultimately concluding the benefits would make it worthwhile).

also implicates a problem of a version of standpoint epistemology that Olúfémi Táíwò calls epistemic deference.[138] Standpoint epistemology values the knowledge gained from one's viewpoint, meaning that people facing oppression may have access to sources of information that privileged do not. The problem comes when we attempt to solve the underlying inequalities solely by deferring to people who share some characteristics of oppression, such as race, but not others, such as class, political connections, or professional status.[139]

Táíwò cautions how this deference comes at the expense of actual engagement with other oppressed classes and an actual interrogation of the mechanisms of oppression.[140] While he is discussing scholarship, there is a corollary for how defenders operate. We have to allow confrontation with why there is a benefit to attorney-client racial concordance to have broader change,[141] and to otherwise gloss over the source of this dynamic may form an obstacle to change by preventing other defenders from "engaging empathetically and authentically with the struggles of other people – prerequisites of coalitional politics."[142] There is also an analogous issue of losing sight of the differences between black lawyers and clients, and substituting judgement despite the difference in privilege between the two, an effect of the elite capture that Táíwò describes.[143]

This does not mean client selection on the basis of race is not worth pursuing, but that it should be interrogated, built upon, and coupled with a long-term tactic to re-envision counseling so that all defenders confront their own role in enforcing racial hierarchies if that then allows for engagement with how to transcend this phenomenon between clients and defenders and others.[144] When we embrace the tension of counsel and acknowledge that all defenders gatekeep clients, we can see that in fact defenders who share some

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[138] Táíwò, *supra*, note 21.

[139] *Id.*

[140] *Id.*

[141] I don't mean to suggest this is a problem with Hoag-Fordjour's proposal, *supra* note 15. I am merely hoping to consider where to go next with her observations and suggestions to build upon it productively and avoid possible pitfalls.

[142] Táíwò, *supra*, note 21.

[143] "[D]eferential standpoint epistemology contributes to elite capture at scale. The rooms of power and influence are at the end of causal chains that have selection effects. As you get higher and higher forms of education, social experiences narrow – some students are pipelined to PhDs and others to prisons. Deferential ways of dealing with identity can inherit the distortions caused by these selection processes."

[144] Táíwò cautions that the first step is not enough, without actual concrete steps towards change. Táíwò, *supra* note 21.

experiences with clients yet are still enforcing legal episteme authority may be better situated to gatekeep client choices since they have more credibility with clients despite limiting their options.

Along with the obvious problems in this treatment of clients,[145] this aspect of the counseling relationship also forms another basis for public defender moral injury, as they find themselves unwittingly reinforcing and actually imposing the racial, class, and other stratifications of the system.[146] Instead of continuing to do so, lawyers must engage with clients about the reality of what is happening and why.[147] Táíwò continues with how "deference rather than interdependence may soothe short-term psychological wounds. But it does so at a steep cost: it can undermine the epistemic goals that motivate the project, and it entrenches a politics unbefitting of anyone fighting for freedom rather than for privilege, for collective liberation rather than mere parochial advantage."[148]

Táíwò's solution in his context is a more "constructive" view of standpoint epistemology.[149] His proposal can be analogized to robust counseling that seeks to center the genuine knowledge that clients have from their unique vantage points and build on that. This may further real change,

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[145] Clair, *supra* note 28.

[146] "[T]he state is neither "neutral" nor "capable of being used by anyone. . . . Relying primarily on formal law and politics diverts attention from the work required to reconstitute politics and the economy." Akbar, *Non-Reformist Reforms*, *supra* note 25, at 2524.

[147] "What does it mean to think about law in relation to emancipation and long freedom struggles? To begin, it requires that we understand law as a site of domination, exploitation, expropriation, and legitimation—and lawyers as central partners therein." Akbar*, Non-Reformist Reform, supra* note 18, at 2508.

[148] Táíwò*, supra*, note 21.

[149]
> A constructive approach [to standpoint epistemology] would focus on the pursuit of specific goals or end results rather than avoiding 'complicity' in injustice or adhering to moral principles. It would be concerned primarily with building institutions and cultivating practices of information-gathering rather than helping. It would focus on accountability rather than conformity. It would calibrate itself directly to the task of redistributing social resources and power rather than to intermediary goals cashed out in terms of pedestals or symbolism. It would focus on building and rebuilding rooms, not regulating traffic within and between them – it would be a world-making project: aimed at building and rebuilding actual structures of social connection and movement, rather than mere critique of the ones we already have.

Id.

and also may assist attorneys in seeing their own limitations, along with the possibilities that exist elsewhere that may be invigorating and hopeful. The author of a Drexel study on public defender moral injury concluded that "the concept of moral injury can be an effective tool for turning a critical lens back on the systems in which public defenders work. In that sense, efforts to improve mental health for public defenders and advocacy efforts directed at changing the criminal legal system itself are not separate fights, but in fact inform and feed one another."[150]

Rather than hiding from injustice, justifying the oppression that occurs, or relying on defenders with their similarly situated lived experiences, defenders have to fully accept the responsibility and obligation of their role as well as the expertise of clients. Defenders, in their role, must scrutinize the hidden mechanisms that force the outcomes for their clients. They must be constantly asking, as Ruth Wilson Gilmore suggests, "why is it like it is?"[151] They are well suited to have this conversation, and doing so will alleviate a major contributor of burnout: the cognitive dissonance that comes from participating in a system that one is well situated to recognize as unjust.

PART TWO: COUNSELING *ABOUT* OPPRESSION

A. A glimpse of something more

As a public defender I, like countless others across the country, was confronted with this area of conflict within the counseling relationship, as well as encountering new sources of information and power.[152] Through my clients, partner community organizations, and my own colleagues focused on broader work, I learned about various movements to change the law, scrutinize courts, and reform police practices. In New York City one such movement was Communities United for Police Reform (CPR). Somehow CPR just naturally became part of my conversations with clients in certain common cases.[153] I would explain their options in the criminal case and how it would affect other forums as normal.[154] But when a client raised it or the circumstances made it seem relevant, I would tell them that although it would

[150] Ferguson, *supra* note 74.

[151] Gilmore continues "and the answer generally has got to be more detailed than 'racism' or 'colonialism,' although those two categories and sets of relationships matter." HAYES & KABA, *supra* note 24 at 119 (quoting a conversation with Ruth Wilson Gilmore).

[152] Táíwò, *supra*, note 21.

[153] *See infra*, Section IV.B

[154] *See supra,* Section II.A

not have any effect on their case or options, there was a growing push to change the practices that had led them here. If they wanted to change the police practices they experienced, they could go to meetings or find some other way to lend their voices to that cause. When it was warranted, I would explain to my clients that they could not get justice in their criminal case, that the most we could do there was prevent further harm. But I would add that maybe, if we set up that case properly, they could get something closer to justice elsewhere. I also began to be explicit in our conversations that regardless of whatever happened in this or any court proceeding, maybe they could make the world more just in general through their organization with others who had similar experiences. Most importantly, I was transparent about my own limitations, how difficult it was for a criminal case to alter the underlying issues that constrained my clients.

The vast majority of my clients in these situations, after my counseling, took pleas or delayed dismissals that let them escape court with minimal harm, but allowed the police, prosecutors, and courts to continue the practices that led them there. But some pursued other routes alongside what happened in criminal courts. Of the several clients I discussed advocacy options or broader fights with, I know that a few went to at least some of CPR's organizing events. Eventually that movement led to the Community Security Act, which greatly curtailed abusive NYPD stop and frisk practices.[155] Separately, a client of mine that I steered to our impact litigation unit ended up a plaintiff in the federal lawsuit that stopped NYPD's vertical patrols and unlawful trespass arrests.[156] Another client of mine informed me of the copwatch[157] movement, which sought to hold police accountable by having members of the community observe and film police interactions in their neighborhoods. That movement would end up being instrumental in an unrelated client's case. Another client who was arrested at his girlfriend's apartment building for trespass won a civil wrongful arrest lawsuit after I referred him to our civil practice. Another client of mine was part of the occupy protests and chose to turn down any offer to make a political statement about policing of nonviolent civil disobedience. He taught me about plea strikes when he and his codefendants (through their lawyers) told me they wished to mobilize for one. A client of mine who faced predatory

[155] N.Y.C. Local Law 2013/071 (2013).

[156] *Ligon v. the City of New York*, 925 F. Supp. 2d 478. (S.D.N.Y. 2013).

[157] Jocelyn Simonson, *Copwatching*, 104 CALIFORNIA L. REV. 391 (2016) (detailing the practice of copwatching and analyzing it as a form of participatory civic engagement in police accountability).

practices by the NYPD's "anti-crime" unit was interested in bringing attention to his unfair situation and had an opportunity years after his case, when the anti-crime unit's continued operation was being debated. Ultimately he declined to share his story in a political forum or with a newspaper that had elicited comments, for fear of reprisal by the NYPD.

A client of mine accused of resisting arrest during an encounter where officers assaulted her and she fought back made the decision to prioritize challenging her stop in an external forum over the effect in her criminal case. She proposed to me a way to challenge the underlying issue if she could win her trial, since she had gone to a hearing on her CCRB complaint and then had enlisted a plaintiff's attorney for follow-up. We went to a non-jury trial[158] and she was found guilty of two counts of attempted assault, which gave her a permanent criminal record.[159] Her lawsuit had to be abandoned because of her conviction. Every few years she and I would talk to catch up, and she would inform me of the jobs she has missed out on because of her conviction.

As I moved to more serious cases, I would occasionally raise the campaign to challenge mandatory sentencing minimums after or alongside the conversation with a client about taking a plea to avoid a harsher sentence after a hearing or trial. I would discuss the possible campaigns to address the unfairness of New York's firearm laws, of the heightened standard for police to be found guilty of assault, or the strict definition of justification, when clients were grappling with their limited options in a particular case. This occurred when a client or family member raised the issue, or I happened to think it relevant, or if a colleague in the policy unit had informed me of a new push to reform sentencing.

Eventually I stopped being a young public defender, and after some

[158] At the time New York law allowed prosecutors in NYC to opt for a bench trial by reducing charges to a class B misdemeanor. They opted to do so frequently in cases involving broken windows policing. New York ultimately amended the law, again through a combined effort of advocacy organizations and lawyers who worked in criminal court and experienced the disconnect between the idea of due process and its reality. New York City Bar Association Committee report, Support for Legislation Permitting Jury Trials for B Misdemeanors (May 2021).

[159] Again this has since changed through the efforts of directly impacted individuals as well as public defenders and others. See Nick Reisman, NYCLU Pushes Preferred 'Clean Slate' Bill, available at https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/03/30/nyclu-pushes-preferred--clean-slate--bill (March 30, 2022). Through those efforts, a decade after my case with this client, New York passed the Clean Slate Act, which created automatic sealing of convictions for certain background checks, after a period with no new arrests. Grace Ashford, New York Will Give a 'Clean Slate' to Formerly Incarcerated People, https://www.nytimes.com/2023/11/16/nyregion/clean-slate-act-ny.html (November 16, 2023).

time found myself as the training director for the entire practice. I had to articulate to new attorneys how to strike the balance in counseling clients. I was buoyed by the growing power of movements for change, but I also worried about lawyers going too far in imposing their own political views. I still believed there was a tension between counseling clients about their case and counseling them in order to achieve greater transformation. I taught new defenders that we are not movement lawyers between 9 and 6, that we can support causes on our own but cannot 'sacrifice' our clients to enact broader change. Even in a holistic office, the line of what to bring into a conversation with a client, and how and when, is a difficult one. But as our office developed an even more robust interface with community organizing, impact litigation, and policy work, I was challenged anew about where the line should be drawn. These practices, and the works of scholars analyzing movements and the law,[160] challenged my perception that we had to choose between working within the system, or without it.

