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Counseling Oppression

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ARTICLES

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ABSTRACT

Critical scholars and public defenders alike have grappled with the contradictions at the heart of counseling clients in a carceral system. Systems of oppression operate within the public defender-client relationship because the defender's role in translating the law also enforces its inequities. Counseling can obscure the workings of the system, providing an illusion of choice despite privileging certain forms of knowledge and tactics.

But the counseling site is also where defenders become exposed to clients' lived experiences, encounter collectivist tactics, and critically examine the tension of their role in the system. Likewise, through counseling, defenders can pull back the veil of the legal system and demystify it to allow clients and movements to address the system's inner workings.

This Article focuses not only on how counseling reinforces oppression, but also on what can happen when defenders and clients acknowledge this tension, examine it, and bring it into the counseling relationship. This critical form of counseling already naturally occurs and should be expanded in a principled and intentional manner. When defenders and clients embrace the contradictions at the heart of counseling and lay them bare, they can help transform the counseling site into a location where epistemes interact. Defenders and clients can collaborate, pool their knowledge, and trace back their constraints to the mechanisms that replicate systems of oppression. They can then go forth from the counseling site together, separately, or with other partners entirely to forums where varied tactics can disrupt those underlying mechanisms.

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INTRODUCTION

Public defenders mediate systemic injustices every time they counsel a client. They act as intermediaries who help clients navigate their perception of the law versus its actual, flawed reality.[1] Lawyers translate the law, as well as the reality of its implementation, to clients in every option they discuss.[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. For example, advising an accused individual about the penalties for going to trial reinforces that mechanism's purpose in coercing more pleas, no matter how thoughtful or client-centered the counseling.[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

[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).

[2] The ethical rule defining "advice" and the rule's attendant comments make clear how essential the very framing of options and scope of consideration are to an attorney's counseling role. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

[3] "[T]he court record documented the formal rules of practice that contradicted the logics and norms of the interpretative aspects of law. The defense attorneys were the translators . . . ." NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 173 (2016).

[4] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 41 (2011 ed. 2011).

[5] GONZALEZ VAN CLEVE, *supra* note 3, at 162 (describing how public defenders sort clients into those "deserving" or "undeserving" of justice based on race as well as attorney's perceptions and fears of how criminal legal system will treat their client).

[6] *See generally* Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019) (describing how trial tax mechanism shapes all aspects of criminal punishment); *see also* NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018) (describing how trial tax mechanism results from formal and informal rules). Defenders must weave these nuances together to advise their client of the consequences of pursuing a trial because the client will bear the effects. *See id.* at 10-12.

[7] *See* Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2022 (2022); Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2263-65 (2014).

[8] Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1282 (2015).

autonomy[9] within a system that is inherently unjust[10] and shaped by society's 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, through means such as 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

[9] *See* Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 440 (2021) (discussing how defenders perpetuate illusion of choice in system, masking systemic issues that constrain clients and obscuring certain tactics such as client-led resistance).

[10] Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 449 (2022) (detailing 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*, 95 N.Y.U. L. REV. ONLINE 119, 132 (2020) (noting that to 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] The need for such transformation is necessary, as prison is designed to oppress poor people. *Gideon*, which focuses on individual representation on a case-by-case basis, "obscures this 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, 175-78 (2021) (discussing contradictions and challenges that arise when defenders work within carceral system despite holding view that system should be abolished).

[14] Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 252 (2019) (exploring viability of bottom-up resistance to unjust elements of established criminal procedure).

[15] Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1538 (2021) (supporting Black defendants' ability to select culturally competent Black defenders).

[16] Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 373 (2006). *But see* Ahmed, *supra* note 10, at 448, 454 (arguing that uncritical emphasis on autonomy and choice can obscure inequities that constrain defendants' choices).

[17] 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 other areas, including immigration defense, family defense, housing, government benefits, and more.

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 traditional view of counseling is that attorneys should discuss a criminal case narrowly and advise clients about choices within those confines, though sometimes lawyers can expand the discussion to other legal forums where a client faces enmeshed consequences. This myopic view has aided and abetted 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. Systemic barriers will undoubtedly persist even if defenders try to broaden the scope of their work. But the friction that results from exposing counseling's contradiction will be worthwhile, and interrogating its limits will elucidate a basis for iterative work to continue to refine counseling in a carceral system. Others have written on the need for movement lawyering more broadly.[20] I seek to orient how critical counseling can amplify the public defender-client relationship if it is brought into the very core of the counseling relationship.

This Article examines not only 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 counseling process illuminates structures of oppression because it requires lawyers to name a client's options and explore the pressures that shape

[18] *See* Karakatsanis, *supra* note 1, at 254-55.

[19] *See* Scott Scheall & Parker Crutchfield, *The Priority of the Epistemic*, 18 EPISTEME 726, 727 (2021) (detailing how epistemic burdens limit options before decision-maker weighs choices through moral or other considerations); Padilla v. Kentucky, 559 U.S. 356, 366-69 (2010) (looking to prevailing conduct of defense attorneys to inform scope of obligations in advising and assisting clients).

[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 D. 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*, PHILOSOPHER, https://www.thephilosopher1923.org/post/being-in-the-room-privilege-elite-capture-and-epistemic-deference (last visited Dec. 7, 2024) (discussing standpoint epistemology and some of its complications); *see also* discussion *infra* Section I.D.

them, thereby elucidating often invisible, or unconscious, powers.[22] Likewise, the counseling process provides an opportunity for lawyers to learn about clients' lived experiences and extralegal power that clients and their communities exert through collective action. The counseling process thus allows lawyers to see how their individualized counseling techniques have the power to support or harm collective power.[23]

I use the term "critical counseling" to refer to the dialogue and discussion that occur when defenders embrace the contradictions of their role.[24] Critical counseling is not my creation; it already occurs sporadically and spontaneously. It happens because public defenders naturally become informed, and radicalized, by the injustices that they play a role in reinforcing.[25] Through explaining the reality of legal systems to clients, and hearing from their clients what led them to court and how the consequences of legal processes will affect their lives, the counseling dynamic reveals "where the law lives" and actually works.[26] 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."[27] When these conversations happen, the defender and client trace back the root cause of the issue together and offer their complementary knowledge and power to brainstorm solutions outside of the predetermined menu of criminal court options.[28] These currently informal moments where defenders

[22] *See* YOUNG, *supra* note 4, at 41 (demonstrating how systemic oppression results from "unquestioned norms" and "unconscious assumptions").

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

[24] Critical counseling is a continuation of critical interviewing and critical lawyering skills more broadly. Laila L. Hlass & Lindsay M. Harris, *Critical Interviewing*, 2021 UTAH L. REV. 683, 685-87 (defining critical lawyering as "a broad lawyering effort to redress social injustice by operationalizing critical legal theory principles within the practice of law").

[25] "Our personal realities are patchworks of things we've seen, been exposed to, and potentially come to understand, bound together by belief." KELLY HAYES & MARIAME KABA, LET THIS RADICALIZE YOU: ORGANIZING AND THE REVOLUTION OF RECIPROCAL CARE 21 (2023).

[26] Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2563 (2023).

[27] *Id.*

[28] Interdisciplinary, holistic defense offices already often expand the scope of representation and even embrace 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, 899-900 (2019) (describing client interfacing with community organizers through Bronx Defenders' "model for holistic defense"). In my experience consulting 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 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. *See infra* Sections II.A and II.B.

and clients clarify the reality of oppressive systems should form the blueprint for a principled and intentional method of counseling that demystifies systemic oppression and allows 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 Article does not focus on criminal court as a site of oppression, although this Article's arguments in favor of collective and anti-oppressive sources of power and knowledge implicate it. Others have already described how client resistance works as a tactic in court and how the system dissuades it.[29] Likewise, the role of criminal court systems in enforcing compliance[30] is only mentioned in passing, although it significantly informs how counseling operates. In later papers, I will examine this contradiction of counseling in the context of how legal epistemology and court systems reinforce court actor behavior, constrain choices,[31] and exclude client sources of knowledge and power.[32] For now, I focus on how the counseling relationship, in spite of its problems, can result in more equitable ways of sharing knowledge as well as brainstorming opportunities to challenge traditional power structures in the criminal legal system.

This Article analyzes how the scope of critical counseling is better aligned with holistic, participatory, and transformative objectives. The established ethical rules of professional conduct, far from being an impediment, already obligate a lawyer advising clients in these contexts to think beyond "traditional" counseling.[33] To satisfy the requirements at the heart of counseling, a lawyer must draw on their client's knowledge about racial and other forms of systemic injustice; explicitly detail the limits of the legal system; and invite suggestions for forums outside the case where the client, the lawyer, or others can intervene to address systemic issues, even if the intervention will not directly benefit the

[29] Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, 100 SOC. FORCES 194, 195 (2021) (detailing how clients are misconstrued as powerless when in reality attorneys and judges silence accused individuals who resist unfair practices); *see also* Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1932-37 (2019) (analogizing historical efforts by lawyers to interfere with fugitive slave enforcement to modern possibilities for disrupting criminal legal system).

[30] Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 5 (2022) ("[C]riminal courts contribute to unique forms of state violence, social control, and exploitation . . . .").

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

[32] Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2048 (2022) (explaining how pretrial release algorithms prioritize carceral system knowledge at expense of "community knowledge sources").

[33] The ethical rules support and possibly even require an expansion of the scope of counsel in defender-client relationships. For further discussion, see *infra* Section II.C.

individual client's criminal case.[34] Similarly, defenders should discuss these broader issues with clients, listen to any concerns that go beyond their case, and both inform and learn from clients regarding avenues for change that reach the heart of the issues.[35]

Even critical counseling still constitutes mere tinkering with the current criminal legal system, rather than transformative change. Nevertheless, it can hopefully bridge the gap between the current system and a better future.[36] By pulling back the veil on the true nature of a client's case, critical counseling can facilitate broader change by revealing the underlying mechanisms of injustice, thereby allowing for awareness, dialogue, and resistance to develop.[37] Critical counseling, and the agonism the process encourages, can be part of the praxis of radically reimagining the future of the criminal legal system.[38] As such, this proposal answers the call that others have raised to reimagine the spirit of the law[39] as it relates to client counseling.

This vision of counseling is prefigurative[40]: an accused person and their advocate engage with one another and share knowledge and power in a manner that hopefully will someday be formalized in a fundamentally different system

[34] This calculation is subjective. Invariably, a client's priorities have preference but are not always attainable, which makes it challenging to objectively assess outcomes. Client-centered lawyering views the empowerment and autonomy retained by a client throughout the process as a worthwhile goal, independent of the outcome. However, Miller analyzes how that may be an illusion that prevents engagement with the larger systemic issues that impact a client's potential outcomes. *See* Miller, *supra* note 9, at 404.

[35] In many ways, this is an implementation of rebellious lawyering, which encourages collaboration and engagement with outside legal systems. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 37 (Robert W. Gordon & Margaret Jane Radin eds., 1992).

[36] 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, *supra* note 26, at 2562-63 (footnote omitted); *see* discussion *infra* Section III.C.

[37] "[N]on-reformist reforms require a 'modification of the relations of power,' in particular 'the creation of new centers of democratic power.'" Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 101 (2020) (quoting ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 8 (Martin A. Nicolaus & Victoria Ortiz trans., 1967)).

[38] *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 828 (2021).

[39] *Id.* at 845-46 (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 47-48 (1983)) (asserting law review articles can either legitimize legal structures, "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").

[40] Sameer M. Ashar, *Pedagogy of Prefiguration*, 132 YALE L.J.F. 869, 871, 877 (2023) (describing prefiguration and applying it to legal work).

of accountability. This Article does not offer solutions or visions of that future 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 critical counsel—where the tensions are made explicit—benefits clients and defenders, and helps reshape power to allow for transformative change. If this counsel is implemented more widely, it will allow clients, attorneys, and movements to challenge systems of oppression in novel, meaningful ways.

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 instead of obfuscating or justifying it. When defenders are explicit with their clients, and themselves, about mechanisms of oppression inherent in their counseling, they can help turn the counseling location into a site where clients and defenders honestly examine the tensions together, each contributing their own knowledge, power, and tools.[41] Such an approach can be the difference between advising a client about an unjust reality and reinforcing that injustice.

Part I details how a public defender's counseling invariably perpetuates oppression, defines oppression, and examines how oppression operates in this context. This Section draws from my experiences as a public defender in the Bronx for over a decade. Part II describes the informal ways by which defender-client counseling spaces transcend the bounds of traditional modes of counseling and proposes a principled version of this more critical approach. Again, this Section draws from my experiences, including as training director of a holistic public defender office where I interrogated how defenders engage in counseling work. Part III addresses possible objections to this version of counseling, including ethical and structural issues. Finally, Part IV examines three examples of extant critical counseling. The first, violence interruption, explains how defenders and clients can benefit from conversations that begin outside the realm of possible feasible case outcomes. The second, the amicus brief of the Black Attorneys of Legal Aid in *Bruen*,[42] exemplifies public defenders meeting clients where they are, mutually sharing knowledge, and using client stories in a lawyer-led brief to agitate for change. The third example is a sample dialogue that, while fictionalized, includes real issues in counseling within the carceral system.[43] The dialogue exemplifies a counseling conversation that stays true to an individual

[41] This fits the heuristic of non-reformist reforms seeking to expose structural issues and alter power dynamics to further transformative change, even through minor changes in aspects of the existing system. *See* Akbar, *supra* note 26, at 2563.

[42] Brief of the Black Attorneys of Legal Aid, the Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners at 16, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022) (No. 20-843) [hereinafter Black Attorneys of Legal Aid et al. Amicus].

[43] Readers who have never represented an individual in court may want to skim this Section first to have context for the paper.

client while accelerating movement-based change. In all 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 to alter fundamental aspects of the criminal legal system.

I. COUNSELING *AS* OPPRESSION

A. *Traditional Counseling*

In 2011, I was a young public defender in the Bronx at the height of stop and frisk. At arraignments, I met predominantly Black and brown clients who had been stopped numerous times but were just now arrested for the first time because the previous stops had not resulted in any charges. Often this nth stop 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 park, or perhaps even in a resisting arrest or assault charge when my client had expressed well-warranted frustration and been met with hostility or violence by the police in response. These cases were overwhelmingly common in the New York City criminal court, driven by an increase in quality-of-life policing.[44] In fact, in 2011, about 74% of arrests in New York were misdemeanors,[45] and overwhelmingly, they were for such quality-of-life offenses.[46]

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. At best, they faced onerous court dates and procedural requirements; at worst, they faced jail time or being branded with a record for life, along with the various associated collateral consequences. I

[44] Bruce D. Johnson, Andrew Golub, Angela Taylor & John Eterno, Quality-of-Life Policing: Do Offenders Get the Message? 1 (June 26, 2002) (unpublished manuscript) (on file with U.S. DOJ) (analyzing New York Police Department's emphasis on quality-of-life offenses, including "minor misbehaviors that were highly visible, such as farebeating, aggressive panhandling, graffiti writing, and sleeping on public benches," in mid-1990s (footnote omitted)). *See generally* Charles C. Lanfear, Ross L. Matsueda & Lindsey R. Beach, *Broken Windows, Informal Social Control, and Crime: Assessing Causality in Empirical Studies*, 3 ANN. REV. CRIMINOLOGY 97 (2020). Thus, from 1980-2017, despite violent crime in New York City dropping from over 133,000 (peaking at over 149,000 in 1990) to under 36,000 offenses per year, the city saw a massive increase in arrests. MEREDITH PATTEN ET AL., TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 1980 TO 2017, at 17-18 (2018).

