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Subversive Lawyering

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Fordham Law School
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CLE COURSE MATERIALS

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**Panel Discussion**


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Dan Farbman joined the Boston College Law faculty as an Assistant Professor of Law in 2017. He teaches and writes in the areas of local government law, legal history, constitutional law, the legal profession, civil rights, and property. His work focuses on the legal history of radical reform movements in public law both from an institutional perspective and from the perspective of the practice of cause lawyering.

After he graduated from Amherst College in 2001, Dan spent a few years in New York City trying (and failing) to make it as a professional actor before he enrolled at Harvard Law School. After graduating in 2007, he was a clerk for Judge Margaret Morrow on the Central District of California in Los Angeles before beginning a Skadden Fellowship at Advancement Project in Washington, D.C. At Advancement Project he worked with community organizers around the country on grassroots efforts to fight racial injustice in public education with a particular focus on the school to prison pipeline.

After leaving practice, Dan pursued a Ph.D. in American Studies at Harvard. For three years prior to joining Boston College, he was a Climenko Fellow and Lecturer on Law at Harvard Law School. While at Harvard, Dan taught Legal Research and Writing and a seminar on Legal Realism.
**Doug Smith**

*Doug Smith* is a Supervising Senior Staff Attorney at Public Counsel, where he works with community-based organizations, community organizers, and leaders in low-income communities across Los Angeles to advance grassroots movements for social justice and equity. In addition to his work at Public Counsel, Doug is a Lecturer at UCLA School of Law, where he co-teaches the Community Economic Development Clinic. From 2015 to 2020 Doug served as an appointed Commissioner on the Los Angeles County Regional Planning Commission. Doug holds a M.A. in Urban and Regional Planning from UCLA School of Public Affairs, and a J.D. from UCLA School of Law.

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INTRODUCTION

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

1. See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 81–82 (2018) (cataloging the various nicknames given to criminal courts, particularly misdemeanor courts, including assembly line processing, “McJustice,” or a supermarket, the term used by Malcolm Feeley). 2. Matthew Clair points out that the term “assembly line justice” comes from Abraham Blumberg’s 1967 book entitled CRIMINAL JUSTICE, in which he described how the courts
mechanical system delivering a form of justice that is impersonal and fallible. Perhaps unintentionally, the epithet reveals another truth: criminal court is also a workplace, and it takes labor to keep it running. But beyond a metaphor, how might a sustained analysis of labor in criminal courts enhance our power of observation?

The social theorist who pioneered labor as a prism of analysis was Karl Marx. For Marx, human labor was the source of all value and the engine for world historical change. Marx’s labor theory of value formed the building block to his philosophy of history: dialectical historical materialism. It was not abstract ideas that drove historical progress but rather the creative energy that humans poured into their efforts. But a person does not approach the world as an artist before a blank canvas. Rather, people live in a particular time in history and face specific limits that mediate their creative energies. It is from that dialectical alchemy of engaged human effort and historically contingent material conditions that an existing or an entirely new social structure can emerge. Inherently, Marx’s theory of history held open the possibility for social transformation because of the weight he afforded to human agency. Because Marx wrote about a system—capitalism—in a way


5. See Karl Marx & Friedrich Engels, The Holy Family, or Critique of Critical Criticism 116 (Richard Dixon & Clement Dutts trans., 1975) ("History does nothing; it ‘possesses no immense wealth’, it ‘wages no battles’. It is man, real, living man who does all that, who possesses and fights; ‘history’ is not, as it were, a person apart, using man as a means to achieve its own aims; history is nothing but the activity of man pursuing his aims."). Letter from Friedrich Engels to J. Bloch (Sept. 21, 1890), https://www.marxists.org/archive/ Marx/works/1890/letters/90_09_21.html [https://perma.cc/NW47-MGHM] ("According to the materialist conception of history, the ultimately determining element in history is the production and reproduction of real life.").

6. See Karl Marx & Frederick Engels, The German Ideology 47 (C.J. Arthur ed., 1970) (“Morality, religion, metaphysics, all the rest of ideology and their corresponding forms of consciousness, thus no longer retain the semblance of independence. They have no history, no development; but men, developing their material production and their material intercourse, alter, along with this their real existence, their thinking and the products of their thinking. Life is not determined by consciousness, but consciousness by life.").

7. See Karl Marx, The Eighteenth Brumaire of Louis Bonaparte 6 (Saul K. Padover trans., 2d ed. 1852) (“Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living.").

8. See Marx, supra note 4, at 29. Marx rejected a view of human effort that was uniquely individual: “[T]he human essence is no abstraction inherent in each single individual. In its reality it is the ensemble of the social relations.” Id. As Graeber puts it, “one that sees society as arising from creative action, but creative action as something that can never be separated from its concrete, material medium.” David Graeber, Towards an Anthropological Theory of Value: The False Coin of Our Own Dreams 54 (2001).

9. See Marx & Engels, supra note 6, at 47.
that he hoped could be useful to those working to overthrow it, it seems particularly apt to invoke his work in a colloquium dedicated to thinking about subverting legal systems.\(^\text{10}\)

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

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

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

Second, labor is an input that determines the size of the criminal punishment system. The addition of more prosecutors and their increased productivity lies at the heart of the historic growth in prison admissions at the turn of the twentieth century.\(^\text{15}\) In turn, as advocates devise reforms to dismantle mass criminalization, shrinking prosecutors’ offices may be the key to true transformation.

Third, labor is also a vital site for struggle. The labor lens illuminates the promise of a specific strategy: building social movement labor unionism in public defenders’ offices. Unionized public defenders are uniquely

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

\(^\text{11}\). See Graeber, supra note 8, at 60–63.

\(^\text{12}\). Marx explains:

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

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

\(^\text{13}\). Graeber, supra note 8, at 1.


\(^\text{15}\). John Pfaff, Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform 129 (2016).
positioned to leverage their working conditions as a platform to advocate for abolitionist reforms that benefit society more broadly: they can demand reductions to prosecutors’ offices to reduce their caseloads and shrink the size of the criminal punishment system. Such a tactic subverts not only the continued operation of criminal courts but also traditional expectations of lawyers as experts leveraging their rarified skills. Instead, the lawyers position themselves as workers and members of the organized labor movement.

I. LABOR AS A SOURCE OF VALUE

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

As criminal law’s primary actors, and as the protagonists of criminal court, prosecutors and judges embody the law’s characteristics. To build criminal law’s moral universe, they deploy violent means and pursue violent ends acting on the bodies and lives of individuals accused of crimes. Prosecutors and judges, along with court officers, police officers, and corrections officers perform “violence work,” to borrow Professor Micol Seigel’s term. They calibrate, rationalize, and allocate state coercion. Judges and prosecutors dispense physical violence most obviously at sentencing when they impose a stint in jail or prison. But sociologists of criminal court have long illuminated the punitive valence of criminal proceedings even before any trial has occurred, a conviction is obtained, and a person is sentenced. Indeed,

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17. Graeber, supra note 8, at 55.
18. Marx, supra note 4, at 29.
19. Whether we adapt a retributivist or utilitarian view of punishment, both converge in their assessment that punishment is painful. See Kent Greenawalt, Punishment, in Joshua Dressler, Encyclopedia of Crime and Justice 1282, 1283 (Joshua Dressler ed., 2d ed. 2002) (“Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification.”).
21. See id.
22. Danielle Sered, Until We Reckon: Violence, Mass Incarceration, and a Road to Repair 27–37 (2019) (discussing the violence inside prisons and jails and demonstrating that confinement is not rehabilitative).
more than forty years ago, Professor Malcolm Feeley declared this process to be punishment.\textsuperscript{23}

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

Prosecutors perform the lion’s share of the adjudicative labor, making them the system’s most powerful actors.\textsuperscript{25} Their charging decisions orchestrate the path of the case. Prosecutors determine whether a case will go to trial or be resolved with a plea.\textsuperscript{26} One labor-saving maneuver that prosecutors consistently deploy is to charge the defendant with the highest possible offense to secure a plea and avoid a labor-intensive trial.\textsuperscript{27} But they do not work simply to extract convictions. Professor Issa Kohler-Hausmann shows that assistant district attorneys in New York City use their charging power to bring the urban underclass under court supervision.\textsuperscript{28} The district attorneys’ offices in New York City tend to assign quality-of-life cases to their new recruits, where they learn their craft by practicing on the lives of Black and Latinx New Yorkers.\textsuperscript{29} The cases are often indistinguishable from one another; their pleadings mirror the boilerplate language in the police paperwork, which is itself reflective of the stubborn persistence of police quotas.\textsuperscript{30} Kohler-Hausmann shows that district attorneys’ offices pursue cases despite the fact that few will result in convictions.\textsuperscript{31} Some cases will even be dismissed by design or by neglect.\textsuperscript{32} But the cost of processing the

\textsuperscript{23} See generally Malcolm Feeley, The Process Is the Punishment: Handling Cases in a Lower Criminal Court (1979) (outlining the range of costs that individuals prosecuted in misdemeanor court in New Haven, Connecticut, incur when they contest their charges, including the costs of retaining counsel, lost wages, stress, and time).

\textsuperscript{24} See generally Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor (2009).


\textsuperscript{26} Pfeff, supra note 15, at 130–32.

\textsuperscript{27} Id. at 133.

\textsuperscript{28} Kohler-Hausmann shows how even the most lenient disposition in criminal court—a deferred dismissal—still provides judges, police, and prosecutors with a tool to manage a huge pool of New Yorkers. See Issa Kohler-Hausmann, Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing 72–74 (2018).

\textsuperscript{29} See generally Zohra Ahmed, The Sanctuary of Prosecutorial Nullification, 83 Alb. L. Rev. 239 (2019).

\textsuperscript{30} See Kohler-Hausmann, supra note 28, at 40–42; Nicole Gonzalez Van Cleve, Crook County: Racism and Injustice in America’s Largest Criminal Court 69 (2016); Ahmed, supra note 29, at 271–72.

\textsuperscript{31} See Kohler-Hausmann, supra note 28, at 68–69.

\textsuperscript{32} See id. at 150.
case is displaced onto defendants who each have to return to court multiple times. For defendants, it means repeated court dates, lost wages, and lost time that court actors systematically devalue. For each court date, to enter these courtroom’s physical spaces, nonlawyers must endure a set of humiliating rituals. Every morning, even before the session begins, a long line of people with court dates hugs the corner of the building—in rain, snow, or shine. The patient attendees wait, only to be greeted by court officers guarding the cold metal detectors. After they take off their outer garments and empty their pockets, those with court dates can expect a brisk pat down. Then, the interminable wait begins, before the court officer finally announces their cases. And, as prosecutors progress through their thick piles of case files, defendants endure repeated trips to court until their case is finally closed. Meanwhile, as the case is pending, the defendant’s life hangs in the balance: even the seemingly benign mark of an open criminal case is apparent to employers, landlords, creditors, and school admissions officers who are given cause to deny a hopeful application. When it finally comes down to resolving the case, prosecutors determine the ultimate disposition for quality-of-life offenses, based not on the strength of the case but rather on the accused’s misfortune of being previously arrested for something else.

Although prosecutors are the most powerful violence workers in criminal court, they tend to minimize the amount of power they exercise over people’s lives, “placing that responsibility onto other systems out of or beyond their control.” The defense attorney has an ambiguous relationship to this violence work. At their most powerful, defense attorneys can slow down the conveyor belt and create off-ramps to mitigate the work of their adversaries. However, defense attorneys cannot expect to disrupt the entire operation through their legal practice. At worst, the defense attorney legitimizes carceral control by providing the illusion of due process.

33. See Van Cleve, supra note 30, at 29.
34. See William Glaberson, Faltering Courts, Mired in Delays, N.Y. Times (Apr. 13, 2013), https://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html [https://perma.cc/73ES-G8B7] (“The problems [in Bronx Criminal Court] are visible even before entering the courthouse on 161st Street, where the line to get inside often stretches down the block and around the corner.”).
35. See Kohler-Hausmann, supra note 28, at 66, 144–45, 267.
36. See id. at 72.
37. Alexandra L. Cox & Camila Grip, The Legitimation Strategies of “Progressive” Prosecutors, Soc. & Legal Stud. 1, 14, 17 (2021) (“The prosecutors’ strategies of legitimation through displacement of responsibility and blame revealed the power that they have to shape the meaning of ‘fairness’ in the context of their cases. For them, a fair or neutral approach to cases is one that was not only ‘race blind’ but also neutral with respect to the facts of a case.”).
38. See Feeley, supra note 23, at 290 (arguing that constitutional rights for defendants in criminal proceedings “may function largely as hollow symbols of fairness or at best as luxuries or reserves to be called upon only in big, intense, or particularly difficult cases.”); Paul D. Butler, Poor People Lose: Gideon and the Critique of Rights, 122 YALE L.J. 2176, 2201 (2013) (“[P]rocedural rights [such as the right to counsel] may be especially prone to legitimate the status quo, because ‘fair’ process masks unjust substantive outcomes and makes those outcomes seem more legitimate. In contrast, a right to a minimum wage, while it may
Prosecutors, as they apply the criminal law, narrow the court’s attention to the singular individual act. Their prerogative to blame obfuscates the conditions outside of the individual’s control that makes criminalization almost inevitable. Prosecutors blindfold themselves to the structural conditions that shape who the police place on the assembly lines. But their adherence to the myth of personal responsibility conflicts with the evidence. Sociologists ascribe urban interpersonal violence, like homicide, to conditions of extreme segregation. But criminal law focuses primarily on the person who pulls the trigger. Even when prosecutors consider mitigation, they still operate within the bounds of retributive justice, applying the defendant’s social history as a discount against the accused’s blameworthiness. Their work minimizes state failure and emphasizes personal responsibility. Indeed, prosecutors are the cult of personal responsibility’s most faithful practitioners.

This methodological individualism entrenches group-level differences. In Chicago’s Cook County, sociologist Nicole Gonzalez Van Cleave captures the tenor of the conversation between courtroom insiders as they negotiate case resolutions. Van Cleave shows how the discourse of crime and its attendant discourse of personal responsibility serves as the civil way to launder discussions of racial hierarchies in racially neutral ways. Defendants’ ascribed personal characteristics feature prominently. Van Cleave traces the logical and linguistic slippages in courtroom actors’ negotiations: the defendant’s poverty becomes ascribed to their laziness.

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41. See Craig Haney, Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death, 49 STAN. L. REV. 1447, 1459 (1997) (“The notion that a defendant’s crime stems entirely from his evil makeup and that he therefore deserves to be judged and punished exclusively on the basis of his presumably free, morally blameworthy choices is rooted in a longstanding cultural ethos that capital jurors (like most citizens) have been conditioned to accept uncritically. As a result, the typical juror’s preexisting framework for understanding behavior is highly compatible with the basic terms of the typical prosecutorial narrative.”); VAN CLEVE, supra note 30, at 62.
42. See VAN CLEVE, supra note 30, at 5.
43. See id. at 53–62; Nicole Gonzalez Van Cleve & Lauren Mayes, Criminal Justice Through “Colorblind” Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice, 40 LAW & SOC. INQUIRY 406, 407 (2015) (“Operating together, they produce and promote the illusion of racial neutrality in criminal justice research while exacerbating racial disproportionality in practice.”). See generally Rebecca Richardson Dunlea, “No Idea Whether He’s Black, White, or Purple”: Colorblindness and Cultural Scripting in Prosecution, CRIMINOLOGY (forthcoming 2022) (finding that prosecutors in Florida seek to approach their cases without accounting for racial disparities).
44. Malcolm Feeley similarly documents that the accused’s personal characteristics feature prominently in plea negotiations. See FEELEY, supra note 23, at 162.
45. See VAN CLEVE, supra note 30, at 65.
A past trauma solicits fear rather than empathy. The lawyers broker deals by trading on pseudosociological tropes: broken families, absent fathers, and dependent mothers. White courtroom insiders awkwardly appropriate African-American vernacular to speak about Black defendants. These ways of speaking parallel the pervasive racial discrimination that taints every aspect of the court system. In this way, criminal legal processes play a critical role in constructing racial hierarchy. Prosecutors and judges reserve their more punitive criminal court sanctions for Black defendants, all other things being equal, particularly in drugs and weapons prosecutions and in the juvenile justice system. The latter has the effect of “creating a cumulative record of disadvantage over the life course.”

Other state-produced vulnerabilities become liabilities in court. Criminal courts are public institutions that almost exclusively regulate the poor and the working class. This is not a coincidence: policy makers in the 1970s anticipated prison constructions based on the number of men who were unemployed. Yet, despite the overrepresentation of poor people in criminal court, being poor systematically disadvantages defendants and undermines their cases in court. Court fines and fees, incarceration, and lost wages further immiserate defendants. Criminal courts’ processes and the

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46. See id. at 111.
47. See id. at 91.
48. See id. at 60.
49. See Matthew Clair & Amanda Woog, Courts and the Abolition Movement, 110 CALIF. L. REV. (forthcoming 2022) (manuscript at 13 nn.72–73) (on file with authors) (discussing the research on racial bias in criminal court).
51. Rosich, supra note 50, at 1, 9.
53. See Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 72 (2007) (“If NAIRU [Non-Accelerating-Inflation Rate of Unemployment] explains the systemic existence of the relative surplus population in the most abstract neoclassical macroeconomic terms, its sociological presence is bounded by the fatal coupling of power and difference, which resolves relationally according to internally dynamic but structurally static racial hierarchies.”); Elizabeth Hinton, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 175 (2016) (arguing that, although policymakers, law enforcement officials, and scholars working for the Nixon administration justified increased prison construction by citing to high rates of reported crime, the “incarceration rates had little relationship to actual crime rates” and that “[i]nstead, incarceration rates correlated directly to the number of black residents and the extent of socioeconomic inequality within a given state”).
54. See Clair & Woog, supra note 2, at 13.
punishment that they dispense also frequently weaponize expressions of neurodivergence, transforming neurocognitive differences into disabilities.\textsuperscript{56} Criminal courts’ violence is thus not just physical but also structural.\textsuperscript{57} To borrow scholar Ruth Wilson Gilmore’s formulation, the criminal punishment system’s practitioners “exploit and renew fatal power-difference couplings.”\textsuperscript{58} Gilmore elaborates: “There is no difference without power, and neither power nor difference has an essential moral value. Rather, the application of violence—the cause of premature deaths—produces political power in a vicious cycle.”\textsuperscript{59} Gilmore draws attention to the legal and extralegal processes, such as racism, ableism, and classism that produce group-level hierarchies.\textsuperscript{60} Criminal procedure participates in these processes, exploiting and reconstructing differences that stratify individuals with life-altering consequences.\textsuperscript{61} The criminal punishment system shortens people’s lives and inflicts psychological and emotional pain.\textsuperscript{62}

Criminal law’s physical and structural violence weakens social bonds. But that disintegration is also a cause: it is precisely the lack of social solidarity that makes this multidimensional violence possible. When prosecutors make charging decisions, they stigmatize defendants as blameworthy and castigate them as unruly, harmful, or dangerous. They inherently assign value to persons and behaviors, identifying who deserves our collective wrath and who merits our solidarity. Their adjudication instructs not only those directly entangled in criminal courts but also the public at large.

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

\textsuperscript{57} See Paul Farmer, On Suffering and Structural Violence: A View from Below, 125 DE\textsc{D}ALUS 261, 274 (1996).
\textsuperscript{58} Ruth Wilson Gilmore, Fatal Couplings of Power and Difference: Notes on Racism and Geography, 54 PRO. GEOGRAPHER 15, 16 (2002).
\textsuperscript{59} Id.
\textsuperscript{60} See id.
\textsuperscript{61} See id.
\textsuperscript{63} See Gilmore, supra note 58, at 16.
II. LABOR AS MATERIAL INPUT

Quantitative analysis confirms the qualitative picture above: greater investment in labor, specifically in violence workers, played a critical role in the historic explosion of the U.S. criminal punishment system. Yet, surprisingly few reform efforts recognize the relationship between the size, scope, and power of the criminal punishment system and the number of violence workers it employs. Although the scale and intensity of carceral institutions provoked a consensus that something is terribly wrong about the American criminal punishment system, the solutions implemented have produced mixed results: while the number of people who are incarcerated has decreased, the net of carceral supervision has also extended to new domains. Popular reforms purporting to address the crisis of mass incarceration often select a narrow set of metrics to diagnose the size, scope, and power of the system. This misaccounting rests in a misrecognition of labor power. Efforts in Seattle, Washington, however, stand out as an exception; there, advocates have called for reductions in the number of violence workers employed in the city’s misdemeanor courts.

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70. Solidarity Budget 2 (2021), https://docs.google.com/document/d/1LK2XaZQPJswoOQbdA8lUa3FbnarWD4lWeYm0zEEl/edit#heading=h.77hx6w52enx [https://perma.cc/Z3JY-GZBJ] (“Seattle’s historic overinvestment in policing and punishment as a response to social problems began a long-overdue reversal in 2020. This year, we demand that the divestment from SPD continue, and that Seattle commit to shrink other parts of the policing pipeline by defunding the municipal court and the criminal division of the City Attorney’s office.”); see infra Part II.C.
A. Prosecutors’ Labor Power Fueled Mass Incarceration

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

Professor John Pfaff has established that more prosecutors and more productive prosecutors played a significant role in fueling prison admissions during the historic incarceration boom at the turn of the twentieth century. As reported crime rates rose sharply between the 1970s and the 1990s, including a 100 percent increase in the reported rate of violent crime, prosecutors’ offices hired approximately 3000 more prosecutors nationally to reach a total of about 20,000 on staff—representing a 17 percent increase in staffing levels. As crime fell between 1990 and 2007 by 35 percent, another 10,000 prosecutors were hired, swelling their ranks to 30,000. As the number of reported crimes decreased, arrests decreased too; but as Pfaff shows, with more staff, prosecutors could invest more time and attention to a smaller case load than before.

The result: prosecutors filed more felony charges per arrest than they ever had before. Prosecutors used their glut of resources to ratchet up charges. Pfaff shows that it was precisely the increase in felony filings per arrest that drove up prison admissions, making prosecutors the protagonists in the story of mass incarceration. Their offices’ capacities to hire more prosecutors and, in turn, those prosecutors’ decisions to file charges, and specifically to file felony charges, best explains prison growth. Pfaff explains, “Even if individual prosecutors were no more aggressive than prosecutors in the past, the increase in staff size would lead to more cases even as crime declined.” His data suggests that reforms aiming to change the culture of aggressive prosecutions within prosecutors’ offices are taking aim at the wrong target if they do not simultaneously address funding and staffing levels.

69. See Pfaff, supra note 15, at 129.
70. Id.
71. See id.
72. See id.
73. See generally John F. Pfaff, The Causes of Growth in Prison Admissions and Populations (Jan. 23, 2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508 [https://perma.cc/P5W7-ZJW4]. Pfaff runs through various possible explanations for the United States’s prison growth, including longer sentences, more arrests, and more crime, but through a process of elimination, Pfaff finds that prison admissions closely track felony filings, an output that the prosecutor controls. See id. at 3 (“Prison admissions grew by approximately 35% between 1994 and 2008, even while the crime rate and the total number of arrests fell. But during that same time, felony filings rose by approximately 35% as well, but admissions per filing remained flat.”).
74. Pfaff, supra note 15, at 130.
75. For an example of culture change reforms, see Ethan Lowens et al., Prosecutorial Culture Change: A Primer (2020), https://static1.squarespace.com/static/5e4fbee5697a989dafe8a23/t/5f5f72984ade463c0254bb65/1599173273238/IIP+Prosecutorial+Culture+Change+FINAL.pdf [https://perma.cc/49UT-MADP] (offering “recommendations designed to encourage prosecutors to think critically about the history of
significant increases in staff took place in urban settings where prison populations have been declining since the beginning of the twentieth century. 76

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

B. The Misaccounting of Size

In the past decade, across the country, a wide swath of the political spectrum has converged to decry mass incarceration and, to a lesser extent, mass criminalization. From the so-called bipartisan consensus on criminal justice reform to the abolitionist left, these voices draw our attention to nearly two million people in confinement and six million under some form of carceral supervision.78 In turn, reformers have argued for shrinking the system so that it harms fewer people, although their reasons and tactics vary.79 There is a lack of clarity and agreement about the best metric to

their institutions and foster in-depth conversations about current policy and ways to bring about sustainable change”.

79. See Taylor Pendergrass, We Can Cut Mass Incarceration by 50 Percent, ACLU (July 12, 2019, 10:00 AM), https://www.aclu.org/blog/smart-justice/mass-incarceration/we-can-cut-mass-incarceration-50-percent [https://perma.cc/6PZZ-HYF8]; About, Right on Crime, https://rightoncrime.com/about [https://perma.cc/UEC3-PZZW] (last visited Mar. 4, 2022) (“We want a prison system that incapacitates dangerous offenders and career criminals but which is not used in such a way that makes nonviolent, low-risk offenders a greater risk to the public upon release than before they entered.”). But see Dana Goldstein, How to Cut the Prison Population by 50 Percent, Marshall Project (Mar. 4, 2015, 7:15 AM), https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent [https://perma.cc/44P7-DJUK] (“Though there is a strong bipartisan movement for sentencing reform, discomfort with allowing violent criminals to avoid prison time or to serve much shorter sentences has left prominent conservatives reluctant to echo the call to ‘Cut50’ [percent of the prison population.’”). For the abolitionist left, size is not the only criticism or even the most important one leveled at the carceral state, but rather the focus is on its very existence. See James Austin et al., Brennan Ctr. for Just., How Many Americans Are Unnecessarily Incarcerated? 7 (2016) (“[A]n estimated 39 percent (approximately 576,000 people) are incarcerated with little public safety rationale. They could be more appropriately sentenced to an alternative to prison or a shorter prison stay, with limited impact on public safety.”); c.f. Analysis & Vision, Survived and Punished, https://survivedandpunished.org/analysis [https://perma.cc/ZB7R-9958] (last visited Mar. 4, 2022) (identifying that “nearly 60% of people in women’s prison nationwide, and as many as 94% of some women’s prison populations, have a history of physical or sexual abuse before
evaluate the system’s size: Is it the number of people confined? Is it the number of people arrested? Or is it the amount of public money it absorbs? Most tend to focus on the number of people under penal control, and to some extent, the intensity of their criminalization. While some reforms have reduced the number of people who are incarcerated, others have widened the net of carceral supervision, allowing people to remain in society but requiring them to submit to surveillance outside of prison.

Furthermore, although the size of the American penal system has attracted national condemnation, for reformers, it is not the system’s only vice. Reformers have devised proposals that purport to address other concerns: its racial disproportion, its predation, its harsh retributive edge, and the lack of due process, to name a few. Many proposals directed at criminal court that purport to address these criticisms are in fact agnostic about size, or they expand the size, scope, and power of the system in new ways. Many direct more resources to the institutions staffing criminal court. Shrinking the system has been an elusive and inconsistently pursued goal.

For example, consider the bail reform movement: although organizers have challenged monetary bail, pretrial supervision remains firmly entrenched. In their appraisal of national bail reform efforts, the abolitionist groups Critical Resistance and the Community Justice Exchange observed that, instead of eliminating or shrinking the legal grounds for pretrial supervision, new bail legislation has substituted one form of being incarcerated” and calling for the “immediate release of survivors of domestic and sexual violence who are imprisoned for survival actions.”


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

82. See id.


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

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

86. See id.


88. Critical Resistance has most clearly articulated the importance of paying attention to objective material indicators, like the size and amount of resources, when assessing the merits of reforms to policing and prisons. See REFORMIST REFORMS OR ABOLITIONIST REFORMS?: HOW TO CHIP AWAY AT THE PIC, CRITICAL RESISTANCE, http://criticalresistance.org/resources/abolitionist-tools/ [https://perma.cc/YT5W-BG2K] (last visited Mar. 4, 2022).

89. I am a consultant to the Community Justice Exchange. See CRITICAL RESISTANCE & CMTY. JUST. EXCH., ON THE ROAD TO FREEDOM: AN ABOLITIONIST ASSESSMENT OF PRETRIAL AND BAIL REFORMS 16–17 (2021).
supervision with another.90 For example, the new laws replace cash bail with electronic monitoring, social service monitoring, or even preventative detention.91 Reforms have not only widened the net of pretrial supervision; they have or will foreseeably increase the labor force in criminal courts—for instance, by hiring more staff to operate pretrial services and additional judges to adjudicate bail hearings.92 Efforts in Illinois are the exception: legislation passed in 2020 eliminated cash bail, constrained judges’ authority to impose pretrial detention, and facilitated opportunities for release.93

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

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90. See id. at 17.
91. See id. at 18.
92. In New Jersey, “[t]he 2017 legislation added significant resources to the state’s pretrial services system, including creating an entire department to oversee the new law and hiring new Superior Court judges to implement it. In 2018, the state’s new pretrial services department had to seek additional state funding beyond the court filing fees that had originally been designated to cover its budget.” Id. at 28. In Harris County, the lawsuit settlement that brought about changes to rules regulating pretrial detention added “funding to the PIC [prison industrial complex] to create and oversee the new release and supervision system.” Id. at 38. In New York State, “[b]ecause ‘release under non-monetary conditions’ is now baked into state law, counties that previously only used ROR and bail will need to create pretrial supervision programs, and some counties will likely rely on existing supervision programs like probation.” Id. at 46. In San Francisco, the policy of the District Attorney’s Office “did not lead to a decrease in funding or resources for the prosecutor’s office itself, the judiciary or courts, or pretrial services.” Id. at 52.
94. See N.Y. CRIM. Proc. LAW § 245.10 (McKinney 2021) (new discovery rules effective May 3, 2020); id. § 30.30 (speedy trial rules effective January 1, 2020).
95. In New York State, for example, after these two reforms were implemented in 2019, the District Attorneys Association of the State of New York requested additional funding from the legislature to hire more staff to guarantee compliance with the new laws. See David Hoovler, President, District Att’y’s Ass’n of the State of N.Y., Codes Implementation of Pretrial Discovery Reform Before the New York State Senate Standing Committee (Sept. 9, 2019), https://www.nysenate.gov/sites/default/files/public_hearing_09_09_2019_testimony_1_of_2_1.pdf [https://perma.cc/G8DS-F96X]; Karen Dewitt, NY’s DA’s Say They Need More Money For Reforms, WAMC (Nov. 9, 2019, 12:00 PM), https://www.wamc.org/new-york-news/2019-11-09/nys-das-say-they-need-more-money-for-reforms [https://perma.cc/C6CR-KPZD].
Alternatives to incarceration have been widely embraced as a solution to the problem of mass incarceration. Problem-solving courts have proliferated to ostensibly address issues like substance dependency, mental health struggles, and some of the unique challenges that veterans and trafficking survivors endure. These problem-solving courts attempt to engage individuals in therapeutic interventions, backed by the threat of criminal sanction. Professors Aya Gruber, Amy Cohen, and Kate Mogulescu call these interventions a form of “penal welfare.” Social workers, case managers and not-for-profit agencies are enlisted in the service of providing alternatives to incarceration and in monitoring and reporting individuals who fail to accept their services. Prosecutors’ offices and courts have also hired their own social workers and case managers to coordinate supervision and monitor compliance. These tend to expand rather than shrink the labor pool of those contributing to the criminal punishment system.

Another common proposal for reform is enhancing funding for public defense to hire more staff and enhance their capacity for zealous representation. A recent study shows that holistic defense—specifically, representation that focuses not only on the criminal case but also on its collateral consequences—can reduce the future likelihood of a custodial arrest and shave off jail time for people prosecuted in Bronx Criminal

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100. See id.
101. Id.
103. For example, in 2016, the Manhattan District Attorney created the “Alternatives to Incarceration Unit” and hired social workers who were tasked with screening defendants seeking alternatives to incarceration. See About the Office: Bureaus and Units, Dist. Att’y of N.Y. Cnty., https://web.archive.org/web/20211220140535/https://www.manhattanda.org/about-the-office/bureaus-and-units/ (last visited Mar. 4, 2022) (“Created by District Attorney Vance in 2016, our Alternatives to Incarceration Unit is the first of its kind of [sic] in New York City. Our ATIU reduces unnecessary prosecution and incarceration by identifying community-based diversion and supervision options in appropriate cases, following up with defendants to check on their progress in the community, and sharing data on the effectiveness of these alternatives.”).
104. See supra notes 89–103 and accompanying text.
Court. But the study revealed that holistic representation had no impact on conviction rates. So far, even in relatively well-resourced jurisdictions, like New York City, where the study took place, individual representation is not a countervailing force sufficient to shrink the criminal punishment system.

When it comes to prosecutors, Pfaff, for example, advocates for reforms that limit prosecutors’ power in plea negotiations. With those restraints, defendants might be more likely to take a case to trial, potentially forcing prosecutors to reduce their caseload. But nothing stops prosecuting offices from hiring more staff to absorb the expanded trial docket. Other recommendations that he offers, such as drafting enforceable guidelines that compel prosecutors to dismiss cases and creating incentives that orient prosecutors toward the most serious offenses, might change the kinds of cases that prosecutors pursue. However, they do not guarantee a reduction in the number of people affected by criminal courts. Rather, these reforms try to equalize the playing field between the defense and the prosecution.

In a different vein, recently, candidates for state and district attorney offices have successfully campaigned on the promise of shrinking the jail and prison populations. State’s Attorney for Cook County, Illinois, Kim Foxx, ran for office on the promise of lightening the touch of the criminal punishment system. A few years later, her office released data showing that it had filed fewer felony charges than her predecessor’s had. Philadelphia District Attorney Larry Krasner has similarly reduced the number of people in the local jail and pursued fewer cases. In homicide

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

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

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

109. See id.

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


112. See id.

cases, Krasner vowed not to always charge the highest grade of murder. Yet, his office has also asked for more funding to hire more staff. By contrast, in the 2021 Manhattan District Attorney race, several candidates promised to cut funding to their office following public pressure. The victor, Alvin Bragg, promised “to reduce his staff in accordance with falling crime rates, and to stop requesting more money for the DA’s budget every year,” but has also suggested that he will need more money to prosecute domestic violence offenses.

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

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

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

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

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

119. See supra notes 90–93, 96–102 and accompanying text.
in half.\textsuperscript{120} The number of people who are incarcerated,\textsuperscript{121} under probation supervision,\textsuperscript{122} and charged\textsuperscript{123} today still does not approximate levels in the 1980s. This is not to suggest that reaching pre-1980s numbers is desirable but rather to illustrate that any reductions in the number of people entangled in the criminal punishment system have been limited. The United States remains an outlier internationally.\textsuperscript{124} Given the sluggish pace of change, might it be time to consider a resource-explicit strategy?

\textsuperscript{120} See Nazgol Ghandnoosh, The Sentencing Project, U.S. Prison Decline: Insufficient to Undo Mass Incarceration (2020) ("At the pace of decarceration since 2009, averaging 1% annually, it will take 65 years—until 2085—to cut the U.S. prison population in half. Clearly, waiting over six decades to substantively alter a system that is out of step with the world and is racially biased is unacceptable.").


C. Defunding Violence Work: Seattle’s Solidarity Budget

Organizers in Seattle, Washington, pioneered a resource-explicit strategy and developed a budget proposal that demands funding cuts to the violence workers overseeing the city’s misdemeanor prosecutions. The document, entitled Seattle Solidarity Budget (“Solidarity Budget”), describes its effort as a “collective call toward a city budget that centers the needs of the most marginalized and vulnerable Seattle residents, responds with funding that is commensurate with the crises we are facing, and prioritizes collective care and liberation.”

The Solidarity Budget not only demands the decriminalization of misdemeanor offenses but also calls for “defunding the misdemeanor punishment arm of the municipal court and the criminal division of the City Attorney’s office by 50% by eliminating courtrooms and shrinking the number of cases prosecuted.”

The proposal aims to shape legal practice by constraining legal institutions financially. The hope is then that these budgetary constraints force prosecutors to shift how they apply their discretion. Reductions in the court budget cement those changes by limiting judicial resources to entertain misdemeanor cases. Unlike other proposals discussed in Part II.A, Seattle aims to pair legal changes with budgetary ones to compel permanent institutional change.

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

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

126. Decriminalization can take a range of forms. In Seattle, for example, organizers call for the city attorney to exercise discretion to “eliminate all filings that currently result in referrals to Community Court. The kinds of cases currently ending up in Community Court are the most straightforward candidates for elimination from the criminal legal system.” 2022 Solidarity Budget, supra note 68, at 18.
127. Id. at 2.
128. Id.
129. Id. at 17–20.
130. See generally id.
131. Id. at 2.
132. Id. at 18.
Significantly, the Solidarity Budget recognizes the connection between labor power and the size, scope, and power of the criminal punishment system.\textsuperscript{133} It builds on a growing literature developed by abolitionist organizers that distinguishes between reform efforts that preserve the legitimacy and power of the criminal punishment system and those that create the conditions for its abolition.\textsuperscript{134} This literature adopts a materialist approach to assessing social change: the power of institutions lies in the resources it commands, the legal authority it enjoys, and its overall size.\textsuperscript{135}

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

\textsuperscript{133} See generally id.
\textsuperscript{135} See Marbre Stahly-Butts & Amna A. Akbar, Transformative Reforms of the Movement for Black Lives 4–5 (unpublished manuscript) [https://perma.cc/6A24-H87Y].
\textsuperscript{137} Foran et al., supra note 67, at 520.
\textsuperscript{138} See id.
\textsuperscript{139} See generally Clair & Woog, supra note 49.
\textsuperscript{140} See generally id.
\textsuperscript{141} See generally id.
\textsuperscript{142} Foran et al., supra note 67, at 520–33.
sources of power in criminal court to tease out a thought experiment about a possible campaign.

III. LABOR AS A SOURCE OF (TRANSFORMATIVE) POWER

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

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

Translating this organizing model to criminal court, however, is not self-evident. Criminal court, like the factory, reproduces the stratification endemic to twenty-first century neoliberalism.149 It is thus also a site for class struggle. But, unlike the factory, it is not a workplace for everyone involved. The oppression that defendants experience does not occur through their employment but rather through the compulsory process. Furthermore, defendants’ leverage to disrupt criminal court to extract concessions is

143. Marx, supra note 4, at 29.
constrained. The risks they incur for disruptive collective action are years in prison, not only lost wages.

When journalists and organizers have focused on labor power in the criminal punishment system, police unions have attracted their attention. But this focus overstates the role of police unions, at least in criminal court. There, prosecutors reign supreme. Furthermore, as Professor Benjamin Levin argues, this recent wave of scrutiny directed at police unions misses the mark. It tends to confuse the problem of policing with a problem with labor protections. Hoping to restrict the political power of police forces by shrinking their collective bargaining rights could inadvertently weaken labor protections for all.

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

This proposal draws on two trends present in the labor movement in the last decade. First, in the past few years, publicly employed public defenders


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

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

153. See id.

154. See id.

155. According to the U.S. Bureau of Labor Statistics, a little over 10 percent of the workforce is unionized. See Economic News Release, U.S. Bureau of Labor Statistics, Union Members Summary (Jan. 20, 2022), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/U9GS-DT9K]. The union membership rate for public-sector workers is 33.9 percent, which is more than five times higher than the rate of private-sector workers, at 6.1 percent. See id. At this point, I have not been able to find data on the total number of public defenders or the number of those who are public employees. Many public defenders are employed by not-for-profits that receive government funding to deliver constitutionally required representation. See, e.g., THE BRONX DEFENDERS, https://www.bronxdefenders.org/ [https://perma.cc/FVY6-FG7A] (last visited Mar. 4, 2022). A 2007 Bureau of Justice Statistics survey of 957 public defender offices in forty-nine states and the District of Columbia found that these agencies employed more than 15,000 full-time equivalent litigating attorneys. See LYNN LANGTON & DONALD J. FAROLE, JR., PUBLIC DEFENDER OFFICES, 2007 STATISTICAL TABLES BUREAU OF JUSTICE STATISTICS (2010).
have formed unions, and a few have shown an inclination to social movement unionism, a model of labor organizing in which members of the unions push for changes that reflect their position not only as workers but also as members of a community. In particular, these unions have signaled their alignment with movements for prison abolition, including the Black Lives Matter movement. Second, in Chicago, New York City, and Los Angeles, teachers’ unions have pioneered a model of collective bargaining known as “Bargaining for the Common Good” (BCG). I describe the efforts of the teachers’ union in Los Angeles and the way they have leveraged their labor power as a means of pushing back against school privatization, policing, and austerity. I suggest that public defenders could learn to do the same, in order to meaningfully shrink the imprint of the carceral state. It has been said that public defenders are not able to address the root causes of criminalization through their representation. But many public defender organizations yearn to do so. Budget battles—the typical site for defend strategy—are not generally in lawyers’ wheelhouse. Lawyers may still have a role to play, however—not as legal experts but as legal workers. Bargaining for the common good strategy offers that outlet in a potentially transformative way by targeting the source of criminalization.