B. Counseling Oppression

Based on all of these experiences, as well as hearing similar tales from my colleagues across the country, I now believe that embracing this tension can turn client counseling into the site of broader convergence of varied epistemes and tactics. This bolsters the connection that naturally develops between public defender counseling and the movements for broader change. This is what I refer to as the more robust counseling that is explicit about limitations, knowledge, and power. Rather than solve those issues, it entails counseling clients about this manner of oppression, and turning the counseling relationship into a broad ranging discussion of how the criminal legal system operates. Defenders know the hidden places where the law works,[161] and should share that 'insider information' with their clients explicitly at all times.[162] But they also can learn a great deal through their clients' lived experiences by broadening the scope of the relationship in this way.[163] This can foster the natural connections that may develop between defenders and movements and should inform the sporadic work that I did above, and that countless others have done and continue to do in jurisdictions across the country. Defenders are obligated to have those conversations whenever we can, to learn from clients, community members, and/or other

[160] Akbar, Ashar, and Simonson, *supra* note 36.
[161] Akbar, *Non-reformist Reforms*, *supra* note 25, at 2563.
[162] Crespo, *supra* note 7.
[163] Clair, *supra* note 28.

advocates about larger movements for change and also required to incorporate those options and tactics into our counseling. The informal counseling that I, and countless others, engaged in is should be a principled and intentional part of nearly every counseling conversation.

As discussed above, public defenders' counsel necessarily makes them complicit in the oppression of their clients by coercive systems.[164] Yet lawyers may feel they have no other choice because of their duties to their individual client, even though they, and their colleagues, may amass dozens or hundreds of "individual" client's situations with uncannily similar themes that point to a larger problem with the law.[165] A public defender's high caseload provides the opportunity for a broader view and a connection to broader coalitions, although the overwhelming amount of work also hinders the chance for insight or action.[166]

But if an attorney is transparent about the reality of those experiences with clients and with society, turns those experiences outwards, and encourages a client to do so as well, that attorney can use the moments of counseling oppression to push back against the oppression itself. A public defender should inform clients of decisions within a case as they already do. But they also must discuss what leads to these issues, whether that is a law, informal court mechanism, police practice, etc. They must advise about options and also in turn must be elicit and learn from clients based on their experiences to stay apprised of what injustices exist and what remedies to pursue.

Those public defenders must also suggest to clients avenues to learn more and engage with work to address those causal mechanisms, whether it is something the lawyer can do on behalf of the client, or connecting a client to an organization or community group, or discussing something the client could do directly. This involves discussing client proposals that go outside the case, even when the issues raised are so fundamental or so large that an attorney has no way to push back or incorporate it into litigation. Learning from clients' own lived experiences is essential to developing a true

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[164] "[The] law [is] a site of domination, exploitation, expropriation, and legitimation—and lawyers [are] central partners therein." Akbar, *Non-Reformist Reforms, supra* note 25, at 2508; s*ee also*, section I, *supra.*

[165] "That the debate should sharpen collective strategy and tactics—collective power and consciousness even—is constitutive to the concept of non-reformist reform itself." *Id.* at 2536.

[166] Johnson, *supra* note 6 (detailing how high caseloads reinforce plea bargaining and the trial penalty as public defenders both are incentivized to facilitate pleas and also lack the resources to push back on the pleas through sufficient investigation and advocacy).

understanding of options to counsel, and exploring options that prove to be futile may still lead to lessons that can be used to guide the next client.

This view must be expansive, it must both propose and accept client proposals that undermine the ordinary operation of the law. It must accept the examples of resistance that Miller, Clair, and others discuss.[167] What this will look can vary greatly depending on the issue, the extant struggles against the issue, and of course client desire. It is possible that many clients will not have the means, energy, or desire to engage with broader work. But even a fraction of clients engaging in different forms of decision-making can be monumental. Mass incarceration and policing has made system-involved individuals into an exceedingly large class.[168] By some estimates one in every three Americans has a criminal record of some form, and faces the host of negative issues associated with it and therefore potentially benefits from involvement in movements to affect the criminal legal system.[169] Given the nature of policing and the fact that certain communities are disproportionately impacted, many of these individuals are clustered in ways that would allow for effective collective mobilization. This expansion of the counseling role also has benefits in shifting the public defender – client counseling relationship beyond the illusion of autonomy.[170]

In the counseling capacity a lawyer must advise their client of the law

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[167] Both Miller, *supra* note 21, and Clair, *supra* note 28, detail numerous ways resistance to the legal system already occurs by clients, through speech and actions. Most acts of resistance by clients are met with punishment. Rather than merely advising a client as such, thereby conditioning them to not engage in the acts, lawyers must collaborate with clients and find ways to advance these tactics just as they do other possible courtroom tactics.

[168] There is a principle in revolutionary thought that exploitative systems "create their own gravediggers." KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO (1848). In their context Marx and Engels wrote of how the capitalist system creates an exploited class that is incentivized, empowered, and able to overthrow that system. The criminal legal system has increased the scope of incarceration and punishment so broadly that it has created mutual interest across a huge number of individuals. This is because of mass policing of communities of color and the history of criminal law. The system's scope has become so enormous that, as Justice Neil Gorsuch observed, "[w]e live in a world in which everything has been criminalized." Transcript of Oral Argument at 52, *Lange v California*, 594 U.S. ___ (2021). The selective enforcement of those laws is oppression in action and provides a strong incentive to the oppressed to oppose it. And the system of plea bargaining has, ironically, given accused individuals the power to shut down that legal system. *See* Crespo, *supra* note 7.

[169] By some estimates one in three Americans has a criminal record. The Sentencing Project, *Ten in Ten* (2022) Available at https://www.sentencingproject.org/app/uploads/2022/08/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf.

[170] *See* Miller *supra* note 21.

as it is. But a lawyer working in such systems must also engage with clients about the failings of the legal system, and also turn outward and reveal to society the gap between the law as it actually exists and its purported ideal. This allows lawyers in such a system to bolster larger change or at least become less of a roadblock in the movements for such changes, without necessarily coopting the energy of the movement.[171] Ideally a confrontation with this tension will alleviate attorneys being jaded, or burnt out by keeping them grounded in the larger issues even while they may perpetuate them.

C. Towards Change

1. Transformation within and without the system

A goal of focusing on this counseling relationship is to make attorneys conscious about the role they play and intentional in how they navigate that role.[172] Lawyers working in such systems already often know how to push back on courts' cultural norms, confront their own biases, and challenge other actors to confront theirs.[173] But that cannot be enough in the face of systemic and entrenched issues.[174] By recalibrating the counseling role, the goal is to bring to the forefront the tension a lawyer has in giving realistic advice and, in doing so, perpetuating those real injustices.

The current outlet for an attorney in that role, who is fighting zealously for their client in the face of systemic injustice, may be to find a safe place to vent or commiserate.[175] While important in many ways, commiseration in private is a poor means of navigating the real harm that occurs through this tension in counseling. Putting on a facade to a client then going back to closed offices and speaking of the injustice to a colleague still perpetuates the injustices, and only continues to hide them from scrutiny or potential change. It may also normalize for the lawyer the injustice that they are perpetuating, if the commiseration is not also productive about means to enact change.[176] The counselor in that role must be transparent with the client

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[171] "[T]he legal regime shapes the consciousness, motivations, and desires of individuals and groups. Law affects the construction of subjectivity in nonlegal actors, particularly when they invest their time and passions in promoting social change through legal reform." Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 956 (2007).

[172] Smith Futrell, *supra* note 13.

[173] *Id.*

[174] Miller, *supra* note 21.

[175] GONZALEZ VAN CLEVE, *supra* note 3, at 251-3.

[176] *Id,*

about that injustice, and also seek to encourage means by which that injustice can be changed.

Gonzalez Van Cleve wrote about the public defenders who failed to mediate properly, who imposed checks of their own on undeserving clients and "passed their fear [of due process] onto their clients instead of resisting on their behalf."[177] Those attorneys became "ambassadors of racialized justice" even if they did not acknowledge or understand their role in it.[178]

Instead attorneys have an obligation to do more than just to check their personal biases and be cognizant of them, and more than just push back against the injustices through their actions in the case itself, but also to shed light on the system through other means. Then they have an obligation to give clients options about what can be done about it. Holistic Defense offices have continued to push the bounds of representation beyond the instant case that brings an individual to them. Many of these offices have policy counsel, community organizing projects, and impact litigation departments that can turn individual client issues into system changing causes.[179] This reframing is not a substitution for the work of those movements. The goal is to prevent the siloed nature of counseling to continue being a road block to such movements.

Robust counseling furthers the goals of broader transformational change by accomplishing what many view as an initial step of any abolitionist[180] project: demystifying the law to explain what the legal system actually does.[181] This role of counseling can interject that demystification into the attorney-client relationship without jeopardizing its core principle of fidelity to an individual client's interest.[182] It can allow the client to see the reality of their situation as required for informed decision-making and also to

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[177] *Id.* at 252.

[178] *Id*.

[179] "Policy and Community Organizers expand the advocacy of The Bronx Defenders through outreach and legislative advocacy on the vital issues faced by our clients. Coordinating with clients, civil leaders and local and national organizations, Policy and Community Organizers ensure that holistic defense is both client-based and community-based." Bronx Defenders, *About us*, available at https://www.bronxdefenders.org/who-we-are/how-we-work/policy-and-community-organizer/.

[180] Abolition is a broad and diverse movement, but a unifying concept is that abolitionists believe "we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems." Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6 - 8 (2019).

[181] Brendan Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 215 (2021).

[182] See *supra* section II. C.

see how that reality can potentially be changed.[183] It also leads attorneys to see their clients lived realities and how they are shaped by the law.

This can help lead people to the next steps of disempowering and dismantling those systems.[184] But that work can be done by others better equipped than a lawyer in a case. That lawyer merely needs to stop from standing in the way and imposing a division that prevents clients from considering systemic issues in their individual case.

This counseling role can involve external community groups, other units within the office if they exist, supporting direct advocacy by a client, or a lawyer's own individual external advocacy. The latter must be most carefully guarded as it is easy to fall into the pitfall of taking actions to further the lawyer's image or career in the guise of client empowerment.[185]

The shifting of power allows for changes that are not dependent on the lawyer's views.[186] Ultimately all this consideration does is help address *Gideon*'s legitimization of a system that does not deserve it.[187] Simply making this tension explicit does not solve the problems, and we must remain mindful that "[t]he idea that legal representation – even free legal representation – will help reduce this country's overreliance on criminalization and incarceration is simply a myth."[188] Yet it can bridge the gap between a radically different world and the current one by helping to reimagine the spirit of the law.[189] Rethinking counseling in this way can shape the interpretive commitments that decide the narrative of the law.[190] It is akin to a non-reformist reform because it aims to heighten the conflicts present in the system. "While reformism aims to depoliticize, non-reformist reforms aim to turbocharge engagement with race, class, and gender

[183] Put even more fundamentally, "[i]n order for the oppressed to be able to wage the struggle for their liberation, they must perceive the reality of oppression not as a closed world from which there is no exit, but as a limiting situation which they can transform." PAULO FREIRE, PEDAGOGY OF THE OPPRESSED, at 49.

