Public Law and Legal Theory Research Paper Series
Research Paper No. 22-24

Decarceration's Inside Partners

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DECARCERATION'S INSIDE PARTNERS

91 FORDHAM L. REV. (forthcoming)

Seema Tahir Saifee[*]

This Article examines a hidden phenomenon in criminal punishment. People in prison, during their incarceration, have made important, sometimes extraordinary, strides toward reducing prison populations. In fact, stakeholders in many corners, from policymakers to researchers to abolitionists, have harnessed the legal and conceptual strategies generated inside the walls to pursue decarceral strategies outside the walls that were once considered impossible. Despite this outside use of inside moves, legal scholars and reform-minded actors have disregarded the potential of looking to people on the inside as partners in the long-term project of decarceration.

Building on the change-making agency and revolutionary ideation inside the walls, this Article points the way to a new, 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 as thought leaders, let alone equal partners, to progress toward a noncarceral state. 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 law scholars 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 innovative, effective and more conceivable possibilities to radically transform our carceral state.

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INTRODUCTION

America's carceral footprint has earned criticism and condemnation from within and outside the nation. There is a growing 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 little agreement as to who, how, how much, or how fast to decarcerate.[1] As numerous scholars have shown, large-scale decarceration requires moving beyond low-level drug and non-violent crimes to dramatically reducing carceral punishment for offenses that criminal law classifies as violent.[2]

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[1] *See* Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 681 (2017) (book review) [hereinafter McLeod, *Beyond the Carceral State*] (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. R. (forthcoming 2022) (manuscript at 2) ("[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.").

[2] Over 50% of people in state prisons—which hold about 90% of the people held in U.S. prisons—have been convicted of a crime classified as violent. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2019, at 20 (2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf; JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION–AND HOW TO ACHIEVE REAL REFORM 6, 11-13 (2017) ("the 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

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How do we accomplish this? Many thoughts have emerged. John Pfaff has opined that "to reduce the prison population, prosecutors are going to be the ones who have to lead the way."[3] There are reasons to doubt this measure. Prosecutors have fueled the rise of prison populations.[4] This is, in part, a function of electoral politics.[5] Perhaps more so, the ideology of prosecution is in fundamental tension with large-scale decarceration.[6] Among prosecutorial offices that adopt decarceral platforms, their initiatives target mostly low-level drug and non-violent offenses.[7] This is even evident

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STATE AND THE LOCKDOWN OF AMERICAN POLITICS 165 (2015) (arguing that focusing on the "non, non, nons"—nonviolent, non-serious, non-sex related crimes—will not meaningfully cut the prison population).

[3] Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment.

[4] Paul Butler, *The Prosecutor Problem*, BRENNAN CENTER (Aug. 23, 2021), https://www.brennancenter.org/our-work/analysis-opinion/prosecutor-problem (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 __, 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").

[5] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509-10 (2001) (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) [hereinafter BARKOW, PRISONERS OF POLITICS] (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").

[6] *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 B.Y.U. L. REV. 669, 698 (1992) (describing this dual advocate/minister role as "ongoing schizophrenia"); Gottschalk, *supra* note __, 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).

[7] *See, e.g.,* Toobin, *supra* note __ (reporting that the Milwaukee County District Attorney "divide[s] our world in two," that is, "people who scare us, and people who irritate

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for the tiny subset of top law enforcers dubbed "progressive prosecutors."[8] 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."[9]

If prosecutors are ill-positioned to lead the decarceral way, so too are judges and legislators.[10] Some legal scholars have renewed calls to engage

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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, 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 (announcing during coronavirus pandemic that any prison releases by U.S. Attorney's Office in Washington D.C. 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/ ("Even with the threat of a deadly virus, so far governors have drawn the line at violence.").

[8] *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); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis,* UCLA L. REV. (forthcoming 2022) (arguing that progressive prosecutors are "at best a half-measure" to achieve real change and at worst risk legitimating the system).

[9] Pfaff, *supra* note __, at 186. Even some critics of mass incarceration are reticent to discuss the topic of violence. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 49-50 (2012) (arguing that avoiding the topic of violence disserves the anti-carceral movement and cedes terrain to proponents of tough-on-crime measures who can "present themselves as the sole defenders of public safety").

[10] *See, e.g.,* BARKOW, PRISONERS OF POLITICS, *supra* note __, 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 __, 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 245 (Justice Tankebe & Alison Liebling eds., 2013) [hereinafter, Simon, *Unenviable Task*] ("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. (forthcoming 2022) (manuscript at 2-4, 11) (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 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").

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"experts" to guide criminal policy decisions through data-driven methods.[11] A growing number of scholars have criticized the myth that deferring to the judgment of "experts" with educational credentials will lead to superior and rational decision-making, let alone deep, systemic change.[12] Like system actors, the expertise of elite academics and pseudo-professionals is also embedded in the construction and maintenance of the carceral state.[13] Although stakeholders within the system as well as those outside the system who hold traditional markers of expertise play an important role in reducing prison populations, these actors, alone, are unlikely to shepherd us to decarceral futures.[14]

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"[15] demands more than mainstream proposals by mainstream actors. David Sklansky argues that substantial decarceration demands reducing reliance on carceral punishment for violent crime[16] in conjunction with confronting how the law thinks about violence,[17] which is central to our carceral state.[18] Put another

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[11] *See, e.g.,* BARKOW, PRISONERS OF POLITICS, *supra* note __, at 165-85; John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 810 (2020).

[12] I discuss this further in Part III. *See* Benjamin Levin, *Criminal Justice Expertise*, FORDHAM L. REV. (forthcoming 2022) (manuscript at 2, 8) (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").

[13] *See infra* Part III; *see also* David Runciman, *Why Replacing Politicians with Experts is a Reckless Idea,* THE GUARDIAN (May 1, 2018) ("When a machine goes wrong, the people responsible for fixing it often have their fingerprints all over it already.")

[14] *See infra* Part III.

[15] Beckett, *supra* note __, at 21.

[16] 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, while excluding conduct that would be seen as violent under ordinary meanings. Sklansky, *supra* note __, at 69-70 (noting that the categories vary among states and even within the same state); *id.* at 236 ("The overreliance on violence as a legal category helped to create mass incarceration and now helps to sustain it.").

[17] Sklansky, *supra* note __, at 2-8; *id*. at 45, 232 (explaining that "the line between 'violent' and 'nonviolent' offenses has become the most important dividing line in criminal law," but that distinction and the significant weight placed on it are modern developments).

[18] *Id.* 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 __, at 200 ("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 __, at 20 (arguing that "shrinking and transforming [the U.S. penal system] will require multi-faceted strategies that address its varied drivers including the

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way, changing how the law and the public think about violence is central to 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, 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 policymakers, and spearheaded advancements in criminal procedure to reduce the numbers of people cycling into prison. I call these steps "inside decarceral moves." 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. This transformative role that people in prison have shouldered has been obscured by the systems we have built.

If decarceration demands reckoning with how the law and, by implication, how *we* think about violence, it inextricably demands confronting how the law thinks about the people it puts in prison. Framing decarceration in this way makes more apparent the essential role of people in prison: in that, among those whom our criminal law exiles from society, considers as disposable, and places under civil death are people who spend their days reckoning with *how the law thinks about them* and others in prison. 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, concepts and actions directed to transformative decarceral ends. These strides are not limited to formal law and legal discourse. People in cages have conceptualized alternative frameworks to understand the reasons for which the criminal legal system has locked them up, pushing reformers and abolitionists alike toward new strategies—on the front and back ends—to reduce prison populations.

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

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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 __, 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 the most challenging project).