158. See, e.g., Walker, supra note 156 (“About a dozen attorneys with the Lancaster County Public Defender’s Office, including Chief Public Defender Chris Tallarico, protested in solidarity with the movement. The attorneys held signs that read ‘Black Lives Matter to public defenders’ and chanted ‘no justice, no peace[‘] . . . .’”; Los Angeles County Public Defender Union—Local 148, FACEBOOK (Apr. 21, 2021), https://www.facebook.com/LApubdefunion/posts/550287156360301 (“Policing, as we know it, is racist and cannot be reformed. We will not be satisfied until we abolish the systems that continue to terrorize communities & kill Black people.”); Why We Formed MDU, supra note 156 (“In the summer of 2020, in the midst of the pandemic, we came together to form the Maryland Defenders Union (MDU), a union of attorneys, social workers, and support staff at OPD . . . . We were also disappointed that OPD had not moved more quickly in support of the Black Lives Matter movement. OPD’s town hall meetings had unintentionally been a wake-up call . . . .”).

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

160. See supra note 158.
teachers and public defenders occupy different positions in relation to the people they serve, there are lessons to draw from teachers’ organizing that could strengthen public defenders’ organizing.

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

In the past decade, teachers’ unions have gone on strike with broad public support, sometimes bargaining not just for themselves but for their entire communities. Through their organizing, teachers have not only shown how their working conditions implicate struggles that affect students, teachers, and entire communities, but they have also used their collective bargaining as a tool to incorporate demands that extend beyond the workplace. Their mobilizations accomplished two feats: (1) showing that what happens in the classroom has implications for the wider public and (2) connecting struggles outside the school to dynamics in the classroom. In reframing collective bargaining agreements as beneficial not just for workers but for society more broadly, BCG invites the public to care about union power. Critically, the strategy requires unions to partner closely with community groups.

In a publication I coauthored, Direct Action for Prison Abolition, I described the import of the United Teachers Los Angeles (UTLA) strike in 2019 and the way UTLA executed the BCG strategy:

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


163. See id.

164. Direct Action for Prison Abolition, supra note 161 (citing Barbara Madeloni, L.A. Teachers Win Big and Beat Back Privatizers, LABOR NOTES (Jan. 24, 2019),
Educators came together with parents, students, school staff, and community organizations to develop a shared vision for what needed to change. The teachers did not simply build a short-term coalition in anticipation of a strike but rather aimed for deep alignment that could sustain long-term mobilization. UTLA tried to build deep and authentic relationships with parents and communities. For example, parents themselves worked as organizers for the teacher’s union. Meanwhile, many teachers in the union identified with their students’ parents over their shared Latinx heritage and identity. As one teacher-member explained, “I see myself in my students in both the literal and metaphorical sense.”

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

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


165. Interview by Zohra Ahmed with Samir Sonti (July 1, 2020).
166. See id.
167. See id.
168. See id.
169. Direct Action for Prison Abolition, supra note 161.
171. See id.
172. See id.
173. See id.
175. See Steve Gorman, After Strike, Los Angeles Teachers Aim at California Tax Reform, REUTERS (Jan. 24, 2019, 7:32 PM), https://www.reuters.com/article/us-usa-education-california-taxes-idUSKCN1JP0J1U [https://perma.cc/W4MI-CEAJ] (discussing Proposition 13, a 1978 ballot initiative in California that capped real estate levies and resulted in a steep decline in public spending per pupil in California and stating that repealing Proposition 13 could generate $10 billion a year or more in new revenue and allow the state to afford to spend nearly $2,000 a year per student statewide, which covers nearly half of the current expenditure gap for K–12 public schools).
It took over five years of deliberate planning to build this coalition. Samir Sonti worked for UNITE HERE!, one of the unions supporting UTLA efforts. He explains that, as early as 2014, UTLA hired a full-time parent organizer. Community members formed the coalition Reclaim Our Schools Los Angeles to articulate their demands for educational reform. Among other things, these groups coauthored a shared vision to resist school privatization, and through training and political education, they disseminated this vision in their communities. As Sonti describes, “The groundswell of popular support for the strike grew out of that organizing.” Other observers remarked that, by linking classroom conditions to redistribution, the teachers and their supporters “pave[d] the way for a broader debate in Sacramento over taxes and education.” More recently, UTLA has advocated for removing ICE from schools and for the complete elimination of the Los Angeles School Police Department, the agency responsible for policing public schools.

B. Bargaining for Abolition

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

Conceiving public defenders as part of organized labor reveals new sources of leverage—they hold the power to strike and, thus, threaten the daily operation of criminal court. A BCG strategy explicitly builds that

176. Interview by Zohra Ahmed with Samir Sonti (July 1, 2020).
177. Id.
178. Id.
179. Id.
180. Id.
182. See Gorman, supra note 175.
leverage by activating workers’ awareness of their own power and by cultivating public support for public defenders’ workplace grievances. Defunding prosecution and policing are demands that may bring together those at risk for criminalization and those who are tasked with its mitigation. Less funding for police and prosecutors likely means fewer cases for public defenders, better working conditions, and better representation.\textsuperscript{185} Indeed, crushing caseloads are one of the defining features of public defender workplace experience.\textsuperscript{186} Typically, the solution is to request more funding to hire more staff to reduce the case count and deliver zealous representation.\textsuperscript{187} But fewer cases per lawyer would also alleviate the strains on public defender offices.

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

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

\textsuperscript{185} See \textsc{Lynn Langton et al.}, \textsc{Bureau of Just. Stat., State Public Defender Programs 2007} (2010) (finding that the largest share of cases handled by public defender programs were misdemeanor and ordinance violations). Low-level offenses are those in which prosecutors exercise maximal discretion.

\textsuperscript{186} See \textit{e.g.}, \textsc{Donald J. Farole, Jr., Bureau of Just. Stat., A National Assessment of Public Defender Office Caseloads} (2010) (finding that approximately “1 in 4 county-based public defender offices had a sufficient number of attorneys to meet caseload standards”).

\textsuperscript{187} See \textsc{Furst, supra note 105}.


\textsuperscript{189} See \textsc{Reddy, supra note 162}.

\textsuperscript{190} See \textsc{Madeloni, supra note 164}.

\textsuperscript{191} \textsc{Antonio Gramsci}, \textsc{Selections from the Prison Notebooks} 18 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971).
linkages between community organizations, the defenders’ organization, and the union.\textsuperscript{192}

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

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


\textsuperscript{195} Id.


\textsuperscript{197} See id.
The cooperation is time-bound and limited to specific campaigns. There are no formal ties of accountability. The UTLA template suggests a different arrangement. The union actively cultivated community leadership. Furthermore, it committed to regular meetings with a separate community coalition. Over the course of several years, the different constituents hammered out a shared vision. When the City of Los Angeles balked at demands, teachers went on strike, buoyed by community support. The picket line became a makeshift daycare and classroom for students. The UTLA example suggests that there can be significant gains both for the union and for the community if the alliance is more than episodic, but rooted in shared values and commitment.

CONCLUSION

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

199. See supra notes 165–73 and accompanying text.
200. See Interview by Zohra Ahmed with Samir Sonti (July 1, 2020).
201. See supra notes 165–73 and accompanying text.
202. See Interview by Zohra Ahmed with Samir Sonti (July 1, 2020).
203. See supra notes 171–73 and accompanying text.
Is there such a thing as subversive lawyering? And if so, what is it? These are the questions that motivate this colloquium issue.

To be sure, other, similar terms exist and have been explicated. Movement lawyering. Rebellious lawyering. Resistance lawyering. Indeed, we were particularly inspired by Daniel Farbman’s article Resistance Lawyering, in which he uncovers the stories of abolitionist lawyers who, confronting the Fugitive Slave Act of 1850, “employed every means at their disposal to frustrate, delay, and dismantle the system within which they were practicing.” But still, we wondered if subversive lawyering might be something different. Something akin to resistance lawyering, and yet distinct. We ourselves were unsure of the answer, but our intuition suggested there was a there there, if we could simply puzzle it out. It was with this openness in mind that we reached out to scholars writing and practicing in different areas of the law—housing law, criminal law, labor law, etc.—who we suspected might be interested in exploring the topic. This is how we framed the invitation:

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* Professor of Law; Director of the Center on Race, Law, and Justice, Fordham University School of Law. This Foreword was prepared for the Colloquium entitled Subversive Lawyering, hosted by the Fordham Law Review and co-organized by the Center on Race, Law, and Justice and the Stein Center for Law and Ethics on October 15–16, 2021, at Fordham University School of Law. A thanks to the authors who contributed to the collection and to the Race, Law, and Justice Center’s Deborah A. Batts fellows, Cameron Porter and Lamar Smith, for providing research for this Foreword. Also, a special thanks to Grant Emrich and the rest of the Fordham Law Review editors and staff for their outstanding work in putting this Colloquium together.

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4. Ch. 60, 9 Stat. 462 (repealed 1864).
5. Farbman, supra note 3, at 1880.
What does it mean in the practice of law to be subversive, i.e., to seek to reform, disrupt, or even overthrow aspects of the legal system through means that are less than transparent, and even transgressive? What does subversive lawyering mean in particular law practices, e.g., in consumer and housing law; in prosecution or government representation; in transactional practice? Can subversive lawyering be justified? Does it even need justification? And how can subversive lawyering and the pursuit of broader political goals be reconciled with ethical duties to one’s client and as an officer of the court? For that matter, how does subversive lawyering differ from, complement, or measure up against other kinds of resistance or movement lawyering, or against other ways of seeking social change through the law or through the political process? Is subversive lawyering something that should be encouraged, and perhaps taught? Even if a lawyer is not fully “subversive” (under whatever definition one adopts), are there useful lessons to be drawn from the concept of subversive lawyering? This colloquium will bring together legal scholars in various areas to think through and address these questions.

Looking back on the invitation now, two things stand out. One, we wanted our authors unrestrained. Two, through our colloquium on subversive lawyering, we hoped our contributors would help us figure out what subversive lawyering is. And what it could be.

This is not to say that the two of us were wholly without opinions. Indeed, as invited scholars asked clarifying questions, certain ideas of our own began to crystallize. For Green, the concept was capacious enough to include not only Daniel Farbman’s abolitionist lawyers but also the brave lawyers who played a crucial role in this country’s independence. At what the American legal profession considers a high-water mark, lawyers set the stage for the American Revolution. In 1774, lawyers John Adams, Patrick Henry, and Roger Sherman were among the members of the First Continental Congress who most vigorously promoted independence. What is sometimes skirted over is that these attendees defied King George III and, in doing so, willingly violated the law by attending the Continental Congress. Less than two years later, lawyers Thomas Jefferson and Robert Livingston, along with Adams and Sherman, were four-fifths of the committee of five—the fifth being Benjamin Franklin—that drafted the Declaration of Independence. From the point of view of England at the time, this declaration constituted treason. And yet it is a liberating document, a democratizing document,

8. See NORTON, supra note 7, at 128.
setting aside the stain of chattel slavery. In many ways, these early lawyers were engaged in subversive lawyering, one of us would say.

For Capers, however, something more is required to set subversive lawyering apart. For example, in an email to a scholar who sought more information about how subversive lawyering might differ from rebellious lawyering, Capers responded by suggesting that rebellious lawyering is overt and confrontational. It wears its rebellion on its sleeve. By contrast, Capers argued, subversive lawyering suggests something more covert. It suggests the Black poet Paul Laurence Dunbar’s line, “We wear the mask that grins and lies.”

A spy in the enemy’s camp. A wolf in sheep’s clothing. A sleeper agent. A lawyer as a trojan horse, keeping hidden, for now, the battle they plan on waging from inside. Subversive lawyering rarely announces itself as such. To be sure, the goal may align with resistance lawyering. Or rebellious lawyering. But the means is decidedly more subtle.

Of course, these are just our own initial ideas. As we thought about it more, we wondered about other things. For example, does the term subversive lawyering have a politics? Stated differently, should the term include those “on the other side” who have a very different conception of what is “right” and what is “good”? Consider, for example, how lawyers supported Donald Trump’s efforts to subvert the legitimate, lawful results of the 2020 presidential election—that is, to subvert democratic self-governance itself.

Soon after the election, the public witnessed, in real time, lawyers’ efforts to use false and frivolous allegations of election fraud to try to persuade courts to invalidate the election results. Through the ongoing efforts of the media and, of late, the Select Committee to Investigate the January 6th Attack on the United States Capitol, we later learned that Trump’s lawyers also plotted in the shadows to persuade state election officials not to certify valid state election results, to persuade state legislatures to send unelected slates of electors to Washington, D.C., and to persuade the vice president to throw the election to Congress rather than to certify the electoral count. Thankfully, the courts, most state election officials, most state legislators, most members of Congress, and the vice president rejected Trump’s efforts.

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13. See, e.g., Scarcella, supra note 12; Hendrickson, supra note 12.


honorably, this was not a moment of unalloyed pride for the legal profession. Trump’s lawyers were surely subversive. Should the term “subversive lawyering” therefore include them?

Other questions surfaced when several of the contributors for this Colloquium gathered via Zoom in August 2021 for an informal discussion about questions that remained on the table for our formal colloquium on October 15 and 16. The law offers lawyers tools but also procedural restraints. Some of our authors questioned whether lawyers’ tools are up to the task, recalling Audre Lorde’s caution that “the master’s tools will never dismantle the master’s house.” One might also question whether the legal processes are the right places in which to make change and whether lawyers, given the limitations within which they work and, in many cases, their own cautiousness, are the right agents of change. We normally assume that lawyers should not subvert the law or legal process to their clients’ detriment; we normally assume lawyers owe their clients loyalty. If we start from these assumptions, the question becomes how lawyers might undermine the law’s objectives either to further clients’ interests, as in the case of the abolitionist lawyers, or independently of legal representations, as in the case of colonial American lawyers yearning for independence. If the American Revolution is any indication, then would-be subversive lawyers, even at their most powerful, cannot single-handedly dismantle unjust laws and processes. Perhaps the most any individual lawyer can do is make tiny cuts that combine with those made by others, both lawyers and nonlawyers.

Consider, too, progressive criminal justice issues, which are finally becoming part of the national conversation. At a time when many are celebrating the election of progressive prosecutors, those committed to more radical change are asking: What good can progressive prosecutors really do? Are they limited to implementing reformist reforms, or can they really champion nonreformist reforms that lead to radical change? More pointedly, is progressive prosecution consistent with abolitionism? For that
matter, can one be a defense lawyer and an abolitionist? These questions resonate with our own concerns teaching criminal law and procedure. Can one teach about the criminal legal process without, to some extent, legitimating it? Can one do any of this and be subversive?

We are not alone in raising questions such as these. A public defender, who has almost 600,000 followers on TikTok and nearly 60,000 on Twitter, recently questioned whether radical lawyers can exist. As his tweet put it, “The practice of law is inherently not radical. You can be a person with radical beliefs who is a lawyer, but I don’t think lawyers are doing anything radical.” His contention was of a piece with an observation made by others: that being at a law school by definition already involves an indoctrination, a privileging of the status quo.

Some of our contributors would vociferously deny that lawyers are not “doing anything radical.” Others, we suspect, would say that the sentiment is sobering but likely true. One great benefit of hosting a discussion on this topic is the opportunity to elicit varied perspectives on questions such as this. And perhaps to be reminded of critical race theory’s commitment to hope even in the face of despair. If the practice of law is inherently not radical—or, to use our term, “subversive”—how can we change that? What preconditions would foster good subversive lawyering, or to borrow from Congressman John Lewis, create “good trouble”? And for lawyer-teachers, an equally important question is: how can law professors prepare their students to fight the good (subversive) fight?

Although our contributors could not possibly respond to all of these questions, each offers interesting insights on the broad theme of subversive lawyering. We commend to you their writings:


22. Peter, supra note 21.


24. Peter, supra note 21.


In *Bargaining for Abolition*, Zohra Ahmed compares the criminal court system to a workplace in which labor is required to keep it running.\(^{27}\) As an example of subversive lawyering, she advocates for unionized public defenders to use collective bargaining negotiations to reduce funding and eliminate staff positions for police and prosecutors’ offices.

In his contribution, *A Commons in the Master’s House*, Daniel Farbman addresses how those of us who seek to change systems are tasked with deciding how to balance our struggles within and against the systems we want to alter.\(^{28}\) He highlights historical events, as well as his personal experience tackling this issue. Farbman communicates how institutional actors can make space within hostile institutions to support resistance movements.

Christina John and Russell Pearce decided that in addressing subversive lawyering, they also wanted to subvert the expectations and norms about who publishes in law reviews. To this end, they invited several coauthors who have encountered the law as members of the public, not as practicing lawyers or legal academics. Collectively, in *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, the authors explore reforms that encourage equity and democracy within existing methods for distributing legal education.\(^{29}\) They begin with reformist steps as temporary solutions toward reaching a just society and end with the notion that abolishing the existing system is necessary to reach a democratic and participatory model of legal education.

In *When We Fight, We Win: Eviction Defense as Subversive Lawyering*, Eloise Lawrence explores the meaning of subversive lawyering within the realm of Massachusetts housing court.\(^{30}\) The essay examines the use of the “sword and shield” model of eviction defense, which combines legal defense, the “shield,” with grassroots activism, the “sword,” to promote justice on both the micro and macro levels.

In *Policy by the People, for the People: Designing Responsive Regulation and Building Democratic Power*, Scott Cummings and Doug Smith call for a new model of policymaking that considers the effect of policies on marginalized groups rather than the interests of those with power.\(^{31}\) The authors explore the role of policy design as a part of legal advocacy and offer examples of how lawyers can encourage the creation of policies that are more responsive to the needs of powerless groups.

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How about using plea bargaining unions to challenge mass incarceration? Can such unions be a way to engage in subversive lawyering? These are the questions Andrew Crespo takes up in *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*. His essay explores the concept of plea strikes, assesses its potential pitfalls, and highlights how criminal defense lawyers could use plea bargaining unions as a tool of subversion.

For his contribution, Paul Butler offers another take on Audre Lorde’s famous quote. In *Progressive Prosecutors Are Not Trying to Dismantle the Master’s House, and the Master Wouldn’t Let Them Anyway*, Butler examines the progressive-prosecutor movement and notes that most progressive prosecutors “are mainly reformers rather than radicals.” Moreover, when a handful of progressive prosecutors have attempted to use their most potent tool—discretion—in radical ways, they have sometimes been stripped of that tool, further demonstrating the limits of criminal justice reform.

Of course, these are just a few examples of how one might think about subversive lawyering. Much more might be said in response to the questions with which we started. We hope this collection of writings is only the beginning of a conversation, and not the last word.

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POLICY BY THE PEOPLE, FOR THE PEOPLE: DESIGNING RESPONSIVE REGULATION AND BUILDING DEMOCRATIC POWER

Scott L. Cummings* & Doug Smith**

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INTRODUCTION

Policymaking in American democracy is often a process that happens to people rather than by them. This is especially the case with respect to policy that affects people with less power in low-income communities and communities of color. Urban policy, in particular, has historically been driven by business elites and white homeowners’ interests, which have shaped exclusionary policies, such as redlining and single-family zoning—etching racial and economic segregation into the fabric of city space. Even when outsider interest groups and social movement organizations gain enough power to shape the policy agenda, give input into the content of policy, and lobby for policy changes that advance their interests, the standard conception of regulatory design is elite-driven: people whose lived reality will be impacted by policy decisions tend to be consulted, if at all, after policy ideas are already articulated and have gained traction in the halls of power.

This Essay seeks to elevate an alternative model of policymaking “by the people” that views the policy process as a means of designing more responsive regulation that emanates from the experiences of marginalized constituencies, while creating an opportunity to build democratic power. 

3. See 1 Bruce Ackerman, We the People: Foundations 317–18 (1991); Lani Guinier & Gerald Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements, 123 Yale L.J. 2740, 2749 (2014).
Policy by the people involves: identifying problems from the perspective of those suffering harm, developing solutions based on lived experiences of what works, conducting policy design through an iterative process in which solutions are translated into law, elevating leadership of the people in advocating for policy change, and ensuring that successful policy is not an end goal but rather a starting point in promoting democratic inclusion and community power. This approach therefore seeks to enable policy design by people that responds to their material interests—what we call responsive regulation—as it simultaneously promotes power-building over time. This Essay aims to fill critical gaps in the literature on lawyering for social change and policy design, while offering a set of principles to guide the role of lawyers in bottom-up policymaking.

Our central contributions are threefold. First, we argue that scholars and lawyers have ignored the role of effective policy design as part of legal advocacy and assert the need for new attention to what policymaking looks like, particularly at the local level. Second, we draw attention to the value added by lawyers in the policymaking process, which transcends background research and technical drafting. In this sense, we are not just advocating for commitment to a community-first model of policymaking, but rather we are seeking to reveal lawyers’ essential contributions to the process at key stages. Third, we want to spotlight policymaking to reframe how lawyers and academics think about the lawyering process—and what counts as “law” in the first instance. Rather than relegating policymaking to the sidelines of an educational experience revolving around litigation and appellate court decision-making, we hope to place policymaking at the center of the legal enterprise.

Our starting point for this project is a commitment to the idea that policymaking should build from authentic mobilization led by the people affected by policy and that lawyers should support mobilization through contributions based on their comparative advantages. To advance this idea, we draw on our experiences as teachers and lawyers who have worked with movements for housing and economic justice in Los Angeles, California. Our method is to derive ideas from this participation to subvert traditional notions of lawyering for social change—spotlighting policy design as part of what effective lawyers do—and also to subvert conventional policy design itself by reconceptualizing the policy process as a power-building exercise. Specifically, we want to show how the people’s expertise can be mobilized and amplified by lawyers who “know their role,” while arguing for a more expansive conception of what that role is: one that moves beyond deferential conceptions derived from the conventional representation paradigm to illuminate the underappreciated ways lawyers create conditions of possibility for policymaking by people who have been historically excluded from the process.4 In this sense, we argue for a form of policymaking that rises to

4. Although our focus is on progressive law reform, our emphasis on the contributions of lawyers to policy design also applies to conservative lawyers. See, e.g., Michael S. Schmidt, Behind the Texas Abortion Law, a Persevering Conservative Lawyer, N.Y. TIMES
meet the current moment of social movement activism combatting racial injustice, economic inequality, and climate change.

Our contribution to the widening conversation about law and social movements is to identify and map the specific ways that movement-inspired normative claims are translated into viable policy that combats injustice, advances people-defined priorities, and accelerates power-building.

Part I begins by examining the literature on lawyering and policymaking, revealing the absence of meaningful cross-fertilization and laying the groundwork for our focus on the lawyer’s role in supporting people-centered social policy campaigns. In Part II, we situate our analysis in the local policy arena, identifying the emergence of local policy as a critical lever for progressive activism and describing four grassroots campaigns in Los Angeles that offer insight into the lawyer’s role in policy by the people. In Part III, we use examples from these campaigns to theorize the lawyer’s role by placing it within the life cycle of policy development and identifying the specific skill set lawyers bring to bear at each stage of representation. Mobilizing examples from the campaigns, we illuminate how lawyers contribute to policy by the people in four key respects by: (1) mapping systems of power from the people’s perspective, (2) generating policy solutions through people-centered process, (3) building power through policy advocacy, and (4) using policy change to promote a more inclusive democracy. In Part IV, we consider implications for lawyering theory and practice by discussing the opportunities and challenges arising from our conception of policy by the people. We then recommend how law schools and public interest legal organizations can adopt new practices to place policy reform at the heart of effective lawyering.

I. POLICY BY THE PEOPLE: SUBVERTING THE TRADITIONAL PARADIGM

For more than a half-century, legal scholars have dissected the role of lawyers in movements for social change, on both the left and right. Although this research examines lawyering from multiple perspectives, it is almost entirely focused on the promise and pitfalls of litigation. Lawyers as policy designers appear infrequently, and their role is not theorized. Similarly, while this literature emphasizes the theme of community empowerment in relation to litigation and, less frequently, transactional lawyering strategies, the research fails to present a framework for...
understanding and executing bottom-up policy design. New governance research on policy development and implementation provides important insights into policy design based on stakeholder participation and iterative rulemaking, but it fails to adequately address asymmetries of power in the policy process and how social movement mobilization may help correct for structural inequality.

Outside of law, the problem is reversed. Although there is a voluminous body of research on interest group participation in and implementation of public policy, there is little research on the role of affected communities in policy design and enforcement. Political science and management studies often ignore or minimize lawyers’ contributions in the policymaking process. Important studies on lobbyists and policymakers omit lawyers entirely, while other research recognizes the role that lawyers play as legal experts in the policymaking process but does not critically examine that role. These gaps pose significant problems for understanding how effective policy comes into being—and what counts as effective—thus disserving research in law and social science.

Our approach is to start from the bottom-up to build a new conception of policy design that centers the people’s perspective, while engaging seriously with the lawyer’s role. In the conventional approach, policy is typically crafted within the walls of city hall or the capitol and then applied in low-income communities and communities of color, often with harmful results. We are interested in a process that inverts this conventional sequence by developing responsive policy in community spaces and then bringing these policies to the legislature as demands from a mobilized base of affected constituents. It therefore engages with the literature on how norm creation from social movements is translated into law by shining light on the mechanisms driving policy change outside of court in legislative and administrative policymaking venues. Our conception of policy by the


people is defined by five key elements: (1) organic identification and analysis of social problems, derived from the experience and expertise of those affected; (2) design of solutions framed by people affected using their practices as a model of what works; (3) translation of language used by people in their day-to-day lives into policy and vice versa; (4) leadership by the people in policy design, advocacy, and implementation; and (5) creation of a proactive plan, built into policy, for community-led monitoring and enforcement, leading toward building greater power and creating new opportunities for organizing against systemic injustice.

To frame our intervention, we build on insights from social movement and institutional political theory referenced above, tying them together in a vision of policymaking that promotes democratic inclusion and thus reorients the lawyer’s role as a change agent within the democratic structure. We use the idea of “the people,” instead of “the community,” to capture what Professors Lani Guinier and Gerald Torres refer to as law-making processes that derive from, and benefit, diverse groups of people—the “demos”—especially those living on the margins with less power. Our Essay focuses on how policy can specifically serve those groups. Accordingly, we do not offer a general theory of all policymaking but rather a more targeted approach designed to promote greater equality in our increasingly unequal society. Policy by the people is focused on a particular type of policy initiative—that seeking to redistribute resources and power to marginalized groups in society—and thus requires lawyers to be accountable to those groups. Lawyering for this type of policy change therefore often involves being embedded in a coalition infrastructure in horizontal relationships with nonlawyer partners and community members seeking to influence elected representatives who are responsive to political pressures.

II. LOCAL POLICYMAKING AS AN ARENA OF PEOPLE POWER

Although the ideas we propose in this Essay apply to policymaking at all levels, our point of departure is local government. This is partly a product of our own experiences, which are shaped by our work with social movement organizations challenging housing insecurity and labor precarity through policy change in Los Angeles. However, our focus on local policymaking as an arena of power also flows from a political economy approach to economic justice that identifies structural opportunities for radical change at the local level. Social movements on the left have thrived and gained power in large cities—in both blue and red states—shifting policy on labor, civil rights, and environmental issues in ways that have reshaped law in urban areas where

15. Guinier & Torres, supra note 3, at 2743 (“Our aim is to better understand and recognize the important roles played by ordinary people who succeed in challenging unfair laws through the sounds and determination of their marching feet.”).

the majority of Americans live.\textsuperscript{17} Research identifies multiple reasons for progressive movements’ influence on city power, including proximity to powerholders and the changing demographics of cities—younger and more diverse—which have made them more receptive political sites.\textsuperscript{18} To illustrate how policy by the people works at the local level, we draw on the following four examples. In each, while multiple campaign tactics are deployed simultaneously—including direct action, organizing, popular education, and communications and narrative strategy—policy change is a crucial dimension of the broader movement agenda. In these examples, lawyers from the public interest law firm, Public Counsel, and law faculty and students at the University of California, Los Angeles (UCLA) participating in a course on community economic development worked directly with community organizers, residents, and leaders to support the policymaking dimensions of these campaigns.

\textbf{A. The LA Street Vendor Campaign}

The LA Street Vendor Campaign is a coalition of street vendors and community-based organizations working to advance economic opportunities and expand legal rights for street vendors in Los Angeles.\textsuperscript{19} For over a decade, the coalition has pursued a comprehensive and multifaceted organizing and policy campaign to end criminalization and create a legal pathway for low-income entrepreneurship.\textsuperscript{20} The campaign secured a major policy victory in 2018, when the coalition successfully advanced California Senate Bill 946 (SB 946),\textsuperscript{21} which required local jurisdictions, including the City of Los Angeles, to rescind criminal bans on street vending and create local regulatory programs.\textsuperscript{22}

Following the enactment of SB 946 and the subsequent adoption of a City of Los Angeles legal sidewalk vending program, the campaign turned its attention to eliminating the remaining


\textsuperscript{20} See id.

\textsuperscript{21} S.B. 946, 2017–18 Leg. (Cal. 2018).

\textsuperscript{22} CAL. GOV’T CODE §§ 51036–51039 (West 2022).
barriers in state and county retail food laws that prevent low-income street food vendors from accessing permits and economic opportunity. The LA Street Vendor Campaign coalition is led by street vendors, with support from community-based organizations. Lawyers work directly with community organizers and vendors to support coalition-led policy design, advocacy, implementation, and enforcement.

B. United Neighbors in Defense Against Displacement and Central City United

United Neighbors in Defense Against Displacement (UNIDAD) and Central City United are two neighborhood-based coalitions working to promote equitable development in South Central and Downtown Los Angeles, respectively, through “People’s Plan” campaigns. Each campaign has produced detailed policy language to reorient the city’s land use development process around the needs and priorities of low-income communities of color. The People’s Plans are part vision statement—an aspiration for equitable community growth—and part technical policy—the legal mechanics to make that vision an enforceable reality. In the UNIDAD and Central City United campaigns, lawyers drafted the People’s Plan policy frameworks to mirror the technical format of formal community plans that are adopted by the city, enabling the coalition’s policy demands to be incorporated directly into new municipal law. Through organizing, direct action, and advocacy, these campaigns demand a planning process that follows the direction of community leaders and helps build durable
community power in neighborhoods historically harmed by land use law and policies.

C. Keep LA Housed

Keep LA Housed is a coalition of tenants, tenant organizers, and community-based organizations that came together during the COVID-19 pandemic to demand protections for renters vulnerable to eviction and displacement during the public health emergency. In early 2021, the coalition engaged tenants, organizers, and lawyers to evaluate the barriers in existing rental assistance programs that were preventing tenants from achieving housing security. This evaluation informed the development of a series of responsive policies to strengthen existing rental assistance programs, eliminate (“cancel”) all rent debt during the emergency period, and prevent evictions and collateral consequences stemming from rent debt. The resulting policy platform, dubbed the “Debt Free Recovery Plan to Keep LA Housed,” has become a foundational document for coalition-organizing strategies like town hall “teach-in” events on policy demands, direct action protests, social media tool kits, media spokesperson trainings, talking points for public hearings, and legislative action. The coalition continues to mobilize tenants to build power and generate pressure in support of these policy demands, while sharing knowledge within a national network of movements demanding to cancel rent.

D. Unincorporated Tenants United

Unincorporated Tenants United is a coalition of community-based organizations and tenants formed to strengthen tenant protections for the nearly half-million renters living in unincorporated Los Angeles County. The coalition published policy analysis, created conditions for low-income tenants to lead public policy conversations, organized tenant advocacy, and drafted model policy language. The efforts culminated in L.A. County

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32. See KEEP LA HOUSED, A DEBT FREE RECOVERY TO KEEP LA HOUSED, https://drive.google.com/file/d/1Tz5wT6n1VBGwBisKtcLd5YjQk9ldNhc/view [https://perma.cc/JSG3-KU29]; see also ACT LA: All for Cmtty. Transit L.A., DEBT FREE RECOVERY TO KEEP LA HOUSED TEACH-IN, FACEBOOK (May 12, 2021, 8:30 PM), https://www.facebook.com/watch/live/?ref=watch_permalink&v=795073407796992 [https://perma.cc/Z8ZG-PQM3] [hereinafter Teach-In].
33. See KEEP LA HOUSED, supra note 32; Teach-In, supra note 32.
34. See, e.g., Teach-In, supra note 32.
adopting a comprehensive rent stabilization and just cause eviction ordinance in 2019— the largest expansion of rent control in California in a generation.

III. CREATING CONDITIONS OF POSSIBILITY: HOW LAWYERS SUPPORT POLICY BY THE PEOPLE

This part presents an action framework for lawyer participation in policymaking by the people, drawing on examples from the four campaigns introduced above. Here, we focus on the lawyer’s role, not to make the lawyer the protagonist in movement-building, but rather to provide a conceptual framework for understanding and evaluating how lawyers matter in the creation of responsive regulation. Although bottom-up policy campaigns decenter the lawyer and elevate community leadership, organizers do call on lawyers to support these campaigns. While playing a supporting role, lawyers perform essential strategic and structuring work that helps meaningfully push forward effective people-led policy design and advocacy. In this part, we seek to operationalize social change principles articulated in the growing law and in social movement literature by describing precisely how lawyers support the translation of normative claims for social change into effective policy. To do this, we trace the life cycle of policy development and use examples from practice to highlight how lawyers add value by contributing particular lawyering skills and producing specific legal instruments at the predesign, design, advocacy, and legacy phases of policymaking.39

Figure 1: Life Cycle of Policy Development

A. Predesign: Mapping Systems of Power from the People’s Perspective

We start by describing how lawyers may help spark policy development through problem identification in what we call the predesign stage, which involves mapping how systems of power operate at the ground level. This means creating processes for fusing two types of knowledge: (1) knowledge


coming from the people’s lived experience of injustice and (2) knowledge coming from lawyers’ analysis of legal barriers to equity and inclusion. Cogenerating this knowledge, and synchronizing it, requires rethinking traditional notions of lawyer fact gathering and legal research, which can help structure community activism and nudge inchoate organizing toward a more well-defined goal.

1. Uplifting the People’s Experience of Injustice Through Bottom-Up Fact Gathering

Creating conditions of possibility for change requires understanding what conditions are causing exclusion and inequality in the first instance. That, in turn, requires a mechanism for uplifting knowledge of the system acquired by those who know it best: the people who live under its rule (or often lack thereof). Here, we are concerned with going beyond simply affirming the validity of people’s legal knowledge, which is essential, to specify effective ways for mobilizing that knowledge and connecting it with expertise that lawyers bring to bear. Lawyers are well positioned to assist this type of bottom-up fact gathering through carefully designed research tools.40

Lawyers who are actively involved in community spaces with coalition leaders have a deeper understanding of existing conditions and priorities than they would if called in to address a specific narrow problem.41 Nevertheless, even the most embedded lawyers must still rely on deliberate techniques to solicit information and facilitate dialogue to shape key policy demands. This can be achieved by shifting from informal fact gathering to more systematic data collection using empirical strategies such as interviews, focus groups, and targeted surveys to enhance understanding of how current conditions could be addressed through policy change.

Interviews were an important fact-gathering tool in the LA Street Vendor Campaign drive to eliminate onerous legal barriers to code-compliant vending carts and permits. Although California decriminalized and legalized street vending, securing a cart that could pass inspection from the Los Angeles County Department of Public Health to sell food has remained exceedingly costly and complex.42 The cost-prohibitive nature of code-compliant carts means that street food vending remains illegal, as a practical matter, for most low-income food vendors.43 To help increase access to legal permits, the street vendor coalition asked lawyers to develop a granular understanding of how and where vendors confronted barriers in the existing permitting process. This required first understanding the

41. See Cummings, supra note 5, at 1695–96.
43. BENNETT ET AL., supra note 23, at 4.
problem from the vendors’ point of view—uplifting their knowledge of the system’s failings—prior to analyzing relevant regulations.

Toward this end, UCLA law students worked with attorneys and community organizers to conduct extensive interviews of street vendors, who had experiences that organizers knew to be common among the broader vendor community. The students developed a list of questions to illuminate daily experiences and elicit ideas for change.44 Through this process, they learned the details of how street vending regulations were being selectively and unevenly enforced, what feedback vendors had received in their interactions with county officials responsible for reviewing permit applications, and the innovative approaches to homegrown cart design and construction that vendors pursued in an effort to meet permitting requirements. None of this important qualitative data could be gleaned by simply analyzing the formal policy. By starting with in-depth interviews before launching into a legal analysis of the code, the legal team was able to create a barrier analysis (a tool described further below) that was directly responsive to how the existing policy framework was impacting vendors’ livelihoods.

Sometimes, such formal data-gathering techniques are not possible or desirable, and lawyers must identify other opportunities to learn from the people’s perspective. Much has been written about the utility of community education and participatory research to empower people affected by systems of repression, and we value those lessons.45 Here, we highlight the reverse flow of knowledge from the people to lawyers through popular education techniques designed to capture collective community memories to build political awareness, strategy, and power. In a popular education setting, lawyers, organizers, residents, and community leaders are simultaneously teachers and learners.46 While lawyers work with organizers to educate residents on existing legal frameworks, this presents an important opportunity for participants to educate lawyers about on-the-ground conditions that form the basis of policy development.

The foundational elements of the People’s Plan campaigns originated in the organic dialogue triggered by a popular education initiative called “People’s Planning School.” Through a collective effort to unpack the complex and inaccessible land use and planning framework, residents shared expertise that formed the basis of new policy demands.47 For example, discussion of how buildings are redeveloped helped elicit a history of prior uses and long-gone community assets in a particular neighborhood, enabling coalition lawyers to begin recording a collective community memory that

44. See id. at 38 n.29.
46. See White, supra note 45.
later became a central feature of policy advocacy. Similarly, a People’s Planning School session on the mechanisms that drive informal eviction sparked a conversation about several blocks undergoing rapid turnover from long-time community tenants to University of Southern California (USC) students. This conversation sparked additional participatory research, community walks, and public forums, which led to the creation of a memory map showing the transition of community housing to student housing over time. This map served as a powerful visual advocacy tool that elevated storytelling in the campaign’s strategy and informed the design of targeted policies within the People’s Plan for South Central Los Angeles to address displacement pressures in the areas adjacent to USC.

2. Deploying Legal Research to Identify How Law Codifies Exclusion

Once grounded in a deeper understanding of how people are experiencing harms, lawyers are better equipped to identify the precise legal and policy roots of that harm. Identifying the legal bases of harm can inspire movement activism by creating a target for change. Specifically, lawyers can situate social problems within a legal structure that demonstrates how law creates barriers to equity and inclusion. This type of barrier analysis is an important form of legal research that serves to structure and motivate next steps: enabling a problem statement to crystalize, which can in turn provide the grounding necessary for a comprehensive strategy involving organizing, direct action, communications, and policy advocacy. In this way, researching how a policy or legal system does not work has utility beyond the ultimate development of policy recommendations: It can create the scaffolding necessary to open dialogue among movement leaders, reveal points of intervention, and ignite next steps. In addition, by incorporating barrier analyses into effective visual tools, like flowcharts using design technology, this type of research can serve to educate community members on how to circumvent barriers while allowing activists to more effectively lobby for change.

After developing a deeper understanding of how street vendors were struggling to navigate permitting and equipment rules through the interviews described above, the legal team conducted a focused policy analysis that linked each of the harms and challenges identified by vendors to a precise regulation. An understanding of legal preemption—the control of local law

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50. See McCANN, supra note 5, at 48.
51. BARDACH, supra note 39, at 1–10.
by higher-order state law—helped the team determine that the manufacturing specifications for street vending carts and attendant equipment were dictated by county permitting regulations, which were in turn crafted to implement state food safety laws. The team scrutinized the local regulations against their state law source and identified a comprehensive list of technical requirements that were impeding vendors’ ability to operate a cart on the sidewalk. The team then organized the policy barriers by category—access, permitting, equipment, support infrastructure, and enforcement—and memorialized this analysis in a detailed—even dizzying—flowchart that outlined each step, and every attendant barrier, that vendors must navigate to secure a permit.\textsuperscript{52} This clear structuring and visual depiction of policy barriers was not just an abstract exercise but rather a crucial first step in helping the coalition name injustice and identify the specific ways that law contributed to it. And by merging the legal source of harm with the real-life impact of that harm, this analysis crystallized what had been an amorphous problem. From here, the team developed a concrete problem statement, which pointed toward directions for legal reform, and thus became the foundation for campaign messaging and ultimately for proposed legislation.\textsuperscript{53}

A legal barrier analysis was also an important spark to the Keep LA Housed coalition’s efforts to protect the most at-risk renters during the pandemic. Beginning in 2020, as COVID-19 ravaged the job market and compounded an already severe housing crisis,\textsuperscript{54} the coalition issued an unambiguous demand for elected officials to “cancel” rent to stabilize housing security for millions of low-income tenants facing the threat of displacement.\textsuperscript{55} However, just as online organizing strategies gained momentum, a series of intertwined federal, state, and local “rental assistance” policies upended the legal landscape for tenant protection by attaching brand new requirements and standards to the allocation of federal funding.\textsuperscript{56} For the coalition, it was clear that the eviction protections and rental assistance policies being adopted by state and local governments, while crucial, would be insufficient to meet the scale of the impending wave of displacement and

\textsuperscript{52} Bennett et al., supra note 23, at 43.

