

## DECARCERATION'S INSIDE PARTNERS

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*This Article examines a hidden phenomenon in criminal punishment. People in prison, during their incarceration, have made important—and sometimes extraordinary—strides toward reducing prison populations. In fact, stakeholders in many corners, from policy makers to researchers to abolitionists, have harnessed legal and conceptual strategies generated inside the walls to pursue decarceral strategies outside the walls. Despite this outside use of inside moves, legal scholarship has directed little attention to theorizing the potential of looking to people on the inside as partners in the long-term project of meaningfully reducing prison populations, or “decarceration.”*

*Building on the change-making agency and revolutionary ideation inside the walls, this Article points the way to an alternative approach to decarceration: thinking alongside people banished from the polity. Criminal law scholars routinely recount their stories, but rarely do we consider people held in prison to be thought leaders, let alone equal partners, in progressing toward a decarceral future. Despite conducting extensive research on prisons and those held inside them, legal scholars know—and wonder—tremendously little about the decarceral work, decarceral ideas, and “think tanks” that surge behind bars. The absence of our curiosity reflects and reproduces the ideological work of carceral punishment.*

*This Article demonstrates that an alternative vision of decarceration that resists this ideological work opens up more promising paths to create the legal and social change that our current moment demands. It calls on legal scholars and all those committed to large-scale decarceration to find ways to discover, ignite, and emancipate more decarceral visions on the inside. And it argues that, unless we make this challenging shift, we suppress*

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*innovative, effective, and more conceivable possibilities to radically transform our carceral state.*

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#### INTRODUCTION

It was 1972 in a hamlet sixty miles north of New York City. Lawrence White was composing a vision statement for a think tank he chaired. From inception, his founding mission centered on issues of concern to people in prison. Top among those issues was reducing prison populations.<sup>1</sup>

Lawrence conceptualized the prison as a “direct relationship” between the state and the predominantly Black and Latinx communities in the nation’s urban neighborhoods.<sup>2</sup> This concept remained abstract.<sup>3</sup> Over the next decade, construction of prisons boomed.<sup>4</sup> The state prison population in New York doubled.<sup>5</sup> To support their concept, Lawrence’s intellectual partner, Edwin, had an idea to cross-reference government data to determine the zip codes that supplied the growth in the state prison population.<sup>6</sup> The researchers found that 75 percent of the state’s entire prison population came from just seven predominantly Black and Latinx neighborhoods in New York

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1. See Orisanmi Burton, *Attica Is: Revolutionary Consciousness, Counterinsurgency and the Deferred Abolition of New York State Prisons* 128–33, 152, 216–18 (2016) (Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with author).

2. *Id.* at 114, 132, 152, 214–15.

3. *Id.* at 152.

4. See HUGH L. CAREY & THOMAS A. COUGHLIN, III, *NEW YORK STATE 1980–1985 CORRECTIONAL SERVICES MASTER PLAN* 103 (1981), <https://www.ojp.gov/pdffiles1/Digitization/91605NCJRS.pdf> [<https://perma.cc/5RS7-Z8TY>].

5. CORRECTIONAL ASS’N OF N.Y., *THE PRISON POPULATION EXPLOSION IN NEW YORK STATE: A STUDY OF ITS CAUSES AND CONSEQUENCES WITH RECOMMENDATIONS FOR CHANGE* I (1982).

6. Burton, *supra* note 1, at 153.

City.<sup>7</sup> The neighborhoods had among the highest rates of poverty, unemployment, and failing schools, as well as the lowest life expectancy in the city.<sup>8</sup>

With the data, the team then elaborated the abstract “direct relationship” as an overinvestment in prisons and a disinvestment in the neighborhoods disproportionately replenishing them.<sup>9</sup> Transforming their research into praxis, the group proposed a new approach to reduce crime and punishment: redirect funds from the state prison budget toward social, educational, and economic development in the seven neighborhoods.<sup>10</sup> Issued in 1979, and again in 1990, this visionary plan of action, rooted in a community-focused commitment to social justice, was not well received.<sup>11</sup>

Decades later, the group’s collective genius upended the dominant narrative of American crime and punishment.<sup>12</sup> The once-mysterious catchphrase “invest-divest” has now swept the nation, transforming dialogue in circles both radical and mainstream. The groundbreaking concept, more to the point, was incubated neither in an elite endowed foundation nor in freedom. Lawrence (Larry White), Edwin (Eddie Ellis), and many more began steering the free world from a think tank founded inside a maximum security prison.<sup>13</sup>

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America’s carceral footprint has earned criticism and condemnation from within and outside the nation. There is widespread understanding in many corners that the expansive systems of carceral control in the United States demand far-reaching change. The project of reducing the nation’s prison population has provisional ideas from many quarters, but there is little agreement as to who, how, how much, or how fast to decarcerate.<sup>14</sup> As numerous scholars have shown, large-scale decarceration requires moving beyond low-level drug and nonviolent crimes to dramatically reducing reliance on carceral punishment for offenses that criminal law classifies as violent.<sup>15</sup> How do we accomplish this?

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7. CTR. FOR NuLEADERSHIP, *THE SEVEN NEIGHBORHOOD STUDY REVISITED* 3–4 (2013), <https://static1.squarespace.com/static/58eb0522e6f2e1dfce591dee/t/596e1246d482e9c1c6b86699/1500385865855/seven-neighborhood+revisited+rpt.pdf> [https://perma.cc/KH9D-NUFQ].

8. *Id.* at 4; *see infra* Part I.B.1.

9. *See infra* Part I.B.1.

10. *See infra* Part I.B.1.

11. *See infra* Part I.B.1.

12. *See infra* Part I.B.1.

13. *See infra* Part I.B.1. I use the term “free world” to describe people and institutions outside of prison.

14. *See* Allegra M. McLeod, *Beyond the Carceral State*, 95 *TEX. L. REV.* 651, 681 (2017) (book review) (noting “the increasing public commitment to decarcerate at least in certain jurisdictions alongside the current lack of viable proposed means to achieve that end”); Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 *STAN. L. & POL’Y REV.* 1, 5 (2022) (“[E]ven among scholars and activists who support large-scale reductions in the prison population, there’s little consensus on who we should decarcerate and how.”).

15. Over 50 percent of people in state prisons—which hold about 90 percent of the people held in U.S. prisons—have been convicted of a crime classified as violent. E. ANN CARSON,

Many thoughts have emerged. One common refrain is: “[T]o reduce the prison population, prosecutors are going to be the ones who have to lead the way.”<sup>16</sup> There are many reasons to doubt this measure. Prosecutors have fueled the rise of prison populations.<sup>17</sup> This is, in part, a function of electoral politics.<sup>18</sup> Perhaps more so, the ideology of prosecution is in fundamental tension with large-scale decarceration.<sup>19</sup> Among prosecutorial offices that adopt decarceral platforms, their initiatives target mostly low-level drug and

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BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2019, at 20 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/EX42-NE8E>]; JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 6, 11–13 (2017) (“[T]he incarceration of people who have been convicted of violent offenses explains almost two-thirds of the growth in prison populations since 1990.”); DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 3 (2021) (observing that meaningfully scaling back incarceration requires “dramatically reduc[ing] our punishments for violent crime”); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 165 (2015) (arguing that focusing on the “non, non, nons”—nonviolent, nonserious, non-sex related crimes—will not meaningfully cut the prison population).

16. Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [<https://perma.cc/RVG2-C82L>] (quoting Fordham Law School professor John Pfaff).

17. Paul Butler, *The Prosecutor Problem*, BRENNAN CTR. (Aug. 23, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/prosecutor-problem> [<https://perma.cc/5H7Y-DYJY>] (describing prosecutors as “the most powerful actors in the criminal legal system” who “often ha[ve] more power over how much punishment someone convicted of a crime receives than the judge who does the actual sentencing”); PFAFF, *supra* note 15, at 127, 206 (concluding that “[f]ew people in the criminal justice system are as powerful, or as central to prison growth, as the prosecutor” and arguing that prosecutors “have been and remain the engines driving mass incarceration”). *But see* Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 CONTEMP. SOCIO. 11, 16–20 (2018) (noting that “Pfaff is undoubtedly correct to emphasize the role of prosecutors in the prison build-up” but offering evidence to refute his arguments that sentencing policy did not matter as much); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837, 841–42, 856–57 (2018) (critiquing Pfaff’s data and conclusion that prosecutors drove mass incarceration but agreeing that prosecutors “played a supporting role in [its] rise”).

18. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–10 (2011) (describing the “two kinds of politics [that] drive criminal law”: politicians responding to punitive impulses of voters, and institutional design and incentives of key actors in the system); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 5, 105–09 (2019) (arguing that populist politics helped create mass incarceration); Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1955 (2019) (noting that “measures of general public punitiveness cannot provide a full account of how or why experts, political officials, and legal professionals built a carceral state”).

19. *See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 198, 217 (1988) (discussing the prosecutor’s dual role to seek convictions and to seek justice); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 698 (describing this dual advocate/minister role as “ongoing schizophrenia”); GOTTSCHALK, *supra* note 15, at 266 (“To reduce the imprisonment rate, prosecutors will have to be cajoled or pressured into embracing a commitment to send fewer people to prison and to reduce sentence lengths.”); Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 760–66 (2018) (discussing the ways in which the structures of the prosecutorial system frustrate reform efforts by nontraditional prosecutors).

nonviolent offenses.<sup>20</sup> This is also true for the tiny subset of top law enforcers dubbed “progressive prosecutors.”<sup>21</sup> If prosecutors exclude crimes classified as violent from meaningful decarceral initiatives, how can they take the lead in reducing, on a large scale, carceral punishment for violent crime? “[A]lmost all politicians steer clear of this topic.”<sup>22</sup>

If prosecutors are ill-positioned to lead the decarceral way, so too are judges and legislators.<sup>23</sup> Some legal scholars have renewed calls to engage “experts” to guide criminal policy decisions through data-driven methods.<sup>24</sup> A growing number of scholars have criticized the myth that deferring to the

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20. See, e.g., Toobin, *supra* note 16 (reporting that the Milwaukee County district attorney “divide[s] our world in two,” that is, “people who scare us, and people who irritate the hell out of us,” and the latter group—people charged with low-level offenses—were the focus of his diversion and deferred-prosecution initiatives); Press Release, U.S. Att’y’s Off. for the Dist. of Columbia, United States Attorney’s Office Opposes Release of Violent Offenders (Apr. 4, 2020), <https://www.justice.gov/usao-dc/pr/united-states-attorneys-office-opposes-release-violent-offenders> [<https://perma.cc/EWS9-B8CF>] (announcing during the COVID-19 pandemic that any prison releases by the U.S. Attorney’s Office for the District of Columbia would be for “non-violent inmates”); Barbara Bradley Hagerty, *Releasing People from Prison Is Easier Said than Done*, ATLANTIC (July 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/releasing-people-prison/613741/> [<https://perma.cc/RB4E-Z7Y9>] (“Even with the threat of a deadly virus, so far governors have drawn the line at violence.”).

21. See, e.g., Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1381–82, 1386–88 (2021) (discussing the limited power of progressive prosecutors to reduce the prison population); Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> [<https://perma.cc/7WDU-2F6E>] (arguing that the “progressive prosecutors’ approach won’t bring about meaningful change”); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 164 (2022) (arguing that progressive prosecutors are “at best a half-measure to achieve real change” and at worst risk legitimating the system).

22. PFAFF, *supra* note 15, at 186. Even some critics of mass incarceration are reticent to discuss the topic of violence. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 50 n.111 (2012) (arguing that avoiding the topic of violence disserves the anticarceral movement and cedes terrain to proponents of tough-on-crime measures who can “present themselves as the sole defenders of public safety”).

23. See, e.g., BARKOW, *supra* note 18, at 186 (“In casting institutional blame for the irrational set of criminal justice policies we have, it is important not to overlook the role of [federal and state] judges.”); Bellin, *supra* note 17, at 837, 856 (arguing that legislators and judges have a greater responsibility for mass incarceration than prosecutors); Jonathan Simon, *An Unenviable Task: How Federal Courts Legitimized Mass Incarceration*, in LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION 227, 245 (Justice Tankebe & Alison Liebling eds., 2013) (“To an important degree the American judiciary, both federal and state[,] have been complicit in normalizing mass incarceration.”); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 5, 15 (2022) (arguing that criminal courts “function as institutions of punitive social control,” playing a central role in legitimating the racialized violence and control of police and prisons “while mythologizing themselves as institutions that afford justice”); Jonathan Simon, *Can Courts Abolish Mass Incarceration?*, in THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY 259, 260–61, 265 (Rosann Greenspan, Hadar Aviram & Jonathan Simon eds., 2019) (explaining why court-based interventions might provide the dynamic needed to progress toward decarceration but cautioning that “[i]t will take more than courts to abolish mass incarceration”).

24. See, e.g., BARKOW, *supra* note 18, at 165–85; John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 810 (2020).

judgment of “experts” with elite educational credentials will lead to superior decision-making, let alone deep, systemic change.<sup>25</sup> Like system actors, the expertise of elite academics and pseudo-professionals is embedded in the construction and maintenance of the carceral state.<sup>26</sup> Although stakeholders both within and outside the system who hold traditional markers of expertise do play an important role in reducing prison populations, these actors, alone, are unlikely to shepherd us to transformative decarceral futures.<sup>27</sup>

A clinical, crime-by-crime, category-focused mindset to decarceration also risks mirroring the machinery that created our present crisis. Addressing “one of the most pressing human-rights challenges of our time”<sup>28</sup> demands more than mainstream proposals by mainstream actors. Scholars have argued that substantial decarceration demands both reducing reliance on carceral punishment for violent crime and confronting how the law *thinks* about violence,<sup>29</sup> which is central to our carceral state.<sup>30</sup> Put another way, changing how the law and the public think about violence is central to

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25. I discuss this further in Part III. See Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777, 2786 (2022) (arguing that “there’s good reason to be skeptical that simply choosing the right experts will address deep-seated cultural attitudes about punishment and the proper scope of criminal law”).

26. See *infra* Part III; see also David Runciman, *Why Replacing Politicians with Experts Is a Reckless Idea*, GUARDIAN (May 1, 2018), <https://www.theguardian.com/news/2018/may/01/why-replacing-politicians-with-experts-is-a-reckless-idea> [https://perma.cc/US4Z-MAGP] (“When a machine goes wrong, the people responsible for fixing it often have their fingerprints all over it already.”).

27. See *infra* Part III.

28. Beckett, *supra* note 17, at 21.

29. Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 575–76, 621 (2011); SKLANSKY, *supra* note 15, at 2–8; *id.* at 45, 232 (arguing that “[t]he line between ‘violent’ and ‘nonviolent’ offenses has become the most important dividing line in criminal law,” but explaining that the distinction and the significant weight placed on it are modern developments); *id.* at 236 (“The overreliance on violence as a legal category helped to create mass incarceration and now helps to sustain it.”). To be sure, “violent crime” is a misleading heuristic. Across states, crimes that count as “violent” for purposes of sentencing enhancements encompass conduct where no one was harmed but exclude conduct that would be seen as violent under ordinary meanings. Ristroph, *supra*, at 573–75, 621 (“[T]he meaning of ‘violent crime’ varies depending on the purpose for which the category is deployed.”); SKLANSKY, *supra* note 15, at 69–70 (noting that the categories vary across jurisdictions and even within the same state).

30. Ristroph, *supra* note 29, at 576; SKLANSKY, *supra* note 15, at 3–6, 87 (observing that moral beliefs about violence are reflected in legal rules, statutes, and precedents and noting the enduring role played by race and racism in shaping those beliefs); see also GOTTSCHALK, *supra* note 15, at 168 (“Drawing a firm line between nonviolent drug offenders and serious, violent, or sex offenders in policy debates reinforces the misleading view that there are clear-cut, largely immutable, and readily identifiable categories of offenders who are best defined by the offense that sent them to prison.”); Beckett, *supra* note 17, at 20 (arguing that “shrinking and transforming [the U.S. penal system] will require multi-faceted strategies that address its varied drivers, including the increasingly tough policy response to violence”); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 230–31 (2017) (arguing that “the label ‘violent offender[.]’ . . . ensures that we will never get close to resolving the human rights crisis that is 2.2 million Americans behind bars”); PFAFF, *supra* note 15, at 100, 227, 232 (arguing that “if we hope to end mass incarceration,” shifting people’s attitudes toward violence and violent crime is the most “fundamental change that we need” and is the most challenging project).

decarceration. These twin aims—reducing the prison population and fundamentally reckoning with our ideas about violence—are inseparable. There is an underexplored and siloed site where aspirational visions and interventions to advance these dual aims have originated: inside prison cages.

With limited to no resources, formal education, or social interaction, some people held in cages have initiated ambitious legal and conceptual strategies to reduce prison populations. People in prison have ushered in new metrics to measure public safety, generated innovative ways of thinking to make complex social problems more understandable to policy makers, and spearheaded advancements in criminal procedure to reduce the numbers of people cycling into prison. I call these steps “inside decarceral moves.” These strides are not limited to formal law or legal discourse. People in prison have conceptualized alternative frameworks to understand why the criminal legal system has locked them up, pushing reformers and abolitionists alike toward new strategies to reduce prison populations. In fact, the criminal legal system and a wide range of actors outside the system have harnessed the work and ideas generated inside the walls to pursue decarceral strategies outside the walls that were once considered a pipe dream. This phenomenon has received practically no legal attention. The transformative role that people in prison have shouldered to reduce prison populations has been obscured by the systems we have built.

If decarceration demands reckoning with how the law thinks and, by implication, how *we* think about violence, it inextricably entails reckoning with how the law thinks about the people it puts in prison. Framing decarceration in this way makes apparent the essential role of people in prison to this effort, in that many people in prison who experience the daily violence of the law spend their days reckoning with *how the law thinks about them*. In that deep contemplation, people in prison have opposed—and produced ideas to expose—the enduring narratives and structures that land them and others behind bars, generating theories, analyses, and actions directed to transformative decarceral ends.

In one sense, it should not come as a surprise that people in prison have decarceral ideations: to exist in a prison is to imagine a world without the prison. Given how many people we incarcerate and whom we incarcerate,<sup>31</sup> it may even be intuitive that some promising legal and conceptual ideas for reducing prison populations have originated in prisons. In another sense, this phenomenon is astounding. People whom our criminal law places under civil death, who are surviving carceral exile, and who are subject to the oppression, isolation, and indignity of state control are imagining new, rich, and hopeful modes of dismantling the punitive reach of the carceral state. Their visions were born in suffering, in prison cages that were designed neither to invite nor to facilitate innovation, but to quash it.

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31. *See infra* note 260 (noting that America has imprisoned leaders of Black, Latinx, and tribal communities for generations).

Of course, for over a century, people in prison have produced knowledge—including political, social, and intellectual thought—that has transformed scholarship and activism. Antonio Gramsci developed the concept of cultural hegemony and the notion of “organic” intellectuals.<sup>32</sup> Angela Y. Davis transformed radical thinking in her intricate conceptualization of the prison-industrial complex.<sup>33</sup> This Article, in fact, was inspired by Davis’s call to acknowledge people in prison as equal partners whose participation is essential to antiprison work.<sup>34</sup> George Jackson expressed a vision for African American freedom rooted in a deep knowledge of American colonialism, racism, capitalism, and imperialism.<sup>35</sup> And, in a landmark text for the civil rights movement, Martin Luther King, Jr.’s *Letter from Birmingham Jail* revolutionized collective thought on civil disobedience both in the United States and beyond this nation’s borders.<sup>36</sup> Recent legal scholarship coauthored by Terrell Carter, who is serving a life sentence without the possibility of parole, Kempis Songster, who served thirty years of a life sentence before his release from prison, and law professor Rachel López provides a firsthand account of the often-collective processes inside the walls that lead people in prison to generate new concepts of law.<sup>37</sup>

This is too short a list of people whose brilliance—born inside cages—continues to influence the ideas and work of scholars and activists today.<sup>38</sup>

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32. SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 3–4, 12, 181–82 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (theorizing the central role of ideology in the ruling class’s ability to exercise hegemony).

33. See ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 105–06 (2005) (describing Davis’s correspondence with George Jackson while both were in jail, as well as its lasting impact on her thinking).

34. See ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT 26 (2016) (“Whenever you conceptualize social justice struggles, you will always defeat your own purposes if you cannot imagine the people around whom you are struggling as equal partners.”); *id.* (“It may not always be easy to guarantee the participation of prisoners, but without their participation and without acknowledging them as equals, we are bound to fail.”).

35. See GEORGE L. JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON 236–37, 264–66 (1970); GEORGE L. JACKSON, BLOOD IN MY EYE 36, 72, 110–11 (1972).

36. See MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in WHY WE CAN’T WAIT 77 (1964); Douglas Brinkley, *How Martin Luther King’s ‘Letter from Birmingham City Jail’ Inspired the World*, HISTORYNET (June 12, 2006), <https://www.historynet.com/martin-luther-king-jrs-letter-from-birmingham-city-jail/> [https://perma.cc/DF3W-GFBQ].

37. Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 321–24 (2021) (describing how people incarcerated in a Pennsylvania state prison developed a concept to challenge life-without-parole sentences, recognizing the law’s failure to take into account the human capacity for change). Thinking alongside people on the inside, López documented that the European Court of Human Rights was developing a similar concept in human rights law at the same time that her coauthors conceptualized a distinct reading of the Eighth Amendment from behind bars. *Id.* at 315, 321–23, 337–38 (arguing for reading a right to redemption in the latent concept of human dignity in the Eighth Amendment).

38. For a few examples of this influence, see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350–51 (1988) (describing Antonio Gramsci’s concept of hegemony and



This Article aims to articulate something distinct: people in prison have ushered in ideas and actions that direct toward near-term and long-term reduction in prison populations. Notwithstanding the talent on the inside, however, legal scholars know and—perhaps more fundamentally—wonder tremendously little about the decarceral imaginations and “think tanks” that surge behind bars.<sup>39</sup> Despite routine narration of their stories—usually starting with a crime—and vast study of prisons and jails, legal scholars rarely consider people in prison to be thought leaders, let alone equal partners, in progressing toward a decarceral future. Our inability to imagine people in prison producing viable ideas for decarceration that engage the legal, social, economic, and structural inequalities for which criminal law has placed them in exile, let alone to unearth the visions on the inside, reflects and reproduces the ideological work of carceral punishment.

Ideology plays a central role in upholding the carceral state. Professor Angela Y. Davis describes the ideological work accomplished by the prison: the very existence of the prison, Davis writes, “relieves us of the responsibility of seriously engaging with the problems of our society, especially those produced by racism and, increasingly, global capitalism.”<sup>40</sup> Professor Jocelyn Simonson examines the ideological work of criminal procedure: the “people/defendant” dichotomy, Simonson reveals,

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ideology and its importance to critical legal theory); Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 259 n.30 (2019) (citing Gramsci and stating that “ingrained ideas about the legal and political world [can] legitimate and normalize systemic injustices”); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 110–11 (2019) (conceptualizing George Jackson’s invocation of the U.S. Constitution as one that advanced an abolitionist reading of the text); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1614–18 (2019) (describing abolition democracy, a concept envisioned by W.E.B. Du Bois and developed further by Angela Y. Davis).

39. For two recent and notable exceptions, see Carter, López & Songster, *supra* note 37, at 315–16, 321 (describing a study group in prison that developed a reading of the Constitution challenging the legal precept that people sentenced to life without parole are incapable of redemption, coauthored with a person in prison and a person released from prison), and V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete?: Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453, 1521 (2019) (representing the first full-length law review article on police abolition, coauthored with a person in prison, and highlighting violence-reduction projects in prison led by people in prison). Law reviews also occasionally publish solo writings by people in prison. See, e.g., *Introduction: Jailhouse Lawyering*, 69 UCLA L. REV. DISCOURSE 1 (2021) (featuring a collection of essays by jailhouse lawyers and journalists behind bars and noting that the legal academy “often—if not always—exclude[s] jailhouse lawyers when discussing who is a lawyer and what it means to be one”); Thomas C. O’Byrant, *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, 301 (2006) (describing the realities of indigent pro se litigation after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996).

40. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 15–16 (2003) (describing how the prison “functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers”); see also DAVIS, *supra* note 33, at 118 (stating that in the United States, “the role of prisons” has “evolved into . . . a default solution to the major social problems of our times”); *id.* at 69 (“Ideologies play a central role in consolidating the prison-industrial-complex”); DAVIS, *supra* note 34, at 22, 24.

“assume[s] a clean separation” between the interests of the public and the interests of the lone person who stands accused.<sup>41</sup> This reigning ideology, Simonson argues, moves us “toward practices that are more punitive than the multifaceted interests of the public dictate” and facilitates the exclusion of marginalized populations who participate in everyday communal interventions “on the other side of the ‘v.’.”<sup>42</sup>

Implicit in Davis’s and Simonson’s insights is another ideological function that criminal law, the legal profession, and the media interact to perform: together, they shape the popular imagination of “the inmate.” In a technocratic, savior-based legal culture, people in prison are primarily seen as objects to cage, save, or study. Put another way, the ideology of criminal law and the legal profession legitimates<sup>43</sup> our distorted ways of thinking about people in prison. This dominant ideology, in turn, blinds us from seeing a path to far-reaching change: in that, the same site that allows us to disclaim responsibility to think about the structural inequalities in our society is a place where visionary ideas have been seeded to intervene in those very inequalities.

This Article argues that it is essential for legal scholars and stakeholders committed to large-scale decarceration to find ways to think alongside and invest in ongoing conversation with people in prison to cultivate decarceral moves and promote decarceral futures. It presents a theoretical and normative argument for why looking to the inside is an important addition to the project of decarceration. Inside-outside collaborations can deepen—and, to date, have deepened—perspectives on decarceral strategies beyond the limited imaginations in elite legal circles. This Article thus goes beyond a call to listen to the *voices* or to center the *experiences* of people in prison and argues that it is essential to ignite and invest in their *visions* for decarceration. Imagining with people banished from the polity is central to envisioning the freedom that can make decarceration more conceivable.<sup>44</sup>

Legal scholars, including Professors Mari Matsuda, Lani Guinier, Gerald Torres, Amna Akbar, Sameer Ashar, Jocelyn Simonson, Ngozi Okidegbe,

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41. Simonson, *supra* note 38, at 249, 271.

42. *Id.* at 252–55.

43. “The legitimating function of legal ideology is a core insight of both critical legal studies and critical race theory.” *Id.* at 259 n.30 (“In Gramscian terms, legal ideology plays a role in perpetuating hegemonic relationships.”); see Crenshaw, *supra* note 38, at 1350 (“Critical scholars derive their vision of legal ideology in part from the work of Antonio Gramsci.”); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051 (1978) (describing how the “law serves largely to legitimize the existing social structure and, especially, class relationships within that structure”).

44. Cf. Dorothy Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1607 (2017) (calling for a vision of democratizing criminal law in which “[B]lack communities have greater freedom to envision and create democratic approaches to social harms—for themselves and for the nation as a whole”); LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11–22, 37 (2003) (describing how collective imagining by racialized communities can “enlarge the idea of what is possible” and can lead to new legal, social, and political understandings).

and many more have thought and written extensively about the place of directly-impacted populations—in the free world—in law, policy, and social change.<sup>45</sup> Collective imagining alongside communities engaged in struggle is, indeed, part of a long tradition in critical legal scholarship.<sup>46</sup> I situate this argument within that tradition: notably, Matsuda's call to critical scholars to “look to the bottom”—to communities that have the least advantage—to generate new concepts of law and social change;<sup>47</sup> and Akbar, Ashar, and Simonson's concept of movement law, a methodology for creating space in legal scholarship to co-generate new theories for change in conversation with social movements whose intellectual traditions, imaginations, and horizons for change “gesture at new possibilities” that expand our thinking.<sup>48</sup>

To be clear, this Article makes no demand that people in prison take on this collective role, let alone lead the way. Such a mandate would equate to compelling the extraction of strategies to decarcerate from people whom we have incarcerated. To the contrary, this Article reveals that engineers of decarceral change—from “everyday activists”<sup>49</sup> to luminaries—exist in prisons, and it anticipates that many more, if so emboldened, have the capacity and the will to generate ideas that hold promise to promote decarceral aims. To that end, this Article is not centrally concerned with prison reform, improving conditions in prisons, or broader issues of governance and policymaking.<sup>50</sup> Its focus is the decarceral work and

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45. For examples of foundational works, see generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); GUINIER & TORRES, *supra* note 44; Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Simonson, *supra* note 38 at 249; Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. 739 (2022).

46. See Akbar, Ashar & Simonson, *supra* note 45, at 832–42 (detailing decades-long history of critical scholars inspired by or cogenerated ideas with social movements); see also *infra* pp. 109–10.

47. Matsuda, *supra* note 45, at 344–45, 349; see *infra* Part II.B.

48. Akbar, Ashar & Simonson, *supra* note 45, at 825–26, 861–62, 875; see *infra* Part II.B.

49. Jane Mansbridge & Katherine Flaster, *The Cultural Politics of Everyday Discourse: The Case of “Male Chauvinist,”* 33 CRITICAL SOCIO. 627, 628, 635–36 (2007) (describing how ordinary people take actions in their everyday lives to respond to instances of injustice that social movements and intellectuals have made salient, becoming part of the process of making new ideas and challenging dominant understandings).

50. Certainly, people in prison can create influence in these domains too, which may have decarceral effects. See, e.g., JAMIE BISSONETTE WITH RALPH HAMM, ROBERT DELLELO & EDWARD RODMAN, *WHEN THE PRISONERS RAN WALPOLE: A TRUE STORY IN THE MOVEMENT FOR PRISON ABOLITION* 112, 125–26, 160, 168, 205 (2008) (discussing a citizen-observer program in which over 1,000 volunteers monitored conditions in a Massachusetts prison and “the critical role of the prisoners’ own agency” in securing direct access to civilians which, in turn, built opposition to prisons); MUMIA ABU-JAMAL, *JAILHOUSE LAWYERS: PRISONERS DEFENDING PRISONERS V. THE USA* 189–90, 209–10 (2009) (chronicling numerous ways, including through lawsuits, in which people in prison “brought change to a system that was determined to resist change” and “exposed [the prison system] to the bright light of day”); DAVIS, *supra* note 40, at 58 (describing a college program introduced in a New York prison as a direct result of demands by people in prison); M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1223, 1229–33 (2020) (arguing that the subjective experience of

decarceration imaginations that take root inside prisons. Inspired by Angela Y. Davis, this Article thus considers people in prison as our partners, not our objects of study or charity.<sup>51</sup> To that end, discovering and developing inside decarceration imaginations does not contemplate a one-time survey or series of questionnaires. A survey would be limited in scope and ability, elicit finite responses, and is not conducive to, nor a substitute for, long-term, generative dialogue. As Professor Lani Guinier stated, “[i]deas get a toehold when there is an ongoing conversation.”<sup>52</sup>

This Article proceeds in three parts. Part I describes diverse ways in which people in prison have made strides to reduce the reach of the carceral state. It shows how decarceration steps conceptualized and implemented inside prison have come to fruition in conversation and collaboration with others on the inside and outside. Part I also examines how system actors and change-oriented actors outside the system have made enormous use of the capacity on the inside to enrich and accelerate the decarceration work on the outside. Part II presents a theoretical account of what I call “looking to the inside” in the project of decarceration, focusing on two justifications: (1) disrupting the ideological function of the prison and (2) revealing the democracy-enhancing agency of people in prison. Part III explores the limits of adopting a lens of expertise to understand the value of people in prison in the ambition for long-term decarceration. At a time when criminal law scholars are debating the role of experts in criminal policy and staking competing claims to expertise, Part III also examines the limits of expertise—and the frame itself—to achieving large-scale decarceration. In conclusion, I argue that thinking alongside people in prison is essential to cultivating and progressing toward more imaginative, hopeful, and transformative decarceration futures. If we fail to make this challenging shift, we miss—and suppress—more humane, innovative, and effective possibilities to radically transform our carceral state.

## I. INSIDE DECARCERATION MOVES

One way to denaturalize the status quo is to unveil its hidden realities. A criminal legal system that churns out carceral sentences and limits the right to counsel post-conviction tautologically produces an uncounseled

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imprisonment, as understood by people who are incarcerated, is essential to improving sentencing policy); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1619–20 (2017) (discussing the influence of prison hunger and labor strikes in sparking reforms to solitary confinement practices in California prisons); Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 87–88, 92, 114, 153, 157 (2022) (demonstrating that people in prison were active partners in directing the Pelican Bay class action, and that the collaborative, nonhierarchical partnership was crucial to ending California’s use of prolonged solitary confinement).