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the prison. Given how many people we incarcerate and who we incarcerate, it may even be intuitive that some promising legal and conceptual ideas for reducing prison populations have originated in prisons.[19] In another sense, this phenomenon is astounding. People surviving carceral constraint, 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, inside prison cages that are designed neither to invite nor to facilitate innovation, but to quash it. The same site that we have created and that has allowed us to disclaim responsibility to think about the enduring inequalities and problems in our society[20] is a place where visionary ideas have been seeded to intervene in those very problems.

Our inability to contemplate people in prison as producing viable ideas for decarceration, let alone to unearth those visions, reflects and reproduces the ideological work of carceral punishment. Legal scholars routinely recount the stories—usually starting with a crime—of people in prison but rarely consider them as thought leaders, let alone equal partners, to progress toward a noncarceral state.[21] Despite vast study of prisons and jails and extensive use of case narratives, legal scholarship knows—and wonders—tremendously little about the decarceral imaginations and "think tanks" that surge behind bars. In a technocratic savior-based legal culture, people in prison are considered, primarily, as objects to cage, save or study.

This Article argues that it is essential for law scholars 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. Imagining with people banished from the polity is central to envisioning the freedom that can make

[19] *See infra* note __ (noting that this nation has imprisoned generations of leaders from Black, Latino and tribal communities).

[20] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 16 (2003) [hereinafter, DAVIS, ARE PRISONS OBSOLETE?].

[21] For two notable exceptions, *see* Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 380-81 (2021) (arguing for a legal right to redemption grounded in the Eighth Amendment, co-authored with a person in prison); and V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453 (2019) (representing the first full-length law review article on police abolition, co-authored with a person in prison). Law reviews also occasionally publish writings by people in prison. *See 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").

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decarceration more conceivable.[22] Inside-outside collaborations can deepen—and, to date, have deepened—perspectives on decarceral strategies beyond the limited imaginations in elite legal circles. To that end, this Article considers people in prison as our partners, and not our objects of study or charity. It thus goes beyond a call to listen to the *voices* or center the *experiences* of people in prison and focuses on igniting and investing in their *visions* for decarceration. On this point, discovering and developing inside decarceral imaginations does not contemplate a one-time survey or series of questionnaires. A survey would be limited in scope and ability, prompt finite responses, and is not conducive to, or a substitute for, long-term, generative dialogue and partnership. "Ideas get a toehold when there is an ongoing conversation between the speaker and her audience."[23]

To be sure, this Article makes no demand that people shut out of civic life take on this collective role, let alone lead the way. Such a mandate would equate to compelling extraction of strategies to decarcerate from people we have incarcerated. Rather, this Article reveals that engineers of decarceral change—from "everyday activists"[24] 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.[25]

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[22] *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 "black communities have greater freedom to envision and create democratic approaches to social harms—for themselves and for the nation as a whole").

[23] Lani Guinier, *The Supreme Court, 2007 Term -- Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 13 (2008); *see also* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11-22 (2003) (describing how collective imagining can lead to new legal, social and political understandings).

[24] 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).

[25] 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); Gimbel & Muhammad, *supra* note __, at 1521 (discussing anti-violence work inside prisons by people held in prison); DAVIS, ARE PRISONS OBSOLETE?, *supra* note __, at 58 (describing a college program introduced in a New

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Its main focus is the decarceral work and decarceral imaginations that take root inside prisons.

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 pioneering decarceral ideas conceptualized in prison have come to fruition in conversation and collaboration with those on the outside. Part I also examines how the criminal legal system and change-oriented actors have made enormous use of the capacity on the inside to enrich and accelerate the decarceral 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: disrupting the ideological function of the prison and revealing the democracy-enhancing agency of people in prison. I situate this account within legal scholarship that "looks to the bottom" to generate new understandings about law and social change. Part III explores the limits of adopting a lens of expertise to understand the value of people in prison in the project of 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—in progressing toward large-scale decarceration. In conclusion, I argue that thinking alongside people in prison is essential to cultivate imaginative, hopeful and transformative decarceral 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 DECARCERAL 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 population whose agency has upended legal, policy 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 reduce new prison admissions, for long stays or at all, release more people from prison or transform conventional understandings of the reasons

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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 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) [hereinafter Simonson, *Democratizing Criminal Justice*] (discussing the influence of prison hunger and labor strikes in sparking reforms to solitary confinement practices in California prisons).

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people land in prison.[26] Part I 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 Brown and were removed from poverty to prison. Part I describes how the criminal legal system and non-system 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."[27] As if the cage were somehow endemic to their very existence, we choose to adopt their locus as some type of nationality, calling them prisoners, inmates, offenders, and convicts. Throughout this Article, I describe people in prison as people in prison.[28] I do not begin any account—unless the decarceral move is contingent upon it—with the crime for which they were convicted.[29] The ideas in these pages were all generated by people convicted of crimes classified as violent: some were admittedly involved in violence, and some had strong evidence of innocence but were not able to prove it in a courtroom; these facts are mentioned, but not at the outset.[30] This Article centers their ideas.

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[26] *See* 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 ET AL., 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," especially for people convicted of violent crimes).

[27] John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 385 (1970); *see also* Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons From the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011) ("The . . . question is whether . . . the public imagination of the 'convict' could ever be reshaped.").

[28] *See* Open Letter from Eddie Ellis, Center on NuLeadership for Urban Solutions 1-2, https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf ("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.")

[29] *Cf.* IAN MANUEL, MY TIME WILL COME 3-4 (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 family, geography, neighborhoods, communities and institutions).

[30] I make this framing choice consciously because introducing these innovations through

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A. Changing the Law

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

1. Non-Unanimous Juries

In 1985, Calvin Duncan was sent to Louisiana's Angola prison to serve a life sentence.[31] At Angola, twenty-four-year old Duncan trained to be an "inmate counsel substitute."[32] People on Louisiana's death row had counsel on their death-qualifying offenses, but no legal representation on their non-capital convictions.[33] Duncan's assigned job was to assist people on the latter cases, for 20 cents an hour.[34]

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

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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 relevant details about crimes in footnotes. These choices are far from perfect but seek to balance focusing on the decarceral ideas. Whether this is the right approach, I am not sure, and I continue to grapple with this question.

[31] 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.

[32] *Id.; see also State v. Hicks*, 992 So. 2d 565 (La. Ct. App. 2008) (observing that the Louisiana Department of Public Safety & Corrections created the "inmate counsel substitute" 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*, 69 UCLA L. REV. DISCOURSE __ (2021) (contrasting the comparatively minimal and deficient training offered to counsel substitutes incarcerated in Louisiana's prisons for women).

[33] Telephone Interview with G. Benjamin Cohen, Chief of Appeals, Orleans Parish Dist. Att'ys Office (Oct. 11, 2021). Cohen was former Of Counsel at The Promise of Justice Initiative, a non-profit organization in New Orleans. In that position, he was counsel of record for the petitioner in *Ramos v. Louisiana*. *See* Brief for Petitioner, *Ramos v. Louisiana*, No. 18-5924 (June 11, 2019); Matt Sledge, *New Orleans DA Jason Williams hires Ben Cohen, Lawyer who Led Push Against Split Juries*, TIMES-PICAYUNE, Feb. 9, 2021.

[34] Telephone Interview with Cohen, *supra* note __; Bazelon, *supra* note __.