\textsuperscript{53} S.B. 972, 2021–22 Leg. (Cal. 2022).


\textsuperscript{55} Cancel Rent! Cancel Mortgages!, #HEALTHY LA, http://healthyla.org/ [last visited Mar. 4, 2022]; #HEALTHY LA, supra note 35.

homelessness. But in the rapidly evolving legal environment, there was also great uncertainty about what exactly was required, or legally possible, to bring Los Angeles’s emergency tenant protection policy framework in line with movement demands.

In this context, the coalition asked lawyers to analyze and explain the new state law allocating federal rent debt relief dollars to local jurisdictions, in order to help movement leaders understand where tenants were encountering barriers to eliminating their rent debt and put forward a viable proposal to cancel rent within the constraints of the new law. This legal barrier analysis included two important elements. First, the legal team provided internal guidance by synthesizing the overlapping federal, state, and local standards for rental assistance, and by distilling complex legal concepts and statutory requirements into accessible terms that helped catalogue barriers. Next, the legal team produced a public-facing visual aid that highlighted the unnecessary and unreasonable complexity of the existing law by presenting these barriers in a flowchart, comprising several pages, that mapped each step of the byzantine process and revealed the head-spinning array of hurdles facing anyone seeking rent debt relief. The visual aid and organizational framework helped shape policy demands to streamline the process as a step toward ending rent debt. Organizers in the coalition then developed a full policy platform and planned direct action protests, using the legal barrier analysis—and the flowchart as a striking visual depiction—to demonstrate the need for streamlining, for more resources, and for structural change to support tenants.

B. Policy Design: Defining Solutions Through People-Centered Process

Once local knowledge gained through innovative fact-gathering strategies is combined with legal research mapping barriers to inclusion and equity, policy by the people shifts to creating the foundations of responsive regulation. This process, which unfolds during the policy design phase,


requires lawyers to deploy what we call iterative client counseling: structured opportunities for sequential dialogue designed to translate the people’s lived experience into a platform, which is revised and refined into policy that represents the people’s interests. Iterative counseling, in turn, leads to drafting specific types of legal products—model policies and legal opinions—that are crucial tools in advancing policy discussions with official decision-makers and in neutralizing opposition.

1. Translating Lived Experience into Just Solutions Through Iterative Client Counseling

Effectively supporting a people-centered movement for transformative policy change requires that lawyers unlearn and challenge traditional notions of “expertise.” Lawyers understand the nuts and bolts of policy and the legal framework for policy adoption. But the people understand the practical and historical implications of policy in ways that most lawyers cannot comprehend. For instance, residents of historically disinvested neighborhoods know how to advance inclusive development because they have done the work of building community against the odds, without the benefit of resources or investment. These forms of expertise are important and must work in tandem. A key principle of people-centered policy design is effectively translating the lived realities of current law into responsive policy change, which is a process that involves multiple iterations of dialogue and counseling to elicit priorities and then transition those priorities and policies into legislation.

The process of policy translation was fundamental to the movement to legalize street vending, which—before the campaign mobilized to address health permit barriers—sought to design local laws setting forth spatial rules for vending across the city. To advance a vendor-centered approach, coalition lawyers were asked to craft a model ordinance that would protect and legitimize the spaces where vendors already worked, which were high-traffic areas essential to their livelihood. The model ordinance needed to rescind a harmful policy of criminalization and proactively establish regulations that would govern street vending locations and operations under a new legal framework.

Although coalition lawyers were trained to create the scaffolding of an ordinance, they were in no position to craft the substantive spatial regulations for street vending. It was the street vendors themselves, forced to develop working arrangements and navigate spatial conflicts in the informal economy for decades, who knew what worked in terms of sharing sidewalk space. Recognizing this expertise, coalition lawyers and law students set out to create an interactive process for street vendors to develop a policy framework for spatial regulations. This started with numerous site visits to key street vending locations, with the lawyers and students trading legal pads and pens for tape measures and chalk. After learning the various informal arrangements and best practices that street vendors had developed, the legal team began memorializing these standards in a broad policy outline, which
was then presented and revised numerous times based on additional feedback and guidance from street vendors. Once there was consensus on the policy framework among vendors, the team consulted outside experts about the potential application of other laws regulating sidewalk activity, such as the Americans with Disabilities Act of 1990. After incorporating feedback from these experts, the lawyers and students brought revisions back to working groups of street vendors to explain and solicit input on proposed changes. Only after consolidating this feedback did coalition lawyers finally set out to convert the policy outline into a model ordinance. Although the lawyers eventually drafted the technical ordinance language, this drafting constituted a *translation* of the policy content created by street vendors according to the systems and arrangements that had developed organically in their work.

The People’s Plan movement has similarly centered community expertise in iterative policy design by uplifting experiential knowledge from resilient communities under conditions of public sector neglect. The People’s Plan campaigns have demanded that new city planning initiatives not only acknowledge the racism and failures of prior planning but also actually undo the harm. A central feature of this new paradigm of land use planning is a recognition that, in the midst of deep irreversible harms created by planning policies, people have found ways to build community nonetheless. Neighborhood support networks, informal economies, and mutual aid efforts developed in disinvested and segregated low-income communities of color, creating spaces and conditions for community and culture to thrive despite structural barriers to wealth and opportunity, and in the face of violent oppression. The People’s Plan campaigns have aimed to acknowledge and elevate this community building, and the residents who served as its architects, in new planning initiatives.

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64. See, e.g., GAYE THERESA JOHNSON, SPACES OF CONFLICT, SOUNDS OF SOLIDARITY: MUSIC, RACE, AND SPATIAL ENTITLEMENT IN LOS ANGELES 1 (2013) (“Locked in by residential segregation and territorial policing, locked out of the jobs, schools, and amenities in neighborhoods of opportunity, and sometimes even locked up in the region’s jails and prisons, Blacks and Mexicans in Los Angeles turned oppressive racial segregation into creative and celebratory congregation. They transformed ordinary residential and commercial sites into creative centers of mutuality, solidarity, and collectivity.”); see also MANUEL PASTOR & PIERRETTE HONDAGNEU-SOTELLO, SOUTH CENTRAL DREAMS: FINDING HOME AND BUILDING COMMUNITY IN SOUTH L.A. 1–3 (2021) (describing the “homemaking” process of Black and Latino residents in South Central Los Angeles amidst demographic changes).
As in the sidewalk vending example, lawyers for People’s Plan campaigns worked closely with organizers and resident leaders to help translate experiences and ideas into policy. Lawyers participated in People’s Planning School’s popular education events, joined town hall forums to discuss development patterns and priorities, debriefed community benefits agreement campaigns, created surveys and charrettes, and spoke at length with residents. Focusing on what residents wished to see in their neighborhoods and what they loved about their communities allowed the campaigns to develop an affirmative platform for equitable growth. Moreover, freed from the bounds of conventional land use and zoning norms, the campaigns were able to envision alternative community-ownership models for affordable housing, reimagine industrial infrastructure to support low-income entrepreneurs, and define the key features of community-serving legacy small businesses. As a result of this process—starting with the imagination and vision of local experts and only turning to technical policy drafting in the last stage—the campaigns were able to articulate the harms of existing land use models while also offering a fully developed alternative rooted in local experience.

2. Drafting Policy Documents as Campaign Assets

As the discussion in this section has underscored, lawyers contribute to policy design by drafting technical policy that conforms to the language and format required by law, while also ensuring that new legal products are consistent with issuing bodies’ jurisdictional authority—for local governments, this means ensuring that local action is not preempted by state law. Two critical drafting products that lawyers generate in this context are model policies and legal opinions, which require different types of drafting approaches rarely taught in law school.

Above, we described the process of translating community practice into policy language through iterative counseling, which involves the gradual evolution from general principles and priorities to precise and technical legislative language. Here, we focus on the output of that process, model policy, defined as legislative drafting that is not yet adopted or codified by the legislature but that serves as a template that a legislature will, if the campaign is successful, eventually incorporate into a local ordinance or state bill. People-led model policy drafting creates an instrument to give legal effect to movement principles and a tool to strengthen advocacy efforts. The drafting process gives people control over framing the issue, while the use of model policy in advocacy can force legislators and political opponents to respond to the movement’s model and thereby shape the conversation on the coalition’s terms.

Lawyers are well positioned to anticipate opportunities and work with community members and organizers to draft responsive model policy that is embedded in a focused advocacy strategy. Drafting model policy requires ensuring horizontal conformity: Does the model policy conform with legal requirements in the relevant jurisdiction? It also requires vertical
conformity: Does the policy conform with legal requirements from higher level jurisdictions under preemption? This style of model policy drafting is objective and declarative. Policies are drafted to fit within an existing legislative scheme and must be synchronized as such. The process involves gathering examples from other jurisdictions and using that material to fashion new law. The audience in the short term is comprised of legislators or voters asked to pass the law; in the long term, it also includes beneficiaries of the law and courts asked to interpret it.

Model policy drafting was key to the movement to legalize street vending. After the counseling described above, the final stage—translating a policy outline into ordinance language—required a specific set of drafting skills. Coalition lawyers ensured horizontal conformity by closely analyzing Los Angeles’s Municipal Code to determine drafting conventions, identify relevant terms already defined in the code, and integrate appropriate cross-references to relevant provisions. The lawyers also researched state laws governing the public right of way and relevant case law on First Amendment activities on public sidewalks to ensure the model ordinance achieved vertical conformity. Finally, lawyers closely reviewed dozens of street vending ordinances in other jurisdictions to identify best practices and pitfalls in order to generate ideas for turning vendor policy priorities into enforceable legislation.

The creation of this model ordinance was not strictly necessary to change city policy. The coalition could have just advocated for changes and then reviewed and commented on draft ordinances that the city produced. But creating a structure and devoting significant time to working with vendors on a model ordinance empowered vendors to step into their role as experts and gave the coalition a powerful tool to challenge city council inaction and otherwise contest a policymaking process that was apathetic to the urgent needs of low-income workers. In public hearings and private meetings with city officials, vendors were able to hold up their model ordinance as a responsive policy solution to the challenges being discussed. When politicians sought to delay by asking for more analysis during public hearings, the coalition pushed back by pointing to the model ordinance as proof that vendors had stepped up to do the hard work and were ready with solutions. When the city did eventually propose and assess policy ideas, the coalition evaluated these ideas through the lens of the vendor-driven model ordinance and were prepared with a rapid response.

A policy campaign must be able to defend the legality of its demands. As we have suggested, this requires evaluating the constitutionality of proposed local policy and the risk of state or federal preemption. Lawyers can do this by drafting legal opinions in support of model ordinances and policy platforms. Unlike many other advocacy materials, legal opinions are

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68. See Hernandez, supra note 25.
objective in tone—concise, free of jargon, and providing a careful assessment of the legality of the policy recommendations at hand. Often, a movement advancing policy change will make a strategic decision to push ambitious and unprecedented policy demands as a tactic to help shape public dialogue, organize popular support, and increase its influence and power. In this case, an objective legal opinion is important, not to dissuade action or temper policy proposals, but rather to inform strategic decisions that balance the risk of untested policy against the movement-building benefits of more aggressive demands. This analysis should assess the immediate risk of the proposal being struck down, as well as the potential longer-term impact of creating bad legal precedent in an important area of evolving law.

Keep LA Housed’s ambitious effort to eliminate unpaid rent debt accrued during the pandemic provides an important illustration of how campaigns can benefit from legal opinions. Because of the unprecedented nature of both the pandemic-induced eviction problem and the proposed policy response, questions about the legality of canceling rent immediately arose. Recognizing that they would encounter these questions in every advocacy meeting, coalition leaders requested legal analysis to help them effectively frame their innovative demands to uncertain politicians. Lawyers thus memorialized the analysis that had backed the policy development process, producing two separate legal opinions: one evaluating the constitutionality of various methods of rent debt elimination and the other providing a preemption analysis of local legal authority to adopt the recommended policies. The coalition sought these opinions for dual purposes: (1) to guide the translation of renters’ policy demands into legislation that stood the best chance of withstanding legal challenge and (2) to arm the campaign with facts and analysis when opponents questioned the legality of the proposals. The opinions presented a thorough and objective assessment of various policy options and articulated how policy goals could be drafted to reduce risk. The coalition relied on these opinions to successfully advocate for the introduction of a local initiative that would study the potential for eliminating existing rent debt. This policy is still under consideration, but the motion to initiate the process represented a significant step toward the coalition’s policy demands.

C. Policy Advocacy: Building Power Through Activism

Once model language and supporting legal documentation are drafted, advocacy shifts from policy design to building political support and navigating the procedures for enactment. In this policy advocacy phase, lawyers help movements make arguments to persuade decision-makers of their position. These arguments must first present a clear and compelling

69. #HealthyLA, supra note 35.


71. SOLIS, supra note 70.
**Problem Definition.** Eugene Bardach provides guidance on this key step, recommending using evaluative statements that specify the problem in terms of existing deficits or excesses and being careful not to define the solution into the problem.\(^72\) With a clearly defined problem, the *causal story* becomes important. Deborah Stone presents a useful framework for connecting causal stories to policy, describing a process in which blame is assigned to actors for conditions that can be regulated through the proposed policy.\(^73\) In this context, framing arguments to multiple audiences, or “targets,” to persuade them of the legitimacy and efficacy of policy is crucial.\(^74\)

These arguments play out in two important arenas: the public domain and the policymaking process. Lawyers provide support in these areas through *narrative drafting* to produce public-facing analysis that shapes the public discourse around movement demands, and by identifying *legal hooks and leverage points in the policymaking process* that can widen access for people to intervene and advance advocacy strategies.

1. **Shaping Public Discourse Around the People’s Priorities**

Although the legislative body is responsible for policy adoption, shaping the public discourse around a policy—by telling compelling stories and by centering the voices of those most impacted—is a fundamental strategy for shifting political dynamics and for pressuring politicians to support movement demands. Bottom-up policy campaigns have influenced public discourse by injecting persuasive policy analysis into the discussion—through reports, white papers, policy briefs, and other written products—as well as by securing media coverage that uplifts the expertise and personal stories of people most impacted by the policy in question.

*Policy reports* were an important tool in both the LA Street Vendor Campaign\(^75\) and the Unincorporated Tenants United campaign to advance rent control.\(^76\) In both, law students worked closely with coalition lawyers and organizers to draft and publish comprehensive reports that presented quantitative and qualitative data analysis in support of coalition policy goals. Reports are common in the policymaking arena, but in most instances these reports are published by grassroots organizations, think tanks, university centers, or other elite institutions and well-funded special interest groups. The policy by the people model mobilizes the policy report as a tool to inject

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\(^72\) See Bardach, *supra* note 39, at 1–2, 7, 26.


\(^75\) Bennett et al., *supra* note 23.

the perspectives of those historically excluded from and harmed by public policy. In both the street vendor and rent control campaigns, reports featured personal stories and on-the-ground knowledge, as well as empirical and legal analyses. The rent control report presented original data that crystalized the magnitude of the affordable housing crisis in L.A. County, alongside stories about how that crisis played out in people’s homes and in low-income neighborhoods across the region. The street vending report exposed the ways an outdated retail food law prevented tens of thousands of low-income entrepreneurs from formalizing their businesses, buttressed by stories and testimonies from vendors about how that exclusion was affecting their day-to-day lives and impacting their community.

The legal team drafting these reports was able to effectively integrate people’s perspectives and expertise with supporting data and analysis by executing the predesign and policy design phases described above and utilizing persuasive drafting skills to present priorities and demands within a format familiar to policymakers. In both cases, coalition leaders and members gave direction on how they hoped to use the report for direct advocacy and organizing objectives. The legal team then created a work plan and scheduled frequent check-in meetings with leaders to update on progress, workshop challenges, and confirm the accuracy and responsiveness of various drafts.

In the reports, the legal team incorporated the three key elements of policy advocacy described above: problem definition, causal story, and audience targeting. The reports drew on both dimensions of knowledge described in the predesign phase—the people’s experience of injustice and the lawyer’s analysis of the legal source of that injustice—to present an evaluative problem statement. The rent control report highlighted the problem of too many people living at the precipice of homelessness, while the street vending report focused on the dual problems of too many entrepreneurs being denied economic opportunity and too few food vendors participating in systems of food safety regulation. A causal story featured heavily in each report. The rent control report told the story of a speculative housing market that disproportionately harmed low-income communities and communities of color. The street vending report told the story of inapt policy and structural racism: generations of local ordinances designed to exclude immigrant workers created the effect of a statewide ban, causing other statewide retail food laws to be designed without street vendors in mind. And each report

77. Id. at 29–33; BENNETT ET AL., supra note 23.
78. See BONETT ET AL., supra note 76, at 16–25.
80. See BONETT ET AL., supra note 76, at 16–43 (describing the impact of rent burden, rent gouging, and formal evictions on housing instability and the history and geography of local rent control policies in California).
81. See BENNETT ET AL., supra note 23, at 12–13 (describing the history of criminalization of sidewalk vending in California, and how, despite recent reforms, certain state retail food laws preserve a framework of criminalization and exclusion).
was carefully tailored to speak to decision-makers and supporters by presenting arguments to neutralize anticipated opposition. This drafting style allowed the reports to serve multiple purposes. They gave ammunition to supporters. For example, in the case of the rent control campaign, the report provided original data to spotlight the scope of the problem, and in the case of the street vending campaign, the report isolated the source of harm and focused on the precise target for policy change. The coalitions also leveraged these reports to organize events around their public release. Unincorporated Tenants United convened a press conference that generated sufficient coverage to force elected officials to respond to the rent control report’s findings, building additional political pressure. The street vending coalition organized a “teach-in” event around the report that ended by urging supporters to make calls and send emails to elected officials. Ultimately, organizing around the street vending report pressured decision-makers to support its proposed policy changes, and resulted in the introduction of a bill that would modify the state retail food law in line with the report’s recommendations.

Both reports also helped neutralize opposition. The rent control report included a section debunking common arguments against rent control and elevating data showing how rent control can help stabilize housing prices. The street vending report anticipated opposition to changing food cart regulations (for example, its proposal to reduce the number of required sink compartments for vending carts) on the ground that the regulations would imperil public health. The report sought to preemptively control that narrative with research and analysis concerning the public health benefits of the coalition’s demands.

2. Demystifying the Policymaking Process to Leverage Organizing

In addition to shaping public discourse, policy advocacy involves direct engagement in the formal policymaking process. For policy campaigns, legally mandated touchpoints within this process—such as public comment periods, public hearing requirements, and policy committee referrals—can present important openings for movements to exert leverage over policy outcomes and to wield collective power. By demystifying the procedures and structures that guide the legislative process, lawyers help policy

82. Each report was drafted to include appendices, with infographics, intended specifically to be distributed as handouts in advocacy meetings.


campaigns identify such leverage points and exploit openings for organizing while also directing action in support of policy demands. A lawyer’s understanding and explanation of technical procedural requirements can uncover opportunities for expert testimony, targets for direct action, and other tactics to build momentum in favor of a set of policy demands.

In support of the Unincorporated Tenants United rent control campaign, coalition lawyers partnered with community organizers to facilitate dialogue that clarified the intricacies of the legislative process at the County of Los Angeles Board of Supervisors. Coalition lawyers then assessed the results of power mapping analyses to inform campaign decisions on which elected officials should be recruited for leadership, which needed to be targeted for additional advocacy efforts, and which coalition partners were best positioned to lead those efforts. Based on this assessment, lawyers helped organizers and community leaders prepare for meetings with elected officials by collaborating on a prepared meeting agenda to emphasize renters’ voices, develop a response to anticipated opposition, and create space for renters to tell personal stories and speak truth to power.

Later, lawyers worked closely with organizers to develop a public comment strategy—helping to identify main arguments, assess which coalition organization was best equipped to carry the message, and craft succinct talking points that could be modified to fit the short three-minute public comment allowance for public hearings. Organizers then worked with residents to practice selected topics and talking points. The result was an organized strategy that wove together personal stories and persuasive testimony into a full narrative arc that covered the multifaceted policy platform. This show of force in public hearings was crucial to outweighing opposition, energizing an organized base of tenant leaders, and signaling formidable people power in support of new tenant protection policies.

B. Legacy: Mobilizing Policy Change Toward Inclusive Democracy

This section spotlights what we call the legacy phase of policymaking—focusing on how lawyers may promote inclusive democracy by thinking proactively about mechanisms for people-centered implementation and policy design that can amplify structural change beyond a single campaign. It is important to distinguish participation from power building in the legacy

86. There are several methods of power mapping, all aimed at creating a visual guide for the various actors that will influence a policy campaign, ranging from decision-makers to potential influencers, whether allied, oppositional, or neutral. See Stoecker, supra note 40, at 70–71; Training & Capacity Building, SCOPE, https://scopela.org/our-work/training/ [https://perma.cc/4HG6-46HE] (last visited Mar. 4, 2022); Alexi Nunn Freeman & Jim Freeman, It’s About Power, Not Policy: Movement Lawyering for Large Scale Social Change, 23 CLINICAL L. REV. 147, 155–160 (2016).

While ensuring that people play a meaningful role in implementing policy can yield more responsive outcomes, policy by the people is ultimately concerned with achieving “policymaking as power-building”—deploying processes and tactics that generate meaningful power to dismantle structures and procedures that perpetuate injustice. This requires a comprehensive approach to policy design and enforcement, which involves considering the composition of formal advisory committees, the level of authority granted to people affected by policy in monitoring and implementation, and where in the process that authority is exercised. Lawyers can work with organizers and movement leaders to conceptualize and draft policy mechanisms that increase the power of the people to meaningfully shape the implementation of policy and to leverage these same mechanisms to establish new openings for continued contestation and organizing for greater change.

1. Centering the People in Policy Implementation

So far, we have discussed drafting in connection with translating community demands into model policies supported by legal opinions. Here, we are concerned with how lawyers, after policy adoption, use drafting to strategically embed opportunities for additional leadership development and power building that arise after policy adoption in the implementation phase. Through strategic drafting, lawyers can help campaigns plan and create conditions for effective implementation before that phase begins. In this regard, lawyers may be called on to draft policy language that modifies the composition of traditional oversight and advisory structures to be more inclusive and to exert more control. Likewise, lawyers may draft language that leverages these bodies to function as a training ground for leadership development.

The Unincorporated Tenants United coalition identified a significant opportunity to involve tenant organizers and movement leaders in the oversight and administration of the countywide rent control law it helped to pass. Most rent control policies in California include a rent control board, which is empowered to administer the program through actions such as adjudicating requests for rent adjustments and appeals, and creating a budget for oversight and enforcement. In the case of L.A. County, coalition lawyers researched the composition of boards in other jurisdictions with rent

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89. K. Sabeel Rahman, Policymaking as Power-Building, 27 S. Cal. Interdisc. L.J. 315, 356 (2018) (“Institutions and processes for policymaking are not just neutral responders to the external pressures of interest groups. Rather, they themselves shape the political terrain on which individuals and constituencies attempt to exercise political power. Thus, institutions and processes can be designed in ways that pro-actively catalyze and facilitate the ability of groups—particularly diffuse, under-resourced, marginalized, or traditionally overlooked groups—to be better able to exercise power and influence.”).
control ordinances, as well as the relevant laws governing the appointment or election of rent board members. Backed by this research, the coalition developed policy recommendations, and lawyers drafted model language for an appointed oversight board with membership reserved for low-income renters and housing justice advocates.92 While full implementation has been impeded by the COVID-19 pandemic, the creation of appointed leadership positions for renters and advocates embeds a space in the formal implementation process to wield “inside” influence in coordination with continued “outside” pressure.93

In the People’s Plan campaign led by Central City United, coalition members sought to identify opportunities in the implementation phase to enhance the influence of low-income downtown residents over planning and development decisions going forward, while simultaneously establishing a pipeline for community leaders to step into formal oversight and administrative roles in land use governance. A key feature of the People’s Plan policy recommendations was a program to generate new revenue—through the sale of development rights—that would be earmarked exclusively for housing justice initiatives that were crafted by coalition leaders, such as supporting tenant acquisition and ownership of buildings, funding community land trusts, creating permanent supportive housing, and funding enforcement of tenant protections. Lawyers drafted program mechanics based on coalition priorities. Chief among them was the creation of an oversight commission—consisting of downtown residents affected by the affordable housing and eviction crisis and comprised of at least 50 percent of current or former houseless residents—to exert control over funding allocations. The City Planning Commission approved a draft of the plan that integrated the coalition’s exact recommendations. While the coalition awaits a final hearing at the Los Angeles City Council, organizers are developing strategies to identify, recruit, and train community members to step into leadership roles in monitoring and enforcing equitable development standards.

2. Designing Policy that Embeds Organizing Opportunities

Beyond carving out a role for community members to exert influence in policy implementation, lawyers also support strategies to embed opportunities for future organizing within legislation. In this sense, policy by the people embraces policymaking as a process not just to design and implement policy but also to create new conditions for power building. This approach conceptualizes policy as an active framework that encodes opportunities for future organizing and creates space for continued

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92. Bonett et al., supra note 76, at 49.
93. Cf. Rahman, supra note 89, at 348–50 (questioning the ability of tenant groups to leverage power and influence through appointments to the Rent Guidelines Board, a rent stabilization administrative board in New York City, relative to a commission created by a community benefits agreement in Oakland where community members hold the balance of power).
contestation within institutional structures. This type of encoding is seen in policy provisions that require ongoing reports or public hearings or that establish performance metrics and periodic data reporting requirements that give additional leverage to organizing campaigns.

The Central City United People’s Plan campaign adopted this approach. In developing a final plan, lawyers researched best practices from other jurisdictions to develop recommendations for a Racial Justice and Equity Analysis. This new program would require the city to evaluate, on an ongoing basis, the racial equity impacts of land use policy and to recommend “transformative or restorative strategies, such as targeted plan and code amendments, if harm is identified.” Historically, community plans in Los Angeles are static: once adopted, they sit unchanged for years, even decades. The Racial Justice and Equity Analysis, on the other hand, would give the coalition a tool to advocate for additional policy changes throughout the life of the plan, creating new legal hooks to continue engaging coalition members and residents around responsive development standards. By tethering this built-in process of ongoing policy reform to racial justice, the analysis incorporates the community plan into the larger movement to dismantle discriminatory planning and development polices in the city.

The Keep LA Housed coalition also worked to strategically embed policy triggers that could be utilized for future organizing and advocacy efforts. Part of the coalition’s policy platform was a requirement for the city to: collect and share data about access to the existing rental assistance program (organized by income, race, gender, age, disability, and neighborhood), monitor and report data on disparities in access on a regular timeline, and evaluate additional policies needed to respond to disparities and stabilize housing for low-income renters. Coalition lawyers drafted—and organizers successfully advocated for—a data collection provision to be included in a Los Angeles City Council directive codifying this element of the policy platform. In turn, the city department responsible for administering the rental assistance program created an online public dashboard showing the demographic data of renters able to access rent debt

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94. See Rahman, supra note 89, at 368.
98. KEEP LA HOUSED, supra note 32.
relief from the program, updated in real time.\textsuperscript{100} By requiring ongoing disparate impact analysis of rental assistance, the coalition ensured an information flow to sustain public awareness about the racial justice implications of the rent debt crisis, plant the seeds for future advocacy and agitation focused on discriminatory impacts, and galvanize further efforts to mobilize support for adopting the remaining provisions of the policy platform.

IV. TOWARD A NEW THEORY AND PRACTICE OF POLICYMAKING

The concept of policy by the people aims to broaden our conception of the lawyer’s role in social change by identifying the important skills lawyers contribute to crafting law through the legislative process that advances goals set by the people affected—what we have called responsive regulation. Beyond highlighting technical skills lawyers bring to bear, the concept challenges conventional understandings of what it means to do policy and thus draws attention to a new dimension of lawyering for social change. In this part, we step back from the mechanics of policy by the people to consider its implications for lawyering and legal process.

A. What It Means to Design Law and What Law Means

Policy by the people imagines distinctive social change roles for lawyers, while also reframing the meaning of law reform—away from litigation toward advocacy for policy change—in ways that spotlight new advocacy opportunities and challenges.

1. Rethinking the Lawyer’s Role

In Part III, we argued that lawyers can play an essential role in people-centered policy campaigns by using specific lawyering skills to create conditions of possibility throughout the life cycle of policymaking. Here, we zoom out to consider two challenges raised by this role. First, we consider challenges stemming from efforts to fashion responsive regulation from underlying laws historically used to perpetuate inequality and exclusion, while helping movements shift from a reactive to a proactive posture. Second, we consider challenges for lawyering practice raised by reconceptualizing notions of client and case in relation to policymaking.

Advancing policy by the people involves a culture shift in terms of the way lawyers think about legal reform that moves from considering law as a force of exclusion to be challenged to understanding law as a force for inclusion that can be built from the ground up. At times, this involves repurposing the same tools that produced harm in prior policy design, which raises fundamental concerns about whether policy reform, at worst, simply reinforces underlying structural inequality or, at best, tinkers around the

margins of an unjust system. In response to this dilemma, the policy by the people model seeks to break down harmful policy into building blocks that can then be reassembled into new frameworks that excise or reformulate negative elements to advance priorities aligned with social movement demands.

This was the approach taken in the People’s Plan campaigns, which began from an explicit recognition that the land use tools being molded to resident priorities had been used for past discrimination. The lawyers’ efforts to identify the legal rules used to codify structural injustice helped the campaigns imagine how to dismantle the system as well as how that system might be rebuilt around equity and inclusion. This process contributed to the design of more responsive regulation while also shifting the coalition’s orientation from a defensive posture to a proactive stance. For instance, instead of fighting a resource-intensive battle for community benefits in relation to a single development site, the community plan offered a vehicle to scale up community benefits standards to apply to all future development. This framework created space for residents and coalition leaders to present an affirmative case for a particular vision of inclusive growth, rather than framing the campaign as a fight against a harmful development project.

In another example, when the LA Street Vendor Campaign met extensive and prolonged resistance from the Los Angeles City Council for its proposal to legalize sidewalk vending, lawyers researched state preemption to consider how the state legislature might impart standards necessary to catalyze action at the local level. When the coalition succeeded in introducing state legislation to compel the city to decriminalize and legalize sidewalk vending, lawyers were able to ensure that specific language was included in state law to prevent harmful provisions being proposed at the local level. In this way, preemption, which has typically been weaponized by conservative actors to blunt local progressive policy change, became a legal tool to overcome recalcitrant local jurisdictions and advance stronger local policy.

These examples demonstrate how lawyers can help social movements disassemble exclusionary policy structures and then reassemble those tools in a different configuration to advance community priorities. Refashioning law in this way raises the deep political question of co-optation: whether

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101. See Truong et al., supra note 47, at 3; see also Cent. City United Coal., Cent. City United People’s Plan 3 (2022), https://static1.squarespace.com/static/5e2f9c1251bedc373bece0fa/t/5e334e9e74383164f98c2bd9/1580420261516/CCUPP2020-Download-FINAL.pdf [https://perma.cc/G22M-ZL4A].

102. Cal. Gov’t Code § 51038(b)(3) (West 2022) (effective Jan. 1, 2019) (“A local authority shall not require a sidewalk vendor to first obtain the consent or approval of any nongovernmental entity or individual before he or she can sell food or merchandise.”). Prior to the adoption of S.B. 946, the City Council was debating several severe restrictions to appease opponents of legalized street vending, including a proposal to grant property owners the ability to veto a vendor’s proposed location. See Editorial, Legalize and Decriminalize Street Vending in L.A., L.A. Times (Dec. 10, 2016, 6:00 AM), https://www.latimes.com/opinion/editorials/la-ed-street-vending-20161211-story.html [https://perma.cc/354A-2QHG].

buying into existing legal concepts—using the “master’s tools”—limits the transformative ambitions of reimagining new systems that work better for the people or whether it is possible to reclaim legal tools to push the existing system in more inclusive directions. Our view is that refashioning is not inconsistent with reimagining—indeed, both are essential strategies that can work together. Reimagining sets the north star for system change, while refashioning helps move toward that direction. Indeed, policy by the people is intended to help facilitate reimagining projects through sustained engagement with people-led social movements seeking to translate transformative visions into structural changes to democratic governance. In this sense, the question is not how to avoid using the “master’s tools” but rather how to do so effectively and toward broader goals championed by movements of marginalized people.

In addition to deepening understanding of how lawyers approach policy change, policy by the people also requires a shift in understanding client relations and what constitutes a “case.” Client relations in policy by the people depend on the nature of local groups challenging injustice and organizing for system change. In the examples we provide, organizations leading policy campaigns were politically sophisticated, with experience engaging elected officials and building cross-sector coalitions. In a different scenario, where organizations are venturing into policy work for the first time, lawyers must engage in capacity building prior to launching into the policy design process. In all cases, given that lawyers are crafting policy that builds on but transcends the interests of a specific client group, there may be potential for client-cause conflict. Lawyers engaged in policy by the people seek to manage this problem by working with groups that are as broadly representative as possible; and yet lawyers must also consider the larger universe of people impacted by policy. While lawyers have been criticized for overreaching in these reform spaces, there are ways in which their professional training, which teaches how to manage conflicts and respect client decision-making, makes them keenly sensitive to inevitable tensions over tactics and goals and makes them well-suited to help shape policy outcomes that serve their client’s immediate interests while also addressing the broader impact—intended and unintended—on similarly situated groups. Making this tension a central aspect of the lawyer-client conversation throughout the policy process will help effectively manage it.

From a lawyering perspective, policy by the people also requires attending to a related tension between discrete policy change and broader social change goals—raising questions about what counts as “success” and when the “case” ends. Our theory of policy by the people situates policy change within a larger agenda that also includes long-term power building by groups historically excluded from the political process. In our framing of the lawyer’s role, policy change is an important outcome, but one pursued in service of other favored outcomes relating to correcting power asymmetry.

Based on direction from campaign leaders, the lawyer may be tasked with facilitating a policy development process and drafting a policy platform for purposes of contesting existing structural injustices, shaping public dialogue, organizing popular support, and increasing the influence and power of the movement. Lawyers in this setting are not primarily concerned with finding the legal levers to pass a policy but with collaborating to develop policy ideas that break with conventional norms in ways that promote wider culture-shifting and power-building goals. In this regard, the policy campaign is part of a larger strategy that transcends the four corners of the policy in question and that calls on lawyers to help develop bold proposals in the short term that feed into a longer-term process to reshape the political environment to make more radical reform possible. In some cases, a movement’s policy demands might be intentionally framed to be more radical than the current political opportunity structure would likely support because the movement seeks to change the popular discourse to create space for reimagination beyond the specific policy at issue. This could mean supporting a policy campaign bound to fail—in order to generate more attention and resources for a new round of policy contention—or simply drafting a model policy used as a public relations and organizing tool as a movement seeks to build early momentum.

2. Reimagining Law Reform

Policy by the people is designed to reorient how we think of law reform, moving it from the realm of impact litigation to impact advocacy. The role of policymaking as a legal strategy to correct injustice is historically overshadowed by the role of litigation and direct services. As we have argued, policy deserves more attention as a fundamental tool of lawyering for progressive social change. Toward this end, policy by the people highlights new law reform opportunities: subverting traditional policymaking centered on elite institutions and inaccessible procedures, by bringing the practice of policy development from the people to the halls of power instead of the other way around. But this model also raises practical political constraints on law reform that underscore the importance of creating and exercising power as a precondition of effective policy design.

Policy by the people necessarily runs through the existing legislative system and thus depends on persuading political officials. Aligning policymaking with organizing is intended to pressure and move those decision-makers toward the people’s demands, but the ultimate decision-making power remains in the hands of elected legislators. As a result, electoral politics plays a crucial role. Social movements seeking to advance policy by the people require a comprehensive political strategy, of which legal advocacy is but one piece. This involves targeting advocacy to the existing configuration of the legislature while also seeking to shift the
political opportunity structure to be more favorable to movement demands over time. It is therefore crucial for policy campaigns to incorporate an electoral strategy. A wide range of constraints, from tax-exempt law to funding parameters, have historically limited the effective integration of electoral strategy into a people-led policy campaign. We do not address these constraints here, but we note that the link between bottom-up policymaking and electoral politics deserves deeper interrogation and should feature in future analysis of lawyering for policy change.

By emphasizing the granular realpolitik of policymaking and the need for comprehensive political strategy, policy by the people departs from new governance theory’s emphasis on “stakeholder participation” as a central feature of responsive regulation.107 While we support the idea of participation, we seek to move the discussion toward the exercise of power, which profoundly shapes outcomes in our political system. Participation detached from power is unlikely to shift the terms of debate or to put pressure on elected officials to direct resources toward outsider groups, particularly in a context of significant economic and political inequality. For this reason, policy by the people is understood as an ongoing process designed to produce social change cascades that create opportunities for policy wins and more resources. These cascades can be harnessed by movements to gain greater influence over local politics: ultimately shaping who gets elected and thereby expanding the opportunity structure for more responsive policy over time.108

B. Proposals for Teaching and Practicing Policy by the People

The approach we have outlined, by spotlighting the lawyer’s role in working with mobilized groups to design policy from the bottom up, also has important implications for how we think about training lawyers and building policy capacity in practice. To move that thinking forward, we offer proposals for how to strengthen the teaching and practice of policy by the people.

1. Law School Curricular Change

Law schools currently do an inadequate job teaching policy design as a core element of what lawyers do. Instead, policy development tends to be reserved for upper-division specialty courses, often taught through clinics. While we support these efforts, we believe they are too little, too late. To augment them, it is essential to reframe law school pedagogy to deepen the recognition of “policy” as an integral part of “law.” Doing this requires change at multiple levels: a conceptual shift in how policy is understood as part of the legal system alongside a more practical shift in the types of skills students are taught.

From a conceptual standpoint, it is essential to approach teaching policy from a critical theoretical perspective that highlights how policy is a product

107. See generally Simon, supra note 8.
of processes distorted by unequal power that have encoded structural racism and other forms of inequality. This perspective creates necessary space for analyzing the structural roots of policy design, which reveals how it has been shaped by underlying forces of oppression while also showing how it has been leveraged to promote equal justice. Traditional approaches to this structural analysis center on how litigation and court-based reform can serve to challenge oppressive policy in a liberal democracy based on majority rule through the assertion of minority rights. Given the well-documented constraints on this method, particularly in a context of judicial conservatism, we have argued in favor of bottom-up policy reform, targeted at cities as sites of favorable political opportunity, as a complement to social change litigation. Methodologically, law teachers could explore policy reform through analysis that empirically examines the ways in which policy has advanced social and economic disenfranchisement, while also analyzing how movements of the past have utilized disruption and organizing to win important policy gains at the national and local levels. As we have emphasized throughout this Essay, teaching policy therefore requires centering an analysis of power in law: specifically, by assessing how power asymmetries have shaped policy and how power can be cogenerated by lawyers and community groups to change policy.

At a more practical level, students should be equipped with specific skills that permit them to interrogate policy’s role in social inequality and to redesign policy in ways that challenge that inequality. This should occur across the curriculum through a “pervasive approach” that begins in the first year (“1L”) and builds through deliberate sequencing in the upper division. This should start by elevating policy as a core lawyering skill in the first year and teaching it as a formal component of 1L doctrinal and law skills courses. Many 1L doctrinal courses—criminal law, property, civil procedure—are built around analyses of the design and distributional consequences of policy regimes and thus are well suited for policy incorporation. These courses could be reframed to emphasize the process by which underlying rules that form the basis of legal challenges analyzed through case law are created—and how those rules might be changed through policymaking. Doing so would lay the foundation for deeper interrogation of policy design in the upper division, while introducing students to a broader way of conceptualizing the attorney-client relationship—one focused on collaboration with nonlawyer activists and community members—which is a theme that can be pulled through upper-division professional responsibility.

courses. To augment these efforts in the classroom, schools could also create formalized opportunities for extracurricular or simulated/live-client legal work in 1L that would expose law students to community-driven policy development efforts to bring these issues to life while promoting public service.

The 1L curriculum should also incorporate new ways to think about legal skills: focusing on policy design and drafting, while reconceptualizing the very idea of what constitutes “research and writing.” Drawing on the work we have described, research methods should include modules on analyzing expertise and power and how to build inclusive policy design processes. Writing should move beyond briefs and memos to include instruction on how to draft policy reports, model ordinances, and legal opinions. More radically, writing should be reconceptualized to incorporate new ways of analyzing and conveying information: teaching facility with “visual tools,” like flowcharts, and with social media designed to communicate with powerholders and shape their decision-making.