51. DAVIS, *supra* note 34, at 26 (“[I]f you think of the prisoners simply as the objects of the charity of others, you defeat the very purpose of antiprison work. You are constituting them as an inferior in the process of trying to defend their rights.”).

52. Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 13 (2008).

population whose agency has upended legal, political, and popular discourse. This part documents different ways in which people in prison have made decarceral moves. I define “decarceral moves” as legal or conceptual strategies that can reduce new prison admissions, for long stays or at all, release more people from prison, or transform conventional understandings of the reasons people land in prison.<sup>53</sup> This part examines this phenomenon in two domains: changing formal law and producing informal knowledge. In each sphere, people in prison have influenced dramatic transformation far beyond their cells. Most of the people whose ideas are described in this part are Black and Latinx and were removed from poverty to prison. This part describes how the criminal legal system and nonsystem actors harnessed their work—and continue to rely on it today—to pursue new decarceral strategies.

A note about language: “[W]e . . . persist in thinking of a convicted person as a special sort of individual, one cut off in some mysterious way from the common bonds that unite the rest of us.”<sup>54</sup> As if the cage were endemic to their very existence, we choose to adopt their locus as a type of nationality, calling them prisoners, inmates, offenders, and convicts. Throughout this Article, I describe people in prison as people in prison to emphasize their humanity.<sup>55</sup> I do not begin any account with the crime for which they were convicted, unless the decarceral move is contingent on it.<sup>56</sup> The ideas in the pages to come were all generated in prison by people convicted of crimes classified as violent—some were admittedly involved in violence and some had compelling evidence of innocence but were not able to prove it in a

53. Cf. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 312 (2009) (“There is no way to change the prison population without changing either the number of people who go to prison or how long they stay there.”); JAMES AUSTIN, ERIC CADORA, TODD R. CLEAR, KARA DANSKY, JUDITH GREENE, VANITA GUPTA, MARC MAUER, NICOLE PORTER, SUSAN TUCKER & MALCOLM C. YOUNG, ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 4, 8 (2013) (“If policy makers want to reduce the costs of corrections, they have to reduce the number of people who enter the system, their length of stay, or both . . . . [E]specially for people convicted of violent crimes.”).

54. John Griffiths, *Ideology in Criminal Procedure or a Third “Model” of the Criminal Process*, 79 YALE L.J. 359, 385 (1970); see also DAVIS, *supra* note 34, at 22 (describing prison as the “notion of a place to put bad people”); Simonson, *supra* note 38, at 250–51, 271, 287 (describing how the ideology of criminal procedure pits the entire community against the lone accused person); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 80 (2011) (“The . . . question is whether . . . the public imagination of the ‘convict’ could ever be reshaped.”).

55. See Open Letter from Eddie Ellis, Ctr. on NuLeadership for Urb. Sols. 1–2 (2017), <https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf> [<https://perma.cc/MU5U-YQ8K>] (“We habitually underestimate the power of language. . . . We think that by insisting on being called ‘people’ we reaffirm our right to be recognized as human beings, not animals, inmates, prisoners or offenders. We also firmly believe that if we cannot persuade you to refer to us, and think of us, as people, then all our other efforts at reform and change are seriously compromised.”).

56. Cf. IAN MANUEL, MY TIME WILL COME 3 (2021) (“In the stories told of my life, each begins with a crime.”). See generally BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 24, 148, 186, 228 (2014) (telling stories that begin with histories—of families, neighborhoods, communities, geographies, and institutions).

courtroom. Facts about the crimes or convictions are mentioned but not at the outset.<sup>57</sup> This Article centers their ideas.

### A. *Changing the Law*

This section examines two distinct inside moves to challenge long-standing laws or precedents that have put thousands of people in cages and kept them there for lengthy terms. It describes how people behind bars have created influence—and law—that carries long-term, continuing, and far-reaching decarceral consequences.

#### 1. Nonunanimous Juries

In 1985, Calvin Duncan, a Black man, was sent to the Louisiana State Penitentiary (“Angola”) to serve a life sentence.<sup>58</sup> At Angola, twenty-four-year-old Duncan trained to be an “inmate counsel substitute.”<sup>59</sup> People on Louisiana’s death row had counsel for their death-qualifying offenses, but no legal representation for their noncapital convictions.<sup>60</sup> Duncan’s assigned job was to assist people on the latter cases, for 20 cents an hour.<sup>61</sup>

In hundreds of cases, Duncan found that the Louisiana Appellate Project (LAP)—the state indigent defense organization that provides appellate counsel in all noncapital felony appeals—almost never sought review in the

57. I make this framing choice consciously because introducing these innovations through the mantle of guilt or innocence may invite the reader into the cognitive trap of valuing each move differently based on whether the person who generated it was factually innocent or not. Nonetheless, I make this choice while mindful not to avoid acknowledging the offenses or the topic of violence. I include information about the alleged crimes and convictions in footnotes. These choices are far from perfect, but they aim to focus on the decarceral ideas. I continue to grapple with whether this is the right approach.

58. Emily Bazelon, *Shadow of a Doubt*, N.Y. TIMES MAG. (Jan. 15, 2020), <https://www.nytimes.com/interactive/2020/01/15/magazine/split-jurors.html> [<https://perma.cc/GN57-C8R4>].

59. *Id.*; see also *State v. Hicks*, 2008-0511 (La. App. 1 Cir. 6/26/08); 992 So. 2d 565 (observing that the Louisiana Department of Public Safety & Corrections created the “inmate counsel substitute” position as one way to effectuate the right of access to the courts articulated by the U.S. Supreme Court in *Bounds v. Smith*, 430 U.S. 817 (1977), *overruled in part on other grounds by Lewis v. Casey*, 518 U.S. 343, 354 (1996)); cf. Robin Bunley, *Making Bricks Without Straw: Legal Training for Female Jailhouse Lawyers in the Louisiana Penal System*, 68 UCLA L. REV. DISCOURSE 128, 130–36 (2021) (contrasting the comparatively minimal and deficient training offered to counsel substitutes incarcerated in Louisiana’s only prison for women).

60. Telephone Interview with G. Benjamin Cohen, Chief of Appeals, Orleans Parish Dist. Att’y’s Office (Oct. 11, 2021). Cohen was previously Of Counsel at the Promise of Justice Initiative, a nonprofit organization in New Orleans that provides litigation, advocacy, and support services for people impacted by the criminal legal system. In that capacity, he was counsel of record for the petitioner in *Ramos v. Louisiana*. See Brief for Petitioner, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924); Matt Sledge, *New Orleans DA Jason Williams Hires Ben Cohen, Lawyer Who Led Push Against Split Juries*, NEW ORLEANS ADVOC. (Feb. 9, 2021), [https://www.nola.com/news/courts/article\\_90fe45ce-6a32-11eb-9bb1-f8554e00cce.html](https://www.nola.com/news/courts/article_90fe45ce-6a32-11eb-9bb1-f8554e00cce.html) [<https://perma.cc/WF5Q-C7C2>].

61. Telephone Interview with G. Benjamin Cohen, *supra* note 60; Bazelon, *supra* note 58.

Louisiana Supreme Court via a writ of certiorari.<sup>62</sup> Absent a writ, people in prison would find their constitutional claims defaulted in federal court.<sup>63</sup> Duncan made a written public records request for LAP's policies on exhaustion.<sup>64</sup> The head of appeals denied the request on the basis that Duncan was not a "person" entitled to request the records.<sup>65</sup>

In Angola, Duncan met G. Ben Cohen, a lawyer who represented people on Louisiana's death row.<sup>66</sup> Duncan forwarded him LAP's public records response.<sup>67</sup> Unable to persuade LAP to exhaust its clients' claims to the state's highest court, Duncan decided to take on this role.<sup>68</sup> Alone and by organizing other inmate counsel substitutes, Duncan preserved constitutional claims for hundreds of people in prison.<sup>69</sup> Nearly everyone in Angola went to Duncan to file writs in the Louisiana Supreme Court.<sup>70</sup> With a ninth-grade education, Duncan did "what the entire public defender system[] of Louisiana . . . failed to do."<sup>71</sup>

Among the claims that Duncan preserved was a challenge to Louisiana's nonunanimous jury rule.<sup>72</sup> Of the over 6,000 people imprisoned in Angola, three out of four are serving a life sentence without parole.<sup>73</sup> Hundreds

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62. Telephone Interview with G. Benjamin Cohen, *supra* note 60; Email from G. Ben Cohen, Chief of Appeals, Orleans Parish Dist. Att'y's Office, to author (Oct. 11, 2021); *see also* Ross v. Moffitt, 417 U.S. 600, 612 (1974) (holding that there is no right to counsel in certiorari proceedings after direct appeal). *See generally* LA. APP. PROJECT, <http://appellateproject.org/> [<https://perma.cc/ZNQ4-57WG>] (last visited Sept. 2, 2022).

63. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999) (holding that the failure to present claims for discretionary review to a state court of last resort procedurally bars federal review); Telephone Interview with G. Benjamin Cohen, *supra* note 60 (stating that this was why the vast majority of case law coming from the Louisiana Supreme Court was driven by state writs).

64. Telephone Interview with G. Benjamin Cohen, *supra* note 60.

65. *Id.*; *see* LA. STAT. ANN. § 44:31.1 (2022) (excluding, with limited exception, people serving a felony sentence who have exhausted their appellate remedies from the definition of "person" entitled to access public records).

66. Telephone Interview with G. Benjamin Cohen, *supra* note 60.

67. *Id.*

68. Email from G. Ben Cohen, *supra* note 62; Telephone Interview with G. Benjamin Cohen, *supra* note 60; LA. APP. PROJECT, *supra* note 62.

69. Telephone Interview with G. Benjamin Cohen, *supra* note 60 (stating that Duncan exhausted claims in the Louisiana Supreme Court so that people in prison could later file a federal habeas petition or petition for certiorari to the U.S. Supreme Court); Email from G. Ben Cohen, *supra* note 62.

70. Telephone Interview with G. Benjamin Cohen, *supra* note 60 ("[Duncan] put the entire criminal legal system on his back"); Email from G. Ben Cohen, *supra* note 62; *cf.* ABU-JAMAL, *supra* note 50, at 137–44, 207 (exploring why many people in jails and prisons "turn to those imprisoned with themselves," given the absence of high quality indigent defense in the free world and the hollowed meaning of the right to effective assistance of counsel).

71. Email from G. Ben Cohen, *supra* note 62.

72. *Id.*; *see also* Bazelon, *supra* note 58.

73. Roby Chavez, *Aging Louisiana Prisoners Were Promised a Chance at Parole After 10 Years. Some Are Finally Free*, PBS (Nov. 26, 2021, 4:13 PM), <https://www.pbs.org/newshour/nation/aging-louisiana-prisoners-were-promised-a-chance-at-parole-after-10-years-some-are-finally-free> [<https://perma.cc/3WH9-RDZE>] (stating that Angola, which was built on the site of a former slave plantation, is the largest maximum-security prison in the United States).

among them were convicted by a 10–2 or 11–1 vote,<sup>74</sup> where one or two jurors voted to acquit. In Angola, Duncan too often came upon divided verdicts where he thought that the one or two dissenters had it right.<sup>75</sup> He researched how split verdicts in criminal cases could be constitutional.<sup>76</sup>

In a deeply fractured set of opinions in the 1972 case *Apodaca v. Oregon*,<sup>77</sup> five justices of the U.S. Supreme Court found that the Sixth Amendment did not require unanimous verdicts in state criminal trials.<sup>78</sup> The tangled decision had grave implications in Louisiana, which has historically boasted the highest incarceration rate in the nation.<sup>79</sup> Duncan resolved to petition the Court to reconsider *Apodaca*.<sup>80</sup> The split-verdict rule did not implicate his own case; he was convicted by a unanimous jury.<sup>81</sup> Still, Duncan understood split verdicts as “a civil rights issue affecting many, many people.”<sup>82</sup> Louisiana and Oregon were the only states that allowed a person to be convicted of a serious felony by a nonunanimous jury.<sup>83</sup> Duncan presented

74. Assoc. Press, *Report: 1,500 La. Inmates Convicted by Nonunanimous Juries*, SHREVEPORT TIMES (Nov. 21, 2020, 7:29 PM), <https://www.shreveporttimes.com/story/news/local/louisiana/2020/11/21/report-1-500-inmates-louisiana-convicted-nonunanimous-juries/6378369002/> [<https://perma.cc/35CJ-38N7>].

75. Bazelon, *supra* note 58.

76. Adam Liptak, *A Relentless Jailhouse Lawyer Propels a Case to the Supreme Court*, N.Y. TIMES (Aug 5, 2019), <https://www.nytimes.com/2019/08/05/us/politics/supreme-court-nonunanimous-juries.html> [<https://perma.cc/YM5G-HYYV>].

77. 406 U.S. 404 (1972) (plurality opinion).

78. Four justices concluded that the Sixth Amendment did not require unanimous jury verdicts in either federal or state criminal trials. *Id.* at 406. Justice Lewis F. Powell, Jr., in a concurring opinion for a companion case, stated that the Sixth Amendment required juror unanimity in federal but not state criminal trials. *Johnson v. Louisiana*, 406 U.S. 366, 369 (1972) (Powell, J., concurring). Four dissenting justices concluded that the Sixth Amendment required unanimous verdicts in both federal and state trials. *See* Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 121 (2020). Under the narrowest-grounds approach, state and federal courts accepted Justice Powell’s concurring opinion as controlling. *Id.* (collecting cases).

79. Chavez, *supra* note 73; *see How Louisiana Became the World’s ‘Prison Capital,’* NPR (June 5, 2012, 11:38 AM), <https://www.npr.org/2012/06/05/154352977/how-louisiana-became-the-worlds-prison-capital> [<https://perma.cc/KNP3-MWDY>].

80. Bazelon, *supra* note 58.

81. Liptak, *supra* note 76 (stating that Duncan pursued the split-jury issue “when it was unpopular,” when “no one was on it,” when “no press was reporting it” and when “no one thought it was going anywhere” (quoting former director of Innocence Project New Orleans Emily Maw)).

82. Bazelon, *supra* note 58 (quoting Cohen).

83. Emily Maw & Jee Park, *Do Non-Unanimous Verdicts Discriminate?: Louisiana Needs to Know*, NEW ORLEANS ADVOC. (July 7, 2021), [https://www.nola.com/opinions/article\\_a48bd5c9-757f-508d-9c43-92031b5a5d6b.html](https://www.nola.com/opinions/article_a48bd5c9-757f-508d-9c43-92031b5a5d6b.html) [<https://perma.cc/C9V7-AWPS>] (“(Louisiana allows 10–2 and Oregon 11–1). But Louisiana is alone in allowing a citizen to be sentenced to spend the rest of his life in prison (without parole) by a jury in which two people have a reasonable doubt that he did it.”). But unanimous verdicts were required for capital crimes in Louisiana and first-degree murder in Oregon. *See* Angela A. Allen-Bell, *How the Narrative About Louisiana’s Non-Unanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 MERCER L. REV. 585, 589 (2016); Andrew Cohen, *Will the Supreme Court Address Louisiana’s Flawed Jury System?*, ATLANTIC (Apr. 23, 2014), <https://www.theatlantic.com/national/archive/2014/04/Louisiana/336072/> [<https://perma.cc/RL47-53QR>].



the plan to Cohen, who agreed to take any split-jury case Duncan brought to him to the Supreme Court.<sup>84</sup>

Between 2004 and 2019, the duo filed twenty-two petitions for writs of certiorari.<sup>85</sup> The nearly two dozen petitions could be brought because Duncan meticulously exhausted constitutional claims in hundreds of cases to ensure that people in Angola had access to the courts.<sup>86</sup> The Court denied certiorari every time.<sup>87</sup> Duncan and Cohen's persistence did not escape notice. In the 2010 Second Amendment–incorporation case *McDonald v. City of Chicago*,<sup>88</sup> Justice John Paul Stevens declared that the Court has “resisted a uniform approach to the Sixth Amendment’s criminal jury guarantee” by demanding unanimous verdicts in federal, but not state, trials, and “[i]n recent years . . . repeatedly declined to grant certiorari to review that disparity.”<sup>89</sup> It was Justice Stevens’s final dissent.<sup>90</sup>

Accompanying Duncan’s exhaustion-plus-certiorari approach was an effort to build momentum in the Louisiana state courts. To that end, from inside prison, Duncan underscored to the indigent defense bar the importance of preserving the unanimity issue at trial.<sup>91</sup> As a result, in about 2008, the Orleans Public Defenders instituted a policy to move for unanimous juries in all criminal trials.<sup>92</sup> In their template pleading, the defenders added a crucial fact: the split-jury rule was first enshrined in Louisiana’s constitution in 1898.<sup>93</sup> The stated purpose of the 1898 constitutional convention was to “establish the supremacy of the white race.”<sup>94</sup>

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84. Bazelon, *supra* note 58 (quoting Cohen).

85. Telephone Interview with G. Benjamin Cohen, *supra* note 60.

86. *Id.* (describing the almost two dozen petitions as “the tip of the iceberg”).

87. Bazelon, *supra* note 58.

88. 561 U.S. 742 (2010).

89. *Id.* at 867–68 (Stevens, J., dissenting) (citing Petition for Writ of Certiorari, Lee v. Louisiana, 555 U.S. 823 (2008) (No. 07–1523)); Email from G. Ben Cohen, Chief of Appeals, Orleans Parish Dist. Att’y’s Office, to author (Dec. 30, 2021) (noting that Lee had different counsel of record, but Duncan shepherded that petition, encouraging Lee to exhaust the claim).

90. Joseph Blocher & Darrell A.H. Miller, *Stevens, J., Dissenting: The Legacy of Heller*, JUDICATURE, Fall/Winter 2019, at 9, 11.

91. Telephone Interview with Colin Reingold, Dir. of Strategic Crim. Lit., Promise of Just. Initiative, former Lit. Dir. & Senior Couns., Orleans Pub. Defs. (Jan. 6, 2022) (stating that Duncan, through Cohen, “drilled into” the Orleans Public Defenders to preserve the jury unanimity issue in every case that went to trial); Email from G. Ben Cohen, Chief of Appeals, Orleans Parish Dist. Att’y’s Office, to author (Jan. 6, 2022) (same).

92. Telephone Interview with Colin Reingold, *supra* note 91 (stating that members of the private bar observed public defenders filing pretrial motions for unanimous juries, so they eventually began to preserve the issue as well).

93. *Id.*

94. OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (H. Hearsey ed., 1898).

After nearly thirty years, Duncan was released in 2011.<sup>95</sup> He continued to fill a role he assumed on the inside,<sup>96</sup> but with far greater resources. Every day, he read all of the opinions issued by the Louisiana Circuit Courts of Appeal.<sup>97</sup> When a split verdict was affirmed on appeal, Duncan informed the inmate counsel substitute at Angola who then exhausted the jury unanimity claim in the state supreme court.<sup>98</sup> Duncan and Cohen then chose cert-worthy cases to take to the U.S. Supreme Court.<sup>99</sup> After his release, Duncan also began traveling the state to talk about changing the split-jury rule and to educate the defense bar, community groups, and law schools about the rule's racist origins.<sup>100</sup>

As the defense bar began to preserve the issue for appeal and began to present equal protection arguments based on the rule's racist origins, state courts took interest but rejected the claims, based in part on a lack of evidence on disparate impact,<sup>101</sup> which one court foreboded "would be impossible . . . to show."<sup>102</sup> This judicial refrain led *The Advocate*, Louisiana's largest daily newspaper, to scour records in thousands of felony trials, revealing the profound and enduring racial impact of Louisiana's jury scheme.<sup>103</sup> The

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95. Liptak, *supra* note 76. Innocence Project New Orleans (IPNO) secured Duncan's release in 2011 as part of an agreement with the state in which he received time served in exchange for pleading guilty to a lesser charge. *Calvin Duncan*, INNOCENCE PROJECT NEW ORLEANS, <https://ip-no.org/what-we-do/client-representation/freed-clients/calvin-duncan/> [<https://perma.cc/2LG6-CVHJ>] (last visited Sept. 2, 2022) (noting that Duncan was convicted of first-degree murder in 1985, where the evidence against him consisted of a fifteen-year-old witness who made a cross-racial identification nine months after the crime and "guilty knowledge" statements that Duncan allegedly made to police when he was arrested). Duncan always maintained his innocence. *Id.*; Liptak, *supra* note 76. Taking on his case in 2003, IPNO discovered that the state withheld evidence that Duncan had no guilty knowledge of the crime, that the assailant's description was not consistent with Duncan's appearance, and that the identification procedure was unreliable. *Calvin Duncan, supra*.

96. Telephone Interview with G. Benjamin Cohen, *supra* note 60.

97. *Id.*

98. *Id.* Duncan mailed the appellate opinions to the inmate counsel substitute. Telephone Interview with Katherine Mattes, Dir., Crim. Just. Clinic, Tulane L. Sch. (Oct. 12, 2021). Otherwise, by the time defense counsel received the decision in the mail, sent it to the prison, and the prison delivered it to the individual (assuming the individual was not, in the interim, transferred to another prison), there would be little time left to file a petition for a writ of certiorari. *Id.*; Telephone Interview with G. Benjamin Cohen, *supra* note 60.

99. See Ellisa Valo, *Liberty and Justice, After All*, LEWIS & CLARK MAG. (2021), <https://www.lclark.edu/live/news/45928-liberty-and-justice-after-all> [<https://perma.cc/FEX2-TPZF>]; Telephone Interview with G. Benjamin Cohen, *supra* note 60.

100. Bazelon, *supra* note 58.

101. See, e.g., *State v. Hankton*, 2012-0375 (La. App. 4 Cir. 8/2/2013), 122 So. 3d 1028, 1037-38, 1041 (acknowledging the racial animus to "disenfranchise" Black voters in the 1898 constitution but finding no evidence that race motivated the nonunanimous jury provision and asserting that the state's 1974 adoption of a revised nonunanimity rule, whose stated purpose was "judicial efficiency," cleansed any racial animus that may have motivated its introduction in 1898); *State v. Webb*, 2013-0146 (La. App. 4 Cir. 1/30/2014), 133 So. 3d 258, 285-86 (finding no proof of discriminatory purpose or disparate impact).

102. *Webb*, 133 So. 3d at 286.

103. Jeff Adelson, Gordon Russell & John Simerman, *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, ADVOCATE (Apr. 1, 2018), [https://www.theadvocate.com/baton\\_rouge/news/courts/article\\_16fd0ece-32b1-11e8-8770-33eca2a325de.html](https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html) [<https://perma.cc/DJC9-J224>].

newspaper's 2018 analysis showed that in parishes across Louisiana between 2011 and 2016, 40 percent of jury convictions ended with one or two holdouts, and that Black people were 30 percent more likely than white people to be convicted by split juries.<sup>104</sup> More limited data in Louisiana's most populous parish, East Baton Rouge Parish, showed that Black jurors, although still far more likely to convict than not, were almost three times more likely to cast a dissenting vote than white jurors.<sup>105</sup> Retrieving this data was a daunting task.<sup>106</sup>

*The Advocate's* 2018 series was published just as the state legislature began debating a bill that would allow Louisiana voters to amend the state constitution to require unanimous jury verdicts—its first serious push to change the law since 1974.<sup>107</sup> The grassroots group Voice of the Experienced (VOTE), founded by Norris Henderson, who was imprisoned in Angola with Duncan, spearheaded a vigorous campaign to educate voters to support the ballot initiative.<sup>108</sup> Representing the state's forty-two district

104. Adelson, Russell & Simerman, *supra* note 103 (describing the study's methodology, data set, and conclusions); John Simerman, *U.S. Supreme Court Refuses to Make Louisiana Ban on Non-Unanimous Juries Retroactive*, NEW ORLEANS ADVOC. (May 17, 2021, 9:10 AM), [https://www.nola.com/news/courts/article\\_40f11aa4-a8dd-11eb-ae3e-dfa9c5d97cc6.html](https://www.nola.com/news/courts/article_40f11aa4-a8dd-11eb-ae3e-dfa9c5d97cc6.html) [<https://perma.cc/FS7V-E9N8>].

105. Adelson, Russell & Simerman, *supra* note 103; Simerman, *supra* note 104.

106. Parishes and judges vary widely in how and whether they record juror votes. Gordon Russell, *Why Are Louisiana Jury Votes Often Absent from Court Record?: Tilting the Scales*, NEW ORLEANS ADVOC. (Apr. 1, 2018, 8:00 AM), [https://www.nola.com/news/courts/article\\_f3369eb7-2ca9-58be-bbc7-37409ee3b91d.html](https://www.nola.com/news/courts/article_f3369eb7-2ca9-58be-bbc7-37409ee3b91d.html) [<https://perma.cc/XY78-5CXE>] (stating that Louisiana juries are often not polled and, when they are, judges usually seal the results or tear them up); John Simerman, *More than 1,500 Louisiana Inmates Were Convicted by Divided Juries, New Report Says*, NEW ORLEANS ADVOC. (Nov. 17, 2020, 5:48 PM), [https://www.nola.com/news/courts/article\\_ddba16a8-2929-11eb-9072-ff7a00598e9f.html](https://www.nola.com/news/courts/article_ddba16a8-2929-11eb-9072-ff7a00598e9f.html) [<https://perma.cc/U4JU-SCA4>]; Maw & Park, *supra* note 83 (stating that no court collects this data consistently and comprehensively); Adelson, Russell & Simerman, *supra* note 103 (“Even the aggregate vote count is absent from many trial records . . .”).

107. Chris Granger, *The Advocate Wins First Pulitzer Prize for Series that Helped Change Louisiana's Split-Jury Law*, ADVOCATE (Apr. 15, 2019, 4:29 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_dba87282-5f28-11e9-92b3-bfba0cf08ab2.html](https://www.theadvocate.com/baton_rouge/news/article_dba87282-5f28-11e9-92b3-bfba0cf08ab2.html) [<https://perma.cc/4E26-Q63B>]; John Simerman & Gordon Russell, *Louisiana Voters Scrap Jim Crow-Era Split Jury Law; Unanimous Verdicts to Be Required*, ADVOCATE (Nov. 6, 2018, 9:45 PM), [https://www.theadvocate.com/baton\\_rouge/news/politics/elections/article\\_194bd5ca-e1d9-11e8-996b-eb8937ebf6b7.html](https://www.theadvocate.com/baton_rouge/news/politics/elections/article_194bd5ca-e1d9-11e8-996b-eb8937ebf6b7.html) [<https://perma.cc/4383-QDE6>].

108. Bazelon, *supra* note 58; see Thomas Aiello, *Non-Unanimous Juries*, 64 PARISHES (Nov. 15, 2021), <https://64parishes.org/entry/non-unanimous-juries> [<https://perma.cc/92Z6-DJSP>] (discussing work from many corners to push the legislature to change the law); Norris Henderson, *What I Learned About Voting Rights in the Fields of Angola*, THE MARSHALL PROJECT (Mar. 12, 2020, 10:00 PM), <https://www.themarshallproject.org/2020/03/12/what-i-learned-about-voting-rights-in-the-fields-of-angola> [<https://perma.cc/6HA4-89S8>]. By this time, advocacy, academic scholarship, and popular writing on the historical roots and modern outgrowth of the split-jury rule, as well as coverage on the Supreme Court petitions, had proliferated. See, e.g., THOMAS AIELLO, *JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY TRIALS IN LOUISIANA IX* (2015) (exposing the law's “design[] to increase convictions to feed the state's burgeoning convict lease system”); Allen-Bell, *supra* note 83, at 592–97; Angela A. Allen-Bell, *These Jury Systems Are Vestiges of White Supremacy*, WASH. POST (Sept. 22, 2017), [https://www.washingtonpost.com/opinions/these-jury-systems-are-vestiges-of-white-supremacy/2017/09/22/d7f1897a-9f13-11e7-9c8d-cf053ff30921\\_story.html](https://www.washingtonpost.com/opinions/these-jury-systems-are-vestiges-of-white-supremacy/2017/09/22/d7f1897a-9f13-11e7-9c8d-cf053ff30921_story.html)

attorneys, the Louisiana District Attorneys Association initially took a strong position against the bill.<sup>109</sup> After the newspaper's coverage began, the association opted to stay neutral; the bill then gained bipartisan momentum and passed both chambers.<sup>110</sup> In November 2018, by a nearly two-to-one margin, Louisiana voters overwhelmingly approved the constitutional amendment to require unanimous verdicts in all felony trials,<sup>111</sup> leaving Oregon the only remaining state to allow less-than-unanimous juries. The amendment, however, applied only prospectively.<sup>112</sup>

The bill's sponsor praised *The Advocate's* Pulitzer Prize-winning series, stating that without the investigative reporting, "it would have been impossible to be successful, not just with the legislators but in getting the public to vote for it."<sup>113</sup> The sponsor omits that the nonunanimous jury rule was known for decades to journalists covering the Louisiana courts.<sup>114</sup> What made the newspaper's reporting "ripe" was Duncan's methodical and rigorous push to build the issue in the courts.<sup>115</sup> Duncan's work inspired new subjects of data collection,<sup>116</sup> dramatically changing how the courts, prosecutors, legislators, and the public thought about—to borrow a phrase from Professor Kimberlé Crenshaw—the "endurance of the structures of

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[<https://perma.cc/2MZW-WQZL>] (stating that eliminating unanimity "paved the way for quick convictions that would facilitate the use of free prisoner labor as a replacement for the loss of free slave labor"); Ken Daley, *Should Juries be Unanimous?: Treme Murder Case Raises Question for U.S. Supreme Court*, NEW ORLEANS ADVOC. (Sept. 13, 2017, 4:00 PM), [https://www.nola.com/news/crime\\_police/article\\_1436dfe9-b963-5e6d-8aa2-beacdee3bde2.html](https://www.nola.com/news/crime_police/article_1436dfe9-b963-5e6d-8aa2-beacdee3bde2.html) [<https://perma.cc/AN9L-8P34>] (discussing the racist roots of Louisiana's law and a certiorari petition by Dale Lambert); Andrew Cohen, *A Vestige of Bigotry*, THE MARSHALL PROJECT (Sept. 25, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/09/25/a-vestige-of-bigotry> [<https://perma.cc/4LKV-N93Z>] (same); Email from G. Ben Cohen, *supra* note 89 (stating that Duncan brought Lambert's case to him to take to the U.S. Supreme Court).

109. Simerman & Russell, *supra* note 107.

110. *Id.*; Granger, *supra* note 107.

111. *See* Granger, *supra* note 107; *see also* Simerman & Russell, *supra* note 107.

112. Simerman & Russell, *supra* note 107 (stating that the amendment applied only to trials involving crimes committed on or after January 1, 2019).

113. Granger, *supra* note 107 (quoting Louisiana state senator JP Morrell).

114. Telephone Interview with John Simerman, Rep., New Orleans Advoc. (Dec. 17, 2021).

115. *Id.* (emphasizing that the newspaper began the data project because Louisiana courts noted the absence of contemporary data showing that the split-jury rule had a lasting racial impact); *id.* (noting that without Duncan's painstaking work to educate the courts and the defense bar, which led the state courts to pay attention, *The Advocate* would not have felt that it "could have made an impact").

116. *See* Adelson, Russell & Simerman, *supra* note 103 (referencing a rare evidentiary hearing in 2017 where a New Orleans trial judge denied a challenge to the split-jury rule in the absence of "a full-scale study" that "shows disproportionate impact"); Telephone Interview with Colin Reingold, *supra* note 91 (stating that this pretrial hearing took place only because Duncan "drilled into" the defense bar the importance of preserving the unanimity issue); Telephone Interview with John Simerman, *supra* note 114 (stating that although verdict data could be collected at any time, Duncan's work in the courts gave the journalists a "reason to do th[e] project").

white dominance.”<sup>117</sup> Those racist structures would become central to the long-awaited Supreme Court decision.