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review in the Louisiana Supreme Court via a writ of certiorari.[35] Absent a writ, people in prison would find their constitutional claims defaulted in federal court.[36] Duncan made a written public records request for LAP's policies on exhaustion.[37] The head of appeals denied the request on the basis that Duncan was not a "person" entitled to request the records.[38]

In Angola, Duncan met G. Ben Cohen, a lawyer who represented people on Louisiana's death row.[39] Duncan forwarded him LAP's public records response.[40] Unable to persuade LAP to exhaust its clients' claims to the state's highest court, Duncan decided to take on this role.[41] Alone and by organizing other inmate counsel substitutes, Duncan preserved constitutional claims for hundreds of people in prison.[42] Nearly everyone in Angola went to Duncan to file writs in the Louisiana Supreme Court.[43] With a ninth-grade education, Duncan did "what the entire public defender system[ ] of Louisiana . . . failed to do."[44]

Among the claims that Duncan preserved was a challenge to Louisiana's non-unanimous jury rule.[45] Of the over 6,000 people imprisoned in Angola, three out of four are serving a life sentence without parole.[46]

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[35] Telephone Interview with Cohen, *supra* note __; Email from G. Ben Cohen to author (Oct. 11, 2021); Louisiana Appellate Project, http://appellateproject.org/. *See Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (holding that there is no right to counsel in certiorari proceedings after direct appeal).

[36] *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 Cohen, *supra* note __ (stating that this was why the vast majority of case law coming from the Louisiana Supreme Court was driven off state writs).

[37] Telephone Interview with Cohen, *supra* note __.

[38] *Id.*; *see* LA. REV. STAT. ANN. § 44:31.1 (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).

[39] Telephone Interview with Cohen, *supra* note __.

[40] *Id.*

[41] Email from G. Ben Cohen to author (Oct. 11, 2021); Telephone Interview with Cohen, *supra* note __; Louisiana Appellate Project, *supra* note __.

[42] Telephone Interview with Cohen, *supra* note __ (stating that Duncan exhausted claims to the Louisiana Supreme Court so 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 to author (Oct. 11, 2021).

[43] Telephone Interview with Cohen, *supra* note __ ("[Duncan] put the entire criminal legal system on his back"); Email from G. Ben Cohen to author (Oct. 11, 2021).

[44] Email from G. Ben Cohen to author (Oct. 11, 2021).

[45] *Id.*; *see also* Bazelon, *supra* note __.

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

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Hundreds among them were convicted by a 10-to-2 or 11-to-1 vote,[47] where one or two jurors voted to acquit. In Angola, Duncan too often came upon divided verdicts where he thought the one or two dissenters had it right.[48] He researched how split verdicts in criminal cases could be constitutional.[49]

In a deeply fractured set of opinions in the 1972 case *Apodaca v. Oregon*,[50] five Justices of the U.S. Supreme Court found that the Sixth Amendment did not require unanimous verdicts in state criminal trials.[51] The tangled decision had grave implications in Louisiana, which has historically boasted the highest incarceration rate in the nation.[52] Duncan resolved to petition the Court to reconsider *Apodaca*.[53] The split verdict issue did not implicate his own case; he was convicted by a unanimous jury.[54] Still, Duncan understood split verdicts as "a civil rights issue affecting many, many people."[55] Louisiana and Oregon were the only states that allowed a person to be convicted of a serious felony by a non-unanimous jury.[56] Duncan

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[47] *Report: 1,500 La. Inmates Convicted by Nonunanimous Juries*, ASSOC. PRESS. (Nov. 21, 2020), https://www.shreveporttimes.com/story/news/local/louisiana/2020/11/21/report-1-500-inmates-louisiana-convicted-nonunanimous-juries/6378369002/ .

[48] Bazelon, *supra* note __.

[49] 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

[50] 406 U.S. 404 (1972) (plurality decision).

[51] Four Justices concluded that the Sixth Amendment did not require unanimous jury verdicts in either federal or state criminal trials. *Id.* at 406. Justice Powell, in a concurring opinion, insisted that the Sixth Amendment required juror unanimity in federal but not state criminal trials. *Johnson v. Louisiana,* 406 U.S. 366, 369 (Powell, J., concurring). Four dissenting Justices maintained 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 took Justice Powell's concurring opinion as controlling. *Id.* (collecting cases).

[52] Chavez, *supra* note __; *How Louisiana Became the World's 'Prison Capital,'* NPR (June 5, 2012), https://www.npr.org/2012/06/05/154352977/how-louisiana-became-the-worlds-prison-capital.

[53] Bazelon, *supra* note __.

[54] Liptak, *supra* note __ (stating that Duncan pursued the 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 Emily Maw, former director, Innocence Project New Orleans).

[55] Bazelon, *supra* note __ (quoting Cohen).

[56] Emily Maw & Jee Park, *Do Non-Unanimous Verdicts Discriminate? Louisiana Needs to Know,* NOLA.com (Oct. 5, 2017), https://www.nola.com/opinions/article_a48bd5c9-757f-508d-9c43-92031b5a5d6b.html ("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.").

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presented the approach to Cohen, who agreed to take to the high court any split-jury case Duncan brought to him.[57]

Between 2004 and 2019, the duo filed twenty-two petitions for a writ of certiorari.[58] Those 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.[59] The Court denied certiorari every time.[60] His persistence did not escape notice. In the 2010 Second Amendment incorporation case *McDonald v. City of Chicago*,[61] Justice 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."[62] It was the Justice's final dissent.

Accompanying his certiorari and exhaustion 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.[63] As a result, in about 2008, the Orleans Public Defenders instituted a policy to move for unanimous juries in all criminal trials.[64] In their template pleading, the defenders added a crucial fact: the split jury rule was first enshrined in Louisiana's constitution in 1898.[65] The stated purpose of the 1898 constitutional convention was to "establish the supremacy of the white race."[66]

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[57] Bazelon, *supra* note __ (quoting Cohen).

[58] Telephone Interview with Cohen, *supra* note __.

[59] *Id*. (describing the almost-two dozen petitions as "the tip of the iceberg").

[60] Bazelon, *supra* note __.

[61] 561 U.S. 742 (2010).

[62] *Id*. at 867-68 (Stevens, J., dissenting) (citing Pet. for Cert. in *Lee v. Louisiana,* No. 07–1523, *cert. denied*, 555 U.S. 823 (2008)); Email from G. Ben Cohen to author (Dec. 30, 2021) (noting that Lee had different counsel of record but Duncan shepherded that petition, encouraging Lee to exhaust the claim).

[63] Telephone Interview with Colin Reingold, Director of Strategic Criminal Litigation, The Promise of Justice Initiative, former Litigation Director and Senior Counsel, Orleans Public Defenders (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 to author (Jan. 6, 2022) (same).

[64] Telephone Interview with Reingold, *supra* note __ (stating that members of the private bar observed public defenders filing pre-trial motions for unanimous juries so they eventually began to preserve the issue as well).

[65] Telephone Interview with Reingold, *supra* note __.

[66] OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (H. Hearsey ed. 1898).

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After nearly thirty years, Duncan was released in 2011.[67] He continued to fill a role he assumed on the inside,[68] but with far greater resources. Every day, he read all of the opinions issued by the Louisiana Court of Appeals.[69] When a split verdict was affirmed on appeal, Duncan informed the inmate counsel substitute at Angola who exhausted the jury unanimity claim in the state supreme court.[70] He and Cohen then chose cert-worthy cases to take to the U.S. Supreme Court.[71]

As the defense bar began to preserve the right to a unanimous jury and presented Equal Protection arguments based on the rule's racist origins, state courts took interest but rejected the claims, based in part on a vacuum of evidence on disparate impact,[72] which one court foreboded "would be impossible . . . to show."[73] This judicial refrain led *The New Orleans Advocate*, Louisiana's largest daily newspaper, to scour records in thousands of felony trials to reveal the profound and enduring racial impact of

[67] Liptak, *supra* note __. 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. Innocence Project New Orleans, Calvin Duncan, https://ip-no.org/what-we-do/client-representation/freed-clients/calvin-duncan/ [hereinafter IPNO-Duncan] (noting that Duncan was convicted of first-degree murder in 1985 where the evidence against him was 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 __. 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. IPNO-Duncan, *supra*.

[68] Telephone Interview with Cohen, *supra* note __.

[69] Telephone Interview with Cohen, *supra* note __.