[45] BECCA CADOFF, ERICA BOND, PREETI CHAUHAN & ALLIE MEIZLISH, CRIMINAL CONVICTION RECORDS IN NEW YORK CITY (1980-2019), at 8 (2021), https://datacollaborativeforjustice.org/wp-content/uploads/2021/04/2021_04_07_Conviction_Record_Report.pdf [https://perma.cc/S55X-YAPS] ("Beginning in 1993, the proportion of misdemeanor arrests surpassed felony arrests, increasing in percentage nearly every year through 2011.").

[46] PATTEN ET AL., *supra* note 44, at 42.

quickly learned there was no outcome in criminal court that would get them anything resembling justice.

Within the narrow legal epistemic framework I was taught,[47] the tension in counseling for those cases seemed relatively clear at the time. To have any chance of achieving 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.[48] 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 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 a difficult decision between unsatisfactory options.

Like countless other public defenders, I developed my language around these options very precisely. I learned to counsel clients and explain the risks and benefits for them to weigh, so they could prioritize what they valued most. 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, I unwittingly facilitated unfair practices in court procedures, plea bargaining, and policing.[49] This is the traditional counseling role.[50]

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[47] Rachel E. López, *Critical Curriculum Design*, *in* RESEARCH HANDBOOK ON GLOBAL LEGAL EDUCATION (Garth & Ballakrishnen eds., forthcoming 2025) (manuscript at 6) (on file with author) (describing how legal education promotes "a blind stewardship of the law" and belief in litigation as primary means of social change because current curricular design "strips the law of its broader context, portraying the law as apolitical and merit-based, and facilitates an acceptance of the status quo as natural and predictable").

[48] While a necessary prerequisite, even a dismissal was not sufficient during this time period to allow certain affirmative actions, such as a malicious prosecution claim. Jasmine B. Gonzales Rose, Caitlin Glass & Neda A. Khoshkhoo, *Unraveling the Web of Legal Protection: Race, Police Misconduct, and the Favorable Termination Rule*, 36 NOTRE DAME J.L., ETHICS & PUB. POL'Y ONLINE SUPPLEMENT 765, 766-67 (2022).

[49] With this understanding, it becomes clear there were thousands of 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 those of other dedicated public defenders. *People in Jail in New York City: Daily Snapshot*, VERA JUST. INST., https://greaterjusticeny.vera.org/nycjail/ (last visited Dec. 7, 2024).

[50] It is somewhat ironic to refer to this as traditional counseling as it is a progressive view of counseling that replaced earlier versions that focused more on the attorney. Client-centered counseling was revolutionary when it began in the '70s. *See* Kruse, *supra* note 16, at 381 (summarizing 1974 study which found "lawyers who adopted a 'client-participatory' model of representation got quantifiably better results for their legal claims, compared with lawyers

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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 law as it should be.[51] 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 legal systems that ensnare underresourced populations. It is imperative to inform a client about reality because they need complete information when assessing risks and benefits of their options. A public defender's advice goes beyond rote law and encompasses the often ugly realities of judicial decision-making, racially biased institutions, and system actors that have motivations beyond merely "doing justice" in a particular case.[52] Thus, for instance, a lawyer advises a client that they face a penalty if they do not compromise their own due process rights,[53] challenges a client to consider who will actually comprise their jury,[54] or educates a client on how substantive legal concepts limit challenges (such as how the law on pretextual stops may lead a judge to admit evidence obtained through racially biased policing).[55]

operating under the 'traditional model'"). It acknowledged the role of clients in making fundamental decisions about cases. Holistic defense further expanded the scope of counseling. But over the past thirty years, even holistic defense has become widespread, has been transformed, and has been incorporated into the current "traditional" form of counseling. *See* 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 U. PUB. L. REV. 139, 164-65 (2011).

[51] Karakatsanis and Butler both speak of public defense serving as a façade to shroud the crumbling edifice of criminal law. Butler, *supra* note 12, at 2196-97 (arguing that *Gideon* and indigent right to counsel shifted focus from systemic change to individual rights, while also legitimizing mass incarceration); *see also* Karakatsanis, *supra* note 1, at 263-64.

[52] *See* BRIAN J. OSTROM & ROGER A. HANSON, EFFICIENCY, TIMELINESS, AND QUALITY: A NEW PERSPECTIVE FROM NINE STATE CRIMINAL TRIAL COURTS 6-8 (2000) (detailing interplay between process and other priorities of court system to find they are often in conflict and require balance).

[53] GONZALEZ VAN CLEVE, *supra* note 3, at 173 (describing how judge's courtroom statements about not holding plea rejection against defendant at trial conflicted with attorney's threats of penalization during sentencing).

[54] *See* Jasmine B. Gonzales Rose, *Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection*, 44 N.Y.U. REV. L. & SOC. CHANGE 309, 312 (2020) (describing how linguistic discrimination against jurors leads to racially and ethnically unbalanced juries).

[55] Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 641-42 (2021) (discussing how constitutional acceptance of pretextual stops increases racial profiling and makes profiling difficult to challenge through suppression in criminal case).

When a defender describes these realities, including such injustices, the counseling role makes a lawyer complicit in the oppression of their clients.[56] 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 injustices by resolving individual cases in a particular client's best interest.[57] While some public defenders enter the field with the hope of supporting radical transformation, the traditional counseling dynamic presents the defender with a discouraging choice: choose to work with the system and 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.[58] The conventional wisdom is that lawyers represent individuals; if they consider systemic issues at all, they decenter the client's best interest in the matter and risk giving improper advice.[59] Certainly, counsel's motivating ethos must be to allow a client to make an informed choice in their case.[60] The importance of this counseling role cannot be overstated.[61] Lawyers translate the law, as well as the reality of its implementation, to clients

[56] GONZALEZ VAN CLEVE, *supra* note 3, at 173 ("The defense attorneys were the translators who 'warned' defendants about [the court's] culture, thereby conditioning them into compliance.").

[57] 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 177.

[58] Sterling, *supra* note 7, at 2263-64; *see also* Jonathan A. 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").

[59] Rapping, *supra* note 58, at 1016 ("Yet, they must be careful to not allow the client to merely become a vessel for achieving an independent goal. Criminal defense lawyers owe a duty of fidelity to one individual; the client."); *see also* Rayza B. Goldsmith, *Is It Possible to Be an Ethical Public Defender?*, 44 N.Y.U. REV. L. & SOC. CHANGE 13, 22-24 (2019).

[60] "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 PRO. CONDUCT r. 1.4(b) (AM. BAR ASS'N 2023).

[61] "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 clients." Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 917 (2017) (footnote omitted). However, 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 2178-79.

in every decision they frame.[62] Their framing may make all the difference in what option a client decides to pursue and, as such, must be honest and straightforward.[63]

But a lawyer's framing of the issues occurs in the context of the unjust realities of society and the court,[64] results-oriented, capricious judicial determinations,[65] and the erosion of personal rights.[66] In its traditional form, counseling perpetuates these systems and allows the mechanisms that create inequity to thrive.[67] Lawyers in these systems act as safety valves that reinforce the inequality and injustice.[68] 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 an enabling intermediary.[69]

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[62] MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

[63] 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 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.

Id. r. 2.1 cmt. 1.

[64] Clair, *supra* note 29, at 208-10 (chronicling how attorneys and judges silence accused individuals).

[65] Angelo Petrigh, *Judicial Resistance to New York's 2020 Criminal Legal Reforms*, 113 J. CRIM. L. & CRIMINOLOGY 109, 112-13 (2023) (observing how judges use routine powers to circumvent reforms meant to reduce pretrial incarceration and increase defense access to discovery).

[66] Miller, *supra* note 9, at 380-81 (detailing how notion that clients have autonomy of choice is an illusion that disguises limited rights and options of accused individuals).

[67] *See* MODEL RULES OF PRO. CONDUCT r. 2.1 cmt. 1 (AM. BAR ASS'N 2023). Despite the coercion of the plea system, 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 L. Reimer & Martín Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus That Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 216 (2019).

[68] *See* Butler, *supra* note 12, at 2178 ("*Gideon* bears some responsibility for legitimating [the increase in mass incarceration] and diffusing political resistance to them.").

[69] 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 . . . ." ABA STANDARDS FOR CRIM. JUST., PLEAS OF GUILTY, 14-1.8(b) (AM. BAR ASS'N 1999); *see also* Johnson, *supra* note 6, at 348-50 (discussing how trial penalties that incentivize guilty pleas require cooperation of public defenders and can evade judicial review because of nature of charging decisions and how bargaining occurs).

The predominant model of defender-client counseling is that an attorney's singular obligation to their client requires putting aside systemic issues entirely.[70] Such a view holds that a public defender must work within the bounds of the criminal system, regardless of the systemic causes that led the client there and the effects outside of the case. 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."[71] Thus, in this traditional model, a 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 other more "effective" strategies rather than strategies designed to expose systemic injustices.[72] Considering if those discrete actions may harm past or future clients or reinforce systems that hurt other potential clients would be improper. This predominant model of public defense considers discussions of issues outside of a criminal case as potential conflicts or a betrayal of the singular duty to a client.

This model of counseling also implicates how attorneys bring systemic issues into the criminal courtroom.[73] For example, defenders and clients can raise challenges to racist police practices in motions to suppress and motions to dismiss, among other methods of intra-system resistance.[74] The complication is that the best choice for a client, because of how system actors create incentives, is often one that continues the inequity.[75] For instance, the client who is close to prevailing on suppression may be offered a plea that is too good to refuse, or a case that may expose an unfair practice can be dismissed by the district attorney to prevent creating bad law. Systemic issues can persist with these minor diversions preventing broader scrutiny. As such, the criminal court can be a difficult venue for accused individuals to address the underlying issues that constrain their choices.[76]

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[70] Sterling, *supra* note 7, at 2250 (explaining that "[t]he right to counsel is largely defined by a defense attorney's action — or inaction — within the clearly delineated parameters of advocating for the client inside the courthouse doors").

[71] *Id.* at 2263.

[72] Smith Futrell, *supra* note 13, at 161.

[73] Sterling, *supra* note 7, at 2263-65 (arguing defense attorneys can both pursue broader causes and be zealous advocates for individual clients simultaneously).

[74] *Id.* at 2265-71 (suggesting proposals to bring goals aligned with movements into courtroom to effect broader change, even if actions fail in individual cases).

[75] *See* discussion *infra* Section II.A (comparing former clients who suffered great personal costs by resisting underlying systemic injustice to those who reduced personal harm by complying with criminal legal system).

[76] "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 A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 363 (2015).

Accordingly, traditional client counseling's sole focus on an individual client and their case may paradoxically allow the underlying inequities to continue. This is the contradiction of counseling: framing decisions to a client narrowly in order to protect their interests ultimately turns a lawyer into the mere enforcer of a client's oppression. Counseling that includes a discussion of the underlying issues, but still limits discussion to the options of a criminal case will not be much better. To return to the trial tax example, "[a] guilty plea entered at gunpoint is no less involuntary because an attorney is present to explain how the gun works."[77] Simply describing the problem more fully does not address the source of coercion. Indeed, the criminal forum will never be able to do so on its own.[78]

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, in their translation, a lawyer also can and must elucidate underlying mechanisms facilitating injustice, learn from clients about mobilization against such mechanisms, and then share that knowledge with other clients.[79] The defender's mediation 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.[80] A defender must continue to tell clients about the reality of the law's implementation in a case, but they must also draw from clients' knowledge to find tactics that allow them to push back against that reality.

B. Defining Oppression

There is already another dynamic at play when a lawyer mediates between the law and reality. Public defenders naturally become informed by, and radicalized by, the injustices they reinforce. This occurs through the process of explaining the reality of the legal process to clients and hearing from clients both what led them to court and what consequences they will face from court outcomes. The

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

[78] *See* Clair & Woog, *supra* note 30, at 6 (elucidating that criminal court system "largely legitimizes and perpetuates the racialized violence and control of police and prisons").

[79] 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, *supra* note 26, at 2563 (footnote omitted).

[80] *See* GONZALES VAN CLEVE, *supra* note 3, at 173 (exemplifying how defenders communicate norms of criminal process and intimidate clients into compliance).

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

Iris Marion Young explains that justice, in addition to 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."[81] She describes oppression as "the vast and deep injustices some groups suffer as a consequence of . . . the normal processes of everyday life."[82] I rely on these conceptions of justice and oppression to explain the phenomena at play in traditional counseling and to set the parameters for more critical counseling discussed below.

Different facets of oppression affect different groups in distinct ways.[83] These groups overlap, as there is rarely a clear monolithic oppressor.[84] 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."[85] 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."[86] This renders the oppressed group's own knowledge, perspectives, and lived experiences invisible.[87]

Traditional counseling furthers oppression by reinforcing dominant group perspectives. It frames every choice through the restrictive lens of legal epistemic authority, prioritizing this dominant perspective over viewpoints that prioritize clients, movements, communities, or other laypeople. It also then reinforces this scope of counsel as the only appropriate one.

The radical promise of more critical counseling is that it goes beyond information sharing or valuing certain epistemic sources. It is an intervention targeting the very mechanism that furthers oppression: the prioritization of certain knowledge and power within the decision-making space that unconsciously limits opportunities for real engagement with the mechanisms of

[81] YOUNG, *supra* note 4, at 39.

[82] *Id.* at 41.

[83] To Young, oppression is "a family of concepts and conditions, which [she] divide[s] into five categories: exploitation, marginalization, powerlessness, cultural imperialism, and violence." *Id.* at 40.

[84] *Id.* at 41, 47-48 (explaining that oppression is product of systemic constraints that affect distinct and shared interests of identity groups and is not necessarily caused by a tyrannical group).

[85] *Id.* at 41.

[86] *Id.* at 59.

[87] *See id.* at 59-60 (describing both invisibility and hypervisibility of oppressed groups).

oppression.[88] It is a means to interrupt one of the sites that reproduces systemic inequity by crystallizing the underlying issues and allowing individuals to recognize what is at stake.[89] The mere recognition and articulation of this dynamic can increase consciousness that will then allow the collaboration and collectivist action necessary for true change.

C. *The Ethical Imperative of Counseling in a Carceral System*

Examining the reality of how oppression operates problematizes the view that traditional counseling meets the ethical standards required of attorneys. The attorney-client relationship "confers upon the client the ultimate authority to determine the purposes to be served by legal representation."[90] The ethical rules envision such a dialogue to extend beyond pure legalism.[91] This principle is not served by obfuscating the operation of oppression, hiding a defender's limitations in criminal court, and ignoring a broader menu of knowledge and tactics.