In 2019, the Supreme Court granted certiorari in the twenty-third petition that Duncan and Cohen cowrote: *Ramos v. Louisiana*.<sup>118</sup> In 2020, the Court overturned the 2016 murder conviction of Evangelisto Ramos, who was serving a life sentence without parole after a 10–2 jury verdict.<sup>119</sup> Calling *Apodaca* “gravely mistaken,” the Court ruled that the Sixth Amendment required a unanimous jury verdict in state criminal trials for serious offenses.<sup>120</sup> The momentous decision announced a new rule of criminal procedure.<sup>121</sup>

“Without Calvin [Duncan], *Ramos* wouldn’t exist.”<sup>122</sup> His unremitting drive to eradicate laws rooted in racial animus continues to reduce the prison population. Today, countless people accused of serious felonies in Oregon and Louisiana will likely face lower charges that carry less prison time, with some saved entirely from conviction and imprisonment.<sup>123</sup> The impact is not limited to future cases or those that were pending on direct appeal at the time *Ramos* was decided. Politicians in Louisiana and Oregon have harnessed *Ramos* to pursue new strategies to reduce the time that people stay in prison, to release people from prison, or both. Although the Supreme Court held in a subsequent case that the new rule announced in *Ramos* did not apply retroactively to overturn final convictions on federal collateral review,<sup>124</sup> the top prosecutor in New Orleans opted not to wait for the retroactivity decision and vowed to review the roughly 340 cases in Orleans Parish whose split-jury convictions became final.<sup>125</sup> Oregon lawmakers are also considering taking

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117. See Kimberlé Williams Crenshaw, *Race to the Bottom: How the Post-Racial Revolution Became a Whitewash*, BAFFLER (June 2017), <https://thebaffler.com/salvos/race-to-bottom-crenshaw> [<https://perma.cc/4DJZ-ZXLX>].

118. 139 S. Ct. 1318 (2019) (mem.) (granting certiorari); see Telephone Interview with G. Benjamin Cohen, *supra* note 60.

119. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1391 (2020).

120. *Id.* at 1397, 1405.

121. See *id.* at 1406.

122. Telephone Interview with G. Benjamin Cohen, *supra* note 60 (“Calvin was a relentless force in a place that is designed to suppress hope.”); Valo, *supra* note 99 (“The reason why we don’t have nonunanimous jury convictions anymore is because Calvin didn’t give up.” (quoting Lewis & Clark Law School professor Aliza Kaplan)).

123. See, e.g., Gordon Russell, John Simerman & Jeff Adelson, *Louisiana Leads Nation in Locking Up People for Life; Often, Jurors Couldn’t Even Agree on Guilt*, NEW ORLEANS ADVOC. (Apr. 21, 2018, 11:00 PM), [https://www.nola.com/news/article\\_175540ba-e44d-5ea0-a734-970600159c77.html](https://www.nola.com/news/article_175540ba-e44d-5ea0-a734-970600159c77.html) [<https://perma.cc/BVS9-VHTQ>]; *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part) (“*Apodaca* sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule (although exactly how many is of course unknowable.)”); Brief of Amicus Curiae State of Oregon in Support of Respondent at 12, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924) (stating that the number of affected cases pending on direct appeal in Oregon “easily may eclipse a thousand”).

124. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021).

125. See Kevin McGill, *Prosecutor Moves to Vacate 22 Non-Unanimous Jury Convictions*, U.S. NEWS (Feb. 26, 2021), <https://www.usnews.com/news/best-states/louisiana/articles/2021-02-26/prosecutor-moves-to-vacate-22-non-unanimous-jury-convictions> [<https://perma.cc/VQ3F-HLQ5>] (noting that the more than 300 people with split verdicts in

up the Court's invitation to apply the new rule in state post-conviction proceedings.<sup>126</sup> A bill proposed in the Oregon legislature would open the door to vacating hundreds, or, by some estimates, more than 1,000 past nonunanimous convictions to be retried, pled out, or dismissed.<sup>127</sup> And the Louisiana Supreme Court is poised to decide a case that could determine whether the more than 1,000 people who remain in prison following split verdicts are entitled to new trials.<sup>128</sup>

Duncan's inside-outside synergistic collaboration ushered in new constitutional and public understandings about the enduring role of racism in shaping who the law sends to prison. In a somewhat surprising turn, the *Ramos* Court began its opinion by underscoring the racist origins of Louisiana's and Oregon's majority-jury rules.<sup>129</sup> In Louisiana, the Court

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New Orleans are out of about 1,600 in the state); Sledge, *supra* note 60; Erik Ortiz, *Ahead of Supreme Court's Decision on Split Juries, New Orleans DA Tackles 'Jim Crow Office,'* NBC (May 9, 2021, 1:30 AM), <https://www.nbcnews.com/news/us-news/ahead-supreme-court-s-decision-split-juries-new-orleans-da-n1266688> [<https://perma.cc/TX4W-CK69>]. The district attorney also moved to vacate convictions of twenty-two people convicted of felonies by split juries. McGill, *supra* (noting that five cases were reviewed to determine whether charges should have ever been filed and, of the seventeen being retried, sixteen agreed to plead guilty as charged or to lesser charges, seeking reductions in sentences that would likely have kept them behind bars for life); Ortiz, *supra* (noting that these twenty-two split-jury convictions occurred between 1974 and 2014).

126. *Vannoy*, 141 S. Ct. at 1559 n.6 (“States remain free, if they choose, to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings.”).

127. Conrad Wilson, *Oregon Lawmakers to Consider Relief for Those Convicted by Non-Unanimous Juries*, OR. PUB. BROAD. (Nov. 16, 2021, 5:00 AM), <https://www.opb.org/article/2021/11/16/non-unanimous-juries-new-oregon-legislation/> [<https://perma.cc/AZ8C-NBLY>] (reporting that “[t]he idea for the legislation follows two recent U.S. Supreme Court rulings” and that, according to the Oregon Department of Justice, “many cases will result in an outright dismissal” (quoting Oregon Department of Justice legislative director Kimberly McCullough)); Noelle Crombie, *Oregon Lawmakers to Take Up Bill that Could Toss out Hundreds of Felony Convictions Based on Split Jury Verdicts*, OREGONIAN (Nov. 17, 2021, 11:08 AM), <https://www.oregonlive.com/crime/2021/11/oregon-lawmakers-to-take-up-bill-that-could-toss-out-hundreds-of-felony-convictions-based-on-split-jury-verdicts.html> [<https://perma.cc/Y66Y-QNN8>].

128. See *State v. Reddick*, 2021-01893 (La. 2/15/22); 332 So. 3d 1173 (mem.) (granting petition); Nick Chrastil, *Group Has Filed More than 1,000 Post-Conviction Relief Applications Challenging Non-Unanimous Jury Verdicts Since Supreme Court Ruling*, THE LENS (Apr. 19, 2021), <https://thelensnola.org/2021/04/19/group-has-filed-more-than-1000-post-conviction-relief-applications-challenging-non-unanimous-jury-verdicts-since-supreme-court-ruling/> [<https://perma.cc/VL7R-ZWDP>] (stating that post-*Ramos*, attorneys for the Promise of Justice Initiative “filed over 1,000 post-conviction relief petitions throughout the state for defendants who were convicted on split-jury verdicts whose convictions were finalized”); *Promise of Justice Initiative Argues Before Louisiana Supreme Court in Reddick v. Louisiana, a Case That Will Decide the Fate of 1,500 People Who Remain Incarcerated as a Result of Jim Crow Juries*, PROMISE OF JUST. INITIATIVE (May 10, 2022), <https://promiseofjustice.org/news/promise-of-justice-initiative-argues-before-louisiana-supreme-court-in-reddick-v-louisiana-a-case-that-will-decide-the-fate-of-1500-people-who-remain-incarcerated-as-a-result-of-jim-crow-juries-j4nla> [<https://perma.cc/2BS8-DPPH>]; Beth Schwartzapfel, *Their Sentences Are Unconstitutional—But They're Still in Prison*, THE MARSHALL PROJECT (May 10, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/05/10/their-sentences-are-unconstitutional-but-they-re-still-in-prison> [<https://perma.cc/8ZRX-ALJC>].

129. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020).

observed, the 1898 constitutional convention delegates were aware that overt exclusion of Black jurors would be struck down by the Supreme Court<sup>130</sup> and sought to undermine the influence of Black jurors in a different way by “sculpt[ing] a ‘facially race-neutral’ rule permitting ten-to-two verdicts in order ‘to ensure that African-American juror service would be meaningless.’”<sup>131</sup> The Court also foregrounded the roots of Oregon’s rule, which traced back to the Ku Klux Klan and efforts to dilute the vote of racial and religious minorities.<sup>132</sup> Professor Melissa Murray conceptualizes this move as reflecting the Court’s interest in reconsidering and overruling precedent, in part, to redress racial injustice.<sup>133</sup>

Over 1,500 people remain in Louisiana prisons following nonunanimous jury verdicts, of whom 80 percent are Black and more than 60 percent are serving life sentences without parole.<sup>134</sup> The majority-jury rule incentivized

130. *Strauder v. West Virginia*, 100 U.S. 303, 304, 310 (1880) (prohibiting states from systematically excluding Black people from juries); *see also Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part) (noting that Black jurors had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875).

131. *Ramos*, 140 S. Ct. at 1394 (plurality opinion) (quoting *State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist. Oct. 11, 2018); and then citing Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1599–1620 (2018) (providing detailed historical account of the racist roots of Louisiana’s nonunanimous jury law)); *see also id.* at 1417–19 (Kavanaugh, J., concurring) (describing the nonunanimous jury as “thoroughly” racist in its origins).

132. *Id.* at 1394 (plurality opinion).

133. Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2080–81 (2021) (“[T]he *Ramos* majority went beyond simply recasting *Apodaca* as an improperly reasoned Sixth Amendment ‘outlier.’ Race, the *Ramos* majority insisted, also shaped its consideration of *Apodaca*’s precedential value.”); *see Ramos*, 140 S. Ct. at 1405 (criticizing the *Apodaca* plurality for “spen[ding] almost no time [in the decision] grappling with . . . the racist origins of Louisiana’s and Oregon’s laws”). In their concurrences, Justices Sotomayor and Kavanaugh echoed these concerns. *Id.* at 1408 (Sotomayor, J., concurring) (“[T]he racially biased origins of the Louisiana and Oregon laws uniquely matter here.”); *id.* at 1417–18 (Kavanaugh, J., concurring in part) (stating that “the Jim Crow origins and racially discriminatory effects” of nonunanimous juries operate “as an engine of discrimination against [B]lack defendants, victims, and jurors” and “strongly support overruling *Apodaca*”); *see also* Charles Barzun, *The Constitution and Genealogy*, BALKINIZATION (July 6, 2020), <https://balkin.blogspot.com/2020/07/the-constitution-and-genealogy.html> [<https://perma.cc/HY2P-7V58>] (“Historical arguments about the social and political origins of legislation used to be, except in rare cases, treated as irrelevant to their constitutional validity. Now such histories—which we might call ‘genealogies’—may be relevant to constitutional analysis as a matter of law.”).

134. *New Report: 80% of People Still Imprisoned Due to Jim Crow Jury Verdicts Are Black, Most Are Serving Life Sentences*, PROMISE OF JUST. INITIATIVE (Nov. 18, 2020), <https://promiseofjustice.org/news/2020/11/18/new-promise-of-justice-initiative-report-80-of-people-still-imprisoned-due-to-jim-crow-jury-verdicts-are-black-most-are-serving-life-sentences> [<https://perma.cc/JS7L-KEG2>] (finding that 62 percent of people still in prison after split verdicts are serving life sentences, compared to just 16.3 percent of Louisiana’s overall adult prison population). Even the latter percentage is the highest in the nation. Lea Skene, *Louisiana’s Life Without Parole Sentencing the Nation’s Highest—and Some Say That Should Change*, ADVOCATE (Dec. 7, 2019, 4:59 PM), [https://www.theadvocate.com/baton\\_rouge/news/article\\_f6309822-17ac-11ea-8750-f7d212aa28f8.html](https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html) [<https://perma.cc/ZB76-PEEE>]; *see also New Report: 80% of People Still Imprisoned Due to Jim Crow Jury Verdicts Are Black, Most Are Serving Life Sentences*, *supra* (stating that the nonunanimous jury rule helped

prosecutors to charge more serious crimes than the evidence warranted—crimes that carried more severe penalties—resulting in “more people serving more time in prison.”<sup>135</sup> This is why the comparatively small number of new prison admissions that followed jury trials “carve[d] a larger footprint in Louisiana’s towering incarceration rate.”<sup>136</sup> In a system of pleas, split juries cast a long shadow. The majority-jury rule gave prosecutors an advantage in plea negotiations, leading accused people to weigh a guilty plea—often to more severe charges for which prosecutors would have a hard time obtaining a unanimous conviction—“against the tall odds of convincing at least three jurors that [the state] got it wrong.”<sup>137</sup> Nonunanimous juries helped Louisiana become the nation’s leader in locking people up for life.<sup>138</sup> Spearheading their demise from inside a cage<sup>139</sup> occasioned their elimination.

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make Louisiana the state with the most wrongful convictions per capita in the Deep South); Nicholas Chrastil, *A ‘Jim Crow Jury’ Prisoner Fights for Freedom*, AL JAZEERA (Oct. 4, 2021), <https://www.aljazeera.com/features/2021/10/4/a-jim-crow-jury-prisoner-fights-for-freedom> [https://perma.cc/D94V-Z3TM] (stating that it is impossible to know how many people in Louisiana were convicted by split juries). For similar reasons it remains unclear how many people in Oregon were convicted by split juries. *See* Crombie, *supra* note 127 (noting stark racial disparities in split-verdict convictions in Oregon).

135. Russell, Simerman & Adelson, *supra* note 123. A Republican state senator who was an assistant district attorney in New Orleans in the late 1980s admitted to filing more severe felony charges than the evidence could support simply to ensure that unanimity would not be required. John Simerman, *For Prosecutors, Louisiana’s Split-Verdict Law Produces Results*, NEW ORLEANS ADVOC. (Apr. 21, 2018, 11:00 PM), [https://www.nola.com/news/courts/article\\_e737f0e7-7d8a-5fc7-84bf-22f33277ea89.html](https://www.nola.com/news/courts/article_e737f0e7-7d8a-5fc7-84bf-22f33277ea89.html) [https://perma.cc/A35S-BF5V] (stating that it was easier “to convict ‘em with 10 out of 12 (jurors)—I’m not proud of that—than it is 6 out of 6” (quoting Louisiana state senator Dan Claitor)); *id.* (noting that nonunanimous juries offer a “longer menu” of compromise verdicts if the jury decides not to convict of the most serious charge). Misdemeanors and some felonies in Louisiana are tried by “six-pack” juries where unanimity is required. *Id.*; *see* Burch v. Louisiana, 441 U.S. 130, 134 (1979) (holding that a nonunanimous six-person jury verdict in a state criminal trial for a nonpetty offense is unconstitutional).

136. Russell, Simerman & Adelson, *supra* note 123.

137. *Id.* (noting that because the law armed prosecutors with such an advantage, the deals offered were not as favorable to the accused, which almost “force[d] some [people accused of crimes] to go to trial, figuring they ha[d] little to lose”).

138. Skene, *supra* note 134 (stating that Louisiana has the highest percentage of people serving life without parole in the nation); Russell, Simerman & Adelson, *supra* note 123.

139. In fact, Duncan’s “legacy is broader than one specific legal issue.” Telephone Interview with G. Benjamin Cohen, *supra* note 60. Almost anyone in Angola at the time, whose claims survived to federal court on any constitutional issue, reached that pinnacle via Duncan. *Id.*; *see also* KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE 148–49 (2013) (stating that Duncan initiated the noncapital appeal in Juan Smith’s case, which culminated in the Supreme Court reversing Smith’s murder conviction by an 8–1 vote in *Smith v. Cain*, 565 U.S. 73 (2012), resulting in the vacatur of Smith’s death sentence). He also won federal habeas petitions for and secured the release of others in Angola. Liptak, *supra* note 76; Telephone Interview with Katherine Mattes, *supra* note 98 (stating that Duncan secured habeas relief for a person with mental illness whom he observed was unable to initiate a case and, as such, he had access to information that people on the outside did not). Journalist Wilbert Rideau was released in 2005 after Duncan helped him secure a new trial. *See* Liptak, *supra* note 76 (noting that Rideau described Duncan as “the most brilliant legal mind in Angola,” stating, “I would not be [out] but for Calvin”); WILBERT RIDEAU, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE 236, 337



## 2. Armed Career Criminal Act

Popular writing and legal elites chronicle the myriad of ways that people in prison depend on the legal profession to secure their release from prison. Far less attention is paid to—and far less is known about—how the legal system and the legal profession harness the agency and aptitude behind bars to generate long-term decarceral outcomes.

In 2015, William Dale Wooden, a white man, was indicted in federal court in Tennessee on a felon-in-possession charge.<sup>140</sup> He maintained his innocence.<sup>141</sup> His federal public defender advised him that he was facing a sentence of twenty-one to twenty-seven months in prison if he were to plead guilty.<sup>142</sup> Relying on that advice, Wooden entered a guilty plea in August 2016.<sup>143</sup> His counsel's assessment was correct. The presentence report recommended that Wooden receive a sentence within the Federal Sentencing Guidelines' range of twenty-one to twenty-seven months of imprisonment.<sup>144</sup> The government filed a notice that it did not object.<sup>145</sup> Having served much of his expected sentence, Wooden anticipated release by Christmas 2016.<sup>146</sup>

Shortly before sentencing, the government changed course and sought to label Wooden a career criminal under the federal Armed Career Criminal Act

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(2010). Duncan was a resource even for seasoned attorneys. Liptak, *supra* note 76 (stating that capital defense lawyers, stumped by a legal question from now Tulane Law School professor Katherine Mattes, advised her to visit Duncan, who was able to answer her question); Video Interview with Emily Bolton, Dir., APPEAL, former Dir. & Founder, Innocence Project New Orleans (Oct. 14, 2021) (stating that Duncan's vision led her to focus on the "lost" population—over 4,000 people sentenced to life without parole—when launching IPNO); *Calvin Duncan*, *supra* note 95 (noting that Duncan helped establish IPNO while he was in prison); *see also* Bazelon, *supra* note 58 (stating that Duncan helped train other inmate counsel substitutes before his release). Duncan also brought to prosecutors' attention the forgotten "10-6ers," the oldest and longest-serving people in Louisiana prisons who are only now being resentenced and released. Email from G. Ben Cohen, Chief of Appeals, Orleans Parish Dist. Att'y's Office, to author (Dec. 29, 2021); *see also* Neil Vigdor, *They Were Promised a Chance at Parole in 10 Years. It's Been 50.*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/us/louisiana-inmates-release.html> [<https://perma.cc/2NRP-ZCN5>] (reporting that dozens of people whose plea deals made them eligible for parole in ten years and six months have remained in prison for over fifty years after Louisiana stiffened and then eliminated parole eligibility in the 1970s); Chavez, *supra* note 73 (explaining that prosecutors and other stakeholders were unaware of the "10/6 lifers").

140. Indictment, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. Mar. 3, 2015).

141. Memorandum Opinion and Order at 4, 6, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. Nov. 29, 2017), 2017 U.S. Dist. LEXIS 195934, at \*5, \*7.

142. Memorandum of Law in Support of Motion to Withdraw Guilty Plea at 1–2, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. June 21, 2017).

143. *Id.* at 2; Memorandum Opinion and Order, *supra* note 141, at 2, 5–6.

144. Memorandum Opinion and Order, *supra* note 141, at 2.

145. *Id.*

146. *Id.*; Memorandum of Law in Support of Motion to Withdraw Guilty Plea, *supra* note 142, at 2.

of 1984<sup>147</sup> (ACCA).<sup>148</sup> The 1980s-era law mandates a fifteen-year minimum sentence on a person convicted of a felon-in-possession charge who also has three prior convictions for a “violent felony,” a “serious drug offense,” or both, “committed on occasions different from one another.”<sup>149</sup> The ACCA imposes one of the harshest punishments in federal law.<sup>150</sup>

The government argued that Wooden was “precisely the kind of individual whom the ACCA was meant to punish.”<sup>151</sup> Two decades earlier, in 1997, Wooden and others breached the exterior of a mini-storage facility in Georgia on one night and broke through the drywall that connected ten of the units.<sup>152</sup> The government argued that the incident, which involved ten separate storage units and resulted in convictions on ten counts of burglary, qualified as ten separate ACCA predicate offenses “committed on occasions different from one another.”<sup>153</sup>

Wooden withdrew his guilty plea on the felon-in-possession charge.<sup>154</sup> In 2018, he was convicted by a jury.<sup>155</sup> At sentencing, the government argued that the two-decades-old mini-storage burglaries “were committed on occasions different from one another” based on the principle that “[y]ou cannot be in two locations at the same time.”<sup>156</sup> Wooden challenged his

147. Pub. L. No. 98-473, 98 Stat. 2185 (codified as amended in scattered sections of the U.S.C.).

148. The government relied on an intervening case, *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016). Memorandum of Law in Support of Motion to Withdraw Guilty Plea, *supra* note 142, at 2, 6; *see also* Memorandum Opinion and Order, *supra* note 141, at 2–3.

149. 18 U.S.C. § 924(e)(1). Enacted in 1984, ACCA’s original iteration imposed a mandatory-minimum sentence of fifteen years for unlawful possession of a firearm if the accused person had “three previous convictions . . . for robbery or burglary, or both,” under state or federal law. Armed Career Criminal Act of 1984 § 1802. Two years later, Congress amended the provision to apply in cases where the three prior convictions were “for a violent felony or a serious drug offense, or both.” Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(a), 100 Stat. 3207-39, 3207-39 (codified as amended at 18 U.S.C. § 924(e)(1)). In 1988, Congress added the provision that predicate offenses must have been “committed on occasions different from one another.” Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4181, 4402 (codified as amended at 18 U.S.C. § 924(e)(1)). The statute puts no limit on the age of the convictions that can be used as predicates. *See* *United States v. McElyea*, 158 F.3d 1016, 1019–20 (9th Cir. 1998) (discussing legislative history).

150. Brief of the National Association of Federal Defenders as Amicus Curiae in Support of Petitioner at 1, *Wooden v. United States*, 142 S. Ct. 1063 (2022) (No. 20-5279); *see also* Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 201–02 (2019) (observing that the ACCA has been “erratically and discriminatorily applied”).

151. Government Sentencing Memorandum at 9, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. Dec. 1, 2016).

152. Brief for the Petitioner at 3–4, *Wooden v. United States*, 142 S. Ct. 1063 (2022) (No. 20-5279).

153. Government Sentencing Memorandum, *supra* note 151, at 8 n.9; *see also* Response to Defendant’s Sentencing Memorandum at 1, 3, 5, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. Feb. 12, 2019). This provision of the ACCA is known as the “occasions clause.”

154. Memorandum Opinion and Order, *supra* note 141, at 10.

155. Minute Entry, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. May 30, 2018), ECF No. 68.

156. Response to Defendant’s Sentencing Memorandum at 1, 3–5, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. Feb. 12, 2019); Joint Appendix at 54–55, *United States*

designation as a career criminal, arguing that the ten mini-storage burglaries arose out of a single occasion on the same date, at the same time, and in the same place.<sup>157</sup> The district court rejected his argument, concluding, under circuit precedent, that “[it was possible to discern the] point at which the first offense was completed and the second began” and “it was possible for [him] to stop at any point between the mini warehouses.”<sup>158</sup> Finding that he had built a criminal “career” over the course of one night, the district court sentenced Wooden to 188 months in prison for unlawful possession of a gun.<sup>159</sup> The U.S. Court of Appeals for the Sixth Circuit affirmed.<sup>160</sup>

Two months into the COVID-19 pandemic, Wooden—indigent and in federal prison—requested the assistance of counsel to take his case to the Supreme Court.<sup>161</sup> Hearing no response from the district court, and with the deadline imminent, Wooden, pro se, prepared a petition for a writ of certiorari.<sup>162</sup> In the questions presented, he raised the “absence of clear statutory definition” in the ACCA occasions clause.<sup>163</sup> He argued, as his counsel did below, that the ten burglaries in his case should be treated as “one criminal episode.”<sup>164</sup> He added his own arguments, emphasizing that the Sixth Circuit recognized that the occasions clause lacked “statutory direction” because Congress did not define “committed on occasions different from one another.”<sup>165</sup> With a ninth-grade education,<sup>166</sup> he asked the Court to “*once again* review a portion of [ACCA] § 924(e) as

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v. Wooden, No. 15-CR-12 (E.D. Tenn. July 24, 2020), 2021 WL 9057645, at \*54–55 (transcript of sentencing proceedings on February 21, 2019). The government also argued that a 1989 assault and a 2005 burglary were ACCA-qualifying offenses, but the district court relied only on the 1997 and the 2005 burglaries in imposing the ACCA enhancement. *United States v. Wooden*, 945 F.3d 498, 500–01, 504 (6th Cir. 2019), *reh'g en banc denied*, 2020 U.S. App. LEXIS 5895 (6th Cir. Feb. 26, 2020).

157. Defendant’s Sentencing Memorandum at 6, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. Jan. 31, 2019).

158. *Wooden*, 945 F.3d at 501; Joint Appendix, *supra* note 156, at \*46–62 (transcript of sentencing proceedings on February 21, 2019); Brief for the Petitioner, *supra* note 152, at 7 (stating that the district court found eleven ACCA predicates: the ten mini-storage burglaries in 1997, plus a burglary conviction from 2005). Given the court’s finding that Wooden had one other ACCA predicate, the mini-storage count was dispositive.

159. Minute Entry, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. Feb. 21, 2019), ECF No. 87.

160. *Wooden*, 945 F.3d at 500; *see also id.* at 505 (“Whatever the contours of a ‘mini’ warehouse, Wooden could not be in two (let alone ten) of them at once.”).

161. Letter, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. June 1, 2020), ECF No. 97 (handwritten letter from Wooden to federal district court stating that he unsuccessfully reached out to his appellate counsel and the federal defenders’ office for assistance).

162. Petition for Writ of Certiorari, *Wooden v. United States*, 141 S. Ct. 1370 (2021) (No. 20-5279). The district court eventually denied his request for appointment of counsel. Order, *United States v. Wooden*, No. 15-CR-12 (E.D. Tenn. July 30, 2020), ECF No. 99.

163. Petition for Writ of Certiorari, *supra* note 162.

164. *Id.* at 8.

165. *Id.* at 4, 9–10; *see Wooden*, 945 F.3d at 504.

166. Memorandum of Law in Support of Motion to Withdraw Guilty Plea, *supra* note 142, at 7.

void-for-vagueness.”<sup>167</sup> The Supreme Court ordered the government to respond.<sup>168</sup>

A law firm with a Supreme Court practice group researched the issue to understand why the Court ordered a response to a pro se petition for certiorari.<sup>169</sup> Wooden’s petition implicated an extensive circuit split over the interpretation of the occasions clause that had resulted in anomalous ACCA consequences for nearly identical conduct across the nation.<sup>170</sup> The firm reached out to the federal prison to set up a telephone call with Wooden.<sup>171</sup> Now represented by counsel, Wooden argued in reply that the Court should grant certiorari to resolve a decades-long recurring circuit conflict on how to determine when offenses are “committed on occasions different from one another” for purposes of the ACCA enhancement.<sup>172</sup> The Court granted certiorari.<sup>173</sup> It was the first time that the ACCA occasions clause was squarely before the Supreme Court.

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167. Petition for Writ of Certiorari, *supra* note 162, at 4 (emphasis added); Telephone Interview with Andrew Tutt, Senior Assoc., Arnold & Porter (Oct. 20, 2021) (noting that the vagueness challenge was not a cert-worthy issue, but that Wooden included the argument in his pro se petition because he had read *Johnson v. United States*, 135 S. Ct. 2551 (2015), which struck down ACCA’s residual clause as void for vagueness). Most people in prison have no formal legal education but they do learn about the law. ABU-JAMAL, *supra* note 50, at 31 (“[It is learned] not in the ivory towers of multibillion-dollar-endowed universities [but] in the bowels of the slave ship, in the hidden, dank dungeons of America—the Prisonhouse of Nations. It is law learned in a stew of bitterness, under the constant threat of violence, in places where millions of people live, but millions of others wish to ignore or forget.”).

168. See *Docket for No. 20-5279*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/docket/docketfiles/html/public/20-5279.html> [<https://perma.cc/25F3-AFRS>] (last visited Sept. 2, 2022) (response requested on September 22, 2020).

169. Jordan S. Rubin, *Inmate Petitioned SCOTUS Alone, Then Arnold & Porter Stepped In*, BLOOMBERG L. (Feb. 24, 2021, 1:45 AM), <https://news.bloomberglaw.com/us-law-week/inmate-petitioned-scotus-alone-then-arnold-porter-stepped-in> [<https://perma.cc/Q8HV-PEJ2>]; Telephone Interview with Andrew Tutt, *supra* note 167.

170. See Rachel Kunjummen Paulose, *Power to the People: Why the Armed Career Criminal Act Is Unconstitutional*, 9 VA. J. CRIM. L. 1, 82 (2021) (“The circuits are split on the interpretation of the different occasions test. The interpretation of seven words in the ACCA has led to widely disparate results for factually similar crimes.”); H.W. PERRY JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 246 (1991) (“[T]he single most important generalizable factor in assessing certworthiness is the existence of a conflict or ‘split’ in the circuits.”).

171. Rubin, *supra* note 169 (“[G]etting in touch with Wooden ‘took a fair amount of work.’” (quoting a partner at Arnold & Porter)).

172. Reply Brief for the Petitioner at 1, *Wooden v. United States*, 142 S. Ct. 1063 (2022) (No. 20-5279), 2021 WL 2322520 [hereinafter Reply Brief dated January 6, 2021]; see also Paulose, *supra* note 170, at 69 (“The most pitched battles [in the lower federal courts] involve not the crimes separated by years, but crimes separated by seconds, minutes, or hours.”); Reply Brief for the Petitioner at 21, *Wooden v. United States*, 142 S. Ct. 1063 (2022) (No. 20-5279), 2021 WL 3374603 (“And since a split-second’s difference between offenses will trigger a fifteen-year mandatory minimum, the Government’s approach magnifies the consequences of error.”).

173. *Wooden v. United States*, 141 S. Ct. 1370 (2021) (mem.) (granting certiorari). Wooden also raised a Fourth Amendment challenge, arguing that law enforcement used deception to gain access to a constitutionally protected area—his home—which led directly to his firearm possession conviction. See Petition for Writ of Certiorari, *supra* note 162, at 2, 5–7; Reply Brief dated January 6, 2021, *supra* note 172, at 3. The Court granted certiorari

In March 2022, the Supreme Court ruled unanimously in Wooden's favor.<sup>174</sup> Eight justices concluded that “[c]onvictions arising from a single criminal episode, in the way Wooden’s did, can count only once under ACCA.”<sup>175</sup> The people affected by this decision “likely number[] in the thousands.”<sup>176</sup> People sentenced under the ACCA comprise a small portion of the federal criminal caseload, but their sentences are substantial.<sup>177</sup> The mere existence of the harsh sentencing law also has considerable indirect effects.<sup>178</sup> Although retroactivity of the ruling is unclear, Wooden’s challenge has future implications for untold numbers of people who otherwise would have been subject to the ACCA’s severe mandatory minimum, as well as consequences for other recidivist statutes.<sup>179</sup>

Significantly, Wooden’s pro se petition teed up a Sixth Amendment challenge to the occasions clause that every circuit court in the nation has rejected for two decades.<sup>180</sup> In fact, the Court’s decision in *Wooden* all but

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only on the occasions clause question. *See Wooden*, 141 S. Ct. 1370 (granting certiorari on question two).

174. *Wooden v. United States*, 142 S. Ct. 1063 (2022).

175. *Id.* at 1067. The Court described a “range of circumstances [that] may be relevant” to the occasions clause inquiry, including whether the offenses were committed in “an uninterrupted course of conduct” or “separated by substantial gaps in time or significant intervening events,” proximity of location, the character and relationship of the offenses, and, in harder cases, ACCA’s history and purpose. *Id.* at 1070–71 (stating that “[f]or the most part, applying this [multifaceted] approach will be straightforward and intuitive”). *But see id.* at 1080 (Gorsuch, J., concurring in judgment) (stating that “a long list of non-exhaustive, only sometimes relevant, and often incommensurable factors promises to perpetuate confusion in the lower courts and conflicting results for those whose liberties hang in the balance”). Justice Gorsuch concluded that the rule of lenity required ruling for Wooden. *Id.* at 1081 (“Because reasonable minds could differ . . . [as to] whether Mr. Wooden’s crimes took place on one occasion or many, the rule of lenity demands a judgment in his favor.”).