Building thoughtfully on the 1L policy curriculum, the upper division should contain pathways to continue investigating policy reform. Specifically, we propose developing class formats that build on, but extend beyond, clinical education to teach essential elements of policy design and implementation. This effort should include increasing nonlitigation experiential opportunities to better prepare students for the reality of contemporary practice in which litigation constitutes a limited aspect of what lawyers do. Beyond this, we recommend that law schools explore how emerging curricular innovations could be adapted to teach policy by the people. One such innovation is the “policy lab” concept increasingly featured in law schools, in which faculty and students draw upon multiple disciplines and analytical tools to develop legal solutions to difficult social problems. While policy labs can risk being top-down exercises in design disconnected from grassroots policy development, they can be thoughtfully constructed to foster people-led processes that formalize partnerships with local community-based organizations engaged in policy work. These courses can be stand-alone or operate as modules in seminars.114

Upper-division experiential courses should also be redesigned to expand the scope of what counts as “lawyering skills.” Building on our examples, this involves reframing the concept of fact gathering to include knowledge of quantitative and qualitative empirical research methods, such as interviews and surveys. In the projects we describe, the UCLA School of Law’s Empirical Research Group, staffed by PhD researchers expert in empirical design and analysis, provided essential support by laying out methods for

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114. For example, the Center for Public Interest Advocacy and Collaboration at Northeastern University School of Law offers a fully integrated classroom and practical program through which students apply legal, research, and lawyering skills to achieve “social, economic, and environmental justice in all dimensions.” Center for Public Interest Advocacy and Collaboration, NE. U. SCH. OF L., https://law.northeastern.edu/academics/centers/cpiac/ [https://perma.cc/Y499-8M2N] (last visited Mar. 4, 2022).
interviewing and providing key statistical analysis. Although such a group is a luxury for many law schools, professors can potentially augment skills courses by building partnerships with academics outside the law school to train students on empirical design and on how to better understand and engage with empirical research as a fundamental predicate of designing good policy. Deepening the skills introduced in 1L, upper-division courses should include policy-oriented drafting in specialized coursework that also teaches lawyering skills at other key stages of the full policy life cycle that we have outlined—skills such as how to secure meetings, how to produce talking point and comment letters, and other communications strategies. Law schools should further consider how to promote opportunities for and publicize policy work that students do outside the classroom to demonstrate to future employers how engagement in community-driven policy advocacy equips students with marketable legal skills while widening access to justice.

Finally, we propose using policy-by-the-people pedagogy to spotlight (and rethink) the broader role that the legal profession plays in entrenching social inequality. In doing so, policy by the people can hold a mirror up to routine practices of lawyers that tilt power away from people toward well-resourced corporate actors that buy legal knowledge to shape policy to their advantage. Reimagining legal training from a people-centered policy perspective ultimately requires critical analysis of the existing maldistribution of legal resources that produces elite-driven policy in the first instance, highlighting the need to rebalance legal resources and redress broader power differentials as part of the legal profession’s obligation to promote and protect democracy and the rule of law. This type of reanalysis has implications beyond just devoting more class time to discussing lawyers’ professional obligations. It argues for a deeper culture shift in law school that addresses explicit and implicit ways in which schools valorize corporate legal work through programming and the structure of hiring processes, while also questioning charitable approaches to professional service, like pro bono work, that do not challenge existing configurations of professional prestige and power.

2. Law Practice Institutional Change

Public interest law organizations can also do more to embrace bottom-up policy design as an important law reform strategy. This requires creating internal organizational infrastructure focused on nurturing a policy practice. As a first step, many organizations may need to think creatively about how to surmount obstacles to rigorous policy work from various funding sources, such as federal legal services and foundation grant restrictions. Organizations should also dedicate resources to hiring and supporting staff attorneys who will focus on community-led policy campaigns as a primary practice, not just as an occasional supplement to direct services or litigation. Organizations should further invest in training and education for staff

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attorneys. This should include formal training on the legislative process, lobbying limits, and reporting requirements for 501(c)(3) organizations, alongside informal mentorship programs that pair junior attorneys with lawyers who are experienced in policy design.

Public interest law organizations should also seek to build external relationships to bolster an effective policy practice. Regional peer-to-peer networks could promote learning on policy strategies by sharing model policies, databases of legislators, and other useful resources. Public interest law organizations should also consider new ways to effectively leverage the resources of local law schools, using the examples in this Essay as a guide to identify mechanisms for sustained partnerships with law students. These partnerships may be achieved through ongoing courses, externships, and less formal extracurricular arrangements that give students rigorous opportunities to engage in community-led policy development and advocacy. As public interest law organizations increase capacity to support policy design as a fundamental legal strategy, they should engage in careful planning to ensure that such design flows from organizing and movement-building led by the people most affected by it. Public interest law organizations seeking to strengthen their capacity for policy work should therefore begin with a landscape assessment of existing community resources, needs, and opportunities in order to develop projects that emanate from social movement struggle and that are accountable to the principles of policy by the people we have set forth in this Essay.

CONCLUSION

In the midst of an ongoing pandemic, as inequality and uncertainty continue to spiral, it is essential to rethink how change happens—by building on the wave of social protest and calls for fundamental restructuring to create a path for sustainable transformation that begins to dismantle the legal regimes, and underlying structures of power, that have produced the current moment. There is no straightforward path. But any path must consider how to seize back policy design from powerful interest groups that have tilted the system away from the interests of people with less money and power. We have proposed policy by the people as one strategy for contributing to this essential broader effort, which offers a new way of thinking about what lawyers can do to help support the development of social movement capacity at the local level to design—and win—more equitable and just regulation.
Almost everyone who reads these words is an institutional insider in some form. Those of us who aspire toward transformation, liberation, and resistance from our institutional settings are forced to confront Audre Lorde’s striking admonition that “the master’s tools will never dismantle the master’s house.” For some, finding themselves in the master’s house is a spur towards purism—a rejection of institutional power in search of a “pure” remove from which to critique it. For others, it is a dispiriting check on their aspirations and an invitation to sullen fatalism. This Essay questions whether we are bound to the hard consequences of purism or whether there are avenues within our institutional infrastructure that allow us to pursue change with radical pragmatism.

Canvassing my own historical work on the struggle against slavery in the 1850s, I advance the beginning of an answer: it may be that it is impossible to revolutionize the institutions we work in as insiders, but it is possible for institutional actors to hold deliberative space within their institutions for transformational and radical imagination. By deliberative space, I mean space held open for conversation, democracy, and participatory deliberation. None of us, alone, can imagine our way out of the master’s house. But together, by stepping back and making space, we may be able to open a commons in the master’s house where we listen, dream, and challenge each other.

I. IMAGINING THE COMMONS......................................................... 2062

A. Compromise and Complicity.............................................. 2062
I. IMAGINING THE COMMONS

A. Compromise and Complicity

In the late summer of 1853, white abolitionists in Cincinnati had a tragic fight about how far to take political purity. In August 1853, a federal marshal arrested George “Wash” McQuerry in Ohio. A Kentuckian named Henry Miller claimed that McQuerry was his property and sought to use the mechanics of the Fugitive Slave Act of 1850 to re-enslave McQuerry and bring him back to Kentucky. As soon as McQuerry was arrested, the antislavery activist network in Cincinnati went into high alert. They knew that if Miller could hurry McQuerry into a courtroom without anyone being the wiser, the quick and egregious legal processes afforded to putative owners would allow Miller to be across the river to enslave McQuerry before anyone had even known he had been captured. So as soon as the arrest took place, one of the most prominent Black abolitionists in the city, Peter Clark, ran through the streets to share the news with the city’s leading abolitionist lawyer, John Jolliffe. Clark and Jolliffe huddled in Jolliffe’s office drafting a writ of habeas corpus. Then, at two o’clock in the morning, Clark drove...
to the town of Clifton where he delivered the writ to U.S. Supreme Court Justice John McLean at his home there.\textsuperscript{8}

The mad dash had its intended effect: instead of McQuerry being silently re-enslaved, his trial became a public spectacle that drew national attention.\textsuperscript{9} Jolliffe used the trial to spotlight the evils of slavery and to build public support for McQuerry (and antipathy toward Miller).\textsuperscript{10} During the trial, Cincinnati’s antislavery forces were united in support of McQuerry. Hundreds of people took to the streets in support of his freedom, and the antislavery activists used the press and the public square to condemn the institution and men like Miller (and then McLean) who upheld it.\textsuperscript{11}

But when the trial ended with the tragic conclusion that McQuerry was to be re-enslaved, a fight broke out among the abolitionists over what measures they should take to free him. Under public pressure, Miller had promised to sell McQuerry into freedom if his supporters could raise $1,200.\textsuperscript{12} Some abolitionist leaders in the city organized an effort to capitalize on public outrage and raise the money to free McQuerry.\textsuperscript{13} Others opposed this effort on the grounds that participating in the monstrous economy of slavery was a

\begin{quote}
Id.\textsuperscript{8} See id.\textsuperscript{9} The trial reached the attention of William Lloyd Garrison, the editor of the leading abolitionist newspaper in the nation, The Liberator. The Liberator reported that the trial was a spectacle: “The jury box was filled by ladies, so crowded was the court room.” Accursed Be the Union!, \textit{Liberator}, Aug. 26, 1853, at 135.\textsuperscript{10} See generally \textit{Levi Coffin, Reminiscences of Levi Coffin, The Reputed President of the Underground Railroad} 545–46 (Cincinnati, Robert Clarke & Co. 2d ed., 1880). Jolliffe pilloried Miller and Kentucky for demanding a process by which this defendant—this intelligent and upright human being—may be dragged from his home, from the wife of his bosom, from the graves of his children, and, bound hand and foot, hurried forever away from them and from all he holds dear, . . . [so that] the last drop of his blood may be scourged out on far Southern plantations. Id.\textsuperscript{11} See generally Accursed Be the Union!, supra note 9.\textsuperscript{12} Miller “generously” offered to contribute $50, making the actual price $1,150. \textit{Coffin}, supra note 10, at 547.\textsuperscript{13} See id. at 547–48.
\end{quote}
ratification of the institution. The disagreement was such that, despite their best efforts, the collection fell short.

The proximate result of this intramovement disagreement was a human tragedy. Wash McQuerry was enslaved, torn from his family and life, and relegated to the status of property. From our perspective today, this looks like an avoidable tragedy—a catastrophic consequence of short-sighted purity politics in the face of a moral cataclysm. It seems that a group of white abolitionists cared more about their own moral consistency than they did about McQuerry’s life. But this tidy presentist moral calculus makes matters too easy. In the brutal reality of slavery, McQuerry’s tragedy was just one among thousands of moral horrors occurring every day. To radical purists, any compromise or complicity with slavery was an endorsement and perpetuation of the system itself, and such an endorsement was too steep a price to pay to save McQuerry. The radical pragmatists who sought to purchase McQuerry’s freedom had to make peace with the fact that they were willing to participate within a system of property and capitalism that was murderous, oppressive, and fundamentally horrific.

Anyone familiar with the internal strategic conflicts in contemporary social movements should be cautious about judging too harshly the

14. Levi Coffin was a Quaker who ran a store that sold goods untainted by the slave economy. See Nikki M. Taylor, Frontiers of Freedom: Cincinnati’s Black Community, 1802–1868, at 152 (2005). He was also one of the most active leaders of the Underground Railroad in Cincinnati. See id. Somewhat ironically, given Coffin’s commitment to purity as a matter of commerce, it was he who “made zealous efforts to raise the sum” to purchase McQuerry’s freedom. Coffin, supra note 10, at 547. On the other side of the debate was Dr. William Henry Brisbane, a former slave owner who had moved north from South Carolina and converted to a rigid and radical abolitionist. See 1 Mary Ellen Snodgrass, The Underground Railroad: An Encyclopedia of People, Places, and Operations 73 (2008). Brisbane was among a group of opponents of slavery who did not support paying slave owners because it suggested that their claims to “property” were legitimate. See Journal of William Henry Brisbane (Aug. 19, 1853) (on file with author) (“To night I attended a meeting at the Zion’s Church held to raise money to purchase the freedom of McQuerry. Not approving the measure I took no part in the meeting.”); see also Farbman, supra note 5, at 1912.


16. See generally id.

17. See Farbman, supra note 5, at 1912. In fact, disputes over whether and how to purchase a slave’s freedom (or “redeem” it) were frequent and ethically complex. For a fuller accounting of the economics and morality of this problem, see Buying Freedom: The Ethics and Economics of Slave Redemption (Kwame Anthony Appiah & Martin Bunzl eds., 2007).

18. While I intend my use of “movement” and “social movement” to be capacious enough to admit multiple definitions, it may be useful to lay out how I understand the term in my own scholarship. My own definition follows that of Lani Guinier and Gerald Torres (who in turn built on the work of many others, including Stanley Tarrow). In their words, “[s]ocial movements arise when ordinary people join forces in confrontation with elites, authorities, and opponents to change the exercise and distribution of power.” Lani Guinier & Gerald Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements, 123 Yale L.J. 2740, 2757 (2014). To this definition I would add my own gloss from prior work: “The movements that I am focused on are demanding fundamental institutional alterations in the legal order. They are movements that challenge the institutions themselves.”
Cincinnati abolitionists who failed to free McQuerry. Questions of purity and pragmatism battle at the heart of most movement strategies.\textsuperscript{19} In our fallen world, situated as we are within overlapping imperfect (and often overtly oppressive) systems, those of us who seek to change or overhaul those systems often face the question of how to situate our struggles within and against these systems. Should we reject the systems altogether? Should we participate in them in good faith? Should we participate in them with the goal of undermining them? How do we balance pragmatism and strategy against purism and moral clarity?

B. The Master’s House

Nobody can pass through any sort of self-reflective activist space without encountering Audre Lorde’s arresting proclamation that “the master’s tools will never dismantle the master’s house.”\textsuperscript{20} Lorde’s words stand in for a broader set of arguments aimed at any number of problematic institutions. From debates over whether it is possible to be a “progressive prosecutor,”\textsuperscript{21} to debates over whether it is possible to be a transformative member of Congress,\textsuperscript{22} to debates over whether it is possible to be a radical corporation,\textsuperscript{23} the question of whether it is possible to transform the world using existing systemic tools is one that haunts nearly every institution in our lives.

For lawyers—and especially those of us who work in and around legal education—the question has specific and familiar contours. We know that

\begin{quote}
\textsuperscript{19} To offer just one representative example, there has long been a similar conversation taking place among activists fighting against cash bail. Some movement actors have championed bail funds (which provide funding for detained people to post bail) as a means of acting pragmatically within the system to resist the system. See Jocelyn Simonson, \textit{Bail Nullification}, 115 Mich. L. Rev. 585, 635–37 (2017). Others have argued that these bail funds legitimize the system by participating in the immoral structure of cash bail. See id.

\textsuperscript{20} \textsc{Audre Lorde}, \textit{The Master’s Tools Will Never Dismantle the Master’s House}, in \textsc{Sister Outsider: Essays and Speeches} 110, 112 (1984).


\textsuperscript{22} While it is true that the group of young, progressive congresspeople who have been labeled “The Squad,” pose a challenge to the mainstream Democratic Party, there is no doubt that they are also committed and strategic institutional actors. See Aída Chávez, \textit{Alexandria Ocasio-Cortez Looks Like a Radical. She’s Really a Pragmatist.}, Wash. Post (Mar. 12, 2020), https://www.washingtonpost.com/outlook/2020/03/12/alexandria-ocasio-cortez-pragmatist/ [https://perma.cc/9NHV-U876].

\textsuperscript{23} While a subset of for-profit corporations have become certified as “B-Corps” for their commitment to balancing profit with doing good in the world, some argue that these labels, however well-intentioned, do little to change the basic underlying structures of inequality and subordination that sustain them. See, e.g., \textsc{Anand Giriharadas}, \textit{Winners Take All: The Elite Charade of Changing the World} 212–14 (2019).
\end{quote}
law schools are haunted by big problems: hierarchy, cartelism, debt, and gender and race inequalities. If we are employed by law schools, we know that we are party to these problems and inevitably complicit in uncomfortable ways. These discomforts demand our own reckoning with Lorde’s challenge. We who live and work in the master’s house—should we be inside this house? And if so, what should we be doing here?

C. A Place for Radical Imagination

It should be clear that I do not have a detached or dispassionate view of this problem. I spent my years in practice before returning to the academy working with grassroots organizers on long-term projects aimed at radically transforming oppressive systems. When I left practice and entered the legal

24. For the last two years, I have taught Duncan Kennedy’s polemic, Legal Education and the Reproduction of Hierarchy, 32 J. LEGAL EDUC. 591 (1982), and despite its age, my students have uniformly identified with Kennedy’s core observation that law schools create, reproduce, and organize themselves through hierarchical logics, see id. at 591–92.

25. The recent movement to abolish the bar exam has invigorated arguments that law schools are part of a “legal cartel” that limits entry into the profession through controlled chokepoints that do little to ensure qualifications and much to limit access. See Brian L. Frye, It’s Time for Universal Diploma Privilege, JURIST (Apr. 6, 2020, 10:03 AM), https://www.jurist.org/commentary/2020/04/brian-frye-diploma-privilege/ (“While I teach professional responsibility, the real title of the class is ‘managing the legal cartel.’”). Jessica Williams, Abolish the Bar Exam, CALIF. L. REV. BLOG (Oct. 2020), https://www.californialawreview.org/abolish-the-bar-exam/[https://perma.cc/NN5H-PE2M] (“The bar exam is [a] system of oppression, as it was designed to keep ‘undesirable’ (read: non-White, non-male) lawyers out of the profession.”).

26. A recent American Bar Association report found that recent law school graduates held an average of $108,000 in debt. See Alexis Gravely, Impact of Student Debt on Young Lawyers, INSIDE HIGHER ED (Sept. 23, 2021), https://www.insidehighered.com/news/2021/09/23/aba-report-shows-impact-law-school-debt-young-lawyers [https://perma.cc/H395-6P9E]. For Black law students, the number was over $200,000. See id. About 80 percent of these students reported that their debt burden had an impact on the choices that they made about their careers. See id.


28. Perhaps the most searing statement of the problems in legal education comes from a letter that Dean Spade wrote in 2010 addressed to “Those Considering Law School.” Letter from Dean Spade for Those Considering Law School (Oct. 2010), http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School.pdf [https://perma.cc/YQ4T-93W4]. Spade’s letter argues that legal work is inherently supportive of existing systems and that law school discourages radical imagination. See id. It is aimed at idealistic young people considering an law school, but also serves as an indictment of the entire system of legal education and legal practice as unsuited to radical transformative work. See id.

29. In the essay where Lorde speaks these words, she is reflecting on the labor of women, and especially non-white women in academic spaces. See generally LORDE, supra note 20. More specifically, she is speaking these words at an academic conference to critique the conference’s troubling complicity with academic hierarchy and erasure of marginalized voices. See id. at 110. From the conference itself, Lorde is challenging her listeners to do better, to seek other modes of solidarity and interaction, and to question their core institutional commitments. See id. at 112–13. In this sense, Lorde offers her own specific response to what academics should be doing with our power.

30. My work was primarily focused on equality in education and school discipline, particularly what is sometimes called the school-to-prison pipeline. The communities and organizers that I was working with imagined public school systems where funding was equal
academy, I found myself haunted by the question of whether I had left a job where I was “fighting the good fight” to join an institution where there was no room for transformational work. I wondered, in short, whether I had moved into the master’s house and picked up his tools.

On the other side of this anxiety was my realization (accepted after hard reflection) that the work I wanted to do was not located on the front lines of the “good fight,” but rather in libraries, in classrooms, and at the keyboard. I had to come to terms with the fact that the work that lit me up was situated (at least according to our current societal order) within the institution of the legal academy.

Having reached this conclusion, the next question was whether it was an impasse. Was compromise the same as concession? Was there room within my work for radical and transformative imagination—even if that imagination targeted the very institutions that I was working within?  

Most academics realize that our research and writing is motivated by autobiographical curiosity or anxiety. (At least, I know this to be true of myself.) This is why this story of my own institutional situation and anxiety helps to explain the historical research and writing that I have been doing since I joined the academy. In every project that I have undertaken, I have asked a version of the same question: is there space within settled and often oppressive institutions for utopian and radical imaginations that challenge those institutions? Upon reflection, I realize that this question is a relative of the question that the Cincinnati abolitionists faced over whether they should purchase McQuery’s freedom. All of us who operate within imperfect, unjust, and even horrific institutions must grapple with the and plentiful, where police did not control discipline, and where Black and brown students could thrive. If this sounds modest, it was not. We were essentially operating on utopian imagination in all of our work.

31. While my own conception of how transformational imagination operates largely springs from my historical work and my practice, it is closely aligned with the way that Amna Akbar describes the radical imagination that flows from movement spaces and into law reform work. See generally Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U L. REV. 405 (2018).

32. It should be said that I know this question to be a basic one. Just like the teenager staring up into the stars contemplating their smallness knows themselves to be asking an age-old question and still simultaneously has their mind blown—so too I experience asking this question as both deeply unoriginal and yet personally vital. Indeed, it seems to me that this is the sort of question that responsible actors must always be asking. When we treat fundamental and existential questions as “asked and answered,” we lose track of the importance of making the asking and answering an iterative process rather than a linear one.

33. Let me be clear that I am not drawing a direct moral equivalency here between the horrific institutional structure of slavery and the legal academy! Obviously they are different, and some might argue that their differences are so extreme that any comparison is specious. My argument is simply that the struggle between purity and pragmatism is not only salient in the most extreme cases, but rather a constant question for all who work within institutions that they are critical of. Moreover, as I have argued elsewhere, it is a mistake to treat slavery and the struggle for abolition as sui generis or a moral outlier. See Daniel Farbman, “An Outrage Upon Our Feelings”: The Role of Local Governments in Resistance Movements, 42 CARDOZO L. REV. 2097, 2171–74 (2021). Slavery was an entrenched legal, political, cultural, and economic institution upheld through “normal” politics and struggled against with the tools of
fraught balance between purity and pragmatism. Are we bound to the hard consequences of purism? Or are there avenues within our institutional infrastructure that allow us to pursue change with radical pragmatism?

This Essay is about the unsettled answer that I keep converging on: it may be impossible to revolutionize the institutions we work in as insiders, but it is possible for institutional actors to hold deliberative space within their institutions for transformational and radical imagination. By deliberative, I mean that the space be held open for conversation, democracy, and participatory deliberation. None of us, alone, can imagine our way out of the master’s house. But together, by stepping back and making space, we may be able to open a commons in the master’s house, where we listen, dream, and challenge each other. This commons could be a place where institutional insiders are invited (or forced) to be in contact and in conversation with voices and views not usually welcome or heard in the sealed spaces they move in. When we open this destabilizing and democratic commons, we may not be tearing down the master’s house, but we could be gaining the means to transform it.

II. THREE EXAMPLES OF THE COMMONS

I am well aware that “holding deliberative space for radical imagination” within institutions is an abstract idea in search of specific instances. In some sense, the abstraction is the point. I have been converging on this aspiration through my work for the last few years, but it is an aspiration more than a prescription. The least I can do, however, is map out the convergence in the hope that in doing so I can give some particularity to the idea.

The following three examples are drawn from my work on the history of the institution of slavery and the struggle to tear that institution down. Because slavery is such an archetype of an oppressive and unjust system, the work of institutional actors within the systemic logics of slavery casts clear shadows on our muddier institutional questions today. In these three histories, I observed actors within institutional hierarchies—lawyers, judges, local governments—wielding their power to open up a critical deliberative space within the institutional structure from which foundational questions about that structure could be asked. In doing so, each institutional actor struggled to balance their assigned roles with radical critiques of the structures on which those roles depended. Like the Cincinnati abolitionists,

“normal” politics. See id. In this sense, it is archetypal rather than atypical when we are thinking about the institutions that we work within today. See id.

34. I recognize that “a commons” is an abstract term, and I invoke it in part because of this abstraction. I expect that the term will resonate differently with different readers and invoke different kinds of social and special imaginations. That’s good! Still, if it is useful, I am drawn to the term in part because it invokes a space that is unowned and undominated but existing within and among (and sometimes even inside) claims of land ownership and mastery. The most explicit example of this was the “commons” system of open fields that existed in Britain before enclosure (when all land was defined as pertaining to specific owners). See generally Simon Fairlie, A Short History of Enclosure in Britain, LAND, Summer 2009, at 16, 19–20.
these institutional actors also struggled to balance the immediate triage demands of ending individual oppression with broader strategic movement goals. From their collective radical pragmatism emerged a common commitment to taking advantage of the space created by these struggles to open doors into political and legal imaginaries that were not welcome within the mainstream institutional framework.

In *Resistance Lawyering*, I focused on the work that lawyers did within the despised procedural framework of the Fugitive Slave Act of 1850. The power that these lawyers successfully wielded for their clients and against the institution of slavery was rooted in the disruptive space they created in courtrooms and within the legal system.

In “*An Outrage Upon Our Feelings*: The Role of Local Governments in Resistance Movements”, my focus shifted to a group of cities and towns across the North that passed resolutions condemning the Fugitive Slave Act. As acts of local governments, these city and town resolutions were, literally, institutional acts. I argued that these resolutions were most effective and promising where they cast the public space of local government as a site of resistance where deliberative democracy and radical imagination could flourish.

Finally, in my most recent paper, *Judicial Solidarity?*, I turn to the most entrenched institutional actor in the legal system: the judge. I tell the story of a judge named Ebenezer Rockwood Hoar and his 1854 grand jury instruction in the wake of an armed uprising against the Fugitive Slave Act. In telling this story, I argue that even judges can seek to make space for movements and radical imagination within the otherwise sealed spaces of elite legal practice.

While I draw the idea of a commons in the master’s house from these examples, none of them offer a “model” or prescription in the sense that lawyers and policy makers often desire. Rather, what is common to these three examples is a shared outlook: humility, inclusion, and radical pragmatism. The commons cannot be planned or built; rather, it is the space that emerges when institutional insiders actively crack the windows and cede space to make room for the voices speaking outside (and often against) the institutional status quo. This is radical pragmatism because it does not seek to manifest a utopian order on a broken world, but rather works in the cracks,

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35. See generally Farbman, supra note 5.
36. See generally Farbman, supra note 33.
37. See id. at 2180–81.
38. See generally Farbman, supra note 18.
39. See id. at 28–49.
40. See id. at 49–54, 58–62.
41. Inside and outside are necessarily (and inherently) relative terms here. I am skeptical that any of the outside voices that I am thinking about here could be considered truly outside any institutional framework. All of us operate within our own frameworks, whether they be nonprofit organizations or just the broader requirements of surviving in a capitalist society. When I speak of “inside” and “outside,” then, I am referring to the specific institutional spaces that legal insiders occupy (law schools, local governments, the courtroom) and the voices that are generally not heard or welcomed in those spaces.
lacunae, and corners of that broken world. Like every house, the master’s house is drafty—there are gaps in the walls, leaks in the roof, unused dusty corners. Those of us who live and work in that house can feverishly spackle, seal, and vacuum—or we can make room for and nurture the disruptive energies where we see them, thus making space for transformational deliberation and radical imagination.

A. Resistance Lawyering

1. The History

By the fall of 1850, a rift had emerged in the socio-legal order of the United States. On one hand, with every passing month, slavery was hardening its grip in the South and in mainstream national law and politics. Across the South, the laws regulating slavery were getting harsher as a new generation of more radical hard-liners ascended to political power. Many states passed laws cracking down on manumission, exiling (or enslaving) free Blacks, and banning abolitionist speech. These state hard-line policies were reflected in national politics as well. By 1850, it had become the orthodox view of legal and political elites that the compromise with slavery was a foundational element of the constitutional order—and that if that compromise was threatened, secession and Civil War would follow.

Fueled by anxiety about the growth of antislavery politics, and with secession and Civil War looming, the South and the allies of slavery extracted a series of further compromises intended to guarantee the perpetuation of slavery. From the Missouri Compromise of 1820 (which opened the Southwest up to slavery), to the annexation of Texas, and then to the “compromise” of 1850,


45. The most famous exponent of this compromise was Justice Joseph Story, who argued in Prigg v. Pennsylvania that the original Fugitive Slave Act of 1793 was constitutional because it embodied the Fugitive Slave Clause in the U.S. Constitution—which was a compromise that was essential to the drafting and ratification of the Constitution. 41 U.S. 539, 540–42 (1842). He wrote, The full recognition of [the right to property in slaves] was indispensable to the security of this species of property in all the slaveholding states; and indeed was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevailing in the non-slaveholding states, by preventing them from intermeddling with or obstructing or abolishing the rights of the owners of slaves. Id. at 540.

a growing Southern brinksmanship sought to extract more assurances supporting the future and security of slavery.\footnote{46} This was the context in which the Fugitive Slave Act of 1850 was passed. Southern legislators demanded new and stronger federal support for slave owners seeking to reclaim their “property” when the human beings that they had enslaved escaped to freedom.\footnote{47} While the absolute numbers of fugitives were low, Southerners saw the new law as a symbolically essential commitment to their “‘sacred’ property rights.”\footnote{48} Not only did “great compromisers” like Daniel Webster accede to this demand, but they also committed themselves to making good on the compromises’ guarantees and to ensuring that alleged fugitives be effectively enslaved to prove the good faith of the North.\footnote{49} Behind legal institutionalists’ increasing adoption of (or capitulation to) a hard-line defense of slavery was the growing salience of antislavery politics. While abolition had been a part of mainstream political discourse since before 1776, it was not until the mid-1830s that it began to grow into anything more than a fringe movement.\footnote{50} After 1836, however, fueled by growing sectional tensions over westward expansion and effective antislavery activism in the press and popular culture, the arguments against slavery had become a force in national politics.\footnote{51} From states passing “personal liberty laws” to protect their Black citizens against kidnapping,\footnote{52} to the controversy over the annexation of Texas,\footnote{53} to the splintering of the Whig party and the birth of the Republican Party,\footnote{54} antislavery arguments were driving electoral and policy outcomes across the country. And so, a dissonant gap opened between the growing antislavery movement challenging the institutional foundations of slavery and the increasingly reactionary mainstream legal and political defense of slavery. While institutions, from Congress to political parties to the courts, doubled down on their pledge of fealty to slavery, in clenching their fists they made the institutions more brittle. When the new Fugitive Slave Act was enacted in September 1850, the law’s explicit goal was to strengthen federal support for slave owners seeking

\footnote{46} For a detailed examination of these assurances, see I William W. Freehling, The Road to Disunion: Secessionists at Bay 1776–1854 (1990).
\footnote{47} See Farbman, supra note 5, at 1893–94.
\footnote{48} Id. at 1893. Slave owners and their political allies often talked about their right to own human beings as “sacred” or “natural.” Among many to invoke the phrase “sacred rights of property” was President James Buchanan in his final address to the U.S. Congress in 1860. See H.R. Journal, 36th Cong., 2d Sess. 13 (1860).
\footnote{49} See Farbman, supra note 5, at 1902–03.
\footnote{50} See Manisha Sinha, The Slave’s Cause: A History of Abolition 228 (2016).
\footnote{51} See id.
to “reclaim” and enslave humans that they claimed as property.\textsuperscript{55} The procedural framework of the law was intended to soothe Southern hard-liners in nearly every respect.\textsuperscript{56} It was very easy for putative owners to engage the machinery of the law with federal marshals standing at the ready to apprehend any alleged fugitive on nothing more than the owner’s word.\textsuperscript{57} Once apprehended, the process afforded by the law was explicitly biased against the alleged fugitive. Alleged fugitives were not guaranteed lawyers, had very little opportunity to present evidence, and could not have their cases heard by a jury.\textsuperscript{58} The commissioners appointed to adjudicate the cases were paid $10 if they found in favor of the putative owner, but only $5 if they found in favor of the alleged fugitive.\textsuperscript{59} Perhaps most inflammatory for Northerners, the new law increased criminal penalties for providing aid and comfort to a fugitive in any way.\textsuperscript{60}

To borrow a phrase, the new law’s cruelty was the point.\textsuperscript{61} Its procedural framework was meant to appease hard-liners through its cramped injustices and slanted summary process. As a result, the procedural legal framework that came into existence was both harsh and brittle. For antislavery lawyers contemplating practicing within this system, its cruelty made it apparent that resistance was necessary.\textsuperscript{62} And yet, while some purists insisted that any participation in the system validated and reified it,\textsuperscript{63} most rejected knee-jerk purism and adopted a radically pragmatic approach to fighting against slavery and against the Fugitive Slave Act.

In case after case, these lawyers used the new law’s paltry procedural tools and all other tools at their disposal to disrupt, delay, and co-opt the law’s process. This is the approach that I call “resistance lawyering” in my recent article.\textsuperscript{64} There I described a resistance lawyer as someone who, by practicing within a system that they believe to be unjust, “seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.”\textsuperscript{65} While I argue that this model of lawyering

\textsuperscript{55} Farbman, \textit{supra} note 5, at 1893.
\textsuperscript{56} See generally \textit{id.} at 1893–95.
\textsuperscript{57} See \textit{id.} at 1894.
\textsuperscript{58} See \textit{id.}.
\textsuperscript{59} See \textit{id.}.
\textsuperscript{60} See \textit{id.} at 1894–95.
\textsuperscript{62} Lawyers were among the thousands of people who protested against the law as soon as it was signed. See generally Farbman, \textit{supra} note 5, at 1895.
\textsuperscript{63} The most famous statement of this view came from Henry David Thoreau who, excoriating lawyers and the legal system, argued that the only decent position that a lawyer or a judge could take was to oppose the law and its operation entirely and exit the system. See \textit{HENRY DAVID THOREAU, SLAVERY IN MASSACHUSETTS, IN WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU} 695, 708 (Brooks Atkinson ed.1992). He wrote, “I am sorry to say that I doubt there is a judge in Massachusetts who is prepared to resign his office and get his living innocently.” \textit{Id.}
\textsuperscript{64} Farbman, \textit{supra} note 5, at 1880.
\textsuperscript{65} \textit{Id.}
transcends the 1850s, these abolitionist lawyers practicing within and against
the Fugitive Slave Act were archetypal examples of resistance lawyering.

Resistance Lawyering was a long article! I won’t rehash its arguments
here or redescribe the remarkable tactics of the abolitionist lawyers who
achieved amazing outcomes for their clients and for the movement more
broadly. Rather, I want to point out how these lawyers, acting as
institutional insiders within a legal procedural system, opened a commons
within the very most hostile institutional space. As noted earlier, the
framework of the Fugitive Slave Act was both harsh \textit{and} brittle. To return
to the analogy of the master’s house, the walls were reinforced, but the joints
were not well sealed.

Through delay, procedural confusion, and strategic use of the press,\textsuperscript{67}
antislavery lawyers invited subversive and radical imaginaries into
courtrooms designed to tamp down those voices. In a system designed to
ensure that alleged fugitives could not speak on their own behalf, lawyers
manipulated the rules so that they could speak.\textsuperscript{68} In a system designed to
minimize public outcry, lawyers magnified political salience and outrage in
every case they could.\textsuperscript{69} In a system designed to reinforce the compromise
with slavery, resistance lawyers transformed each case into a space to contest
and challenge that compromise.

2. Lawyers as Institutionalists

It is tempting to lionize abolitionist resistance lawyers and to figure them
as subversives and revolutionaries. I think this both overstates the case
and understates the power of the lessons they have to teach us today. There are
many lawyers today who stand in a similar oppositional (and yet embedded)
position with respect to the legal system that they practice within.\textsuperscript{70}
Especially for public interest and nonprofit lawyers (who are
undercompensated financially), there is an understandable tendency to
compensate themselves with the self-righteousness of heroism. Indeed, since
the article was published, I have been struck by how many lawyers have
sought to claim the label “resistance lawyer” for themselves as a badge of
honor. As a former underpaid civil rights lawyer, I understand this impulse.

\begin{itemize}
  \item\textsuperscript{66} For those who are interested, I tell these stories in some detail in Part II of the article.
  \textit{See id.} at 1895–932.
  \item\textsuperscript{67} \textit{See id.} at 1905.
  \item\textsuperscript{68} \textit{See, e.g., Mark Reinhartd, Who Speaks for Margaret Garner? 25–26 (2010)}
  (describing how lawyer John Jolliffe, representing Margaret Garner—whose story inspired
  Toni Morrison’s novel \textit{Beloved}—managed to manipulate the trial process to allow Garner to
testify before the commissioner).
  \item\textsuperscript{69} In case after case, lawyers used the bully pulpit of the courtroom to speak indirectly
  to the press and build public support for the alleged fugitives they represented. \textit{See generally}
  Farbman, \textit{supra} note 5, at 1905–32.
  \item\textsuperscript{70} Here again, I acknowledge the huge differences between the context of slavery and
  our present unjust frameworks, while insisting that the shadows of the past can be usefully
  observed in the present. In the paper, I offer capital defense lawyers, public defenders, and
  immigration lawyers as examples, though there are many others one could imagine as well.
  \textit{See id.} at 1939–52.
\end{itemize}
Badges of radicalism, like proclamations of purity, are powerful rhetoric against the ever-pulling tide of institutional complicity. Whether or not a lawyer’s work fits within the definition I laid out, given the choice between “resistance” and “status quo,” it is easy enough to guess which one most cause lawyers would choose.

But while many lawyers are resistance lawyers in some sense, treating the term as a heroic and individualistic badge misunderstands the lessons of the 1850s. The reality is both more prosaic and more powerful. Lawyers working within institutions and struggling to make space to question and upend those institutions are working in incremental but essential ways to make a commons within the master’s house—not alone, but together with each other and with the excluded voices whose imaginaries they invite into that commons. Making this commons is resistance by inclusion and invitation. It is resistance by making space for discourse and democracy. To the extent that this is heroic work, it is heroism on a modest scale. And modesty is a critical element: this model of resistance suggests that lawyers are not the heroes of the movement, but rather coparticipants with the activists, agitators, dreamers, and grassroots organizers who would be excluded from the master’s house.

This modesty matters because no matter how radical a lawyer’s work and critique, to be a lawyer is to be an institutionalist. Lawyers are, almost definitionally, embedded as practitioners within a legal system. Living in the real world, it hardly needs saying that all legal systems have a politics and that many legal systems launder a complicity with oppressive structures through the guise of neutrality. As I argue in *Resistance Lawyering*, there is no one great structure that we can name “the legal system,” but rather multiple and overlapping substantive and procedural frameworks that lawyers practice within and around.\(^1\) Even if lawyers practice within substructures and subsystems that they oppose, most lawyers retain a deeper commitment to the “rule of law” and the abstract idea of a good and functioning “legal system.”\(^2\)

Casting lawyers as institutionalists should not minimize or dispirit. Rather, it should highlight the extent to which lawyers cannot constructively cast themselves as purists, wash their hands of “the system,” and propose to burn it all down. Rather, as institutional insiders, their radicalism must be pragmatic. Even for resistance lawyers with deep critiques of the systems that they are operating within, it is not their work alone that is doing the work of resistance.

The abolitionist lawyers that I wrote about were not dismantling slavery on their own, and those that hoped to do so were deluded and ineffective. Rather, they were vectors for bringing radical and transformative arguments fueled by a transformative abolitionist imagination into legal spaces. Through their obstructionist practices, grandstanding oratory, and procedural shenanigans, these lawyers found ways to bring the force of outside

\(^1\) See id. at 1933–34.
\(^2\) See id.
movement arguments into courtrooms, and then back out again into the public view.

The radical and revolutionary energy that was driving antislavery politics and resistance was an energy growing in movement spaces: Black abolitionist vigilance committees, antislavery societies, churches, and women’s sewing circles. The boundaries between those movement spaces and the conventional and conservative spaces of law and legal argument were policed by status quo legal elites. Paeans to “the rule of law” and demands that laws like the Fugitive Slave Act be upheld to preserve “legal order” were intended to do precisely what today’s demands that law not be “politicized” are intended to do: erect a barrier between legal imaginaries and the unsettling and threatening radical imaginaries developing in movement spaces.

What resistance lawyers did and continue to do is to breach that barrier. By making space for movement actors to speak and by muddying the boundaries between legal and movement imaginaries, lawyers can open up a deliberative space within the very institutions that they operate within. Framed this way, resistance lawyers both past and present do not need to choose purity or complicity. They need not choose whether to take up or reject the “master’s tools.” Instead, through modesty, strategy, and radical pragmatism, they can make space within the master’s house for critique, imagination, and transformation.

B. Outraged Towns

Lawyers were not the only institutionalists outraged by the Fugitive Slave Act. When the law was signed by President Millard Fillmore in 1850, a wave of outrage manifested in spontaneous community gatherings and meetings across the increasingly antislavery North. Most of the antislavery societies and vigilance committees that convened these meetings operated outside of government. The mass movement against the law was burning from the grassroots against the brittle but rigid institutions that upheld slavery.