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.[92] An attorney who holds such a position may already incorporate clients' views into the role of counseling. But even attorneys who believe in systemic injustice may still prioritize traditional counseling if they view their work within the formal legal system as inherently complicit and separate from their work outside of the system.[93]

Regardless of whether an attorney personally feels the legal system is unjust, I explain below that an attorney has an obligation to counsel their client on systemic factors in order to meet professional ethical standards and provide quality representation. A public defender should discuss with clients the externalities that constrain a client's options in their criminal case or that influence the outcome both formally and informally. These externalities can be policing practices, prosecutorial discretion, sentencing laws, and more. Public defenders often already know about these mechanisms and how they affect aspects of a criminal case. Indeed, that is what makes them counselors: the capability to understand what is at play that constrains a client's choices.[94] The question is whether to discuss those constraints openly with clients—and continue to engage with the client, wherever that may lead—or narrow the

[88] *See* sources cited *supra* note 19 and accompanying text.

[89] Akbar, *supra* note 26, at 2563.

[90] MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 1 (AM. BAR ASS'N 2023).

[91] *Id.* r. 2.1.

[92] Clair & Woog, *supra* note 30, at 9 ("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 . . . .").

[93] *See* GONZALEZ VAN CLEVE, *supra* note 3, at 172-76.

[94] *See* Reimer & Sabelli, *supra* note 67, at 216.

conversation to focus on the more immediate implications for a criminal case as well as the tactics available in the criminal court.

Even an attorney who does not see any injustice in the system has an obligation to acknowledge realities. The "fundamentals" of the counseling role look very different if the general dialogue acknowledges and confronts how the origin and purpose of racially biased policing, prosecution, and court systems[95] influence every aspect of the criminal legal system.[96] A lawyer may disagree about the cause or solution, but it is undeniable that the legal system disproportionately punishes people of color.[97] Public defenders may see it as an issue that is both beyond consideration in their role and impossible to fix within the legal system.[98] When forward-thinking and creative lawyers have brought such challenges in court, they have faced limited success given how tumultuous the consequences of any real acknowledgment of racial bias would be.[99] But rather than making such a conversation meaningless, including the limitations of defender power allows clients to engage with this challenge.

Critical counseling requires a lawyer to be confronted with potential injustices that they perhaps have become acclimated to, given their proximity to the legal system.[100] Being open to discussions of areas for potential change will allow for conversations with clients, and potentially external actors, for progress.

Of course, the system, certain actors, or even the lawyer may consider some problematic aspects of the system to be intentional and worthwhile, such as the trial penalty serving the system's interest in efficiency.[101] In this case, elucidation through the counseling role will simply allow for earnest conversation outside the case itself about the costs and benefits of such a

[95] Clair & Woog, *supra* note 30, at 16 ("White supremacy is foundational to criminal courts' violence and social control function.").

[96] *See* Pinard, *supra* note 11, at 132 (discussing how any reforms to criminal legal system must address roots of racial criminalization to have any success).

[97] ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 2 (2018), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/7NJM-QVX5] (demonstrating racial disparities in criminal justice system, including "disproportionate levels of stops, searches, arrests, and pretrial detention for black people").

[98] Pinard's proposal demonstrates that the status quo fails because it focuses on changes within the legal system. Pinard, *supra* note 11, at 132.

[99] In *McClesky v. Kemp*, when the Supreme Court failed to take action despite 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." 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) (discussing majority's fear that petitioner's claim would create chain reaction of challenges to overall justice system).

[100] Karakatsanis, *supra* note 1, at 254-55 (describing "normalization of this brutality" as "chief daily bureaucratic function" of many lawyers).

[101] *See* Johnson, *supra* note 6, at 348 (questioning whether expediency is "valid purpose of punishment").

practice, rather than reinforce the practice mindlessly in a forum where it is not subject to scrutiny.[102] Even settled issues can have a renewed debate in political forums if and when appropriate.

The current myopic view of counseling has led to defense lawyers' abdication of their responsibility.[103] Racial injustice, mass incarceration, and the carte blanche to law enforcement through the whittling away of Fourth and Fifth Amendment rights have continued precisely because attorneys have allowed themselves to be blind to obvious inequity that is glossed over through individual representation.[104] 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 obfuscates the systemic injustices that actually shape outcomes.[105] 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.[106]

Miller and others have suggested that 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.[107] These observations also force a reckoning with the ethics of traditional counseling. 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, including acts external to the case itself.[108]

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[102] *See id.* (characterizing plea negotiations as "opaque form of administrative justice"); *see also* Akbar et al., *supra* note 38, at 845 (discussing legal scholars' role in understanding dynamics of movements for change).

[103] 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.

[104] *See id.*; *see also* Butler, *supra* note 12, at 2178.

[105] Miller, *supra* note 9, at 440.

[106] *Id.*

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

[108] *See id.* at 440-41.

This expanded counseling obligation stems from the model rules' allocation of authority between an attorney and a client.[109] 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 authority has been used to further holistic, client-centered counseling because a client can prioritize outcomes in venues besides the criminal case, such as ones where a client accepts an otherwise avoidable conviction to secure a better outcome for immigration or housing or a custody case.[110] The same is true for outcomes outside those venues as well, such as community organizing, public policy, and impact litigation outcomes. The model rules explicitly state, in their 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."[111] 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 may impact their future legal involvement. 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.[112] In fact, critical counseling is an imperative in any form of client-centered counseling.[113]

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.[114] This view improperly leads attorneys to obscure options from clients, and thus, abandon the attorney's requirement that they be accountable to a client and serve the client's desires. While a basis in the model rules for limiting the scope of representation or tactics exists, it is a narrow exception. The exception assumes a discussion 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 that the tactic is

[109] MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 1 (AM. BAR ASS'N 2023).

[110] *See* Smyth, *supra* note 50, at 144.

[111] MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

[112] Likewise, Karakatsanis finds that public defenders have limited their clients' options in a way that wealthy clients do not face. Karakatsanis, s*upra* note 1, at 256.

[113] *See* Kruse, *supra* note 16, at 413-14.

[114] Many offices offer "defensive" holistic consultation for immigration, housing, employment, benefits, and parental rights. But some offices are also increasing their menu of "offensive" holistic counseling, such as policy work, community organizing, and impact litigation. *See Explore Holistic Defenses.*, BRONX DEFS., https://www.bronxdefenders.org/who-we-are/how-we-work/ [https://perma.cc/Y2D2-Q49Z] (last visited Dec. 7, 2024). Whether that counseling is part of the initial counseling on a criminal case is a different matter.

"repugnant or imprudent."[115] The current counseling role occurring in most practices does not engage in this analysis.[116] The issue is not that a lawyer has disregarded community organizing or social movements as imprudent, but rather that a lawyer is unaware of what exists, cabins in the universe of options 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.[117]

This limiting of choices results in less dialogue and knowledge. This "epistemic burden" raises the cost of many options that an accused individual may otherwise choose, and limits defender knowledge in the process, leading both clients and defenders to seemingly ignore or opt out of feasible choices.[118]

That's not to suggest ethical issues do not form some justified boundaries. 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."[119] But public defenders do not need to "solve" that problem. Indeed, public defenders do not need to be organizers. They should defer to those who have the skills and are in the best position to organize coalitions. But public defenders can and should be activists.[120] They should use their tools and position to highlight issues and advocate as possible, including in the counseling relationship. Public defenders can do so by elucidating oppression, learning about coalitions, and making others aware of them. Defenders should be attuned to movements focused on transforming the legal system but should not actually be 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 other people in terms of campaigns or in terms of movement building."[121]

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[115] MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 6 (AM. BAR ASS'N 2023).

[116] *See* Carle & Cummings, *supra* note 20, at 451.

[117] In my capacity as a training director, I observed that newer attorneys and clients would naturally gravitate toward conversations of why things were the way they were. That may have been a product of the moment: New York City in the 2010s in the midst of the Black Lives Matter movement.

[118] *See* Scheall & Crutchfield, *supra* note 19, at 727 ("[T]hat ignorance shapes the psychology of decision-making in the way that we posit means that epistemic considerations are logically prior to moral, prudential, and pecuniary considerations.").

[119] Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737, 761 (2009).

[120] [E]very 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 & KABA, *supra* note 25, at 13-14.

[121] *Id.* at 14 (quoting conversation with Barbara Ransby).

Many criticisms of expanding the scope of representation respond to a poorly enacted caricature of such counseling.[122] 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 with a concurrent impact litigation case, or a concurrent civil misconduct lawsuit, this counseling can be done in an artful, client-centered way.

However, the current framing of the counseling role is a fatal barrier to such collaboration because of the "individualistic ethic" of client-centered advocacy.[123] Others have left open the question of what the counseling role would look like with an expanded scope, but have suggested that attorneys should mostly be allies who get out of the way, not the impetus for such mobilizations.[124]

D. *Epistemic Deference, Epistemic Coherence, and Moral Injury*

Ignoring the contradictions of counseling in a carceral system also exacerbates public defender burnout and attrition.[125] Public defense often draws attorneys that are skeptical of the criminal legal system and view it as deeply flawed.[126] Yet the work of public defenders in counseling furthers some of the criminal legal system's worst aspects, given the role of lawyers in translating unspoken inequities and conditioning clients into accepting them.[127] 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.[128] A common way to protect themselves from the cognitive dissonance that stems from their role in perpetuating injustice is either to grow callous to the harm inflicted through the work or to justify their role despite the flaws, thereby minimizing the perceived

[122] 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 (citing Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1251-52 (1975)).

[123] *Id.* at 2023.

[124] *Id.* at 2024 (arguing that building collective power is primarily work of organizers, not public defenders).

[125] Beatrice Ferguson, *The Relentless Mental Toll of Public Defense*, SLATE (Jan. 4, 2023, 5:55 AM), https://slate.com/technology/2023/01/public-defender-mental-health-trauma.html [https://perma.cc/H7S5-37Y9].

[126] A public defender who experienced severe burnout described widespread moral injury among public defenders because their work props up the system they oppose. *Id.*

[127] For a discussion on how race and class inequities are reproduced in attorney-client relationships, resulting in "coercion, silencing, and punishment" for disadvantaged clients, see MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 7 (2020).

[128] Ferguson, *supra* note 125.

harm.[129] Otherwise, the attorney will continue to endure the moral injury and eventually find the work untenable.[130] This is the way oppression operates: actors justify the actions they take in order to reconcile the reality of injustice with their worldview.[131] 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."[132] 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 within a space of heightened tension and conflict, where its contradictions are made clearest.

This phenomenon is actually an indication of the power inherent at the counseling site. Lawyers who, despite their diverse backgrounds, are all steeped in the law, 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.[133] This contributes to a related form of dissonance, called "incoherence,"[134] whereby defenders and defender organizations are confronted with the conflict between the work they aspire to do and the work they actually do.[135] Defenders, as all lawyers, are drilled in the process of legal formalism for years. They then 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.[136] Even more strikingly, those defenders who do not share clients' lived experiences are exposed to the same history, stereotypes, and power dynamics that prop up the violence of the system in which they now work.[137] These defenders may not have previously confronted those dehumanizing biases until faced with their clients' actual humanity.[138] The counseling role may be the first place they truly grapple with how communities

[129] For more information on different responses to moral injury, burnout, and stress, see JOANNA FLECK & RACHEL FRANCIS, VICARIOUS TRAUMA IN THE LEGAL PROFESSION: A PRACTICAL GUIDE TO TRAUMA, BURNOUT AND COLLECTIVE CARE 56-65 (2021).

[130] *See* Ferguson, *supra* note 125.

[131] *See* HAYES & KABA, *supra* note 25, at 23-24.

[132] *Id.* at 24.

[133] *Id.*

[134] *See generally* Fernando Toro-Alvarez, *Coherence and Dissonance: A New Understanding in Management and Organizations*, 11 PSYCHOLOGY 748 (2020) (describing how cognitive dissonance indicates lack of coherence and motivates organizations to find means to attain coherence).

[135] *See id.* at 754 (showing conflict between values positively correlates with stress).

[136] Petrigh, *supra* note 65, at 113.

[137] GONZALEZ VAN CLEVE, *supra* note 3, at 133 (discussing how lawyers taught to oppose racism and acknowledge implicit bias end up practicing and enforcing racialized system of punishment).

[138] *See generally* López, *supra* note 47.

of color are policed, how courts treat people without material wealth or political connections, and how those communities' resistance is obstructed by legal systems. This challenges their worldview and sense of identity.

The key is to not turn away from this epistemic incoherence but confront it and find resolutions to the systemic issues underlying it. Defenders have to acknowledge what is happening in order to find ways to overcome it. Doing so, especially confronting one's own role in furthering oppression, will be challenging. But these defenders would do well to follow Mariame Kaba's advice that "[h]ope and grief can coexist . . . [l]et this radicalize you rather than lead you to despair."[139]

The racial aspects of a defender's cognitive dissonance are particularly pronounced. Nicole Gonzalez Van Cleve has pointed out that distinguishing clients on race and class lines is work that is largely accomplished by public defenders,[140] the system's "ambassadors of racialized justice"[141] who are able to pick up on markers of race and class to decide whether a client deserves attention as well as able to discount clients' lived experiences.[142] 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.[143] This can come from a good place, such as a desire to spare a client from the negative effects of insisting on due process or an acknowledgement of how other court actors would treat their clients.[144] But Gonzalez Van Cleve found defenders also had become oblivious to what they were doing. While they did not often explicitly overbear clients' will, defenders subtly devalued clients' opinions and knowledge to substitute judgment or apply pressure when client choices did not align with attorney advice.[145] Many defenders even held personal beliefs about the injustice of the system yet perpetuated those injustices, especially in regard to racial coding.[146] Gonzalez Van Cleve recognized a "disjuncture between

[139] HAYES & KABA, *supra* note 25, at xiv-xv.

[140] *See* GONZALEZ VAN CLEVE, *supra* note 3, at 174.

[141] *Id.* at 179.

[142] "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.* at 164.

[143] *Id.* at 162 ("Similar to the way prosecutors and judges use the performance of whiteness to distinguish a rare deserving white defendant, defense attorneys use a similar measure, beyond the criminal record, to decide whether to invest capital in a client.").

[144] *See id.* at 173 (describing how defense attorneys can reveal "subtext of the culture" to avoid potential judicial retribution for exercising right to jury trial).

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

[146] *Id.* at 133.

perspectives . . . and *practices*" when it came to racial injustice especially.[147] Defenders could "narrate thoughtful critiques of the law and whether it provided justice or not, but practice the law in another manner entirely."[148]

Others grappling with this phenomenon propose 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.[149] As a generality, Black public defenders harbor less anti-Black bias than non-Black colleagues and are more understanding of shared lived experiences,[150] but this does not resolve the underlying issues and may not alleviate the dissonance as it places an undue burden on Black defenders.[151] Client selection of attorneys with a similar identity also implicates a problem of a version of standpoint epistemology that Olúfémi Táíwò calls epistemic deference.[152] Standpoint epistemology values the knowledge gained from one's viewpoint, meaning people facing oppression may have access to sources of information that privileged people do not.[153] The problem comes when we attempt to solve the underlying inequalities solely by deferring to people who share some characteristics of the oppressed group, such as race, but not others, such as class, political connections, or professional status.[154]

Táíwò cautions how this deference comes at the expense of actual engagement with other oppressed classes and interrogation of the mechanisms of oppression.[155] Likewise, defenders must be open to reflecting on the benefits of attorney-client racial concordance to have broader change.[156] 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."[157] There is also an analogous issue of losing sight of the differences between Black

[147] *Id.*

[148] *Id.*

[149] Hoag, *supra* note 15, at 1533 (explaining that "[s]ameness, whether stemming from race, sexuality, or some other shared identity, can inspire connection" and same-race representation may lead to more robust case theory development).