176. Reply Brief dated January 6, 2021, *supra* note 172, at 9; *id.* at 4–6 (demonstrating that eight circuits apply the ACCA enhancement when crimes are “sequential[] rather than simultaneous[]” and arguing that this reading “sweep[s] within ACCA vastly more conduct than a rule reaching only those crimes committed under different circumstances or opportunities”); *see also* Paulose, *supra* note 170, at 8.

177. *See* U.S. SENT’G COMM’N, FEDERAL ARMED CAREER CRIMINALS: PREVALENCE, PATTERNS, AND PATHWAYS 7 (2021) (“Offenders who were subject to the ACCA’s 15-year mandatory minimum penalty at sentencing received an average sentence of 206 months in fiscal year 2019. Offenders who were relieved of the mandatory minimum for providing substantial assistance to the government received significantly shorter sentences, an average of 116 months in fiscal year 2019.”); *see also* Paulose, *supra* note 170, at 86 (arguing that prosecutors and judges “are misusing the ACCA to issue what are essentially life sentences to a whole swath of people”).

178. *Beckett*, *supra* note 17, at 13, 18 (noting that the existence of harsh sentencing statutes “enhances prosecutorial power in plea negotiations, which yields longer average sentences”); Paulose, *supra* note 170, at 12 (explaining that ACCA has “become a tool used at the whim of prosecutors”).

179. Brief of the National Association of Federal Defenders as Amicus Curiae in Support of Petitioner, *supra* note 150, at 1 (“Each year, federal defenders represent tens of thousands of indigent criminal defendants in federal court, including thousands sentenced under the enhancement provision in 18 U.S.C. § 924(e).”); Paulose, *supra* note 170, at 8; *see also id.* at 9–12 (describing the “ruthless impact of the ACCA different occasions clause as it is now interpreted by judges”).

180. The Supreme Court has explained “over and over” to the point of “downright tedium” that “only a jury, and not a judge, may find facts that increase a maximum penalty, except for

invited the Sixth Amendment question to be presented in a follow-on case.<sup>181</sup> The constitutional challenge—grounded in over twenty years of Supreme Court jurisprudence and an “unusual confession of error by a sitting Supreme Court justice”—creates an opening for the entire ACCA provision to be struck down as unconstitutional.<sup>182</sup> Wooden’s pro se petition has opened the way to putting a major dent in a 1980s-era, tough-on-crime law.

For a Supreme Court that seeks the perfect “test case” to change the law—a venture that is challenging to set up in civil cases<sup>183</sup> and next to impossible in criminal cases<sup>184</sup>—the agency of people in prison can be critical. Not unlike most lawyers, most people in prison do not anticipate what issues will

the *simple fact* of a prior conviction.” *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016) (“That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.”). Yet the lower courts routinely make such findings to apply ACCA’s occasions clause test. Brief for Amicus Curiae the National Association of Criminal Defense Lawyers in Support of Petitioner at 5, 7, 24–25, *Wooden v. United States*, 142 S. Ct. 1063 (2022) (No. 20-5279) (arguing that the occasions clause inquiry involves judicial factfinding about the circumstances of each conviction and requesting the court to take up the Sixth Amendment question to “put a stop to the constant stream of [constitutional] violations” in the lower federal courts); Paulose, *supra* note 170, at 77–81 (collecting circuit court cases).

181. *Wooden v. United States*, 142 S. Ct. 1063, 1068 n.3 (2022) (stating that two amici briefed “whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion” but declining to address the constitutional question because Wooden did not raise it); *see also id.* at 1087 n.7 (Gorsuch, J., concurring in judgment) (noting that “[a] constitutional question simmers beneath the surface of today’s case . . . [and] there is little doubt [the Court] will have to [address it] soon”).

182. Paulose, *supra* note 170, at 21–57 (recounting in detail Supreme Court cases). In a 5–4 decision, the Supreme Court in *Almendarez-Torres v. United States* held that the existence of a prior conviction that triggers enhanced penalties is a sentencing factor that could be found by a judge, not an element of the offense that must be found by a jury beyond a reasonable doubt. 523 U.S. 224, 226–27, 247 (1998). Two years later, the Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum” is an element of the crime that “must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi* Court recognized a narrow exception for the “fact of a prior conviction.” *Id.* at 487–90 (stating that *Almendarez-Torres* is “at best” an exceptional departure from the Court’s jurisprudence). The four justices who dissented in *Almendarez-Torres* formed the majority in *Apprendi*, joined by Justice Thomas, who cast the fifth and deciding vote for the majority in *Almendarez-Torres*. *Id.* at 520 (Thomas, J., concurring) (admitting that he “succumbed” to “error” in *Almendarez-Torres*). For two decades, Justice Thomas has continued to express regret for his vote in *Almendarez-Torres* and to urge its reversal. *See, e.g., Shepard v. United States*, 544 U.S. 13, 27–28 (2005) (Thomas, J., concurring in part) (“[A] majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*’ continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under [its] flawed rule . . .” (citations omitted)); *Mathis*, 136 S. Ct. at 2259 (Thomas, J., concurring) (“I continue to believe that depending on judge-found facts in [ACCA] cases violates the Sixth Amendment and is irreconcilable with *Apprendi*. . . . This Sixth Amendment problem persists regardless of whether ‘a court is determining whether a prior conviction was entered, or attempting to discern what facts were necessary to a prior conviction.’” (quoting *Descamps v. United States*, 570 U.S. 254, 280 (2013))).

183. *See Supreme Court Lawsuits in Search of a Plaintiff*, BLOOMBERG L. (Apr. 16, 2018, 3:58 PM), <https://news.bloomberglaw.com/business-and-practice/supreme-court-lawsuits-in-search-of-a-plaintiff> [<https://perma.cc/2UWW-N34J>].

184. I thank Andrew Tutt for making this point about test cases.

interest the Supreme Court, but their circumstances embolden them to take steps to respond to injustices that their experience and the law have made salient.<sup>185</sup> By presenting legal claims that their lawyers forego, they become part of the process of shaping new constitutional meanings, pushing us toward new possibilities to incrementally and—as the next section shows—dramatically reduce our carceral footprint.

### B. Idea Generation

Accompanying the work of challenging unjust state and federal laws from inside the walls is deep contemplation by people in prison aimed at conceptualizing alternative frameworks for understanding why the criminal legal system has locked them up. Inside-born innovations have engaged incarceration differently, pushing the outside to new ways of thinking about the structures of inequity, trauma, racism, and disinvestment that drive people into prison and fuel violence outside the walls. This section examines two groundbreaking ideas seeded inside prison walls that have inspired, shepherded, and deepened the decarceral work outside the walls.

#### 1. Neighborhood-to-Prison Migration

In September 1971, more than 1,000 people held in New York's Attica Correctional Facility took over the state prison in a historic uprising against the brutal conditions in American prisons and jails.<sup>186</sup> People incarcerated in Attica took some staff hostage in a demand to end dehumanizing conditions and racial abuse.<sup>187</sup> After failed negotiations, Governor Nelson Rockefeller, New York State Police, law enforcement from outside counties, and corrections officers launched a disastrous operation to reclaim the prison.<sup>188</sup> After deploying enormous lethal force to suppress the rebellion, authorities tortured people in prison and pursued a cover-up that lasted decades.<sup>189</sup>

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185. Cf. *supra* note 49 and accompanying text.

186. HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY 1, 565, 570 (2016) (providing “a comprehensive history of the Attica prison uprising”); Maria Bailey, *Remembering the Attica Prison Riots*, N.Y. DAILY NEWS (Sept. 8, 2021, 12:00 AM), <https://www.nydailynews.com/news/remembering-attica-prison-riots-gallery-1.2781829> [<https://perma.cc/5QN7-CX68>].

187. Bailey, *supra* note 186.

188. THOMPSON, *supra* note 186, at 153–80; Larry Getlen, *The True Story of the Attica Prison Riot*, N.Y. POST (Aug. 20, 2016, 1:33 PM), <https://nypost.com/2016/08/20/the-true-story-of-the-attica-prison-riot/> [<https://perma.cc/HB6H-T4TN>]; Bailey, *supra* note 186.

189. See THOMPSON, *supra* note 186, at 227–41, 486–91; Erik Wemple, *Journalists Bungled Coverage of the Attica Uprising; 50 Years Later, the Consequences Remain*, WASH. POST (Sept. 30, 2021, 1:34 PM), <https://www.washingtonpost.com/opinions/2021/09/30/attica-chronicle-media-disaster/> [<https://perma.cc/552D-FQ9U>] (noting that the state attempted to cover up murdering its own employees by casting blame on the people in prison, but autopsy findings confirmed that all of the hostages were killed by police gunfire); Getlen, *supra* note 188; Bailey, *supra* note 186.

After the Attica rebellion, hundreds of people were transferred to Green Haven Correctional Facility, a maximum-security prison in New York.<sup>190</sup> Transfers continued for years from the state's most brutal prisons, culminating in the New York State Department of Correctional Services (NYS DOCS) issuing a directive to send the "toughest," most violent, and "hard-core inmate[s]" to Green Haven.<sup>191</sup> Among the transferees were people whose revolutionary consciousness was viewed as disruptive to prison operations.<sup>192</sup>

Social anthropologist and professor Orisanmi Burton recounts the intellectual formation that followed. In Green Haven, Larry White realized that people in prison needed new strategies of resistance that "mobilized ideas."<sup>193</sup> With a sixth-grade education, White, a Black man who grew up in deep poverty, founded a study group called the "Think Tank."<sup>194</sup> Eddie Ellis, a Black Panther who witnessed the Attica rebellion, joined the Think Tank along with others sent to Green Haven.<sup>195</sup> At this time, study groups could meet with relative ease, sometimes with community sponsors, in the tolerance for reform that followed the rebellion.<sup>196</sup> That would soon change.

Between 1971 and 1981, New York's prison population more than doubled.<sup>197</sup> Eighteen new prisons were constructed, opened, or renovated between 1971 and 1979.<sup>198</sup> The commissioner of NYS DOCS announced that the department was no longer engaged in rehabilitation but only in

190. Burton, *supra* note 1, at 121–22.

191. Nathaniel Sheppard Jr., *Green Haven Reports Increase in Prisoner Clashes*, N.Y. TIMES (Nov. 2, 1976), <https://www.nytimes.com/1976/11/02/archives/green-haven-reports-increase-in-prisoner-clashes.html> [<https://perma.cc/V9L8-9SA2>]; *see also* Burton, *supra* note 1, at 122; DAVIS, *supra* note 40, at 58.

192. NYS DOCS "took all the so-called ringleaders from the different prisons and for some reason put us all in the same joint." Burton, *supra* note 1, at 122 (quoting Larry White); Pam Widener, *Man of the Year: Eddie Ellis at Large*, PRISON LIFE, Oct. 1996, at 44, 49 [https://www.prisonlegalnews.org/media/publications/Prison\\_Life\\_October\\_1996.pdf](https://www.prisonlegalnews.org/media/publications/Prison_Life_October_1996.pdf) [<https://perma.cc/L2YT-Z6BN>].

193. Burton, *supra* note 1, at 119 (noting that White was sent to Green Haven in the wake of leading a rebellion at Auburn Correctional Facility in 1970, prior to the Attica rebellion).

194. *Id.* at 116, 129 (noting that White founded the study group in 1972); *see also* History, CTR. FOR NULEADERSHIP ON HUM. JUST. & HEALING, <https://www.nuleadership.org/history> [<https://perma.cc/Q35W-5EJT>] (last visited Sept. 2, 2022) (observing that the Attica rebellion sparked innovative ideas by people in prison, including the "formation of study and organizing groups emerging in prisons throughout the nation").

195. Burton, *supra* note 1, at 5–6, 59, 106; *id.* at 216, app. I, at 3 (GREEN HAVEN THINK TANK DOCUMENT (1972)) (describing members of the Think Tank as "socially concerned" people "whose activity has been defined by prison policies as 'radical,' 'militant' and 'disruptive'"); Widener, *supra* note 192, at 50 (noting that members were mostly "lifers").

196. Burton, *supra* note 1, at 114, 129, 135, 138–39 (noting that the Think Tank organized community events and discussions in the prison and invited lawmakers into the prison and lobbied them to change laws); Widener, *supra* note 192, at 51; Don Goodman & Maggie Smith, *An Interview with Eddie Ellis*, 22 HUM. & SOC'Y 98, 102 (1998) (noting increased community entry into the prison post-Attica).

197. THE PRISON POPULATION EXPLOSION IN NEW YORK STATE, *supra* note 5, at 1.

198. *See* CAREY & COUGHLIN, *supra* note 4, at 103.



“finding the next cell.”<sup>199</sup> Areas in prisons once slated for programming and special events were repurposed to warehouse more bodies.<sup>200</sup> In his proposed budget for the 1982–1983 fiscal year, New York Governor Hugh Carey requested over \$322 million for NYS DOCS with at least \$241 million slated for prison expansion.<sup>201</sup>

To counter this impulse for expansion, the Think Tank advanced a concept and a methodology to show that incarceration was not a viable solution to crime.<sup>202</sup> People held in Attica during the Attica rebellion had theorized the prison as a “relationship” between the state and Black and Latinx communities in mostly urban neighborhoods, which were also a “kind of carceral site.”<sup>203</sup> This metaphor was rooted in the Black intellectual tradition.<sup>204</sup> Larry White elaborated this concept—which people in Attica described as a genocide process—as a “direct relationship,” based on the abstract notion that the state prison population appeared to be drawn from “a very small pool” of Black and Latinx neighborhoods.<sup>205</sup>

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199. Burton, *supra* note 1, at 151 (“As of December 4, 1981, the inmate population of 25,490 represents 112 percent of the system’s capacity.” (citing sworn affidavit by NYS DOCS commissioner)).

200. *Id.*; see also Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. (Aug. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe> [https://perma.cc/KJ9Y-5A4W] (stating that “[a]s prison systems expanded over the last four decades, many states rejected the role of rehabilitation and reduced the number of available rehabilitation and educational programs,” but noting research showing that programs reduce recidivism rates and violence in prisons); Sheppard, *supra* note 191 (discussing the connection between overcrowding, limited program space, people being idle, and violence).

201. Burton, *supra* note 1, at 151–52.

202. *Id.* at 152; see also *id.* at 130–31; *id.* at 218, app. I, at 5 (GREEN HAVEN THINK TANK DOCUMENT (1972)) (redefining the Think Tank’s purpose as “allow[ing] inmates an opportunity to enter into the process of solving the broader problems of their life-situation, which they view as not one of a struggle against prison conditions, but rather the broader social problems of the communities to which they will return”).

203. *Id.* at 113–14 (describing how those incarcerated in Attica watched as prisons broke people to no longer value human life and returned them, dehumanized, back to their communities to commit crimes against their own people); *id.* at 113 (“It was common parlance for captives to describe brick and mortar facilities as ‘maximum security’ prisons and the communities of the free world as ‘minimum security’ prisons”).

204. See, e.g., W.E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* 8 (3d ed. 1903) (describing that the “shades of the prison-house closed round about us all”); W.E.B. DU BOIS, *BLACK RECONSTRUCTION* 701 (Eric Foner & Henry Louis Gates, Jr. eds., Library of America 2021) (1935) (condemning the failure of Reconstruction in rendering Black people “caged human being[s]”); DAN BERGER, *CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA* 52, 227 (2014) (describing how Black intellectuals mobilized carceral metaphors to describe Black urban life in the twentieth century).

205. Burton, *supra* note 1, at 113–16, 152 (“Captives knew this from experience, as they often found themselves imprisoned alongside many of the people they knew in the street.”); Sophia Giovannitti, *A Conversation with Larry White: The Radical Anti-Prison Activist and Teacher for Life*, SSENSE.COM (Dec. 17, 2020), <https://www.ssense.com/en-us/editorial/culture/a-conversation-with-larry-white-the-radical-anti-prison-activist-and-teacher-for-life> [https://perma.cc/BA6V-L4YU] (interviewing Larry White, who described the processes in prison that led him “to understand the connections between prison and the communities [he] came from”); Widener, *supra* note 192, at 49–50 (quoting Eddie Ellis, who stated, “I seemed to know everyone” in “[e]very prison I was in,” either directly from the neighborhood or within two degrees of separation).

To substantiate this anecdotal evidence, Eddie Ellis had an idea to cross-reference New York state census data with NYS DOCS population data to determine the neighborhoods that supplied the state's prison population.<sup>206</sup> The Think Tank obtained technical support from a Black-led nonprofit urban research center.<sup>207</sup> The study group found that 85 percent of New York's prison population was Black or Latinx, and that 75 percent of the state's entire prison population came from just seven neighborhoods in New York City.<sup>208</sup> The neighborhoods comprised seventeen assembly districts<sup>209</sup> and were set apart by "social conditions that by every possible measure—health care, housing, family structure, substance abuse, employment, education—rank at the very bottom in the state."<sup>210</sup>

With data to support its hypothesis, the Think Tank articulated the "direct relationship" between the prison and the communities as an overinvestment in prisons and a disinvestment in the seven neighborhoods.<sup>211</sup> The study group sought to use the data to determine where interventions were most needed and published papers arguing that the fundamental solution to crime, violence, and drugs inhered in the community.<sup>212</sup> The study group proposed

206. Burton, *supra* note 1, at 153.

207. CTR. FOR NULEADERSHIP, *supra* note 7, at 3 (describing various state and census data used to conduct the study). The Metropolitan Applied Research Center (MARC), then headed by psychologist and civil rights activist Dr. Kenneth Clark, provided research design support. *Id.* A project director at MARC was initially hesitant to work with people in prison, but the Think Tank was persistent, writing letters seeking assistance. Burton, *supra* note 1, at 138. MARC eventually became an early ally of the Think Tank. *Id.*; see also Charlayne Hunter, *Urban Analyst to Replace Clark at Research Center*, N.Y. TIMES (May 4, 1975), <https://www.nytimes.com/1975/05/04/archives/urban-analyst-to-replace-clark-at-research-center.html> [<https://perma.cc/5CME-V6X5>]. In the 1940s and 1950s, Drs. Kenneth Clark and Mamie Clark famously designed a series of experiments called the "Doll Test" to study the psychological effects of racial segregation on Black children. Leila McNeill, *How a Psychologist's Work on Race Identity Helped Overturn School Segregation in 1950s America*, SMITHSONIAN MAG. (Oct. 26, 2017), <https://www.smithsonianmag.com/science-nature/psychologist-work-racial-identity-helped-overturn-school-segregation-180966934/> [<https://perma.cc/7GGL-9XZW>] (reporting that the doctors' research and expert testimony played a role in the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954)).

208. CTR. FOR NULEADERSHIP, *supra* note 7, at 3–4 (identifying the seven neighborhoods and the regions that supplied the remaining 25 percent of the state prison population).

209. *Id.* at 3 (explaining that the state assembly districts were identified for geographic reference and political support); Goodman & Smith, *supra* note 196, at 99.

210. Widener, *supra* note 192, at 50 (quoting Eddie Ellis); see also CTR. FOR NULEADERSHIP, *supra* note 7, at 4; Darren Mack, *Opinion: In Plan to Close Rikers, Community Reinvestment Is Key to Repairing Harms of Incarceration*, CITY LIMITS (Apr. 1, 2021), <https://citylimits.org/2021/04/01/opinion-in-plan-to-close-rikers-community-reinvestment-is-key-to-repairing-harms-of-incarceration/> [<https://perma.cc/UVJ4-Y6T7>] ("These communities have been historically deprived of resources and then criminalized in their struggle to survive.").

211. Burton, *supra* note 1, at 153; see also Goodman & Smith, *supra* note 196, at 99–100; Widener, *supra* note 192, at 51 (stating that the Think Tank continued over the next decade to analyze the prison-community relationship); Eddie Ellis, *Non-Traditional Approach to Criminal and Social Justice*, in BLACK PRISON MOVEMENTS USA 92, 94–100 (NOBO J. of Afr. Am. Dialogue ed., 1995) (discussing historical research conducted by the Think Tank).

212. CTR. FOR NULEADERSHIP, *supra* note 7, at 5 ("[A]lmost exactly the same neighborhoods that had so many of its people in prison had the worst schools in the city. It

reappropriating funds from the state's prison budget for education and economic development in the seven neighborhoods.<sup>213</sup> At the time—indeed for decades—this radical proposal, rooted in a long-term abolitionist agenda,<sup>214</sup> met with little support.

The research study, which the Think Tank titled “The Non-Traditional Approach to Criminal and Social Justice,” became known as the “Seven Neighborhoods Study” or the “Green Haven Study.”<sup>215</sup> Originally conducted in 1979–1980 and reissued in 1990, the study won little popular attention until 1992, when *The New York Times* “catapulted” the findings.<sup>216</sup>

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seemed clear to us, then and now, if we know where the failing schools are and they are the same neighborhoods that account for the high numbers in the prison system, then we can target interventions specifically to them in very cost-effective ways. In our study, we called this a ‘community specific’ approach.”); Widener, *supra* note 192, at 51; David Greaves, *Eddie Ellis: Prison Reform Visionary*, OUR TIME PRESS, <https://ourtimepress.com/eddie-ellis-prison-reform-visionary/> [<https://perma.cc/92K8-KXJN>] (last visited Sept. 2, 2022) (interviewing Ellis, who stated that people in the disinvested neighborhoods have very few viable options).

213. Burton, *supra* note 1, at 153; *see also* Goodman & Smith, *supra* note 196, at 103–04; Greaves, *supra* note 212 (interviewing Ellis, who suggested that the criminal legal system should aim to address social and economic problems, which will lead to less people going to prison and less need for prisons); *cf.* Burton, *supra* note 1, at 28 (“Black radical knowledge production makes no claims to objectivity or to ‘detachment’ . . . [but] ‘grow[s] out of a concrete intellectual engagement with the problems of aggrieved populations confronting systems of oppression.’” (citing ROBIN D.G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* (2003))); Erin Collins, *Abolishing the Evidence-Based Paradigm*, *BYU L. REV.* (forthcoming 2022) (manuscript at 60) (on file with author) (“Data cannot, as QuantCrit scholars remind us, speak for [i]tsel[f] . . . . It can help describe the impact of a law, policy, or procedure, but it does not prescribe the path forward. We choose both the meaning we draw from data, and what we do with that message.”).

214. *See* Burton, *supra* note 1, at 217, app. I, at 4 (GREEN HAVEN THINK TANK DOCUMENT (1972)) (describing the Think Tank’s “[l]ong range priorities” as “[r]eduction of prison populations and the phasing-out of existing prison models”).

215. CTR. FOR NULEADERSHIP, *supra* note 7, at 2. This vocabulary housed criminal justice under a larger commitment to social justice. The “non-traditional” model rejected “traditional” theories and approaches to crime and punishment. Burton, *supra* note 1, at 152; Widener, *supra* note 192, at 53 (stating that the new approach was based on the notion that the failure of social institutions serving Black and Latinx communities was directly responsible for crime and punishment); Juan Rivera, *A Non-Traditional Approach to a Curriculum for Prisoners in New York State*, 4 *J. PRISONERS ON PRISONS*, no. 1, 1992, at 29 (contrasting the “traditional” or “Eurocentric, white, and middle-class” approach that rests fault with the individual, with a “non-traditional” approach that takes into account institutional failures in communities as understood from Afrocentric and Latinocentric perspectives); Ellis, *supra* note 211, at 94 (discussing the philosophies and goals of the nontraditional approach). *See generally* RESURRECTION STUDY GRP., *THE NON-TRADITIONAL APPROACH TO CRIMINAL AND SOCIAL JUSTICE* (1997), [https://static1.squarespace.com/static/58eb0522e6f2e1dfce591dee/t/5edf83f8c692cc7379542d72/1591706634465/NonTraditionalApproachUpdatedRpt\\_Scanned.pdf](https://static1.squarespace.com/static/58eb0522e6f2e1dfce591dee/t/5edf83f8c692cc7379542d72/1591706634465/NonTraditionalApproachUpdatedRpt_Scanned.pdf) [<https://perma.cc/9GYS-TDBC>] (providing a detailed historical account of the “direct relationship” from an Afrocentric and a Latinocentric perspective).

216. CTR. FOR NULEADERSHIP, *supra* note 7, at 2; Francis X. Clines, *Ex-Inmates Urge Return to Areas of Crime to Help*, *N.Y. TIMES* (Dec. 23, 1992), <https://www.nytimes.com/1992/12/23/nyregion/ex-inmates-urge-return-to-areas-of-crime-to-help.html> [<https://perma.cc/7TDD-8C75>] (describing the study as a “radical new approach to penology” by “unaccredited street penologist[s] without portfolio”); Greaves, *supra* note 212

In a front-page article in the *Times*, the Think Tank, via Ellis, who was now out on work release, brought to the attention of mainstream circles the “symbiotic” relationship—the “umbilical cord”—between prison and the seven neighborhoods.<sup>217</sup>

In 1994, Ellis was released after serving twenty-three years in prison.<sup>218</sup> He then helped to establish an outside arm to facilitate the Think Tank’s<sup>219</sup> research and writing,<sup>220</sup> thereby extending his work on the inside. In 2001, Ellis was a senior consultant at the Open Society Institute (OSI).<sup>221</sup> Ellis shared the Think Tank’s demographic data with Eric Cadora, then a program officer in OSI’s After Prison Initiative.<sup>222</sup> With the Think Tank’s data and access to greater resources—including residential data and geographic mapping software—Cadora identified at the census block level the neighborhoods that the Think Tank had identified at the district level.<sup>223</sup> The maps showed that the vast majority of people in New York state prisons came from an “astonishingly small” number of poor, segregated, predominantly Black and Latinx neighborhoods, and were primarily concentrated on particular blocks in those neighborhoods.<sup>224</sup> Cadora later collaborated with

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(interviewing Eddie Ellis, who explained that the study was not well received when it was released in the 1980s).

217. Clines, *supra* note 216 (quoting Eddie Ellis).

218. A leader in the Black Panther Party, Ellis was arrested for a fatal shooting in 1969 and sentenced to 25 years to life. Widener, *supra* note 192, at 48 (stating that Ellis was targeted by the Federal Bureau of Investigation’s Counterintelligence Program (“COINTELPRO”)). Ellis continued to maintain his innocence until his passing in 2014. *Id.* at 48–49 (stating that no physical evidence connected Ellis to the crime and that he had no connection to the victim).

219. Think Tank founder Larry White would remain in prison for another thirteen years—thirty-two years in total. Giovannitti, *supra* note 205. White, in his own words, was “state-raised.” *Id.*; Burton, *supra* note 1, at 118 (quoting White, who “gr[e]w[.] up in prison”). In 1947, twelve-year-old White was placed in a youth house for “wayward kids.” Giovannitti, *supra* note 205; Burton, *supra* note 1, at 118. Since adolescence, he was in and out of juvenile facilities, adolescent facilities, and adult prisons. *Id.*; Giovannitti, *supra* note 205. White returned to prison for the last time in 1976 to serve twenty-five years to life for armed robbery and second-degree murder. Burton, *supra* note 1, at 118; Giovannitti, *supra* note 205. In 2007, White was paroled at the age of seventy-two. *Id.*

220. Widener, *supra* note 192, at 54–55 (describing the Harlem Community Justice Center). Ellis went to college in prison, where he obtained associate’s and bachelor’s degrees, followed by a master’s degree from New York Theological Seminary. *Id.* at 51; Clines, *supra* note 216.

221. CTR. FOR NULEADERSHIP, *supra* note 7, at 5.

222. *Id.*; Eric Cadora, THE GOVERNANCE & JUST. GRP., <http://www.governancejustice.org/eric-cadora> [https://perma.cc/2A6Q-QBWZ] (last visited Sept. 2, 2022).

223. CTR. FOR NULEADERSHIP, *supra* note 7, at 5–6; Robert F. Moore, *On the Inside, Cons Wondered About Numbers*, N.Y. DAILY NEWS (Mar. 18, 2007, 4:00 AM), <https://www.nydailynews.com/news/cons-wondered-numbers-article-1.216876>

[https://perma.cc/EN7K-G77S] (stating that Cadora plotted the Green Haven group’s findings with the aid of computer software); see also LAURA KURGAN, CLOSE UP AT A DISTANCE: MAPPING, TECHNOLOGY, AND POLITICS 187–88 (2013) (stating that after *The New York Times* article was published, Cadora gathered state incarceration data to test the Think Tank’s research on a larger scale); Brett Story, *The Prison in the City: Tracking the Neoliberal Life of the ‘Million Dollar Block,’* 20 THEO. CRIMINOLOGY 257, 259 (2016).

224. Trevor Paglen, *Ways of Seeing: A New Book Examines How Mapping Technologies Shape Our View of the World*, BOOK FORUM (2013), <https://www.bookforum.com/print/2001/a-new-book-examines-how-mapping-technologies-shape-our-view-of-the-world-11237>

architect Laura Kurgan to map on a larger scale the home address of everyone held in the New York state prison system.<sup>225</sup> Cadora and Kurgan attached a dollar figure to the maps to denote when the state spent at least one million dollars a year to incarcerate residents of a single city block and coined the now-famed expression “million-dollar blocks.”<sup>226</sup> A 2003 map, for example, depicts that New York spent \$17 million to incarcerate 109 people who lived on seventeen blocks in Brownsville, a neighborhood in Brooklyn.<sup>227</sup> Brownsville has among the highest rates of poverty, unemployment, failing schools, and infant mortality, as well as the lowest life expectancy in New York City.<sup>228</sup>

The Think Tank’s concept and method, made into visuals on Cadora and Kurgan’s maps, “upended the prevailing narrative about crime and [punishment],”<sup>229</sup> shaping new perspectives about the purpose of criminal law and new ways of thinking and advocating for change. Maps were soon

[<https://perma.cc/9FFH-W4KG>] (observing that the maps were inspired by the Think Tank’s work and analysis); JONATHAN GRAY & DANNY LÄMMERHIRT, *DATA AND THE CITY: HOW CAN PUBLIC DATA INFRASTRUCTURES CHANGE LIVES IN URBAN REGIONS* 32 (2017) (stating that the Think Tank’s findings “caught the attention of scholars and advocates of criminal justice reform who replicated [their] observation”); KURGAN, *supra* note 223, at 187 (same).

225. GRAY & LÄMMERHIRT, *supra* note 224, at 33–34. The mapping project was a collaboration of the Justice Mapping Center and Columbia University’s Spatial Information Design Lab, now the Center for Spatial Research. Lauren MacIntyre, *Rap Map*, *NEW YORKER* (Jan. 1, 2007), <https://www.newyorker.com/magazine/2007/01/08/criminal-justice-dept-rap-map> [<https://perma.cc/GDP7-3EYW>].

226. MacIntyre, *supra* note 225 (stating that Cadora multiplied the minimum sentence of each person incarcerated by the estimated annual costs to imprison an individual (\$32,400) and combined those numbers to calculate the incarceration costs per block); Emily Badger, *How Mass Incarceration Creates ‘Million Dollar Blocks’ in Poor Neighborhoods*, *WASH. POST* (July 30, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/30/how-mass-incarceration-creates-million-dollar-blocks-in-poor-neighborhoods/> [<https://perma.cc/4FHH-9UNJ>] (stating that this figure did not include money spent incarcerating people in federal prison or local jails). *But see* John Pfaff, *Criminal Punishment and the Politics of Place*, 45 *FORDHAM URB. L.J.* 571, 572 n.10 (2018) (expressing skepticism on the million-dollar value on the basis that some prison costs are fixed and the marginal cost of locking up one more person is much less than the average).