Apart from the small, but growing, cadre of antislavery politicians at the state and national levels, most public officials and government actors either stayed aloof from the abolitionist firestorm or, like Daniel Webster, pledged fealty to the new law and the “patriotic” project of compromise. Nevertheless, a small number of towns and cities sought to get off the sidelines by passing resolutions that condemned the Fugitive Slave Act and promised to nullify it.

I wrote about these local resolutions in my recent article, “An Outrage Upon Our Feelings”: The Role of Local Governments in Resistance Movements. In that article, I collect examples of local resolutions from

73. See Farbman, supra note 33, at 2125.
74. Today we would likely see them as nonprofits or nongovernment organizations, but those labels did not carry their present meaning in the 1850s.
75. See Farbman, supra note 33, at 2167–69.
76. See generally id. at 2122–63.
cities and towns across the North. The language in these resolutions was strident. Acton, Massachusetts, called the law “an abomination without a parallel in the annals of our government.” The citizens of Marshfield, Massachusetts—the hometown of hero-turned-villain Daniel Webster—called the law a “disgrace to the civilization of the age, and clearly at variance with the whole spirit of the Christian faith.” Not only was the law a moral outrage, they argued, but it was unconstitutional. For the local governments that felt and spoke this way, it was clear that they sought to resist the Fugitive Slave Act. The central strategic question was then: what could be done to stop the law? The short answer common to every resisting town was, dispiritingly, almost nothing. In some places, like Acton or Marshfield, there were very few Black residents and very little chance that an alleged fugitive slave would ever be apprehended in town. In small and predominantly white towns, the outrage of the new law was a political abstraction. It was easy to promise to resist or even nullify the law because there was almost no chance that anyone would be forced to keep that promise in any substantial way.

In other places, like Chicago, there were many more free Black residents and thus a much higher likelihood that a slave owner would leverage the law’s mechanisms to reclaim their “property” within the city. For a city like Chicago, the question of local capacity for resistance was much more pragmatic. The city could choose to deploy its police or constabulary to intervene against the federal marshals and protect an alleged fugitive. Moreover, the city could choose to use its resources in other material ways to provide physical sanctuary and protection for alleged fugitives. For pragmatic reasons, however, no city ever proposed to take such steps. Interposing local police against federal marshals was a recipe for armed civil conflict, which the city would almost certainly lose. Perhaps more to the point, although there was value in expressing antislavery outrage, there was less reason for the city government to take the much more substantial risk of challenging the federal government on behalf of residents who were not full-fledged citizens.

Whatever the reasons, despite often high-flying rhetoric and saber-rattling about nullifying the law, no local government actually took any meaningful

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77. Although, truth be told, the vast majority of the examples wind up being from small towns in Massachusetts, with Chicago being an important outlier. See generally id.
79. Id. at 2100 (quoting 1 LYSANDER SALMON RICHARDS, HISTORY OF MARSHFIELD 163 (1901)).
80. In Weymouth, Massachusetts, the resolutions proclaimed the law “‘highly obnoxious to the people of this Town’ because it was ‘unconstitutional’ as well as ‘arbitrary, unjust, and cruel.’” Id. at 2130 (quoting Proceedings of the Weymouth Town Meeting of November 12, 1850, in RECORDS OF THE TOWN OF WEYMOUTH).
81. See id. at 2127, 2142.
82. See id. at 2134–35.
substantive action to resist the law. While private citizens organized to patrol the streets and alert residents to the threat of slave catchers,83 local governments did not help with these efforts.84 While private citizens denounced anyone who would collaborate with the slave catchers, local governments were unwilling to back their rhetoric with real sanctions against their collaborating neighbors.85

Where the gap between rhetoric and action was so stark, it is tempting to conclude that local governments were simply not rich or effective sites for resistance. Put more sharply, a close examination of many of these resolutions points toward a shallow and ineffective performative alignment with the abolitionist movement. To speak against an outrage is better than nothing! But empty institutional promises feel more like bluster than support.

It is not hard to translate the bleak picture from the past into today’s landscape. In my recent article, I note the many parallels between the 1850 resolutions and contemporary sanctuary resolutions.86 The politics around proclaiming sanctuary are problematically familiar, and many cities and towns have performatively embraced the idea of sanctuary as “good politics” without doing as much as they could (or should) to actually protect their residents against being detained and deported.87

It is tempting, then, to drift toward purism—to the view that the only place where “true” resistance can happen is on the outside of the formal structures of governance. It is tempting to conclude that local governments can, at best, be sympathetic windbags and, at worst, make cynical promises that they will not live up to. In short, looking at the present through the past, there is reason to be concerned that governmental actors cannot be productive participants in resistance movements.

83. In Chicago, a group of abolitionists gathered at Quinn Chapel A.M.E. Church (a predominantly Black church) to create a well-articulated plan for private patrols. Id. at 2135. The meeting was explicit about how much help they expected from the government: “[W]e must abandon the hope of any protection from [the] government.” Id. (second alteration in original) (quoting 1 CHRISTOPHER ROBERT REED, BLACK CHICAGO’S FIRST CENTURY: 1833–1900, at 101 (2005)).
84. See id. at 2161.
85. In Weymouth, Massachusetts, for example, the resolutions labeled “any man who of officially or unofficially shall aid or abet the execution of the Fugitive Slave Law” as “a deadly enemy to the virtue[,] peace[;] and security” of the town. Proceedings of the Weymouth Town Meeting of November 12, 1850, in RECORDS OF THE TOWN OF WEYMOUTH; see also Farbman, supra note 33, at 2129–30. Having said that, however, the town meeting failed to impose any available sanctions, such as revoking town licenses or expulsion from the town meeting. See id. at 2130.
86. See generally Farbman, supra note 33, at 2169–81.
87. The example of Chicago is relevant again here. In 2016 after the election of former President Donald Trump, Mayor Rahm Emmanuel promised undocumented residents of the city that they would be “safe in Chicago.” Alex Kotlowitz, The Limits of Sanctuary Cities, NEW YORKER (Nov. 23, 2016), https://www.newyorker.com/news/news-desk/the-limits-of-sanctuary-cities [https://perma.cc/4E9C-C3UF]; see also Farbman, supra note 33, at 2175 n.242. In the first six months after the election, U.S. Immigration and Customs Enforcement deported nearly 3,000 Chicagoans. Id. at 2177.
For all the sympathy I have with this temptation, I want to push back against it. My argument in the article begins with the flickering promise of the resolutions passed by the town meeting in Acton, Massachusetts, in the spring of 1851. Like many of its neighboring towns that spoke out, Acton’s resolutions condemned the Fugitive Slave Act in no uncertain terms. They called the law a capitulation to slavery and slave owners and called the law “manifestly iniquitous and unconstitutional.” But unlike its neighbors, Acton’s resolutions neither promised to nullify the law nor to provide sanctuary. Rather, Acton’s resolutions made explicit that the purpose of speaking was not to pretend substantive protection, but rather to keep faith with the town’s tradition of civic engagement and virtue. In keeping faith with the town’s moral traditions, Acton was doing more than virtue signaling. The resolutions make it clear that the town was pledging to hold civic space for resistance to the law. Without promising to resist the law by public means, the resolutions promised to value civil disobedience against the law and to support and foster a space for town residents to organize against the law.

Acton’s resolutions modeled the promise of radical pragmatism in local resistance. Acton did not cast itself as the hero or protector. The town meeting seemed aware of the limits of its own capacity to resist the law. But the resolutions also implicitly recognized that the institution of local government represents a civic space. Acton’s resolutions thus invited civil resisters, abolitionists, organizers, and radical imaginations into the civic space of the town. In this sense, Acton transformed its town common into a commons within the master’s house.

Acton’s example from 1851 points the way toward a model for today’s local governments. Just as resistance lawyers decenter themselves to create space within the institutions of legal practice, so too can local governments decenter their own role to create civic space for movement energies to flow in and through. Once again, the model is radical pragmatism. Where institutionalists within local governments (including the political arms of

88. See generally Farbman, supra note 33, at 2104, 2155–60.
89. See id. at 2155.
90. Id. at 2156 (quoting Resolutions at 1851 Acton Town Meeting in Response to Federal Fugitive Slave Act, supra note 78).
91. See id.
92. The resolutions declare that the town meeting “feel it to be a duty we owe to the memory of our Fathers that we owe ourselves, to our descendants, to our Country and to our God, to record our solemn protest against said law.” Id. at 2157 (quoting Resolutions at 1851 Acton Town Meeting in Response to Federal Fugitive Slave Act, supra note 78).
93. See id. at 2158.
94. See id. at 2159.
95. See id.
96. See id.
97. See generally id.
those governments themselves) are drawn toward helping resistance
movements, they can act strategically and incrementally. Broad public
statements of sanctuary may be helpful, but so too may be small gestures like
participatory budgeting, extending the franchise to noncitizens, and making
room for radical imagination within and across the wide array of local public
space.

If the argument here is somewhat dyspeptic about the value of public
proclamations of sanctuary or high-flying local political rhetoric, it is
ultimately optimistic on the question of whether and how local governments
can participate in resistance movements. If movements require nourishment
and democratic space to thrive, local governments can be powerful
incubators of transformative ideas and energies. Not only is this a hopeful
image, it is already happening to a greater and lesser extent all over the
country and the world.99 Recognizing these already flourishing commons
within our existing institutions promises to shift focus away from
antigovernment purism and toward growing, extending, and maximizing
these spaces.

C. Resisting Judges

The optimistic spark that I am trying to protect from the elements relies on
the observation that, to varying degrees, institutional actors have made, and
can make, space within otherwise hostile institutions to nourish and support
resistance movements. But against that optimism blows a large objection.
Even if the kind of radical pragmatism that I am identifying is possible, it is
also rare. It is far more common for institutional insiders to act to exclude
radical imaginaries and close down the space for resistance movements to
flourish.

This was true in the 1850s, and it remains true today. Perhaps the most
well-known study of this bleak story is Robert Cover’s book Justice Accused:
Antislavery and the Judicial Process.100 In the book, Cover canvassed the
way that the legal elite—especially judges—coalesced around the view that
the survival of the union depended on maintaining the compromise with
slavery.101 In particular, Cover focused on antislavery judges.102 As judges,
these men (and they were all men) were the central pillars of the legal
establishment, and in Cover’s telling, every one of them chose complicity

99. One prominent example of this idea is the municipalist movement. Municipalists have
identified local government as a site for their work of “radicaliz[ing] democracy, feminiz[ing]
politics and driv[ing] the transition to an economy that cares for people and our environment.”
4JUT] (last visited Mar. 4, 2022). The most prominent working example of municipalism in
action is Barcelona, but there are municipalist movements and governments all over the world.
See Map, FEARLESS CITIES, https://www.fearlesscities.com/en/map [https://perma.cc/SASL-
100. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS
(1975).
101. See generally id.
102. See generally id.
with slavery over their personal moral objections against it. This was what Cover called “the moral-formal dilemma.” While Cover began his analysis disgusted at these craven judges, he ultimately concluded that lawyers and judges, as deeply entangled as they were with the institutions that they operated within, were simply not well-suited to be the agents of change within those institutions. In his evocative framing, judges were priests, not prophets.

Robert Cover’s view of judges and the limited scope of their capacity to be useful in resistance movements stands not only as the definitive statement on the subject for the 1850s, but also for today. In my recent paper, Judicial Solidarity?, I call Cover’s view “judicial dismalism” and argue that it is aligned with a form of purism that comes straight from Henry David Thoreau. Thoreau, in his seminal essay Civil Disobedience, argues that where a judge is faced with an unjust law, his only option is to refuse to enforce that law and resign. Both Thoreau and Cover share the view that judges either cannot or will not do anything from within their institutional role to disrupt or challenge that institution. To merge their views, prophets resign while priests labor on.

In Judicial Solidarity?, I confront the Cover/Thoreau purist view and, through the story of Thoreau’s neighbor, Judge Ebenezer Rockwood Hoar, unsettle the stability of their conclusion. Judge Hoar, a native of Concord, Massachusetts, was deeply entwined personally and intellectually with his famous transcendentalist neighbors Emerson and Thoreau. Hoar’s parents were Yankee royalty (his father was known as “Squire Hoar” and his mother was the daughter of Roger Sherman). Like so many other Massachusetts elites, Hoar had been educated at Harvard and raised in staunchly orthodox traditional politics. In short, he was no firebrand. But Hoar was also a leader of the increasingly mainstream antislavery political movement in Massachusetts. As an elite antislavery institutionalist, Hoar fit Cover’s

103. See generally id. See also Farbman, supra note 18, at 13–14, 57–58.
104. Cover, supra note 100, at 5; see also Farbman, supra note 18, at 57.
105. See generally Cover, supra note 100.
106. See id. at 259 (“If a man makes a good priest, we may be quite sure that he will not be a great prophet.”).
107. See Farbman, supra note 18, at 12.
109. See generally Farbman, supra note 18, at 57–58.
110. See generally id. at 5–8.
111. See id. at 28, 37–38. Hoar’s sister had been engaged to marry Emerson’s younger brother Charles before he tragically died, and Ralph Waldo Emerson had taken her into his household. See id. at 36. Hoar’s younger brother was Thoreau’s close friend and frequent walking companion. See id. at 37.
112. See id. at 28–29.
113. See id. at 29–30.
114. While Hoar was no fire-breather, he was a staunch opponent of slavery when he served in the state legislature. See generally id. at 34–36. He was among the first and founding members of the Massachusetts Republican Party that emerged as an antislavery party from the ashes of the Whig Party. See id.
profile perfectly. He was precisely the kind of judge who would oppose slavery in private but uphold its institutional compromises in public in the name of political and social stability.

Hoar was not the only antislavery judge to charge a grand jury on how the law should treat abolitionists who resisted the Fugitive Slave Act. In *Judicial Solidarity?*, I collect and digest all the other grand jury instructions delivered in cases prosecuting abolitionists who tried to rescue or otherwise help alleged fugitives.115 Every other judge, no matter where they sat or what their attitude toward slavery was, had the same response to these cases: the Fugitive Slave Act must be enforced, and resistance to the law must be punished because otherwise the rule of law would disintegrate.116 These jury instructions, as a collection, strongly confirm Cover’s dismal view of antislavery judges. To a man, the priests of the legal institution doubled down on institutionalism and sought to choke off any challenges to the status quo and the legal order.

Judge Hoar’s jury instruction was different. Where every other judge took pains to establish the legitimacy and enforceability of the Fugitive Slave Act, Judge Hoar proclaimed that the law “seems to me to evince a more deliberate and settled disregard of all the principles of constitutional liberty than any other enactment which has ever come under my notice.”117 Where every other judge argued that the law’s legitimacy must be stable, Hoar (while acknowledging that the law was currently constitutional) argued that the law’s legitimacy is dynamic and could be changed through mass politics.118 And where every other judge feared that any resistance to the law in the name of “higher law” would be the gateway to secession and anarchy,119 Hoar explicitly allowed for the moral possibility of civil resistance. He allowed that when a man “acting conscientiously and uprightly, believes [a law] to be wicked, and which, acting under the law of God, he thinks he ought to disobey, unquestionably he ought to disobey that statute.”120

In the context of the other jury instructions, and in the shadow of Cover’s dismal view, Judge Hoar’s instruction stands out. Again and again, Hoar rejects the institutional orthodoxy that would clamp down on dissent and affirm the legal order. Again and again, Hoar makes space for the radical abolitionist ideas swirling outside his courtroom door. One could dispute (and I discuss this dispute at length in the article) whether Hoar’s instruction does enough to truly stand in solidarity with the movement to abolish slavery. One could argue (as Thoreau did)121 that it would have been better for him to resign than to continue to operate within a corrupted system.

115. See id. at 16–24.
116. See id.
117. Ebenezer Rockwood Hoar, Charge to the Grand Jury, at the July Term of the Municipal Court, in Boston, 1854, at 7 (Boston, Little, Brown & Co. 1854); see also Farbman, supra note 18, at 44.
118. See Farbman, supra note 18, at 43.
119. See generally id. at 16–24.
120. Hoar, supra note 117, at 8 (emphasis added); see also Farbman, supra note 18, at 47.
121. See supra note 63 and accompanying text.
Ultimately, these strategic arguments are beside the point. The question is not whether or not Judge Hoar was a “hero of the resistance.”\textsuperscript{TM} As I previously argued, this very idea is itself a distraction. Instead, what interests me is the attempt. In Judge Hoar’s deviant grand jury instruction, I see another effort by someone who holds institutional power to make space for deliberation, resistance, and radical imagination within a hostile system. It may be that, in Cover’s terms, Hoar is a priest and not a prophet. But he is a priest who wants to make room for prophecy rather than one who wants to stamp it out. Or, to bring the metaphor back around, Hoar is yet another master who is working to open up a destabilizing and democratizing commons within the master’s house.

Transposing Hoar’s story to the present, we face the modern application of Cover’s challenge. Can judges be allies in struggles for liberation and in movements resisting unjust institutions? One could argue that the question itself is destabilizing. The concepts of judicial remove and neutrality are baked so deeply into our legal system that the ideas (and self-evident facts) of judicial politics and moral motivation are taboo.\textsuperscript{122} To suggest that judges can or should make room for the challenges of movement politics within their courtrooms is a fundamental breach of this decorum. The trouble, however, is that the breach is inevitable. It does not take an expert to see how deeply the political environment outside the courtroom walls inflects the decision-making of the judges within. As was true in the 1850s, judges can either work actively to exclude the deliberative and radical clamor of movement politics from legal spaces or, like Judge Hoar, they can make space for that clamor within the system.

Neither of these two options is “neutral” or “impartial.” Both are taken with the clamor within earshot. The question today, as in the past, is what judges and other institutionalists do in the context of that clamor. Modest as

\textsuperscript{122} It would be almost silly to generate a string-cite here to encapsulate the broad struggle being waged in academia, in the courts, and in our politics. Instead, let me offer just two prominent examples, both from the highest priests of the judiciary: Justice Breyer and Chief Justice Roberts. Justice Breyer has argued repeatedly against the view that judicial decisions are driven by politics instead of legal principles, which he believes is inaccurate and erodes the public’s trust in the U.S. Supreme Court. See Harvard Law School, Scalia Lecture: Justice Stephen G. Breyer, “The Authority of the Court and the Peril of Politics,” YOUTUBE (Apr. 7, 2021), https://www.youtube.com/watch?v=bHxTQxDVTdU [https://perma.cc/J4LX-DHZR]. His view, apparently sincerely held, is rooted in a deep orthodoxy within the legal profession, which insists that judicial impartiality is a necessary virtue for the ongoing health of the legal order. Chief Justice Roberts agrees. In his (in)famous testimony during his nomination hearings, he insisted that the role of a judge was simply to “call balls and strikes.” Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.) (“I come before the Committee with no agenda. I have no platform. Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).
it is, Hoar’s model shows how a judge might make a less dismal choice than simply stopping up their ears and screaming for peace.

III. MAKING THE COMMONS

A. Against Prescription

One of the risks of rooting historical examples in the movement to abolish slavery is that it feeds the temptation to lionize the resisters in these stories. There are few moments in history where “right” and “wrong” seem so starkly defined from our modern vantage point than the 1850s in the United States. Along with the temptation toward lionizing resisters comes a temptation to draw prescriptive lessons from them. It is tempting, in short, to argue that these heroes strove to make a commons in the master’s house and that we should follow their blueprint.

As tempting as this takeaway is, I want to reject it. I reject it for two reasons that are worth rehearsing here as I close. First, the very idea that there are heroes, or that institutional actors can be heroes, is counterproductive. To the extent that there is a utopian promise of making a commons within our unjust institutions, it is a collective project that requires stepping back and ceding space rather than stepping up and taking credit.

Second, the search for a prescriptive blueprint is a distraction. Even if it were not true that the 1850s was a fundamentally different political, cultural, and legal context than today, what is common to each of these stories is not substantive strategy, but rather a radical pragmatism that rejects grand plans and adopts contingency and specificity. What it meant for institutionalists to make space and cede power was entirely contingent on their relationships to organizers, movements, and radical imagination. What the examples in these stories have in common is an aspiration toward, rather than a plan for, opening space.

The difference between aspiration and planning may seem abstract, but it is critical. One of the things that makes lawyers so prone toward institutionalism is the way that legal training emphasizes planning. Law students and young lawyers are taught to brief cases, outline classes, map out pleadings, and script out depositions. They are professionalized into the logic of law school and the legal profession in its hierarchy123 (and in its maleness124 and whiteness125). All these strategies are about creating and preserving order. For example, the very act of outlining a class in preparation for a final exam is predicated on the hope that there is rationalized order that the student can impose on the class. That order, properly imposed, creates the possibility of planning for (and succeeding on) a final exam that tests synthetic comprehension. Students become the heroes of their own quest to

123. See generally Kennedy, supra note 24.
125. See generally Capers, supra note 27.
impose effective order on the universe and then have their heroism crowned with the laurels of the professor’s evaluation.\footnote{Though, of course, grades are not strictly speaking evaluations so much as they are an exercise in ranking to fill the insatiable appetite of the curve. The fact that the laurels come from comparison and competition only emphasizes the extent to which students are the heroes of their own saga.}

Where the goal is success within the guidelines of an established institutional framework (grades in law school), this makes perfect sense. But it should also be clear that it reifies the institution itself. Where the institution rewards the heroes who vanquish their exams, those who get those rewards walk away with more power within the institutions as their spoils. Thus, the ideas of heroism and institutionalism are intertwined and self-reinforcing. Heroism exists only in the context of the institutions—the sword that the law student uses to vanquish exams cannot be used to vanquish the idea of exams altogether. In other words, to deploy the central metaphor of this Essay in a different context, no matter how carefully sharpened or expertly wielded, the master’s tools will never dismantle the master’s house.

Opening a commons within the master’s house, then, must mean something other than planning and heroic striving. What all of the stories that I summarize here share are people with institutional power aspiring toward destabilizing the very institutions that gave them power. What the abolitionist judges, the town meeting of Acton, and Judge Hoar all understood was that the real power to destabilize came from outside (or at least beyond) the relatively narrow confines of their specific institutional context. The goal was not to tame and translate those forces into a litigation strategy or a closing argument. Rather, the goal was to let the forces in, in all of their chaos, complexity, and radical potential.

All these stories show that the acts of letting in, making space, and stepping back are opportunistic rather than premeditated. I have called the process “radical pragmatism.” It requires the institutional actors to be in active and integrated relationships with movement actors and to seize the opportunities to open a commons when they appear at the cracks and joints of their institutional practice. This means humility. But it also means more than that. It means a thoughtful and self-reflective practice of space making.

And since this Essay is partly written in the key of autobiography, let me say that what I describe here is a practice that I aspire to in my own work both on the page (here) and in the classroom. Although I am identifying this strain of thought and practice in my own work, I am far from the only lawyer or academic working on these ideas.\footnote{Generating anything like a full list of citations here would almost certainly exclude by omission more than it would include. Suffice it to say that the work I am identifying myself with here is work claimed by lawyers who call themselves movement lawyers, community lawyers, organizers, radicals, cause lawyers, and more. It is work that is undertaken every day in law school clinics and law school classrooms. To cite just a few personal lodestars: \textit{Gerald P. López, Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice} (1992); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, \textit{Movement Law}, 73 \textit{Stan. L. Rev.} 821 (2021); Derrick A. Bell, Jr., \textit{Serving Two Masters: Integration Ideals}} I am, myself, no “hero of the
resistance,” but I do believe that law schools and the legal academy are institutional contexts where space making is both essential and able to make change.

I say this because I have seen it. I am writing these words just weeks after one of my most influential mentors, Lani Guinier, passed away. I took Professor Guinier’s class “The Responsibilities of Public Lawyers” when I was a first-year student at law school. Two years later, I was lucky to be a teaching fellow for the class when she taught it again. Like many students who came to law school hoping to change the world, I had found the reality of legal education to be dispiriting and obfuscating. I had found my own capacity for imagination to be dulled by complexity and confusion. But when I stepped into Professor Guinier’s class in the spring of my first year, it was like I felt the breeze on my cheeks for the first time in months. There, in the heart of the master’s house of Harvard Law School, Professor Guinier was modeling the practice of stepping back and challenging us, as students, not only to step up, but to make space for voices and imaginations beyond ourselves and beyond our law school context to be present in our conversations.

Professor Guinier was not perfect, and neither was the class. We did not escape the hierarchy of our surroundings or bring about radical transformations on the spot. But I will never forget the optimism that I felt in the first week of class as I started to see the promise of the practice of radical pragmatism in my legal education. This is the promise that I realize animates my writing and my teaching. It is an optimism that lives not in a prescription for how we should teach, but rather in a reminder that when we step back, cede space, crack the windows and relinquish control, we let in the breezes and voices that can change the spaces we inhabit from within.

B. In Defense of Where We Are

I can trace how my own path of inquiry has traveled from Professor Guinier’s classroom, to my time in practice, to research that I have committed my last five years to. But I can also see how my nonprescriptive prescription to “make space” and practice radical pragmatism might be frustrating. At the nub of each story that I have told is a kernel of optimism—that struggle against oppressive institutions may not be in vain. But if I refuse to tell you how to struggle (you’ll know it when you see it) or that the struggle is heroic (you win when you recede), it all can feel more like an aphorism or a koan than a law review article. Fair enough. So let me close with something more like concrete optimism.

I presume that almost everyone reading this Essay is an institutionalist of some stripe. If you are a law student, you already hold a great deal of privilege and power and are being trained to wield and reify the power of the legal order as part of your professional identity. If you are a law professor,

despite your grumbling, your power and institutional complicity are all the more deeply inscribed. If you are a lawyer, politician, teacher, etc., I can tell similar stories. Few of us (and perhaps none of us), as individuals, are truly outsiders.

Given this reality, the great danger that purism poses is a corresponding fatalism. If we believe that the master’s tools will never dismantle the master’s house, but all we have are the master’s tools, then we are forced to conclude that we will never dismantle the house. This fatalism itself need not be crippling for the existentialists among us, but it will be dispiriting to many. As a general matter, it leaves institutionalists with three choices: The first is to follow Thoreau and reject the institutions altogether and become a purist agitator for external change. The second is to follow Cover’s judges and reject the hope of change altogether and become an avowed defender of the institution. The third is to reject fatalism.

The most common way that lawyers tend to reject fatalism is to reject Lorde’s warning altogether. The argument goes: lawyers have been heroes in the story of making fundamental change. With the right litigation strategy or the right degree of leverage, this view suggests, lawyers can change the world. This view is a version of the hero’s journey that I am skeptical of. Doubtless, lawyers do a great deal of good for their clients within the existing institutions that they inhabit. Much of that good might rightly be called heroic—from keeping clients alive in the face of the death penalty to keeping clients in homes in the face of eviction. But the conventional heroism here is within the framework of the “system” not struggling to transform it. Thus, this pathway is less a rejection of fatalism than an avoidance.

But I think it is possible for insiders to reject fatalism in a more effective way without renouncing the institutions themselves. In the stories I have told in my articles and that I summarize here, radical pragmatists balance the individual heroism of their practice within the system with a broader opportunistic struggle against the oppressions of those institutions. They decenter their own heroic narratives within the logics of the system and make space for other voices, other stories, and other imaginations to mingle in the commons.

What radical pragmatism and the commons look like will be different in different institutional contexts. I have said a good deal about what this may mean for lawyers, judges, and public officials, but it is worth locating the practice specifically in the space that may be closest to home for many who read it: law school and legal education. Those of us who teach in law schools hold the keys to the discursive spaces in our classrooms. While there is much about the institutional realities of legal education that we cannot change,

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128. The particular existentialist that I am thinking of here is Derrick Bell. While Bell famously came to the conclusion that racism is permanent, he refused to let its permanence be a cause to stop striving. His conclusion, he argued, was not “cause for either despair or surrender. Rather, these dire prognostications pose a challenge and a basis for lifetime commitment to fight against the racism that diminishes the lives of its supporters as well as its victims.” Derrick Bell, The Racism is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide, 22 CAP. U. L. REV. 571, 572 (1993).
there are a thousand ways that we have the power to open classroom spaces and disrupt their hierarchies and rigidities. Those of us who write scholarship similarly have a great deal of agency in what we write and who we write for (even if we write within a framework of scholarly pressures that we don’t control). And those of you who are law students do so much work to hold the institutional space of legal education. There are countless opportunities to make space and open windows from within the classroom, in making editorial decisions on journals, and in student organizing.

It is critically important to say that not all of us who are situated within institutions believe those institutions need to be changed. But for those of us who do, we are not faced with the stark choice between complicity and purism. Rather, we—lawyers, law students, law professors, institutionalists of all stripes—have the power to invest in radical imaginaries and movement pressures and to opportunistically make space within our institutional practices for those imaginaries and pressures to operate from the inside. Through the specific transformative work of self-awareness and engagement, we can, together, open a commons in the master’s house.

129. Amna Akbar, Sameer Ashar, and Jocelyn Simonson have recently argued “that legal scholars should take seriously the epistemological universe of today’s left social movements, their imaginations, experiments, tactics, and strategies for legal and social change.” Akbar, Ashar, & Simonson, supra note 127, at 825.

130. Here, again, I speak from autobiography. One of the moments in my own life within the institutional framework of law school that I found most optimistic was my experience as part of a team of editors that worked on an article published in the *Harvard Civil Rights–Civil Liberties Law Review* (CRCL) by a man named Thomas O’Bryant. See Thomas C. O’Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 Harv. C.R.-C.L. L. Rev. 299 (2006). O’Bryant was (and remains) imprisoned in Florida on a sentence of life imprisonment without parole. When I was a student editor at CRCL, we received a submission from O’Bryant telling his story and critiquing the byzantine rules of habeas under the Antiterrorism and Effective Death Penalty Act of 1996. Over the course of a year, I worked as part of a team of editors to bring O’Bryant’s handwritten article into the formal pages of a law review—and thus into the view of a set of readers who would not have otherwise encountered it. On one level, it was small work—one law review article (maybe 100,000 law review articles) will not change the world. On the other hand, it was transformational work for me, my coeditors, and O’Bryant. We were occupying a formal and well-understood institutional space publishing scholarship in a well-respected journal. By opening space for a different and otherwise excluded voice, we let a new breeze blow through the still air of our journal office. For more about the publication of the article and the journal’s process, see Jocelyn Simonson, *Breaking the Silence: Legal Scholarship as Social Change*, 41 Harv. C.R.-C.L. L. Rev. 289 (2006). It is the author’s great risk that telling personal stories tends toward a heroic account from the first person. That is not what I intend! Rather, I mean this story as an illustration of what kind of work I am talking about, tuned, inevitably, in the key of my own experience.
SUBVERSIVE LEGAL EDUCATION: REFORMIST STEPS TOWARD ABOLITIONIST VISIONS

Christina John,* Russell G. Pearce,** Aundray Jermaine Archer,*** Sarah Medina Camiscoli,**** Aron Pines,***** Maryam Salmanova,****** Vira Tarnavska*******

Exclusivity in legal education divides traditional scholars, students, and impacted communities most disproportionately harmed by the legal education system. While traditional legal scholars tend to embrace traditional legal education, organic jurists—those who are historically excluded from legal education and those who educate themselves and their communities about their legal rights and realities—often reject the inaccessibility of legal education and its power.

This Essay joins a team of community legal writers to imagine a set of principles for subversive legal education. Together, we—formerly incarcerated pro se litigants, paralegals for intergenerational movement lawyering initiatives, first-generation law students and lawyers, persons with years of formal legal expertise, and people who have gained expertise outside of law schools—bring together critical insight about the impact of legal education’s exclusivity and the means by which we have worked to expand

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access necessary for our survival. The Essay explores the frameworks of movement law, Black feminism, and abolition as impacted people look to reclaim experiences and create tools for subversive legal education that teaches that the law belongs to the people and how they themselves can make and change the law.

In Part I, we explore reformist strategies that address the pervasive racism in legal education and the bar admission system while leaving the institutional framework intact. In Part II, we share four case studies of transformative legal tools; these tools work to subvert legal education from a machine that excludes, extracts, and exploits our communities into a mechanism that educates and liberates our communities. In Part III, these case studies illuminate principles that prioritize access, transparency, and collective design with impacted scholars and communities. This is a first step toward abolition—a radical reimagining of legal education that makes legal knowledge a right, that democratizes legal power, and that recognizes that the production of legal knowledge, teaching, and scholarship must include those whom the law impacts, consistent with the disability rights activism mantra “Nothing About Us Without Us.” For us, abolishing the existing structures perpetuating exclusive enclaves in legal education can assist in other abolitionist struggles, such as abolition of the prison industrial complex; these struggles are tied, not siloed from one another.

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this is the oppressor’s language

yet I need it to talk to you

—Adrienne Rich

1

Even when they are dangerous
examine the heart of those machines you hate
before you discard them
and never mourn the lack of their power
lest you be condemned
to relive them.

—Audre Lorde

2

Our project is reformist to the extent we engage with the oppressor’s language—and publish our work in a law review. But we move beyond reformist steps to the radical reimagining that Amna Akbar and Bennett Capers invite and that Swethaa Ballakrishnen and Sara Dezalay inspire.3 We propose dismantling the master’s house4 by replacing our current system of

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3. See generally Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 STAN. L. REV. 821 (2021); Bennett Capers, Afrofuturism, Critical Race Theory, and Policing in the Year 2044, 94 N.Y.U. L. REV. 1 (2019). In exploring how to “de-centre and enlarge the gaze” of legal inquiry, Ballakrishnen and Dezalay employ Lois Weaver’s long table format—“a structured, stylised, open-ended, non-hierarchical format for interactional participation and intellectual political commitment. The idea of the long table is to structure conversation as a dinner party where conversation is the ‘only course.’” Swethaa S. Ballakrishnen & Sara Dezalay, Introduction: Law, Globalisation, and the Shadows of Legal Globalisation, in INVISIBLE INSTITUTIONALISMS: COLLECTIVE REFLECTIONS ON THE SHADOWS OF LEGAL GLOBALISATION 1, 4, 7 (Ballakrishnen & Dezalay eds., 2021). On this project, the coauthors met weekly in a long table Zoom session hosted by coauthor Sarah Medina Camiscoli.
legal education—embracing abolition as a means of ending the carceral state and the legal institutions that enforce racist oppression.

Our objective is to broaden the discourse on legal education, rather than to provide a definitive blueprint. In Part I, we explore reforms that promote equality and democracy within existing mechanisms for distributing legal knowledge and power. In Part II, we illustrate legal education and empowerment outside law schools—in prison, in community legal advocacy, in youth empowerment, and in disability activism. Part III reimagines where legal education can take place when we democratize legal power and assert legal knowledge as a right.

We have collaborated as coauthors of diverse backgrounds: formerly incarcerated persons, legal fellows, legal workers, paralegals, a law student, recent law graduates, and a law professor. We define our coauthors collectively and interchangeably as organic jurists or community legal writers. Based on Antonio Gramsci’s concept of “organic intellectuals,” an organic jurist “studies, analyzes, and comments on the law.” Gramsci, who spent years imprisoned by Mussolini’s fascist regime, viewed every person as an intellectual. Professional intellectuals, those with formal education and certification, function to “maintain[] and reproduce[] a given economic and social order.” To counter hegemony, the oppressed classes generate “organic intellectuals,” whatever their training, who are organic to the oppressed classes and have the “capacity” to “oppos[e] and transform[] the existing social order.” We define organic jurists as legal scholars without traditional educational prerequisites.

We borrow community legal writers from Amanda Alexander, founder of the Detroit Justice Center. Community legal advocates are “trained community members who will help [impacted community members] understand, use, and shape the laws . . . [i]nstead of turning [only] to traditional lawyers . . . to empower them to solve justice problems on their own.” Community legal writers learn elements and procedures of legal scholarship to contribute their knowledge, tools, and insights. We coined these terms to model the flexibility necessary to expand access and opportunity.

5. Special thanks to Jacob Pearce for flagging the importance of Gramsci’s concept of the organic intellectual.


8. See id.

9. Id. at 300–01, 305–06, 318–22. Gramsci understands the professional intellectuals as being organic to the dominant social order. See id. For our purposes, we use “organic” to refer particularly to those, regardless of training, with the “capacity” to “oppos[e] and transform[] the existing social order.” Id. at 300.

10. See Community Legal Advocates, supra note 6.
B. How We Got Here: Our Journey to Conceptualizing Subversive Legal Education

Christina: We begin subverting legal education’s facade of neutrality by discussing identity. “[T]he personal is political” is a phrase long established in Black feminist literature, referenced in the Combahee River Collective’s “Black Feminist Statement”11 and Audre Lorde’s The Master’s Tools Will Never Dismantle the Master’s House.12 I am a melanated, queer woman of color and the daughter of South Indian immigrants. Even with covering,13 I am too many degrees away from the privileges of a White14 man, despite my father naming me “Christina Elizabeth John,” a name that passes on job applications but is disconnected from my ancestors. Mine is a name that does not protect me once people see me. After my arrest at twenty-one years of age, I cluelessly attempted to navigate the legal system. I did not know lawyers or otherwise have access to the legal system. When I called the district attorney’s office to advocate for myself, I was told that they only spoke to lawyers. When I was able to afford a lawyer, the matter was essentially taken care of after a minutes-long chat with an assistant district attorney. Reflecting on my experience and the experiences of youth like Kalief Browder15 fueled my path in the law.

Russ: I am a sixty-five-year-old White heterosexual cis-male. My identity has opened doors for me and made me comfortable in the predominantly White, heterosexual, cis-male space16 where I have worked as a professor since 1990.17

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12. See LORDE, supra note 4.
14. We coauthors view it as anti-racist to bring attention to White identity and not erase it. We believe that too often White history or a White-dominant legal system are taught as neutral history or a neutral legal system when they are anything but that. See, e.g., Bennett Capers, THE LAW SCHOOL AS A WHITE SPACE, 106 Minn. L. Rev. 7, 29 (2021) (describing “white letter law”). We are persuaded by the anti-racist arguments for why “White” should also be capitalized. Brittany Wong, HERE’S WHY IT’S A BIG DEAL TO CAPITALIZE THE WORD ‘BLACK,’ HUFFPOST (Sept. 3, 2020, 4:13 PM), https://www.huffpost.com/entry/why-capitalize-word-black_5f342ca1c5b6960c066faea5 [https://perma.cc/6423-HPPN].
15. Kalief, a Black youth from the Bronx, was sixteen years old when he was arrested for a crime that he repeatedly insisted he did not commit. See Jennifer Gonnerman, KALIEF BROWDER, 1993–2015, NEW YORKER (June 7, 2015), https://www.newyorker.com/news/newsdesk/kalief-browder-1993-2015 [https://perma.cc/BWG7-KD92]. Kalief spent three years on Rikers Island without a conviction; two of those years were in solitary confinement, where he attempted suicide several times. See id. He was released from Rikers in June 2013 and committed suicide just two years later. See id.
17. My religious commitments as a theologically left Jew shape my morality and my world view, but I believe that, despite the persistence of anti-Semitism in the United States, expressed in such events as the 2017 Unite the Right Rally in Charlottesville, Virginia, White
Inspired by civil rights lawyers, I began law school in 1978. I was quickly disillusioned, learning vocabulary that obscures how law structures power and justice, language my grandparents—only one of whom completed high school—could not readily engage. I asked now Judge Guido Calabresi, my torts professor, whether I should remain in law school. He urged me to focus my career on remaking the system of justice.

As a teacher, I aspire to apply the wisdom of bell hooks and Paolo Freire in recognizing my students as teachers. Christina has been my teacher as a student and as a teaching assistant and coteacher of my Lawyers and Justice seminar, and she is the first author of this Essay.

As a scholar, I have written about “White Lawyering.” We can have a just society when we denormalize Whiteness and dismantle structural racism. We can do that if White people like me share power and give up the benefits that structural racism has wrongly bestowed. I share my power as a law professor by participating in a team on which my position and identity do not determine my authority.

In Movement Law, Amna Akbar, Sameer Ashar, and Jocelyn Simonson teach:

When we produce legal scholarship, we propagate ideas. Typically, we tell stories about what is wrong with our systems and institutions of law, and we advocate for solutions. Movements, like scholars, are fundamentally invested in the realm of ideas. But unlike most legal scholarship, left movements are invested in disrupting the status quo and transforming political, economic, and social relations. Movements often start with disrupting ideas and telling new stories about what is possible. Movement law attempts to engage, celebrate, and participate in disruption from the grassroots. When this effort arises from within the university, it is necessarily contradictory given the university’s central role in reproducing elite rule and the myth of meritocracy. Nonetheless, we believe it is important and possible for legal scholars to support efforts at radical and popular ideation toward transformation. Otherwise, we acquiesce to a much narrower and more elite discourse.

Christina: We are constructing this dialogue to represent conversations we have had through our relationships: student-professor, coeducators, coauthors, friends. bell hooks notes, “To engage in dialogue is one of the simplest ways we can begin as teachers, scholars, and critical thinkers to cross boundaries, the barriers that may or may not be erected by race, gender,
class, professional standing, and a host of other differences.” 21 This dialogue can serve as a useful intervention. By modeling dialogue, we hope to encourage dialogue.