[150] *Id.* at 1532-33.

[151] *Id.* at 1544-45 (discussing benefits and downsides of proposal to allow clients to select defenders of same race, including undue burden on Black defenders, though ultimately concluding benefits would make it worthwhile).

[152] Táíwò, *supra* note 21.

[153] *See id.* (finding that putting standpoint epistemology into practice calls for deference to marginalized people as sources of knowledge).

[154] *See id.*

[155] *Id.*

[156] I do not suggest this is a problem with Hoag-Fordjour's proposal itself. *See generally* Hoag, *supra* note 15. I am merely considering where to go next with her observations and how to build upon it productively to avoid possible pitfalls.

[157] Táíwò, *supra* note 21.

lawyers and clients and substituting judgment despite the difference in privilege between the two, an effect of the "elite capture" that Táíwò describes.[158]

This does not mean client selection on the basis of race is not worth pursuing; rather, it should be interrogated, built upon, and coupled with long-term tactics to re-envision counseling, so all defenders confront their own role in enforcing racial hierarchies and allow for engagement with how to transcend this dynamic.[159] In fact, defenders who share some experiences with clients yet are still enforcing legal episteme authority may be more effective at limiting client choices, because they have more credibility with clients.

Along with the inherent problems in limiting client choice,[160] this aspect of the counseling relationship also causes the public defender moral injury, as they find themselves unwittingly reinforcing and actually imposing racial, class, and other stratifications of the system.[161] Instead of continuing to do so, lawyers must engage with clients about the reality of what is happening and why.[162] 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.[163]

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[158] Táíwò states:

> [T]his deferential form of 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. *Id.*

[159] *See id.* (cautioning that first step is not enough without actual concrete steps toward change because "attention to spokespeople from marginalized groups could . . . direct attention away from the need to change the social system that marginalizes them").

[160] Clair, *supra* note 29, at 195 (arguing that defense attorneys who reject clients' efforts to advocate for themselves "produce higher levels of mistrust among disadvantaged defendants").

[161] *See* Akbar, *supra* note 26, at 2524 ("[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." (footnote omitted) (quoting Robert Brenner, *The Problem of Reformism*, AGAINST THE CURRENT, Apr. 1993, at 42).

[162] *See id.* at 2508 ("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." (footnote omitted)).

[163] Táíwò, *supra* note 21.

Táíwò's solution in his context is a more "constructive" view of standpoint epistemology.[164] His proposal can be analogized to critical counseling that seeks to center, and build on, the genuine knowledge that clients have from their unique vantage points. This may further real change and assist attorneys in seeing their own limitations, along with other invigorating and hopeful possibilities.[165] A public defender who discusses moral injury concluded that:

> [T]he 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.[166]

Rather than hiding from injustice or justifying the oppression that occurs, defenders have to fully accept the responsibility and obligation of their role as well as the expertise of clients. Defenders must scrutinize the hidden mechanisms that force outcomes on their clients. They must be constantly asking, as Ruth Wilson Gilmore suggests, "[w]hy is it like it is?"[167] Having this conversation in the counseling site will alleviate a major contributor to burnout: the cognitive dissonance that comes from participating in a system that one is well-situated to recognize as unjust.

II. COUNSELING *ABOUT* OPPRESSION

A. *A Glimpse of Something More*

As a public defender, I, like countless others across the country, was confronted with this conflict within the counseling relationship, and I encountered new sources of information and power.[168] Through my clients, partner community organizations, and my colleagues, 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

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[164] Táíwò states:

> 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. . . . [I]t would be a world-making project: aimed at building and rebuilding actual structures of social connection and movement . . . . *Id.*

[165] Ashar, *supra* note 40, at 896 (discussing how integrated advocacy can "lead[] lawyers out of the trap of deference or domination" and "permit[] lawyers to engage in that generative collaboration . . . to access the full range of possibility").

[166] Ferguson, *supra* note 125.

[167] HAYES & KABA, *supra* note 25, at 81 ("And the answer generally has got to be more detailed than 'racism' or 'colonialism,' although those two categories and sets of relationships matter." (quoting conversation with Ruth Wilson Gilmore).

[168] *See* Táíwò, *supra* note 21.

conversations with clients in certain common cases.[169] As routine practice, I would explain their options in the criminal case and how it would affect other forums.[170] But when a client raised it or the circumstances made it seem relevant, I would tell them that although it would not have any effect on their case or options, there was a growing push to change the practices that had led them there. 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, and the most we could do was prevent further harm. But I would add that maybe, if we set up our case properly, they could get something closer to justice elsewhere. I also began to be explicit that regardless of whatever happened in this or any court proceeding, maybe they could make the world more just, in general, through organizing with others who had similar experiences. Most importantly, I was transparent about my own limitations, and how difficult it was for a criminal case to alter the underlying issues that constrained my clients.

After my counseling, the vast majority of my clients in these situations 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 on top of what happened to them in their criminal case. Of the several clients I discussed advocacy options or broader movements with, a few went to some of CPR's organizing events. Eventually, that movement led to the Community Security Act, which greatly curtailed abusive New York Police Department ("NYPD") stop and frisk practices.[171] Separately, clients who I steered to our impact litigation unit ended up as plaintiffs in lawsuits, including one that stopped NYPD's vertical patrols and unlawful trespass arrests.[172] Another client of mine informed me of the "copwatch"[173] 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 of mine was part of the occupy protests and chose to make a statement about policing of nonviolent civil disobedience by turning

[169] *See infra* Section IV.B.

[170] *See supra* Section I.A.

[171] N.Y.C., N.Y., LOC. L. 2013/071 (2013) (mandating that members of police department are prohibited from engaging in bias-based profiling, and individuals subject to bias-based profiling may file complaint).

[172] Ligon v. City of New York, 925 F. Supp. 2d 478, 524 (S.D.N.Y. 2013) (finding testimony of named plaintiffs supported conclusion that NYPD repeatedly made trespass stops without reasonable suspicion).

[173] Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 407-13 (2016) (detailing practice of copwatching and analyzing it as form of participatory civic engagement in police accountability).

down plea offers. He taught me about plea strikes[174] when he and his co-defendants (through their lawyers) told me they wished to mobilize for one.

A client of mine, who was 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 challenging the underlying issue if she could win her trial, because she had gone to a hearing on her Civilian Complaint Review Board ("CCRB") complaint and had enlisted a plaintiff's attorney for a follow-up. We went to a non-jury trial,[175] and she was found guilty of attempted assault, which gave her a permanent criminal record.[176] Her lawsuit had to be abandoned because of her conviction. Every few years, she and I would catch up, and she would inform me of the jobs she 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 during or after the conversation with a client about taking a plea to avoid a harsher sentence after a hearing or trial. When clients were grappling with their limited options in a case, I would discuss the possible campaigns to address the unfairness of New York's firearm laws, the heightened standard for police to be found guilty of assault, or the strict definition of self-defense. This occurred when a client or family member raised the issue, I thought it was relevant, or a colleague in the policy unit had informed me of a new push to reform an issue.

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[174] Plea strikes come from the concept that if a large group of accused individuals refuse to plead guilty, then the system would be unable to accommodate their trials and face a crisis that may render prosecutions impossible. *See* Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html.

[175] At the time, prosecutors in New York City could opt for a bench trial by reducing charges to a class B misdemeanor. They did so frequently in cases involving broken windows policing or allegations of police misconduct. New York ultimately amended the law through a combined effort of impacted people, advocacy organizations, and lawyers, who worked in criminal court and experienced the disconnect between the idea of due process and its reality. *See* DANNY ALICIA, TESS M. COHEN & BRIAN ADAM JACOBS, N.Y.C. BAR ASS'N, REPORT ON LEGISLATION (May 2021), https://www.nycbar.org/wp-content/uploads/2023/05/2019511-BMisdemeanor_Jury_Trials.pdf [https://perma.cc/ZG2S-KN7P] (supporting bill A.4319/S.689, which would eliminate prohibition of right to jury trial for B misdemeanors in N.Y.C. Criminal Courts).

[176] This has since changed through the efforts of directly impacted individuals as well as defenders. *See* Nick Reisman, *NYCLU Pushes Preferred 'Clean Slate' Bill*, SPECTRUM NEWS 1 (Mar. 30, 2022, 11:38 AM), https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/03/30/nyclu-pushes-preferred--clean-slate--bill [https://perma.cc/F4GK-QKLB]. 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*, N.Y. TIMES (Nov. 16, 2023), https://www.nytimes.com/2023/11/16/nyregion/clean-slate-act-ny.html.

I learned much from my clients, including the reality of how the law worked. But I was also confronted with how my fundamental thinking, based in legal authority, was often warped. I struggled to explain to clients why they had not been assaulted when they were placed forcibly against a wall and searched invasively, without cause or justification. I had to grapple with why police could not and would not be criminally charged, beyond merely saying: "because that is the law." I was confronted with the limits of the viewpoints I had been steeped in.

Eventually, I stopped being a young public defender and became the training director for the practice. I had to articulate to new attorneys how to strike a 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 nine and six, that we can support causes on our own but cannot "sacrifice" our clients to enact broader change. Even in a holistic office, it is difficult to find the line between what to bring into a client conversation, and how and when. But as our office developed a robust interface with community organizing, impact litigation, and policy work, I was challenged anew about where I had drawn the line. These practices, and the works of scholars analyzing movements and the law,[177] challenged my perception that I had to work within the system or without it.

B. *Counseling Oppression*

Based on these experiences, and tales from colleagues across the country, I now believe that embracing the tension between the legal system as it is and the legal system as it should be can turn client counseling into a site of broader convergence of varied epistemes and tactics. This bolsters the connection that naturally develops between public defender client counseling and movements for broader change. This is what I refer to as critical counseling—counseling that is explicit about limitations, knowledge, and power. Rather than solve those issues, critical counseling entails discussing aspects of oppression with clients, and turning the counseling relationship into a nuanced discussion of how the criminal legal system operates.

Importantly, critical counseling requires a two-way exchange of information, challenging traditional hierarchies that conceive of the attorney as the sole arbiter of knowledge and advice. Defenders know the hidden places where the law works,[178] and should share that "insider information" with their clients explicitly, at all times.[179] But they can also learn a great deal through their

[177] *See generally* Akbar et al., *supra* note 38.

[178] *See* Akbar, *supra* note 26, at 2562-63.

[179] *See* Crespo, *supra* note 7, at 2024.

clients' lived experiences by broadening the scope of the relationship.[180] Critical counseling can foster the natural connections that develop between defenders and movements. A principled approach to critical counseling should inform the work that I and countless others have done and continue to do in jurisdictions across the country.

Public defenders' counsel necessarily makes them complicit in the oppression of their clients by coercive systems.[181] Defenders may limit themselves to traditional efforts to reduce harm from criminal prosecution for individual clients, even as they amass dozens or hundreds of "individual" client's situations whose situations present uncannily similar themes that point to a larger problem with the law.[182] A public defender's high caseload provides the opportunity for a broader perspective and a connection to coalitions, although the overwhelming amount of work also hinders the chance for insight or action.[183]

But if an attorney is transparent about the reality of those experiences with clients and society, turns those experiences outward, 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 continue to inform clients of decisions within a case. 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, in turn, must elicit and learn from client experiences to stay apprised of what injustices exist and what remedies are being pursued.

Public defenders must also learn from and engage with work that addresses those causal mechanisms, whether it is work being done by lawyers, organizations, or community members. This entails discussing client proposals that go outside the case, even when they address systemic issues and cannot be practically incorporated into litigation. Learning from clients' own lived experiences is essential to developing a true understanding of counsel, and exploring options that prove to be futile may still lead to lessons that can be used eventually.

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.[184] What this entails can vary

[180] *See* Clair, *supra* note 29, at 207-09 (demonstrating how defendants cultivate expertise).

[181] Akbar, *supra* note 26, at 2508-09 (remarking on how lawyers are central partners of law's domination and legitimation); *see also supra* Section I.

[182] *See* Akbar, *supra* note 26, at 2536.

[183] Johnson, *supra* note 6, at 317 (detailing how high caseloads may reinforce plea bargaining as expedient). Public defenders are both incentivized to facilitate pleas and lack the resources to push back on the pleas through sufficient investigation and advocacy.

[184] Both Kathryn Miller and Matthew Clair detail numerous ways resistance to the legal system already occurs by clients, through speech and actions. *See* Miller, *supra* note 9, at 428; Clair, *supra* note 29, at 203. Most acts of resistance by clients are met with punishment. Rather

greatly depending on the issue, the extant struggles, and of course, client desire. It is possible that many clients will not have the means, energy, or interest 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.[185] By some estimates, one in every three Americans has a criminal record of some form, faces the host of negative issues associated with it, and potentially benefits from involvement in movements to affect the criminal legal system.[186] 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 mobilization. This expansion of the counseling role also has benefits in shifting the public defender-client counseling relationship beyond the illusion of autonomy.[187]

In the counseling capacity, a lawyer must advise their client of the law as it is. But a lawyer working in such systems must also engage with clients about the legal system's failings and turn outward to 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 change, without necessarily co-opting the movement's energy.[188]

than merely advising a client, 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.

[185] There is a principle in revolutionary thought that an exploitative system "produces . . . its own grave-diggers." KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 69 (Samuel Moore & Frederick Engels trans., Pluto Press 2017) (1848). In their context, Marx and Engels wrote of how the capitalist system creates an exploited class that has the incentive and capability to overthrow that system. The criminal legal system has increased the scope of punishment so broadly, due to mass policing of communities of color, that it has created mutual interest across a huge number of individuals. The system's scope has become so enormous that, as Justice Neil Gorsuch observed, "we live in a world in which everything has been criminalized." Transcript of Oral Argument at 52, Lange v. California, 594 U.S. 295 (2021) (No. 20-18). The selective enforcement of those laws constitutes 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, at 2003.

[186] *Americans with Criminal Records*, SENT'G PROJECT 1 [hereinafter THE SENT'G PROJECT], https://www.sentencingproject.org/app/uploads/2022/08/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf [https://perma.cc/Q4SX-8YBQ] (last visited Dec. 7, 2024).

[187] *See* Miller, *supra* note 9, at 438.

[188] "[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).

C. *Toward Change*

1. Transformation within and without the system

One value of critical counseling is that it creates more opportunities for a public defender to provide quality individual representation while supporting broader efforts for transformative social change. A goal of focusing on this counseling relationship is to make attorneys conscious about the role they play and intentional in how they navigate it.[189] Lawyers working in unjust systems are often already aware of the courts' role in perpetuating cultural norms, their own biases, and the biases of other actors.[190] But that cannot be enough in the face of systemic and entrenched issues.[191] The goal of recalibrating the counseling role is to bring to the forefront the tension a lawyer has in giving realistic advice and, in doing so, perpetuating those real injustices.

It is important to develop a coherent set of principles for critical counseling; otherwise, an attorney's desire to discuss broader social issues can easily stray from the bounds of productive exchange. Without these principles, an attorney who is fighting zealously for their client in the face of systemic injustice may turn to colleagues as their safe place to vent or commiserate.[192] 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 façade 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. If the commiseration is not also productive about means to enact change, it may normalize for the lawyer the injustice that they are perpetuating.[193] Instead, the counselor must be transparent with the client about the injustice and seek to encourage ways to change the injustice.