227. KURGAN, *supra* note 223, at 186; Email from Laura Kurgan, Dir., Ctr. for Spatial Rsch., to author (Jan. 15, 2022).

228. Ginia Bellafante, *New York City Can’t Just Gentrify Its Way Back to Normal*, *N.Y. TIMES*, <https://www.nytimes.com/2021/06/04/nyregion/nyc-pandemic-economy-poverty-brownsville-brooklyn.html> [<https://perma.cc/K4FE-SKMS>] (June 14, 2021) (“[N]o [mayoral] candidate really has a comprehensive plan to eradicate deep poverty in neighborhoods where rates have remained virtually unchanged since the 1970s.”); Kathleen Culliton, *This Is the Deadliest Neighborhood in New York City*, *PATCH* (July 11, 2019, 7:00 AM), <https://patch.com/new-york/brownsville/deadliest-neighborhood-new-york-city> [<https://perma.cc/9CB3-9PT9>]; *Brownsville BK 16*, *NYU FURMAN CTR.*, <https://furmancenter.org/neighborhoods/view/brownsville> [<https://perma.cc/D5GJ-3A3T>] (last visited Sept. 2, 2022); FAMILIES FOR EXCELLENT SCHOOLS, *THE FORGOTTEN FOURTH 3–4* (2014), [http://www.familiesforexcellentschools.org/wp-content/uploads/2014/10/TheForgottenFourth\\_V4.pdf](http://www.familiesforexcellentschools.org/wp-content/uploads/2014/10/TheForgottenFourth_V4.pdf) [<https://perma.cc/2UG6-FM5Y>]; NYC DEP’T OF MENTAL HEALTH AND HYGIENE, *COMMUNITY HEALTH PROFILES 2015—BROOKLYN COMMUNITY DISTRICT 16: BROWNSVILLE*, at 7 (2015), <https://www1.nyc.gov/assets/doh/downloads/pdf/data/2015chp-bk16.pdf> [<https://perma.cc/AMZ3-H9LQ>].

229. Noah Chasin, *Laura Kurgan*, *BOMB* (Dec. 15, 2016), <https://bombmagazine.org/articles/laura-kurgan/> [<https://perma.cc/C9BU-ZH8S>].

requested in other states, and neighborhood-to-prison mapping became a national initiative.<sup>230</sup> The data visuals showed the same stark pattern in cities across the nation, revealing “previously unseen dimensions” of the criminal legal system.<sup>231</sup> The spatial analysis created “a radically new understanding of crime, poverty, and imprisonment.”<sup>232</sup> Given the extent to which people cycle in and out of—and back into—prison, the spatial concentration of incarceration revealed a “mass migration of sorts.”<sup>233</sup>

The Think Tank’s theory and research shifted attention from the limited (and limiting) question of where crimes are committed to where people lived before entering prison, fundamentally redefining—and creating new metrics to measure—public safety. Traditional crime mapping tools, such as the New York Police Department’s CompStat (“computer statistics”) software, are commonly used by law enforcement to detect crime “hot spots” in order to

230. MacIntyre, *supra* note 225; Diane Orson, ‘Million-Dollar Blocks’ Map Incarceration’s Costs, NPR (Oct. 2, 2012), <https://www.wbur.org/npr/162149431/million-dollar-blocks-map-incarcerations-costs> [<https://perma.cc/QXX6-QVVA>]; Jennifer Gonnerman, *Million-Dollar Blocks*, VILLAGE VOICE (Nov. 9, 2004), <https://www.villagevoice.com/2004/11/09/million-dollar-blocks/> [<https://perma.cc/HY7W-RH79>].

231. Susan B. Tucker & Eric Cadora, *Justice Reinvestment*, IDEAS FOR OPEN SOC’Y, Nov. 2003, at 2, 2 (stating that Connecticut spends \$20 million a year to imprison almost 400 people in the Hill, a neighborhood in New Haven); *id.* at 3 (stating that 3 percent of Cleveland neighborhoods are home to 20 percent of people in Ohio prisons); CHICAGO’S MILLION DOLLAR BLOCKS, <https://chicagosmilliondollarblocks.com/> [<https://perma.cc/2TFJ-HAVD>] (last visited Sept. 2, 2022); SPATIAL INFO. DESIGN LAB, THE PATTERN: MILLION DOLLAR BLOCKS 10–33 (2008), <http://www.spatialinformationdesignlab.org/MEDIA/ThePattern.pdf> [<https://perma.cc/3CML-6B7N>] (depicting million-dollar blocks in Phoenix, Arizona, Wichita, Kansas, and New Orleans, Louisiana); *Million Dollar Blocks*, COLUMBIA CTR. FOR SPATIAL RSCH., <https://c4sr.columbia.edu/projects/million-dollar-blocks> [<https://perma.cc/5E63-7P92>] (last visited Sept. 2, 2022) (stating that the criminal legal system became the “predominant government institution in these communities”).

232. Paglen, *supra* note 224 (“The project is a powerful critique of mass incarceration.”); *see also* SPATIAL INFO. DESIGN LAB, *supra* note 231, at 4 (“The geography of incarceration differs considerably from that of crime.”); AUSTIN ET AL., *supra* note 53, at 5 (arguing that these already-disadvantaged neighborhoods were punished into deeper distress, isolation, and disenfranchisement by concentrated incarceration and forced migration of residents to and from prison).

233. Paglen, *supra* note 224; SPATIAL INFO. DESIGN LAB, *supra* note 231, at 5 (stating that 95 percent of people in prison are released and that most return to their home communities); *Million Dollar Blocks*, *supra* note 231 (stating that “roughly forty percent do not stay [out of prison] more than three years before they are reincarcerated”); Dana Goldstein, *The Misleading Math of ‘Recidivism,’* THE MARSHALL PROJECT (Dec. 4, 2014, 11:15 AM), <https://www.themarshallproject.org/2014/12/04/the-misleading-math-of-recidivism> [<https://perma.cc/24CQ-QJKN>] (clarifying that a large number of people return to prison not for new crimes but for technical parole violations (such as missed appointments or positive drug test results), and that studies of “recidivism” rates are influenced by the measure selected); Ryan G. Fischer, *Are California’s Recidivism Rates Really the Highest in the Nation?: It Depends on What Measure of Recidivism You Use*, BULLETIN, Sept. 2005, at 1, 1–2 (documenting that two-thirds of Californians are reimprisoned within three years, over half for parole violations, and partially attributing this high rate to California’s practice of placing virtually all people released from prison on parole supervision).

allocate law enforcement resources to reduce crime.<sup>234</sup> Crime mapping technology compiles data on the time, location, type, and frequency of reported incidents.<sup>235</sup> Because these technologies measure data that is critical to *policing* success, metrics are chosen based on how law enforcement defines public safety.<sup>236</sup> The dominant law enforcement worldview, whose muse is high-crime areas, now competed with the stark view from below: high-incarceration neighborhoods. Considering that the residential data used to create the maps was accessible to states and localities,<sup>237</sup> this shift in focus betrayed something more elemental: data “echoes its collectors.”<sup>238</sup> “What data set to focus on, and how to frame it, is a decision”<sup>239</sup> produced by normative choices and shaped by power, politics, and enduring structural inequities.<sup>240</sup> Most data on imprisonment

234. *Award: Compstat: A Crime Reduction Management Tool*, HARV. KENNEDY SCH. ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION (Jan. 1, 1996), <https://www.innovations.harvard.edu/compstat-crime-reduction-management-tool> [<https://perma.cc/2TYE-HLU8>].

235. *Id.*; Lena V. Groeger, *When the Designer Shows Up in the Design*, PROPUBLICA (Apr. 4, 2017, 8:00 AM), <https://www.propublica.org/article/when-the-designer-shows-up-in-the-design> [<https://perma.cc/9YGU-U774>].

236. *See, e.g.*, POLICING PROJECT, STATEMENT OF PRINCIPLES OF DEMOCRATIC POLICING (2015), [https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59dfa277a803bb57bb93252e/1510756941918/Democratic+Policing+Principles+9\\_26\\_2017.pdf](https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59dfa277a803bb57bb93252e/1510756941918/Democratic+Policing+Principles+9_26_2017.pdf) [<https://perma.cc/K594-ZN39>] (“For too long, policing success has been defined almost exclusively by crime and arrest rates.”); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 794–95 (2021) (observing that scholars and researchers measure the success of various reforms using the same metrics, that is, police statistics on crimes as reported by police, in order to assess whether the reforms lead to a reduction in “crime rates”); Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725, 728 (2022) (discussing different conceptions of public safety other than “freedom from sudden, violent, physical harm”); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 205–47 (2001) (critiquing traditional ideas of measuring “harm” that do not consider the harms of policing policies); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1811 (2020) (“CompStat is now widely viewed as having incentivized the rise of stop and frisk in New York City.”).

237. *See* Chasin, *supra* note 229 (interviewing Laura Kurgan, who noted that the maps were prepared with government data, but the stories they told were transformative).

238. Groeger, *supra* note 235 (explaining that before data is interpreted or analyzed, an assumption must first be made about what data to seek out to help answer a question); *id.* (“The way in which data is collected often reflects something about the people who collect it.”); *see also* Kate Crawford, *The Hidden Biases in Big Data*, HARV. BUS. REV. (Apr. 1, 2013), <https://hbr.org/2013/04/the-hidden-biases-in-big-data> [<https://perma.cc/28SF-C6YB>] (“Data are assumed to accurately reflect the social world, but there are significant gaps, with little or no signal coming from particular communities.”); *id.* (“[A]s we increasingly rely on big data’s numbers to speak for themselves, we risk misunderstanding the results and in turn misallocating important public resources.”).

239. Groeger, *supra* note 235.

240. *See* William Alonso & Paul Starr, *Introduction* to THE POLITICS OF NUMBERS 1, 3 (William Alonso & Paul Starr eds., 1987) (arguing that “political judgments are implicit in the choice of what to measure, how to measure it, how often to measure it, and how to present and interpret the results”); Aziza Ahmed, *Trafficked?: AIDS, Criminal Law and the Politics of Measurement*, 70 U. MIAMI L. REV. 96, 151 (2015) (“While measurement and indicators are treated as an objective and neutral way to move away from ideological debates and towards documenting realities . . . measuring and data-gathering itself is a political process.”); *see also* GRAY & LÄMMERHIRT, *supra* note 224, at 34 (“[W]hen [crime] maps are made [ . . . ], they

had focused on the state and county level. The neighborhood-prison spending maps exposed a legal system that was “spending millions to imprison people but little on the communities to which they return.”<sup>241</sup>

Despite—yet paradoxically, by reason of—their dire circumstances in prison, the Think Tank marshalled a theory, with supporting data that prominent scholars and policy organizations have cited authoritatively,<sup>242</sup> whose reach has stretched beyond criminal law and policy to transform research in public health.<sup>243</sup> The idea to collect the data was born in prison, by people surrounded by people in prison who contemplated their oppression within a framework rooted in the Black intellectual tradition. The Think Tank study group initiated a decarceral praxis that opened up new routes to disrupt overreliance on criminal punishment, engaged complex problems more intelligently and humanely, and guided those on the outside to more

often stop at the very first element: what crimes were committed and where.” (quoting Kurgan)).

241. MacIntyre, *supra* note 225.

242. See Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552, 1568 (2003) (emphasizing that “there have been few studies of the spatial concentration of incarceration in neighborhoods in the nation’s largest cities” and citing to *The New York Times* article on the Seven Neighborhoods Study); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 596 nn.151–53 (2003) (observing that the spatial concentration of incarceration produces neighborhood effects (citing VERA INST. OF JUST., *THE UNINTENDED CONSEQUENCES OF INCARCERATION* (1996) and Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 114–15 (2001))). Both the Vera Institute and Wacquant cite to the Green Haven Study as their source. See also Dick Price & Sharon Kyle, *Million Dollar Hoods: Why L.A. Cages More People Than Any Other City*, LA PROGRESSIVE (July 9, 2018), <https://www.laprogressive.com/million-dollar-hoods/> [<https://perma.cc/8SGD-2NLN>] (discussing UCLA historian who was inspired by the Green Haven Study to launch a complementary project in 2016 that found similar neighborhood effects in the local jail system in Los Angeles County).

243. After seeing the Seven Neighborhoods data, Columbia University professor of sociomedical sciences Robert E. Fullilove focused his public health research on the role of mass incarceration in driving the HIV epidemic. See Robert E. Fullilove, *Mass Incarceration in the United States and HIV/AIDS: Cause and Effect?*, 9 OHIO ST. J. CRIM. L. 353, 357 (2011) (arguing that “the greatest engine driving the [HIV] epidemic was the cycling of inmates in and out of prison and in and out of their communities”); CTR. FOR NULEADERSHIP ON URB. SOLS., A MEMORIAL FOR EDWIN “EDDIE” ELLIS 10 (2014), [https://www.nuleadership.org/assets/downloads/Hyperlink\\_EddieEllisBio\\_EEmemorialProgramFINAL.pdf](https://www.nuleadership.org/assets/downloads/Hyperlink_EddieEllisBio_EEmemorialProgramFINAL.pdf) [<https://perma.cc/R5KC-TTY9>] (remarks by Bob Fullilove) (stating, about his shift in research, that Fullilove “owe[d] it all to [the Think Tank’s] pioneer[ing] contributions,” because “[w]hen we looked at the data [that Ellis] cited, it became clear that those were the [seven] neighborhoods with the highest rates of HIV/AIDS in [New York] [C]ity”). Increased attention to the high concentration of incarceration in neighborhoods thus carries the potential to guide decisions on public health. See KAMALA MALLIK-KANE & CHRISTY A. VISHER, *HEALTH AND PRISONER REENTRY: HOW PHYSICAL, MENTAL, AND SUBSTANCE ABUSE CONDITIONS SHAPE THE PROCESS OF REINTEGRATION* 8 (2008) (concluding that attending to the health needs of people in and returning from prison can affect the course of epidemics); Janaki Chadha & Ruth Ford, *What Drives NYC’s Health Disparities?*, CITY LIMITS (Jan. 4, 2017), <https://citylimits.org/2017/01/04/what-drives-nycs-health-disparities/> [<https://perma.cc/PW88-QTMA>] (describing how poor health outcomes reflect history of neighborhood disinvestment); Nolan Hicks, *Vaccine Efforts Still Lagging in Poorer NYC Neighborhoods*, N.Y. POST (Mar. 30, 2021, 7:00 AM), <https://nypost.com/2021/03/30/vaccine-efforts-still-lagging-in-poorer-nyc-neighborhoods/> [<https://perma.cc/AN22-FVTS>].



effective and sustainable community solutions. Based on a deep understanding of the racial and class inequities that undergird criminal punishment, the Think Tank urged a neighborhood-focused agenda rooted in social justice, a concept that scholars and scientists today are championing to dramatically reduce reliance on incarceration.<sup>244</sup>

Gathering a different set of data and framing that data differently made the social and economic dimensions of incarceration more understandable to a wide range of stakeholders.<sup>245</sup> Facing budget shortfalls, lawmakers invited Cadora to present the maps and began to talk about incarceration differently, with some undertaking reforms to lower prison populations.<sup>246</sup> The maps created space to develop a neighborhood-driven safety agenda that Cadora and Susan Tucker—the founding director of OSI's After Prison Initiative—coined “justice reinvestment.”<sup>247</sup> This 2003 proposal—divestment of monies from prisons and targeted investment in million-dollar blocks—was initially considered a “fantasy scenario.”<sup>248</sup> But the initiative soon gained momentum and attracted broad, bipartisan support.<sup>249</sup>

In response to initial success by states piloting the model, the U.S. Department of Justice teamed up with the Pew Charitable Trusts in 2010 to

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244. See, e.g., Eugenia C. South, Opinion, *To Combat Gun Violence, Clean Up the Neighborhood*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/opinion/gun-violence-biden-philadelphia.html> [<https://perma.cc/V4S9-LHN4>] (describing large-scale empirical studies demonstrating that greening and cleaning vacant land in segregated, disadvantaged neighborhoods resulted in up to a 29 percent decline in gun violence, and noting qualitative reports that the place-based geographic interventions improved community members' well-being); James Austin, Todd Clear & Garry Coventry, *Reinvigorating Justice Reinvestment*, 29 FED. SENT'G REP. 6, 6 (2016) (describing the original concept of justice reinvestment as “housed within an ideal of social justice”); see also Mack, *supra* note 210 (stating that the New York City Council approved a plan in 2019 to close Rikers Island and established a commission to make recommendations on reinvestment in impacted communities).

245. Orson, *supra* note 230 (explaining how the maps became a guide to targeting resources); see also Groeger, *supra* note 235.

246. Orson, *supra* note 230 (interviewing Cadora, who metaphorically described the legislators transforming into “urban planners”); *id.* (noting that Connecticut legislators who examined the maps questioned why the state was spending \$6 million a year to return people to prison for parole violations when it could invest in the social and economic well-being of the neighborhood); see also Gonnerman, *supra* note 230 (noting that Connecticut changed its spending priorities and reporting that Louisiana's governor requested even more maps); MacIntyre, *supra* note 225 (interviewing Cadora, who stated that New York legislators shifted from tough- or soft-on-crime rhetoric to “What are we going to do about Bed[ford]-Stuy[vesant]?” (a neighborhood in Brooklyn)); AUSTIN ET AL., *supra* note 53, at 24–26 (discussing how incarceration mapping helped states to develop ideas for shifting spending).

247. Tucker & Cadora, *supra* note 231, at 2 (“The goal of justice reinvestment is to redirect some portion of the \$54 billion America now spends on prisons to rebuilding the human resources and physical infrastructure—the schools, healthcare facilities, parks, and public spaces—of neighborhoods devastated by high levels of incarceration.”).

248. Gonnerman, *supra* note 230; see also Tucker & Cadora, *supra* note 231, at 2, 4 (stating that the initiative seeks community-level solutions); Ed Chung & Betsy Pearl, *How to Reinvest in Communities When Reducing the Scope of Policing*, CTR FOR AM. PROGRESS (July 29, 2020), <https://www.americanprogress.org/article/reinvest-communities-reducing-scope-policing/> [<https://perma.cc/U7X6-TV6K>].

249. Chung & Pearl, *supra* note 248; Austin, Clear & Coventry, *supra* note 244, at 7.

launch the Justice Reinvestment Initiative (JRI).<sup>250</sup> States that have participated in the JRI, however, have not made significant progress in reducing prison populations.<sup>251</sup> Instead of investing in neighborhoods, they have largely channeled reinvestment into law enforcement and criminal law agencies, including community corrections, “stripp[ing] [justice reinvestment] of its core purpose.”<sup>252</sup> As scholars and advocates have argued, one “key but missing element” of justice reinvestment is an organized, sustained demand for prison reductions and neighborhood reinvestment rooted in the long-term interests, priorities, and visions of local communities.<sup>253</sup> Scholars have argued that JRI will not achieve long-term and continuing reductions in prison populations absent early partnerships with local officials, grassroots leaders, and residents to develop a decarceral strategy responsive to the needs of those most affected.<sup>254</sup>

The Think Tank’s animating goals were to reorient the criminal legal system to address social and economic problems.<sup>255</sup> As scholars have shown, without enabling such transformative change, initiatives like JRI that are motivated by cost-cutting largely preserve the status quo and threaten to

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250. Chung & Pearl, *supra* note 248; *Justice Reinvestment Initiative (JRI)*, BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST. (Mar. 7, 2012), <https://bja.ojp.gov/program/justice-reinvestment-initiative/overview> [<https://perma.cc/U4UY-94RD>]. JRI is a multimillion-dollar federal grant program that provides funding to state, local, and tribal governments to reduce corrections spending and invest savings in evidence-based strategies to enhance public safety. *See id.*; *see also* Chung & Pearl, *supra* note 248.

251. AUSTIN ET AL., *supra* note 53, at 16; Chung & Pearl, *supra* note 248 (stating that thirty-five states have participated in JRI); Austin, Clear & Coventry, *supra* note 244, at 6, 11 (“More than half the states have engaged in justice reinvestment activities. When we compare their collective progress on prison population reduction to the non-JRI states, there is no meaningful difference.”); *id.* at 13–14 (expressing concern that justice reinvestment, as practiced to date, may have helped to institutionalize high rates of imprisonment).

252. AUSTIN ET AL., *supra* note 53, at 4, 6, 10 (“The lack of targeted reinvestment in high incarceration communities is probably the most glaring weakness of JRI.”); *id.* at 8, 20 (arguing that programmatic initiatives, such as substance abuse treatment and in-prison and reentry services, although laudable, cannot alone produce meaningful reductions in prison populations); Austin, Clear & Coventry, *supra* note 244, at 6, 11–13 (describing an extensive literature on the long-term social and economic benefits of community investments, but noting that JRI restricts states to investing in “proven” strategies with speedy crime reduction outcomes); JEREMY WELSH-LOVEMAN & SAMANTHA HARVELL, JUSTICE REINVESTMENT INITIATIVE DATA SNAPSHOT: UNPACKING REINVESTMENT 1–2, 7 (2018), [https://www.urban.org/sites/default/files/publication/98361/justice\\_reinvestment\\_initiative\\_data\\_snapshot\\_0.pdf](https://www.urban.org/sites/default/files/publication/98361/justice_reinvestment_initiative_data_snapshot_0.pdf) [<https://perma.cc/CM2F-J9FV>].

253. AUSTIN ET AL., *supra* note 53, at 4–5, 8, 19; *see also* Tucker & Cadora, *supra* note 231, at 4 (“The solution to public safety must be locally tailored and locally determined.”).

254. *See* AUSTIN ET AL., *supra* note 53, at 4, 8, 19, 25 (noting that a lasting reduction on crime depends on efforts to revitalize high-incarceration neighborhoods). The failure to reinvest monies into social justice, health, and infrastructure for communities “is a symptom of [JRI’s] failure to meaningfully engage these communities in the first place.” Chung & Pearl, *supra* note 248. As a result, JRI reinvestment strategies have reflected the priorities of state policy makers. *Id.* (advocating for community control over redirected investments); *see also* Tucker & Cadora, *supra* note 231, at 5 (envisioning localities making their own decisions on how to spend reallocated dollars).

255. Greaves, *supra* note 212; *see also* McLeod, *supra* note 14, at 706 (arguing that decarceration requires more transformative visions that reorient the state and the law “from punitive to social ends”).

entrench carceral practices.<sup>256</sup> Perhaps more overlooked is that both the justice reinvestment concept, and scholars and advocates who criticize the formalized JRI for departing from that concept, do not explicitly consider people in prison—whose circumstances are the ostensible focus of community investments—among the “residents” who might have valuable, locally tailored strategies for stronger and safer neighborhoods.<sup>257</sup> I raise these shortcomings to bring a paradox into focus: new ways of thinking ushered in by people in prison exclude people in prison from those new ways of thinking. People in prison developed a heightened understanding of a problem that has plagued them and confounded scholars, policy makers and advocates, but are disregarded as collaborators, let alone thought leaders, in developing a heightened understanding of its solutions. This simultaneous use and disregard—taking their finished research but ignoring the potential on the inside for unfinished ideas—reproduces the very ideology that the Think Tank upended. Making tremendous use of the Green Haven Study but discounting the implications that its intellectual formulation and vision for community-specific investment came from “inside the bowels of the prison system”<sup>258</sup> turns a blind eye to the possibilities that people in prison can generate valuable or even better interventions than traditional “experts.”<sup>259</sup>

Justice reinvestment, as practiced in this way simultaneously recognizes and ignores that substantial numbers of residents in million-dollar blocks are in prison. This is perhaps not surprising because people in prison are routinely excluded from American deliberative processes. But when large constituencies in high-incarceration neighborhoods are, by definition,

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256. See McLeod, *supra* note 14, at 666, 670–71 (describing decarceration that is driven primarily by cost-cutting as “neoliberal penal reform”); GOTTSCHALK, *supra* note 15, at 25 (“[M]ounting budgetary and fiscal pressures will not be enough on their own to spur cities, counties, states, and the federal government to make deep and lasting cuts in their incarceration rates and to address the far-reaching political, social, and economic consequences of the carceral state.”).

257. See, e.g., Tucker & Cadora, *supra* note 231, at 5 (encouraging the “mobiliz[ation of] people returning home from prison” to join with other community members to rebuild and redesign the neighborhood, but in a post-release context); AUSTIN ET AL., *supra* note 53, at 4, 21 (discussing the role of local stakeholders and “residents” in discussions about reinvestment); *id.* at 25 (highlighting a state that gave “scant attention” to “which kinds of investments might best improve the circumstances of people returning to the neighborhoods so vividly mapped in [million-dollar blocks]”).

258. CTR. FOR NULEADERSHIP, *supra* note 7, at 6. “[Decades] before the emergence of the Justice Reinvestment concept, Eddie [Ellis and others in Green Haven prison] delineated the neighborhoods that fill the cells of [New York]’s prison system and raised [their] voice in demand for an investment in those very communities.” CTR. FOR NULEADERSHIP ON URB. SOLS., *supra* note 243, at 12 (remarks by former deputy commissioner of the New York City Department of Probation Clinton Lacey).

259. Cf. Goodman & Smith, *supra* note 196, at 103–04 (interviewing Ellis, who discussed the next generation of the Think Tank, as well as ideas on community safety generated by lifers’ groups in other prisons); Burton, *supra* note 1, at 37 (stating that “the Think Tank’s activism inspired others within the prison system” and that “[t]oday there is an entire constellation of organizations that function within and outside of the New York State Prisons system [including a recent generation of activists,] and many of them trace their political-intellectual genealogy to Attica by way of the Think Tank”).

incarcerated, and successful reinvestment in their neighborhoods is rooted in developing the visions of local constituencies, this omission is consequential.

This missing element is crucial for another reason: neighborhoods hurting from poverty and criminalization have been chronically deprived of role models who succeeded in or outside the community, in part because generations of leaders from Black, Latinx, and tribal communities were sent to prison.<sup>260</sup> Emboldening neighborhood-specific idea generation on the inside is tied, therefore, not only to the successful transition of people returning home, but also to the success of the community itself. If community leaders are eventually coming out of our prisons, then igniting, developing, and investing in their talent and visions for community-driven safety is an overlooked form of investing in the communities to which they will return.

Indeed, the Think Tank envisioned that people in prison would play a role in community-specific investment because their “futures are tied up with those communities.”<sup>261</sup> This was not just a reference to back-end or in-prison programming but to tightening the relationship between people in prison and their neighborhoods.<sup>262</sup> Because 95 percent of people in prison will return

260. See WARD CHURCHILL & JIM VANDER WALL, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* 60–66, 257 (2002) (documenting Black and tribal community leaders who were imprisoned in the 1960s and 1970s as part of the FBI's covert and targeted campaign, COINTELPRO, to decimate the Black Panther Party, the American Indian Movement, and other freedom movements to prevent their ideas from influencing youth); see also Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/3CN3-UMPF>] (describing the “American tradition of criminalizing [B]lack leadership” well before COINTELPRO); Widener, *supra* note 192, at 49 (indicating that COINTELPRO used the criminal legal system to “remove people with undesirable political views”); Eugenia C. South, *If Black Lives Really Matter, We Must Invest in Black Neighborhoods*, WASH. POST (Mar. 16, 2021), <https://www.washingtonpost.com/opinions/2021/03/16/black-neighborhoods-parks-safety/> [<https://perma.cc/3LZB-L677>] (stating that “mass incarceration extracts resources and talent from Black communities”); Giovannitti, *supra* note 205 (“We didn’t have models of people who made it outside the community.” (quoting Larry White)). The incarceration of leaders of color has persisted over decades, though the connection is “not [always] immediately legible as political.” Burton, *supra* note 1, at 4–6 (stating that imprisoning Black Panthers facilitated the emergence of revolutionary consciousness in prisons); Greaves, *supra* note 212 (interviewing Eddie Ellis, who projected that, in the twenty-first century, “the leadership of the Black community is going to come out of the universities and out of the prisons”); ASSATA SHAKUR, *ASSATA: AN AUTOBIOGRAPHY* 52 (1987) (“Black revolutionaries do not drop from the moon. We are created by our conditions. Shaped by our oppression. We are being manufactured in droves in the ghetto streets, places like attica, san quentin, bedford hills, leavenworth, and sing sing. They are turning out thousands of us.”); Ben Brazil, *Ferin Kidd Went from Prison to Fighting for Black Voices in Orange County*, DAILY PILOT (July 8, 2020), <https://www.latimes.com/socal/daily-pilot/entertainment/story/2020-07-08/ferin-kidd-went-from-prison-to-fighting-for-black-voices-in-orange-county> [<https://perma.cc/CY3D-QG9P>] (profiling community activist in Orange County, California, who had access to Black male role models for the first time while in prison).

261. Burton, *supra* note 1, at 153 (quoting Eddie Ellis).

262. See Clines, *supra* note 216 (noting that Ellis taught classes in the seven neighborhoods while on work release).

to their home communities, the study group insisted that “what we do in the prisons can’t be done in the abstract, removed from these neighborhoods and their Afrocentric and Latino cultures.”<sup>263</sup> Their intention to enhance this connection remains unfinished.

Of course, most decarceral ideas seeded in prison will be unfinished; the status and isolation of people in prison deprives them of resources, power, access, credibility, and significance to comprehensively advance, let alone implement, their visions. Professor Allegra McLeod has argued that the unfinished quality of alternatives to criminal law reform is not a flaw but “a source of critical strength and possibility.”<sup>264</sup> Aspirational ideas to reduce reliance on incarceration can transform into more conceivable, and even essential, possibilities for change.<sup>265</sup> As organizer and abolitionist Mariame Kaba stated about “invest-divest,” the once-obscure concept popularized in 2014 by the Movement for Black Lives, “[Eddie Ellis] made it possible for us to think that thought.”<sup>266</sup>

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263. *Id.* (quoting Ellis). The Think Tank submitted a proposal to the state legislature to require housing, education, and crime-prevention duties as a condition of parole, and for people in prison to receive community development training while in prison. *Id.* (describing classes by Ellis encouraging people in prison to become creatively involved in community interventions); Widener, *supra* note 192, at 51; Ellis, *supra* note 211, at 99, 105 (advocating for collective action between people in prison and the community); Goodman & Smith, *supra* note 196, at 104 (interviewing Ellis, who stated that “what takes place in [the prison] shapes what takes place in the community”). Indeed, other people in prison have expressed a similar ethos. See Gimbel & Muhammad, *supra* note 39, at 1506 (discussing an initiative created by people in prison “that seek[s] to stem cycles of violence and empower communities devastated by mass incarceration by bridging the gap between prisoners and the communities to which they will eventually return”); *id.* at 1501 (“Since the majority of incarcerated gang members will return to their communities, any sensible approach to reducing the gang threat must start behind prison walls.”).

264. Allegra M. McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 113–14, 123 (2013) (calling on law scholars to engage seriously with partial, aspirational, and in-process alternatives to conventional criminal law administration and explaining that the unfinished character holds promise to produce new conceptual approaches and “new ways of thinking and speaking about criminal law”); see also THOMAS MATHIESEN, *THE POLITICS OF ABOLITION: ESSAYS IN POLITICAL ACTION THEORY* 13 (1974) (“[T]he alternative lies in the unfinished, in the sketch, in what is not yet fully existing.”).

265. See McLeod, *supra* note 264, at 114, 119–20, 132 (“[U]nfinished alternatives may make it feasible for fundamentally distinct approaches to become incrementally conceivable, workable, and enforceable, and for new voices to gain increased visibility—producing an opening first at the level of ideas, then within our institutions, and perhaps ultimately within locations of power and in our criminal law and politics.”).

266. MARIAME KABA, *WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE* 174 (2021) (“Eddie [Ellis] was [constantly] talking about [invest/divest] in the early 2000s . . . [in] room after room after room”); see also Goodman & Smith, *supra* note 196, at 103 (interviewing Ellis, who was able to disseminate the concept because he was released from prison, and who emphasized that the model was formulated and developed not by him alone but by many members of the Think Tank who remained in prison); Alexandra Marks, *N.Y. Prison Religion Program Helps Turn Lives Around*, CHRISTIAN SCI. MONITOR (Mar. 11, 1997), <https://www.csmonitor.com/1997/0311/031197.us.us.2.html> [<https://perma.cc/P5M7-T235>] (stating that, in the mid-1990s, Ellis was “spearheading a state-wide effort to urge [New York] Governor [George] Pataki to take the \$21 million dollars slated to build three new jails and instead put it into neighborhood services”).

## 2. Rethinking Violence

Developing these unfinished ideas holds potential to progress toward more transformative, long-term decarceral aims. In this section, I present one example of how an organic, outside-inside conversation can spark this innovation.