**Russ:** I have argued that legal institutions privilege White people and do not promote equal justice. 22 Law schools further complicity in structural racism by teaching “that lawyers should ‘bleach out’ their racial, as well as their other personal identities,” 23 and “to treat whiteness as a neutral norm or baseline, and not a racial identity . . . to view racial issues as belonging primarily to people of color.” 24

**Christina:** Russ and I received educations approved by the American Bar Association (ABA) that trained us as Gramsci’s professional intellectuals who maintain and reproduce existing hierarchies. 25 I suggested we invite nonlawyers 26—persons we call organic jurists—who have used “subversive” methods to learn the law 27 by learning outside of law schools. Organic jurists have been my greatest educators for reimagining legal institutions. For those who say abolition is a fantasy, organic jurists have shown me that we, in fact, live a fantasy when we believe our society can sustain the existing system.

**Russ:** I have forty years of socialization in traditional legal scholarship. I had to set aside my inclination of drawing on convention. Christina persuaded me—asking me to act consistently with a position I had long argued—that the public good, justice, and democracy require we open the delivery of legal services to people without law degrees. 28

**Christina:** But how do we both bring people in and support them in the process? My labor has previously gone uncompensated and unrecognized. Women who are highly aware of the pay gap may be nodding along. If you have an intersectional identity, you may also be nodding along because you, too, have given your time, energy, and vulnerability without credit.

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21. HOOKS, supra note 18.
22. See generally Russell G. Pearce, Eli Wald & Swethaa S. Ballakrishnen, Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships, 83 FORDHAM L. REV. 2407 (2015); Pearce, supra note 19.
23. Pearce, supra note 19, at 2083.
24. Id.
25. See supra notes 7–9.
26. The term nonlawyers is problematic, implying a status that is somehow less than that of lawyers. See, e.g., James Goodnow, Non-Attorney—Distinction or Diss?, ABOVE THE L. (Feb. 7, 2020, 11:47 AM), https://abovethelaw.com/2020/02/non-attorney-distinction-or-diss/ [https://perma.cc/4UQD-PJCA].
27. See Akbar et al., supra note 3 (emphasizing the importance of collaborating on scholarship with grassroots movements).
Coauthorship is one form of recognition for organic jurists that assumes “the personal is political.” Several individual feminists credited with coining the term have rejected the individual recognition, instead “cit[ing] millions of women in public and private conversations as the phrase’s collective authors.”

Russ: Every point Christina made was correct, but I worried about practicality and risk based on my forty years in legal scholarship. Would I—would we—be derided for listing seven coauthors, most of whom would be organic jurists? The more we discussed the topic, the more I agreed that subversive legal education requires vulnerability.

Christina: As bell hooks says, “When the obsession with maintaining order is coupled with the fear of ‘losing face,’ of not being thought well of by one’s professor and peers, all possibility of constructive dialogue is undermined.” For transparency, we share our discomfort and fears of losing face. We reflect on our limits and lived experiences. We open ourselves to criticism to be held accountable to our words. We hope to model reformist steps in subversive legal education toward abolitionist visions that reimagine the legal academic space.

I. REFORMIST STEPS: THE ANTI-RACIST LAW SCHOOL

In this part, we examine proposals for making legal education more equal and inclusive while retaining existing institutions: the privilege to deliver legal services as a lawyer generally requires a college degree, a three-year law school degree, and bar admission. But the existing forms, as Duncan


30. HOOKS, supra note 21, at 179.

31. The movement’s critiques may make us uncomfortable, and taking them on in the classroom may require risks, but we need to get uncomfortable. For too long, too many of us have looked the other way, even when we know better. It is time to look at the law beyond our conventional ways of seeing. It is time to bring in the people who for too long have been outside the classroom, and yet are so central to law’s operations. See Amna A. Akbar, Law’s Exposure: The Movement and the Legal Academy, 65 J. LEGAL EDUC. 352 (2015).

32. Akbar et al., supra note 3 (explaining that accountability is necessary in movement law).

33. “In [forwarding an abolitionist imagination], the movement offers transformative, affirmative visions for change designed to address the structures of inequality—something legal scholarship has lacked for far too long.” Amna A. Akbar, Toward a Radical Imagination of Law, 93 N.Y.U. L. REV. 405, 410 (2018).

34. Although unauthorized practice laws restrict the practice of law to lawyers, the actual boundaries of this restriction sometimes blur. Many jobs, such as social work, could include legal advice for clients seeking government assistance, and others, such as accounting, are acknowledged to include a significant component of legal analysis and advice. Today, moreover, new types of legal services providers, many of which rely on artificial intelligence, are gaining a multibillion-dollar foothold in the legal services market. See RENEE KNAKE JEFFERSON ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 47–57 (2020).
Kennedy observed, reproduce the dominant societal hierarchies.\textsuperscript{35} Or, in Gramsci’s terms, legal education gives the “impression of being democratic in tendency.”\textsuperscript{36} We recognize that within these limits, change can make a difference to people who become lawyers, as well as to the functioning of the legal system.

A survey of all the ways to make legal education more equitable is beyond the word limits of this Essay. Rather, we seek to join and advance the scholarly conversation regarding one particular dimension of reform. We highlight some of the racist policies that “produce[] or sustain[] racial inequity between racial groups” and the anti-racist reforms suggested for “produce[ing] or sustain[ing] racial equality between groups.”\textsuperscript{37} We recognize that many readers will find our arguments more palatable when made within the spirit of disparate impact analysis: when facially neutral policies have racially disparate impacts, the burden shifts to defenders of those policies to provide nondiscriminatory justifications.\textsuperscript{38} We hope this part provides a roadmap for conversation along these lines, although we are persuaded by Ibram X. Kendi’s argument that, given the fundamental equality of all people, we should eradicate any policy that results in an outcome that subordinates a particular racial group.\textsuperscript{39}

The American legal system has long been the engine of White supremacy, through conquest, enslavement, and Jim Crow, and later through facially neutral laws that, despite the civil rights movement, continue to maintain disparate White power and wealth.\textsuperscript{40} As of 2019, “the typical White family has eight times the wealth of the typical Black family.”\textsuperscript{41} As Bennett Capers notes,

We live in a world built on racialized hierarchies and inequality, and much of the reason we live in such a world is because of what we call the law, from Slave Codes to the enshrinement of slavery in the Constitution to the doctrine of manifest destiny to anti-miscegenation laws to the Chinese Exclusion Act to zoning rules to qualified immunity to racialized highway

\textsuperscript{36} \textit{THE GRAMSCI READER}, supra note 7, at 318.
\textsuperscript{37} IBRAM X. KENDI, \textit{HOW TO BE AN ANTIRACIST} 18, 20 (2019).
\textsuperscript{39} See KENDI, supra note 37, at 18.
\textsuperscript{40} See generally AZIZ RANA, \textit{THE TWO FACES OF AMERICAN FREEDOM} (Harv. Univ. Press 2010); K-Sue Park, \textit{The History Wars and Property Law: Conquest and Slavery as Foundational to the Field}, 131 YALE L.J. (forthcoming 2022).
construction to so much more. It is the law, after all, that has contributed to why, even now, we are segregated in where we live and where we go to school and whom we love. Quite simply, law is haunted by race . . . .  

The legal profession recapitulates White people’s disproportionate representation, power, and resources—discriminatory impact occurs at every step through admission to the bar. As Deborah Rhode noted, “Law is the least diverse profession in the nation.” Although non-Latinx White people are only 60.1 percent of the population, they comprise 86 percent of lawyers, while Black people are 13.4 percent of the population and 5 percent of lawyers. Capers notes that “[a] recent survey of 238 large firms found that fewer than 5% of associates are Black, as are fewer than 2% of the equity partners. By contrast, white lawyers make up almost 90% of the equity partners.”

Not surprisingly, legal education is the primary vehicle for recapitulating White people’s disproportionate representation, power, and resources in the profession. As Capers observes, law school is a “White space.” His description applies to the demography of students and teachers, as well as to pedagogy and architecture. Capers notes:

[I]n 2019, Latinx students accounted for 12.7% of students at ABA accredited law schools, even though Latinx individuals make up approximately 18.3% of the population in the United States. The number of Black students is even smaller. Blacks make up just 7.94% of law students, though Blacks make up 13.4% of the population.

An American Bar Foundation study found that “Black students and Hispanic students are disproportionately enrolled in lower-ranked schools.” Capers notes, “At the top 30 law schools, Latinx students make up just 9% of the students; Blacks only 6%.”

42. Capers, supra note 14, at 58.
47. U.S. CENSUS BUREAU, supra note 45.
48. Lawyers by Race & Ethnicity, supra note 46.
49. Capers, supra note 14, at 22.
This underrepresentation does not reflect college enrollment where “52.9 percent [of students] are non-Hispanic white, 20.9 percent are Hispanic, [and] 15.1 percent are black.”

Probably the most significant roadblock to law school admissions is the ABA’s requirement that law schools “require each applicant for admission . . . take a valid and reliable admission test to assist the school and the applicant in assessing the applicant’s capability of satisfactorily completing the school’s program,” namely either the Law School Admission Test (LSAT) or the Graduate Record Examination (GRE). As commentators note, these criteria “lock[]-in” White dominance. White test-takers receive an average LSAT score of 153; Black test-takers average 142, and Latinx test-takers average 146. GRE results are similarly disparate. To the extent the LSAT is at all predictive, its value is somewhat circular—it correlates loosely with what we already do, but these measures do not necessarily tell us whether someone will be a better lawyer. The LSAT predicts only one-third of the difference in first year grades, which means two-thirds of the difference depends upon other factors: “[A] 6-point score difference between two LSAT scores accounted for only a 0.1 difference in law school grade point average.” And though the LSAT correlates with “how well a student will do on the Bar Exam on the first attempt . . . [i]t is not . . . a successful measure for . . . subsequent attempts.” Employing disparate impact tests, the use of the LSAT or GRE cannot be justified. An anti-racist law school would not require either for admission.


56. See id.

57. Capers, supra note 14, at 48; see also Daria Roithmayr, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014); Erika Wilson, Monopolizing Whiteness, 134 HARV. L. REV. 2382 (2021).


63. See Capers, supra note 14, at 48.
Law schools additionally create discriminatory barriers through their cost. “Black families’ median and mean wealth is less than 15 percent that of White families.” But law schools, by deciding to prioritize merit-based scholarships over need-based scholarships to attract applicants with higher LSAT scores for *U.S. News and World Report* rankings purposes, seemingly do not factor structural racism into financial aid decisions. These practices compound the disproportionate obstacles facing Black graduates, saddling them with higher debt than White graduates. Indeed, “Black or African American law school graduates loan debts are 97% higher on average than white law school graduates.” To mitigate this disparate treatment, dramatically increasing financial aid available on the basis of family wealth can apportion debt more equally. Another approach could be to create low-cost law schools like the YMCA schools that provided low-cost evening legal education for working class, immigrant, and minority communities.

Moreover, law school hiring perpetuates the White space. Law professors are 69.4 percent White and 7.2 percent Black. Further, 76% of law professors in this country are “graduates of just fourteen American law schools, all of which are among the most highly ranked schools in the country . . . . The average black enrollment at these schools is 6.92% while the average black enrollment at the schools considered unranked is 13.7%.” The discriminatory impact of hiring criteria places the burden on law schools to find new ways to hire to end White advantage.

The pedagogy of law school further perpetuates structural racism. The dominant role ideologies are those of the neutral partisan lawyer, neutral judge, and neutral teacher. But if the context is a racist system, neutrality leaves the system undisturbed. Sandy Levinson describes how lawyers

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64. *See* Bhutta *et al.*, *supra* note 41.
aspire to “bleach out” personal identities, maintaining the profession’s Whiteness. Eduardo Capulong, Andrew King-Ries, and Monte Mills further note that neutral ideologies make Whiteness “the norm, i.e., the assumed unstated, invisible measure of neutrality and objectivity.” Neutral law professors teach black letter law instead of what Capers terms “white letter law,” which would teach how black letter law is applied differently when race is involved. White dominance is not explicitly taught, and race is otherwise treated as supplemental. This reinforces what Kimberlé Williams Crenshaw calls “perspectivelessness” or what Elizabeth Mertz describes as “erasure or cultural invisibility” or “amorality”—“what is understood as objective or neutral is often the embodiment of a white middle-class world view.” Role neutrality leads to training lawyers, professors, and judges who function as cogs in a structurally racist system. The inability to think critically about why White people dominate power and resources “locks in White advantage,” making structural change unlikely.

A belief in neutrality can obscure unequal treatment in courts. The ABA and the National Center for State Courts have recognized that the persistence of implicit bias requires judges to move beyond, not ignore, their biases to deliver impartial justice.

Readily available resources, such as a recent book from Teri A. McMurtry-Chubb, and the edited volume from Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russell, and Genevieve B. Tung offer specific, accessible, and practical recommendations for both first-year and advanced courses. K-Sue Park’s article on property law offers an invaluable model for faculty seeking to understand how facially
neutral legal categories mask structural racism. Capulong, King-Ries, and Mills offer a guide for forming an anti-racist professional identity as opposed to an identity that ignores institutional racism.

As Mertz and Crenshaw note, the false veneer of neutrality has a discriminatory impact by leaving structural racism intact. Research has shown that the Socratic method is permeated with implicit bias and the style of negative reinforcement has a racially problematic impact. A Stanford study found that Black students do not respond as well as White students to “unbuffered critical feedback” but do respond as well as, or better than, White students to “wise intervention” combining “rigorous feedback” invoking “high standards with the assurance of students’ capacity to reach those standards.” Moreover, law school classrooms are racially hostile environments because of microaggressions, microinsults, and trauma. McMurtry-Chubb notes:

Implementing DEI curricular and classroom initiatives requires that faculty . . . see with fresh eyes who their students are and will be, how they do and would like to teach them, and to what effect . . . these considerations call professors to grapple with the reality of racism as trauma historically and in the lived experiences of their students in and outside of their classrooms.

After graduation, the bar exam perpetuates structural racism. Milan Markovic has described bar examinations as “major obstacles to diversifying the legal profession,” noting that Black, Hispanic, and Asian test takers have historically failed bar examinations at higher rates than white takers. Where bar examinations subject to Title VII scrutiny, they would be struck down because of their unproven validity and disparate impact on minority groups. Although courts have consistently rejected constitutional challenges to . . . bar exams, they have voiced concerns about arbitrary grading and unscientific selections of “cut scores.” Because bar examinations are challenging without ensuring that candidates are prepared to represent

81. See Park, supra note 40.
82. See Capulong et al., supra note 73.
83. See Mertz, supra note 76; Crenshaw, supra note 75, at 1.
87. McMurtry-Chubb, supra note 80, at 41–42.
actual clients, commentators have charged that their primary purpose is to limit competition and protect (predominately white) incumbents.\textsuperscript{89} Markovic interrogates whether bar exams exclude incompetent lawyers.\textsuperscript{90} Comparing the rate of disciplinary cases against Wisconsin lawyers admitted through diploma privilege and those admitted through the bar exam, Markovic identified “no evidence that the bar examination affects attorney misconduct.”\textsuperscript{91} Given the significant discriminatory impact of the exam and the absence of evidence that it serves nondiscriminatory purposes, the bar exam must be abolished.

Discriminatory impact characterizes every step through bar admission, and structural racism within the legal profession, unsurprisingly, recapitulates structural racism in our society. As a result of the disparate impact, anyone who wants to end racism in legal education and bar admission should interrogate and reconsider each of these policies. If you find racist outcomes unacceptable, these policies must be rejected and replaced. But these reforms are only the beginning. We must look beyond the status quo to take into account the production of legal knowledge and power outside the narrow confines of the legal profession.

II. CASE STUDIES IN SUBVERSIVE LEGAL EDUCATION

In Part II, pathbreaking scholars share frameworks that disrupt the traditional approaches to legal education with more democratic and liberatory pedagogies. Inspired by movement lawyer Amanda Alexander’s employment of “community legal advocates,” our team designed this Essay to create a space for community members who understand and support subversive legal education to share their work through scholarship. Instead of relying only on traditional legal scholars, we place the opportunity to practice legal scholarship in the hands of the organic jurists. This allows them to share their knowledge of how impacted, excluded advocates access, explore, and create legal knowledge to engage legal power in solving pressing social justice problems.\textsuperscript{92} Like community legal advocates, these authors hope to use the learning from this project on traditional legal scholarship to transform knowledge, tools, and insights in and outside of historically exclusive legal spaces. These individuals share their subversive models of legal education to disrupt current models of legal education that perpetuate oppression and to democratize access to legal education and legal power. Here, these authors both imagine and demand new possibilities in legal education for the dignity of their own lives.

\textsuperscript{89} Id. at 2–3.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 23.
\textsuperscript{92} See Community Legal Advocates, supra note 6.
A. Legal Tools for Intergenerational Movement Lawyering

1. The Project

My name is Maryam Salmanova, and I am a youth leader at the Peer Defense Project. We created my position as “Paralegal of Movement Lawyering.” Every day, I bring to this role my experiences as an organizer, an alum of the New York City Department of Education, a youth leader in participatory budgeting efforts in local government, and a paralegal. My personal experiences with government institutions inspire my commitment to subversive legal education. In this section, I will illuminate the technologies we have built as a community—students, legal workers, lawyers—in order to democratize access to legal tools and knowledge.

The Peer Defense Project is a youth-led, intergenerational firm that builds youth power in schools, courts, and the government through a movement lawyering model.³ Our mission is to develop youth leaders to build legal tools to remedy the harms of segregation and systemic racism with power and self-determination. We create legal tools and democratize knowledge production and access.

We currently build legal education and tools for youth in three areas: abolition, integration, and governance. Our tools support youth and youth-centered institutions to listen to youth concerns, learn youth rights, lead in governmental institutions, legislate, litigate, and leverage power.

As the authors of Movement Law⁴ discuss, the following processes democratize legal knowledge and sustain expertise and change: locating resistance, understanding existing dynamics, shifting knowledge, and embodying solidarity. Movement Law illustrates how movements shift the paradigms of legal knowledge and legal practice. Similarly, the Peer Defense Project shares and expands knowledge and access of law to youth and with youth.

I first experienced the harms of not having access to legal education as a five-year-old immigrant from Azerbaijan looking to enroll in the New York City Department of Education. My English as a second language (ESL) teacher introduced me to the New York City public school system—the largest and most segregated school system in the United States. As an English-language learner, my capacity to socialize was already limited without my having a tongue to relate to my peers. The law required my teachers to schedule English-language prep during my kindergarten recess hour—the only time I could even try to connect through play with other children. Neither I nor my family understood the rights of immigrant youth to participate in regularly scheduled activities, so I had to suffer through these forms of isolation and segregation. I internalized the direct harms of segregated schools and a lack of legal autonomy as personal deficiencies.

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⁴ See id.
rather than as rights violations by the Department of Education. It was not until years later that I began to locate the legal language to understand or change the Department of Education’s calculated neglect, racism, and classism through my studies at the City University of New York in literature and heterodox economics.

As a paralegal at the Peer Defense Project, I work to empower students to navigate the school system and to build legal tools to challenge its inequities. Together, we have the opportunity to explore, challenge, and redefine traditional limitations of legal education.

We worked on our first intergenerational movement lawyering model, for a case on behalf of IntegrateNYC, PS 132 Parents for Change, and 14 individual plaintiffs in IntegrateNYC, Inc. v. New York. From the beginning, we created norms with the legal team at Public Counsel to build youth autonomy and youth institutional power in schools, courts, and our weekly meetings. We worked to ensure the plaintiffs understood how their stories demonstrated the direct culpability of the defendants’ perpetuation of racism and violating state human rights law and educational constitutional rights. We designed tools to ensure intergenerational understanding from the first step. We used Universal Design for Learning (UDL) framework to ensure students and parents fully understood the retainer they signed for the case.

As the case gained public recognition, we worked to center student leadership in an intergenerational press conference, earned media coverage, and created a “Know Your Case” public education campaign on social media. We democratized access to legal education by ensuring that students both understood the case and could share their story. Oftentimes, youth plaintiffs will share the story of harm while the attorneys make any and all comments on the actual rights violations. We wanted to expand and elevate the expertise of New York students so that they could serve as credible messengers and advocates in their community about their story and their case.


96. To ensure students and parents fully understood the retainer they signed for the case, we used multimedia, visuals, and circle talks to process the court documents and receive student input. We provided networks, resources, and connections to experts to expand our plaintiffs’ understanding of the case and access to supports while we waited for a favorable outcome. See The UDL Guidelines, UDL GUIDELINES, https://udlguidelines.cast.org/ [https://perma.cc/BRJ9-NGLP] (last visited Mar. 4, 2022).


99. See supra note 97 and accompanying text.
When my coauthors invited me to share about this journey, I immediately experienced our collaboration in legal scholarship as a subversive act. In acknowledging one another as scholars, we challenge the gatekeeping, elitism, and exclusion that define legal education. Our inclusion in a historically exclusive literary discipline reminded me of Audre Lorde’s reflection on discrimination in feminist literary magazines that purposefully excluded poetry:

Unacknowledged class differences rob women of each others’ energy and creative insight. Recently a women’s magazine collective made the decision for one issue to print only prose, saying poetry was a less “rigorous” or “serious” art form. Yet even the form our creativity takes is often a class issue. Of all the art forms, poetry is the most economical.¹⁰⁰

Together, we—paralegals, formerly incarcerated poets, activists, and students—bring critical insight from the global majority about the exclusivity of legal education. We reclaim our experience as impacted peoples; we work to understand the systems that harm us, and we build legal tools for our communities to share. Subversive legal education means access and transparency with impacted communities and requires that legal scholarship includes our voices.

2. “First Five”: A Technology to Expand Youth Access and Power in Exploring Litigation

Technology’s tools and activities can facilitate a platform or conversation. As we work to expand the Peer Defense Project, we rely on openness and curiosity to create unprecedented, versatile technologies. We build these technologies to democratize understanding and legal education when we work with young people to design tools or consider how we might participate in new cases that seek to empower and provide resources to youth.

At the top of each meeting, we review the “First Five.” This norm ensures our intergenerational group understands and aligns to the following: 1) confidentiality, 2) capacity, 3) accommodations, 4) agenda, and 5) roles. Appendix A holds a concise explanation of how this norm creates equitable boundaries and access.¹⁰¹

As youth impacted by legalized segregation and exclusivity from legal knowledge, we create time and space to build comfort around legal education and to identify the design of infrastructure to democratize our learning. The First Five helps create a foundation on which legal education is dynamic and expanding. In fact, I facilitated a series of conversations¹⁰² with my peers at the Peer Defense Project to reflect on the arguments in Movement Law and

¹⁰¹. See infra Appendix A.
to explore how we have built subversive methodologies through regular norms, routines, and technologies to empower youth in legal spaces.

We reclaim our experience as impacted peoples; we work to understand the systems that harm us, and we build legal tools for our communities to share. Subversive legal education means access and transparency with impacted communities and requires that legal scholarship includes our voices.

3. The “Know Your Case Campaign”: A Technology to Democratize
Public Information Throughout Litigation

While we encourage movement lawyers working with youth to build plaintiff tool kits, we emphasize that internal knowledge about a public case is insufficient for movement lawyering. Public court documents must be made publicly accessible outside of esoteric court dockets. In ongoing conversations with plaintiffs about effective mediums for challenging the exclusive mechanisms obscuring legal education, we aligned on Instagram. Our plaintiffs and partners have been creative storytellers. The idea of amplifying this experience on a medium with expansive accessibility creates a replicable tool. With this focus, we launched a “Know Your Case” campaign on Instagram.

Within the ten-slot allocation for each post on Instagram, we explained our amended complaint. We used UDL to interpret the complicated legal language, introduce the parties, and translate their pleadings into multiple formats, mediums, and languages. Please refer to Appendix B for a complete breakdown of the posts and intentions.103

4. Subversive Legal Education: A Practice

Information and knowledge exist in many mediums. Wisdom exists both inside and outside of institutions. The legal profession often deliberately dismisses a locus of community, networks, and experiences. Centering youth voice creates vision and democratizes knowledge. Redefining the parameters of legal education becomes a subversive practice. Our tools acknowledge that while the case moves through the court system, students continue to navigate the nation’s most segregated school system.104 During this waiting period, our subversive technologies help demystify conversations, intentions, and focus. These tools provide access to forums through comments and messages. With these tools, we create alignment and knowledge in resistance—dialogue actively creates awareness across generations. Legal expertise expands outside of siloed credentials. Subversive legal education builds legal autonomy and legal networks for the students and families directly experiencing the disparate impact and violence of segregation.

103. See infra Appendix B.
B. Disability Rights and “Nothing About Us Without Us”

Data sets, regressions, and spreadsheets—my professors emphasized these research methods when I was writing my senior thesis. However, this insular approach bothered me. I knew it would not justly depict the stories of the displaced Crimean Tatars, a Muslim group indigenous to Crimea, who fled their homes for Western Ukraine after the 2014 annexation of the peninsula.\footnote{See generally Steven Pifer, Crimea: Six Years After Illegal Annexation, BROOKINGS (Mar. 17, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/ [https://perma.cc/CC6F-6WDU] (discussing the 2014 annexation of Crimea by Russia).}

There is a lot of time and space between me and my grandmother. My name is Vira Tarnavska, and I am an immigrant from Ukraine and the first person in my family to attend college in the United States. I have opportunities my grandmother could only dare imagine. My grandmother is a Muslim Tatar who was eighteen years old when she fled from Russia to Ukraine in search of a better life. Her plight as a refugee inspired me to write my senior thesis in college.

To honor my grandmother, I resisted pressure to solely rely on a quantitative approach to research. I was indebted to my country, my heritage, and my grandmother to bring a voice to the Crimean Tatars’ untold stories. I drafted a lengthy list of interview questions, scheduled as many meetings with Crimean Tatars as I could possibly fit into one week, and took a flight to Ukraine. After transcribing and translating hours of conversations, the common themes throughout the interviews became the basis of the findings and recommendations in my thesis.

Three years later, when I worked in the Disability Rights Division (DRD) at Human Rights Watch, I was pleasantly surprised to discover more than one way to approach human rights research. The disability rights movement’s motto, “Nothing About Us Without Us,” powerfully “expresses the conviction of people with disabilities that they know what is best for them.”\footnote{Eli A. Wilff & Mary Hums, “Nothing About Us Without Us”—Mantra for a Movement, HUFFPOST (Sept. 6, 2017), https://www.huffpost.com/entry/nothing-about-us-without-us-mantara-for-a-movement_b_59aea450e4b0c50640cd61cf [https://perma.cc/HT4V-YPAG].} In advocacy, research, and any decision that impacts their lives, people with disabilities are “the ones whose voices must lead the way.”\footnote{Id.}

At DRD, I was reminded that people are central to human rights research. Although my thesis was based on information that I learned directly from the Crimean Tatars, I still wondered whether readers would question my conclusions because I did not provide enough quantitative support. Witnessing DRD researchers center their work on the human experience proved to me that emphasizing the human element can be an equally valuable way to conduct academic research.
Every DRD report centers the voices of people with disabilities. Recommendations reflected information collected from directly impacted individuals. Report pages quoted people with disabilities recounting their experiences. Their voices were not distilled through the lens of one author. In DRD, people with disabilities lead as decision-makers. “Many of us in the division have disabilities,” Carlos Ríos Espinosa, senior researcher and advocate, told me. Ríos Espinosa was 4 months old when he got polio, and he has been a wheelchair user since then. Others in the division have close family members with disabilities. People with disabilities are members of DRD’s advisory committee, which helps the division identify emerging human rights issues, among other responsibilities.

DRD empowers disability rights leaders through the Marca Bristo Fellowship. This year’s fellow, Bryan Russell, is a Peruvian human rights advocate who is “one of the few people with Down Syndrome worldwide to run for public office.” Hauwa Ojeifo, the previous fellow, was the first person in Nigeria “with a mental health condition to publicly urge lawmakers to ensure inclusion of people with psychosocial disabilities in creating human-rights-respecting mental health legislation.” DRD colleagues support the fellows by providing training, knowledge sharing, and advocacy opportunities.

DRD conducts advocacy by directly involving people with disabilities, aligning with disabled people’s organizations, and “jointly pushing for change.” Ríos Espinosa worked with a local organization of women with disabilities on reforming Mexico’s General Law on Women’s Access to a


109. Interview with Carlos Ríos Espinosa, Senior Researcher and Advoc., Human Rights Watch (Sept. 29, 2021) [hereinafter Espinosa Interview].


115. Fellowship Honors Disability Rights Icon Marca Bristo, supra note 113.


117. Interview with Jane Buchanan, Deputy Dir. for Disability Rts., Human Rights Watch (Sept. 29, 2021).
Life Free of Violence. He explained that the women “take the main voice” in their joint advocacy because “they are in a better position and have more authority than me, a man, to advocate for themselves.”

When I heard my grandmother’s immigration story, spoke with the Crimean Tatars in Ukraine, and read the narratives of people with disabilities in DRD reports, I found a common thread. They wanted decision-makers to hear their true concerns. “Nothing About Us Without Us” represents the disability rights movement’s commitment to bring the voices of people with disabilities to the forefront. Applying a similar approach to legal education would benefit law students, lawyers, and more importantly, their clients. People—not law students, law scholars, or lawyers—are central to legal education, legal scholarship, and legal advocacy. Individuals who are directly impacted by the legal system are vital sources of knowledge that we should not overlook in our classrooms. Lawyers’ duty to zealously represent their clients does not stop there. Lawyers should also help their clients develop the tools to independently navigate the legal system and advocate for themselves. People with lived experiences are authoritative authors, beyond their obvious position as sources of information. We should embrace “Nothing About Us Without Us” in legal scholarship to collaboratively produce authentic, impactful, and inclusive knowledge.

C. Jailhouse Lawyering and In-Prison Self-Education

“Doesn’t look like much,” I remember thinking the first time I walked into a prison law library. It was smaller than a typical library, had no computers but plenty of shelves filled with dog-eared books, some missing pages, and others missing chapters thanks to incarcerated individuals who could not afford to pay for photocopies. My name is Aundray Jermaine Archer, and I was serving twenty-two years to life for a murder I did not commit. My neighbor had suggested I visit the law library, the unofficial house of worship where, no matter one’s religion, one can find faith, if I hoped to legally shorten my prison stay. The first law clerk I spoke to advised me, “Innocence doesn’t matter in court.” He was correct; guilt had played no role in my conviction. My future had been shaped by people who spoke a language filled with incomprehensible terminologies and phrases and affirmed by twelve people who probably understood less than I had. If I hoped to regain control over my future, I needed to begin by learning the language of law.

Using the Jailhouse Lawyer’s Manual to simplify otherwise complex legalese, I developed a belief that if I kept the faith, I would earn my place in the afterlife—society. I educated myself through correspondence with paralegal courses and prison legal research workshops, and along the way,

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118. Espinosa Interview, supra note 109.
119. Id.
120. See supra note 109.
filed petitions and briefs to regain my freedom. I learned to practice law akin to a doctor practicing medicine on himself; every failure to follow legal procedures, every misuse of a legal term, every violation of motion practice, came with immediate consequences—ridiculing remarks by district attorneys, denials by courts, and reduced chances of freedom. On my sixth birthday inside, I received a letter informing me that the appellate court had denied my appeal of my criminal conviction. While most incarcerated people lose hope after being denied on appeal, the denial inspired me to study law even more in hopes of leveling the playing field. Once, I filed a pro se motion requesting a new trial based on newly discovered witnesses that would testify that I did not commit the crime. The district attorney argued that the law procedurally barred my claim because, although I did not know about the witnesses, my trial lawyer had known and chose not to use them. The court agreed. I filed another pro se motion arguing that I had been denied effective assistance of trial counsel due to my lawyer’s failure to use those witnesses. The court denied my motion, declaring it too easy to second-guess failed trial strategies in hindsight.

I became a law clerk, and with time and experience, I minimized mistakes and won a few legal victories for others over law school–educated assistant district attorneys. I had become an “organic jurist,” someone who learned law literally through “trial and error.” Recognizing the power of my legal education, I facilitated legal research classes for incarcerated individuals entrapped in an alien legal system. Many struggled to comprehend the Latin phrases, esoteric terms, and technical legal requirements. While law school–educated prosecutors had access to legal search engines, including LexisNexis and Westlaw, we had not graduated high school and were limited to the scant and poorly maintained resources of the prison law library. I made it a point to always walk clients through the legal process, explaining every stage of their legal proceedings so they could understand what was happening.

Today, I work at a law firm while enrolled in LSAT prep, my first step toward becoming a lawyer. My in-prison experience, community employment, and law school involvement have shown me that many people dedicated to assisting clients adversely impacted by the justice system do not have the experience to relate to those they are so eager to serve. Often, they lack the language or cultural understanding to relate to clients; thus, I advise my colleagues to also attempt to teach our clients to advocate for themselves because being fluent in the language of law is vital to understanding the power it entails and learning how to harness that power. In June 2021, I co-coordinated a Legal Aid Society of Westchester County–sponsored “Know Your Rights” forum, where we broke down complex legal jargon into everyday terms for over one hundred directly impacted people. When my colleagues comment on how I overcame insurmountable odds and have become an asset to society, I tell them I am not a token—there are many more individuals capable of accomplishing the same, if not more, if given the same opportunity and education.
I once read that “written laws are like spiders’ webs, and will, like them, only entangle and hold the poor and weak, while the rich and powerful will easily break through them.” Poor, uneducated people make up small insects; wealthy, educated individuals constitute larger organisms. To benefit intended targets, subversive legal education must include directly impacted individuals not only as authors but also as legal practitioners, providing the legal education, structure, and language necessary to attain self-agency. Today, I continue to fight for my innocence. Six months after my release, I filed yet another post-conviction motion to overturn my wrongful conviction, this time with a wealth of experience, an abundance of resources, and the assistance of an attorney. Although my lawyer is my attorney of record, I am actively involved in all strategic decisions and have agency over the arguments raised in the fight to clear my name.

D. Pro Se Litigation and Self-Representation

My name is Aron Pines, and my understanding of the law began with my experience as a pro se litigant. Sanborn and I called it swinging. We were locked up in the county jail when he first spoke about it. I was twenty-one with a murder charge and was preparing to go to trial. We spoke one night a few weeks before my court date. I was stressed—I did not trust my public defender enough to go to trial, but it seemed inevitable. “I don’t do lawyers. I swing,” Sanborn said, as he motioned like a batter with both hands. “I represent myself at trial.”

Swinging.

During the three years I had been detained at the county jail, I had never come across someone who represented themselves in court. The rare times that anyone spoke before the judge, they were considered crazy. But Sanborn was not crazy. He epitomized the subversive legal education—a disruptor with a deep understanding of how the judicial system worked against him and the tenacity to strike back through litigation. The American justice system often exploits the lack of legal understanding on the part of the defendant. Access to proper legal resources is limited, as well as the means for defendants to be instructed properly on how to interpret and apply the law in relation to their own cases; yet Sanborn had upended the established norm.

Over the next few weeks, I tethered myself to his hip. I often found him sitting at his desk in the cell, his legs crossed, glasses loosely clinging to the bridge of his nose, a thick law book in his hand. I would ask him questions—about litigation, discovery, statutes—and he would hand me the books he was reading and instruct me to go over certain chapters. One night in my cell, I was reading a section that focused on pro se representation. It was then that the idea to represent myself at my own trial made all the sense imaginable.


123. At the time of this writing, the motion is pending.
The following month, the trial court held a *Faretta* hearing\textsuperscript{124} to approve my right to waive counsel. I was then granted access to the law library every day rather than one hour a week. Sanborn and I went to work immediately. We started by going over the different articles of evidence, parts of a trial, and the U.S. Constitution. We spent hours walking the yard, talking litigation, or in the multipurpose room, going over discovery and witness profiles and preparing a defense. I discovered, through the veil of complex legal jargon, that the law oriented itself toward impartial logic, yet there was an element of fluidity that allowed for logic to be challenged and redefined; that each case presented a variety of components that evince a different way of interpreting law and prior precedent. The law galvanized my creativity; a breath of fresh air in a claustrophobic void. It allowed me to reclaim an essence of life that I had lost, an agency that would propel my ambition for liberation. Over the summer that year, I drafted my own legal brief in defense of a motion that the state had submitted to the court. The prosecutor had moved to submit evidence under New Jersey Rule of Evidence 803(c)(3), or the state-of-mind exception to the hearsay rule; but the evidence was inflammatory and could violate my right to a fair trial. I argued using New Jersey Rule of Evidence 403(a), which requires the court to exclude relevant evidence if its probative value is outweighed by its risk to cause prejudice. I would have never stood a chance had I still been ignorant of the law. In the fall, we argued before the court and the judge ruled in favor of the defense. Sanborn always told me you had to “muddy the waters” to challenge everything when it comes to liberating yourself—both body and mind. I was becoming a disruptor; someone who subverted the judicial process of being represented by court-appointed counsel.

Swinging.

Through my journey, I realized the significance of educating oneself about the law, especially those who are most vulnerable to the legal system’s web. There exists a tragedy, an injustice, in the fact that the people most likely to be confronted with the carceral state are equally likely to neither have the resources needed to secure a legal education or adequate representation. This perpetuates a gross hierarchy of power: those confronted with the judicial system are exploited by this lack of resources and legal savvy. Defendants plead guilty, not always due to an actual matter of guilt, but sometimes due to an inability to navigate litigation, as well as a deep-rooted disenchantment toward the courts and its agents. Prior to developing legal knowledge as a pro se litigant, I too shared this disenchantment. I loathed the prosecutor, was suspicious of the judge presiding over my case, and was convinced that my public defender would not exhaust himself when representing me at trial. My decision to represent myself as a pro se litigant was a direct result of the

\textsuperscript{124} See *Faretta* v. California, 422 U.S. 806, 835 (1975) (a defendant has a Sixth Amendment right to represent oneself at trial, so long as the defendant has “voluntarily and intelligently” waived the right to counsel, “clearly and unequivocally declar[ing] . . . that he wanted to represent himself” and did so voluntarily and intelligently, as may be established in a “*Faretta* hearing”).
lack of trust I held toward my court-appointed counsel. It illuminated the
to my court-appointed counsel. It illuminated the
more egregious issues surrounding mass incarceration—a relational
breakdown between defendants and the court-appointed counsel charged
with properly representing them. Why else would a twenty-one-year-old kid
relieve his attorney from the duty of defending him at trial?

Prior to becoming a pro se litigant, I believed that my fate was solely
dependent on the ability and sincerity of my attorney; I never considered that
I could take a proactive role and educate myself on the law. Sanborn
shattered every misconception that I previously held toward the law. He
demystified it. It no longer felt like some sacred weapon used by government
officials to leverage power but rather something accessible and necessary—a
tool to be utilized when mitigating the stifling advances of a judicial system
far too willing to exploit a population that it shows no incentive to inform.
Subversive legal education seeks to operate as a bridge for the populations
most at risk of exposure toward the prison industrial complex. It seeks to
decenter the focus of law school as the only means of acquiring legal
knowledge. I am an advocate for establishing a mechanism that would
provide proper legal training for incarcerated populations, such as workshops
and seminars designed to give a basic understanding of laws and
constitutional rights and to teach the proper way of going over discovery.
Providing legal access can be one method for shrinking mass incarceration.
Legal education not only arms populations with the intellectual stamina to
defend themselves in the judicial process but also fosters healthy cooperation
between clients and attorneys. It is important for impacted populations to
have a self-deterministic attitude toward freedom. We must obliterate
traditional ways of navigating the judicial system and use agency to gain
liberation.

III. ABOLITIONIST VISIONS

The educational models in Part II illustrate that abolition cannot be
achieved if visioning remains within the walls of law school. Steps created
within law schools are reforms at most. We explore ways to approach
abolitionist visions where legal knowledge is democratized and legal
education is lifelong. As paralegals, formerly incarcerated poets, activists,
and students, we bring critical insight from the global majority about the
exclusivity of legal education. We work together to understand the systems
that harm us and build legal tools to share with our communities. Subversive
legal education means access and transparency with impacted communities
and requires that legal scholarship includes all of our voices.
A. Legal Knowledge as a Right

Law is the language of power, and “lawyers in the United States enjoy a near monopoly on the knowledge of what the law is and how it works.” In a society where structural racism is pervasive, the arduous requirements for becoming a lawyer skew the monopoly White and wealthy. People who seek legal knowledge face several barriers.

Aundray Archer and Aron Pines illustrate these challenges through their experience with the carceral system. Archer writes of his first time in the prison law library: “It was smaller than a typical library, had no computers but plenty of shelves filled with dog-eared books, some missing pages, and others missing chapters thanks to incarcerated individuals who could not afford to pay for photocopies.” Although the Supreme Court has held that incarcerated people have a right to adequate law libraries or legal assistance, most prison libraries lack adequate resources, or access to libraries is so circumscribed as to undermine any right to access.