[70] *Id.* Duncan mailed the appellate opinions to the inmate counsel substitute. Telephone Interview with Katherine Mattes, Director, Criminal Justice Clinic, Tulane Law School (Oct. 12, 2021). Otherwise, by the time defense counsel awaited the decision in the mail, sent it to the prison and the prison delivered it to their client (assuming they were not, in the interim, transferred to another prison) there would be little time left to file a writ. *Id.*; Telephone Interview with Cohen, *supra* note __.

[71] Ellisa Valo, *Liberty and Justice After All*, LEWIS & CLARK MAGAZINE (Spring 2021), https://www.lclark.edu/live/news/45928-liberty-and-justice-after-all; Telephone Interview with Cohen, *supra* note __.

[72] See, e.g., *State v. Hankton*, 122 So. 3d 1028, 1037-38, 1041 (La. Ct. App. 2013) (acknowledging the racial animus to "disenfranchise" Black *voters* in the 1898 constitution but finding no evidence shown that race motivated the non-unanimous jury provision, and asserting that the state's 1974 adoption of a revised non-unanimity rule, whose stated purpose was "judicial efficiency," cleansed any racial animus that may have motivated its introduction in 1898); *State v. Webb*, 133 So. 3d 258, 285-86 (La. Ct. App. 2014) (finding no proof of discriminatory purpose or disparate impact).

[73] *Webb*, 133 So. 3d at 286.

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Louisiana's jury scheme.[74] The newspaper's analysis showed that in parishes across Louisiana between 2011 and 2016, forty percent of jury convictions ended with one or two holdouts and that Black people were thirty percent more likely than white people to be convicted by split juries.[75] More limited data in Louisiana's most populous parish, East Baton Rouge Parish, showed that Black jurors, while still far more likely to convict than not, were almost three times more likely to cast a dissenting vote than white jurors.[76] Retrieving this data was a daunting task.[77]

The Advocate's 2018 series was published just as the state legislature began debating a bill—its first serious push to change the law since 1974—that would allow Louisiana voters to amend the state constitution to require unanimous verdicts.[78] 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.[79] Representing the state's forty-two district attorneys,

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[74] Jeff Adelson, Gordon Russell & John Simerman, *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, THE ADVOCATE (Apr. 1, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html.

[75] Adelson et al., *supra* note __ (describing the study's methodology, dataset, and conclusions); John Simerman, *U.S. Supreme Court Refuses to Make Louisiana Ban on Non-Unanimous Juries Retroactive,* NOLA.COM (May 17, 2021), https://www.nola.com/news/courts/article_40f11aa4-a8dd-11eb-ae3e-dfa9c5d97cc6.html.

[76] Adelson et al., *supra* note __; Simerman, *supra* note __.

[77] 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*, THE ADVOCATE (Apr. 1, 2018), https://www.nola.com/news/courts/article_f3369eb7-2ca9-58be-bbc7-37409ee3b91d.html (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*, NOLA.com (Nov. 17, 2020), https://www.nola.com/news/courts/article_ddba16a8-2929-11eb-9072-ff7a00598e9f.html; Maw & Park, *supra* note __ (stating that no court collects this data consistently and comprehensively); Adelson et al, *supra* note __ ("Even the aggregate vote count is absent from many trial records[.]").

[78] Chris Granger, *The Advocate Wins First Pulitzer Prize for Series that Helped Change Louisiana's Split-Jury Law,* THE ADVOCATE (Apr. 15, 2019), https://www.theadvocate.com/baton_rouge/news/article_dba87282-5f28-11e9-92b3-bfba0cf08ab2.html; John Simerman & Gordon Russell, *Louisiana Voters Scrap Jim Crow-era Split Jury Law; Unanimous Verdicts to be Required*, THE ADVOCATE (Nov. 6, 2018), https://www.theadvocate.com/baton_rouge/news/politics/elections/article_194bd5ca-e1d9-11e8-996b-eb8937ebf6b7.html.

[79] Bazelon, *supra* note __; Thomas Aiello, *Non-Unanimous Juries,* 64 PARISHES, https://64parishes.org/entry/non-unanimous-juries (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*, MARSHALL PROJECT (Mar. 12, 2020). By this time, advocacy,

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the Louisiana District Attorneys Association initially took a strong position against the bill.[80] After the newspaper's coverage began, the association opted to stay neutral; the bill then gained bipartisan momentum and passed both chambers.[81] In November, 2018, by a nearly 2-to-1 margin, Louisiana voters overwhelmingly approved the constitutional amendment to require unanimous verdicts in all felony trials,[82] leaving Oregon the only remaining state to allow less-than-unanimous juries. The amendment, however, applied only prospectively.[83]

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."[84] The sponsor omits that the non-unanimous jury rule was known, for decades, to journalists covering the Louisiana courts.[85] What made the reporting "ripe" was Duncan's methodical and rigorous push to build the issue in the courts.[86] Duncan's work inspired new subjects of data

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academic scholarship and popular writing on the historical roots and modern outgrowth of the jury rule, and coverage on the Supreme Court petitions, had proliferated. *See, e.g.,* THOMAS AIELLO, JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY TRIALS IN LOUISIANA (2015) (exposing the law's "design[ ] to increase convictions to feed the state's burgeoning convict lease system"); 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, 592-97 (2016); Angela A. Allen-Bell, *These Jury Systems are Vestiges of White Supremacy*, WASH. PO. (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 (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*, NOLA.COM (Sept. 13, 2017), https://www.nola.com/news/crime_police/article_1436dfe9-b963-5e6d-8aa2-beacdee3bde2.html (discussing racist roots of Louisiana's law and certiorari petition of Dale Lambert); Andrew Cohen, *A Vestige of Bigotry*, THE MARSHALL PROJECT (Sept. 25, 2017), https://www.themarshallproject.org/2017/09/25/a-vestige-of-bigotry (same); Email from G. Ben Cohen to author (Dec. 30, 2021) (stating that Lambert was a split jury case Duncan brought to him to take to the U.S. Supreme Court).

[80] Simerman & Russell, *supra* note __.

[81] *Id.*; Granger, *supra* note __.

[82] Granger, *supra* note __; Simerman & Russell, *supra* note __.

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

[84] Granger, *supra* note __ (quoting state senator JP Morrell).

[85] Telephone Interview with John Simerman, Reporter, The New Orleans Advocate (Dec. 17, 2021).

[86] Telephone Interview with Simerman, *supra* note __ (emphasizing that the newspaper began the data project because Louisiana courts noted the absence of contemporary data that the 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").

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collection,[87] dramatically changing how the courts, prosecutors, legislators and the public thought about the endurance of structures of white dominance. Those racist structures would become central to the long-awaited Supreme Court decision.

In 2019, the Supreme Court granted certiorari in the 23rd petition that Duncan and Cohen co-wrote: *Ramos v. Louisiana*.[88] In 2020, the Court overturned the 2016 murder conviction of Evangelisto Ramos, who was serving a life sentence without parole after a 10-to-2 verdict.[89] Calling *Apodaca* "gravely mistaken," the Court ruled that the Sixth Amendment requires unanimous jury verdicts in state criminal trials.[90] The momentous decision announced a new rule of criminal procedure.[91]

"Without Calvin [Duncan], *Ramos* wouldn't exist."[92] 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 time in prison, with some saved entirely from conviction and imprisonment.[93] 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 the *Ramos* decision to pursue new strategies to reduce the time people stay in prison, release people in prison, or both. Although the

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[87] Adelson et al., *supra* note __ (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 Reingold, *supra* note __ (stating that this pre-trial hearing took place only because Duncan "drilled into" the defense bar the importance of preserving the unanimity issue); Telephone Interview with Simerman, *supra* note __ (stating that verdict data could be collected at any time, but Duncan's work to raise the issue in the courts gave the journalists a "reason to do th[e] project").