Empirical research has shown that noncarceral, community-driven violence interventions can dramatically reduce involvement in gun and extreme violence.<sup>267</sup> Recognized as a pioneer in the violence-reduction field, Eddie Bocanegra today “runs one of the most innovative violence-prevention programs in the country.”<sup>268</sup> His initial vision for a novel intervention, which laid the foundation for his current work, was spurred by a generative conversation in prison.<sup>269</sup>

In 2005, twenty-nine-year-old Bocanegra, a Latino man who had been in prison since age eighteen, received a visit from his brother Gabriel.<sup>270</sup> A decorated U.S. Army veteran, Gabriel had just returned from his second tour in Iraq.<sup>271</sup> Gabriel struggled with combat-related trauma and advised the elder Bocanegra that he, too, was experiencing the traumatic effects of

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267. See, e.g., Roge Karma, *How Cities Can Tackle Violent Crime Without Relying on Police*, VOX (Aug. 7, 2020, 8:10 AM), <https://www.vox.com/21351442/patrick-sharkey-uneasy-peace-abolish-defund-the-police-violence-cities> [<https://perma.cc/3AJW-824K>] (“We now have a pretty well-established base of evidence telling us that residents and local organizations are at least as effective as the police in controlling violence.” (quoting sociologist Patrick Sharkey)); *id.* (emphasizing that community groups need funding equal to what police would receive to be effective); Patrick Sharkey, Gerard Torrats-Espinosa & Delaram Takyara, *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOCIO. REV. 1214, 1234 (2017); DON STEMEN, VERA INST. OF JUST., *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 5* (2017), [https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf) [<https://perma.cc/BLH7-C3MS>] (finding that increased incarceration has no effect on violent crime and in some instances may increase crime in neighborhoods with concentrated incarceration); Amanda Alexander & Danielle Sered, *Making Communities Safe, Without the Police*, BOS. REV. (Nov. 1, 2021), <https://bostonreview.net/articles/making-communities-safe-without-the-police> [<https://perma.cc/HW53-R35F>] (“In cities and towns across the country, people have produced safety in ways the criminal punishment system has not and cannot.”); David Alan Sklansky, *Addressing Violent Crime More Effectively*, BRENNAN CTR. (Sept. 27, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/addressing-violent-crime-more-effectively> [<https://perma.cc/2XMR-YTCZ>].

268. Alex Kotlowitz, *The Killing of Adam Toledo and the Colliding Cycles of Violence in Chicago*, NEW YORKER (Apr. 24, 2021), <https://www.newyorker.com/news/dispatch/the-killing-of-adam-toledo-and-the-colliding-cycles-of-violence-in-chicago> [<https://perma.cc/TJA8-AMWS>].

269. Audie Cornish, *Chicago Teens and Combat Veterans Join Forces to Process Trauma*, NPR (Jan. 25, 2016, 4:05 PM), <https://www.npr.org/transcripts/463875598?storyId=463875598> [<https://perma.cc/X9LL-M6EE>].

270. See Kotlowitz, *supra* note 268; Michael Golden, *Interview with Eddie Bocanegra, Gun Safety Leader and Senior Director at READI Chicago*, THE GOLDEN MEAN (Jan. 8, 2020), <https://www.thegoldenmean.us/interview-with-eddie-bocanegra-gun-safety-leader-and-senior-director-at-readi-chicago/> [<https://perma.cc/GP6Y-PVZM>].

271. Golden, *supra* note 270; Cornish, *supra* note 269.

violence.<sup>272</sup> Along with the stabbings and suicides that occurred in prison, and the violence that the structure of incarceration itself inflicted, Bocanegra had been exposed to household violence, violence unfolding in school, and fatal shootings during his childhood in Little Village, Chicago.<sup>273</sup> “Eddie, actually there were some nights that growing up as a kid living in Little Village was probably worse or equally as bad as Iraq,” Gabriel said.<sup>274</sup>

Bocanegra observed parallels between his brother’s reaction to violence on the battlefield, his own reaction to violence in the neighborhood, and a hypervigilance among people surrounding him in prison who committed, witnessed, and survived violence.<sup>275</sup> Gazing across the visiting room table at the Bronze Star on Gabriel’s uniform, he wondered how Gabriel’s acts of violence were valorized.<sup>276</sup>

Sparked by his brother’s wisdom and after observing people in prison, Bocanegra began to develop a different understanding of gun violence that has since informed the violence-prevention field. After fourteen years in prison, he was released in 2008.<sup>277</sup> Through a local church, Bocanegra mentored kids who were in the same street gangs with which he was involved at a young age.<sup>278</sup> He was then recruited to join CeaseFire, now known as Cure Violence, a street outreach program that intervened on the spot to mediate and prevent heated disputes from escalating into violence, but the model was limiting.<sup>279</sup> Reflecting on his meeting with Gabriel, he began to

272. See Sharon Cohen, *War Vets, Kids Scarred by Gangs Help Each Other*, KSL.COM (Sept. 27, 2014, 9:51 AM), <https://www.ksl.com/article/31694208/war-vets-kids-scarred-by-gangs-help-each-other> [<https://perma.cc/86S2-B4DX>].

273. See Cornish, *supra* note 269; Golden, *supra* note 270.

274. Cohen, *supra* note 272.

275. See Golden, *supra* note 270.

276. *Id.*

277. Cohen, *supra* note 272; Golden, *supra* note 270. In retaliation for a shooting that left his friend paralyzed, eighteen-year-old Bocanegra fatally shot another eighteen-year-old who Bocanegra thought was in a rival gang. *Id.*; Katie Mingle, *After Committing Murder as a Teen, a Chicago Man Dedicates His Life's Work to His Victim*, WBEZ CHI. (July 19, 2013), <https://www.wbez.org/stories/after-committing-murder-as-a-teen-a-chicago-man-dedicates-his-lifes-work-to-his-victim/8b74459e-b1f6-4227-8ac6-056fa88e7ea6> [<https://perma.cc/5K5H-UFK5>]. Bocanegra was convicted of murder and sentenced to twenty-nine years in prison. Cohen, *supra* note 272.

278. Golden, *supra* note 270; Telephone Interview with Eduardo Bocanegra, Senior Dir., READI Chi. (Nov. 11, 2021).

279. Golden, *supra* note 270. Although Cure Violence, or the “Interrupters Model,” is often hailed as the model of violence intervention, research has shown mixed results. *Cure Violence (Chicago, Illinois)*, YOUTH.GOV, <https://youth.gov/content/cure-violence-chicago-illinois> [<https://perma.cc/Z8SE-9X8F>] (last visited Sept. 2, 2022); Karma, *supra* note 267; Ashley Luthern, *Gun Violence as a Public Health Issue: How Does the “Cure Violence” Interrupter Model Work?*, MILWAUKEE J. SENTINEL (Sept. 25, 2019, 5:00 AM), <https://www.jsonline.com/story/news/special-reports/milwaukee-violence/2019/09/25/public-health-how-cure-violence-interrupts-shootings/2390180001/> [<https://perma.cc/M9LM-EECK>] (explaining that the model takes a public health approach, treating violence as a contagion, and “pay[s] and train[s] trusted insiders of a community to anticipate where violence will occur and intervene before it erupts”). Turnover is high. See José Santos Woss, *Violence Interrupters: A Key Element of Justice Reform*, FRIENDS COMM. ON NAT’L LEGIS. (Dec. 9, 2021), <https://www.fcnl.org/updates/2021-12/violence-interrupters-key-element-justice-reform> [<https://perma.cc/6TJG-UGKT>] (noting that the model can retraumatize

think about new ways to conceptualize urban youth, whom criminal law and society labeled as “thugs.”<sup>280</sup>

Growing up in poor, disinvested communities, with no opportunity or mobility, in families struggling with substance abuse and domestic violence, Bocanegra understood that he and others in prison carried chronic trauma from an early age.<sup>281</sup> He began to understand that this constant exposure to trauma fueled neighborhood violence.<sup>282</sup> Joining a gang meant protection and ownership over their lives.<sup>283</sup> Youth found social capital in the streets, only to escape near-death shootings, watch loved ones get shot before their eyes, and carry guns to survive.<sup>284</sup> Building a connection to the violence in warfare, Bocanegra began to understand urban youth who lived in communities with high rates of gun violence as “child soldiers” and the inner-city streets of Chicago as “kind of a combat zone.”<sup>285</sup>

Any effort to interrupt this cycle of trauma and violence and equip adolescents with some tools to begin to heal would require young people to recognize signs of their own trauma and its roots.<sup>286</sup> Bocanegra understood the barriers to youth engagement and thought that war veterans might be

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interrupters); *see also* Gimbel & Muhammad, *supra* note 39, at 1519 (arguing that Cure Violence “does not pretend to offer solutions to the underlying social problems giving rise to pervasive violence in the first place”).

280. *See* Golden, *supra* note 270.

281. *See id.*

282. *See id.*; Eddie Bocanegra, Erica Ford & Mike McBride, *There’s a Proven Way to Reduce Gun Violence in America’s Cities. We Just Need to Fund It*, TIME (July 8, 2021), <https://time.com/6078496/reduce-gun-violence-americas-cities/> [https://perma.cc/5YP8-BKNZ] (discussing this intergenerational cycle of trauma and violence); ERICA J. ADAMS, JUST. POL’Y INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 1 (2010), [https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/10-07\\_rep\\_healinginvisiblewounds\\_jj-ps.pdf](https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/10-07_rep_healinginvisiblewounds_jj-ps.pdf) [https://perma.cc/HR43-3855] (stating that “between 75 and 93 percent of youth entering the juvenile justice system annually . . . have experienced some degree of trauma”).

283. *See* Golden, *supra* note 270 (interviewing Bocanegra, who recounted becoming involved in street gangs at an early age for safety purposes, including to protect his siblings).

284. *See* JOCELYN FONTAINE, NANCY LA VIGNE, DAVID LEITSON, NKECHI ERONDU, CAMERON OKEKE & ANAMIKA DWIVEDI, URB. INST., “WE CARRY GUNS TO STAY SAFE”: PERSPECTIVES ON GUNS AND GUN VIOLENCE FROM YOUNG ADULTS LIVING IN CHICAGO’S WEST AND SOUTH SIDES 4–5 (2018), [https://www.urban.org/sites/default/files/publication/99091/we\\_carry\\_guns\\_to\\_stay\\_safe\\_1.pdf](https://www.urban.org/sites/default/files/publication/99091/we_carry_guns_to_stay_safe_1.pdf) [https://perma.cc/RW5Z-3AD9]; Annie Sweeney, *Veterans Help Chicago Teens Through “War” Times*, CHI. TRI. (July 11, 2014, 2:00 AM), <https://www.chicagotribune.com/news/ct-urban-warriors-met-20140711-story.html> [https://perma.cc/8JT9-D77Q].

285. Golden, *supra* note 270 (quoting Bocanegra, who noted that the nation does not invest in youth living in war zones in its own backyards); Nissa Rhee, *Veterans, Gang Members Find Peace in Unexpected “Brotherhood,”* CHRISTIAN SCI. MONITOR (Nov. 11, 2015), <https://www.csmonitor.com/USA/Military/2015/1111/Veterans-gang-members-find-peace-in-unexpected-brotherhood> [https://perma.cc/GQ2G-YJWG] (quoting Bocanegra, who stated that NGOs provide aid to child soldiers). Studies reflect striking parallels between the experiences of child soldiers and gang-involved youth. *See, e.g.*, Patricia K. Kerig, Cecilia Wainryb, Michelle Sinayobye Twali & Shannon D. Chaplo, *America’s Child Soldiers: Toward a Research Agenda for Studying Gang-Involved Youth in the United States*, 22 J. AGGRESSION, MALTREATMENT & TRAUMA 773, 775–77 (2013).

286. *See* Golden, *supra* note 270.



uniquely qualified to mentor young people in CeaseFire zones.<sup>287</sup> He reasoned that neighborhood youth joined gangs, and young adults enlisted in the armed forces, for a similar reason: identity.<sup>288</sup> To check his bias, he administered an informal survey to a dozen urban youths.<sup>289</sup> Inviting them to rank their top three choices, the survey asked, “Who do you respect?” followed by twenty or thirty options: firefighters, police, teachers, coaches, doctors, lawyers, veterans, street gangs, and more.<sup>290</sup> The top response was, overwhelmingly, veterans.<sup>291</sup> He debriefed the kids, who explained that veterans, too, wore insignia, carried guns, went on missions, had ranks, and had a strong sense of brotherhood and belonging.<sup>292</sup>

In 2013, the YMCA of Metropolitan Chicago recruited Bocanegra, who was pursuing a master’s degree at the University of Chicago, to lead its new Youth Safety and Violence Prevention Program.<sup>293</sup> He shared his concept for a youth violence intervention program with evidence to cement it.<sup>294</sup> The

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287. Rhee, *supra* note 285; Michelle Miller, *Urban Warriors: Stemming the Tide of Street Violence*, CBS NEWS (July 31, 2016, 9:49 AM), <https://www.cbsnews.com/news/urban-warriors-stemming-the-tide-of-street-violence-2/> [<https://perma.cc/X8B6-DZP3>]. Angela Y. Davis has described the “striking similarities in the human populations of [the military and the prison].” See DAVIS, *supra* note 33, at 39 (“[M]any young people—especially young people of color—who enlist in the military often do so in order to escape a trajectory of poverty, drugs, and illiteracy that will lead them directly to prison.”).

288. Telephone Interview with Eduardo Bocanegra, *supra* note 278; Golden, *supra* note 270 (interviewing Bocanegra, who stated that identity formation was key to his involvement with street gangs because he had few employment opportunities and role models in the community upon which to model his future).

289. Telephone Interview with Eduardo Bocanegra, *supra* note 278.

290. *Id.*; Taylor Brown, *Urban Warriors: The Unexpected Pair*, CMTY. REC MAG. (Jan. 8, 2021), <https://communityrecmag.com/urban-warriors-the-unexpected-pair/> [<https://perma.cc/X6WR-LPVJ>]; Rhee, *supra* note 285; Cornish, *supra* note 269.

291. Telephone Interview with Eduardo Bocanegra, *supra* note 278; Brown, *supra* note 290.

292. Telephone Interview with Eduardo Bocanegra, *supra* note 278; Rhee, *supra* note 285; Cornish, *supra* note 269.

293. Telephone Interview with Eduardo Bocanegra, *supra* note 278 (stating that after his release from prison, he built connections with state representatives through his work as a community organizer, and that the YMCA was familiar with his community work); Nissa Rhee, *Healing Is Prevention*, U. CHI. MAG., May–June 2015, at 18, 19 (noting that Bocanegra was featured in the 2011 documentary, *The Interrupters*). See generally THE INTERRUPTERS (Kartemquin Films 2011).

294. Telephone Interview with Eduardo Bocanegra, *supra* note 278 (stating that Bocanegra deepened his understanding and vocabulary about the effects of trauma on brain development in children through his course and community work). After his release, Bocanegra, who obtained his GED in prison, attended college and graduate school, where he pursued degrees in social work and began to incubate his idea for a youth violence intervention program with social scientists who studied trauma. *Id.* Skeptical of his idea, the YMCA performed more formal preassessments of its youth. *Id.* The YMCA’s findings echoed those in Bocanegra’s informal surveys. Brown, *supra* note 290. In fact, combat veterans and urban youth had far more in common. See Lois Beckett, *The PTSD Crisis That’s Being Ignored: Americans Wounded in Their Own Neighborhoods*, PROPUBLICA (Feb. 3, 2014, 3:21 PM), <https://www.propublica.org/article/the-ptsd-crisis-thats-being-ignored-americans-wounded-in-their-own-neighbor> [<https://perma.cc/VCR8-FY8L>] (stating that research shows that people in neighborhoods hurting from violence develop post-traumatic stress disorder (PTSD) at rates comparable to, or even higher than, war veterans, and citing research that people with PTSD may be more likely to carry a weapon to “restore feelings of safety”); Jill Tucker,

next year, the YMCA, in collaboration with the Adler School of Professional Psychology, launched Urban Warriors, a dynamic weekly mentoring program that paired veterans who served in Iraq or Afghanistan with adolescents from Chicago neighborhoods with the highest levels of poverty and violence.<sup>295</sup> The program was piloted in Little Village, Bocanegra's childhood neighborhood.<sup>296</sup>

Feeling an instant bond, the veterans shared how experiencing violence affected them, providing guidance on processing and responding to trauma.<sup>297</sup> The teens gradually opened up: some expressed being on high alert after a shooting, after hearing a loud vehicle drive by, or after seeing someone selling drugs on the street.<sup>298</sup> This hypervigilance was also common among veterans returning home.<sup>299</sup> A preassessment instrument administered by the University of Chicago found that many youths in the pilot program had more symptoms of post-traumatic stress disorder than their veteran mentors.<sup>300</sup> Since completing the program, some teens expressed a

*Children Who Survive Urban Warfare Suffer from PTSD, Too*, S.F. CHRON. (Aug. 25, 2007), <https://www.sfgate.com/education/article/Children-who-survive-urban-warfare-suffer-from-2524472.php#ixzz2KKiW4CXq> [<https://perma.cc/WZ68-NAVQ>] (citing research that up to one-third of children in neighborhoods with high violence have PTSD, nearly twice the rate of troops returning from war zones in Iraq).

295. Brown, *supra* note 290; Cornish, *supra* note 269. The YMCA identified youth from the juvenile system and housing projects, targeting those in gangs or on probation, and received referrals from courts and schools. Sweeney, *supra* note 284; Rhee, *supra* note 293. Up to 90 percent of the youth living in the areas that Urban Warriors served were "exposed to serious and chronic forms of violence." Rhee, *supra* note 285 (stating that some youth experienced homelessness, or physical or sexual abuse). The military veterans that Bocanegra recruited grew up in the same neighborhoods as the youth. Brandis Friedman, *Urban Warriors*, WTTW CHI. (Mar. 18, 2015, 10:30 AM), <https://news.wttw.com/2015/03/18/urban-warriors> [<https://perma.cc/2ZJD-SP5R>]. Some were once involved with gangs, and some were not much older than their mentees. Miller, *supra* note 287; Rhee, *supra* note 285 (stating that veterans and youth came together on a weekly basis, for sixteen weeks, for team building, talking, playing games, field trips, and learning strategies for coping with trauma and loss).

296. Sweeney, *supra* note 284.

297. Rhee, *supra* note 285; *see also* Sweeney, *supra* note 284 (stating that the veterans "kn[e]w well the struggle of surviving a dangerous place"); Cornish, *supra* note 269; Miller, *supra* note 287. The program provided a sense of purpose that some veterans may struggle to find, giving them a chance to "model healing." Brown, *supra* note 290 (describing critical benefits that the program provided to veterans); Rhee, *supra* note 285 ("While the primary goal of Urban Warriors is to help the mentees, many of the veterans have found it beneficial as well."); Sweeney, *supra* note 284 (same); *War Vets, Kids Scarred by Gangs Help Each Other*, COLUMBIAN (Nov. 22, 2014, 12:00 AM), <https://www.columbian.com/news/2014/nov/22/war-vets-kids-scarred-by-gangs-help-each-other/> [<https://perma.cc/VUW7-6MVW>]. Some mentees said that it was the veterans who motivated them to come back. Friedman, *supra* note 295.

298. Cornish, *supra* note 269; Rhee, *supra* note 285 (stating that of the 435 people killed in Chicago in 2014 (the year the program launched), 46 percent were between the ages of fifteen and twenty-four).

299. Cornish, *supra* note 269; Rhee, *supra* note 285; *see also* Beckett, *supra* note 294 (discussing "chronic hyperarousal," a severe symptom of PTSD).

300. Telephone Interview with Eduardo Bocanegra, *supra* note 278; Golden, *supra* note 270; *see also* Tucker, *supra* note 294 (citing research that up to one-third of children in neighborhoods with high violence have PTSD, nearly twice the rate among troops returning from war zones in Iraq); Leslie Morland, Eric Elbogen & Kirsten Dillon, *Anger and PTSD*, 31 PTSD RSCH Q., no. 3, 2020, at 1 (stating that decades of research have found "a robust

greater sense of self-worth, were no longer involved in gangs, returned to high school, and spoke of plans to go to college.<sup>301</sup>

The innovative, research-based model gained national attention.<sup>302</sup> It was “on the cutting edge of what emerging science [wa]s telling us about the effects of trauma.”<sup>303</sup> The MacArthur Foundation awarded the program a \$400,000 grant.<sup>304</sup> In 2015, then mayor of Chicago Rahm Emanuel announced his intent to secure funding to extend the program to “every part of the city of Chicago.”<sup>305</sup> Bocanegra was invited to speak to the Centers for Disease Control and Prevention about the program, and the mayor’s office invited him to speak to members of the Obama White House.<sup>306</sup>

The innovation disrupted the prevailing narrative on neighborhood violence, shaping new ideas and inspiring a wide array of stakeholders to think differently about—and value—urban youth. Igniting his thinking in prison accelerated Bocanegra’s leadership in the polity upon his release, paving a path to forge partnerships and open new ways to understand—and reduce—violence. His work would soon usher in new collaborations.

Following Chicago’s surge in gun violence in 2016, the University of Chicago Crime Lab drew from rigorous research to develop a concept for a violence intervention: combining cognitive behavioral therapy (CBT) with paid transitional employment for people at the highest risk of gun violence.<sup>307</sup> The lab brought the idea to Heartland Alliance, an anti-poverty

relationship between the incidence of PTSD [in veterans] and elevated rates of anger, aggression and violence”).

301. See Rhee, *supra* note 285; Miller, *supra* note 287; Sweeney, *supra* note 284; see also Joseph Darius Jaafari, *An Unlikely Bond Between Chicago Teens and Veterans Is Saving Lives in the City*, NATIONSWELL (Aug. 24, 2018), <https://nationswell.com/chicago-veterans-teens/> [<https://perma.cc/S242-AAXU>] (stating that outcomes have been mostly anecdotal).

302. Rhee, *supra* note 285.

303. *Id.* (quoting the director of the Chicago Center for Youth Violence Prevention, Professor Deborah Gorman-Smith). At the time, a growing body of scientific literature showed that children who were exposed to violence and endured trauma before adolescence struggled to learn in school and had “measurably different” brains and brain function than those who did not experience high levels of trauma. Avi Asher-Schapiro, *Should Growing Up in Compton Be Considered a Disability?*, VICE (Oct. 20, 2015, 9:24 PM), <https://www.vice.com/en/article/d3933m/should-growing-up-in-compton-be-considered-a-disability> [<https://perma.cc/U6NB-9GEQ>] (reporting on a lawsuit in which families and teachers argued that trauma was a disability that the Compton, California, school district had failed to accommodate).

304. Friedman, *supra* note 295; *YMCA of Metropolitan Chicago*, MACARTHUR FOUND., <https://www.macfound.org/grantee/ymca-of-metropolitan-chicago-440/> [<https://perma.cc/WFW4-MSRU>] (last visited Sept. 2, 2022).

305. Rhee, *supra* note 285. Since its formation, Urban Warriors has served more than 400 youths across genders in multiple Chicago neighborhoods. Brown, *supra* note 290.

306. See Rhee, *supra* note 285; Telephone Interview with Eduardo Bocanegra, *supra* note 278.

307. *READI: Connecting Chicago’s Youth at the Highest Risk of Gun Violence to Transitional Jobs, Support Services, and Cognitive Behavioral Therapy*, RESULTS FOR AM. (Dec. 9, 2020), <https://catalog.results4america.org/program/readi-chicago/readi-connecting-chicagos-highest-risk-youth-to-transitional-jobs-support-services-and-cognitive-behavioral-therapy> [<https://perma.cc/5PRB-PFQY>] (stating that, in 2016, Chicago experienced a 58 percent increase in homicides and a 43 percent increase in nonfatal shootings); *Chicago Ends Year with 762 Killings, the Most in 2 Decades*, N.Y. TIMES (Jan. 1, 2017),

and human rights organization.<sup>308</sup> Heartland partnered with local, community-based organizations to launch READI Chicago, an initiative that connects people at the highest risk of gun violence in Chicago to eighteen months of subsidized transitional employment, paid group CBT sessions, and wraparound support services.<sup>309</sup>

In 2017, Heartland recruited Bocanegra to build, lead, and implement READI.<sup>310</sup> Bocanegra hired a team whose members were predominantly from the same neighborhoods as prospective participants to make recommendations on outreach and engagement.<sup>311</sup> Barriers to outreach were considerable. The population READI serves—those most likely to shoot or be shot—had little to no traditional work histories, were not connected to

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<https://www.nytimes.com/2017/01/01/us/chicago-2016-killings.html> [https://perma.cc/8VLA-2Z2V] (noting that the bulk of the shootings were in five neighborhoods); MAX KAPUSTIN, JENS LUDWIG, MARC PUNKAY, KIMBERLY SMITH, LAUREN SPEIGEL & DAVID WELGUS, GUN VIOLENCE IN CHICAGO, 2016, at 13 (2017), <https://urbanlabs.uchicago.edu/attachments/c5b0b0b86b6b6a9309ed88a9f5bbe5bd892d4077/store/82f93d3e7c7cc4c5a29abca0d8bf5892b3a35c0c3253d1d24b3b9d1fa7b8/UChicagoCrimeLab%2BGun%2BViolence%2BIn%2BChicago%2B2016.pdf> [https://perma.cc/35WK-BFQQ] (stating that Black men ages fifteen to thirty-four make up 4 percent of Chicago’s population but over 50 percent of its homicide victims).

308. *READI: Connecting Chicago’s Youth at the Highest Risk of Gun Violence to Transitional Jobs, Support Services, and Cognitive Behavioral Therapy*, *supra* note 307.

309. U. CHI. CRIME LAB, READI CHICAGO: A COMMUNITY-BASED APPROACH TO REDUCING GUN VIOLENCE 2 (2021), <https://urbanlabs.uchicago.edu/attachments/cc07421f48cec7f43282377ffaf1223f7e079b46/store/eb7d1b4c96b0bf0bd7fbf12cd3deeccd1e075d8c7fdf61481b1a2cd4420/READI+Chicago.pdf> [https://perma.cc/4EVT-6GPA] (stating that participants have access to an additional six months of coaching, support services, and CBT sessions to help transition to unsubsidized employment); *see also* Press Release, Heartland All., Heartland Alliance Announces Innovative Program Designed to Reduce Gun Violence and Provide Economic Opportunity for Those at Highest Risk of Gun Violence Involvement (June 8, 2018), [https://www.heartlandalliance.org/press\\_release/heartland-alliance-announces-innovative-program-designed-to-reduce-gun-violence-and-provide-economic-opportunity-for-those-at-highest-risk-of-gun-violence-involvement/](https://www.heartlandalliance.org/press_release/heartland-alliance-announces-innovative-program-designed-to-reduce-gun-violence-and-provide-economic-opportunity-for-those-at-highest-risk-of-gun-violence-involvement/) [https://perma.cc/L76D-DHQE] (stating that READI is funded primarily through private philanthropy). READI’s CBT sessions are designed to help participants cope with trauma and learn techniques for dealing with stressful situations to help avoid violent confrontations. Kotlowitz, *supra* note 268; *see also* READI CHI., WORKING TOGETHER TOWARD SAFER COMMUNITIES: REFLECTIONS FROM READI CHICAGO 8 (2021), <https://www.heartlandalliance.org/wp-content/uploads/2021/09/READI-Chicago-Working-Together-Toward-Safer-Communities-small.pdf> [https://perma.cc/Q8V2-8D8Q] (“The men READI Chicago serves come from communities that have faced decades of disinvestment and generational trauma.”).

310. *READI: Connecting Chicago’s Youth at the Highest Risk of Gun Violence to Transitional Jobs, Support Services, and Cognitive Behavioral Therapy*, *supra* note 307.

311. *Outreach Workers: Using Their Past to Help Others Become Better Men*, HEARTLAND ALL., <https://www.heartlandalliance.org/outreach-workers-using-their-past-to-help-others-become-better-men/> [https://perma.cc/7Z93-FVPZ] (last visited Sept. 2, 2022); *Putting a Face to the Numbers*, HEARTLAND ALL., <https://www.heartlandalliance.org/putting-a-face-to-the-numbers/> [https://perma.cc/GTK7-BTGE] (last visited Sept. 2, 2022); Telephone Interview with Eduardo Bocanegra, *supra* note 278. Bocanegra managed over one hundred staff to implement the initiative. *Id.*; *see also* Tia Carol Jones, *READI Chicago Receives \$2 Million Investment*, WKLY. CITIZEN (May 26, 2021), <https://citizennewspapergroup.com/news/2021/may/26/readi-chicago-receives-2-million-investment/> [https://perma.cc/C925-BML4].

existing programs or social services, or were homeless.<sup>312</sup> Few, if any, public institutions served READI's target population.<sup>313</sup>

Despite many obstacles, 55 percent of individuals who were offered READI participated, an “incredible” success rate considering they “ha[d] been disappointed so many times in their lives by different social systems.”<sup>314</sup> The levels of violence experienced by READI participants are staggering. Ninety-eight percent have been arrested and 80 percent have been victims of violence.<sup>315</sup> Of the individuals referred, over one-third had been shot.<sup>316</sup> The average READI participant has been arrested seventeen times.<sup>317</sup> Since its launch, over 800 people have enrolled.<sup>318</sup> READI participants worked 75 percent of the weeks available to them during in-person programming and are highly engaged.<sup>319</sup>

A randomized control trial evaluating READI is still in progress, but as of September 2021, READI participants have had 79 percent fewer arrests for shootings and homicides.<sup>320</sup> In June 2021, President Joe Biden invited Bocanegra to the White House to discuss investing in community-based violence interventions.<sup>321</sup> The next month, Attorney General Merrick

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312. Press Release, Heartland All., *supra* note 309; Nissa Rhee, *Radical New Program Finds Men Most Likely to Be Shot—and Hires Them*, BLOCK CLUB CHI. (July 26, 2018, 8:20 AM), <https://blockclubchicago.org/2018/07/26/radical-new-program-finds-men-most-likely-to-be-shot-and-hires-them/> [<https://perma.cc/J3AC-MRPY>].

313. See Patrick Smith, *Anti-Violence Programs Are Working. But Can They Make a Dent in Chicago's Gun Violence?*, WBEZ CHI. (Nov. 1, 2021, 6:00 AM), <https://www.wbez.org/stories/chicago-anti-violence-efforts-succeed-but-shootings-rise/07af00be-03ae-4a4d-adba-71e688301a60> [<https://perma.cc/9D8F-E38Q>] (stating that the only public institution to which many in the target population had any sustained connection was the criminal legal system). READI identifies prospective participants through referrals from community partner organizations, referrals from corrections institutions of individuals reentering the community from jails and prisons, and a risk-assessment tool developed by the Crime Lab to predict a person's risk of becoming involved in gun violence. U. CHI. CRIME LAB, *supra* note 309, at 1–2; *READI: Connecting Chicago's Youth at the Highest Risk of Gun Violence to Transitional Jobs, Support Services, and Cognitive Behavioral Therapy*, *supra* note 307; see also READI CHI., *supra* note 309, at 8 (noting that participants are predominantly Black men ages eighteen to thirty-two); *id.* at 5 (stating that, in 2016, 87 percent of shooting victims in Chicago were eighteen and older).

314. Smith, *supra* note 313 (quoting Cornell University Professor Max Kapustin); U. CHI. CRIME LAB, *supra* note 309, at 2.

315. READI CHI., *supra* note 309, at 8.

316. U. CHI. CRIME LAB, *supra* note 309, at 2.

317. *Id.*

318. *Impact*, READI CHI., <https://www.heartlandalliance.org/readi/impact/> [<https://perma.cc/PFQ6-9RX4>] (last visited Sept. 2, 2022).

319. U. CHI. CRIME LAB, *supra* note 309, at 2.

320. *Id.* at 1.

321. *Eddie Bocanegra Meets with President Biden*, HEARTLAND ALL., <https://www.heartlandalliance.org/eddie-bocanegra-meets-with-president-biden/> [<https://perma.cc/6F78-QYEF>] (last visited Sept. 2, 2022). Following the meeting, President Biden announced plans to curb gun violence by focusing on community-based interventions and stricter gun enforcement laws. *Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy*, THE WHITE HOUSE (June 23, 2021, 4:55 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/> [<https://perma.cc/2YYT-JZ45>]. This followed President Biden's call on Congress to invest

Garland and Senator Dick Durbin visited READI Chicago, where the two met with Bocanegra, his partners, and READI participants to learn more about the initiative and its outcomes.<sup>322</sup> Other cities across the nation have reached out to discuss adapting READI to their jurisdictions.<sup>323</sup>

## II. LOOKING TO THE INSIDE

The preceding part reveals that people who are incarcerated have generated and found ways, during their incarceration, to bring about ideas that incrementally expand possibilities<sup>324</sup> for moving toward a decarceral future. A range of system and nonsystem actors continue to rely on these inside moves today to confront the violence of the carceral state. Part II builds on the influence produced by these inside moves by presenting a theoretical account for why it is essential to think alongside people on the inside in the project of decarceration. This part argues that our current moment demands looking to the inside to promote decarceral futures both in order to stand up to the ideological work of the criminal legal system and to further our democracy.