The inadequate access to legal knowledge in the carceral system exemplifies how unequal access to legal knowledge magnifies injustice. Pines observes:

The American justice system often exploits the lack of legal understanding on the part of the defendant. Access to proper legal resources is limited, as well as the means for defendants to be instructed properly on how to interpret and apply the law in relation to their own cases.

This perpetuates a gross hierarchy of power: those confronted with the judicial system are exploited by this lack of resources and legal savvy. Defendants plead guilty, not always due to an actual matter of guilt, but sometimes due to an inability to navigate litigation, as well as a deep-rooted disenchantment toward the courts and its agents.


127. See supra Part I.

128. See supra Part II.C.


131. See supra Part II.D.
Archer underscores this point: “[G]uilt had played no role in my conviction. My future had been shaped by people who spoke a language filled with incomprehensible terminologies and phrases and affirmed by twelve people who probably understood less than I had.”

Salmanova’s case study, drawing on her childhood experiences as an immigrant enrolled in ESL classes, further underscores the negative impact of monopolized legal knowledge:

The law required my teachers to schedule English-language prep during my kindergarten recess hour—the only time I could even try to connect through play with other children. Neither I nor my family understood the rights of immigrant youth to participate in regularly scheduled activities, so I had to suffer through these forms of isolation and segregation. I internalized the direct harms of segregated schools and a lack of legal autonomy as personal deficiencies rather than as rights violations by the Department of Education. It was not until years later that I began to locate the legal language to understand or change the Department of Education’s calculated neglect, racism, and classism through my studies at the City University of New York in literature and heterodox economics.

The counter to a system in which legal knowledge and legal power disproportionately belong to the few is a system in which legal education is a right. As Archer reflects, “If I hoped to regain control over my future, I needed to begin by learning the language of law.”

When legal education is a right, the walls of law school must fall. Legal education would be available throughout society, becoming a central component of universal education, as core as math, reading, or history.

The Peer Defense Project, for example, supports this by teaching ways to educate youth to become legal agents, democratizing legal knowledge and power.

Legal education should be freely available to all adults, not only students at community or four-year colleges, who seek to understand the laws that shape their lives. As both Archer and Pines demonstrate, legal education occurs in prison, and effective legal teachers do not need formal legal training. Their stories underscore the importance of a right to legal education throughout the carceral state for as long as it exists. Pines offers a way to fulfill the Supreme Court’s aspiration of full and adequate access to legal knowledge:

I am an advocate for establishing a mechanism that would provide proper legal training for incarcerated populations, such as workshops and seminars designed to give a basic understanding of laws and constitutional rights and

132. See supra Part II.C.
133. See supra Part II.A.
134. See supra Part II.C.
135. This parallels the way civics was once part of the established curriculum but goes further beyond the minimum of civics to developing mastery of legal language and concepts. See, e.g., Rebecca Winthrop, The Need for Civic Education in 21st Century Schools, BROOKINGS (June 4, 2020), https://www.brookings.edu/policy2020/bigideas/the-need-for-civic-education-in-21st-century-schools/ [https://perma.cc/HG3U-R7K9].
to teach the proper way of going over discovery. Providing legal access can be one method for shrinking mass incarceration. Legal education not only arms populations with the intellectual stamina to defend themselves in the judicial process but also fosters healthy cooperation between clients and attorneys. It is important for impacted populations to have a self-deterministic attitude toward freedom.\footnote{See supra Part II.}

This mechanism further demands that the lawyer-client relationship works as a locus to share legal knowledge. Archer elaborates that, beyond mere representation, lawyers should “attempt to teach . . . clients to advocate for themselves because being fluent in the language of law is vital to understanding the power it entails and learning how to harness that power.”\footnote{See supra Part II.}

Democratizing does not mean the end of schools specializing in law. Teachers of law—and legal services providers—can continue to seek specialized training at law schools.

\section*{B. Democratizing Legal Power}

Democracy requires a democratic and participatory approach to determining who has the power to participate in the legal system. To fully accomplish that goal—for people more generally to understand and harness the power of the law—we must abolish our system of licensing the privileged few. Instead, it should be replaced with a system that opens the legal system to advocates with a wide range of training and expertise, much like the organic jurists and community legal advocates we highlight.

Gerald López, who coined the term \textit{rebellious lawyering} and inspired community and progressive lawyering, has long argued for the value of legal advocates without law degrees.\footnote{See Jessica A. Rose, \textit{Rebellious or Regnant: Police Brutality Lawyering In New York City}, 28 \textit{Fordham Urb. L.J.} 619, 622–23 (2000) (outlining López’s “rebellious lawyering” as a professional or lay lawyer’s use of lawyering skills to alleviate a subordinated position, in contrast with “regnant lawyering” perpetuating traditional power inequities between lawyer and client and between client and society).} Drawing on the work of information economists who maintain that “[c]ontributing to and drawing upon what we collectively know . . . can . . . transform the . . . way we govern ourselves,”\footnote{Gerald P. López, \textit{Shaping Community Problem Solving Around Community Knowledge}, 79 N.Y.U. L. REV. 59, 64 (2004).} López opines, “No longer would our democracy honor more often in the breach than in the observance of the claim that decisions reflect the input of everyone—including ‘ordinary folks’ of all races, cultures, genders, and income levels.”\footnote{Id.}

Consider parent advocates, a type of peer advocate trained to help parents procure solutions at the agency level and facilitate community organizing.\footnote{Jane M. Spinak, \textit{They Persist: Parent and Youth Voice in the Age of Trump}, 56 \textit{FAM. CT. REV.} 308, 314–15 (2018).}
An example of parent advocate training is the Child Welfare Organizing Project’s (CWOP) Parent Leadership Curriculum, “a [six]-month training program for parents with child welfare experience to learn about the child welfare system, to learn how to effectively advocate for themselves, and to learn how to help other parents advocate for themselves.” CWOP-trained parent advocates were hired to work at CWOP, foster care agencies, and family defense practices.

The Bronx Defenders, viewing parents as collaborators and coequal problem solvers, similarly created the Parent Liaison Institute, “a community-based twelve-week advocacy training program”:

> Former and current clients, social workers, criminal defense lawyers, family defense lawyers, doctors, psychiatrists, and community activists jointly created the curriculum . . . . The goal was for all of the participants to bring knowledge and skills back to their neighborhood, and . . . to become employed as parent advocates in local child welfare agencies.

This model recognizes community and lived experience, decentering lawyers in empowerment and knowledge production. This community-built and community-led program informed by lived experience did not rely on institutional measures of expertise.

Salmanova’s discussion of the Peer Defense Project also illustrates how individual offices can provide training for impacted individuals to analyze their lived experiences through a legal framework. The Peer Defense Project created mechanisms for youth litigants to participate in their own advocacy and understand how their experiences in the New York City educational system illustrate the legal violations by city and state actors. The Peer Defense Project models this approach from the beginning by reviewing the retainer agreement as an exercise for facilitating dialogue where youth litigants can ask questions and share knowledge with their licensed advocates. The Peer Defense Project developed the “First Five” to facilitate meetings and utilized platforms such as Instagram to translate various aspects of litigation, exemplifying a collective approach not limited to those already involved, inviting others in.

For Archer and Pines, learning the law was not simply a means of understanding legal strategy as clients but a means of representing themselves in court. Both underscore the importance of self-determination and helping peers learn and understand the law.

The case studies are not geared solely toward individual and collective empowerment. This is a radical departure from formal legal education and licensing that focuses on individual development. Community legal advocates and organic jurists learn the law to become proficient in translating legal concepts for their community and translating lived experience into legal

142. Id. at 316.
143. Id.
145. Id.
advocacy. Rather than relying on sources purely from the academy, community legal advocates create knowledge with and for the community in order to democratically build legal power. Community legal advocates share a perspective with the community that is extremely underrepresented in traditional spaces.

To democratize legal power, the requirements of law school and bar admission must be abolished.\textsuperscript{146} Our case studies demonstrate the success of sharing legal knowledge in service of exercising legal power. The Peer Defense Project created a civil procedure workshop for youth litigants to understand how their case would move through the court system. Incarcerated folks, even in harsh conditions with limited resources, learn and teach the law, representing themselves and others.

Until the introduction of unauthorized practice laws of the early twentieth century, transactional legal representation was unregulated. Until the creation of the organized bar in the late nineteenth century and the accompanying uniform and restrictive admissions requirements, bar admission required only a few questions by a judge. Many low-cost law schools providing the opportunity for legal education to students from low-income backgrounds existed early in the twentieth century.\textsuperscript{147} Some did not require high school degrees, and none required a college education. In response, the ABA and the Association of American Law Schools tightened requirements, and these schools declined. Scholar Henry Drinker viewed “Russian Jew Boys” as the greatest threat to professional ethics, requiring deterrents like college.\textsuperscript{148} From our modern perspective, there is little justification for the requirements that too many uncritically embrace today.\textsuperscript{149}

\textbf{C. The Pedagogy of “Nothing About Us Without Us”}

In a democratic legal regime, the people are central to the legal narrative. This understanding should shape teaching and scholarship. Unfortunately, as our case studies highlight, the prevailing legal narrative is one created by lawyers for lawyers. In a law school classroom or in court, lawyers and judges write for the most part about those outside their group. Rarely do

\textsuperscript{146} We are of course open to forms of consumer protection so long as they do not serve to reimpose a monopoly on legal power. We also recognize that the requirements of law school and the bar exam were not even widespread until the late nineteenth century. \textit{See} BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 60–61 (2017).


\textsuperscript{148} \textit{Id. at 184 n.41; see also id. at 99–101, 176; cf. Russell G. Pearce, Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School, 29 Loy. U. Chi. L.J. 719, 732–33 (1998).}

\textsuperscript{149} While many commentators accept the existing requirements without question, some leading scholars have indeed sought to rethink legal education, especially with regard to ways to provide more opportunities to people from low-income backgrounds. \textit{See, e.g.}, BENJAMIN BARTON, FIXING LAW SCHOOLS: FROM COLLAPSE TO THE TRUMP BUMP AND BEYOND (2019); BRIAN Z. TAMANAH, FAILING LAW SCHOOLS (2012).
those impacted by the law have a role in shaping that narrative, in teaching and writing about law, or in constructing legal opinions. As a White space, the legal profession is not a representative or democratic space.

Tarnavska has shared an antidote to otherizing those impacted by law. “Nothing about us without us” demands that impacted individuals engage as active participants in their own advocacy. Through this lens, law cannot be understood without the participation and perspective of those who experience it.

Similarly, when legislators who had never experienced incarceration visited his prison, Archer and other incarcerated men stressed that plans about them should not be devised without them; legislators who had never experienced incarceration would not get it right without working with those who had lived experience. As Archer says, “subversive legal education must include directly impacted individuals not only as authors but also as legal practitioners.”150 Access to subversive legal education for those most subject to the legal system constitutes a major step toward equality, diversity, and inclusion.

Abolishing legal education as it exists cannot happen without leadership from those impacted by the law and the effects of legal education. Those directly impacted are our educators; more than simply being invited to the space within law school walls, they must be seen as educators who will lead the practice of abolition through visioning and imagination, within and beyond the walls of law school.

CONCLUSION: ABOLITION IS IMAGINATION

This Essay begins with reformist steps and ends with abolition of the existing system in favor of a democratic and participatory model of legal education. Our reformist steps join with Bennett Capers in opening the doors of law schools and ending law school as a White space.151 At minimum, the discriminatory outcomes that pervade legal education and bar admission require rethinking every step in the established process. Or, rather than seek facially neutral justifications for racist policies, we should reject them altogether in favor of anti-racist policies that promote equality among racial groups.

But reformist steps are only a temporary step toward a just society. Subverting injustice requires a world where the walls of law school and the organized bar do not obscure and monopolize legal knowledge and power. We do not claim to offer a blueprint for democratizing legal knowledge and power. It would be misguided to expect a law review essay—of all the available tools—to be such a vehicle. We imagine legal education beyond the existing walls of law school and the gates of the legal profession. We do seek to abolish law school as the only location for education and the profession as the only avenue for advocacy.

150. See supra Part II.
151. See Capers, supra note 14.
Abolition requires “work in solidarity with others toward the world as they wish for it to be,”152 so we imagine building together. We imagine those traditionally viewed as experts sharing their platforms with those who are not. We imagine many more articles coauthored by lawyers passionate about social justice issues and those most directly impacted who have gained expertise through lived experiences. This is the pedagogy of “Nothing About Us Without Us”—all teaching and scholarship of law must include the participation and wisdom of those impacted by the law.

As we model, abolition is a gradual, collaborative process requiring many perspectives, particularly of those most acutely impacted by racist and oppressive punishment mechanisms. Historically, the abolitionist movement has been a movement of growth away from morally unsustainable practices.153 The abolitionist movement is concerned with repair, restoration,154 and hope.155 Abolition without addressing the social ills—without implementing creative, imaginative reforms to build alternative systems that prioritize healing and potential and that we create hand-in-hand with those most impacted by social ills—is irresponsible, only making already existing harmful mechanisms look all the more desirable.

We imagine a world where other locations for legal education besides law school are robustly supported. So that police officers are not giving children their first lesson in the law, we imagine a cumulative development of legal education in grades K–12, when youth are taught their rights and discuss questions of accountability and repair. We imagine a world where legal education is well resourced in prisons and jails for as long as the carceral state exists. We imagine a system of legal knowledge that empowers community legal advocates, litigants partnering with trained legal services providers, and pro se litigants.

To achieve abolition, we must practice imagination. With imagination, the master’s tools can be repurposed; they can be democratized to be reclaimed as the people’s tools.156

153. See Allegra M. McLeod, Prison Abolition and Grounded Justice, 62 UCLA L. REV. 1156, 1161 (2015) (defining prison abolition as “a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation is recognized as morally unsustainable”).
154. See Taylor, supra note 152.
155. Id. (“Hope is a discipline. We must practice it daily.” (quoting Mariame Kaba)).
156. See Lorde, supra note 4, at 1–2. Lorde’s famous quote, “the master’s tools will never dismantle the master’s house,” is often misinterpreted to mean that the tools of institutions cannot be repurposed to achieve something other than what the master intended. Id. Using the master’s tools in the way the master intended would mean that “only the most narrow parameters of change are possible and allowable.” Id. But if the master used differences to “divide and conquer” and we instead used differences to “define and empower,” we would find use for the tools. Id.
APPENDIX A

“First Five”: A Technology to Expand Youth Access and Power in Exploring Litigation

1. Confidentiality Review

While knowledge and experience are personal, establishing an understanding of confidentiality allows for ideas, identities, and developments to be protected or projected with consent.

2. Capacity Check

During each meeting, the facilitators consider each participant’s individual needs and boundaries as we move through challenging conversations about race, trauma, and litigation with people across age, identity, and experience.

3. Accommodations Check

*Enabling Live Transcript:* Auditory processing is centered in COVID-era telecommunications, however maintaining visual cues helps to facilitate an added layer of information understanding.

*Cameras, Mics, and Tele-Accessibility:* Practicing an intergenerational effort recognizes capacities vary—especially in what being present looks like. Addressing in the beginning of virtual meetings how people can participate opens up the ability to voice expertise without the pressure of conforming to any particular form.

*Trigger Warnings:* Trauma responses are managed differently. We recognize the importance of identifying and preparing participants to grapple with potentially triggering content.

4. Agenda Review

With a walk-through of an agenda, everyone who is present is both able to consent to the course of events, as well as add any additional topics. Furthermore, the combination of intention and agenda helps focus clarity checks but does not impose limitations. For instance, we create space throughout the meeting for pauses; one can choose to bring forward questions, but simply sitting with information is integral to processing.

5. Role Assignment

In a youth-led and intergenerational space, we create clarity around facilitation, pacing, and notetaking so we can share in leadership and participation.
APPENDIX B

First Post: Sharing the Background of the Case and the Complaint

We created our social media launch after the filing of our litigation. The ongoing manner of legal cases presented us with a specific opportunity: first, introduce IntegrateNYC v. State of New York.

Our first post needed to articulate that our schools were racist; they violated our constitutional rights to a sound basic education. Despite over seventy years since Brown v. Board of Education,157 schools are more segregated than ever. Violating rights to equal protection, schools actively breach student human rights.

While restitution takes time to develop, this suit came with demands. Following the framework of the 5 R’s, students’ demands were cited as follows on bright illustrations:

- The right to inclusive, anti-racist schools and curriculum
- Access to resources for students to actively identify and dismantle racism
- Culturally responsive mental health supports
- Diverse educators

We name and define the parties involved: plaintiffs, defendants, intervenors. As such, the post carries a slide to name the respondents at the local and state levels. Furthermore, the post defines intervenors. After the case was filed, an organization was able to obtain permission from the judge to enter this litigation. They are a third party aligned with the defense: intervenors.

We identify organizations, including PS 132 Parents for Change and the NYC Coalition for Educational Justice. Youth-led IntegrateNYC is also among the organizational plaintiffs. This post helps articulate their role in pursuing their rights. It also helps to avoid jeopardizing the privacy of individual clients. Using functions like tagging, Instagram allows us to directly connect anyone on the page to the networks involved.

This resource is available in English, Spanish, French, and Mandarin. The virtual press conference breaks up posts about the litigation. The combination of these five posts were guided by a UDL framework. The social media platform makes it easy to display many points of access. This post distills the complaint, yet information sharing is versatile. We create this replicable repository, amplifying print media coverage. With the space

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for video sharing, an intergenerational and comprehensive Zoom press conference is on the page.

The captions and comments are also offered in a compiled version. They function as an alternative text.

Second Post: Sharing the Messages of the Motions to Dismiss

Shortly after the filing of the complaint, the city, state, and intervenors filed a motion to dismiss. Digesting the three documents to be engaging, creative, and accurate became our new focus.

Opting for a familiar format, we selected to form a text message thread. Smartphones and social media are endemic. The legal advice would be something new paired with something borrowed, the group message structure.

The city and state offered deflections of responsibility. The intervenors minimized the severity and harm of the consequences of racism. An exchange of several messages between two students captures this avoidance of responsibility.

As with the breakdown of the complaint, this resource is online in Spanish, French, and Mandarin.

Moderation

As we move through our projects, our internet presence will change. Right now, we find ourselves on Instagram and similar social sites. We are choosing to operate in free, familiar, and functional formats, aligning with the principles of movement law. With current and updated discourse, these posts democratize vocabulary.
WHEN WE FIGHT, WE WIN: EVICTION DEFENSE AS SUBVERSIVE LAWYERING

Eloise Lawrence*

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INTRODUCTION

“When we fight,” shouts a tenant, “WE WIN!” responds the room filled with tenants, organizers, homeowners, neighbors, and lawyers. These words echo off the brick walls of a converted brewery in Jamaica Plain, Massachusetts, where the weekly City Life/Vida Urbana (“City Life” or CLVU) tenant association’s meeting occurs. The rallying call is uplifted in

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praise of a tenant who has just told her story of resisting her eviction. The incantation is a reminder to all those present in the struggle for their own home, and a message to the newcomers that the act of fighting for yourself and your neighbors is where victory lies.¹

To reinforce this solidarity, a meeting organizer asks each newcomer, “Are you willing to fight to stay in your home?” The organizer repeats the question three times until the affirmative response is loud and emphatic. Satisfied, the organizer continues, “and guess what?” On cue, the packed meeting erupts with, “And we’ll fight WITH YOU!!”

These City Life meetings are the heart of the “sword and shield” model described in this Essay. The weekly meetings are where lawyers and law students meet with people facing eviction, where organizers conduct political education, and where members share news of recent and upcoming actions and events. Most importantly, it is the time and place where people facing displacement are told to “leave their shame at the door.” A longtime lead organizer, Jim Brooks, would joke that people were “welcome to pick it up on their way out,” but shame had no place here.

I. GOALS FOR THE ESSAY

This Essay will examine the “sword and shield” model in action to explore the meaning of “subversive lawyering” in the housing context, particularly in eviction defense. In this model, we²—the lawyers and law students—provide the “shield” (i.e., legal defense), while the organizers and members of grassroots housing justice organizations³ provide the “sword” (i.e., public pressure and protest). The lawyers are shielding tenants and foreclosed homeowners in the courts, which allows these “defendants” to simultaneously work with organizers to take necessary extralegal actions to ensure they are protected from displacement.

What is subversive about this model? The methodology is similar to that of a “resistance lawyer,” as defined by Professor Daniel Farbman in his brilliant article about “a group of abolitionist lawyers” who fought to keep their clients free and frustrate the operation of the Fugitive Slave Act of 1850.⁴ Farbman describes a “resistance lawyer” as someone who “engages in a regular, direct service practice within a procedural and substantive legal

². By “we,” I am referring to my students, my colleagues, and myself at the Harvard Legal Aid Bureau (HLAB), as well as the student attorneys, clinical instructors at the Legal Services Center at Harvard Law School, and the attorneys at Greater Boston Legal Services. Where I do not cite to a particular source, my commentary is based on my own observations and experiences drawn from practicing and teaching in this method over the last decade.
³. Our primary “sword” partner, and one of the creators of the sword and shield method, is City Life/Vida Urbana, located in Boston. We also work with other grassroots organizations such as Lynn United for Change (LUC) and Springfield No One Leaves. See infra notes 114–16 and accompanying text.
⁴. Daniel Farbman, Resistance Lawyering, 107 CALIF. L. REV. 1877, 1877 (2019); Ch. 60, 9 Stat. 462 (repealed 1864).
regime that she considers unjust and illegitimate. Through that practice, she seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.”

Not content with mitigating and resisting the unjust system, a “subversive lawyer” seeks to subvert the corrosive effects of such a system on poor people and people of color. Such a lawyer works directly with organizers to take a moment imbued with vulnerability, isolation, and feelings of powerlessness—when a person is facing an eviction—and transform it into one of strength, solidarity, and empowerment. In the words of one tenant, reflecting on his and his fellow tenants’ successful fight to remain in their building, “[W]e realized we are a lion.”

Finally, this Essay is my attempt to answer my clinical students who frequently ask questions expressing doubt and skepticism about their chosen profession after a disheartening appearance in court or an upsetting encounter with an opposing counsel. These questions are of this nature: “How can I even participate in such an unjust legal system? Aren’t I actually helping to preserve the status quo as an ‘officer of the legal system’?” with my participation? Isn’t this preservation or perpetuation made worse when I am not explicitly challenging the laws, the judges, or the courts, but instead simply trying to prevent my client from being evicted?” My hope is that this Essay demonstrates how a lawyer can work “within” a system, and “resist, obstruct and dismantle the system itself.”

This discussion proceeds as follows: Part II will explore how our model of eviction defense and movement building (i.e., the “sword and shield” model) shares many of the attributes of the abolitionists’ “resistance lawyering,” as defined by Farbman in his article of the same name, with an added subversive element. Part III will include two case studies, based on my own cases, demonstrating how our “sword and shield” model has worked in response to different displacement forces, namely foreclosure and gentrification, and why the model is “subversive.”

II. THE “SWORD AND SHIELD” MODEL EXAMINED IN THE CONTEXT OF ABOLITIONISTS’ “RESISTANCE LAWYERING”

The “sword and shield” model of eviction defense and movement building bears many striking similarities to the “resistance lawyering” of the abolitionist lawyers. Two aspects of “resistance lawyering” are directly relevant to the “sword and shield” model. First, the abolitionist lawyers worked “within [a] system with the goal of resisting it . . . [They] did not

5. Farbman, supra note 4, at 1880.
7. See MASS. RULES OF PRO. CONDUCT pmbl. (1997). A lawyer is “an officer of the legal system” and “lawyers play a vital role in the preservation of society.” Id.
8. Farbman, supra note 4, at 1880.
9. With some trepidation of creating a false equivalency between slavery and eviction, I follow Farbman’s call to heed “[t]his history” in the hopes that it “serve[s] as a provocation for contemporary resistance lawyering.” Farbman, supra note 4, at 1877.
abandon the field to levy high-level attacks on slavery, but rather engaged in a detailed, strategic practice of direct representation.”

Second, the abolitionist lawyers “were not deluded into thinking that their practice alone would make the change that they sought.” They understood that their daily practice was “situated within [a] broader context” and that “every courtroom battle helped to build political power.”

Another remarkable parallel is that we are both operating in a “summary process” regime where the laws explicitly prioritize property rights over human rights. The very premise of “summary process” actions is that they favor the right of the “owner” to retrieve property “without fuss, delay, or political uproar.” In formal law, Massachusetts’s summary process has been tempered over the last fifty years by the recognition of “the unique and fundamental need of tenants for dwellings that are habitable and secure.” As a result, “extensive changes [have occurred] through case law in the legal relationship between tenants and landlords and a host of legislative enactments providing tenants with new rights and remedies.” In practice, these additional rights and remedies are only meaningful if tenants know they exist and understand how to enforce them. These conditions rarely exist without legal representation, and only a tiny fraction of tenants are represented by counsel. Given this deep power imbalance, summary

10. Id. at 1932.
11. Id.
12. Id.
13. Id. at 1894; see also infra notes 44–46 and accompanying text. The modern summary process rules explicitly state that they shall be interpreted in a manner that ensures “the just, speedy, and inexpensive determination” of every eviction case. MASS. UNIF. SUMMARY PROCESS R. 1.
15. MASS. UNIF. SUMMARY PROCESS R. 1 cmt.
16. Id.
17. See Adjartey v. Cent. Div. of the Hous. Ct. Dep’t, 120 N.E.3d 297, 302 (Mass. 2019) (“[W]e [the Supreme Judicial Court] recognize that the complexity and speed of summary process cases can present formidable challenges to individuals facing eviction, particularly where those individuals are not represented by an attorney.”); see also Andrew Scherer, Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings, 23 HARV. C.R.-C.L. L. REV. 557, 562 (1988) (making the case that the constitutional right to procedural due process should encompass the right to counsel “when faced with the loss of something as crucial as one’s home”).
18. According to the Massachusetts Housing Court Department Fiscal Year 2019 Statistics, almost 90 percent of all tenants facing eviction were unrepresented by counsel. MASS. HOUS. CT. DEP’T, ADDITIONAL DEPARTMENTAL STATISTICS (2019), https://www.mass.gov/doc/2019-housing-court-self-represented-represented-litigants-by-court-location/download [https://perma.cc/6G5W-D4AR]. A 2014 study of Boston Housing Court (now Eastern Housing Court) revealed that, of those represented, only 7 percent received full representation, 2 percent had limited assistance representation, and 1 percent had assistance filing out a pro se answer form. See PROJECT HOPE, HOMESTART & DUDLEY ST. NEIGHBORHOOD INITIATIVE, BOSTON HOUSING COURT DATA REPORT 12 (2016). The rate of execution (the presumed rate of actual evictions) was almost one third of all cases brought against unrepresented tenants, but only 17.5 percent for tenants who received full representation. See id. at 12 tbl.3, 23 tbl.13.
19. The deep power imbalances in Eastern Housing Court that I observe routinely between the largely white, male, able-bodied landlords and their attorneys and the “unrepresented
process works as originally intended in the vast majority of cases, and places profit over people. Thus, the “shield” lawyers, like the abolitionist lawyers, work within the system to represent individual “defendants,” and with the “sword” activists and community members to expose the inequities in the eviction system itself and the role that the eviction system plays in perpetuating societal inequality and injustice.

A. “The Shield” as “Contemporary Resistance Lawyering”

In his article *Resistance Lawyering*, Farbman reveals and reframes the history of abolitionist lawyers who defended people against being returned to slavery—and in the process sought to undermine the Fugitive Slave Act of 1850 itself. Farbman explains that “[r]esistance lawyering is rooted in direct service within the hostile system rather than collateral attack against it through other systems.” He posits that the most effective attacks on the Fugitive Slave Act were “within its own procedural framework.” Specifically, these attacks or tactics took the form of “delay” through continuances or “clogging up the process” with custody disputes between the federal and state authorities. Both of these tactics, along with substantive legal victories, allowed for political organizing. The political organizing was critical to increasing the chances of “freedom of the alleged fugitive” and to transforming “summary rendition into a community referendum on slavery.”

20. Even those summary process actions that do not immediately result in actual eviction may result in what Nicole Summers refers to as “civil probation agreements.” See Nicole Summers, *Civil Probation*, 75 STAN. L. REV. (forthcoming 2023) (manuscript at 22–24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897493 [https://perma.cc/3XAU-NZKQ]; see also id. at 4 (noting that 37 percent of all summary process filings in Boston Housing Court over a five-year period resulted in “civil probation agreements”). These agreements provide stays of the “actual eviction” unless and until certain conditions are met. If these conditions are violated, a simple motion for execution (“actual eviction”) is filed by the landlord to which the tenant has extremely limited procedural protections remaining. *Id.* at 4–5.

21. Farbman’s novel research reveals that out of 210 cases in which some type of process was invoked, eighty-one “of the fugitives ended their cases as free people.” Farbman, *supra* note 4, at 1896–97. He uses this data to demonstrate that lawyers and activists were more effective in preventing people from being sent back into slavery than historians previously understood. See *id.* at 1882.
One of the stories Farbman tells is the case of Shadrach Minkins, a former slave in Boston, who was subject to the Fugitive Slave Act. When Minkins was captured by a slave catcher and brought to court, a network of abolitionist activists and lawyers quickly assembled to prevent Minkins from having “a swift and quiet hearing.”27 Although the lawyer for the purported “slave owner” argued that because the proceedings were “summary,” they should proceed at once, Minkins’s lawyers requested a continuance for three days, arguing that they had just met their client and needed time to prepare.28 While the hearing was proceeding, a group of abolitionist activists gathered quickly outside the courthouse. When the continuance was granted and Minkins was to be held in the courtroom, the crowd broke into the courtroom and ushered Minkins “into the street and eventual freedom.”29

As I illustrate in the case studies in this Essay,30 “shield” lawyers similarly use the eviction process’s own procedural framework to fight “the hostile system.”31 By “hostile system,” I mean an “eviction system” that grossly favors landlords, results in the displacement of thousands of people annually, and robs the dignity of many subjected to it. While the core of our work is direct service, we also are “happy to use the strategies of impact litigation and collateral attack when they [are] useful.”32 Similarly, we will use other systems, such as the legislative process, public protest, and political pressure, to attack the hostile system. To that end, we are both engaging in “resistance lawyering,” as defined by Farbman, and seeking to subvert the current paradigm where thousands of people are displaced from their homes every year.33 Furthermore, we are a counterpoint to the view that “triage and direct service is generally not seen as the most direct way to achieve broad systemic reforms.”34

An opposing view of direct service has existed in many social reform efforts for decades. Professor Gary Bellow, who founded the Legal Services

27. Id. at 1907.
28. Id.
29. Id. at 1908.
30. See infra Part III.
31. Farbman defines the word “system” as a “discrete legal system like the Fugitive Slave Law, capital punishment, bankruptcy, etc.”; it “does not mean ‘the law’ broadly.” Id. at 1880 n.4.
32. Id. at 1880.
33. See CITY OF BOS. EVICTION PREVENTION TASK FORCE, AN ACTION PLAN TO REDUCE EVICTIONS IN BOSTON 6 (2019), https://www.boston.gov/sites/default/files/file/2020/01/An_Action_Plan_to_Reduce_Evictions_in_Boston_%28Report%29%2020190109_1.pdf [https://perma.cc/272H-HUS7] (noting that in the City of Boston alone, “[t]he total number of eviction cases filed in Eastern Housing Court . . . were . . . approximately 5,000 for each of the three years examined: 2015, 2016 and 2017”). According to the Massachusetts trial court’s statistics for the 2019 fiscal year (the last full year before the pandemic), 30,614 summary process cases were filed. See MASS. HOUS. CT. DEP’T, DEPARTMENTAL TOTAL NUMBER OF FILINGS AND DISPOSITIONS (2019), https://www.mass.gov/doc/filings-and-dispositions-by-court-location-3/download [https://perma.cc/X8PR-BB5Y].
34. Farbman, supra note 4, at 1881. Farbman uses the term “triage [to] . . . refer[]] to the direct service lawyer’s position in relation to her clients . . . . [T]he purpose of direct representation is to address the symptoms that walk in the door rather than the diseases that may be causing them within the political culture.” Id. at 1881 n.6.
Center in Boston, describes how he and his staff in the early 1980s used a “focused-case” strategy in Social Security cases as a way “to produce changes in local practice and perspective that had proven very hard to alter in more judicially and legislatively focused challenges to the same problems.”

Bellow further explains that “[f]rom 1984 to 1989, the same staff undertook a variation of this ‘focused-case’ strategy in an effort to stop evictions and slow down speculation in a rapidly gentrifying area of Boston.” As described below, Bellow’s method was one of the precursors for the current “sword and shield” model that we use thirty years later.

When discussing the abolitionist lawyers, Farbman makes a critical point, however, that this direct service cannot be understood without acknowledging “that lawyers [were] acting in concert with grassroots opposition to slavery” and that they had a “clear political analysis” of how their efforts fit into the broader movement to end slavery.

Farbman eloquently summarizes:

> The story of the antislavery lawyers shows the power of direct representation as a proxy battle in a broader political movement. It shows how a clear political analysis and a deep connection with movement activists can transform a triage legal practice into a tool in a broader project of social change.

Similarly, Bellow notes that “the legal work was done in service to both individuals and larger, more collectively oriented goals. . . . Moreover, the visions we embraced, particularly those that sought radical extensions of democracy, equality, and racial justice, were focused on deep-seated, structural, and cultural change.” In short, Bellow also thought it essential that direct service work be connected to an articulated political analysis.

A further parallel can be drawn between abolitionist lawyers’ efforts to attack the hostile system from within and our own efforts today. Neither I nor my colleagues believe that we will achieve our broader goals of “housing justice” in the courtroom alone. Likewise, abolitionist lawyers knew that

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36. Id.
37. Farbman, supra note 4, at 1903, 1953.
38. Id. at 1953.
40. Id.; see also Gary Bellow, Turning Solutions into Problems: The Legal Aid Experience, 34 NLADA BRIEFCASE 106, 119 (1977) (“It’s my own experience that these views—of the limited change potential in aggressively representing individual clients, and of the degree of professional circumspection, detachment and apoliticality necessary in legal aid work—are simply wrong. Both personal involvement and a political orientation in legal aid work seem to me essential to avoiding its further bureaucratization. Indeed, the conception of the legal problems of clients as capable of division between large (and political) “test case” claims, and routine (apolitical) grievances not only depreciates the importance of day-to-day legal aid work but actually fosters the very limiting perceptions of what can and could be done in those cases to which it purports to respond.”); Betty Hung, Essay—Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change, 1 L.A. PUB. INT. L.J. 4, 7 (2009) (“[L]awyers and organizers [should] find common ground with a shared theory of social change that honors the primacy of affected community members.”).
“slavery was a problem too large to be attacked directly by lawyering.”¹⁴¹ However, our direct representation and the attendant challenge to the eviction system is a “proxy battle” for the larger goals of the housing justice movement. These goals are exemplified by the intention of Right to the City Alliance, a leading grassroots housing justice organization, to fight for “[t]he right to land and housing that is free from market speculation and that serves the interests of community building, sustainable economies, and cultural and political space.”⁴² And the housing justice movement is part of an even larger reimagining. In the words of Professors David Madden and Peter Marcuse, “The built form of housing has always been seen as a tangible, visual reflection of the organization of society. It reveals the existing class structure and power relationships. But it has also been a vehicle for imagining alternative social orders.”⁴³

B. Summary Process Under Fugitive Slave Act Versus Under Eviction Statutes

The Fugitive Slave Act and eviction law both employ what is called “summary process.”⁴⁴ Summary process means that the time for the lawsuit is considerably shorter and that procedural protections are fewer than in a traditional civil case.⁴⁵ According to Farbman, the Fugitive Slave Act “was intended to create a summary process where owners could reclaim their ‘property’ with federal assistance, requiring only minimal proof.”⁴⁶

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¹⁴¹ Farbman, supra note 4, at 1952.
⁴³ DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING 12 (2016).
⁴⁴ See Farbman, supra note 4, at 1898 (describing the summary process of the Fugitive Slave Act). In 1972, the U.S. Supreme Court upheld the use of summary process for evictions against a constitutional challenge. See Lindsey v. Normet, 405 U.S. 56, 64–69 (1972) (holding that Oregon’s use of summary process in eviction cases was not a violation of the federal Due Process Clause even where the statute allowed the trial to be held six days after service of the complaint).
⁴⁵ Farbman, supra note 4, at 1894. Farbman’s description of summary process as prescribed in the Fugitive Slave Act is far more restrictive than summary process for the possession of land in Massachusetts; for example, alleged fugitives were not allowed to testify on their own behalf, and were not entitled to jury trials. See id. But similarities do exist; there is no guarantee of counsel in either procedure, and minimal proof is required for the landlord’s prima facie case. While jury trials are allowed in eviction cases, they are the exception, and they are frequently waived (often unintentionally by pro se litigants) or stripped for minor infractions. See MASS. GEN. LAWS ch. 185C, § 21 (2022) (“All cases in the housing court department . . . shall be heard and determined by a justice of a division of the housing court department sitting without jury, except . . . in all cases where a jury trial is required by the constitution of the commonwealth or of the United States and the defendant has not waived his rights to a trial by jury . . . .”); see also CMJ Mgmt. Co. v. Wilkerson, 75 N.E.3d 605, 613 (Mass. App. Ct. 2017) (overturning the trial court’s decision to strip a pro se tenant of her jury trial because she failed to file a pretrial memorandum in accordance with housing court’s instructions).
⁴⁶ Farbman, supra note 4, at 1907.
Massachusetts law has long allowed for summary process to recover possession of real property. The Uniform Summary Process Rules, promulgated pursuant to the Summary Process for Possession of Land statute, are explicit that the rules “shall be construed and applied to secure the just, speedy, and inexpensive determination of every summary process action.” The official commentary explains that the reason underlying this directive is that “time is of the essence in eviction cases. This is based on the notion that real estate constitutes unique property and that because it generates income, time lost in regaining it from a party in illegal possession can represent an irreplaceable loss to the owner.” In other words, the state will provide minimal due process protections to a tenant because the loss of time means the landlord will lose money that cannot be replaced.

The official commentary notes that this “principle”—that housing is a unique commodity intended for the benefit of the owner—is in competition with the unique and fundamental need of tenants for dwellings that are habitable and secure. Recognition of this need has resulted in extensive changes through case law in the legal relationship between tenants and landlords and a host of legislative enactments providing tenants with new rights and remedies. These changes have made the legality of possession an often difficult and complex judicial question.

Exploiting this tension is often central to our work. The court, the landlords, and their attorneys focus almost exclusively on the legislature’s goal of providing “just, speedy and inexpensive” process. We, as eviction defense attorneys, leverage all the procedure and protections provided by the summary process rules, especially those requiring strict compliance. We also employ additional protections provided by the applicable rules of civil procedure, as well as other statutory “enactments providing tenants with new

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48. MASS. GEN. LAWS ch. 239 (2022).

49. MASS. UNIF. SUMMARY PROCESS R. 1.

50. Id. cmt.

51. MASS. UNIF. SUMMARY PROCESS R. 1. (“Procedures in such actions that are not prescribed by these rules shall be governed by the Massachusetts Rules of Civil Procedure insofar as the latter are not inconsistent with these rules, [or] with applicable statutory law . . . .”).

52. Id. cmt.


54. For a discussion of the importance of strict compliance with the summary process rules, see Dayton v. Brannelly, 152 N.E. 65, 66 (Mass. 1926) (“The process pursued is purely statutory; and it does not lie in favor of any one not strictly within its terms.”).
rights and remedies" and long-existing constitutional rights, such as the right to a jury trial.  

Farbman posits that the reason for summary process in the Fugitive Slave Act was “to avoid the political complications of public attention and resistance.” Arguably, the same could be said for allowing summary process in eviction of people from their homes. He also points out that “[t]here was no prohibition against alleged fugitives being represented by lawyers, but it was fairly clear the Law did not anticipate a robust legal process.” Similarly, the current eviction system depends on scarce legal representation and minimal legal process in the large majority of cases. As a result, when we meet someone on the day of their trial in housing court, we will use “every scrap of procedure that [we can] grasp to slow down and frustrate the process.” We will also use our activist colleagues in big and small ways to resist this speedy process by relying on their presence in the hallways of the courthouse to identify unrepresented tenants, and on the courthouse steps to protest unjust evictions. One could easily apply Farbman’s description to our work when he says, “It was this collaboration between activists and lawyers and their work resisting the Law and its operation that accounted for most of the successes achieved by opponents of the Law.”