[88] *Ramos v. Louisiana,* 139 S. Ct. 1318 (2019) (mem.) (granting cert.).

[89] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1391 (2020).

[90] *Id.* at 1397, 1405.

[91] *Id.* at 1406.

[92] Telephone Interview with Cohen, *supra* note __ ("Calvin was a relentless force in a place that is designed to suppress hope."); Valo, *supra* note __ ("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);

[93] *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*, THE ADVOCATE, (Apr. 21, 2018), https://www.nola.com/news/article_175540ba-e44d-5ea0-a734-970600159c77.html; *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").

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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,[94] the top prosecutor in New Orleans opted not to await the retroactivity decision, vowing to review the roughly 340 cases in Orleans Parish whose split-jury convictions became final.[95] Oregon lawmakers are considering taking up the Court's invitation to apply the new rule in state post-conviction proceedings.[96] A bill proposed in the Oregon legislature would open the door to vacating hundreds, or, by some estimates, more than 1,000, past non-unanimous convictions to be re-tried, pled out or dismissed.[97]

Duncan's inside-outside partnership 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 and Oregon's majority-jury rules.[98] In Louisiana, the Court observed, the 1898 constitutional convention delegates were aware that overt exclusion of Black jurors would be struck down by the Supreme Court[99] and sought to undermine

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[94] *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021).

[95] McGill, *supra* note __ (noting that the 300-plus people with split-verdicts in New Orleans are out of about 1,600 in the state); Sledge, *supra* note __; Ortiz, *supra* note __ . The district attorney also moved to vacate convictions of twenty-two people convicted of felonies by split juries. Kevin McGill, *Prosecutor Moves to Vacate 22 Non-Unanimous Jury Convictions*, ASSOC. PRESS (Feb. 26, 2021), https://www.usnews.com/news/best-states/louisiana/articles/2021-02-26/prosecutor-moves-to-vacate-22-non-unanimous-jury-convictions (noting that five cases were reviewed to determine whether charges should have ever been filed and, of the seventeen being re-tried, 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); Erik Ortiz, *Ahead of Supreme Court's Decision on Split Juries, New Orleans DA tackles 'Jim Crow Office'*, NBC (May 9, 2021), https://www.nbcnews.com/news/us-news/ahead-supreme-court-s-decision-split-juries-new-orleans-da-n1266688 (noting that these twenty-two split jury convictions occurred between 1974 and 2014).

[96] *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.")

[97] Conrad Wilson, *Oregon Lawmakers to Consider Relief for Those Convicted by Non-Unanimous Juries*, OREGON PUBLIC BROADCASTING (Nov. 16, 2021), https://www.opb.org/article/2021/11/16/non-unanimous-juries-new-oregon-legislation/ (reporting that "[t]he idea for the legislation follows two recent U.S. Supreme Court rulings" and that, according to the state department of justice, "many cases will result in an outright dismissal"); Noelle Crombie, *Oregon Lawmakers to Take Up Bill that Could Toss out Hundreds of Felony Convictions Based on Split Jury Verdicts*, THE OREGONIAN (Nov. 17, 2021), 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.

[98] *Ramos*, 140 S. Ct. at 1394.

[99] *Strauder v. State of 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).

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the influence of Black jurors in a different way, by "sculpt[ing] a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'"[100] 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.[101] Melissa Murray conceptualizes this move to reflect the Court's interest in reconsidering and overruling precedent, in part, to redress racial injustice.[102]

Over 1,500 people remain in Louisiana prisons following non-unanimous verdicts, of whom 80% are black and more than 60% are serving life sentences without parole.[103] The majority-jury rule incentivized

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

[101] *Ramos*, 140 S. Ct. at 1394.

[102] Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2079-81 (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.") (internal citation omitted). *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 non-unanimous juries operate "as an engine of discrimination against black 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 ("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.").

[103] *New Report: 80% of People Still Imprisoned Due to Jim Crow Jury Verdicts are Black, Most are Serving Life Sentences*, The Promise of Justice 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 (finding that 62% of people with split verdicts are serving life sentences compared to just 16.3% of Louisiana's overall adult prison population). Even the latter percentage is the highest in the nation. Skene, *supra* note __. *See also* Promise of Justice Initiative, *supra* (stating that the jury rule helped 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 (stating that is impossible to know how many people were convicted by split juries in Louisiana). For similar reasons it remains unclear how many people were convicted by split juries in Oregon. *See* Crombie, *supra* note __ (noting stark racial disparities in split verdict convictions in Oregon).

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prosecutors to charge more serious crimes than the evidence warranted that carried more severe penalties, resulting in "more people serving more time in prison."[104] 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."[105] 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."[106] Non-unanimous juries helped Louisiana become the nation's leader in locking people up for life.[107] Spearheading their demise from inside a cage[108] produced their elimination.

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[104] Russell et al., *supra* note __. 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*, NOLA.COM (Apr. 21, 2018), https://www.nola.com/news/courts/article_e737f0e7-7d8a-5fc7-84bf-22f33277ea89.html (stating 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 Sen. Dan Claitor); *id.* (noting that non-unanimous 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 non-unanimous six-person jury in a state criminal trial for a nonpetty offense is unconstitutional).

[105] Russell et al., *supra* note __.

[106] Russell et al., *supra* note __ (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").

[107] Lea Skene, *Louisiana's Life Without Parole Sentencing the Nation's Highest – and Some Say That Should Change*, THE ADVOCATE (Dec. 7, 2019), https://www.theadvocate.com/baton_rouge/news/article_f6309822-17ac-11ea-8750-f7d212aa28f8.html (stating that Louisiana has the highest percentage of people serving life without parole in the nation); Russell et al, *supra* note __.

[108] Duncan's "legacy is broader than one specific legal issue." Telephone Interview with Cohen, *supra* note __. 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 non-capital appeal in Juan Smith's case, which culminated in the U.S. Supreme Court reversing Smith's murder conviction by a 8-to-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 __; Telephone Interview with Mattes, *supra* note __ (stating that Duncan secured habeas relief for a person with mental illness whom he observed was unable to initiate a case and, as such, 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 __ (noting that Rideau described Duncan as "the most brilliant legal mind in Angola,"

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2. *Armed Career Criminal Act*

Popular writing and legal elites chronicle the myriad ways that people in cages 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 profession harness the agency and aptitude behind bars to generate long-term decarceral outcomes.

In 2015, William Dale Wooden was indicted in federal court in Tennessee on a felon-in-possession charge.[109] He maintained his innocence.[110] His federal public defender advised him that he was facing a sentence of 21 to 27 months in prison if he were to plead guilty.[111] Relying on that advice, Wooden entered a guilty plea in August, 2016.[112] His counsel's assessment was correct. The presentence report recommended that Wooden receive a sentence within the Guidelines range of 21 to 27 months' imprisonment.[113] The government filed a notice that it did not object.[114] Having served much of his expected sentence, Wooden anticipated release by Christmas 2016.[115]

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stating, "I would not be [out] but for Calvin."). Duncan was even a resource for seasoned attorneys. *Id*. (stating that capital defense lawyers advised now-Tulane Law Professor Katherine Mattes, whose legal question stumped them, to visit Duncan, who was able to answer her legal question); Video Interview with Emily Bolton, Director, APPEAL; former Director and 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); IPNO-Duncan, *supra* note __ (noting that Duncan helped establish IPNO while he was in prison); s*ee also* Bazelon, *supra* note __ (stating that Duncan helped train other inmate counsel substitutes before his release). He also brought to prosecutors' attention the forgotten "10-6ers," the oldest and longest-serving people in Louisiana prisons who are now being resentenced and released or under imminent consideration. Email from G. Ben Cohen 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 (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 five decades when Louisiana stiffened and then eliminated parole eligibility in the 1970s); Chavez, *supra* note __ (explaining that prosecutors and other stakeholders were unaware of the "10/6 lifers").