[184] Roediger, *supra* note 143.

[185] Smith Futrell, s*upra* note 13.

[186] For an in-depth analysis of how to shift from lawyer led change to community based, *see* Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis* 69 UCLA LAW. REV. 164 (2022).

[187] Butler, *supra* note 12.

[188] Smith Futrell, *supra* note 13.

[189] Again, this paper is an attempt to "help articulate a contrasting 'nomos' that cannot be reconciled with our current arrangements, a different understanding of our ethical commitments to each other with which the academy and the law must then contend." Akbar, Ashar, & Simonson, *supra* note 36.

[190] Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 1, 4, 6 (1983).

struggles."[191] More robust counseling, while not itself a vision of a new world or a complete recounting of the woes of the current one, could still constitute "an evolving praxis of how to bridge the two."[192]

The conversation on the limits of client counseling has already started in the context of plea strikes.[193] Can or should an attorney counsel their clients to risk a much worse personal outcome in a criminal case in order to "go to trial [to] crash the system?" [194] Would that do a disservice to the individual client they represent who would likely suffer an outsized negative outcome?[195]

The conclusion reached by many in that conversation is the same for any broader movement. Rather than decide for a client or keep the option from a client entirely, the answer is to expand the counseling role and include in its scope interventions beyond the instant case.[196] The attorney must continue to navigate a client through the options available to them in their pending case, but also continue that mediation role in the other direction with the systems themselves. This could include, but also go beyond, collectivist action like plea strikes.[197] It should require attorneys to learn about, engage in, and inform clients about options outside their direct case, such as community organizing efforts, impact litigation, or policy proposals.

More robust counseling helps address ethical issues with

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[191] Akbar, *Non-Reformist Reform*, *supra* note 18, at 2565 (citing *Abolition and the State: A Discussion Tool*, INTERRUPTING CRIMINALIZATION 5 (2022)).

[192] *Id.* at 2497 (citing ROSA LUXEMBURG, REFORM OR REVOLUTION AND OTHER WRITINGS 3 (2006).

[193] This is discussed in greater depth in section C.1 *infra*.

[194] Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (March 10, 2012), (available at https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html).

[195] *See* Crespo, *supra* note 7.

[196] As Michelle Alexander's N.Y. Times opinion piece suggests in closing, the conflict is not between advising clients to refuse a plea for a broader goal or to advise them not to. It may merely be to advise clients that it is an option. Alexander, *supra* note 104.

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> "Defense attorneys cannot force their clients to go to trial or decline to plead guilty; nor can they coerce clients to do so. But they can offer zealous representation that allows clients to make truly voluntary choices, and that representation can include an invitation (in appropriate cases) to participate in a collaborative effort to change the system by forcing it to bear some of the real costs of mass misdemeanor processing."

Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1100 (2013).

representation and collectivist action. Other scholars have recognized the difficulty in being an ethical public defender given the conflicting duties of candor to the tribunal and confidentiality and zealousness.[198] At first glance, this counseling proposal seems to complicate that further by adding yet another consideration that is arguably even more complicated to incorporate: a consideration of issues outside the direct case. But as others posit, the solution to conflicting ethical rules is in fact to be explicit with clients about the limitations inherent in the current system.[199] In these contexts, others have proposed that a defender must be honest about their limitations and that they inherently may not have the resources, or scope to accomplish real change and may even have duties that conflicts with the clients' best interest.[200] I embrace this and propose expanding this honest conversation to include the limitations of attorneys in general, to allow client expertise in to the counseling relationship, as well as limitations in a criminal case forum itself, and the opportunities to look beyond that forum for opportunities.

That's not to suggest ethical issues do not form some boundaries and must be considered. It is true that "[t]he public defender's office can solve the collective action problem that plagues its clients only if each public defender forgoes her duty of loyalty to the individual client."[201] But public defenders do not need to 'solve' that problem. Indeed public defenders do not need to be, and in this capacity should not be, organizers. They should defer to those who have the skills and are in the best position to organize coalitions. But public defenders can be, and should be, activists.[202] They should use their tools and position to highlight issues and advocate as they can, which includes in the counseling relationship. The way public defenders can do that is by elucidating oppression and making people aware of the coalitions that others are forming. Defenders should be attuned to movements focused on transforming the legal system, but not actually organizing them or setting their goals. "There are people who are in motion [. . .] but they're not necessarily the people who are, in a strategic methodical way, trying to move

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[198] Goldsmith *supra* note 53.

[199] *Id*.

[200] *Id.*

[201] Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 754-758 (2009).

[202] "Every organizer is an activist, but not every activist is an organizer. Activism encompasses all the ways we show up for justice. It can take a multitude of shapes, depending on a person's skills, interests, and capacity [. . .] Organizing, on the other hand, is a more specific set of practices. It is a craft that requires us to cultivate a variety of skills, such as intentional relationship building and power analysis." HAYES AND KABA, *supra* note 24 at 36.

other people in terms of campaigns or in terms of movement building."[203]

Many criticisms of expanding the scope of representation are responding to a poorly enacted caricature of such counseling.[204] Such counseling is not an all or nothing proposition where the attorney either ignores the client's interest in larger change or imposes their own view of what change should be. Just as with advising on a case and concurrent impact litigation case, or concurrent civil misconduct lawsuit, this counseling can be done artfully and centered on a client.

However, the current framing of the counseling role is a fatal barrier to such collaboration. Because of the "individualistic ethic" of client-centered advocacy "the animating ethos of criminal defense work stands in sharp tension with a collectivist campaign like a plea bargaining strike."[205] Others have left open the issue of what the counseling role would look like in such a situation, but have suggested that attorneys must mostly be allies who get out of the way, not the impetus for such mobilizations.[206] A key part, however, will be to create a lawyer role "that shares insiders' system knowledge generously with organizers as they develop campaign strategies outside the context of individual cases."[207] That is precisely what such a recalibration of the counseling role can accomplish. It is hardly a complete solution to the thorny ethical issue that many recognize and analyze. But it is a step in allowing attorneys to connect (or get out of the way of clients already connecting) individual cases with systemic change.

2. Holistic defense

Robust counseling works alongside holistic defense. However, a holistic model, by itself, is not enough without a concurrent reframing of the direct advocate's role in advising a client. While this is already incorporated, to varying extents, in some holistic offices, not every office does so. The label of holistic may only mean that an office provides an immigration consult attorney and social worker, in which case, there may be little being done that affects the nature of counseling as it pertains to systemic issues. [208] Likewise,

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[203] *Id.* (quoting a conversation with Barbara Ransby).

[204] An example is the anecdote of the lawyer who unilaterally declared all his clients would be going to trial after one client's plea was rejected. Crespo, *supra* note 7, at 2022.

[205] *Id.* at 2023.

[206] *Id*. at 2022-2024.

[207] *Id*. at 2024.

[208] Johnson, *supra* note 55 (discussing the relatively low number of fully holistic defense offices nationwide and advocating for an expansion to improve plea bargaining outcomes).

an office that is staffed with a full holistic team that incorporates other forums and also community and policy work and broader systemic issues may still cabin off these units from each other and not listen to client ideas and other community members proposals and then bring each into different spheres of practice or incorporate the tactics and experiences of other players into the direct case counseling.

Enacting robust counseling may be more challenging in offices without a substantial holistic practice. The way the counseling looks will differ from office to office, but even the smallest model will allow lawyers to discuss these issues with clients and refer out to community groups, or learn from some clients and then inform others of possible advocacy or policy issues that they can learn more about.[209]

3. Participatory defense

Robust counseling is not an explicit participatory defense tactic, but hopefully complements such a view. Participatory defense remains a small subset of defense.[210] Since it requires true and organic, non-lawyer led community collective action, it cannot be created by public defender offices.[211] Offices can help further participatory defense however by welcoming collaboration. Hopefully these opportunities will continue to grow, and an expansion of the counseling role can facilitate that and provide guidance for when it is not available.

Even when participatory defense resources are available, the parties must grapple with the role of defense lawyers. There is a compelling argument that ethics may very well require lawyers to engage with

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[209] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

MODEL RULES OF PROF'L CONDUCT 2.1.

[210] National Participatory Defense Network, available at https://www.participatorydefense.org/hubs.

[211] Moore, Sandys, & Jayadev, *supra* note 8.

participatory defense.[212] And those ethics requirements may require lawyers to speak and listen to clients about opportunities to go on the offensive outside of the confines of the criminal case. To change laws, to organize, to protest, to join or create class actions, to connect, to disrupt, to educate.

This reframing of counseling opens up avenues for forms of participatory defense, and offense, by allowing impacted clients to engage in other forums where they do not face serious negative repercussions yet have the chance of creating change. Channeling client voices to community organizing, policy work, and class action impact litigation can allow those clients to directly lead to real change for the system without jeopardizing the outcome in their individual criminal case.

This proposal will lead to some solutions that are attorney focused and legal sphere focused, such as the amicus case study in section IV. The counseling phenomenon this paper discusses is not always true participatory defense, which seeks to allow clients and their communities to steer their case and have all impacted voices heard.[213] However, this counseling tactic can perhaps feed into and support that avenue. Rather than silencing a client entirely in the legal sphere[214] through a decision not to testify in a case, or a decision to accept a plea, this tactic can allow a client to accomplish some form of justice or have their voice or actions channeled into other forums through social movements, organizing, or policy work, etc.

Likewise this suggestion fits with bringing communities into individual cases. Simonson focused on a related dynamic: that with the diminishment of jury trials, the public is given more means to weigh in on systemic issues than on individual cases.[215] Participatory defense is one way to bring communities in to make real change on individual cases.[216] Lawyers should be required to engage with such avenues if they are to advocate effectively for their clients.

Robust counseling can assist in breaking down the walls between individual and systemic consideration by building into the counseling role a discussion of broader issues and an openness of attorneys to hear clients when they raise such issues. Mass movements and organizers must still be the

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

[213] A growing consensus is that abolition and many reforms to the legal system cannot be attorney driven. *See* Moore, Sandys, & Jayadev *supra* note 8, and Clair, *supra* note 28.

[214] Natapoff, *supra* note 30 at 1487 (discussing how the legal system is structured to silence people accused of crimes).

[215] Simonson, *supra* note 14.

[216] *Id.*

impetus of change, but this proposal will aid in preventing lawyers from fragmenting or obstructing such avenues while keeping the core of individual client-centered counseling intact.