C. Differences Between Fighting a Facially Unjust Law and an As-Applied Unjust Law

A key difference between the Fugitive Slave Act, which Farbman describes as the “archetypal unjust American law,” and the totality of the laws that govern evictions in Massachusetts is that the latter does not appear on its face to substantially favor one party over the other. This appearance of fairness is due to the case law and statutory enactments over the last half century that have provided many tenants rights and remedies that did not exist in the traditional summary process scheme. In fact, one scholar has characterized Massachusetts as one of only thirteen states with “protectionist” or pro-tenant laws. Instead, one could argue that it is the

55. MASS. UNIF. SUMMARY PROCESS R. 1. cmt.
56. See, e.g., New Bedford Hous. Auth. v. Olan, 758 N.E.2d 1039, 1045 (Mass. 2001) (“Article 15 has been construed as preserving the right to trial by jury in actions for which a right to trial by jury was recognized at the time the Constitution of the Commonwealth was adopted in 1780. At that time, the common law afforded a tenant the right to trial by jury on a landlord’s writ of entry, the procedure to evict a tenant after the expiration or termination of a tenancy. Thus, the right to trial by jury in eviction cases has been preserved under art. 15.” (internal citations omitted)).
57. Farbman, supra note 4, at 1907.
58. Id. at 1908.
59. Id. at 1903.
60. Id. at 1904.
61. Id. at 1885.
62. See supra note 52 and accompanying text.
application of the eviction laws by the landlords, the landlords’ attorneys, and the judges that makes the “eviction system” deeply unjust. In support of such an argument, legal scholar Nicole Summers’s novel research has shown how most cases in Eastern Housing Court—the busiest housing court in Massachusetts—are resolved through civil probation, which creates a “shadow legal system” that undermines the rights and procedures established by the legislature. These are the same rights and procedures that are intended to regulate the power imbalances that exist between the parties in the eviction system.

If we accept this view, it would be logical to assume that if we could get summary process to function as it is intended, then we would achieve a just result. This conclusion is supported by the example of New York City, where the “Right to Counsel” law has been enacted; there, the overall number of evictions has dropped considerably. Arguably, the enforcement of the procedural mechanisms by a more adversarial system has driven up the cost of eviction and changed the calculus for landlords. Disrupting and shrinking the eviction machine would lessen the racial inequities caused by

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64. See Summers, supra note 20, at 39–51.
65. See generally id. (presenting novel empirical research on the number of cases that result in “civil probation agreements” as a result of the vast numbers of unrepresented clients, as well as other factors).
66. See id. at 40–45.
67. N.Y.C., N.Y., ADMIN. CODE §§ 26-1301 to 26-1306.
68. See OFF. OF CIV. JUST., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR TWO OF IMPLEMENTATION IN NEW YORK CITY 4 (2019), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2019.pdf [https://perma.cc/6M4M-LEP5] (“In the last quarter of FY2019, over 32% of tenants appearing in Housing Court for eviction cases were represented by attorneys, reflecting . . . an exponential increase from the representation rate for tenants of only 1% in 2013 . . . .”); Yoav Gonen, Eviction Drop Fuels Push to Expand Free Housing Help for Low-Income NYC Tenants, CITY (Feb. 24, 2020, 4:00 AM), https://www.thecity.nyc/housing/2020/2/24/21210511/eviction-drop-fuels-push-to-expand-free-housing-help-for-low-income-nyc-tenants [https://perma.cc/HF37-8DZB] (“Over the first two years of the program, evictions in the covered neighborhoods fell by a combined 29%—from 4,355 to 3,105, according to the analysis by the nonprofit Community Service Society. Evictions decreased citywide by roughly 18% over the same time period—to about 16,200, according to the analysis. That’s down from a recent peak of nearly 29,000 evictions conducted by city marshalls [sic] in 2013 . . . .”).
the current system. Even if we achieved this critical goal of lessening the number of evictions by increasing the number of lawyers, and thereby ensuring a more robust legal process, it would not address the more fundamental problem of commodification of a basic human necessity. And “the problem with

70. Recent studies have shown that the trauma and harm of evictions in Boston is disproportionately felt by communities of color. A report found that evictions filed during the pandemic were more than twice as likely to have been filed in neighborhoods where a majority of renters are people of color than in neighborhoods where most renters are white. See David Robinson & Justin Steil, City Life/Vida Urbana, Evictions in Boston: The Disproportionate Effects of Forced Moves on Communities of Color 8 fig.3 (2020) [hereinafter Robinson & Steil, City Life/Vida Urbana Study]. Additionally, although only 52 percent of the city’s rental housing is in neighborhoods where a majority of renters are people of color, 70 percent of eviction filings take place in these neighborhoods. See id. Conversely, neighborhoods where a majority of renters are white contain 46 percent of Boston’s rental housing and make up only 30 percent of the city’s eviction filings. Id. Although communities of color are disproportionately bearing the brunt of the COVID-19 eviction crisis, this trend predates the pandemic. In an examination of Boston Housing Court eviction records in Boston from 2014 to 2016, Massachusetts Institute of Technology (MIT) researchers found that the vast majority of eviction filings were concentrated in the Roxbury, Dorchester, Mattapan, and Hyde Park neighborhoods—all communities of color. See David Robinson & Justin Steil, Eviction Dynamics in Market-Rate Multifamily Rental Housing, 31 Hous. Pol’y Debates 647, 657 (2021). In fact, this research revealed that “market-rate eviction filings are more likely in census tracts with a higher share of black renters.” See Robinson & Steil, City Life/Vida Urbana Study, supra, at 40.

71. Matthew Desmond has explained that eviction “is a cause, not just a condition, of poverty,” and research is rife with data supporting his fundamental reshaping of our collective understanding of eviction as a social problem. See Matthew Desmond, Evicted: Poverty and Profit in the American City 298 (2016). Evictions can also lead to homelessness because families are often unable to find subsequent stable housing. See Robert Collinson & Davin Reed, The Effects of Evictions on Low-Income Households (Feb. 2019) (unpublished manuscript), https://robcollinson.github.io/RobWebsite/jmp_rcollinson.pdf [https://perma.cc/3ZG4-ZWNH]. Formal evictions can disqualify families from most affordable housing programs, leaving them with no choice but to move into lower quality housing and more isolated neighborhoods. See Stephanie DeLuca et al., Why Poor Families Move (and Where They Go): Reactive Mobility and Residential Decisions, 18 City & Cnty. 556, 557 (2019) (“[W]hen families are forced to move, they land in poorer and less safe neighborhoods—and this is especially true for black renters.”). The effects of evictions extend beyond just housing. See Mark Melnik & Abby Raisz, Bos. Found., Racial Equity in Housing in the COVID-19 Era 3 (2020), https://www.ywboston.org/wp-content/uploads/2020/08/THEBOS2.pdf [https://perma.cc/6PZV-LKAD] (finding that evictions affect families’ access to opportunity and social mobility); Binyamin Appelbaum, Opinion, The Coming Eviction Crisis: “It’s Hard to Pay the Bills on Nothing,” N.Y. Times (Aug. 9, 2020), https://www.nytimes.com/2020/08/09/opinion/evictions-foreclosures-covid-economy.html [https://perma.cc/MYE7-J97] (noting that evictions displace families from communities, forcing children into lower quality schools and increasing the likelihood of divorce); Matthew Desmond & Rachel Tolbert Kimbro, Eviction’s Fallout: Housing, Hardship, and Health, 94 Soc. Forces 295, 310–13 (2015) (finding that evicted tenants are more likely to be laid off, have lower incomes and material hardship, and have poorer physical and mental health).

72. But see John Whitlow, Gentrification and Countermovement: The Right to Counsel and New York City’s Affordable Housing Crisis, 46 Fordham Urb. L.J. 1081, 1131–32 (2019) (placing the right to counsel (RTC) within the context of other legal limits placed on property owners’ absolute right to control their property, and explaining the RTC Coalition’s
making housing a commodity,” as Madden and Marcuse have explained, is that “living space [is] distributed based on the ability to pay and provided to the extent that it produces a profit. But ability to pay is unequal while the need for a place to live is universal.”73 To create a society where we provide safe and decent housing for all, regardless of ability to pay (or identity or characteristic of the dweller), we must fundamentally change the politics around the provision of this basic necessity. To shift the politics, a movement led by the people most affected is essential. And to build a movement, the lawyers who provide eviction defense must not simply “solve cases,” but must use an eviction as a moment to connect individuals to others who are exposed to the same forces of displacement and who will fight with them.74 In short, the lawyers must practice “subversive lawyering.”

III. CASE STUDIES OF THE SWORD AND SHIELD MODEL AS SUBVERSIVE LAWYERING

To understand how practitioners engaged in the “sword and shield” model are “subversive lawyers,” I will describe two cases of mine that involved fighting different forces of displacement. The first case took place in the context of the foreclosure crisis, where I was representing homeowners and tenants in Lynn, Massachusetts and working closely with Lynn United for Change (LUC), a grassroots housing organization and close ally of City Life/Vida Urbana. The second case is an example of a fight against the forces of gentrification and speculation that are fueling rapid displacement of low-income people of color from the traditional heart of the Black community in Boston. Before describing these cases in detail, however, it is important that I explain the history and philosophy of the “sword and shield” model.

A. History of the “Sword and Shield” Model

The origins of the “sword and shield” model trace back to two distinct efforts in the Jamaica Plain neighborhood of Boston. The first was the grassroots tenant organizing of the 1970s, and the second was the innovative legal work of Gary Bellow and his colleagues at the Legal Services Center (LSC) in the 1980s. The grassroots tenant organizing started in 1973, when tenants living in the Jamaica Plain and Roxbury neighborhoods came together to fight displacement by forming the Jamaica Plain Tenants Action Group (JP TAG).75 This group engaged radical tactics exemplified by the construction of RTC as a method “to build the organizing capacity of tenants, with the ultimate aim of reconstituting housing as a social good”).

73. MADDEN & MARCUSE, supra note 43, at 51.

74. See SARENA NEYMAN, CITY LIFE/VIDA URBANA, BANK TENANT ASSOCIATION ORGANIZING MANUAL: BUILDING SOLIDARITY TO PUT PEOPLE BEFORE PROFIT 30 (2012), http://www.campusactivism.org/server-new/uploads/city_life_bank_tenant_association_manual.pdf [https://perma.cc/R5CW-LGBK] (describing CLVU’s “radical organizing” model: “It is not about providing services or advocacy. No radical challenge can emerge from fostering reliance on professional advocates or service providers.”).

story of 68-year-old Mrs. Dona Julia Diaz and her two grandchildren, who were evicted from their Roxbury apartment.76 Mrs. Diaz had refused to pay rent because of the lack of heat and hot water and the presence of rats and roaches.77 The housing court had taken the word of the inspector who had not visited the property and ordered her out.78 “When the marshals arrived to evict her, forty friends and neighbors stood in the way. Five days later, however, with the police there in force, the eviction took place.”79 These friends were JP TAG, who moved Mrs. Diaz back in a few days after the eviction—“still cold, still without hot water, still living with roaches, but there, undaunted, and determined to change things.”80

JP TAG changed its name to City Life/Vida Urbana in the late 1970s.81 It has remained “committed to fighting for racial, social and economic justice and gender equality by building working class power” for almost fifty years.82 Members of CLVU also “promote individual empowerment, develop community leaders and build collective power to effect systemic change and transform society,” all while maintaining its core focus on housing justice as a central building block in the transformation of society.83

In 1979, in the same section of Boston, Gary Bellow, Jeanne Charn, and other “political lawyers” and innovators in legal education created a neighborhood legal clinic called the Legal Services Institute.84 Bellow, in his well-known article on “political lawyering,” explained that, from 1984 to 1989, LSC had a focused case strategy where

[w]e designated an ‘eviction-free zone,’ took as many eviction cases from that area as possible, and pressed the cases in ways that not only sought to preserve tenants’ possession of the property, but communicated directly to landlords the risk of increased cost and exposure that would accompany efforts to empty substandard residential property for redevelopment. These efforts were accompanied by attempts—still ongoing—to affect the

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77. Id.
78. Id.
79. Id.
80. Id. Professor Zinn described this event in an op-ed in The Boston Globe and provided commentary that CLVU would still wholeheartedly approve of: “It is a harsh commentary on our economic-constitutional system that, after 200 years of national history, the law still fails to recognize what should be an elementary principle of any decent society: that no family should be deprived of a home, no one shall be chased out on the sidewalk, because they cannot pay the price set by some real estate profiteer, or because they insist that their living space be fit for human habitation.” Id.
81. See Our History, supra note 75.
83. Id. For further history of CLVU and eviction blockades, see Our History, supra note 75.
84. See History, WILMERHALE LEGAL SERVS. CTR. OF HARV. L. SCH., https://www.legalservicescenter.org/about-the-legal-services-center/history/ [https://perma.cc/D97A-XSSW] (last visited Mar. 4, 2022). The Legal Services Institute has changed its name a number of times throughout its history, but for the purposes of this Essay, I will refer to it as the Legal Services Center or “LSC.”
attitudes and behavior of court and other personnel toward both our clients and the much larger number of tenants who appear without representation.\(^85\)

In the late 1990s and early 2000s, a protégé of Gary Bellow, David Grossman,\(^86\) continued the “focused-case strategy” and joined forces with CLVU lead organizer Steve Meacham.\(^87\) Meacham, who had been an organizer in Cambridge in the fight to defend rent control, was now organizing tenant unions in buildings located in Jamaica Plain and Roxbury.\(^88\) Grossman and his students began representing individual tenants in their eviction cases, and they also represented the tenant unions organized by CLVU in collective bargaining negotiations with the landlords.\(^89\) In particular, they would use the poor conditions in the properties as leverage against the landlords because, in Massachusetts, poor conditions can mean both money damages for a tenant and defense to eviction.\(^90\) Similar to Bellow’s approach in the 1980s, this method “communicated directly to landlords the risk of increased cost and exposure that would accompany efforts to empty substandard residential property for redevelopment.”\(^92\)

Grossman and Meacham employed this combination of legal and political strategies, including the consistent use of “eviction free zones,” to force landlords into collective bargaining agreements where the tenants would forgo their claims in exchange for long-term leases with affordable rents and commitments to conduct repairs.\(^93\)

The partnership of Grossman and Meacham was significant not only because of their complementary tactics but also, in the words of Betty Hung, because they had “a shared theory of social change.”\(^94\) Hung believes that “[f]or those dedicated to the law and organizing model, it seems imperative that there be commitment to a theory of social change based on the primacy and leadership of affected community members and, thus in practice, a prioritization of community organizing complemented by legal and other social change strategies.”\(^95\)

\(^85\). Bellow, supra note 35, at 299.


\(^87\). Interview with Steve Meacham, CLVU Lead Organizer, CLVU in Jamaica Plain (Sept. 14, 2021) (interview notes on file with author).

\(^88\). Id.

\(^89\). Id.

\(^90\). Id.

\(^91\). See MASS. GEN. LAWS ch. 239, § 8A (2022).

\(^92\). Interview with Steve Meacham, supra note 87.

\(^93\). Id.

\(^94\). Hung, supra note 40, at 21–23.

\(^95\). Id. at 21.
Grossman and Meacham had a deep commitment to the idea that those most affected must lead. This principle meant, in practice, that it was necessary for the low-income, working class people of color who were being displaced or losing their homes to discuss tactics, decide strategy, and be the public voice and face of the movement. Grossman and Meacham also shared the view that legal strategies should complement organizing and movement building; they are not ends unto themselves.

B. Case Study: Foreclosure Resistance

In 2006 and 2007, a new pernicious force of displacement was growing: foreclosure and the evictions that ensued. In Massachusetts, a foreclosing entity\(^\text{96}\) may conduct a “nonjudicial” foreclosure (i.e., without judicial imprimatur) to attain full title to a property, but the bank cannot attain possession of the property without using the judicial system if a resident chooses not to leave their home.\(^\text{97}\) As a result, Grossman, his students, and other legal aid lawyers who worked regularly in Boston Housing Court began to notice many filings in which banks were the named plaintiffs.\(^\text{98}\)

The Harvard Legal Aid Bureau (HLAB) jumped in to start representing these tenants and homeowners. The size and the scale of the problem, however, demanded that HLAB move away from its traditional full representation model.\(^\text{99}\) Former HLAB student Nick Hartigan explained that “we knew that litigating cases only for the few tenants who actively sought legal services assistance would not be sufficient to achieve this broad effect. Rather, tenants would need to file responsive pleadings, request jury trials, and fight every step of the way en masse.”\(^\text{100}\) As a result, HLAB and colleagues at LSC reemployed the “focused case representation” model, but rather than focusing on a geographic area or any one landlord, they focused on any tenant or former homeowner who was being evicted by a bank.\(^\text{101}\)

In practice, this focused case representation meant that HLAB and LSC would contact all potential defendants before their court dates, and host weekly clinics to ensure that every tenant who appeared in court to fight post-foreclosure eviction would have representation or attorney advice to support their pro se efforts at fighting foreclosure.\(^\text{102}\) Even with the combined resources of the Harvard Law School clinics, the volume was too great even to perform Limited Assistance Representation\(^\text{103}\) and provide brief

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96. I will refer to the “foreclosing entity” as the “bank,” but in reality, it was often a loan servicing company that was acting on behalf of the entity that owned the loan.
98. See Nicholas Hartigan, No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts, 45 HARV. C.R.-C.L. L. REV. 181, 188 (2010).
99. See id. at 189.
100. Id. at 189–90.
101. Id. at 183–84, 190.
102. See id. at 190–91.
103. Limited Assistance Representation is an effort to “unbundle” legal services and fill the gap for low-income people who are unable to secure an attorney. See MASS. TRIAL CT. R. XVI.
When we fight, we win.

service and advice without partnering with Greater Boston Legal Services (GBLS) and CLVU. This eventual partnership was called the “Foreclosure Taskforce,” and it is in that space where CLVU first “preached victory through the combination of the legal shield from the Foreclosure Taskforce attorneys and the sword of public action.”

The model itself was quickly known as the “sword and shield” model and was incredibly successful in protecting tenants and homeowners facing eviction in Boston Housing Court. This success inspired the Foreclosure Taskforce to try to replicate the model in other communities hit hard by the foreclosure crisis. The model was adapted to community needs and the organizers’ specific styles and approaches, but overall most of the tactics—both legal and extralegal—were largely the same. Each week we would get the list of new cases from the court, and in any case with a bank or servicing company as the plaintiff, the organizers would send letters and knock on doors to make contact and encourage the named defendants to come to a meeting to fill out pro se answers and discovery forms.

Our method was to represent every single tenant or former homeowner who was facing an eviction by a bank post-foreclosure. In that way, we employed the “triage” method, as the word is used by Farbman, wherein the direct service lawyer who “takes in those with the symptoms created by the broader political and social problems as an emergency room takes in all comers.” We would do enough to buy some time and give them the opportunity to join with organizers and other members in the fight. We did not evaluate the merits of their claims or decide who was worthy of our limited resources.

If we met them the day of trial, we would enter a limited assistance appearance in the summary process action. In that appearance, we would argue a motion to file a late answer and request discovery, assuming that the unrepresented foreclosed homeowner had not submitted anything prior to the trial date. The answer would not only assert potential defenses and counterclaims but also request a jury trial. Given the volume of cases, the request for discovery alone could provide weeks, if not months, for the homeowner to connect with the movement and fight to undo the foreclosure.

104. Hartigan, supra note 98, at 196.
105. The model was featured on the PBS television program Bill Moyers Journal. See Steve Meacham: Fighting Foreclosure, PBS (May 1, 2009), https://www.pbs.org/moyers/journal/05012009/profile2.html [https://perma.cc/E3Y2-S5FN].
106. I use the term “we” because I was hired by HLAB in 2011 to expand the sword and shield model outside of Boston. I had previously worked at GBLS in the Consumer Rights Unit providing full representation to homeowners fighting foreclosures and learned firsthand how few people I could serve using this traditional legal services approach. I worked in a number of communities (e.g., Brockton, Randolph, Stoughton, and Worcester), but spent the majority of the next four years in Lynn, Massachusetts, working daily with members and organizers of LUC. In particular, I worked with the extraordinary LUC lead organizer Isaac Simon Hodes, who created a version of the sword and shield model uniquely suited to his community.
107. Farbman, supra note 4, at 1881 n.6; see also supra note 34 and accompanying text.
negotiate for a modified loan, or complete a “buyback” via a nonprofit. In short, we “used delay, procedural entanglement, and building public attention as strategies in nearly every case.”

Our representation of the tenants and homeowners across the board forced the banks’ attorneys and the court to change their behavior. They knew that, in every case, we were going to ask for discovery, demand a jury trial, and most likely file dispositive motions based on the discovery received. Initially, many Housing Court judges were extremely hostile to the efforts of legal aid lawyers pushing for any protections for homeowners, and routinely ruled that the Housing Court did not have jurisdiction to hear any challenge to the foreclosure itself. Furthermore, many Housing Court judges adopted the view of the banks that argued that because the former homeowners had never been tenants, they were not entitled to raise any substantive defenses or counterclaims. Due to the combined efforts of HLAB, GBLS, and LSC, the Massachusetts Supreme Judicial Court repeatedly overruled the Housing Court’s narrow interpretation of its jurisdiction or the rights of former homeowners.


109. Farbman, supra note 4, at 1905.

110. In addition to the traditional protections for all tenants in Massachusetts, tenants in post-foreclosure properties received greater protections as a result of the passage of Tenant Protections in Foreclosed Properties. MASS. GEN. LAWS ch. 186A (2022). This bill was written by Grossman and his students at HLAB, and at the time it was passed, it was one of the strongest in the nation. Essentially, the law required a landlord to have “just cause” to evict a tenant; as defined by the statute, just causes for eviction included a tenant’s refusal to pay rent or violation of a material term of their lease. See MASS. GEN. LAWS ch. 186A, §§ 1–2 (2022). Because the banks had no interest in becoming landlords, they almost never asked for rent or accepted it, and thus the law was incredibly effective at protecting tenants from eviction.

111. See, e.g., Bank of N.Y. v. Bailey, 951 N.E.2d 331, 332 (Mass. 2011) (“BNY argued that the housing court lacked jurisdiction to address the claim raised by Bailey’s defense, and that it had made out a prima facie claim for superior possession by virtue of the deed, a copy of which was attached to the complaint. The motion judge agreed; she allowed BNY’s motion, and entered summary judgment in favor of BNY.”).

112. But see Bank of Am. v. Rosa, 999 N.E.2d 1080, 1085 (Mass. 2013) (consolidated appeals) (affirming the decision of a rare Housing Court judge who did find that Housing Court had jurisdiction to hear defenses and counterclaims that challenge title in postforeclosure cases).

113. In Bailey, argued by an HLAB student under the supervision of her clinical instructor Esme Caramello, the Supreme Judicial Court found that the Housing Court had “jurisdiction to consider the validity of the plaintiff’s title as a defense to a summary process action after a foreclosure sale pursuant to [MASS. GEN. LAWS ch. 239, § 1 (2022)].” 951 N.E.2d at 332. Essentially this case allowed us to argue that improper foreclosures invalidated the bank’s title and were fatal to their summary process case. What was considered an improper or “void” foreclosure was vigorously contested by legal aid lawyers as well. See generally Fed. Nat’l Mortg. Ass’n v. Marroquin, 74 N.E.3d 592 (Mass. 2017); Pinti v. Emigrant Mortg. Co., 33 N.E.3d 1213 (Mass. 2015); Eaton v. Fed. Nat’l Mortg. Ass’n, 969 N.E.2d 1118 (Mass. 2012); U.S. Bank Nat’l Ass’n v. Ibanez, 941 N.E.2d 40 (Mass. 2011); Bevilacqua v. Rodriguez, 955 N.E.2d 884 (Mass. 2011). All of these cases were litigated by one of the three shield partners: HLAB, LSC, or GBLS. See Martin & Weinstein, supra note 108, at 531 (describing some of the GBLS, LSC, and HLAB cases); see also Larisa G. Bowman et al., Remembering Chief Justice Gants as a Champion for Housing Justice, 62 B.C. L. REV. 2840,
The cases that went up to the Massachusetts Supreme Judicial Court were almost always cases where we had initially encountered the person in the course of our triage method. We did not search for law reform cases. Instead, they bubbled up through the sheer volume of cases, and the repetitiveness of the errors that the national banks and servicers made. As an example, a pivotal case that allowed former homeowners to bring substantive defenses and counterclaims—including discrimination and unfair and deceptive acts and practices claims—in summary process originated from some of the families we met in Northeast Housing Court in Lynn. These families became active members and leaders of LUC.

One of the most protracted fights to restore a family’s home started with an encounter in the hallway of the Northeast Housing Court. The Northeast Housing Court was located in a modest, single-story office building with a narrow hallway leading to small, crammed courtrooms. On Tuesdays, when the Housing Court heard summary process cases, the hallway was always jammed with people. It was the summer of 2011, and the lead organizer of LUC ran into a man, Mr. H, whom he knew from playing soccer in Lynn.

The organizer would attend court every Tuesday looking for people who, like this gentleman, were facing eviction after foreclosures on their homes. The organizer quickly advised Mr. H not to agree to move out of his home, and instead to assert his right to a jury trial and seek discovery. He then advised Mr. H to come to an LUC weekly meeting to figure out how to fight for his home.

Mr. H and his wife were foreclosed on early in 2011. Their mortgage loan was insured by the U.S. Department of Housing and Urban Development’s (HUD) Federal Housing Administration (FHA) and as a result had additional protections for homeowners in default. These protections required a bank or its servicer to have a face-to-face meeting with the homeowner to address the default and avoid a foreclosure. Banks routinely ignored this requirement and rushed to foreclose to collect on the insurance provided by the government. We argued that the foreclosing entity must comply with this face-to-face meeting requirement in order to strictly comply with the terms of the mortgage. Because they had never had such a meeting with the mortgagors, the foreclosing entity had failed to strictly comply with the terms of the mortgage, rendering the foreclosure void.

After we employed the limited procedural protections of summary process and of the nonjudicial foreclosure statute beyond the bank’s expectation, the

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114. See Rosa, 999 N.E.2d at 1083. One of the pro se answers that formed the basis of this case had been filled out at Dunkin’ Donuts shortly after meeting the former homeowners in court.


116. See Wells Fargo v. Cook, 31 N.E.3d 1125, 1130–32 (Mass. App. Ct. 2015) (holding that the face-to-face requirement contained in the HUD mortgage was considered a “term of the mortgage” under Massachusetts Power of Sale, Mass. Gen. Laws. ch. 183, § 21 (2022), and therefore strict compliance was required).
bank eventually dismissed the eviction case in exchange for negotiating an alternative solution called a “buy back.” Despite HUD’s written guidance that would have allowed a sale back to Mr. H, HUD’s practices “in the field” were preventing it. Upon realizing that HUD was the roadblock for this sale and many others, LUC organized to change these practices. This organizing included a public protest interrupting a speech of Julián Castro, then secretary of HUD, when he came to Boston to speak at the John F. Kennedy Presidential Library and Museum. While the protest produced many subsequent meetings with HUD both in Boston and Washington, D.C., HUD’s approach did not change.

Mr. H., however, was equally resolute. And finally, the bank relented and decided to forgo the HUD insurance and sell back directly to the family. This resolution was not completed until 2019—eight years after the foreclosure and twelve years since the original default. This case was an outlier in the time it took to resolve and the resources it consumed, but we had many cases that lasted three, four, and five years after the successful defeat of the summary process case. In almost all of these cases, the individuals remained dedicated members of LUC and continued to grow the movement in Lynn. This committed group of homeowners and tenants who had suffered in the foreclosure crisis remains an essential component of the housing justice movement in Massachusetts and is a key reason that the Commonwealth passed the most aggressive eviction moratorium at the start of the pandemic in 2020.

Looking at our methods and results from the outside, a critic might argue, as Farbman suggests, that “in a robust adversarial system, all lawyering is resistance lawyering”—and that what we were doing in the foreclosure crisis was no different than what any litigator would do to achieve the goals of a client “by making [the legal system] more complex, opaque, or nonfunctional.” But, like the resistance lawyers that Farbman describes, we were not merely “manipulating discovery rules to reach a better outcome.” Instead, we “oppose[d] the procedural regime underlying the cause of action.”

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121. Farbman, supra note 4, at 1932.

122. Id.

123. Id. at 1933.

124. Id.
In the post-foreclosure cases, we were both fighting the “speedy” resolution of the summary process scheme and increasing the actual process due to homeowners and tenants under the law. These changes forced banks to reconsider their calculus when it came to foreclosing in Massachusetts. Instead of deciding it was financially preferable to foreclose and evict families, let the house sit empty to the detriment of the neighborhood, and/or resell at a substantial loss, we wanted them to modify the predatory or unaffordable loans before the foreclosure. Beyond the specific policies, we wanted to bring the moral lens to the actions of the banks and all those who were complicit in destroying the lives of so many people. Similar to the abolitionist lawyers who saw the courtroom contests as proxy battles, our goals were connected to the larger national struggle against a deeply oppressive structure of debt, greed, and wealth extraction largely from individuals and communities of color.125

C. Case Study: Gentrification Resistance

On a Monday morning in the winter of 2018, HLAB received two phone calls. Each was from a tenant who had received a summons and complaint addressed to Jane and John Doe, which was highly unusual. An experienced third-year law student noted the oddity and looked up the cases on the online court docket system.126 Her search revealed that six cases had been filed by the same landlord—all against Jane and John Doe. Suspecting that this was a “building clear-out,” she and the other students contacted CLVU to mobilize a response.

After voting to accept the initial cases on a limited assistance basis, the students asked the tenants to come to a weekly Tuesday night CLVU meeting the next evening127 and to bring any neighbors they could. At that first Tuesday night meeting, only a few residents showed up, but Steve Meacham, lead organizer at CLVU, spoke to those present about forming a tenant association. The students also strongly encouraged the tenants to invite their neighbors in the building to attend HLAB’s regular Friday morning Answer and Discovery clinic in Cambridge. A number of tenants did attend the clinic, but some tenants still had not been reached. As a result, Project No One Leaves, one of Harvard’s Student Practice Organizations, was mobilized to canvass the building on their Saturday morning canvass.128 The students

125. In 2015, the Federal Reserve Bank of Boston documented that only a third of Black residents in Boston owned a home, and those that did had much higher levels of mortgage debt than white families. See Ana Patricia Muñoz et al., Fed. Rsrv. Bank of Bos., The Color of Wealth in Boston 20 (2015). The average net worth of a white family in Boston was $247,500 as opposed to $8 for a Black family. Id.
126. HLAB is a two-year commitment for Harvard Law School students. As a result, the student membership is approximately twenty-five 2Ls and twenty-five 3Ls.
127. Weekly meetings are a central aspect of CLVU’s model of organizing, which employs the “five masses”: Mass Outreach, Mass Meeting, Mass Casework, Mass Actions, and Mass Political Discussions. See Neyman, supra note 74, at 16–17. HLAB and other “shield” lawyers attend this meeting every week to provide brief services and advice.
128. See Hartigan, supra note 98, at 182.
brought the pro se forms to the building and filled them out on-site for all of the remaining tenants except one. In five days, the students had learned of the existence of the building and the clear-out, and had filed and served responsive pleadings for all but one person in the building.

The tenants lived in a building located on a one-way street behind a new transit stop on the border of the Roxbury and Dorchester neighborhoods of Boston. This area of Boston is ground zero for gentrification due to the decades-long disinvestment and more recent reinvestment in response to advocacy by the local constituents of color. The building itself was originally built to have six three-bedroom apartments. Over the years, the building had become dangerously run-down. The owner only kept it profitable by making minimal repairs and renting to individuals who were unable to acquire secure, sanitary, and affordable housing elsewhere.

In 2018, the owner decided to sell the building to a real estate “investor.” The owner had promised the building empty and had hired a lawyer inexperienced in eviction matters to clear the tenants out. At this time, each unit had three to four unrelated residents who had individual rooms—living rooms that had been turned into bedrooms—with locks on their bedroom doors and shared use of the kitchen and the bathroom. When the constable served the summonses and complaints, he dumped them all on the floor of the front hallway. None of the documents contained any actual names, instead they were addressed only “to Jane and John Doe.” As a result, we helped file motions to dismiss on behalf of each tenant not properly named.

On the day of the hearings for the motions, the students and I (as their supervisor) filed notices of limited appearance in order to argue before the Eastern Housing Court. The HLAB student argued that because summary process action is an “in personam” rather than “in rem” remedy, the failure to name an actual person, as opposed to Jane and John Doe, was fatal. It was not only a violation of summary process rules but also a violation of the Massachusetts Rules of Civil Procedure because it did not give the tenant-defendants actual notice of the lawsuit.

The court ruled in the tenants’ favor and dismissed all five lawsuits.

CLVU had been quick to identify some leaders in the building, and a tenant association was formed and active almost immediately. In addition to the

129. HLAB students conducted a mini clinic where they worked with tenants to complete pro se answers and discovery forms, a transfer from the District Court (where the cases had originally been filed) to the Housing Court, and motions to intervene and dismiss because the tenants had not been properly named.


131. See supra note 104 and accompanying text (discussing limited assistance representation).

132. See MASS. R. CIV. P. 4(b).

133. The court also denied the landlord’s motion to amend due to futility. The notices to quit were similarly flawed, and if the tenancy was never properly terminated, the landlord could not make his prima facie case for possession.
legal defense, residents had signed a petition demanding that they be allowed to remain, pay affordable rent, and receive long-term leases to prevent future displacement. But shortly after the court’s dismissal, the property was sold from the longtime owner to a real estate investor. The following month, the same attorney for the new owner tried again to evict the tenants. CLVU and the tenant association recognized that public pressure needed to be increased, and they held a vigil at the building to make similar demands of the new owner.

These new evictions were also fundamentally flawed because they were brought in the name of the investor himself, not the limited liability company that had legally purchased the building. We filed motions to dismiss on behalf of the remaining tenants, and the court granted them. In December 2018, the limited liability company filed a third set of summary process cases. But again, they were not in strict compliance with the Uniform Summary Process Rules, and the court granted our motions to dismiss. Instead of choosing to fix the problem, the landlord decided to file a motion to reconsider, which HLAB opposed—and won.

Similar to Farbman’s description of the abolitionist lawyers’ use of the Fugitive Slave Act, where the “law did not anticipate a robust legal process,” we leveraged the technical process contained in the Summary Process Statute and rules to stave off evictions. Farbman observed, “by claiming more process than was intended, the abolitionists were undermining the very purposes of the Law itself.” Likewise, we—the shield—were claiming more process than the summary process statute and rules intended, thereby thwarting their purpose to ensure “speedy[] and inexpensive determination” of eviction actions.

A full year had now passed since the new owner had purchased the building, and he had accomplished some of his intended displacement by attrition, but none by the court system. His attorney again filed a fourth round of summonses and complaints, but again they were not in compliance with the Uniform Summary Process Rules. We filed yet another round of motions to dismiss. The court again allowed the motions.

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134. See Rental Prop. Mgmt. v. Hatcher, 97 N.E.3d 323, 325 (Mass. 2018) (reaffirming that only the “owner or lessor” of a property is entitled to use summary process to recover possession of a residential property). The named plaintiff was not the lessor because no leases existed, nor was he the owner because the owner was the limited liability company. Id.

135. The landlord’s attorney had failed to file the notices to quit with the summonses and complaints in violation of Massachusetts Uniform Summary Process Rule 2(d). See MASS. UNIF. SUMMARY PROCESS R. 2(d).


137. Farbman, supra note 4, at 1908.

138. Id.

139. See MASS. UNIF. SUMMARY PROCESS R. 1 cmt.

140. This time, the summons had been served on May 14, 2019—fewer than seven days before the entry date of May 20, 2019—in violation of Massachusetts Uniform Summary Process Rule 2(b), which requires at least seven days. MASS. UNIF. SUMMARY PROCESS R. 2(b).

In July 2019, the landlord and his attorney filed the fifth set of summary process cases, and they were finally procedurally sufficient.142 Eventually, all the cases were scheduled for jury trials.143 The first of the four cases went to jury trial in October 2019.144 Throughout the trial, CLVU members and other members of the community were in the gallery to support the tenants—visible for the judge, the landlord, and the jury to see. Many times, members wore CLVU’s signature neon yellow t-shirts.145 When we would have a break or were waiting for the jury verdict, the student attorneys and I would gather with the tenants, the organizers, and CLVU members to discuss the events of the trial. The presence of the community was essential to bolstering the spirits of the two tenants participating in the trial because it was emotionally and physically exhausting for them. We also chose to put as many of the other tenants on the stand as the judge would allow to testify not only to the conditions but also to the landlord’s discriminatory treatment of them—all persons of color.

In the end, the jury found for the tenants on their claims of retaliation for engaging in protected activity (participating in a tenant association), interference with quiet enjoyment, breach of the warranty of habitability, and violation of the Massachusetts Consumer Protection Act,146 but did not find a violation of the state antidiscrimination law based on the tenants’ race or national origin. Both sides were now facing another three jury trials in seriatim. We began to engage in serious settlement discussions, but it took over four months to agree to final terms. In exchange for the dismissal of all the tenants’ claims, the landlord agreed to enter into five-year leases with affordable rents for all the tenants in the tenant associations; waive any claims for back rent (two years at that point); make enumerated repairs (the landlord planned a gut rehabilitation of each unit); waive any demand for rent until all repairs were complete; and pay a fraction of the attorney’s fees. We finalized the agreement and entered it with the court days before the pandemic began.

If we had finished the story of this “case” at the point where the lawyers usually exit the scene, we might have concluded with a quote from after the jury trial win. One of the tenant-defendants, Babatunde Kunnu, was interviewed after the trial and said: “We are powerful. We needed to know our rights, and we needed to exercise our rights. With support from City

143. Id.
144. Id. What ensued was an eight-day trial with three HLAB students (one 3L and two 2Ls) representing the tenants throughout, from the voir dire, opening statements, and witness examinations to closing arguments.
145. Prior to the pandemic, CLVU members clad in their neon yellow t-shirts would attend Eastern Housing Court on the “trial day” for most summary process cases. The First Justice of the Eastern Housing Court, who was not presiding over this trial, was openly hostile to the t-shirts and would instruct the court officer to order CLVU members to take them off or turn them inside out when they were sitting in the gallery in support of a tenant facing eviction.
146. MASS. GEN. LAWS ch. 93A (2022).
Life/Vida Urbana and the amazing lawyers at Harvard Legal Aid Bureau, we realized we are a lion.”

But knowing and exercising one’s rights is rarely enough. It has been two years since that victory. CLVU and the tenant association have had to use many of their “sword” tactics both before and after the trial; their work has included organizing public protests, vigils, testimony, and confrontation at public meetings, as well as generating media stories and letters to public officials. As a result of these efforts and ongoing lawyering, the owner has finally sold the building to Boston Neighborhood Community Land Trust, making this building permanently affordable housing controlled by the community.

In sum, the use of the sword, shield, and offer approach shifted power from the developers to the community and to the residents in particular. The fight for this building has also been a rallying cry for an entire neighborhood undergoing similar displacement pressure, and it has awakened the city to the critical need to intervene and to preserve housing for the existing low-income residents.

CONCLUSION

This Essay has described how housing lawyers providing eviction defense within the context of the “sword and shield” model are “subversive lawyers.” We share the methods of a “resistance lawyer” as defined by Professor Farbman, by engaging in the “regular, direct service practice” of eviction defense “within a procedural and substantive legal regime” that is often “unjust.” At the same time, we mitigate “the worst injustices” of the eviction system by working with organizers, activists, and community organizers.

147. Trojano, supra note 6, at 15.
148. Justice delayed is justice denied for some of our clients—one of whom passed away during this period, another who had a stroke and is now too disabled to live in the building, and a third who contracted COVID-19 and decided to leave permanently. Furthermore, we spent over a year trying to enforce the settlement agreement to repair the building, including twenty-five court appearances, before the building was sold to the Boston Neighborhood Community Land Trust.
150. The Boston Neighborhood Community Land Trust was created during the foreclosure crisis and was formerly known as the Coalition for Occupied Housing in Foreclosure (COHIF). COHIF allowed homeowners and tenants to remain in foreclosed properties as renters in now permanently affordable housing. An entire essay could be written about the lessons learned from this experiment, but suffice to say, the entity is now a land trust and continues to serve as a critical piece of the “offer.”
151. Sheila Dillon, Boston’s chief of housing and director of the Department of Neighborhood Development, noted in an article about the acquisition of the building: “It’s very important that we supported the tenants . . . [while] creating more affordable housing in an area that’s becoming increasingly expensive.” Lovett, supra note 130.
152. Farbman, supra note 4, at 1880.
members “to resist, obstruct, and dismantle the system itself.”\textsuperscript{153} We are also “subversive” due to our efforts to overturn the traditional oppressive effects of the eviction process on low-income people and people of color who are losing their homes. We strive to have clients cease being clients and instead become members of a movement who believe that “when they fight, they win!” This transformation grows the power of the housing justice movement to dismantle the present system and to build a more just and equitable future.

\textsuperscript{153} Id.