[109] Indictment, *United States v. Wooden*, No. 15-cr-12, Dkt. No. 1 (E.D. Tenn. Mar. 3, 2015).

[110] Opinion and Order, *Wooden*, No. 15-cr-12, Dkt. No. 59, pp. 4, 6 (E.D. Tenn. Nov. 29, 2017) [hereinafter *Wooden* Order].

[111] Mem. of Law in Supp. of Mot. to Withdraw Guilty Plea, *Wooden*, No. 15-cr-12, Dkt. No. 51, pp. 1-2 (E.D. Tenn. June 21, 2017) [hereinafter *Wooden* Mem. in Supp.].

[112] *Id.* at 2; *Wooden* Order, at 2, 5-6.

[113] *Wooden* Order, at 2.

[114] *Id.*

[115] *Id.*; *Wooden* Mem. in Supp., at 2.

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Shortly before sentencing, the government changed course and sought to label Wooden a career criminal under the federal Armed Career Criminal Act ("ACCA").[116] 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."[117] The ACCA imposes one of the harshest punishments in federal law.[118]

The government argued that Wooden was "precisely the kind of individual whom the ACCA was meant to punish."[119] In 1997, two decades earlier, Wooden and others breached the exterior of a ministorage facility in Georgia on one night and broke through the drywall that connected ten of the units.[120] The government argued that the ministorage burglaries, 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."[121]

Wooden withdrew his guilty plea on the felon-in-possession charge.[122] In 2018, he was convicted by a jury.[123] At sentencing, the government argued that the two-decade-old mini-storage burglaries "were committed on occasions different from one another" based on the principle

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[116] The government relied on an intervening case, *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016). *Wooden* Mem. in Supp., at 2, 6; *Wooden* Order at 2-3.

[117] 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, Pub. L. No. 98-473, § 1802, 98 Stat. 2185. Two years later, Congress amended the provision to apply 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. 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. 4402 (1988). The statute puts no limit on the age of the convictions which can be used as predicates. *See also United States v. McElyea*, 158 F.3d 1016, 1019-20 (9th Cir. 1998) (discussing legislative history).

[118] Brief of the National Association of Federal Defenders as *Amicus Curiae* in Support of Petitioner, at 1, *Wooden v. United States*, 141 S. Ct. 1370 (2021) (No. 20-5279) [hereinafter Br. of Federal Defenders]; *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 ACCA has been "erratically and discriminatorily applied").

[119] Gov. Sentencing Mem., *Wooden*, No. 15-cr-12, Dkt. No. 41, p. 9 (E.D. Tenn. Dec. 1, 2016) [hereinafter Gov. Sentencing Mem.];

[120] Brief for the Petitioner, at 3-4, *Wooden v. United States,* No. 20-5279 (May 3, 2021).

[121] Gov. Sentencing Mem., at 8 n.9; *see also* Response to Def.'s Sentencing Mem., *Wooden*, No. 15-cr-12, Dkt. No. 85, p. 1, 3, 5 (E.D. Tenn. Feb. 12, 2019).

[122] *Wooden* Order, at 10.

[123] Minute Entry., *Wooden*, No. 15-cr-12, Dkt. No. 68 (E.D. Tenn. May 30, 2018).

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that "[y]ou cannot be in two locations at the same time."[124] Wooden challenged his designation as a career criminal, arguing that the ten ministorage burglaries arose out of a single occasion on the same date, time and place.[125] 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."[126] Finding that he had built a criminal "career" over the course of one night, the district court sentenced Wooden to 188 months in prison.[127] The Sixth Circuit affirmed.[128]

Two months into the COVID-19 pandemic, indigent and in federal prison, Wooden requested the assistance of counsel to take his case to the U.S. Supreme Court.[129] Hearing no response from the district court, and with the deadline imminent, Wooden, *pro se,* prepared a petition for a writ of certiorari.[130] In the questions presented, he raised the "absence of clear statutory definition" in ACCA's occasions clause.[131] He argued, as his counsel did below, that the ten burglaries in his case should be treated as "one criminal episode."[132] 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."[133] With a ninth-grade education,[134] he asked the

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[124] Response to Def.'s Sentencing Mem., *Wooden*, No. 15-cr-12, Dkt. No. 85, p. 1, 3-5 (E.D. Tenn. Feb. 12, 2019); Sentencing Proceedings, *Wooden*, No. 15-cr-12, Dkt. No. 86 (Feb. 21, 2019). The government also rested on a 1989 assault and a 2005 burglary as 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).

[125] Def.'s Sentencing Mem., *Wooden*, No. 15-cr-12, Dkt. No. 84, p. 6 (E.D. Tenn. Jan. 31, 2019).

[126] *Wooden*, 945 F.3d at 501; Sentencing Proceedings, *Wooden*, No. 15-cr-12, Dkt. No. 86 (Feb. 21, 2019); Brief for the Petitioner, at 7, *Wooden v. United States,* No. 20-5279 (May 3, 2021) (stating that the district court found eleven ACCA predicates: the ten ministorage burglaries in 1997, plus a burglary conviction from 2005). Given the court's finding that Wooden had one other ACCA predicate, the ministorage count was dispositive.

[127] Minute Entry., *Wooden*, No. 15-cr-12, Dkt. No. 87 (E.D. Tenn. Feb. 21, 2019).

[128] *Wooden*, 945 F.3d at 500, 505 ("Whatever the contours of a 'mini' warehouse, Wooden could not be in two (let alone ten) of them at once.").

[129] *Wooden*, No. 15-cr-12, Dkt. No. 97 (E.D. Tenn. June 1, 2020) (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).

[130] Pet. for Cert., *Wooden v. United States,* No. 19–5189 (July 24, 2020) [hereinafter Wooden Pet. for Cert.]; The district court eventually denied his request for appointment of counsel. *Wooden*, No. 15-cr-12, Dkt. No. 99 (E.D. Tenn. July 30, 2020).

[131] Wooden Pet. for Cert.

[132] Wooden Pet. for Cert., at 8.

[133] Wooden Pet. for Cert., at 4, 9-10; *see Wooden*, 945 F.3d at 504.

[134] *Wooden* Mem. in Supp., at 7.

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Court to "*once again* review a portion of § 924(e) [ACCA] as void-for-vagueness."[135] The Supreme Court ordered the government to respond.[136]

A law firm with a Supreme Court practice group researched the issue to understand why the Court ordered a response to a *pro se* certiorari petition.[137] Wooden's petition implicated an extensive circuit split over the interpretation of ACCA's occasions clause that had resulted in anomalous ACCA consequences for nearly identical conduct across the nation.[138] The firm reached out to the federal prison to set up a telephone call with Wooden.[139] Represented now 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.[140] The

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[135] Wooden Pet. for Cert., at 4 (emphasis added); Telephone Interview with Andrew Tutt, Senior Associate, 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,* 576 U.S. 591, 594, 597 (2015) (striking 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. MUMIA ABU-JAMAL, JAILHOUSE LAWYERS: PRISONERS DEFENDING PRISONERS V. THE USA 31 (2009) ("[It is learned] not in the ivory towers of multi-billion-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.").

[136] *See* Minute Entry, *Wooden v. United States,* No. 20-5279 (Sept. 22, 2020), *at* https://www.supremecourt.gov/docket/docketfiles/html/public/20-5279.html.

[137] *Inmate Petitioned SCOTUS Alone, Then Arnold & Porter Stepped In*, BLOOMBERG LAW (Feb. 24, 2021), https://news.bloomberglaw.com/us-law-week/inmate-petitioned-scotus-alone-then-arnold-porter-stepped-in [hereinafter *Inmate Petitioned SCOTUS Alone*]; Telephone Interview with Tutt, *supra* note __.

[138] *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.") (internal citation omitted); 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.").