Similarly, without principles for engaging in critical counseling, attorneys may project concerns and anxieties about systemic injustice onto their clients without further discussing the paths their clients or others may take. In this way, attorneys can misuse this faux-critical counseling to list complexities and then absolve themselves of the responsibility to help, hold, and navigate that complexity, putting it all on the client. Gonzalez Van Cleve wrote about public defenders who failed to mediate properly, imposed checks of their own on "undeserving" clients, and "passed . . . fear [of repercussions for due process] on to their clients rather than resisting on their behalf."[194] Those attorneys became "ambassadors of racialized justice" even if they did not acknowledge or understand the role.[195]

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[189] *See* Smith Futrell, *supra* note 13, at 183-86.

[190] *Id.* at 183.

[191] *See* Miller, *supra* note 9, at 407.

[192] GONZALEZ VAN CLEVE, *supra* note 3, at 157-58.

[193] *See id.* at 169.

[194] *Id.* at 173.

[195] *Id.* at 162, 179.

In a critical counseling model, attorneys have an obligation to not only check their personal biases but also to shed light on the system and give clients options for navigating and resisting that system. 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.[196] This reframing does not substitute for the work of movements but may prevent the siloed nature of counseling from continuing to be a roadblock to such movements.

Critical counseling furthers the goals of broader transformational change by accomplishing an initial step of any abolitionist[197] project: demystifying the law to explain what the legal system actually does.[198] 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.[199] It can allow the client to see the reality of their situation as required for informed decision-making and to see how that reality can potentially be changed.[200] It also leads attorneys to see their clients' lived realities and how they are shaped by the law.

These revelations can help lead people to the next steps of disempowering and dismantling those systems.[201] However, that systemic work can be

[196] "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." *Policy and Community Organizer*, BRONX DEFS., https://www.bronxdefenders.org/who-we-are/how-we-work/policy-and-community-organizer/ [https://perma.cc/85W4-8997] (last visited Dec. 7, 2024).

[197] 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 E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6-8 (2019).

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

[199] *See supra* Section II.C; *see also* Vincent M. Southerland, *Public Defense and an Abolitionist Ethic*, 99 N.Y.U. L. REV. 1635, 1674-1701 (2024) (advocating for public defense to shift its paradigm to account for systemic change through integration with movements, a racial justice framework, and a holistic, client-centered mindset).

[200] 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 49 (Myra Bergman Ramos trans., Bloomsbury, 30th Anniversary ed. 2014) (1968).

[201] For discussion on disempowering and dismantling, see Roediger, *supra* note 198, at 215-17.

completed by individuals better trained to do so than a lawyer on a case. Instead, lawyers need to stop standing in the way and imposing divisions that prevent clients from recognizing systemic issues in their personal case.

This counseling role can involve supporting direct advocacy by a client, collaborating with external community groups or other units within the office, and engaging in a lawyer's own external advocacy. Lawyers' external advocacy 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.[202]

The shifting of power allows for changes that are not dependent on the lawyer's views.[203] Ultimately, all this consideration does is help address *Gideon v. Wainwright*'s[204] legitimization of a system that does not deserve it.[205] 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 to reduce this country's overreliance on criminalization and incarceration is simply a myth."[206] Yet it can bridge the gap between a radically different world and the current one by helping to reimagine the spirit of the law.[207] Rethinking counseling in this way can shape the interpretive commitments that decide the narrative of the law.[208] As a non-reformist reform, critical counseling aims to heighten the conflicts present in the system.[209] More critical 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."[210]

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[202] *See* Smith Futrell, s*upra* note 13, at 185 (describing defenders' personal motivations, such as heroism and pride).

[203] For an in-depth analysis of how to shift from lawyer-led change to community-based change, see Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 214-28 (2022).

[204] 372 U.S. 335 (1963).

[205] Butler, *supra* note 12, at 2178 (arguing that *Gideon* "stands in the way of the political mobilization that will be required to transform criminal justice").

[206] Smith Futrell, *supra* note 13, at 176-77.

[207] Akbar et al., *supra* note 38, at 845-46.

[208] *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 7 (1983).

[209] *See* Akbar, *supra* note 26, at 2565 (citing ANDREA J. RITCHIE & MARIAME KABA, ABOLITION AND THE STATE: A DISCUSSION TOOL 23 (2022), https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/63743b68cd71d319d5229a6f/1668561795501/Abolition+and+the+State.pdf [https://perma.cc/5MVX-MSEX]) ("While reformism aims to depoliticize, non-reformist reforms aim[] to turbocharge engagement with race, class, and gender struggles.").

[210] *Id.* at 2528 (citing ROSA LUXEMBURG, REFORM OR REVOLUTION AND OTHER WRITINGS 3 (Dover Publications 2006) (1899)).

The conversation on the limits of client counseling has already started in the context of plea strikes.[211] 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 and "crash the system"?[212] Would that do a disservice to the individual client they represent who would likely suffer an outsized negative outcome?[213]

The conclusion many reach in that conversation is the same as that 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.[214] The attorney must continue to both navigate a client through the options available to them in their pending case and mediate with the systems themselves. This could include, but also go beyond, collectivist action, like plea strikes.[215] 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 critical counseling helps address ethical issues with representation and collectivist action. Other scholars have recognized the difficulty of being an ethical public defender given the conflicting duties of candor to the tribunal, confidentiality, and zealousness.[216] 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.[217] In these contexts, a defender must be honest about their limitations: they inherently may not have the resources or scope to accomplish real change and may even have duties that conflict with the clients' best interests.[218] I embrace this and propose expanding this honest conversation to include the limitations of attorneys in general, allow client expertise into the counseling relationship, acknowledge limitations in a criminal case forum itself, and highlight the possibility to look beyond that forum for opportunities.

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[211] This is discussed in greater depth in Section III.C *infra*.

[212] *See* Alexander, *supra* note 174.

[213] *See* Crespo, *supra* note 7, at 2023.

[214] As Michelle Alexander's *New York 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 doing so is an option. Alexander, *supra* note 174.

[215] 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).

[216] Goldsmith, *supra* note 59, at 17-18.

[217] *See* Crespo, *supra* note 7, at 2024 ("Most of all, these news [sic] public defenders would need to counsel those clients thoughtfully, honestly, and ably, not just about the risks of such solidarity, but about its potentially dramatic decarceral power, too.").

[218] *See id.* at 2023.

A key part 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."[219] That is precisely what critical counseling is. It is hardly a complete solution to the thorny ethical issues, 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 and participatory defense

Critical counseling works alongside holistic defense and helps further its goals. Just as with client-centered counseling, holistic defense does not inherently encompass or require critical counseling. While some holistic defense offices embrace critical counseling to varying extents, not all do. 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.[220] Likewise, an office staffed with a full holistic team that incorporates other forums and community and policy work on broader systemic issues may still cabin off these units from each other. And even integrated holistic offices may not see the counseling space as one where attorneys should listen to ideas from clients and community members, then put those ideas into practice through the direct case, extralegal organizing, or both.

Enacting critical 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 can provide lawyers with opportunities to discuss systemic issues with clients and learn and share information about possible advocacy efforts, community groups, or policy issues.[221]

Likewise, critical counseling is not an explicit participatory defense tactic, but hopefully complements the ethics and principles underlying participatory defense.[222] Since participatory defense requires true, organic, and non-lawyer

[219] *Id.* at 2024.

[220] Johnson, *supra* note 61, at 941-42 (discussing relatively low number of fully holistic defense offices nationwide and advocating for expansion to improve plea bargaining options and outcomes).

[221] 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 PRO. CONDUCT r. 2.1 cmt. 4 (AM. BAR ASS'N 2023).

[222] Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 716 (2018) (defining participatory defense as movement seeking to highlight defendant and empower community).

led community collective action, it cannot be created by public defender offices[223] and remains a small subset of defense.[224] However, offices can help further participatory defense by welcoming collaboration. Critical counseling can facilitate such collaborations, help fill the gap, and encourage the creation of participatory defense resources.

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 participatory defense.[225] 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.

Critical counseling opens up avenues for forms of participatory defense, and offense, by allowing impacted clients to strategize with their attorney about their direct case and consider whether they want to engage in other advocacy forums. Channeling client voices to community organizing, policy work, and class action impact litigation can allow those clients to directly lead real change for the system without jeopardizing the outcome in their individual criminal case.

Critical counseling is not always true participatory defense, which seeks to allow clients and their communities to steer their case and have all impacted voices heard.[226] Critical counseling may result in clients making the same choice they would have made under a traditional counseling model (such as pleading) or may lead to broader solutions that are still court- and attorney-centered, such as the amicus case study in Section IV.A. However, critical counseling is still aligned with the objectives of supporting client and community voices. Rather than silencing a client entirely in the legal sphere[227] through a decision not to testify in a case, or a decision to accept a plea, critical counseling can allow a client to accomplish some form of justice or have their voice or actions channeled into other forums through social movements, organizing, and policy work.

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[223] Moore et al., *supra* note 8, at 1283.

[224] *National Participatory Defense Network*, PARTICIPATORY DEF., https://www.participatorydefense.org/hubs [https://perma.cc/779V-8W4L] (last visited Dec. 7, 2024) (mapping participatory defense hubs concentrated largely in Northeast and Southwest regions of United States).

[225] Godsoe, *supra* note 222, at 731.

[226] A growing consensus is that abolition and many reforms to the legal system cannot be attorney driven. *See* Moore et al., *supra* note 8, at 1283; Crespo, *supra* note 7, at 2024 ("[W]hile the obstacles to [defendant collective action] are undeniably real, they could also be surmountable, especially if organizers and defense attorneys learn to operate in tandem . . . with organizers in the lead.").

[227] Natapoff, *supra* note 31, at 1487; *see also* M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 496-97 (2021) (discussing how clients are harmed when they attempt to have a voice in criminal court despite the value of information they provide).

Likewise, this suggestion fits with bringing communities into individual cases. Simonson focused on a related dynamic: with the diminishment of jury trials, the public is given more means to weigh in on systemic issues than on individual cases.[228] Participatory defense is one way to bring communities in to make real change on individual cases.[229] Lawyers should be required to engage with such avenues if they are to advocate effectively for their clients.

Critical 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 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 collaboration requirement may diminish attorney power. As others have noted, this aspect results in the most hostility from the legal systems and defenders themselves.[230] Pro se clients are often punished not only by judges, but also by the defense attorneys who feel slighted at the diminishment of their expertise, and in the case of some assigned counsel, actual economic loss.[231] Likewise, in many instances when an accused individual seeks assistance from the court for perceived failings by their lawyer, they are often met with hostility for breaching decorum and breaking the expectation of client silence.[232]

The solution is to normalize resistance and include it 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. Oftentimes distrust between clients and lawyers

[228] Simonson, *supra* note 14, at 287 (proposing "collective interventions" on behalf of defendants in criminal proceedings which allow public to "connect the fates of those defendants to the well-being of entire neighborhoods and communities").

[229] *See id.* at 292-93 (arguing for larger community intervention for defendants because public defenders are limited in their ability to act as community representatives because of their obligations to client).

[230] *See* Clair, *supra* note 29, at 208-09 (discussing how lawyers commonly "silence or coerce defendants" who resist their authority and judges penalize defendants for not listening to their lawyers).

[231] GONZALEZ VAN CLEVE, *supra* note 3, at 177-79 (asserting that defenders reprimanded or bullied pro se defendants in court because "rejecting representation is a challenge to their professional authority and skills" in political context where defenders already feel marginalized).

[232] Miller, *supra* note 9, at 433-34.

comes from the friction between a client's frustration with a reality their lawyer glosses over.

Finally, expanding the role blends 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.[233] Underpinning all this is a belief in democracy—true 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 toward practices and ideologies of institutions in power, but do so through engagement with those institutions."[234] This expanded counseling relationship can further that transformation. The counseling itself would become a prefiguration of the open dialogue and tension, the elucidation of the actual issues at work. It would also lead to connections outside the closed and fragmented counseling relationship by clarifying underlying issues and 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.

III. OBJECTIONS

There are potential obstacles to an expanded counseling role, but these challenges can be overcome. At worst, these limitations may involve simple conversation changes 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, and improving bail or discovery laws.

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 fundamentally about how counseling fits into the system and society at large.[235]

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[233] JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION, at X (2023).

[234] *Id.* at 12.

[235] Charles J. Ogletree and Randy Hertz discussed the defense role's broader impact on the legal system, outside of just criminal cases directly. Charles J. Ogletree & Randy Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 23, 28-29 (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* 44-45 (N.Y. Univ. Sch. of L. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 10-65, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737841 [https://perma.cc/RH83-EDRA]. The tactic this paper examines is quite different from both proposals, yet in many

The conversation about client choices must be broader, explicitly discuss limitations, and consider possible workarounds.

A. *Ethical Considerations*

Two expected criticisms are that expanding the counseling role will clash with ethical rules that require a lawyer to prioritize only a client's best interests, and that expansion may conflict 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 interests only, with limited consideration of broader goals.[236] But this can remain the case.[237] A lawyer who weaves in and reinforces practices that coerce clients has already, to some extent, muddied the pure platonic ideal of counsel.[238] 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."[239] Impact litigation units manage issues of structure and conflicts of interest between individual clients as well as

ways is a continuation of suggestions to harness public defense's assets to counterbalance the system's failings.

[236] Carle and Cummings discussed this issue with other aspects of movement lawyering. Carle & Cummings, *supra* note 20, at 465 ("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 . . . ." (footnote omitted)).

[237] Carle and Cummings propose using the Model Rules as a starting point for deeper analysis of movement lawyering's ethical issues. *Id.* at 473. This analysis may be necessary for the larger goals of movement lawyering for abolition. Still, this Article'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 allowing client's consideration of movement goals in the forum of their own case.

[238] I return 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, because the client bears the cost and must be so informed. But if the lawyer does nothing to go beyond that, for instance by telling the client what mechanisms cause the penalty and how to challenge them, then the counseling role itself has 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. The lawyer must then discuss methods to affect those underlying issues, like sentencing reform proposals, media attacks on judicial decision-making, and community organizing against prosecution overcharging.

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

between defense offices and the city or state.[240] 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.[241] 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 are the broader organizational or political conflicts that can arise. Even conflicts related to court or office culture can lead to negative results for attorneys or their clients when they engage in more critical counseling. This 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. Potential for broader conflicts does not alter the truth that the counseling role must include discussions of such issues and that the discussions themselves are private and safe from reprisal. Even more fundamentally, sometimes public defenders are government employees and are constrained by the scheme of their employment from pursuing certain tactics.[242] Far from being an obstacle, the obligation to expand the scope of counsel will hopefully shed light on these restrictions to allow an interrogation of their origins and purposes and whether they serve client interests.[243] That the issue is so fundamental as to challenge the public defense structure itself (and possibly turn clients against it) is a benefit of this approach.[244] If the current conceptions of representation cannot survive a critical focus then there is a fundamental problem with their formulation.