This counseling change and requirement for collaboration may involve a diminishment of attorney power. As others have noted, this is an aspect that results in the most hostility by the legal systems and public defenders themselves. Pro se clients are often punished by judges but also often by the defense attorneys who felt slighted at the diminishment of their expertise, and in the case of some assigned counsel, actual economic loss.[217] Likewise in many instances when an accused individual would seek assistance from the court for perceived failings by their lawyer, they were often met with hostility for having breached decorum and broken the expectation of client silence.[218]

The solution is to normalize resistances and include them in the counseling conversation. Public defenders must not abandon clients by jumping to the extreme of withdrawal when confronted with the frustration of systemic limitations. Nor must they impose a requirement to do things their way at the start, even if ultimately the client's proposal is something they do not feel comfortable pursuing. Instead, there needs to be a true, open conversation where options are on the table and discussed between lawyers and clients. This broadening of the counseling role is more honest. Clients can see the reality of limitations in court systems, and oftentimes distrust between clients and lawyers comes from a client's frustration at a reality and a lawyer's glossing over what caused that reality to occur and instead focusing on the legal issues that may greatly constrain a person's choices.[219]

Finally expanding the role blends the counseling for a discrete issue with the larger systemic issues that must be addressed. In "Radical Acts of Justice," Jocelyn Simonson speaks of the varied and diverse ways in which "ordinary" people outside the legal system are working to transform it.[220] Underpinning all this is a belief in democracy, but democracy reclaimed from the bureaucracy and supposed expertise of the legal system. Simonson speaks of contestation, and the principle of "agonism" in democratic theory whereby people "take an adversarial stance towards practices and ideologies of institutions in power, but do so through engagement with those

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[217] GONZALEZ VAN CLEVE, *supra* note 3.

[218] Miller, *supra* note 9.

[219] "The non-reformist reform must not simply be antagonistic; it must build popular organized power." Akbar, *Non-Reformist Reform*, *supra* note 18, at 2571.

[220] JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE (2023).

institutions."[221] This expanded counseling relationship can further that transformation. The counseling itself would become a microcosm of the open dialogue and tension, the elucidation of the actual issues at work. But more importantly, it will lead to connections outside the closed and fragmented counseling relationship by clarifying underlying issues and also by increasing consciousness for clients and attorneys. The open dialogue it encourages will allow more defenders and system involved individuals to see themselves as fellow travelers on the road to a just transformation of the criminal legal system.

PART THREE: OBJECTIONS

There are potential drawbacks and obstacle to an expanded counseling role, but these challenges can be overcome. At worst, these limitations may involve a conversation with not as much follow up to begin with, until lawyers earn trust and learn more from clients about avenues for change. At a minimum, a lawyer can counsel a client as they always would but listen to client input and include discussions of underlying issues such as sentencing minimums, decriminalizing similar charges, or improving bail or discovery laws, etc.

But at its zenith, this dual role can be something direct advocates incorporate fully into their counseling to alter advice and tactics. The challenge here is more fundamental about how counseling fits in to the system and society at large.[222] The conversation about client choices must be changed to be broader and also explicitly discuss the limitations and their possible workarounds.

A. Ethical considerations

[221] *Id*. at 12.

[222] Charles Ogletree and Randy Hertz have discussed the defense role's broader impact on the legal system, outside of just criminal cases directly. Charles Ogletree & Randy Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. Rev. L. & Soc. Change 26 (1986). Martin Guggenheim envisioned replacing the judiciary's failed oversight with a check on the executive through defense's investigative fact finding. Martin Guggenheim, *The People's Right: Reimagining the Right to Counsel*, NYU School of Law, Public Law Research Paper No. 10-65 (January 10, 2011). The tactic this paper examines is quite different from either proposal, yet in many ways is a continuation of his suggestion to harness public defense's assets to counterbalance the system's failings.

An expected criticism is that expanding the counseling role will clash with ethical rules that require a lawyer to prioritize only a client's best interests, as well as possibly conflicting with confidentiality to the extent broader movement connections require revealing information learned in the client relationship. It is true that a lawyer has to advise a client in their best interest only, with limited consideration of broader goals.[223] And this can remain the case.[224] But a lawyer who weaves in and reinforces practices that coerce clients has already, to some extent, muddied the pure platonic ideal of counsel.[225] They have interjected the system's unfairness and supported it in the process of giving a client a real assessment. To then push back on that reality is not in itself a diminishment of the counseling role but an attempt to remedy what diminishment would otherwise occur.

The supposed tension between direct representation and larger cause-based advocacy may be "a false binary in practice."[226] Impact litigation units

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[223] Carle and Cummings discussed this issue with other aspects of movement lawyering.

> Although the Model Rules invite lawyers to consider the impact of client work on others, including the court, third parties, and society as a whole, they do not call on lawyers to consider what impact their work will have on the world after their particular client representation ends, even though the impact may often extend far longer than the defined endpoint of a matter. Indeed, the one area in which the rules address long-term obligations of lawyers is confidentiality-a duty to clients, rather than the public interest, that lasts forever. Other duties, such as client loyalty, terminate when the client representation ends.

Carle & Cummings, *supra* note 20, at 465.

[224] Carle & Cummings propose an expansion of the Model Rules, which may be necessary in the larger goals of movement lawyering for abolition and the need for accountability to clients and their causes after representation ends. *Id.* But this paper's interpretation of the current rules would go a long way in allowing public defenders to interface with, and connect clients to, such movements as well as to allow client's consideration of movement goals in the forum of their own case.

[225] I return again to the trial tax example. A public defender informing a client of the trial penalty will exert pressure on that client to take a plea offer, most would argue rightfully so, since the client would bear the brunt of the penalty and must be so informed. But if the lawyer does nothing to go beyond that, for instance to tell the client what mechanisms causes the penalty and how to potentially challenge them, then the counseling role has itself become part of the process that enforces the penalty without doing anything to account for it. Therefore, the lawyer must tell the client that this is a product of sentencing minimums, of prosecutorial power in charging, and of judicial norms in using discretion to prioritize efficiency. Then discuss methods to affect those underlying issues, sentencing reform proposals, media attacks on judicial decision-making for efficiency, community organizing against prosecution overcharging, etc.

[226] Sterling, *supra* note 7, at 2263.

manage issues of structure and conflicts of interest between individual clients as well as defense offices and the city or state.[227] They do so through an individual consideration of their clients' interests, which enables them to take various litigation actions simultaneously. Such offices even bring litigation against their funders at times.[228] The interventions that lead out of an expanded counseling role would be much less significant, given few would involve direct outside litigation by an attorney.

More insidious than conflicts of interest within a case is the broader organizational or political conflicts that can arise. Even conflicts related to court or office culture could lead to negative results for attorneys or their clients when they engage in more robust counseling. This limitation on an attorney or a fear of reprisal against clients, real or imagined, may be a reasonable basis for self-censorship by public defenders. The possibility for such conflicts would require careful management of outward actions by a client or attorney, but again is a question of tactic, client choice, and level of risk aversion. That does not alter that the counseling role must include discussions of such issues and indeed the discussions themselves are private and safe from reprisal. Even more fundamentally, sometimes public defenders are government employees and are forbidden by the terms of their employment to discuss certain issues or pursue certain tactics.[229] Far from being an obstacle to expanding counseling, the obligation to do expand the scope of counsel will hopefully shed light on these restrictions to allow an interrogation of their origins and purposes and if they serve client interests.[230] That the issue is so fundamental as to challenge the very notion of public defense structure is a benefit of this approach.

Expanding the counseling role to include matters external to the case also implicates an attorney's duty of confidentiality. This is clearly implicated in mass media strategies, but it is also relevant merely by sharing an anecdote about a client in a policy proposal or community organizing project.[231] It may be unfair for a lawyer to even ask a client to waive

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[227] For an examination of the ethical issues with impact litigation at a direct services organization, particularly a public defender, *see* Ogletree & Hertz, *supra* note 97.

[228] For just one example, New York public defenders sued New York City, New York State, and the Office of Court Administration to challenge court staffing and delay. *Public Defenders in the Bronx, NY File Lawsuit Over Court Delays*, NPR (May 10, 2016), https://www.npr.org/2016/05/10/477529311/public-defenders-in-the-bronx-n-y-file-lawsuit-over-court-delays.

[229] Irene Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113 (2020).

[230] *Id*.

[231] Nicole Smith Futrell, *Please Tweet Responsibly: The Social and Professional Ethics*

confidentiality in a situation where the client has little to gain directly and the lawyer may have an ulterior motive or personal benefit.[232] But as with the conflict-of-interest issue above, this can be managed and accounted for in the manner of counseling.

Just as with most actions taken by a defender, the manner of counseling implicates informed consent,[233] or "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[234] The general scheme for how to engage in such an analysis do not need to be disturbed.[235] Essentially, an attorney is only free to pursue tactics that they have provided sufficient information for a client to see the risks and benefits of such a course.[236] This again supports expanded counseling since a defender should be fully sharing options with a client for them to reject or approve.

The discussions above have all considered how to speak with a client in the course of counseling. Sharing information learned in the course of representation is a different matter and even more sensitive given how tightly confidential information is regulated, rightfully so.[237] Public defenders have already begun to touch on the use of social media to share client stories for their client's benefit and to mobilize for broader transformative change.[238] This is a precarious situation since attorneys may benefit in terms of prestige or professional opportunities if the discuss a case, and the supposed personal benefit may taint an attorneys analysis in what options to propose to a client in terms of waiving confidentiality. [239] This does not make balancing

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of Public Defenders Using Client Information in Social Media Advocacy, THE CHAMPION (Dec. 2019) [hereinafter: *Tweet Responsibly*].

[232] *Id.* at 13 (noting the possible impropriety of asking a client to waive confidentiality when a case is open "given concerns about attorney-client privilege and the power imbalance between attorney and client.").

[233] MODEL RULES OF PROF'L CONDUCT 1.0, Comment 6.

[234] MODEL RULES OF PROF'L CONDUCT 1.0(e).

[235] A discussion of the factors occurs in the comments regarding the definition of terms. MODEL RULES OF PROF'L CONDUCT 1.0, Comment 6.

[236] *Id.*

[237] MODEL RULES OF PROF'L CONDUCT 1.6.

[238] Russell M. Gold & Kay L. Levine, *The Public Voice of the Defenders*, 75 ALABAMA L. REV. (2023).

[239] "In this age of social media celebrity, public defenders must also honestly assess whether any part of recounting the story serves to benefit their own reputation or ego. If it truly is not about the individual public defender, it is worth exploring whether a way exists to still achieve the articulated purpose by sharing the story anonymously. Smith Futrell, *Tweet Responsibly*, *supra* note 202, at 15.

impossible, it just means public defenders must be cognizant of why they are sharing a story, how they are doing so, what the benefit is to a client, and what other avenues exist to further protect client confidentiality and still achieve a similar outcome.[240] The same subconscious bias and benefit applies to attorneys who wish to take a case to trial for prestige or the opposite, fear a difficult trial and the appearance to their professional identity.

This frame of analysis also applies to sharing client stories for legal or political forums such as amicus briefs, impact litigation, or policy proposals. This balancing of ethical obligations is already possible when a client is facing cases in different forums with different risks and benefits. For instance, it is not uncommon for a client to be facing a criminal case and also pursuing a wrongful arrest claim for that same case and be a possible class member for an impact litigation case stemming for the arrest, which could even involve a media or policy component.[241] Attorneys are able to navigate advice in these contexts and can continue to do so if there is an affirmative obligation to speak to clients about these other forums.