[139] *Inmate Petitioned SCOTUS Alone*, *supra* note __ ("getting in touch with Wooden 'took a fair amount of work[ ]'") (quoting partner at Arnold & Porter).

[140] Reply Br. for the Petitioner, at 1, *Wooden v. United States*, No. 20-5279 (Jan. 6, 2021) [hereinafter Reply Br.]; *see also* Paulose, *supra* note __, 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 Br., at 21 ("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.").

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Court granted the petition for certiorari.[141] It will be the first time the ACCA occasions clause is squarely before the U.S. Supreme Court.

Although retroactivity is unclear, if Wooden's challenge is successful, the people affected "likely number[ ] in the thousands."[142] His challenge has future implications for untold numbers of people subject to the severe mandatory minimum and consequences for other recidivist statutes.[143] People sentenced under the ACCA comprise a small portion of the federal criminal caseload, but their sentences are substantial.[144] The mere existence of the harsh sentencing law has considerable indirect effects.[145]

Significantly, Wooden's petition also tees up a Sixth Amendment challenge to the occasions test that has been rejected by every circuit court in the nation for two decades.[146] The constitutional challenge—grounded in

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[141] *Wooden v. United States,* 141 S. Ct. 1370 (2021) (mem.) (granting cert.). 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* Wooden Pet. for Cert., at 2, 5-7; Reply Br., at 3. The Court granted certiorari only on the occasions clause question. *See Wooden*, 141 S. Ct. 1370 (2021) (mem.) (granting cert on question two).

[142] Reply Br., at 9; *id.* at 5-7 (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 __, at 8.

[143] Br. of Federal Defenders, 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 __, at 8; *see also id.* at 9-12 (describing "ruthless impact of the ACCA different occasions clause as it is now interpreted by judges").

[144] *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 __, at 86 (arguing that prosecutors and judges "are misusing the ACCA to issue what are essentially life sentences to a whole swath of people").

[145] Beckett, *supra* note __, 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 __, at 12 (explaining that ACCA has "become a tool used at the whim of prosecutors").

[146] 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 the *simple fact of* a prior conviction." *Mathis v. United States*, 136 S. Ct. 2243, 2252 (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 test. Brief for Amicus Curiae the National

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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.[147] The *pro se* petition holds potential to put a major dent in a 1980s-era tough-on-crime law.

For a Supreme Court that pursues the perfect "test case" to change the law—a venture that is challenging to set up in civil cases[148] and next to impossible in criminal law[149]—the agency of people in prison can be critical. Not unlike most lawyers, most people in prison do not anticipate what issues 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.[150] Presenting legal claims that their lawyers forego, they become part

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Association of Criminal Defense Lawyers in Support of Petitioner, at 5, 7, 24-25, *Wooden v. United States*, 141 S. Ct. 1370 (2021) (No. 20-5279) (arguing that the occasions inquiry involves judicial fact-finding 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 __, at 77-81 (collecting circuit court cases).

[147] Paulose, *supra* note __, at 21-57 (recounting in detail Supreme Court cases). In a 5-4 decision, the Supreme Court in *Almendarez-Torres*, 523 U.S. 224, 226-27, 247 (1998), 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. 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 urged its reversal. *See, e.g., Shepard v. United States*, 544 U.S. 13, 27 (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 . . . .") (internal 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.'").

[148] *See Supreme Court Lawsuits in Search of a Plaintiff*, BLOOMBERG LAW (Apr. 16, 2018), https://news.bloomberglaw.com/business-and-practice/supreme-court-lawsuits-in-search-of-a-plaintiff.

[149] I thank Andrew Tutt for making this point about test cases.

[150] *Cf. supra* note __ [Jane Mansbridge FN] and accompanying text.

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of the process of shaping new constitutional meanings, pushing us toward new possibilities to incrementally and—as the next Part shows—dramatically reduce our carceral footprint.

B. Idea-Generation

Accompanying the work to challenge unjust state and federal laws from inside the walls is deep contemplation by people in prison to conceptualize alternative frameworks to understand why the criminal legal system has locked them up. These innovations engage incarceration differently, pushing the outside toward 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 trailblazing ideas seeded inside prison walls that have guided, inspired and deepened the decarceral work on the outside.

1. Neighborhood-to-Prison Migration

In September, 1971, more than one thousand 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.[151] People incarcerated in Attica took some staff hostage in a demand to end dehumanizing conditions and racial abuse.[152] 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.[153] Deploying enormous lethal force to suppress the rebellion, authorities tortured people in prison and pursued a cover-up that lasted decades.[154]

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[151] 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), https://www.nydailynews.com/news/remembering-attica-prison-riots-gallery-1.2781829.

[152] Bailey, *supra* note __.

[153] Thompson, *supra* note __, at 153-180; Larry Getlen, *The True Story of the Attica Prison Riot*, N.Y. POST (Aug. 20, 2016), https://nypost.com/2016/08/20/the-true-story-of-the-attica-prison-riot/; Bailey, *supra* note __.

[154] Thompson, *supra* note __, at 227-241, 486-91; Erik Wemple, *Journalists Bungled Coverage of the Attica Uprising; 50 Years Later, the Consequences Remain*, WASH. PO. (Sept. 30, 2021), https://www.washingtonpost.com/opinions/2021/09/30/attica-chronicle-media-disaster/ (noting that the state attempted to cover up murdering its own employees by casting blame on the people in prison when autopsies confirmed gun shots from authorities); Getlen, *supra* note __; Bailey, *supra* note __.

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After the Attica rebellion, hundreds of people were transferred to Green Haven, a maximum security prison in New York.[155] Transfers continued for years from the state's most brutal prisons, culminating in the New York Department of Corrections ("NY DOCCS") issuing a directive to send the "toughest," most violent, and "hard-core inmate[s]" to Green Haven.[156] Among the transferees were people whose revolutionary consciousness was viewed as disruptive to prison operations.[157]

In Green Haven, Larry White realized that people in prison needed new strategies of resistance that "mobilized ideas."[158] With a sixth-grade education, White founded a study group called the "Think Tank."[159] Eddie Ellis, a Black Panther who witnessed the Attica rebellion, along with others sent to Green Haven, joined the Think Tank.[160] At this time, study groups could meet with relative ease, sometimes with community sponsors, in the tolerance for reform that followed the rebellion.[161] That would soon change.

Between 1971 and 1981, New York's prison population had more than doubled.[162] Eighteen new prisons were constructed, opened or

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[155] Orisanmi Burton, Attica Is: Revolutionary Consciousness, Counterinsurgency and the Deferred Abolition of New York State Prisons 121-22 (2016) (Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with author).

[156] *Id*. at 122; 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; DAVIS, ARE PRISONS OBSOLETE?, *supra* note __, at 58.

[157] NYDOCCS "took all the so-called ringleaders from the different prisons and for some reason put us all in the same joint." Burton, *supra* note __, at 122 (quoting Larry White); Pam Widener, *Man of the Year: Eddie Ellis at Large,* PRISON LEGAL NEWS 49 (1996), https://www.prisonlegalnews.org/media/publications/Prison_Life_October_1996.pdf.

[158] Burton, *supra* note __, at 119 (noting that White was sent to Green Haven after leading a 1970 rebellion in Auburn prison, before Attica).

[159] *Id.* at 116, 129 (noting that White founded the study group in 1972); *see also* Center for NuLeadership on Human Justice and Healing, https://www.nuleadership.org/history (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").

[160] Burton, *supra* note __, at 5-6, 59, 106; *id.* at 216, Appx. I, Green Haven Think Tank Document 3 (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 __, at 50 (noting that members were mostly "lifers").

[161] Burton, *supra* note __, 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 __, at 51; Don Goodman & Maggie Smith, *An Interview with Eddie Ellis*, 22 HUMANITY AND SOCIETY 98, 102 (1998) (noting increased community entry into the prison post-Attica).