### A. Disrupting the Carceral Mindset

The criminal legal system and the polity rarely consider people in prison as agents of change, much less transformative change directed to decarceral ends. The shrouding of this phenomenon is a symptom of incarceration itself. Laying bare this phenomenon—and its concealment—manifests what

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\$5 billion in evidence-based community violence interventions. *FACT SHEET: More Details on the Biden-Harris Administration's Investments in Community Violence Interventions*, THE WHITE HOUSE (Apr. 7, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-more-details-on-the-biden-harris-administrations-investments-in-community-violence-interventions/> [https://perma.cc/W9F3-B46A].

322. *Innovative READI Chicago Initiative Brings Hope amid Heartbreak of Gun Violence*, U. CHI. NEWS (Sept. 15, 2021), <https://news.uchicago.edu/story/innovative-readi-chicago-initiative-brings-hope-amid-heartbreak-gun-violence> [https://perma.cc/N7M7-PP3X]; *Attorney General Merrick Garland, Sen. Dick Durbin Visit READI Chicago*, HEARTLAND ALL., <https://www.heartlandalliance.org/attorney-general-merrick-garland-sen-dick-durbin-visit-readi-chicago/> [https://perma.cc/NBS8-E9B6] (last visited Sept. 2, 2022); Dick Durbin, *Op-ed: At the Heart of Chicago Gun Violence Is Poverty and Trauma*, CHI. TRIBUNE (July 29, 2021, 12:31 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-dick-durbin-chicago-gun-violence-20210729-p65ii3uy4feyfgefissottgx6a-story.html> [https://perma.cc/LW72-ER2U].

323. *Innovative READI Chicago Initiative Brings Hope amid Heartbreak of Gun Violence*, *supra* note 322; Kotlowitz, *supra* note 268; Golden, *supra* note 270.

324. See FORMAN, *supra* note 30, at 229 (“I have described mass incarceration as the result of a series of small decisions, made over time, by a disparate group of actors. If that is correct, mass incarceration will likely have to be undone in the same way.”); Renagh O’Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 632 (2022) (“Mass incarceration was built piece by piece and must be dismantled the same way.”); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1156, 1161, 1239 (2015) (describing abolition as “an aspirational ethic” that entails a “gradual project of decarceration” in which investment in positive, alternative social projects and institutions supplants criminal legal enforcement).

scholar and activist Angela Y. Davis calls the ideological work of the prison.<sup>325</sup>

Davis observes that “the prison is present in our lives and, at the same time, it is absent from our lives.”<sup>326</sup> As Davis argues, it is difficult to imagine a world without prisons, but we are reluctant to think about what takes place in them.<sup>327</sup> Every year the state removes hundreds of thousands of mostly poor, economically, racially, and socially marginalized people from their homes and communities, often to remote locations.<sup>328</sup> This de jure segregation produces a banishment from civic life<sup>329</sup> that exiles people from sight, thought, and significance. The prison accomplishes both a material and a symbolic separation.<sup>330</sup> As Davis describes, the prison “functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are [disproportionately] drawn.”<sup>331</sup> For meaningful decarceration to occur, it is essential, as Davis states, to attend to this ideological role.<sup>332</sup> Thinking alongside people in prison is an important step toward resisting and refusing—and, ultimately, unsettling—the ideological work of the prison.

The phenomenon described in the preceding pages remains obscured in part also by a legal profession that sees people in prison largely as clients to save or culprits to cage. If meaningful decarceration requires confronting the ways in which the law and the public think about and understand violence,<sup>333</sup> it necessarily requires confronting the ways we think—and do not think—about people in prison. Engaging in collaboration with people on the inside holds promise to transform how the law and the legal profession think about

325. DAVIS, *supra* note 40, at 16 (stating that the existence of the prison “relieves us of the responsibility of seriously engaging with the problems of our society, especially those produced by racism and, increasingly, global capitalism”).

326. *Id.* at 15 (“It is as if prison were an inevitable fact of life, like birth and death.”); see also Decarceration Nation, 106 *David Sklansky*, at 07:47 (June 7, 2021), <https://decarcerationnation.com/106-david-sklansky/> [<https://perma.cc/88TM-JQDV>] (stating that we have become used to high rates of incarceration and long sentences in this nation, and that most people do not see or think of prisons, which are out of sight and located far from major metropolitan centers).

327. DAVIS, *supra* note 40, at 15.

328. See Akbar, *supra* note 236, at 1805; Beatrix Lockwood & Nicole Lewis, *The Long Journey to Visit a Family Member in Prison*, THE MARSHALL PROJECT (Dec. 18, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison> [<https://perma.cc/CYU6-VR5R>]; see also Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1843–46 (2020) (revealing that almost all states send some people to be confined out of state, far beyond their contiguous borders).

329. See Hanan, *supra* note 50, at 1194–95; Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 96, 96–98 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

330. See DAVIS, *supra* note 34, at 22 (“The very existence of the prison forecloses the kinds of discussions that we need in order to imagine the possibility of eradicating [violence].”).

331. DAVIS, *supra* note 40, at 16.

332. DAVIS, *supra* note 34, at 22 (“[W]e have to imagine the abolitionist movement as addressing those ideological . . . issues as well. Not just the process of removing the material institutions or facilities.”).

333. See *supra* notes 28–30 and accompanying text.

people in prison. Avoiding this collective work means that we really do depend on the divisions created by criminal law to maintain social control.

The ideological work performed by the prison hides—and the decarceral imaginations in prison reveal—another source of knowledge. Almost all the decarceral moves in Part I—challenging the split-jury rule, researching the neighborhoods that supply the prison population, and reflecting on intergenerational neighborhood trauma that fuels violence—were shaped by close observation and frequent encounters with people in prison. Each intervention was compelled by circumstances, but the prison served as more than just a site that motivated decarceral moves; the systemic operation of injustice, and the collective operation of punishment, occasioned access to a “text” in prison—the people locked inside it.<sup>334</sup> That access to systemic injustice generated a deep reflection that produced analysis and action<sup>335</sup> directed toward transformative, decarceral ends. For Duncan, it was overexposure to unexhausted and what appeared to be factually inaccurate split-jury convictions; for the people in Green Haven, it was overexposure to neighborhood saturation that appeared to be pervasive; for Bocanegra, it was overexposure to a hypervigilance that appeared to be rooted in cycles of trauma and violence. This is just a slice of the trends they observed and analyzed in confinement.<sup>336</sup> Collective enclosure with people oppressed by similar economic, social, legal, and political circumstances offers another way to think about this phenomenon: the sustained exposure, wisdom to understand the problems that they observed and theorized as structural, resistance to their circumstances, and deep humanity created an alchemy to analyze problems differently and to combine theory and action to challenge the enduring narratives that land people in prison.

A serious willingness to entertain strategies for decarceration outside the institutional framework must include finding ways to think alongside people in prison as equal partners. To decline to discover and develop decarceral

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334. This notion of a “text” is inspired by Professor Jennifer Gordon’s work on the ways in which poor immigrant workers develop strategies for social change. Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428, 435 (1995) (describing a community-based center for immigrant workers that employed popular education techniques pioneered by Paulo Freire in Latin America and Myles Horton in the United States to “use their own experiences as a text for analyzing the problems that their communities face”); *id.* at 435 n.85 (“These popular education techniques, rooted in the teaching of literacy, bring together groups of poor and often illiterate people to reflect on their lives, analyze the causes of the problems that they face, and develop group strategies to combat those problems.”); *id.* at 435–36 (contrasting this approach, “set up to provide group opportunities for reflection that will lead to analysis and action,” with the traditional legal and lawyer-led approach that would have been inadequate to tackle the workers’ needs).

335. *See id.* at 435.

336. *See* Widener, *supra* note 192, at 49 (stating that the Think Tank sought to “make sense of the prison experience,” “what they were doing there,” and “the purpose of prison”); Telephone Interview with Katherine Mattes, *supra* note 98 (noting that Duncan had access to information that the outside did not because he was “embedded” within the prison diaspora); Email from G. Ben Cohen, *supra* note 139 (stating that Duncan brought the “10-6ers” to the attention of Louisiana prosecutors who were unaware of this longest-serving and forgotten contingent).



imaginings inside prison walls—particularly after having made tremendous use of the groundbreaking ideas birthed within—enables the prison to continue to lock us into a carceral mindset even as we claim to be moving in the direction of a decarceral one.

On that point, a solidaristic generative process can inspire ideas in people who are confined *and* people who are free. Aspirational moves on the inside have shaped scholarly trajectory on the outside,<sup>337</sup> elevated judicial, political, and public consciousness, and awakened new ideas to reckon with our carceral state. An inside-outside process of co-ideation can produce different sources of data and methods of collection and measurement,<sup>338</sup> different ideas about law, community health, and root causes of crime, and new paths to decarceration that can inform judges, prosecutors, lawmakers, traditional experts, and advocates, as well as rich perspectives on decarceral strategies beyond the limited ideas conceived in law's perch.<sup>339</sup> Collective envisioning also holds the potential to transform how people in prison think about their own power to make change.<sup>340</sup>

The inside moves described in Part I oriented a wide range of actors toward new ways to think and speak about law, safety, health, and society. These moves were not lawyer-led or lawyer-initiated. But it was through collective conversation and investment of time, resources, and allyship that the visions shaped and continue to shape long-term and near-term transformation. Given the isolation of carceral constraint, a collective process is essential. Collective imagining enables different understandings to become more visible, creating the potential to build more transformative possibilities. The next part identifies a gap, and thus an opening, in legal scholarship to pursue this collective challenge.

### B. Prison's Antidemocratic Paradox

Looking to the inside to envision decarceral futures recalls Professor Mari Matsuda's famous call to legal scholars to "look to the bottom" as "a new epistemological source."<sup>341</sup> Matsuda encouraged critical legal scholars to

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337. Video Interview with Robert Fullilove, Prof. of Clinical Sociomedical Scis., Columbia Univ. (Nov. 5, 2021) (stating that his scholarly career was based on the research and wisdom produced by the Think Tank); CTR. FOR NULEADERSHIP ON URB. SOLS., *supra* note 243, at 10 (same).

338. *Cf.* Simonson, *supra* note 236, at 853 (arguing that directly-impacted people "might also seek data and information from less traditional sources"); McLeod, *supra* note 14, at 657–58 (arguing that even limited initiatives can serve as an opening toward more transformative ends).

339. *Cf.* Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703, 710 (2019) ("The legal scholar's impulse is to say: Enough description. We know the problem. How are we going to fix it? But 'we' do not have a rich understanding of 'the problem.'").

340. *Cf.* Guinier & Torres, *supra* note 45, at 2786–87, 2790 (discussing the lawmaking potential of social movements); Gordon, *supra* note 334, at 410, 445–47 (describing the process of creating a theory of social change alongside immigrant workers, whose "daily reality" provided a text to develop a "long-term process of analysis leading to action").

341. Matsuda, *supra* note 45, at 324–26, 346–47 ("Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist

listen to those with the least advantage and study and support the organized struggles and campaigns of people of color who have experienced subordination.<sup>342</sup> Matsuda argued that adopting the perspective of “grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression,”<sup>343</sup> or what Antonio Gramsci called “organic intellectuals,”<sup>344</sup> can lead to concepts and theories about law that are “radically different from those generated at the top.”<sup>345</sup>

In the over three decades since Matsuda’s seminal article, legal scholars have echoed this demand, recognizing that bottom-up visions and interventions have made a profound impact on the criminal legal system, generate new understandings about the law, present alternate conceptualizations of the problems to be addressed, and offer a more expansive, grounded, and transformative framework for change.<sup>346</sup> Articulating the concept of “movement law,” Professors Amna Akbar, Sameer Ashar, and Jocelyn Simonson have encouraged scholars to turn beyond *studying* social movement critiques to co-creating ideas and scholarship *with* grassroots struggles.<sup>347</sup>

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critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”). *But cf.* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1312 (2002) (challenging “the bottom” as “insufficiently theorized” by critical race theorists).

342. Matsuda, *supra* note 45, at 324–25, 349 (calling on scholars to look to “the actual experience, history, culture, and intellectual tradition of people of color in America”).

343. *Id.*

344. SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI, *supra* note 32, at 5.

345. Matsuda, *supra* note 45, at 326, 362 (discussing reparations as a “legal concept generated from the bottom”); Akbar, Ashar & Simonson, *supra* note 45, at 839 (“For decades now, Matsuda has distilled brilliance born within collective struggle.”).

346. *See, e.g.*, Akbar, *supra* note 45, at 476 (“Radical social movements are important not simply for what changes they effectuate in law . . . . They articulate harms so pervasive, structural, or intersectional as to make them difficult for legal institutions to recognize let alone redress. They offer alternative frameworks for the way forward . . . . Their visions for social change, the way they point to the limits of what formal legal channels can handle or hear, can be profound.”); *id.* at 425 (discussing the importance of “invest[ing] in the[ ] creative potential [of social movements] to transform the state”); Akbar, *supra* note 236, at 1837–46 (explaining why legal scholars should take abolitionist organizing seriously); Simonson, *supra* note 38, at 266–70, 287–97 (describing bottom-up forms of communal contestation and their effect on everyday criminal adjudication); Simonson, *supra* note 50, at 1613, 1623 (calling for bottom-up forms of agonistic participation in criminal justice policymaking); McLeod, *supra* note 14, at 705 (arguing that the “ambitious visions of decarceration [from movement actors] . . . offer a set of transformative aspirational ideas which might orient current reform efforts, rescuing more moderate criminal law reform from its weakest and most disappointing possible futures”); *see also* Guinier, *supra* note 52, at 47 (describing the “often undervalued[] power of social movements or mobilized constituencies to make, interpret, and change law”); JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 237–80 (2005) (discussing the change-making capacity of immigrant workers, whom Gordon describes as “non-citizen citizens”).

347. *See* Akbar, Ashar & Simonson, *supra* note 45, at 844–45, 881 (calling on legal scholars to co-generate ideas alongside grassroots struggles seeking to transform the status quo); Akbar, *supra* note 45, at 479 (calling on legal scholars to “imagine collaboratively” with social movements); *see also* Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1283–88 (2015) (discussing the power of participatory defense as a new model for challenging mass incarceration in an article coauthored by a movement leader who developed

This work is inspiring, transformative, and critical. I envision the idea of “looking to the inside” as sharing theoretical and solidaristic space with “looking to the bottom.” The inside is, in many ways, bottom adjacent: people in prison are typically removed from communities on the bottom. I note, however, two important distinctions in looking to the inside in the manner proposed in this Article. I raise these distinctions not to distance both moves, which I see as complementary, but to argue why the moves, which share many parallel aims, should nonetheless be theorized separately.

First, when legal scholars study, engage, and bring critical perspectives from “the bottom” into scholarly discourse, the focus is mainly on constituencies in the body politic, that is, constituencies that are “free.”<sup>348</sup> There are exceptions. Simonson describes how people in prison engage in bottom-up interventions in the form of hunger and labor strikes.<sup>349</sup> Simonson argues that this collective contestation has influenced changes in prison conditions, destabilized the prison’s complete control over those confined, and awakened public consciousness on degrading conditions of confinement, forced labor, and mass incarceration.<sup>350</sup> I propose something distinct: looking to people who are unfree as partners in decarceration. The ideological work of criminal law and the restraint on communication accomplished by the prison cannot be overstated here; both, of course, heighten the challenges associated with exploring meaningful partnerships. As the inside moves in Part I demonstrate, however, the circumstances in prison—and the contemplation of freedom—can produce reflections, analyses, and strategies that enrich the outside in distinct ways and that, by design or in effect, direct toward decarceral ends.

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the participatory defense framework); Simonson, *supra* note 236, at 830–48 (supporting the movement demand to shift governance and policymaking power downward to populations most harmed by mass incarceration and everyday policing).

348. See *supra* notes 344–46. I use the term “free” in the narrow sense of physical liberty from carceral punishment. Conditions on the bottom deny marginalized communities freedom from social, political, racial, and economic inequality, freedom from life-threatening harm, freedom of personhood, and freedom from state supervision. See Matsuda, *supra* note 45, at 389–90. Among those on the bottom are people whose liberty was at one point restricted. *Id.* at 363, 367–68 (discussing movement by Japanese-Americans to seek reparations for internment during World War II). It is also important to note that some of the social movements whose bottom-up visions have informed legal scholarship collaborate with people who are incarcerated. See, e.g., Akbar, *supra* note 45, at 436 (discussing Critical Resistance, a grassroots prison abolitionist organization and co-drafter of the policy platform of the Movement for Black Lives); Akbar, Ashar & Simonson, *supra* note 45, at 851 n.113 (describing Black & Pink, an abolitionist organization that is rooted in working with queer and transgender people who are incarcerated).

349. Simonson, *supra* note 50, at 1619–20; see also Lobel, *supra* note 50, at 88 (describing how the Pelican Bay class action that ended indefinite solitary confinement in California prisons “resulted from, and interacted with, a prisoners’ movement that conducted three mass hunger strikes [that] garnered national and international attention”).

350. Simonson, *supra* note 50, at 1619–20 (discussing the influence that collective resistance inside prison walls, through hunger and labor strikes, had in catalyzing reforms to solitary confinement practices in California prisons); see also Lobel, *supra* note 50, at 92, 114, 157 (describing how people in prison, in partnership with lawyers, participated in directing the Pelican Bay class action and how that active, collaborative, nonhierarchical framework was crucial to the success of the litigation).

This brings me to a second distinction, perhaps more suitably described as a contradiction, in looking to the inside. Akbar, Simonson, and other scholars who study and work alongside grassroots movements rooted in a decarceral agenda call on scholars to engage perspectives from the bottom to create alternative frameworks for change and to “democratize” criminal law.<sup>351</sup> Although the concept I propose—looking to the inside to discover, develop, and co-envision decarceral moves—is grounded in the goal of decarceration, there is a democratic tension in looking to the inside. In every practical sense, people in American prisons have virtually no democratic existence. Their disappearance is not limited to formal channels of voting<sup>352</sup> or jury service. The vast majority are denied, by law or in effect, any meaningful participation in civic society or community life. Shutting out their visions from formal and informal channels of popular participation *is* American democracy in action. This reveals a paradox. Preventing us from seeing people in prison as potential agents of decarceral change is, in part, the work of American democracy. Yet, in refusing to accept criminal law’s antidemocratic function,<sup>353</sup> some people in prison have “convert[ed]” their

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351. See, e.g., Akbar, Ashar & Simonson, *supra* note 45, at 827 (“We are interested in social movements for their potential to democratize our politics and embolden our visions for change.”); Akbar, *supra* note 45, at 426 (describing the Movement for Black Lives’s vision for reform as “rooted in a decarceral agenda rooted in an abolitionist imagination”); Simonson, *supra* note 38, at 289, 299 (revealing the value of contestatory participation over consensus-based methods of gathering popular input, and arguing that opening up both sides of a criminal case to communal contestation can facilitate decarceral discourse); Simonson, *supra* note 236, at 845 (“The task of democratizing reform, then, is to better enable countervailing interests and community groups to assert their views, hold governments and other actors to account, and claim a share of governing power.”); Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America’s Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 Nw. U. L. REV. 1625, 1650 (2017) (“Reconstructing the carceral state will require a democratic process that involves impacted communities first and foremost in re-norming the abnormality against which the carceral state operates.”); Simonson, *supra* note 50, at 1612 (arguing that bottom-up modes of agonistic participation in criminal justice are “crucial for *democratic* criminal justice”).

352. See Hansi Lo Wang, *Most Prisoners Can’t Vote, But They’re Still Counted in Voting Districts*, NPR (Sept. 26, 2021, 7:01 AM), <https://www.npr.org/2021/09/22/1039643346/redistricting-prison-gerrymandering-definition-census-congressional-legislative> [<https://perma.cc/PVW6-QN7A>]; Vaidya Gullapalli, *Another Reason to End Prison Gerrymandering: To Identify and Invest in Neighborhoods Most Affected by Incarceration*, THE APPEAL (Feb. 28, 2020), <https://theappeal.org/another-reason-to-end-prison-gerrymandering-to-identify-and-invest-in-neighborhoods-most-affected-by-incarceration/> [<https://perma.cc/LC5P-W6TX>] (discussing prison gerrymandering, “the practice of counting people where they are incarcerated rather than where they lived prior to incarceration,” which swells the political power of largely white, rural prison districts and diminishes the voting power of the largely Black and Brown districts from which people in prison are disproportionately drawn); see also DAVIS, *supra* note 33, at 83–84, 101–03 (describing the risks of reducing democracy to the right to vote).

353. See Simonson, *supra* note 50, at 1610 (describing three levels of the antidemocratic nature of the criminal legal system); Akbar, *supra* note 236, at 1805 (describing “the carceral state’s central role in denying primarily Black, [B]rown, and poor people participation in formal democratic channels and civic and community life—let alone determining the conditions of their lives and engagement with their communities”); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 266, 279–80 (2007); Roberts, *supra* note 44, at 1604–05

oppression and subjugation into “theor[ies] for future action”<sup>354</sup> that have had transformative effects on law, political discourse, and society. Although the carceral state has shut down their civic participation, their individual and collective imagining has advanced democratic ideals. Excluded from democracy *by* American democracy, people in prison have educated democratic leaders and the public about the harms of the systems they have built, pushed them to think about how to be less punitive and less violent, and enabled our democracy to progress. Collective imagining with people on the inside thus not only unsettles criminal law’s antidemocratic center, but also accomplishes a new vision of democracy.<sup>355</sup> It unearths latent possibilities for political, social, and economic liberation, while revealing that the agency of people exiled from American democracy is, and holds promise to remain, democracy-enhancing.

### III. REVISITING EXPERTISE

It may be tempting to assume that this Article argues that people in prison have a certain kind of expertise that can facilitate decarceration. Although their capacity and knowledge might warrant the expert label, it is important to examine whether the vocabulary of expertise best captures the decarceral moves in prison. I raise this threshold question for two reasons: First, in a technocratic legal culture, an impulse emerges to retrofit different forms of knowledge into the mantle of expertise.<sup>356</sup> Second, if the language of expertise is not the appropriate framework for understanding the decarceral work described in this Article—and I conclude that it is not—does that carry implications for the place of expertise in the project of decarceration? I situate this question within current debates on the value of expertise in criminal policymaking.

In recent years, a number of legal scholars have renewed calls to create agencies led by social scientists and policy “experts” to guide decisions on public safety and crime reduction based on empirical data.<sup>357</sup> This approach

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(arguing that dismantling criminal law’s antidemocratic function requires an abolitionist movement); Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1715 (2016) (arguing that denying poor people the right to choose counsel blocks pressure from marginalized communities to strengthen the right to counsel, concentrates unchecked judicial power, and undermines the legitimacy of the criminal legal system).

354. Gordon, *supra* note 334, at 446–47, 450 (describing, in a different context, the struggle for social change alongside immigrant workers and the process of developing strategies that “convert [their] daily experiences into a theory for future action”); *see also* Burton, *supra* note 1, at 154 (asserting that the Think Tank members presented themselves “as part of a legitimate political constituency”).

355. *Cf.* DAVIS, *supra* note 33, at 47, 103 (urging us to think about “different versions of democracy” and “different criteria for democracy,” including “democracies in which those social problems that have enabled the emergence of the prison-industrial-complex will be, if not completely solved, at least encountered and acknowledged”).

356. *Cf.* Pierre Schlag, *Expertopia—The Rule of Expertise*, at 87 (June 2, 2022) (unpublished manuscript) (on file with author) (“[E]xpertise has but one move, or one tendency: to reduce everything to the order of expert knowledge.”).

357. *See, e.g.*, BARKOW, *supra* note 18, at 165–85 (calling for “expert bodies that use empirical data and studies to guide their decisions about criminal justice policy”); Rappaport,

is grounded in the idea that academics with elite educational credentials who regularly study these issues may be better able to resist “penal populism,” the tendency to set criminal policy by catering to ill-informed, irrational voters who are driven by emotions, fear, and punitive impulses.<sup>358</sup> Many scholars have challenged the idea that engaging these experts will lead to more “rational” decisions by deconstructing the ways in which policy analysis and the scientific method—often portrayed as neutral and objective tools—necessarily involve normative and political choices at every inflection point.<sup>359</sup> As Professor K. Sabeel Rahman argues, “[t]o overlook the political and moral dimensions of expert judgment—or to rely solely on expert rather than collective decision-making—is to displace the potential and responsibility for public judgments about the most important questions of how to structure our politics, society, and economy.”<sup>360</sup>

A small but growing number of law scholars have promoted a new vision of expertise in policymaking that embraces a “different kind of expert”: people in racially and economically marginalized communities who speak

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*supra* note 24, at 810–12 (arguing for reform that “emphasizes an evidence-based approach to criminal justice problem-solving focused on achieving outcomes consistent with democratic values”).

358. See BARKOW, *supra* note 18, at 1–10 (discussing the importance of engaging experts “to make sure we are making the right calls to maximize public safety and are spending our limited resources most effectively”).

359. See, e.g., Bernard Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 420–21 (2018) (arguing that “the very act of conceptualizing and defining a metaphorical system, and the accompanying choice-of-scope decisions, constitute inherently normative decisions that are value laden and political in nature”); Emily Hammond Meazell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 744 (2011) (“Legal institutions and the citizenry at large suffer from a science obsession, assuming that if only we had answers from science, we would know what regulatory decisions are ‘correct.’”); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1831 (2020) (describing “purportedly neutral and technocratic visions for rationalizing governance” as “neither neutral nor, in practice, rationalizing”); Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43 BRIT. J. SOCIO. 173, 187 (1992) (describing a popular view of the expert as “embodying neutrality” and “operating according to an ethical code ‘beyond good and evil’”); Evan Selinger & Robert P. Crease, *Introduction to THE PHILOSOPHY OF EXPERTISE* 1, 3 (Evan Selinger & Robert P. Crease eds., 2006) (“[T]he authority so conferred on experts . . . risks elitism, ideology, and partisanship sneaking in under the guise of value-neutral expertise”); Alonso & Starr, *supra* note 240, at 3 (arguing that deciding what to measure and how to measure it are political choices); Kimani Paul-Emile, *Foreword: Critical Race Theory and Empirical Methods Conference*, 83 FORDHAM L. REV. 2953, 2956 (2015) (“[T]he social sciences’ implicit claims of ‘objectivity’ and embrace of ‘neutrality’ in knowledge production stand in contrast to CRT’s contention that these claims mask hierarchies of power that often cleave along racial lines.”); K. SABEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 100 (2017) (arguing that expertise “can offer insight, but not resolution”).

360. RAHMAN, *supra* note 359, at 100; see also *id.* at 99 (“Experts are not neutral technocrats, but political agents who engage in moral and political judgment, and whose conceptualizations and arguments help shape and create social world.”); Harcourt, *supra* note 359, at 421 (“When th[e] choices are made by technocrats, the methods no longer merely implement political decisions. They no longer serve democratic politics. Instead, the methods reshape our politics.”).

from experience about the harms of policing, criminalization, and incarceration.<sup>361</sup> Simonson argues that opening the concept of expertise in this way brings in missing knowledge and engages deeper critiques that can destabilize the status quo.<sup>362</sup> Shifting and expanding the definition of expertise also shifts power to define and measure safety and security.<sup>363</sup> This radical understanding of expertise recognizes the wisdom of people directly impacted by the system who are “consistently excluded from most forms of public participation in the criminal legal system.”<sup>364</sup>

In their competing, yet somewhat complementary, visions of good governance, both camps—described by scholars as “bureaucratizers” and “democratizers”—lay a claim to expertise.<sup>365</sup> The implications for decarceration on each side are far less clear. Although this Article is not centrally concerned with policymaking broadly conceived, current debates in criminal policy about turning to experts, and which experts to turn to, are relevant to decarceration. Professor Benjamin Levin argues that the traditional expert’s footprint is embedded in the carceral state.<sup>366</sup> The

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361. Simonson, *supra* note 236, at 850–51 (“[They] do not just become important subjects of policing governance; they become *experts themselves*.”); *see also* Akbar, *supra* note 45, at 425 (arguing that the Movement for Black Lives “is about a vision to imagine expertise very differently than law scholarship”); Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 208 (2019) (“[A]s subordinates of the criminal justice system, members of marginalized communities are especially knowledgeable about systemic injustice and thus especially capable of and responsible for rectifying it.”); Bell, *supra* note 339, at 712.

362. Simonson, *supra* note 236, at 853–54.

363. *Id.* at 851, 853–55 (arguing that these new experts “might also seek data and information from less traditional sources”); Okidegbe, *supra* note 45, at 782–83 (calling for communal expertise in the production of pretrial risk-assessment instruments); *see also* Collins, *supra* note 213 (manuscript at 37, 40) (arguing that the evidence-based paradigm—the leading model for criminal law reform—is undemocratic because it “narrowly limit[s] what counts as evidence” and “disqualifies wide swaths of knowledge as a basis for reform or intervention, including observational, community, and experience-based knowledge”).

364. Simonson, *supra* note 236, at 850–53; *cf.* Levin, *supra* note 25, at 2784, 2833–35 (underscoring the potential of this deconstructive move but questioning whether “expertise” is the best way of describing the move to shift power to marginalized communities, and identifying the risks of reifying exclusion and power imbalances in adopting a vocabulary of “expertise”).

365. *See* Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1399 (2017) (separating scholars into “democratizers” and “bureaucratic professionalizers”); Levin, *supra* note 25, at 2782 (describing both sides as adopting a “shared appeal to the language of experts and expertise”).

366. Levin, *supra* note 25, at 2811 (arguing that vocational and educational experts “have been key players in constructing the carceral state”); *id.* at 2810 n.186 (arguing that “framing the problems with the criminal system as its irrationality or emotion-driven dimensions understates the ways in which rationality and what purports to be cold neutrality have actually operated as significant drivers of mass incarceration and the new penology”); *id.* at 2817 (“Some of the most maligned theories and practices of criminal law’s administration over the last half century haven’t been the product of tough-on-crime voters or politicians; they have been crafted by the sorts of experts frequently offered as potential technocratic saviors.”); *id.* at 2798 (arguing that the turn to education-based expertise is in many ways a response to the “resounding failure” of vocational expertise, including the “false claims to expertise” by police, corrections, crime labs, and other system actors who have contributed to mass incarceration); *id.* at 2818 (stating that “the expert-driven universe of criminal justice policy

destabilizing move to shift expertise to impacted communities traditionally excluded from criminal policymaking is, for many scholars, rooted in a decarceral agenda,<sup>367</sup> but some scholars have surfaced a tension between a more equitable process for popular participation and the goals of decarceration.<sup>368</sup> Siloed from both camps are people in prison, who are democratically exiled and have virtually no traditional credentials, but some of whom have made important, difficult decarceral moves.

If decarceration is a non-neutral, value-laden choice, how can purportedly “neutral” experts lead us to it? More to the point, if deferring to the professional judgment of “neutral” experts has expanded the carceral state, it can also undermine decarceration. And if opening the definition of expertise, on its own, might not serve decarceral ends, another question arises: is “expertise,” traditional or inverted, the pathway to decarceration? Reflexively turning to expertise to resolve complex social problems masks a broader problem: the frame itself.

The “draw of expertise” is premised on a longstanding intuition that expertise is an inherent virtue.<sup>369</sup> Professor Anna Lvovsky disrupts this “virtue-based vision of expertise.”<sup>370</sup> Complicating the familiar association

reflected an ‘emphasis on . . . formal rationality’” and a logic of social control (alteration in original) (quoting Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 454 (1992) (describing a fundamental shift in the dominant ideology of criminal punishment in the 1970s and 1980s toward the management of marginalized groups))).

367. See, e.g., Akbar, *supra* note 45, at 426 (describing the Movement for Black Lives’s vision for reform as “rooted in a decarceral agenda rooted in an abolitionist imagination”); Simonson, *supra* note 38, at 303–06 (suggesting that opening up criminal adjudication to more popular input on behalf of the accused has the potential to lead toward large-scale decarceration, but stating that drawing a direct line between the two “requires more study”).