B. Structural Limitations

Another criticism is that this recalibration places an undue burden on overworked public defenders and even on clients themselves to do work that may be superfluous to the direct representation, when the "core" of legal representation is already overwhelming enough.[242]

This is a common response whenever the counseling role has been expanded in a necessary way. It is a criticism I heard for years in my capacity as a training director at a holistic defense office that would train offices across the country on adopting an interdisciplinary approach to improve their clients' outcomes in a criminal case and also in other venues.

When holistic defense began, it was met with such criticism by traditional public defenders who were incredulous that, for example, they should advise a client about immigration consequences as part of counseling

[240] Smith Futrell suggests attorneys in such a situation interrogate their own motivations before sharing anything about a case. "Who is the defender trying to influence and what result is being sought? Is there a specific, articulated outcome for the client or greater systemic understanding that can be realized? Client experiences should not be shared on social media simply because they are interesting or satisfy voyeuristic tendencies. They should not be shared as a means of venting or blowing off steam." *Id.*

[241] See Rajagopal, *supra* note 18.

[242] Smyth, *supra* note 30.

on a criminal case.[243] Eventually in *Padilla v. Kentucky*,[244] the Supreme Court made that part of holistic defense a legally required consideration for the very low floor of effective assistance of counsel. Now this holistic counseling is viewed as essential instead of superfluous, and in fact offices around the country have been expanding the areas that are encompassed in such counselling.[245]

But the criticism is still a valid one, as the panoply of holistic defense extends ever outward and risks consuming time and resources. Further, the counseling recalibration proposed in this paper is a more fundamental one than the holistic issues above, which often still constitute plea advisal on a case. Unlike holistic considerations that may involve mostly check-listing and issue spotting to then loop in other advocates on discrete issues,[246] this sort of counseling may require much more work by the counseling lawyer to stay apprised of a shifting list of outside organizers or policy projects and also to be open to proposals clients bring to them that may be novel and time consuming to discuss.

Just as with holistic defense's evolution, these details can be worked out and issues can be resolved.[247] Preventing an exploration of this role is self-fulfilling, as public defender funding and resourcing is based on what effective representation requires. Also, the narrower the role of the public defender to "protect" their time, the more they are simply reciting a menu of poor choices for clients to choose between under the guise of client-centered counsel.[248] The solution is not to protect public defenders and clients from a further burden, but quite the opposite, to expand what is minimally necessary for representation and the parameters of the role of counseling. At a minimum this expansion has real, harm-reductive benefits to clients,[249] but more ideally

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[243] J. McGregor Smyth*, From 'Collateral' to 'Integral': The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation,* 54 HOWARD L. J. 3, 795, 807 (2011) (detailing the resistance by defense attorneys to expanding the scope of criminal case representation to include immigration consequences).

[244] 559 U.S. 356 (2010).

[245] *See e.g.*, Bronx Defenders and Neighborhood Defender Services, housing rights, immigration removal defense, benefits, employment law, etc.

[246] James Anderson, Maya Buenaventura, & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*,132 HARV. L. REV. 819, 836 (2019) (discussing holistic checklists).

[247] Smyth, *supra* note 30.

[248] Miller, *supra* note 9.

[249] "These results suggest that strengthening indigent defense might be an underappreciated tool in the larger effort to address problems of mass incarceration in the United States. Opponents of decarceration often express concern that reducing the prison and

this reframing has the potential to address the more fundamental systemic issues resulting in inequality.

This robust counseling role is a means of harnessing the experience of public defenders and of their clients to improve outcomes.[250] Just as the configurations of holistic defense and client-centered representations that came before, it is a recognition that clients know best what is affecting them and that defenders must expand their field of view beyond just a single criminal case. In the past this has meant including civil consequences such as housing court and immigration consequences etc.[251] More recently it means impact litigation, policy forums, and community organizing.[252] But this field of view must continue to expand beyond legal forums not just in terms of what is available at an office, but what is part of the core counseling for a criminal case.[253] It must bring in challenges to criminal court that address the racial inequalities that underlie almost every issue in the criminal legal system.[254] But counseling of this nature would also allow challenges to societal racial inequality to be bolstered by more individuals experiencing one aspect of this inequity through criminal court.

Relatedly, some offices may be constrained as state agencies in what tactics they can pursue or the scope of their counsel. And an even more fundamental consideration is that public defenders come to the work for all sorts of reasons. Some may not perceive any systemic problems with the criminal system, and may believe it is working justly. And many may be wary of this robust counseling, to the extent it diminishes the role of an attorney. That diminishment, is in fact, the point. It is inseparable from the substance of the collaboration since the very nature of counsel within the system means that pulling back the veil will reveal how defenders are severely limited in the real differences they can make in the world for a client through a criminal case.

That is not to discount the importance of defenders in affecting case

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jail population might lead to higher crime rates, as defendants who would have previously been held in custody are left on the streets. Based on the evidence supplied in the above discussion, holistic representation offers a means to appreciably reduce the use of prison and jail as punishment without fueling future crime." Anderson, *supra* note 103, at 870.

[250] Emily Galvin Almanza, *Well-Equipped Public Defenders Can Help Reduce Recidivism*, Law 360 (June 2, 2023).

[251] Rajagopal, *supra* note 18.

[252] *Id.*

[253] "[T]he state is neither "neutral" nor "capable of being used by anyone. . . . Relying primarily on formal law and politics diverts attention from the work required to reconstitute politics and the economy." Akbar, *Non-Reformist Reforms*, *supra* note 25, at 2524.

[254] Sterling, *supra* note 7.

outcomes substantially through litigation and advocacy. A lawyer can win a trial or negotiate a plea that spares their client a host of awful consequences.[255] Nor am I discounting the value in being present for clients in traumatic and awful situations, of lawyer as accompagnateur.[256] The value of all client-centered counseling in helping a client navigate a dehumanizing system is important. But there must be more.

These aspects of counseling can and should continue to exist. The benefit of expanding the counseling role is it can lead to progress without abandoning the counseling role.[257] The goal is not a top-down imposition of lawyer's beliefs, but rather meeting clients where they are more fully.[258] That client counseling occurs in private causes difficulty for this approach to reshape attorney culture. But it is possible for change to continue by discussing the benefits of such an approach with one another, and sharing stories of things we've learned from clients with one another. Change doesn't happen overnight, but by slowly altering our perceptions of what our obligations really mean. Once this process gets started, it has the potential to snowball. Defenders could have their own perspective radically reshaped when they begin to open up the conversations. Indeed it is why I believe these conversations already occur informally; defenders begin to learn a bit and become incentivized to learn more, they increase their consciousness about larger struggles, and become radicalized.[259] Traditional counsel draws them back from this, tells them to stop, when the better course is to lean in to this further.

C. The "law firm model"

To further discuss one facet of the objection that it is inappropriate for public defenders to engage in this counseling, I want to examine it in light

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[255] Johnson, *supra* note 55.

[256] Danielle Pelfrey Duryea, Margaret Reuter & Stephen A. Rosenbaum, *Attorney as Accompagnateur: Resilient Lawyering When Victory Is Uncertain or Nearly Impossible,* 59 WASH. U. J. OF L. AND POLICY 115 (2019).

[257] Indeed the skills that assist in expansive counseling are not so far from legal counsel skills. At their core one must work "cultivating skills, which may be first taught in law schools, in areas such as close listening, consultation, collaboration, mindfulness, fair-mindedness, and sensitivity to context and nuance." Carle & Cummings, *supra* note 20 at 464.

[258] Anyone looking to engage with systemic issues must "work hard to stay in sync with the desires and articulated interests of the constituencies they work with." *Id.*

[259] "Our personal realities are patchworks of things we've seen, been exposed to, and potentially come to understand, bound together by belief." HAYES & KABA, *supra* note 24 at 44.

of a popular goal: the law firm model. Public defense organizations often state that they aspire to provide the level of service that a law firm provides to their clients.[260] This is, in many ways, an illusory goal given the nature of the criminal legal system and how power operates in our society.[261] But it may be useful to the extent it reveals the aims of counsel and its already acceptable boundaries. An examination of this reveals that coordinating with varied advocacy in other fields is necessary, first to attain high quality representation and second to account for the significant resource differences between law firm clients and indigent clients.

Big law firms will utilize tools beyond a legal case. A legal strategy for a well-resourced client will include media tactics, political tools, and whatever other resources a client can expend.[262] A lawyer representing a client on an issue may not be in charge of those strategies, but the counsel and legal work will be incorporated with and mindful of the other avenues where change is being pursued for a client's benefit. This is exactly the expanded counseling role that must be brought to indigent defense.

The substance of that counseling will look very different for indigent clients. Even well-resourced public defense offices still represent only indigent clients by definition and the nature of policing and prosecution means those clients are predominantly from marginalized communities. What public defense clients may lack in political connections and monetary resources they make up for in the possibility for mass engagement.[263] Collective action can lead (and has led) to plea strikes[264] or bail nullification[265] or mutual aid[266] campaigns to be enormously successful. These are community lead actions and must remain so, but an attorney can acknowledge their existence and account for them the way a law firm attorney may coordinate with a trade association or account for a client's public

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[260] A Gideon's promise stakeholder named that the goal for high level public defense is for "public defenders to be able to litigate their case the same way they would be able to litigate it if they were working for a big law firm, defending some multi-national company." Judge Todd Edelman, *Gideon's Promise Public Defender Testimonials*, available at https://www.gideonspromise.org/honorable-judge-todd-edelman (last accessed Oct. 19, 2023).

[261] Miller, *supra* note 9.

[262] Matthew Goldstein & Kenneth P. Vogel, A *Fugitive Financier's Charm Offensive Has P.R. Firms Proceeding with Caution*, N.Y. Times (Nov. 13, 2018), https://www.nytimes.com/2018/11/13/business/jho-low-1mdb-influence-campaign.html.

[263] The Sentencing Project, *supra* note 83.

[264] Crespo, *supra* note 7.

[265] Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

[266] SIMONSON, *supra* note 206.

relations strategy.

Although individuals accused of crimes are a frequently disenfranchised group, if organized they can still constitute a significant voting bloc.[267] Mass movements by individuals accused of crimes and community members of overpoliced and prosecuted communities have already achieved great success in changing laws in the criminal system and pushing for changes to policing and prosecution.[268] To leave that conversation separate from the direct representation itself would be doing clients a disservice. A company obtaining counsel on discrete issue may be advised what legislation to consider supporting or opposing, even if it would not affect their instant matter and even if that client may not be their client in the future. Indeed when systems work against the powerful, the goal is often to dismantle those systems.[269] Oftentimes a company facing violations or regulation does not only seek to get the best outcome in one instance, they also organize to deregulate their industry and disempower the government actors investigating or prosecuting them.[270] They do so through a variety of means, including forming trade associations where attorneys at competing organization may find common ground against their own regulators.[271] If defenders believe they are working to give clients law firm caliber representation then they must also look to how to affect the systems themselves. If nothing else this analogy should work to reveal the supposed tension between cause lawyering and individual representation is more a tension of what it means to counsel zealously in a repressive carceral system. Collectivism already exists for the powerful, it can hardly be a violation of a lawyer's ethical duties to suggest the same should occur for the oppressed.