Expanding the counseling role to include matters external to the case also implicates an attorney's duty of confidentiality. This duty is clearly implicated in mass media strategies, but it is also relevant to the mere sharing of a client

[240] For an examination of the ethical issues with impact litigation at a direct services organization, particularly a public defender organization, see Ogletree & Hertz, *supra* note 235, at 28-29.

[241] For example, New York public defenders sued New York City, New York State, and the New York State Office of Court Administration to challenge court staffing and delay. *See* Joel Rose, *Public Defenders in the Bronx, N.Y., File Lawsuit over Court Delays*, NPR (May 10, 2016, 4:25 PM), https://www.npr.org/2016/05/10/477529311/public-defenders-in-the-bronx-n-y-file-lawsuit-over-court-delays [https://perma.cc/BL3L-HS9Z].

[242] *See* Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 118 (2020) (noting how assignment of public defenders to particular government branch "has important implications for the public defender's efficacy and the tools that are available to ensure the institution's compliance with constitutional and ethical rules").

[243] *See id.* at 153, 156-57.

[244] "The non-reformist reform must not simply be antagonistic; it must build popular organized power." Akbar, *supra* note 26, at 2571.

anecdote in a policy proposal or community organizing project.[245] It may be unfair for a lawyer to even ask a client to waive confidentiality in a situation where the client has little to gain directly and the lawyer may have an ulterior motive or stands to personally benefit.[246] But as with the conflict of interest issue noted above, this concern can be managed and accounted for during counseling.

Just as with every action taken by a defender, the manner of counseling implicates informed consent,[247] 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."[248] The general scheme for how to engage in such an analysis does not need to be disturbed.[249] Essentially, an attorney is only free to pursue tactics when they have provided a client sufficient information to understand those tactics' risks and benefits.[250] This requirement again supports expanded counseling since a defender should be fully sharing options with a client for them to reject or approve.

Critical counseling's effect on client counseling does not implicate these ethical rules. Sharing information learned in the course of representation is a different matter and is rightfully regulated.[251] 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.[252] This is a precarious situation since attorneys may gain prestige or professional opportunities from sharing client stories, which may taint their analysis of waiving confidentiality.[253] This risk does not make balancing impossible; it only means public defenders must be cognizant of why and how they are sharing a story, how the client will benefit, and what other avenues exist to protect client

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[245] Nicole Smith Futrell, *Please Tweet Responsibly: The Social and Professional Ethics of Public Defenders Using Client Information in Social Media Advocacy*, 2019 CHAMPION 12, 13-14.

[246] *Id.* at 13 (noting potential conflict of interest because defenders gain recognition and professional opportunities due to social media presence).

[247] MODEL RULES OF PRO. CONDUCT r. 1.0 cmt. 6 (AM. BAR ASS'N 2023).

[248] *Id.* r. 1.0(e).

[249] A discussion of the factors relevant in determining whether the information and explanation provided to obtain informed consent occurs in the comments regarding the definition of terms. *Id.* r. 1.0 cmt. 6.

[250] *Id.*

[251] *See id.* r. 1.6.

[252] Russell M. Gold & Kay L. Levine, *The Public Voice of the Defender*, 75 ALA. L. REV. 157, 161-62 (2023).

[253] 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, *supra* note 245, at 16 (footnote omitted).

confidentiality and still achieve a similar outcome.[254] The same bias may affect attorneys who wish to take a case to trial for prestige or conversely fear a difficult trial and the effect on their professional identity.

This frame of analysis also applies to sharing client stories for legal or political purposes, such as in amicus briefs, impact litigation, or policy proposals. Balancing ethical obligations is already possible when a client is facing cases in different forums with different risks and benefits. For instance, a client may be facing a criminal case, pursuing a wrongful arrest claim for that same case, and participating as a class member in an impact litigation case stemming from the arrest, which could even involve a media or policy component.[255] 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 other forums.

B. *Structural Limitations*

Another criticism is that critical counseling places an undue burden on overworked public defenders and on clients themselves to do work that may be superfluous to the already overwhelming direct representation.[256]

This is a common response whenever the counseling role is 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 trained offices across the country to adopt an interdisciplinary approach to improve their clients' outcomes in criminal cases and other venues.

When holistic defense began, even modest suggestions of asking about immigration status were met with such criticism by public defenders who were incredulous that they should have to discuss immigration consequences as part of counseling on a criminal case.[257] Eventually in *Padilla v. Kentucky*,[258] the Supreme Court concluded that holistic defense is a legally required consideration for the very low floor of effective assistance of counsel.[259] Now this holistic counseling is viewed as essential instead of superfluous; in fact,

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[254] Smith Futrell suggests attorneys in such situations should 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." *Id.* (footnote omitted).

[255] *See* Rajagopal, *supra* note 28, at 878.

[256] *See* Smyth, *supra* note 50, at 145.

[257] McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 815 (2011) (detailing resistance by defense attorneys to expanding scope of criminal case representation to include immigration consequences).

[258] 559 U.S. 356 (2010).

[259] *Id.* at 374 (holding counsel must inform client of potential for deportation).

offices around the country have been expanding what such counseling encompasses.[260]

But the criticism is still a valid one, as the panoply of holistic defense extends ever outward and risks consuming time and resources. Further, critical counseling is a more fundamental recalibration than some holistic integrations, which may 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,[261] critical counseling may require more work by the counseling lawyer to stay apprised of a shifting list of outside organizers or policy projects and 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.[262] Preventing an exploration of this role is self-fulfilling, as public defender funding and resourcing is based on what effective representation is deemed to require.[263] 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.[264] The solution is not to protect public defenders and clients from further burden, but quite the opposite: to expand what is minimally necessary for representation and the parameters of the counselor's role. At a minimum, this expansion has real, harm-reductive benefits to clients,[265] but ideally this reframing has the potential to address the fundamental systemic issues that result in inequality.

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[260] *See, e.g.*, NEIGHBORHOOD DEF. SERV., https://neighborhooddefender.org/ [https://perma.cc/MS7R-AHKW] (last visited Dec. 7, 2024).

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

[262] *See* Smyth, *supra* note 50, at 142 (arguing lessons of *Padilla v. Kentucky* can drive better defense practices).

[263] *See, e.g.*, *Padilla*, 559 U.S. at 374.

[264] *See* Miller, *supra* note 9, at 393, 404 (describing how principles underlying client-centered model give illusion of client autonomy without providing meaningful choice in reality).

[265] 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 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 et al., *supra* note 261, at 870.

This critical counseling role is a means of harnessing the experience of public defenders and of their clients to improve outcomes.[266] Just like the configurations of holistic defense and client-centered representations that came before, it recognizes 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 that defenders should also consider civil consequences that may affect their clients, such as housing court matters and immigration consequences.[267] More recently, it means impact litigation, policy forums, and community organizing.[268] This field of view must continue to expand beyond legal forums, not just in terms of what is available at an office, but also what is part of the core counseling for a criminal case.[269] Counseling must bring in challenges to criminal courts that address the racial inequalities that underlie almost every issue in the criminal legal system.[270] In this vein, counseling of this nature would bolster challenges to societal racial inequality by exposing the vast number of individuals subject to this inequity in criminal court.

The spotlight on the broad reach litigation and advocacy have on outcomes outside the instant case is not to discount the importance of defenders affecting individual case outcomes. A lawyer can win a trial or negotiate a plea that spares their client a host of awful consequences.[271] Nor am I discounting the value in being present for clients in traumatic and awful situations, of lawyer as *accompagnateur*.[272] The value of all client-centered counseling in helping a client navigate a dehumanizing system is important. But there must be more.

These traditional aspects of counseling can and should continue to exist. The benefit of expanding the counseling role is that doing so can lead to progress without abandoning the existing counseling role.[273] The goal is not a top-down imposition of a lawyer's beliefs on their client, but rather meeting clients where

[266] Emily Galvin-Almanza, *Well-Equipped Public Defenders Can Help Reduce Recidivism*, LAW360 (June 2, 2023, 3:22 PM), https://www.law360.com/articles/1604517.

[267] Rajagopal, *supra* note 28, at 877-79 (discussing importance of addressing forces that drive people into court to begin with and contending with multiple oppressive systems that affect defendants beyond legal system, including poverty, immigration, and education).

[268] *See id.*

[269] *See* Akbar, *supra* note 26, at 2524.

[270] *See* Sterling, *supra* note 7, at 2251.

[271] Johnson, *supra* note 61, at 903.

[272] Margaret Reuter, Stephen A. Rosenbaum & Danielle Pelfrey Duryea, *Attorney as* Accompagnateur*: Resilient Lawyering When Victory Is Uncertain or Nearly Impossible*, 59 WASH. U. J.L. & POL'Y 107, 115 (2019) (describing lawyer's role of *accompagnateur* as one recognizing professional value of accompanying client and sharing journey of uncertainty with them while providing "perspective, strength, and comfort").

[273] Indeed, the skills that assist in expansive counseling are legal counsel skills. At their core, one must work to "cultivat[e] 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.

they are more fully.[274] That client counseling occurs in private makes it difficult for this approach to reshape attorney culture. But it is possible for change to continue and spread 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 if they begin to open up the conversations. Indeed, I believe these conversations already occur informally; defenders learn a bit in these discussions, become incentivized to learn more as they increase their consciousness about larger struggles, and then become radicalized.[275] Traditional counsel draws them back from this and tells them to stop, when the better course is to lean in further.

C. *The "Law Firm Model"*

To discuss one facet of the objection that it is inappropriate for public defenders to engage in critical counseling, I want to examine 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 clients.[276] This is, in many ways, an illusory goal given the nature of the criminal legal system and how power operates in our society.[277] But it may be useful to the extent it reveals the aims of counsel and its already acceptable boundaries. An examination reveals that coordinating with advocates 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 the legal case itself. A legal strategy for a well-resourced client will include media tactics, political tools, and whatever other resources a client is able to procure.[278] A lawyer representing a

[274] 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.*

[275] "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 25, at 21.

[276] *See, e.g.*, Todd Edelman, *Public Defender Testimonials*, GIDEON'S PROMISE, https://www.gideonspromise.org/honorable-judge-todd-edelman (last visited Dec. 7, 2024). Judge Todd Edelman noted a goal of his as a judge was 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." *Id.*

[277] *See* Miller, *supra* note 9, at 383.

[278] *See, e.g.*, 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 (reporting two high-powered law firms spent more than $1 million in public relations tactics as part of their legal strategy).

well-resourced 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.[279] This is exactly the expanded counseling role that must be brought to indigent defense.

The substance of that counseling will look very different. Even well-resourced public defense offices still represent 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, in comparison to these big law firms, they make up for in the possibility for mass engagement.[280] Collective action can lead (and has led) to plea strikes,[281] bail nullification,[282] or mutual aid[283] campaigns to be successful. These are community-led actions and must remain so, but a defense attorney should 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 relations strategy.

Although individuals accused of crimes are a frequently disenfranchised group, if organized, they can still constitute a significant voting bloc.[284] Mass movements by community members of overpoliced and prosecuted communities have already successfully changed laws in the criminal system and pushed for changes to policing and prosecution.[285] Leaving that conversation separate from direct representation does clients a disservice. A company obtaining counsel on a discrete issue may be advised what legislation to consider supporting or opposing, even if it would not affect their instant matter.[286] Indeed, when systems work against the powerful, the goal is often to dismantle those systems.[287] Oftentimes, a company facing SEC violations or being regulated by

[279] *See, e.g.*, Michael Dore & Rosemary Ramsay, *Dealing with Public Relations Concerns in Products Liability and Toxic Tort Litigation*, N.J. LAW., Feb. 2002, at 52, 52.

[280] *See* THE SENT'G PROJECT, *supra* note 186, at 1.

[281] Crespo, *supra* note 7, at 2003.

[282] Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 588 (2017).

[283] *See* Simonson, *supra* note 173, at 396 (discussing how community copwatching can help hold police accountable to populations they police).

[284] *See* THE SENT'G PROJECT, *supra* note 186, at 1.

[285] Many recent reforms to the criminal system, from New York to Ohio, have originated from mass movements and community organizers' efforts. *See* Alicia Maule & Yili Liu, *Remembering Kalief Browder a Year After His Suicide and Why Rikers Island Should Be Shut Down*, INNOCENCE PROJECT (July 1, 2016), https://innocenceproject.org/news/remembering-kalief-browder-year-suicide-rikers-island-shutdown/ [https://perma.cc/WG67-BGSW]. The criminal legal reforms enacted in New York in 2020 were initially named Kalief's Law. *See* S.B. S1738, 2019-2020 Reg. Sess. (N.Y. 2019).

[286] *See, e.g.*, Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487, 487-88 (2009).

[287] *See* Senator Elizabeth Warren, Remarks at Coalition for Sensible Safeguards Symposium 2-3 (June 5, 2018), https://www.warren.senate.gov/imo/media/doc/2018-6-5%20Warren%20Regulations%20Speech.pdf [https://perma.cc/V5GB-RGUY].

the FTC not only seeks to get the best outcome in their case, they also organize to deregulate their industry and disempower the government actors investigating or prosecuting them.[288] They do so through a variety of means, including forming trade associations where attorneys at competing organizations may find common ground against their own regulators.[289] If defenders believe they are working to give clients law firm caliber representation, then they must work to affect systems. If nothing else, this analogy reveals the supposed tension between cause lawyering and individual representation is really a tension of counseling in a repressive, carceral system. Where collectivist legal action is already a legitimate tool for the powerful, it can hardly be considered a violation of a lawyer's ethical duties to suggest the same should exist for the oppressed.

D. *No Singular, Monolithic "Client"*

A further complication may be that clients may never expect to be involved in a criminal matter again,[290] and clients' views on the criminal system may vary by issue, as values are certainly not monolithic across individuals. Yet counsel can still discuss how to influence legal systems based on their client's own personal experiences, either for the client's larger goals, or if the client or their loved ones are ever accused again.[291] If not, by fragmenting the larger struggle into individual case advice, lawyers prevent the mobilization of clients into larger and more powerful groups.[292]

This counseling model finds a parallel in victims' rights mobilization.[293] Individual victims may have widely different views on issues but 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, they may opt to do so anyway because of their experiences. Advocacy

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[288] *Id.* at 5-6 (arguing that corporations drove deregulation measures of Trump administration).

[289] *See Second Opinion Report Finds That Trade Associations Are Active in Deregulation*, POWER ONLINE, https://www.poweronline.com/doc/second-opinion-report-finds-that-trade-associ-0001 [https://perma.cc/CTE2-2WMX] (last visited Dec. 7, 2024) (finding trade associations rank deregulation as one of their top priorities, and sponsor research and legislative lobbying).

[290] "What should be clear is that the criminal legal system is not a place where most individuals opt in through their own deviant choices." Miller, *supra* note 9, at 401.

[291] 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 (FamHIS)*, 5 SOCIUS 5 (Mar. 4, 2019), https://journals.sagepub.com/doi/pdf/10.1177/2378023119829332.

[292] *See* Butler, *supra* note 12, at 2179, 2185-86 (arguing focus on individual cases and merits of individual counsel obscures reality that system at large is main culprit for subordination inherent in U.S. criminal justice system).

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

groups oftentimes provide advice and counsel on individual cases, but they also create connections and make clients aware of areas to influence larger goals.[294] Although not every criminal case involves a victim, and not every victim shares preferences with other victims, the victims' rights movement is a large and powerful force in criminal law.[295] 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.[296] But counseling should not immediately discount larger issues that influenced those cases, whatever participation may look like afterward.