368. See Rappaport, *supra* note 24, at 719–20, 759 nn.276–78, 760 nn.279–82, 808–09 (predicting that popular participation will not dismantle the carceral state and collecting studies showing that laypeople can be punitive, in contrast to the claim that democratizing criminal adjudication will lead to leniency); Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 *YALE L.J. F.* 798, 805 (2021) (“It would be a categorical mistake to equate the pursuit of an equitable process of crime policymaking—even as it relates to race-class subordinated communities—with the pursuit of equitable crime policy.”); Levin, *supra* note 25, at 2828 (questioning whether shifting power will serve decarceral ends); cf. Simonson, *supra* note 236, at 789 (recognizing that communities are not monolithic, and power-shifting on its own does not guarantee any particular outcome).

369. See Anna Lvovsky, *Rethinking Police Expertise*, 131 *YALE L.J.* 475, 483, 486, 493, 495, 554 (2021) (arguing that in legal culture “there persists some notion that . . . assuming a particular function is worth doing, the way to get it done well is by entrusting it to those with the greatest skill and insight in the field”); STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* 8 (1994) (“[E]xpert knowledge has enjoyed a virtually unquestioned legitimacy in American culture.”). Underlying this draw is a persisting sense that expert decision-making is better decision-making. See, e.g., BARKOW, *supra* note 18, at 168 (“[W]hen it comes to public safety and maximizing limited resources, there is such a thing as expertise that can improve decision-making.”). But see Lvovsky, *supra*, at 493–94 (noting that critics “assail th[is] presumption” and “deride the notion of the ‘objective’ expert as an anti-democratic myth, an attempt to sell the people a dictatorship under the guise of technocratic neutrality”).

370. Lvovsky, *supra* note 369, at 481, 555, 559 (describing the virtuous view as “imagin[ing] expertise as a presumptive institutional good”).



between expertise and deference in the context of policing, Lvovsky exposes a counterintuitive phenomenon: case law where conceded claims of expertise do not insulate police conduct from judicial scrutiny but drive adverse judgments against the state.<sup>371</sup> Across a range of disputes about police misconduct, Lvovsky demonstrates that it was not poorly trained or overzealous officers who fueled judicial concerns about legality, but well-trained, highly experienced, “sophisticated” officers who “masterfully” performed their designated tasks.<sup>372</sup> As Lvovsky argues, “[o]ur moral intuitions surrounding expertise as a virtue have blinded us to the extent to which expertise is, essentially, just another tool of the police.”<sup>373</sup> The courts’ embrace of concededly expert policing as “a source of active *mistrust*,”<sup>374</sup> Lvovsky contends, “invites us to look with renewed skepticism” at a range of disciplines grounded on deference to professional judgment and “upend[s] our intuitions about the value of expertise itself.”<sup>375</sup>

The “deceptive allure” of expertise that wrests uncritical judicial deference across a range of doctrines<sup>376</sup> also infiltrates our processes for social change. In these final pages, I argue that the aspirational work inside prison signals that it is essential to move beyond expertise to decarcerate. I reach this conclusion by considering the limits of a framework of expertise for understanding inside decarceral moves. I then propose a different way of thinking about inside decarceral work.

To be clear, I do not mean to oppose the role or value of “experts” who hold traditional academic credentials to advance decarceration. Indeed,

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371. *Id.* at 480, 497–98, 555, 572. The presumption that police have any expertise to speak of is hotly contested. *Id.* at 479; see also Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997 (2017) (describing the history of the “judicial presumption of police expertise: the notion that trained, experienced officers develop insight into crime sufficiently rarefied and reliable to justify deference from courts”).

372. Lvovsky, *supra* note 369, at 480, 483, 497–509, 515–34, 563, 567 (providing case studies of police using their training and skills in strategic deception and manipulation); see also *id.* at 550 (arguing that these “displays of professional skill” feed judicial qualms “that there exist certain effective—even skilled—forms of investigation that the police should not engage in to begin with, much less become ‘expert’ at”).

373. *Id.* at 554; see also *id.* at 481, 485 (arguing that judges in these cases treat expertise not as a de facto virtue but as a tool that, like other policing technologies, expands police power and sharpens judicial scrutiny). Adopting this granular approach, Lvovsky argues, has the potential to “recast the value of expertise” in areas of criminal procedure most traditionally associated with deference—assessments of reasonable suspicion and probable cause—where an officer’s specialized training and rarefied eye for danger operates as a claim to authority. *Id.* at 484.

374. *Id.* at 559–61 (arguing that courts concede that “the acknowledged expertise of public actors can coexist with and even exacerbate the risk of legal infirmities in how they perform their tasks, without being any less ‘expert’ for that fact”).

375. *Id.* at 534, 558–61 (“The courts’ cynical confrontations with police expertise demonstrate the importance of wresting free of those technocratic biases—the extent to which our understanding of judicial reasoning still stands to learn from the richer sociologies of knowledge and power produced in other fields.”); see also Susan Stefan, *Leaving Civil Rights to the “Experts”*: *From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 700–15 (1992) (discussing a series of underanalyzed grants of deference to experts).

376. Lvovsky, *supra* note 369, at 482, 555.

imaginings formulated inside prison have come to fruition in conversation and collaboration with those who bear traditional markers of expertise, and the project of decarceration needs many hands on deck. Nor do I mean to suggest abandoning radical movement claims over expertise—deconstructing and shifting expertise is destabilizing, inspiring, and essential.<sup>377</sup> Rather, I seek to question the instinctive pull toward “expertise” to understand enlightened knowledge and highlight the limits of the frame for progressing toward decarceration. I consider both moves—reimagining expertise and contesting the frame altogether—as complementary and denaturalizing. Far from debating in these final pages who has the expertise to reduce our prison population—a question that presupposes a coherent theory as to the capacity of expertise to reduce prison populations—I surface three limits to adopting the frame of expertise in the ambitious project of decarceration. My caution is premised on the idea that the mantle of expertise can corrupt thought.

First, a stay-in-your-lane overtone hovers over expert claims. The expert’s value is typically cabined to insights in the domain in which the expert has expertise.<sup>378</sup> Exalting expertise inevitably invites the following question: what “expertise” would the ordinary person in prison possibly have? Conditions of confinement? Prison-as-experienced? The very language, accompanied by the ideological work of carceral punishment, invites skepticism that people in prison might have acumen, value, or knowledge beyond the four corners of the cage. The implications of this skepticism are pronounced in a nation that incarcerates so many people. Sophisticated levels of knowledge on the inside extend far beyond prison walls to law, politics, capitalism, public health, neighborhood priorities, violence reduction, peer relations, and much more. Professor Jules Lobel unveils this dynamic in the context of attorney-client collaborations, explaining that the Pelican Bay class action challenging California’s use of prolonged solitary confinement resulted from a collective, nonhierarchical partnership with people held in prison whose active role in directing that litigation and “wealth of knowledge . . . [Far beyond] the prison regime” was critical to the lawsuit’s successful outcome.<sup>379</sup> All told, people in prison have, in a myriad of ways, shaped legal and social change. Their engagement has awakened

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377. Simonson, *supra* note 236, at 851; Levin, *supra* note 25, at 2784 (arguing that expanding the meaning of expertise “highlights the politicized project of selecting experts in the first place and denaturalizes experts’ privileged status”).

378. See, e.g., Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 262 (2017) (“[T]he expertise of experts tends to be limited to their domain of detailed knowledge.”).

379. Lobel, *supra* note 50, at 92, 150, 153–54, 157, 159 (stating that the Pelican Bay hunger strikers “offer[ed] the[ir] lawyers such a wealth of knowledge” beyond the prison regime, including on strategy central to the class action, and noting that some had mastered the law, others were widely read in philosophy, neuroscience, politics, and Black consciousness thought, and others had closely analyzed social relations in a carceral setting); *id.* at 159 (“Imagining a more egalitarian society requires developing nonhegemonic relationships between professionals and the people with whom they work, based in part on the recognition of different forms of intelligence and expertise.”).

public consciousness, shaped the evolution of constitutional meaning, and deepened popular and policy discourse. “[T]he law’s infatuation with expertise”<sup>380</sup> contributes to why we do not think of people in prison as agents of change in progressing toward a decarceral future.

Second, the very notion of expertise suggests that there is some “correct” response to complex social problems and that experts are the ones to “solve” them.<sup>381</sup> This concept ties into the aura that experts are a source of infallible truth.<sup>382</sup> However, many concepts and practices developed by “infallible” experts—whose expertise has expanded the power of the carceral state—have been widely discredited.<sup>383</sup> Meanwhile, some “fallible” people in

380. Lvovsky, *supra* note 369, at 492.

381. See Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2024 (2015) (“This important role of agency-as-expert coincided with the inherently optimistic belief that there were ‘objectively correct solution[s] to the country’s problems.’”); Meazell, *supra* note 359, at 744 (“Legal institutions and the citizenry at large suffer from a science obsession, assuming that if only we had answers from science, we would know what regulatory decisions are ‘correct.’”).

382. See RAPHAEL SASSOWER, KNOWLEDGE WITHOUT EXPERTISE: ON THE STATUS OF SCIENTISTS 101 (1993) (noting the common view of “expertise as a privileged, divine-like attribute”). A halo of “mystic infallibility” surrounds the expert label. *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (“voiceprint” expert); see also *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) (eyewitness expert); Lvovsky, *supra* note 369, at 487–88 (noting that prosecutors invoke police credentials to “bathe their observations in the aura of authority”). This halo creates a substantial risk of distracting fact finders—both technicist-minded judges and lay jurors—from rigorous scrutiny over claims of expertise. *Id.* at 486, 536, 559 (suggesting that the “mysticism of police expertise” may explain judicial warnings against “second guessing” police decisions); *State v. Young*, 2009-1177 (La. 4/5/10); 35 So. 3d 1042, 1050 (noting that “merely being labeled” a specialist in eyewitness identification has the broad potential to mislead the jury); Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, SCI. AM., May 1990, at 46, 46, 48 (“[T]he esoteric nature of an expert’s opinions, together with the jargon and the expert’s scholarly credentials, may cast an aura of infallibility over his or her testimony.”).

383. See, e.g., Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANN. REV. L. & SOC. SCI. 433, 435 (2020); HARCOURT, *supra* note 236, at 163 (describing how broken windows policing turns entire classes of people into “subjects that need to be controlled”); James Forman Jr. & Kayla Vinson, Opinion, *The Superpredator Myth Did a Lot of Damage. Courts Are Beginning to See the Light.*, N.Y. TIMES (Apr. 20, 2022), <https://www.nytimes.com/2022/04/20/opinion/sunday/prison-sentencing-parole-justice.html> [<https://perma.cc/MXN5-BJD4>] (describing how the superpredator theory, the brainchild of a political scientist and since disproven, drove excessive sentences and laws that allowed young people to be tried as adults); Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, WASH. POST (Apr. 18, 2015), [https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcabc310\\_story.html](https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcabc310_story.html) [<https://perma.cc/VR2D-FH2T>] (reporting that nearly every examiner in an elite FBI forensic unit gave flawed testimony in over 95 percent of trials in which they offered evidence against criminal defendants over more than a two-decade period, and that hundreds of state and local crime lab analysts were FBI-trained); NAT’L RSCH. COUNCIL, NAT’L ACAD. OF SCIS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 39, 42–43 (2009) (calling into serious question the scientific basis and reliability of many forensic methods and techniques commonly used in criminal prosecutions); Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986–2010*, 5 UC IRVINE L. REV. 89, 103, 135 (2015) (describing judicial deference to expertise of officials in supermax prisons); Lvovsky, *supra*

prison have produced pioneering decarceral-oriented change. If expertise operates as a gateway to deference and authority—privileges that people in prison have rarely, if ever, enjoyed<sup>384</sup>—sublimating people in prison to the perch of expertise also risks colluding with the framework’s “flawless” ideology.

Third, expertise finds its purchase in a hierarchy of knowledge.<sup>385</sup> In his seminal article, economist and philosopher F.A. Hayek argued that knowledge is not concentrated in a central authority but is dispersed among individuals throughout society.<sup>386</sup> He calls this “local knowledge.”<sup>387</sup> Indeed, it was, in part, local knowledge that produced the decarceral ideas described in these pages, at times alongside advocates and scholars with traditional credentials. To label this cross-pollinated phenomenon as “expertise” conspires in the frame’s appeal to superior and exclusive knowledge and risks sidelining the difficult and often collective struggles that occur within exile. As a consequence, adopting the frame of expertise reifies the status quo and runs up against what Professor Marie Gottschalk describes as “the convulsive politics from below that we need to dismantle the carceral state and ameliorate other gaping inequalities.”<sup>388</sup> In that, to silo the ideas produced in confinement as the work of “experts” undercuts the communal

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note 369, at 496 (noting that the most touted examples of police knowledge are “often grounded less in reliable data than in hunches” and racism).

384. Cf. E. JOHANNA HARTELIUS, *THE RHETORIC OF EXPERTISE* 1 (2011) (“[B]eing recognized as an expert generates not only status and power but considerable influence. Those [so] labeled reap the financial and symbolic benefits . . . . Their voices are heard above others.”). “[E]xpertise is a relational bid for social standing, an assertion of superiority over the ‘ordinary’ layperson.” Lvovsky, *supra* note 369, at 541; *id.* at 494 (arguing that the expert mantle “devalues more informal authorities”).

385. “Even if expertise and technocracy become somehow disentangled, there’s still a risk that appeals to expertise suggest that only some subset of the polity is qualified to decide or opine.” Levin, *supra* note 25, at 2833 (“[T]he power of the expertise claim generally rests on its exclusivity.”).

386. Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519, 521–22 (1945).

387. *Id.*

388. GOTTSCHALK, *supra* note 15, at 282; James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 *U. PA. L. REV.* 685, 699 (1985) (“By appearing to be neutral to ends, or by merely offering means to reach pre-selected ends, the ideology of technocracy actually buttresses the status quo.”); Pierre Schlag, *A Reply—The Missing Portion*, 57 *U. MIAMI L. REV.* 1029, 1037 (2003) (describing two complementary moves: one that “reveal[s] the emptiness of the claims to expertise” and one that shifts expert authority to those who are excluded, but arguing that both moves reinscribe and reinforce “precisely the sort of rhetorics and hierarchies they contest”); Levin, *supra* note 25, at 2835 (“Expertise might become a shorthand for legitimacy and standing, but I wonder whether that rhetorical or framing move has costs in that it implies an acceptance of the logic of qualified participation”); *id.* at 2818 (“[D]ismantling these unjust institutions would require much more than greater expert involvement; it would require a deep reckoning with the fundamental logics that have allowed these institutions to proliferate in the first place.”); Akbar, *supra* note 236, at 1806 (“Bureaucracy and democracy—experts, the public, politics, and data—got us into the mess of mass criminalization in the first place. It will take an upheaval of our conceptions of crime, punishment, and expertise to undo mass criminalization and stop police violence.”); Simonson, *supra* note 236, at 860 (“Nor should we look to the usual experts to create roadmaps for transformational change.”).

consciousness that is essential to movements for freedom.<sup>389</sup> As organizer and activist Derecka Purnell stated, “the idea of being an abolitionist *expert* feels counter to the communal politics of abolition.”<sup>390</sup> Expertise creep is a particular concern for decarceration, a relatively new, aspirational mission that has only tentative ideas from many quarters.

There are other reasons to rethink the frame of expertise, traditional or inverted, in decarceration. Inside decarceral moves expose the limits of professional judgment in a carceral state. Traditional experts certainly could have designed a study of the zip codes that send people to prison. Supreme Court “experts” could have brought the same or similar challenges to the high court; some, in fact, tried without success.<sup>391</sup> Expertise also seems inadequate to capture the contemplation that perseveres in shackles. What emboldens people under confinement to study the law and bring cases to courts, often tirelessly, with limited resources and no counsel? And for many, to bring cases that have no impact on them? What motivates them to design research to understand an issue that has confounded advocates, law enforcement, researchers, and policy makers? Even lived experience comes up short. Although lived experience is one significant source of the wisdom on the inside, and inside moves are certainly shaped by the social, racial, and economic oppression experienced during and before confinement, lived experience alone does not seem to fully explain mastering or critiquing the law, a vision to design new data metrics, turning ambitious theories into action, or the full extent of the epistemic value of people in prison in generating decarceral moves.

I propose a different way of theorizing these inside moves. The moves in Part I appear to share a common capacity: a deep resistance to captivity moored to opposing how the law thinks about the people it sends to prison. Many people in prison have local knowledge of the broader reasons why they are in prison and a deep incentive to resist carceral logics. Their contemplation and resistance to how law and society understand them has generated work and ideas to oppose the laws and circumstances that land them in prison, tapping into an organic intellect and agency to chip away at the carceral state’s power.

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389. Cf. DAVIS, *supra* note 34, at 2 (“It is essential to resist the depiction of history as the work of heroic individuals in order for people today to recognize their potential agency as a part of an ever-expanding community of struggle.”).

390. Derecka Purnell (@dereckapurnell), TWITTER (June 17, 2020, 6:01 PM), <https://twitter.com/dereckapurnell/status/1273375358298009601> [<https://perma.cc/38CW-6DDB>] (emphasis added).

391. See, e.g., Eugene Volokh, *Supreme Court Declines to Reconsider Constitutionality of Convictions by Non-Unanimous Juries*, THE VOLOKH CONSPIRACY (Jan. 10, 2011, 11:38 AM), <https://volokh.com/2011/01/10/supreme-court-declines-to-reconsider-constitutionality-of-convictions-by-non-unanimous-juries/> [<https://perma.cc/Q7WN-EFJ3>] (describing a law professor’s unsuccessful 2010 certiorari petition in *Herrera v. Oregon*, a case challenging Oregon’s nonunanimous jury rule that was briefed and had amici support); Petition for Certiorari at i, *Dutch v. United States*, 139 S. Ct. 1590 (2019) (No. 18–8442) (arguing that the judicial fact-finding required by the ACCA’s occasions clause violates the Sixth Amendment).

Importantly, and on this point, imaginations behind bars have produced important decarceral steps precisely because people in prison are not “neutral” or detached.<sup>392</sup> Inside pursuits are driven by oppression,<sup>393</sup> elevated yet subjugated knowledge,<sup>394</sup> deep humanity, and the capacity to believe in ideas that the deprivation of freedom can make more conceivable on the inside than on the outside. This brings to mind what Gramsci called “an optimism of the will.”<sup>395</sup> Similarly, although criminal punishment sends a message to people in prison that they are inconsequential, “it does not follow that individuals surrender a desire to create change, or the belief that it is possible.”<sup>396</sup>

Thinking about the mobilization of ideas inside the walls as unmoored to expertise but anchored in resistance can have implications for how people in prison think about their own agency and can encourage more collective processes between legal scholars, traditional experts, and people in prison.<sup>397</sup> Pushing against the reflexive draw to expertise as the source of these moves opens up a window to see that people in prison have also used law, data, and innovation, including in ways that expose how the law thinks (and does not think) about who it sends to prison—an ambition that is essential to decarceration.<sup>398</sup>

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392. Cf. Burton, *supra* note 1, at 121–22 (“Black radical knowledge production makes no claims to objectivity or to ‘detachment’ . . . [but] ‘grow[s] out of a concrete intellectual engagement with the problems of aggrieved populations confronting systems of oppression.’” (citing ROBIN D.G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* (2002))).

393. Cf. Lobel, *supra* note 50, at 153 (“Ironically, the [Pelican Bay hunger strikers’] extreme isolation in oppressive conditions induced them to study law . . . .”); BISSONETTE ET AL., *supra* note 50, at 22, 27–28, 68, 76, 145, 158, 168, 221 (describing cross-racial organizing by people in a Massachusetts prison who “resisted the role they had been consigned to in society,” and detailing the over two-month period when the entire guard force went on strike and nearly six hundred people held captive ran the maximum security facility, preventing violence from erupting in a prison that once boasted the nation’s highest rate of homicide).

394. See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972–1977*, at 78, 82 (Colin Gordon ed., 1980) (“[B]y subjugated knowledges one should understand . . . a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated . . . located low down on the hierarchy . . . which owes its force only to the harshness with which it is opposed by everything surrounding it.”).

395. SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI, *supra* note 32, at 175 & n.75 (combining the “pessimism of the intelligence” with an “optimism of the will”). Allegra McLeod describes this maxim, which Gramsci wrote while imprisoned by Mussolini, as “the courage to try to alter [current] possibilities” to “attempt difficult things despite the odds.” McLeod, *supra* note 14, at 657 n.22.

396. HANNAH L. WALKER, *MOBILIZED BY INJUSTICE: CRIMINAL JUSTICE CONTACT, POLITICAL PARTICIPATION, AND RACE 5* (2020) (analyzing how negative criminal justice experiences mobilize alternate forms of political engagement by marginalized communities); see also Henderson, *supra* note 108 (“[W]e asked ourselves: Do we want to change our conditions, or do we want to change our circumstances?” (quoting Norris Henderson, who was imprisoned in Angola for nearly thirty years)).

397. Cf. DAVIS, *supra* note 34, at 2 (“It is essential to resist the depiction of history as the work of heroic individuals in order for people today to recognize their potential agency as a part of an ever-expanding community of struggle.”).

398. See *supra* pp. 57–59.

At the risk of stating the obvious, disconnecting from the mantle of expertise in decarceral work will be difficult. As Lvovsky argues, the credentials, designations, and privilege that many lawyers and scholars enjoy and see as central to our own performance may make us “especially susceptible” to “the promise of professional problem solving.”<sup>399</sup> But in a carceral state that remains in deep crisis, it is crucial to check that reflex and examine the ways in which the perch of expertise can imprison our thinking.

It is important to note that some people in prison described in Part I were able to move forward the ideas seeded on the inside only (or in large part) due to their release from prison. They had jobs or family support and a roof over their heads (for some, a direct result of their inside work, which built connections on the outside) that enabled them to focus on continuing the work that they began on the inside. Still, generating—and having someone on the outside invest in generating—these moves while inside prison was critical to the success of their work and their visions, particularly when release was anything but certain.

This is not to suggest that all, or even most, people in prison will have good legal or community-specific interventions, or that we can reach all who do. The next task is to think through possible methodologies to maximize this collective work. I begin, again, by recognizing the obvious: this task will be complicated by the constraints of carceral confinement.<sup>400</sup> As Angela Y. Davis has stated, however, “[i]f you’re serious about developing egalitarian relations, you will figure out how to make these connections.”<sup>401</sup> In these final words, I gesture toward a preliminary set of nonexhaustive next steps.

One step toward finding ways to think alongside people in prison is to engage in the four methods in movement law scholarship described by Akbar, Ashar, and Simonson. Adapted to the inside, these modes include (1) paying attention to “existing modes of resistance” on the inside “as a source for new insights”; (2) studying strategies of resistance on the inside that are often obscured in elite legal circles; (3) centering their intellectual traditions and worldviews to denaturalize established understandings of law and democracy; and (4) adopting a collective, solidaristic stance.<sup>402</sup> With these four methodological moves, movement law scholars explore new “terrain[s] of critique” alongside communities in struggle and “treat movement actors and activists as equal research partners in the generation of questions and answers about the world.”<sup>403</sup>

The partnership this Article envisions is not just for legal scholars to undertake. As revealed in Part I, people in prison have inspired a wide range of stakeholders toward new ways of thinking. To shift and share focus of decarceral know-how, it is critical for researchers, policy makers, social

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399. Lvovsky, *supra* note 369, at 541–42.

400. *Cf.* DAVIS, *supra* note 34, at 26 (“It may not always be easy to guarantee the participation of prisoners, but without their participation and without acknowledging them as equals, we are bound to fail.”).

401. *Id.* at 27.

402. Akbar, Ashar & Simonson, *supra* note 45, at 848–70.

403. *Id.* at 849, 863.

scientists, practitioners, and community members committed to large-scale decarceration to join in this collaborative work. Thinking with people in prison to develop decarceral strategies can begin with immersion in inside-outside study groups or an embrace of movement law techniques: participatory action research,<sup>404</sup> coauthoring scholarship,<sup>405</sup> cocreating knowledge, identifying new subjects of data collection,<sup>406</sup> and creating new theories for change.<sup>407</sup> Social movements that organize and campaign alongside people on the inside, nonprofit groups led by people who were once

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404. Scholars in law and related disciplines have engaged in participatory action research to understand, analyze, and find solutions to complex social problems. See Lauren Johnson, Cinnamon Pelly, Ebony Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. (forthcoming) (manuscript at 3–4, 10) (describing research in which predominantly Black community members in Cincinnati are collectively redefining public safety alongside academic researchers). This methodology prioritizes the knowledge and the research questions of communities who are “too often viewed as research subjects.” *Id.* (manuscript at 8); see also Emily M.S. Houh & Kristin Kalsem, *It’s Critical: Legal Participatory Action Research*, 19 MICH. J. RACE & L. 287, 294 (2014) (“[L]egal participatory action research’ . . . treat[s] those ‘at the bottom’ as equal research partners who are presumptively best situated to identify, analyze, and solve the problems that directly affect them.”); Editha Rosario-Moore & Alexios Rosario-Moore, *From the Ground Up: Criminal Law Education for Communities Most Affected by Mass Incarceration*, 23 CLINICAL L. REV. 753, 754–55 (2017) (“In concert with Critical Legal Theory, [participatory action research] challenges both the objective neutrality of the law and claims of empirical objectivity made by social researchers.”).

405. See, e.g., Moore, Sandys & Jayadev, *supra* note 347, at 1281 (discussing participatory defense as a new model for challenging mass incarceration in an article coauthored with a movement leader who developed the model); Carter, López & Songster, *supra* note 37, at 315 (describing a study group formed by people in prison that developed a concept grounded in the Eighth Amendment to challenge life-without-parole sentences in an article coauthored with a person in prison and a person released from prison); Gimbel & Muhammad, *supra* note 39, at 1505–28 (discussing a range of nonpolice models for curbing violence in an article coauthored with a person in prison); see also Akbar, Ashar & Simonson, *supra* note 45, at 862, 875.

406. Cf. Simonson, *supra* note 236, at 851–55 (arguing that directly-impacted populations might envision new data sources and new methods of data collection and measurement).

407. A growing body of participatory action research is taking shape in the prison context. See, e.g., Danielle L. Haverkate, Travis J. Meyers, Cody W. Telep & Kevin A. Wright, *On PAR with the Yard: Participatory Action Research to Advance Knowledge in Corrections*, 5 CORRECTIONS 28, 34 (2020). Although typically focused on conditions inside prisons, including health, education, and safety, recent participatory research has tapped the knowledge and skills of people in prison “to better understand what was and was not working with reentry.” *Id.* at 7–9 (describing a collaborative project in which policy makers and researchers in Arizona codesigned a survey instrument with people in prison and prepared them to conduct interviews on issues relating to recidivism and reentry); see also LAUREN FARRELL, BETHANY YOUNG, JANEEN BUCK WILLISON & MICHELLE FINE, URB. INST., PARTICIPATORY RESEARCH IN PRISONS 1–2, 6–8 (2021) (describing examples of participatory research with people in prison and outlining strategies to promote the well-being of people behind bars). Although this Article does not envision collaborations premised entirely on survey administration, participatory action research offers one established model by which scholars and policy makers can cocreate a research agenda, research questions, methods of data collection, analysis of findings, and actionable plans for change with people in prison. See Haverkate, Meyers, Telep & Wright, *supra*, at 6–7; FARRELL, YOUNG, WILLISON & FINE, *supra*, at 2–4, 8–9, 11, 14 (describing the key elements of participatory research in prisons and the importance of and challenges to relationship-building in light of power imbalances).



incarcerated, faculty in law and other disciplines who lead inside-outside courses or otherwise teach in prisons, and organizations that work with people formerly in prison can serve as resources and entry points for connecting with study groups and individuals thinking on the inside.<sup>408</sup> This project might eventually aspire to more imaginative, long-range possibilities, such as the creation of nationwide “decarceration centers,” somewhat like law school clinics, but with the purpose of locating organic activists on the inside, thinking together to develop innovative decarceral theories and collaborations, and co-imagining strategic and conceptual interventions to progress toward decarceration.

### CONCLUSION

Sociologist and professor Tony Cheng has argued that the participation of the public in police-community meetings often becomes “input without influence.”<sup>409</sup> This maxim brings into focus a paradox in American democracy: many people in carceral institutions have created influence without input. Responding to inequality made salient by the law, by the

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408. For a few key resources, see CTR. FOR NULEADERSHIP ON HUM. JUST. & HEALING, <https://www.nuleadership.org/staff-board> [<https://perma.cc/C6MX-XBUK>] (last visited Sept. 2, 2022); THE FORTUNE SOC'Y, <https://fortunesociety.org/> [<https://perma.cc/K7YH-G53X>] (last visited Sept. 2, 2022); JUSTLEADERSHIPUSA, <https://jlusa.org/> [<https://perma.cc/6J75-2QGA>] (last visited Sept. 2, 2022); THE FIRST 72+, <https://www.first72plus.org/> [<https://perma.cc/43T7-CLHF>] (last visited Sept. 2, 2022); SUSAN STURM & HARAN TAE, LEADING WITH CONVICTION: THE TRANSFORMATIVE ROLE OF FORMERLY INCARCERATED LEADERS IN REDUCING MASS INCARCERATION (2017), [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3034&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3034&context=faculty_scholarship) [<https://perma.cc/EQ6Y-CQMR>]; CRITICAL RESISTANCE, <https://criticalresistance.org/> [<https://perma.cc/5CWY-ANX6>] (last visited Sept. 2, 2022); BLACK & PINK, <https://www.blackandpink.org/> [<https://perma.cc/3MX3-W3CY>] (last visited Sept. 2, 2022); *Exoneree Advisory Council*, INNOCENCE PROJECT, [https://innocenceproject.org/disciplines/exoneree\\_advisory\\_group/](https://innocenceproject.org/disciplines/exoneree_advisory_group/) [<https://perma.cc/4232-HTQU>] (last visited Sept. 2, 2022); BARD PRISON INITIATIVE, <https://bpi.bard.edu/> [<https://perma.cc/D78T-LPL3>] (last visited Sept. 2, 2022); PA. PRISON SOC'Y, [https://www.prisonersociety.org/about\\_us](https://www.prisonersociety.org/about_us) [<https://perma.cc/9WTT-NM5L>] (last visited Sept. 2, 2022). Population-led coalitions and “lifers clubs” inside prison walls, better known for serving needs within prisons, have built inside-outside coalitions to advance policy projects, created opportunities for community connection, promoted public awareness of issues relating to mass incarceration, and organized for social change. *See, e.g.*, Anna Clark, *How a Group of Lifers Cracked the Code of Prison Reform*, POLITICO (June 25, 2020, 3:00 AM), <https://www.politico.com/news/magazine/2020/06/25/criminal-justice-prison-conditions-national-lifers-association-334021> [<https://perma.cc/4A9U-VCTF>]; Gregory K. Atkins, Opinion, *Lifers Club Shows Hopeful, Productive Life Can Continue in Prison*, KNOXVILLE NEWS SENTINEL (Aug. 30, 2018, 4:00 PM), <https://www.knoxnews.com/story/opinion/columnists/2018/08/30/lifers-club-shows-hopeful-productive-life-can-continue-prison/1057709002/> [<https://perma.cc/7M2Q-NHZW>].

409. Tony Cheng, *Input Without Influence: The Silence and Scripts of Police and Community Relations*, 67 SOC. PROBS. 171, 176 (2019) (finding that community meetings become “a mechanism of legitimating the input process, but only further reforc[e] the social order”); *see also* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 698 (2020) (“[W]hen people directly affected by the criminal legal system attempt to intervene in policy debates over criminal law and procedure, they find their calls muted because they are members of a population that has been systematically disenfranchised by the very systems of criminal law that they aim to reform.”).

prison, and by a deep reflection on who the law sends to prison, people held in cages have generated remarkable strategies, ideas, and moves that serve decarceral ends. Their innovative strides have made it more conceivable to gradually reduce the carceral footprint, opening up possibilities to create long-term legal and social change.

As many scholars and activists have argued, our current moment requires a profound commitment to transformative change. If we are serious about meaningful decarceration, it is essential to think alongside different ideas, actors, and partners. Some people in prison have produced important, even stunning, decarceral work, and fresh, brilliant ideas that would be startling even if generated by those not subject to carceral punishment. Ambitious ideas to reduce prison populations and reimagine public safety are percolating on the inside; some are inchoate, and some are yet to be conceptualized. These interventions continue to remain hidden to the outside but can be sparked by ongoing collective imagining. Our moment demands looking to people inside prison as decarceral partners. The test is whether we have the will to do so.