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[267] The Sentencing Project, *supra* note 83.

[268] Many recent reforms to the criminal system, from NY to Ohio have originated from mass movements and community organizers efforts. The Innocence Project, *Remembering Kalief Browder a Year After his Suicide and Why Rikers Island Should be Shut Down*, available at https://innocenceproject.org/news/remembering-kalief-browder-year-suicide-rikers-island-shutdown/ (July 1, 2016). The criminal legal reforms enacted in New York in 2020 were initially named Kalief's Law. *See* Sponsor's Memorandum from Jamaal T. Bailey, N.Y. State Sen., in support of S. 1738, 2019 Leg., Reg. Sess. (N.Y. 2019).

[269] Elizabeth Warren, *Remarks at Coalition for Sensible Safeguards Symposium,* available at https://www.warren.senate.gov/newsroom/press-releases/senator-warren-delivers-speech-on-dangers-of-deregulation (June 5, 2018)

[270] *Id.* (arguing that corporations drove the deregulation measures of the Trump administration).

[271] https://www.poweronline.com/doc/second-opinion-report-finds-that-trade-associ-0001

D. No singular, monolithic "client"

A further complication may be that clients would never expect to be involved in a criminal matter again,[272] and that their views on the criminal system may be varied depending on the issue and certainly not monolithic across individuals. Yet counsel can still discuss how to influence legal systems based on their own personal experiences, either for larger goals or if they or their loved ones are ever accused again.[273] Instead by fragmenting the larger struggle into individual case advice, lawyers prevent mobilization of clients into larger and more powerful groups.[274]

This counseling right finds a parallel in victims' rights mobilization.[275] Individual victims may have widely different views on issues, but also may find common ground nonetheless. A survivor of violence may never benefit from changes to how future survivors are treated, but if apprised of opportunities to influence changes may opt to do so anyway because of their own personal experiences. Advocacy groups oftentimes provide advice and counsel on individual cases, but they also create connections and make clients aware of areas to influence larger goals.[276] Although not every criminal case involves a victim, and not every victim shares preferences with other victims, the victim's rights movement is a large and powerful force in criminal law.[277] Similar forms of counseling can exist in public defense spaces. Some people accused of crimes may find common ground in certain causes, some may not.[278] But if the counseling doesn't immediately discount larger issues that influenced their case then the discussion can happen, whatever participation may look like afterwards.

A countervailing organized bloc in the criminal forum already exists, in the form of police (and corrections) union mobilization on political

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[272] "What should be clear is that the criminal legal system is not a place where most individuals opt in through their own deviant choices. Instead, many criminal defendants are selected for participation in the criminal legal system by state agents due to the defendants' passive membership in disfavored groups." Miller, *supra* note 9, at 401.

[273] One study provided that 45% of Americans have had an immediate family member incarcerated at some point in their lives. Peter K. Enns et. al, *What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey*, SOCIUS 5 (2021).

[274] Butler, *supra* note 12.

[275] Paul H. Robinson, *Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication*?, 33 MCGEORGE L. REV. 749 (2002).

[276] *Id.*

[277] "[T]he victims' rights movement is the dominant organization of lay persons involved in criminal justice reform." *Id.* at 749.

[278] Akbar, *Non-reformist reforms*, *supra* note 25, at 2531.

issues.[279] Legal reforms organized by mass movements have been met by well organized opposition by police unions, prosecutors, and other political actors.[280] This political opposition has also incentivized judicial obstruction of democratically enacted reforms, with judges both openly or surreptitiously using their other powers to bypass reforms for discovery and bail.[281] As I suggested in this context, the answer is continued scrutiny of the judiciary by organized groups and the same mass movements that led to the reforms in the first place.[282] This counseling role furthers that goal, allowing individual cases where judges fail to enact reforms to be brought together for better transparency and to organize for a response.[283]

The fact that there is a pluralistic shifting view of groups and interests is not counter to this type of counseling. Quite to the contrary it is an aspect of the democratic theories that underpin the need for such frameworks. This counseling framework allows for the building of capacious movements which necessarily includes increasing friction about the goal of movements. "That the debate should sharpen collective strategy and tactics—collective power and consciousness even—is constitutive to the concept of non-reformist reform itself."[284]

PART FOUR: CASE STUDIES

The following two case studies are meant to concretely show the robust counseling model that I describe in Section II B *supra*. These case studies are necessarily informed by the fact that I was a public defender and those experiences are the basis for my own knowledge. There are myriad other examples from the point of view of impacted people and outside the legal realm entirely, but I leave those to others better informed to discuss them. The examples however do cover both ends of the spectrum of a legal case, from a conversation at the very inception of a case to the highest-level appeal possible in our system. They cover the various ways the tension of counseling can lead to new avenues to pursue when lawyers recognize their own limitations and the power of their clients' epistemes, power, and voices in order to work together to merge the best of both of their positions.

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[279] fwd.us, *Freedom, Then the Press*, available at www.fwd.us/wp-content/uploads/2021/06/Bail_Reform_Report_052421-1.pdf (last accessed Oct, 26, 2023).

[280] *Id*.

[281] Petrigh, *supra* note 59.

[282] *Id*.

[283] *Id.*

[284] *Id.* at 2536.

A. The Black Attorneys of Legal Aid Amicus in Bruen

The brief anecdotes in Section II A *supra* and the proposal for robust counseling comport well with existing thought on movement lawyering as applied to public defense. But the following example of the Black Attorneys of Legal Aid's Amicus is more complicated. It was lawyer led, in a legal venue, and focused on a purely legal, rights-based remedy. Yet it brought together client stories, which was the dominant argument format for the amicus, to a forum where those stories resonated with other state actors, organizations, and members of the public who ordinarily would not find common ground. It bridged gaps while also creating new conflicts.[285] It was in many ways an agonist act,[286] creating friction to expose unfairness in need of a remedy, and also creating solidarity in at least one instance among people facing existing state restrictions.[287] I seek to highlight how it was possible because of the manner in which these defenders engaged in counseling, how they were aware of their limitations within the system and looked for ways for them, or their clients, or others to move beyond those limitations.

Public Defenders in New York at various offices recognized how their counsel was furthering oppression in the context of firearm possession. Those charges carry steep mandatory minimums because of popular support for disincentivizing firearm possession.[288] The court-approved prosecution policy of requiring a waiver of appellate rights also ensured that clients had to abandon suppression or trial issues entirely to benefit from a plea below that minimum.[289] District Attorney offices throughout the city also uniformly made offers of state jail incarceration because of popular support for tough

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[285] "Campaigns for non-reformist reforms seek to create social conflict among and between classes in order to build class consciousness and force people to pick a side." Akbar, *Non-Reformist Reforms, supra* note 25, at 2564.

[286] I understand how some may react to a radical democratic concept being used to describe a legal brief by lawyers, for the Supreme Court, framed to appeal to conservative members of the court. Yet it furthered agonism as opposed to an act that sought compromise.

[287] "One advantage of the heuristic of non-reformist reform is precisely that it does not require a completely shared vision for the future. In its capaciousness, it allows for diverse coalitions to come together who share some goals or agree to take some steps together." Akbar, *Non-reformist reforms*, *supra* note 25, at 2531.

[288] For example, 79% of New Yorkers opposed eliminating the need for any permitting for a concealed firearm. Sienna College Research Institute, June 2022 Survey, available at /https://scri.siena.edu/wp-content/uploads/2022/06/SNY0622-Crosstabs.pdf.

[289] Barbara Zolot, *The Gov't Tool You've Never Heard of That Conceals Police Misconduct*, N.Y. L. J. (September 18, 2020).

on gun policies given the reality of firearm deaths in the city.[290] Due to those same political pressures, guns were also the priority of the NYPD, and the reason for many aggressive policies on searches and surveillance.[291] Finally those same pressures placed clear incentives on judges to set high bail for firearms possession allegations and to be leery of suppressing a firearm or dismissing a gun possession case.[292]

Public Defenders were counseling clients in the context of this reality.[293] That reality meant could have been the victim of unlawful and oppressive tactics by NYPD units charged with finding guns at all costs. They also could have had persuasive reasons for possessing a firearm. But that occurred in the context of a harsh trial penalty, unmoving prosecutors, and results-oriented judges. Those defenders grappled with the reality that their clients in such situations were overwhelmingly incentivized to plead guilty, however reasonable their possession may have been or however unjust the police practices that uncovered the gun.

But those defenders then asked, as Ruth Wilson Gilmore advised, a more fundamental question, "[w]hy is this place the way it is? Why is it like it is?"[294] They then used that interrogation[295] to find a location for possible change, and found a vehicle to take those same clients' stories directly to that battleground. They filed an amicus that centered their clients' experiences,[296] and did so in support of a broad view of the second amendment that would

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[290] Bronx District Attorney's Office, D.A. Clark Looks Forward to Working with NYPD and Courts to Rid Guns From Streets, (June 2016) available at www.bronxda.nyc.gov/downloads/pdf/pr/2016/7-2016%20DA%20Clark%20on%20Gun%20Courts.pdf

[291] Mark Morales and Peter Nickeas, The NYPD has resurrected its controversial anti-crime unit. Success will be determined by avoiding mistakes of the past, CNN, available at https://www.cnn.com/2022/01/27/us/nypd-anti-crime-unit-eric-adams/index.html

[292] Petrigh, *supra* note 59.

[293] For a conversation with three of the main actors behind the amicus explaining their reasoning and motivation, *see* Avinash Samarth, Michael Thomas, & Christopher Smith, *Second Class,* INQUEST (Nov. 5, 2021) (available at https://inquest.org/nyc-public-defenders-amicus-second-class).

[294] HAYES & KABA, *supra* note 24 at 119 (quoting a conversation with Ruth Wilson Gilmore).

[295] "These are our mostly Black and brown clients who get wrapped up in the system — sent to Rikers, sent upstate, sent to prison over something that somewhere else, nothing would happen." Samarth, Thomas, & Smith, s*upra* note 293.

[296] "We included the stories of some of our clients to highlight exactly what happens to them when they are charged with these offenses. [... W]hen we look through all of those different consequences, it highlights just how devastating it can be for anyone to have a criminal case. And the brief gives us a way to show what that actually means practically for that individual, and just how much that can really uproot someone's life." *Id*. at 293.

problematize New York's view of gun criminalization.

The Amicus caught many off-guard, which only underscores the invisible harm the government was inflicting on certain individuals and in certain contexts.[297] For decades scholars have critiqued social change through criminalization. What began as a fringe view in the early era of mass incarceration ended up gaining popular will with the backlash to the war on drugs and eventually the large-scale acceptance that criminalization of drug possession, and even sale, was excessive and unjust.