A countervailing organized bloc in the criminal forum already exists in the form of police and corrections union mobilization on political issues.[297] Legal reforms organized by mass movements have been met by well organized opposition by police unions, prosecutors, and other political actors.[298] This political opposition has incentivized judicial obstruction of democratically enacted reforms, with judges both openly or surreptitiously using their other powers to bypass reforms for discovery and bail.[299] 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.[300] A counseling role built on critical counseling 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.[301]

The fact that there is a pluralistic, shifting view of groups and interests is not fatal to critical 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.[302]

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[294] *See id.* at 758.

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

[296] *See* Akbar, *supra* note 26, at 2531 (discussing advantages of reform where diverse coalitions that do not necessarily share all goals work together).

[297] LAURA BENNETT & JAMIL HAMILTON, FREEDOM, THEN THE PRESS: NEW YORK MEDIA AND BAIL REFORM 4 (2021), www.fwd.us/wp-content/uploads/2021/06/Bail_Reform_Report_052421-1.pdf [https://perma.cc/VU2M-PAMF] (providing example of law enforcement uniting to oppose bail law reforms, despite concessions granted to them in legislative process).

[298] *See id.*

[299] Petrigh, *supra* note 65, at 133, 147 (examining instances of judicial opposition, such as setting excessive monetary bail and resisting discovery reforms, like imposing discovery sanctions).

[300] *Id.* at 167, 173.

[301] *See id.* at 174.

[302] "That the debate should sharpen collective strategy and tactics—collective power and consciousness even—is constitutive to the concept of non-reformist reform itself." Akbar, *supra* note 26, at 2536.

Being capacious still allows for parameters that determine the edges of critical counseling. 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, and the like. First, defenders already have to navigate such dynamics within the counseling relationship as it pertains to advising on the direct case itself. But more importantly, those uncommon positions fall outside of this critical counseling model because there is no systemic oppression for the attorney to consider and elucidate.

Iris Marion Young's conception of oppression provides clarity as to when a defender engages in reinforcing systems of oppression and has to explore that tension. More realistically than a fringe white supremacist, the real challenge will be in detangling the overlapping and messy manners of oppression, and how some may benefit or desire interventions that conflict with other potential coalition members.[303] This tension is part of the process, not counterproductive to it, if one seeks to build expansive coalitions even when they are not united in every view. As Amna 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."[304]

These hypothetical challenges are manageable considerations, and the dialogue may point to avenues that involve social and political factors, and even morality, as the ethical rules explicitly envision,[305] rather than attorney action in the case. If no feasible version of systemic 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 no tension to be explored in counseling oppression. Even in these cases, critical counseling can be a way to broaden clients' commitments and alter power dynamics outside the counseling space. Again, that is because the broader benefit is 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."[306]

Given the nature of policing and prosecution, there is clear synergy between the legal system's oppression and certain larger movements, such as the Black

[303] *See* YOUNG, *supra* note 4, at 47-48.

[304] Akbar, *supra* note 26, at 2531.

[305] "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 PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023). The scope of representation "may exclude actions that . . . the lawyer regards as repugnant or imprudent." *Id.* r. 1.2 cmt. 6.

[306] Akbar, *supra* note 26, at 2564.

Lives Matter movement and the New York Immigration Coalition.[307] But there is no list, however expansive, that can account for all areas or issues for counseling. Instead, 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.[308]

IV. CASE STUDIES

The following two case studies are meant to concretely show the critical counseling model that I describe in Section II.B. These case studies are informed by my experiences as a public defender. There are other examples from the point of view of impacted people and organizers outside the legal realm entirely, but others are better situated to discuss those. My examples cover the spectrum of a legal case, from a conversation at the very inception of a case, to engagement around case outcomes, to intervention in the highest-level appeal possible in our system. The examples also 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, perspectives, and voices in order to merge the best of both positions.

A. *Gun Violence Interruption*

Critical counseling is not limited to issues arising from lopsided misdemeanor enforcement as found in the anecdotes of Section II.A, but also applies in cases of violence. Communities impacted by the dual scourge of over-policing and spiraling gun violence began to look for solutions to address the root causes of violence, instead of the reactive and punitive approach of police and the courts.[309] Community groups recognized that many shootings were retaliation for a prior shooting and were rooted in a need for safety through community, perhaps counterintuitive to dominant policing narratives.[310] They developed strategies for trained mediators to intervene directly in tense situations where violence was likely to occur.

These community organizations relied heavily on gun violence interrupters, individuals who were credible messengers for their community because they were "former high-level or popular gang members" with lived experience in the criminal legal system.[311] They could relate to and understand the impetus of the

[307] "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 2264 (quoting Rapping, *supra* note 58, at 1019).

[308] *See* Butler, *supra* note 12, at 2201-04.

[309] Christopher Lau, *Interrupting Gun Violence*, 104 B.U. L. REV. 769, 796-801 (2024).

[310] *Id.* at 772, 775-76.

[311] *Id.* at 798 (quoting Jeffrey A. Butts, Caterina Gouvis Roman, Lindsay Bostwick & Jeremy R. Porter, *Cure Violence: A Public Health Model to Reduce Gun Violence*, 36 ANN. REV. PUB. HEALTH 39, 41 (2015)).

violence but also were believable when they relayed the drastic negative consequences that could result.

As a public defender, I became aware of violence interruption because my clients desired for me to help warn others about their dire situation. The unfortunate requirement for a successful credible messenger is that something needed to disrupt their lives significantly, and often that was serious violence against them or a loved one and/or a serious allegation against them that resulted in lengthy prison exposure.

Many of my clients who were most invested in violence interruption could not benefit their cases with their involvement. Charged with murder or other serious offenses, they were foreclosed from programming, were often incarcerated pretrial, and received lengthy prison sentences. Because the actual work of violence interruption requires training in mediation and direct intervention at moments of tension to defuse the situation,[312] people cannot fully engage in this work while incarcerated, even if there is still tremendous benefit to sharing stories and experiences.

Individuals with less serious cases who can more easily take part in violence interruption often have less reason for exposing themselves to that risk. The work may involve proximity to violence or taking possession of a gun for disposal. This is one aspect of the tension of counseling in a carceral system. As Christopher Lau explains, violence interruption does not fit well into the criminal legal system as it exposes vulnerable former system-involved individuals to potential criminal liability.[313] In traditional counseling, an attorney may not want to open up that discussion just to ultimately dissuade a client from the potential risk or talk down a client who got their hopes up for a program resolution for a violent charge. Attorneys would want to push back on a client's explanations for violence and make sure a client understood those explanations were not defenses, lest a client make a drastic, misinformed decision to go to trial on a serious charge with an improper defense. There is certainly merit to these goals of "managing client expectations" and advising them of the reality of defenses. However, such counseling also forms an obstacle to a broader sharing of each other's realities. The defender can explain the reality of justification's very narrow definition in New York,[314] the lack of adequate defenses to possession of a firearm,[315] and the opposition to programming even

[312] *Id.* at 776.

[313] *Id.* at 806-07.

[314] Because New York's justification defense requires imminent deadly harm and imposes a duty to retreat, many explanations for violence are not defenses and instead provide the prosecution with evidence of a motive for the accused's actions. *See* N.Y. PENAL LAW § 35.15(2) (McKinney 2024).

[315] In New York, justification is not a defense to possession of a firearm, which still carries a hefty mandatory prison sentence of three and a half to fifteen years. N.Y. PENAL LAW §§ 70.02(1)(b), (3)(b) (McKinney 2024). Also, the lack of a federal defense for innocent

when it is proven effective.[316] And they in turn can learn about the reality their client faces.

An honest discussion between client and defender about the situation outside the bounds of a legal outcome or defense is part of the epistemic exchange that could teach a defender something that may have been foreign to them about the reality of safety for communities marginalized by the legal system,[317] the simultaneously harsh and neglectful nature of policing,[318] and the blurred reality of "victim" and "offender."[319] A client's explanation to an attorney for why they may see the police as "just another gang"[320] would likely be inculpatory, and if brought to light may make a court or prosecutor more likely to seek a harsh outcome. But that is the beauty of the counseling space: these realities can collide within the bounds of confidentiality, and even if there is no useful knowledge sharing or practical output, there is still no downside.

In some circumstances though, there are benefits in legal outcomes. Learning about violence interruption through these clients allowed me, as with other public defenders, to suggest more options to clients who did not find themselves in as dire of a situation but had unique circumstances that could support an unusual resolution and who expressed a desire to alter a significant dynamic of their own lives. In places like New York City, Baltimore, and Chicago, these community organizations (and sometimes even government agencies) eventually formed a basis to actually resolve some peoples' firearms charges with formal programming tied to violence interruption.[321] One such client of mine faced an allegation that he had disposed of a gun someone else had used moments earlier for a shooting. Because of a serious health complication requiring hyperspecialized treatment, a prison sentence would almost certainly kill him. He had avoided criminal system contact for years, recently gained a good long-term job that required state licensing, and provided for the daughter

possession is an obstacle for advising a client to engage in violence interruption. *See* Lau, *supra* note 309, at 821.

[316] *See* Lau, *supra* note 309, at 801-04 (condensing literature on efficacy of violence interruption as public health tool).

[317] *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066-67 (defining legal estrangement as cultural orientation that makes certain communities cynical of police and courts as capable of ensuring public safety); *see also* Emmanuel Mauleón, *Legal Endearment: An Unmarked Barrier to Transforming Policing, Public Safety, and Security*, 112 CALIF. L. REV. 755, 774 (explaining why dominant groups who benefit from policing suffer from blind spot to understanding marginalized groups' dynamics with policing).

[318] Bell, *supra* note 317, at 2118.

[319] Cynthia Godsoe, *The Victim/Offender Overlap and Criminal System Reform*, 87 BROOK. L. REV. 1319, 1319-21 (2022) (explaining criminal legal system's inability to recognize link between victimization and offending).

[320] Bell, *supra* note 317, at 2087.

[321] Lau, *supra* note 309, at 798-99 (detailing increased focus on communities "most likely to use guns").

he co-parented. Despite his situation, the prosecutor and court would not allow him to resolve his case without upstate prison. But he became one of those credible messengers nonetheless, explaining to others how he came to be involved in the cycle of gun violence retaliation, and how much he had to lose. Eventually, a formal court program advocated for him to be considered given his work so far, and the program's established record allowed them to vouch for the client without exposing him to potential risk of liability with specifics. He was conditionally allowed to continue his work and his case later resolved with his violence interruption work, mainly to spare him the significant complications of prison for his unique health concerns, but certainly at least in part because of the glowing words from case managers about his involvement as a violence interrupter.

While such a formal outcome may only be possible in large court systems where substantial nonprofits can provide oversight for creative programming, the counseling has benefits beyond the case outcome. And the possibility for the formation of any new outcome is impeded by cabining away such conversations as outside the realm of possibility or as complications to the "actual" legal issues of a case.[322]

B. *The Black Attorneys of Legal Aid Amicus in* Bruen

The Black Attorneys of Legal Aid's Amicus is a more complicated example than the anecdotes of Section II.A or the other examples in this Section, which comport well with existing thought on movement lawyering as applied to public defense. The amicus was lawyer-led, in a legal venue, and focused on a purely legal, rights-based remedy.[323] Yet it brought client stories, which were 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.[324] It bridged gaps while also creating new conflicts.[325] It was in many ways an agonist act,[326] creating both friction to expose unfairness in need of a remedy and solidarity in at least one instance among people facing existing state restrictions.[327] I seek to highlight how the

[322] Indeed, Lau's suggestions for how to more fully integrate violence interruption require an in-depth understanding of its realities and its barriers within the legal system. He also highlights the epistemic benefits to understanding safety alongside any actual reduction in violence. *Id.* at 804.

[323] *See generally* Black Attorneys of Legal Aid et al. Amicus, *supra* note 42.

[324] For an example demonstrating the power of amicus briefs to uplift community voices, see Robert S. Chang, *The Fred T. Korematsu Center for Law and Equality and Its Vision for Social Change*, 7 STAN. J. C.R. & C.L. 197, 199 (2011).

[325] *See* Akbar, *supra* note 26, at 2564.

[326] It may seem strange to use a radical democratic concept to describe a legal brief framed to conservative members of the Supreme Court. Yet it furthered agonism and forced a reckoning on issues to shift coalitions.

[327] *See* Akbar, *supra* note 26, at 2531.

manner in which these defenders engaged in counseling made it it possible, because they were aware of their limitations within the system and looked for ways 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 because of the unexpectedly harsh penalties and lack of defenses for simple possession.[328] Simple possession carries steep mandatory minimums because of popular support for disincentivizing firearm possession.[329] The court-sanctioned prosecution requirement of waiving appellate rights also ensured that clients had to abandon suppression or trial issues entirely to benefit from a plea below that minimum.[330] District Attorney offices throughout the city uniformly made offers of state jail incarceration because of popular support for tough-on-gun policies, given the reality of firearm violence in the city.[331] Due to those same pressures, guns were also the priority of the NYPD and the reason for many aggressive policies on searches and surveillance.[332] 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.[333]

Defenders were counseling clients in the context of this reality.[334] Clients could have been the victims of unlawful and oppressive tactics by NYPD units

[328] New York's scheme meant an individual with no criminal record who possessed a firearm, even if licensed in another state, lawfully purchased, dismantled, with ammunition outside the chamber and magazine, would still be guilty of a violent felony carrying a mandatory three and a half to fifteen years in jail followed by lengthy parole supervision. *See* N.Y. PENAL LAW §§ 265.03(3), 265.03(1)(b), 265.00(15), 265.15(4), 70.02 (McKinney 2024).

[329] For example, 79% of New Yorkers who were registered voters opposed eliminating the need for any permitting for a concealed firearm. *June 7-9, 13, 2022: 802 New York State Registered Voters*, SIENNA COLL. RSCH. INST. 6, https://scri.siena.edu/wp-content/uploads/2022/06/SNY0622-Crosstabs.pdf [https://perma.cc/SSN5-G27P] (last visited Dec. 7, 2024).

[330] Barbara Zolot, Opinion, *The Gov't Tool You've Never Heard of That Conceals Police Misconduct*, ALM: N.Y. L.J. (Sept. 18, 2020, 10:00 AM), https://www.law.com/newyorklawjournal/2020/09/18/the-govt-tool-youve-never-heard-of-that-conceals-police-misconduct/ [https://perma.cc/LX4H-PLQ6].

[331] *See* Press Release, Darcel D. Clark, District Attorney, D.A. Clark Looks Forward to Working with NYPD and Courts to Rid Guns from Streets (Jan. 12, 2016), www.bronxda.nyc.gov/downloads/pdf/pr/2016/7-2016%20DA%20Clark%20on%20Gun%20Courts.pdf [https://perma.cc/Z96H-QT3F].

[332] Mark Morales & Peter Nickeas, *The NYPD Has Resurrected Its Controversial Anti-Crime Unit. Success Will Be Determined by Avoiding Mistakes of the Past*, CNN, https://www.cnn.com/2022/01/27/us/nypd-anti-crime-unit-eric-adams/index.html [https://perma.cc/KS8S-FZG3] (last updated Jan. 27, 2022, 7:29 PM).