But drugs are hardly unique in this regard and the same analysis of racial bias, excessive sentencing, and unfair prosecutorial discretion apply to firearm possession crimes as well.[298] Likewise addressing drug prosecutions, cannot solve America's staggering over incarceration problem.[299]

In New York, an individual who possesses a firearm, even if licensed in another state, lawfully purchased, dismantled, locked in a case, with ammunition outside the chamber and magazine, would still be guilty of possessing a loaded and operable firearm.[300] That is a violent felony that, for someone with no prior record, carries a minimum of three and a half years in jail with two years of post-release supervision,[301] up to a maximum of fifteen years in jail and five years post-release supervision.[302]

New York's gun licensing scheme and corresponding criminalization are draconian and rooted in racial bias and continued racist enforcement. They began with the 1911 Sullivan Law, intended to prevent organized laborers, immigrants, and Blacks from arming themselves.[303] The criminalization continued and grew harsher in response to the civil rights movements of the 60s and 70s when Black organizers armed themselves in the fight for civil rights. This has culminated such that in 2020 in New York City, 96% of felony gun arrests were of Black or Latine individuals.[304]

These public defenders, from offices across New York, experienced first-hand through their clients the devastation of New York's criminal gun

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[297] *Id*.

[298] Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016) (discussing the similarities in the war on drugs and policing of guns and the role of both in mass incarceration).

[299] *Id.*

[300] N.Y. Penal Law §§ 265.03(3); 265.03(1)(b); 265.00(15); 265.15(4).

[301] For all intents and purposes, post-release supervision is parole supervision.

[302] N.Y. Penal Law § 70.02.

[303] David B. Kopel, *The Great Gun Control War of the Twentieth Century—And its Lessons for Gun Laws Today*, 39 FORDHAM URB. L. J. 1527, 1529 (2012).

[304] NYPD Arrests Data, NYC Open Data (last visited July 19, 2021), https://data.cityofnewyork.us/Public-Safety/NYPD-Arrests-DataHistoric-/8h9b-rp9u.

possession laws and were dismayed that no conversations were happening about the unjust laws and practices.[305] They chose to file an amicus in support of the New York State Rifle and Pistol Association in their lawsuit against New York's gun licensing scheme. The amicus was a way for them to share clients' own stories, to impact a case with real direct outcomes to help future clients, but also to force a conversation about the law's injustices.

The amicus gained national attention, although largely missing the context and intentions behind it. Conservatives rejoiced that the liberal bloc on gun control was breaking down,[306] as though individuals sent to jail for years at a time for gun possession ever constituted a strong voting group in favor of gun control. And the amicus was bemoaned on the left as misguided at best. An essay analyzing the amicus found much common ground but criticized the public defenders' reliance on the courts and strengthening of the Second Amendment instead of democratic, legislative change.[307] But the amicus was in fact part of democratic change. Along with speaking to conservative justice, it was also a coalitional call

The criticism by Blocher and Siegel ignores the urgent and desperate need for action. New York's gun regime originated as a response to black and immigrant gun possession. It grew more and more draconian, a ratchet that only ever moved upwards in ease of conviction and length of prison sentence because of the popularity of being tough on guns and the invisibility of its harms. The phenomenon the public defenders were describing was the result of the democratic process playing out for decades.[308] Nothing short of a seismic shift in consciousness, or coalitions or perception would disrupt that process. As one of the attorneys behind the Amicus explained, "[w]hat we're trying to do here is not limited to a Supreme Court case. We're trying to push a conversation that has not really developed at all in New York about whether

[305] One of the attorneys behind the amicus explained that the in New York the conversation about the overcriminalization of guns "is kryptonite — no one wants to have it. And a lot of the people who support criminal law reform in New York have never really squarely addressed what to do with people possessing firearms for self-defense. But that's a huge part of New York's criminal legal system." Samarth, Thomas, & Smith, *supra* note 293.

[306] Editorial Board, *Progressive Gun Control Crack Up*, THE WALL STREET J. (July 23, 2021).

[307] Joseph Blocher and Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. Rev. F. 449 (2022).

[308] "[G]un laws in the United States and in New York, [are] deeply intertwined with our country's history of systemic racism. . . . We need to examine this history closely, and honestly, if we are going to have any chance at dismantling the systemic and institutional racism in this country." Samarth, Thomas, & Smith, *supra* note 293.

or not different ways of thinking about the criminal legal system should also apply to gun possession."[309] It was an attempt for an otherwise vulnerable group to form a new coalition.

This highlights the stark differences that arise based on the underlying theory of democracy one subscribes to, and how robust counseling at the outset was able to break through traditional viewpoints. Blocher and Seigel acknowledged gun control's racial unfairness[310] but held up the democratic political process as the solution. However these gun control laws were intentionally created in response to Blacks and immigrants arming themselves.[311] The attorneys in the amicus recognized this dynamic because of their knowledge of gun control's history and clients stories of its reality. They and their clients faced obstacles in a state focused on imposing gun restrictions at all costs, no matter the unfair and disproportionate consequences. The attorneys used their legal knowledge to guide those client's voices somewhere they may make a difference.

The amicus was not brought on behalf of a class that chose involvement as in an impact litigation case. The plaintiffs in *Bruen* were chosen to be ideal test cases.[312] But the clients described in the Black Attorneys of Legal Aid Amicus did not chose to become spokespeople for the over-prosecution of guns.[313] Instead, they were living their lives when police raided their homes, cars, and persons.[314] They had their rights violated, they spent time in jail, and they bore the lasting mark of a violent felony arrest and often conviction. They were not seeking to make change, they had injustice inflicted on them, but their stories could impact whether the mechanisms that lead to their injustice was reinforced in the future.

The Black Attorneys of Legal Aid Amicus reveals the power of more robust counseling. These attorneys counseled clients about the limits of the

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[309] *Id*.

[310] Blocher and Siegel, *supra* note 306.

[311] Kopel, *supra* note 302, at 1529.

[312] Anne McCloy, *Supreme Court Conceal-carry Reversal Began with Two Men in Rensselaer County Who Fought NY*, CBS 6 Albany, June 24, 2022 (available at https://cbs6albany.com/news/local/supreme-court-conceal-carry-reversal-began-with-two-men-in-rensselaer-county-who-fought-ny).

[313] The data on gun prosecution presented in the amicus supports those accused individuals are, as Miller points out, people who did not make choices that lead to their involvement to the system as much as they were "selected" due to being Black and brown New Yorkers. "What should be clear is that the criminal legal system is not a place where most individuals opt in through their own deviant choices. Instead, many criminal defendants are selected for participation in the criminal legal system by state agents due to the defendants' passive membership in disfavored groups." Miller, *supra* note 9, at 401.

[314] *See* Black Attorneys of Legal Aid's Amicus Brief.

Second Amendment in defending their cases. They told clients about the law in New York and its draconian definition of loaded, the harsh sentencing scheme, and the difficulty in overcoming presumptions for possession, knowingly, and intent to use. The attorneys fought the cases and sometimes won and sometimes clients took pleas. They did great work as counselors and achieved the best outcomes they could for their clients, although it did nothing to address the deluge of similarly situated individuals.

But they did not stop at handling their individual cases in criminal court. They took the information they gleaned from clients and looked for an opportunity to use the combined knowledge about the reality of the injustices that they conveyed to clients to push outwards against the system.[315] The greatest opportunities to agitate for change are in the very places where these attorneys have to "translate" for clients the most and where the gap between the law and its perception is largest.

The lawyers recognized an area for advocacy and facilitated their client's ability to be heard to force a conversation about these issues which is playing out now in local courts and legislatures across the country. In submitting this amicus, they created a real opportunity for better outcomes for their clients. They also brought attention to the injustice of racist over-policing, harsh sentencing, and excessive prosecutorial discretion for gun possession. But perhaps just as importantly, they lifted the curtain on their own translation work. They showed higher courts, and society at large, what they had been doing in counseling clients in an unjust system. Doing so allowed them to continue to do the counseling necessary for their direct representation, but stay grounded in the larger injustice of that work. They could show clients that their situation exists in reality, but that avenues to challenge that reality exist elsewhere in society.

The public defenders who submitted the *Bruen* amicus largely came from holistic offices. But the impetus for the brief was not a policy unit or

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315 Despite having a pretty comprehensive view into that legal system, we don't really have much of a platform. We speak up in local courtrooms. But the only people who hear us there are state court judges and state prosecutors. So this was an opportunity to break out of that, and talk to a much larger audience that sits outside of New York City. That's an audience that includes people who not only have different ideas about gun policy, but also includes those who actually genuinely believe that there's a Second Amendment right, a constitutional right to keep and bear a firearm.
Samarth, Thomas, & Smith, *supra* note 293.

impact litigation department, it came straight from the direct advocates in the criminal cases themselves and the stories they heard.[316] It was an organic event and oftentimes offices merely must allow the natural processes to play out while guiding best practices and providing resources as able. But the resources and community connections of the holistic offices are still instrumental in helping to make larger views and mobilizations possible. Holistic offices with impact litigation units, policy units and community organizing make this counseling work easier, but are not a requirement. Conversely a holistic office is not enough if the core of representation remains focused on cases and lawyers without a sharing of knowledge and tactics between client and lawyer that goes beyond the case.

The Black Attorneys of Legal Aid's Amicus does not neatly fit the existing discussions around expanding counseling in participatory defense or movement lawyering. Robust counseling would interplay well with community led movements, and is already occurring to an extent in some holistic offices. But it also informs attorney actions, and ones that may not be immediately apparent to critics of the criminal legal system. The expanded scope of view allows the opportunities for further action by clients, by attorneys, and by others entirely outside of criminal court.

In this example however, it was led by attorneys. It is not a coincidence that the public defender amicus in *Bruen* was largely organized and written by black public defenders.[317] They were lawyers engaging in a very lawyerly form of advocacy that was made easier by their proximity to the legal world. They were public defenders seeing larger trends through their repeat work in a high-volume criminal court.[318] But they were also the defenders who most directly experienced and identified with unfair policing and who were best motivated to do something outside the norm to find a way to bring attention to an injustice.[319] Rather than continue to bear the burden of holding back clients, this advocacy served dual purposes. Along with allowing clients and attorneys to strike back at underlying mechanisms of

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[316] *See* Samarth, Thomas, & Smith, *supra* note 293.

[317] "Black defenders may be more likely to recognize racism and raise race-based challenges by virtue of their experience as Black people. In this way, Black defense counsel are particularly well-situated to challenge anti-Black racial bias whenever it arises in the client's case." Hoag-Fordjour, *supra* note 15, at 1539.

[318] "Over a quarter of my felony caseload as a public defender consists of people possessing — not using, just possessing — a firearm without a license. It's also a disproportionately large percentage of the cases that result in people going to Rikers pretrial, as well as a disproportionately large percentage of the cases that result in people sentenced to prison time." Samarth, Thomas, & Smith, *supra* note 293.

[319] Hoag-Fordjour, *supra* note 15.

injustice, this process works against burnout for defenders who otherwise continually push against their clients to see reality and are never given the ability to push in the other direction.

Case Study B – A fictionalized example of a robust counseling dialogue

The second example is a dialogue between a public defender and a client. It will hopefully be very familiar to anyone who has practiced as a public defender. There is nothing starkly different from this conversation and one that is client-centered and holistic, but more traditional in its scope. The defender can facilitate client knowledge being seen as equal to attorney knowledge, just different in scope, as well as bringing in extra-legal power and tactics as just another tool for a client to consider. An attorney who shares their information freely and accepts client information can create a dialogue where both can work towards something more. This example is what that looks like at the very outset, though it may develop in a variety of ways depending on the circumstances.