[333] Petrigh, *supra* note 65, at 166.

[334] For a conversation with three of the main actors behind the amicus explaining their reasoning and motivation, see Avinash Samarth, Michael Thomas & Christopher Smith,

charged with finding guns at all costs. They also could have had persuasive reasons for possessing a firearm, and defenders could have learned of this through the in-depth conversations about the reality of what violence looked like in their communities.[335] But that occurred in the context of a harsh trial penalty, unmoving prosecutors, and results-oriented judges. These defenders grappled with the reality that their clients were overwhelmingly incentivized to plead guilty, however reasonable their possession may have been or however unjust the police practices that uncovered the gun.[336]

Those defenders became exposed to clients' understanding of guns and why they carried them, as well as the understandings they brought with them from the other jurisdictions they lived in where guns were drastically less criminalized.[337] 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?"[338] They used that interrogation to find a location for possible change and create a vehicle to take those same clients' stories directly to that battleground.[339] They filed an amicus that centered their clients' experiences[340] and, in so doing, put forth an unpopular position of the Second Amendment that problematized New York's view of gun criminalization.[341]

Their interrogation also led them to an understanding of how New York's gun licensing scheme and corresponding criminalization are draconian and rooted in racial bias and continued racist enforcement.[342] By 2020, 96% of felony gun

Second Class, INQUEST (Nov. 5, 2021), https://inquest.org/nyc-public-defenders-amicus-second-class [https://perma.cc/976U-4NZ6].

[335] *See supra* Section IV.A.

[336] *See, e.g.*, Jacob D. Charles, *Firearms Carceralism*, 108 MINN. L. REV. 2811, 2861-62 (2024).

[337] Samarth et al., *supra* note 334.

[338] HAYES & KABA, *supra* note 25, at 81 (quoting conversation with Ruth Wilson Gilmore).

[339] "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 et al., *supra* note 334.

[340] 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.

[341] At the time, this critical view of the criminalization of guns in New York was not mainstream. *But see generally* Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016) (discussing similarities between war on drugs and policing of guns, and role of both in mass incarceration).

[342] Samarth et al., *supra* note 334 (describing how gun laws are "deeply intertwined with our country's history of systemic racism" and stating history must be examined closely to dismantle racism); *see also* 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, 1537-65

arrests in New York City were of Black or Latine individuals.[343] Through their clients, these NYC public defenders learned the devastation of New York's criminal gun possession laws and were dismayed that no conversations were happening about the laws and practices.[344]

The amicus gained national attention, from conservatives rejoicing that the liberal bloc on gun control was breaking down,[345] to voices from the left bemoaning the amicus as misguided at best.[346] Joseph Blocher and Reva Siegel's analytical essay, though finding much common ground, criticized the public defenders' reliance on the courts and strengthening of the Second Amendment instead of democratic, legislative change.[347] But the defenders coming in close proximity to client stories felt an urgent and desperate need for action, despite the failure of the democratic process that had been playing out for decades.[348] Nothing short of a seismic shift in consciousness among groups, or of the perception of the situation, would disrupt that process. The amicus was an appeal to like-minded people to reconsider positions and coalitions, not purely an end.[349]

The amicus's tact highlights the stark differences that arise based on which underlying theory of democracy one subscribes to. Blocher and Seigel acknowledged gun control restrictions' disparate racial impact but held up the

(2012) (discussing how criminalizing gun ownership in America began with desire to control immigrants and former slaves and later expanded again as response to undermine civil rights movement).

[343] *NYPD Arrests Data (Historic)*, NYC OPEN DATA, https://data.cityofnewyork.us/Public-Safety/NYPD-Arrests-DataHistoric-/8h9b-rp9u [https://perma.cc/A4K4-FMNP] (last updated Apr. 23, 2024) (providing raw data on arrests since 2006).

[344] One of the amicus attorneys explained that 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 et al., *supra* note 334.

[345] *See* Opinion, *Progressive Gun-Control Crackup*, WALL ST. J. (July 23, 2021, 6:34 PM), https://www.wsj.com/articles/progressives-gun-control-black-attorneys-of-legal-aid-supreme-court-amicus-brief-11627078928 (noting how public defenders "can't afford to treat gun laws as one more culture-war bludgeon").

[346] Joseph Blocher & Reva B. Siegel, *Race and Guns, Courts and Democracy*, 135 HARV. L. REV. F. 449, 451-52 (2022) (criticizing legal aid brief for its use of Second Amendment to show stories of racial bias).

[347] *Id.* ("[R]acial justice . . . should be addressed in democratic politics rather than in the federal courts.").

[348] Samarth et al., *supra* note 334.

[349] As one of the amicus attorneys explained, "What 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 or not different ways of thinking about the criminal legal system should also apply to gun possession." *Id.*

deliberative political process as the solution to the racial bias of the criminal system and to gun control specifically.[350] The amicus attorneys recognized the historical dynamics that made the democratic process a one-way ratchet, only ever increasing the policing, prosecution, and punishment of their clients.[351] They and their clients faced obstacles in a state focused on imposing gun restrictions while ignoring the unfair and disproportionate consequences. The attorneys used their legal knowledge to guide those clients' voices where they could make a difference and force a conversation with criminal reformers who supported punitive firearms policies. These voices showed the hidden downsides of such an approach and asked such advocates to imagine gun control that did not require sending scores of people to jail for years.[352]

The amicus was not brought on behalf of a class that chose involvement as happens in impact litigation.[353] The clients described in the amicus did not go out of their way to become spokespeople for the over-prosecution of guns.[354] Instead, they were living their lives when police raided their homes, cars, and persons.[355] They had their rights violated, spent time in jail, and bore the lasting mark of a violent felony arrest and, often, conviction. They were not seeking to make change but instead had injustice inflicted on them and decided their stories could impact the mechanisms that led to their injustice.

The Black Attorneys of Legal Aid Amicus reveals the power of more critical counseling. These attorneys counseled clients about the limits of defending their cases. They told clients about the law in New York and its definition of "loaded" in New York's harsh sentencing scheme and the difficulty in overcoming presumptions for possession and intent to use.[356] The attorneys fought the cases

[350] *See* Blocher & Siegel, *supra* note 346, at 457.

[351] Black Attorneys of Legal Aid et al. Amicus, *supra* note 42, at 9 (citing Kopel, *supra* note 342, at 1529).

[352] *But see* Daniel Harawa, NYSRPA v Bruen*: Weaponizing Race*, 20 OHIO ST. J. CRIM. L. 163 (2022) (detailing how despite advocates' legitimate racial justice concerns, the Supreme Court misappropriated race to expand second amendment rights in manner that may harm black people through its conceptions of race as well as lead to more searches and dangerous encounters with police).

[353] The plaintiffs in *Bruen* were chosen to be ideal test cases. *See* Anne McCloy, *Supreme Court Conceal-Carry Reversal Began with Two Men in Rensselaer County Who Fought NY*, CBS 6 ALBANY, https://cbs6albany.com/news/local/supreme-court-conceal-carry-reversal-began-with-two-men-in-rensselaer-county-who-fought-ny [https://perma.cc/G8KW-KKV3] (last updated June 27, 2022, 12:00 PM).

[354] *See generally* Black Attorneys of Legal Aid et al. Amicus, *supra* note 42. The amicus's data on gun prosecution highlights that the accused individuals were, as Miller points out, not willing participants but people "selected" for involvement in the system due to being Black and brown New Yorkers. *See* Miller, *supra* note 9, at 401.

[355] *See* Black Attorneys of Legal Aid et al. Amicus, *supra* note 42, at 18-22.

[356] Black Attorneys of Legal Aid et al. Amicus, *supra* note 42, at 7 ("[New York] Penal Law considers a firearm 'loaded' if a person possesses it 'at the same time' they possess

and sometimes won, sometimes lost. They achieved the best outcomes they could for their clients, although this did nothing to address the deluge of similarly situated individuals.

But they also took the information they gleaned from clients and looked for an opportunity to use the combined knowledge about the reality of the injustices to push outward against the system.[357] 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.

They lifted the curtain on their own translation work and revealed the information they learned from clients about the real effects clients experienced. They showed society what they had been doing in counseling clients in an unjust system.

The public defenders who submitted the *Bruen* amicus came from holistic offices.[358] But the impetus for the brief was not a policy unit or impact litigation department; it came straight from the direct advocates in the criminal cases themselves and the stories they heard.[359] It was an organic event. Oftentimes, offices merely must allow the natural processes to play out while guiding best practices and providing resources. But the structure of holistic offices is still instrumental in helping to make systemic views and mobilizations possible. This work already exists in many offices which have impact litigation units, policy units, and community organizing. Holistic offices make this counseling work easier, but it is not a requirement. Conversely, a holistic office is not enough if the core of representation remains focused on cases and lawyers do not incorporate these methods into their counsel of clients.

It is not a coincidence that the public defender amicus in *Bruen* was sponsored, and largely organized and written, by Black and brown public

ammunition, regardless of whether the firearm is, in fact, loaded." (quoting N.Y. PENAL LAW § 265.00(15) (McKinney 2024))).

[357] 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 et al., *supra* note 334.

[358] *See generally* Black Attorneys of Legal Aid et al. Amicus, *supra* note 42.

[359] *See* Samarth et al., *supra* note 334 (explaining that they drafted brief in response to seeing their clients incarcerated for what is commonplace elsewhere in country); *see also Joint Public Defender Statement on U.S. Supreme Court Ruling in* New York State Rifle & Pistol Association Inc. v. Bruen, BRONX DEFS. (June 23, 2022), https://www.bronxdefenders.org/supreme-court-strikes-down-the-carry-provision-of-new-york-states-gun-licensing-scheme/ [https://perma.cc/22X2-GE6E].

defenders.[360] They were lawyers engaging in advocacy based on their legal knowledge and positions within the legal world. They were public defenders seeing larger trends through their repeat work in a high-volume criminal court. 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.[361] Rather than continue to bear the burden of holding back clients, this advocacy served dual purposes: defenders who would otherwise push against their clients to see reality, instead identified and acted on an opportunity to push in the other direction.

C. *A Fictionalized Example of a Critical Counseling Dialogue*

The following example is a dialogue between a public defender and a client. There is nothing starkly different from this conversation and one that is client-centered and holistic, but more traditional rather than critical in scope. This example hopefully illustrates how a defender can facilitate client knowledge while imparting attorney knowledge and bringing in extralegal power and tactics as other tools for a client to consider. An attorney who shares information freely and accepts client information can create a dialogue where both can work toward something more.

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Attorney ("A"): Hi Mr. Jones, I'm Angelo Petrigh, an attorney at the Bronx Defenders, and I'm going to represent you for your case. Here's my card. I'm sorry you're in this situation. How are you doing, all things considered?

Client ("C"): I'm fine I guess, but I don't understand why I'm here. I was assaulted by those officers. I want to press charges.

A: I'm very sorry. Do you want to talk about what happened? Or would you rather see the complaint against you first, so you can see what they're saying happened and what you're charged with?[362]

C: I want to see the charges; they wouldn't tell me.

A: Okay, we can see what you're charged with, but then I want to hear what really happened from you. So, this is the complaint, this part lists the offenses.

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[360] "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, *supra* note 15, at 1539.

[361] *See generally id.*

[362] This insight to not automatically begin with a reading of the complaint but rather to do so at the invitation of the client comes from Isis Misdary. *See* Kathleen M. Boozang, *Faculty Feature — Meet Professor Isis Misdary (they/she)*, SETON HALL L., https://law.shu.edu/news/faculty-feature-meet-professor-isis-misdary.html [https://perma.cc/98RW-67XM] (last visited Dec. 7, 2024). They suggest attorneys not read the complaint at all before meeting the client in order to read the complaint together for the first time.

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 p.m. on East 239th Street, he observed you in an area near Edenwald Houses.

C: Yeah, I live there.

A: Okay, 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: Okay, I want to hear about that also. 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, you bit Officer Smith in the forearm. Okay, 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 fingerprint me. I told them I'd show them a photo of my ID and pulled out my phone, and the officer behind me grabbed me. 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 to my sides, 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 saw it. These are my neighbors, and now they think I am a criminal. I missed work today already without calling out. It's 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 until they speak to the officers. We could ask the judge for a plea, but she can only do that on a misdemeanor, and that gives you a record forever. So I suggest we come back at least one time to see if I can get the DA to offer a reduced non-criminal charge, and you can compare that option 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 9:30 on a weekday in about thirty 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: So they just believe the cops, no questions asked? Can I explain to the DA and have them charge the officer too?

A: Talking to them can backfire. It's part of the unfair reason it's hard to make allegations against the police. My job is to advise you of risks, and the safest

thing is often not to talk about the incident with an ADA who could use it against you. But it's your decision.

Also, it takes a lot for an ADA to charge a police officer. The legal standards for assault are different for police. And it's political; DAs can't lose support of police unions, so they can't pursue these cases without a lot of proof against police. My investigator can look to see if there is a video showing what happened. You said there were people around, maybe we can speak with them. If you want the officers to face consequences, there are other ways, such as civil lawsuits or misconduct investigations. Those are civil proceedings and can result in you getting monetary damages or the officers having a disciplinary finding. We can talk about preserving your rights, but you probably can't start pursuing those unless we win your case, which would require you to come back for more than one date. Outside of any courts, there is also a push recently for police accountability, to stop things like public housing trespass patrols, like what you experienced. And a push for better accountability when police do things like this.

C: What do you mean a push?

A: Like people working toward 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 what happened to you is right on point with 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, people in my building have been getting stopped lately. There was a shooting a few weeks ago nearby, so they put in a mobile tower, and there's been a group of cops walking around who call themselves "the gun boys" and stop everyone. My neighbor says they're just trying to search people for any reason to see if they have a gun. My community board said they want to write the commissioner or city council about this.

A: I didn't know any of that about Edenwald. Or the petition. I have other clients that may want to hear about that. "The gun boys" is often what anti-crime officers call themselves. There's been a focus on them in some of those

campaigns I mentioned, because of their tactics. 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 later. Maybe we can find a day after work for you to come by my office to discuss your case itself, and 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: Okay, 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, okay?

C: Why?

A: Often, they run background checks when they do that, and we'd want to close your case first. Right now, a background check would show the original arrest charges, which if you look here, included felony assault on an officer and marijuana possession, 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 didn't charge you with 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?

C: 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 available for discussion 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 such constraints seem like part of the natural operation of law. Relatedly, counseling can privilege legal epistemes and individualized forms of knowledge and power, providing an obstacle to real engagement with those mechanisms.

A more critical view of counseling already naturally develops between clients and attorneys who recognize the limitations of the criminal system. Such counseling makes the contradiction explicit and part of the relationship. This elucidates, and brings into the conversation, whatever obstacles, incentives, or systems influence a client's case and situation. First, this shift improves the quality of counseling itself by making lawyers cognizant of their role, grounding 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 improves trust with lawyers, allows for client-led representation, and also facilitates movements that can bring about true change. Finally, this expanded role prevents lawyer gatekeeping from impeding mobilization and instead uses the amassed knowledge of public defense offices and their clients to further their larger 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 places roadblocks to any true reimagining of what our system, and even individual client outcomes, can look like.