Attorney: Hi Mr. Jones, I'm Angelo Petrigh, I'm an attorney at the Bronx Defenders and I'm going to represent you for your case. Here's my card. I want to read this complaint to you charging you with a crime so that you can know what the police are saying happened, then I want to hear from you what actually happened, and then we can talk about court today and next steps, does that all sound ok?

Client: Yes. I really just want to know how I'm charged with anything. Those officers assaulted me. I want to press charges.

A: I'm very sorry, and I want to hear from you about what really happened. We can talk about that after we talk about the charges, is that ok? I just want you to see what they're saying first and what you're charged with.

C: Ok.

A: So this is the complaint, this part lists the offenses. You're charged with resisting arrest and two counts of assault, those are all misdemeanors, you're also charged with trespass and disorderly conduct, which are both violations and not crimes. Here is where the officer has sworn out the allegations. Officer Jones is saying that on April 4, 2012, at 7:30 pm on E

239th street he observed you in an area near Edenwald Houses.

C: Yeah I live there.

A: Ok, well he's saying this area is clearly marked with signs at both entrances saying "park closes at dusk." He states that when he approached you to issue you a summons for trespass you became "belligerent."

C: How can I trespass there? I live there, we all cut through the park on the side to get in. There have been a lot of people getting arrested for stupid things recently though.

A: Ok, I want to hear more about that. But first, this officer is saying when he was going to issue you a summons for trespass you became belligerent and struck him in the face causing an injury. It says that he and Officer Smith then attempted to place you under arrest for that behavior and you struggled with the officers, twisted your body and refused to extend your arms. That the officers and you all fell to the ground and that while attempting to handcuff you, that you bit Officer Smith in the forearm. Ok, tell me what happened?

C: That's all a lie. I was walking home, I had just gone around the block to enjoy the weather and get some air. I went through the park on the side of the building like I always do, and these officers came out of nowhere and surrounded me, three of them. They asked me what I was doing and I told them. They told me to stop because I was still walking and talking. I asked them why. They said I was trespassing. I asked them, how? They told me I needed to give them an ID so they could write me a summons. I didn't have ID, I was a block from my house just walking around, what do I need my wallet for? They told me if they couldn't verify who I was they'd have to take me to the precinct to finger print me. I told them I'd show them a photo of my ID and pulled out my phone and the officer behind me yelled stop and grabbed me from behind. I flinched and shrugged him off and the officer in front of me punched me in the face and they both tackled me. They knocked me down they were hitting me and grabbing my arms, I told them to stop, one of them was kneeling on me with his arm around my neck so I bit him so he'd get off of me and he did. Once he got off of me I stayed on my stomach and put my hands out on the floor in front of me so they could grab them, I wasn't trying to fight anyone, they punched me. They cuffed me and left me on the

ground for like 5 minutes or 10. Look I have a bruise here already.

A: I'm so sorry that happened. That's awful.

C: It was. People outside the park walking by saw it. These are my neighbors and now they think I am a criminal. I missed work today already without calling out. Its construction, if I don't show I don't get paid and I might be pulled off the job entirely. This isn't the first time I've been stopped outside my building, but never like this.

A: What's happened in the past? It says here you don't have a record. This part of what I have lists any criminal history. Along with the complaint that we read that's the only other thing I have for your case so far.

C: I don't have a record. They've never arrested me even. I got a ticket once or twice for some petty things, drinking in public and being loud. I've never been arrested let alone for anything like this. So what's going to happen today?

A: Today this court proceeding is technically to decide bail, but the DA isn't asking for any bail for your case. So you'll go home while this case is open.

C: This case is going to be open? For how long? And I have to come back here? I have work, I can't be coming to court every day.

A: Well until we go to trial or resolve it.

C: Resolve how? I didn't do anything. I don't want to go to jail or get a record.

A: That'll be a question for down the road. Fighting a case takes time, and that's intentional so that people give up and take a plea. And yes they'll threaten you with a record or maybe even jail if you decide to fight your case and end up losing. But right now we don't know what that would look like and we don't have anything to consider. The DA says they aren't offering anything today and not until they speak to the officers. We could ask the judge for a plea, but she can only do that on a misdemeanor that gives you a record forever. So I suggest we come back at least one time to see what I can get the

DA to offer for a reduced non-criminal charge and you can compare that to trial. Hopefully by then we'll have the discovery in your case, paperwork and videos, so we can meet in my office and talk about what both options would actually look like. Our next court date would be at 930 on a weekday in about 30 days. Is there a day of the week that's better for you?

C: No, I can't really come back to court any day. I work 6 days when on a job, only Sunday off. Well assuming I didn't get fired already.

A: I can try to get us out quickly on that next court date if you can start late? Then possibly after that I can get your appearance waived for future dates. Or I can write a letter to your job if it would help to explain?

C: Yeah that would probably make things worse. I'm not really looking to have them know why I'm taking off. But one day will be fine, let's do that.

A: Right. Okay. You said when we got started that you wanted to press charges on the police for assaulting you. Can we talk about that?

C: Yeah. They need to have consequences. I spent a day in here for allegedly punching them. But they punched me. They get to go back to arresting people? They don't have anything happen to them? That's not fair.

A: It's not fair. If you mean having them arrested, realistically that's very hard to have happen. Only the police can arrest someone and only the DA can charge someone with a crime. The police decided to arrest you and the ADA upstairs working in the complaint room decided to charge you with a crime instead.

C: They didn't even hear my side of what happened first!

A: Yeah, that's also unfair, although in some ways to protect you. You have a right to remain silent, which may be good, since even if they heard your side they may have used that against you instead of charging the police. It takes a lot for an ADA to charge a police officer. The legal standards are different for police in NY. And also it's political, DAs can't lose support of the police unions so can't pursue these cases without a lot of proof against police. My investigator and I can look to see if there is video from around

there showing what happened, since that would make a difference. You said there were people around, maybe we can see what they saw before a police investigator speaks to them.

If you want the officers to face consequences there are other ways. There are civil lawsuits, or police misconduct investigations that you can pursue, where you can accuse the police in a civil proceeding and either get money or have a disciplinary finding against them. We can talk about getting those started, but you probably can't finish pursuing those unless we win your case, which would require you to come back for much more than one date. Outside of any courts, there is also a push recently to get more police accountability, to stop things like public housing trespass patrols, like what you experienced. Also a push for police bodycams which may have helped here. And for better accountability when police do things like this.

C: What do you mean a push?

A: Like people working towards it. Some people have proposed laws to stop NYCHA patrols like what the officers were doing in your case. Some people are organizing around it to write their representatives or protest or publish articles that highlight what's happening.

C: That's great. People need to know. But I'm not really the protest type.

A: Not everyone involved is. But it sounds like happened to you though is right on point to what they're trying to change. You could go to a meeting and see what they're all about.

C: I might. How would this help my case?

A: It wouldn't, but you said this was happening a lot? That you'd been stopped before? And others in your neighborhood charged with trespass? It might be possible to stop this from happening again to you and your neighbors. Can you tell me about what's been happening?

C: Yes, the main entrance into my building has been broken for months. There was some problem with the door and the lock and it's taken them forever to fix it so they blocked it off. The other entrance is on the same side of the park, but sometimes the walkway is closed and then the only way

to get in is by walking through the park. It's not even really a park, go take a look, it's a tiny strip by the building with black top and a tree. And it looks like it's part of the project, I always thought it was.

And yeah, I've been hearing a lot about people in my building getting stopped lately. There was a shooting a few weeks ago nearby so they put in a mobile tower and there's a always a group of cops walking around. They stop everyone, they go inside the building and ask them for ID. Everyone says they're just trying to search people for any reason to see if there's a gun that matches. My community board said they want to write the commissioner or city council about this. It has something to do with an NYPD unit called 'anti-crime.' I've seen then before, they said they're the gun boys, they don't care about petty stuff. Last time they just frisked me and let me go.

A: I didn't know any of that. That might explain a lot. Well if you pursue one of these avenues, the campaigns I mentioned or the ones you did it might be possible eventually to stop these practices. Do you want to find out more about your community board and what they're doing about 'anti-crime' and let me know? We can talk about this when you're out, maybe we can find a day after work for you to come by my office so we can discuss your case itself, and all of your options, before your next court date. There's a lot to consider.

I have a few more questions to ask before we see the judge. Where were you born?

C: In Harlem.

A: I ask that of everyone to make sure the open case isn't going to be an issue for immigration status. You said you work construction, for a private company?

C: Yeah.

A: Ok, if you apply for a new job that has a background check let me know since this case may affect it. And you live in Edenwald Projects? Let me know if you have to renew your lease or change who is on it, ok?

C: Why?

A: Sometimes they run background checks when they do that and

we'd want to close your case before that happens. Right now a background check would show the original arrest charges, which if you look here, were actually for felony assault on an officer and marijuana possession among the rest, and those could cause problems for your renewal.

C: That's ridiculous. This whole thing is crazy. Anyway I told them the weed wasn't mine, it was just on the floor where I fell.

A: Yeah and the ADA seems to have agreed, they didn't charge you with any of that. Just let me know about your lease so we can be safe. Oh and even though you weren't charged with the weed there is a push, uh, people are trying to legalize it partly because it's an easy thing for the police to make up right now. They claim to smell weed, or find it on the floor by someone. Something else to consider is joining that as well if the police have harassed you or others over weed.

C: Yeah I don't care about that.

A: Fair enough. Anyway I think that's it, what questions do you have for me before we see the judge?

C: That's it. How long until I see the judge and get out of here?

A: Hopefully about 30 minutes. I'll see you out there.

CONCLUSION

Public defenders navigate a tenuous relationship whenever they advise clients of their options. This counseling role is the foundation of modern public defense and the site of true client-centered representation. It is where clients are able to work through and elucidate priorities, and attorneys are able to guide them through this process. It is iterative, and ongoing, and its scope is malleable. Ultimately this collaboration leads clients and attorneys to decide on defense strategies, theories, and litigation.

But this counseling occurs within a tragically imperfect system. Systemic issues in society, in criminal law, and in policing impact the real-world options to be discussed in the counseling process. These mechanisms of oppression are often reinforced through the counseling relationship. Counseling can obfuscate the underlying reasons for constrained client choice by making it seem as part of the natural operation of law. Relatedly

counseling can privilege legal and individualized forms of knowledge and power, providing an obstacle to real engagement with those mechanisms.

The solution to this is a more robust view of counseling that makes this contradiction explicit and part of the counseling relationship. This elucidates, and brings into the conversation, whatever obstacles, incentives, or systems influence a client's case and situation. This shift improves the quality of counseling itself by making lawyers cognizant of their role, grounding public defenders in broader issues, and possibly diminishing moral injury and burnout. Second, this counseling role pulls back the veil for clients on the realities of their cases. This candid discussion should improve trust with lawyers, allow for client-led representation, and also facilitate movements that can bring about true change. Finally, this expanded role will prevent lawyer gatekeeping from impeding mobilization and instead use the amassed knowledge of public defense offices and of their clients to further broader shared goals.

In a system defined by pleas, disparate racial outcomes, and mass incarceration, counseling becomes the site of real outcome selection, and therefore is the site where true change must be discussed. Ignoring the contradictory nature of the counseling dynamic improperly limits client options and puts a roadblock to any true re-imagining of what our system, and even individual client's outcomes, can look like.