[162] THE PRISON POPULATION EXPLOSION IN NEW YORK STATE – A STUDY OF ITS CAUSES AND CONSEQUENCES WITH RECOMMENDATIONS FOR CHANGE, THE CORRECTIONAL ASSOCIATION OF NEW YORK 1 (1982).

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renovated between 1971 and 1979.[163] The Commissioner of NY DOCCS announced that the department was no longer engaged in rehabilitation but only on "finding the next cell."[164] Areas in prisons once slated for programming and special events were repurposed to warehouse more bodies.[165] In his proposed budget for the 1982-83 fiscal year, New York Governor Hugh Carey requested over $322 million for NY DOCCS with at least $241 million slated for prison expansion.[166]

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.[167] People held in Attica had conceptualized the prison not as a discrete site, but as a relationship between the state and Black and Latino communities in the nation's mostly urban neighborhoods, also a "kind of carceral site."[168] This metaphor was rooted in Black intellectual traditions.[169] White elaborated the concept—described by people in Attica 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 Latino neighborhoods.[170]

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[163] *See* State of New York Department of Correctional Services Master Plan 1980-85 p. 103 (Jan. 1981), https://www.ojp.gov/pdffiles1/Digitization/91605NCJRS.pdf.

[164] *Id.* at 151 (citing sworn affidavit of NY DOCCS Commissioner) ("As of December 4, 1981, the inmate population of 25,490 represents 112 percent of the system's capacity.").

[165] *Id.*; *see also* Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CENTER (Aug. 9, 2021) (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 programs reduce recidivism rates and violence in prisons); Sheppard, *supra* note __ (discussing connection between overcrowding, limited program space, people being idle, and violence).

[166] Burton, *supra* note __, at 151-52.

[167] *Id.* at 152; *see also id.* at 130-31, 218, Appx. I, Green Haven Think Tank Document 5 (1972) (re-defining 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").

[168] *Id.* at 113-14 (describing how the Attica Brothers 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) (citing McKay Commission hearings); *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").

[169] *See, e.g.,* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 8 (1903) (describing the "shades of the prison-house closed round about us all"); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 701 (1935) (condemning the failure of Reconstruction for 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 20th Century).

[170] Burton, *supra* note __, at 113-16, 152 ("Captives knew this from experience, as they

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To substantiate the anecdotal evidence, Eddie Ellis had an idea to pinpoint the neighborhoods that supplied the state's prison population.[171] The study group obtained technical support from a Black-led non-profit urban research center.[172] The Think Tank found that 85% of New York's prison population was Black or Latino and that 75% of the state's entire prison population came from just seven neighborhoods in New York City.[173] The neighborhoods were encompassed by seventeen assembly districts.[174] The seven neighborhoods 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."[175]

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.[176]

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often found themselves imprisoned alongside many of the people they know in the street."); Widener, *supra* note __, at 49-50 ("Every prison I was in," [Ellis] says, "I seemed to know everyone," either directly from the neighborhood or within two degrees of separation).

[171] Burton, *supra* note __, at 153.

[172] THE SEVEN NEIGHBORHOOD STUDY REVISITED, CENTER FOR NULEADERSHIP 3, https://static1.squarespace.com/static/58eb0522e6f2e1dfce591dee/t/596e1246d482e9c1c6b86699/1500385865855/seven-neighborhood+revisited+rpt.pdf [hereinafter SNS] (describing 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 __, at 138. MARC eventually became an early ally. *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. In the 1940s and 1950s, Dr. Kenneth Clark and Dr. 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/ (reporting that the doctors' research and expert testimony played a role in the U.S. Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954)).

[173] SNS, *supra* note __, at 3-4 (identifying the seven neighborhoods and the regions that supplied the remaining 25% of the state prison population).

[174] SNS, *supra* note __, at 3 (explaining that the state assembly districts were identified for geographic reference and political support); Goodman & Smith, *supra* note __, at 99.

[175] Widener, *supra* note __, at 50 (quoting Ellis); *see also* SNS, *supra* note __, 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/ ("These communities have been historically deprived of resources and then criminalized in their struggle to survive.").

[176] Burton, *supra* note __, at 153; *see also* Goodman & Smith, *supra* note __, at 99-100;

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From their research, which became known as the "Seven Neighborhoods Study," the Think Tank developed "The Non-Traditional Approach to Criminal and Social Justice.[177] 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 lied in the community.[178] The study group proposed shifting funds from the state's prison budget to re-appropriate for education and economic development in the seven neighborhoods.[179] At the time—indeed for decades—the radical proposal, rooted in a long-term abolitionist agenda,[180] met with little support.

The Green Haven study, conducted in 1979-1980, and issued again in 1990, won little popular attention until 1992, when the *New York Times* "catapulted" its findings.[181] Through the front page article, the Think Tank,

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Widener, *supra* note __, 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, NOBO JOURNAL OF AFRICAN AMERICAN DIALOGUE 94-100 (Africa World Press 1995) [hereinafter Ellis, Non-Traditional Approach] (discussing historical research conducted by the Think Tank).

[177] SNS, *supra* note __, 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 __, at 152; Widener, *supra* note __, at 53 (stating that the new approach was based on the notion that the failure of social institutions serving Black and Latino communities was directly responsible for crime and punishment); Ellis, Non-Traditional Approach, *supra* note __, at 94 (discussing the philosophies and goals of the Non-Traditional Approach). *See generally* THE NON-TRADITIONAL APPROACH TO CRIMINAL AND SOCIAL JUSTICE, RESURRECTION STUDY GROUP (Jan. 1997) (on file with author) (providing a detailed historical account of the "direct relationship" from an Afrocentric and Latinocentric perspective).

[178] SNS, *supra* note __, at 5 ("[Almost exactly the same neighborhoods that had so many of its people in prison had the worst schools in the city. It 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 __, at 51; David Greaves, *Eddie Ellis: Prison Reform Visionary*, OUR TIME PRESS (Aug. 5, 2019), https://ourtimepress.com/eddie-ellis-prison-reform-visionary/ (interviewing Ellis, who stated that people in the disinvested neighborhoods have very few viable options).

[179] Burton, *supra* note __, at 153; *see also* Goodman & Smith, *supra* note __, at 103-04; Greaves, *supra* note __ (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).

[180] *See* Burton, *supra* note __, at 217, Appx. I, Green Haven Think Tank Document 4 (1972) (describing Think Tank's "[l]ong range priorities" as "[r]eduction of prison populations and the phasing-out of existing prison models").

[181] SNS, *supra* note __, at 2; Francis X. Clines, *Ex-Inmates Urge Return to Areas of Crime to Help*, N.Y. TIMES (Dec. 23, 1992) (describing the study as a "radical new approach to penology" by "unaccredited street penologist[s] without portfolio"); Greaves, *supra* note

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via Ellis, who was now out on work release, brought to mainstream circles the "symbiotic" relationship—an "umbilical cord"—between prison and the communities.[182] In 1994, Ellis was released after serving twenty-three years in prison.[183] He then helped to establish an outside arm to facilitate the Think Tank's research and writing,[184] extending his work on the inside.

In 2001, Ellis was a senior consultant at the Open Society Institute ("OSI").[185] Ellis shared the Think Tank's demographic data with Eric Cadora, then a program officer in OSI's After Prison Initiative.[186] With the Think Tank's data, geographic mapping software, and access to greater data, including home residences, Cadora charted at the census block level the neighborhoods that the Think Tank had identified at the district level.[187] The maps showed that the vast majority of people in New York state prisons were from an "astonishingly small" number of poor, segregated, predominantly Black and Latino neighborhoods, and primarily concentrated on particular blocks in those neighborhoods.[188] Cadora later collaborated with architect

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

[182] Clines, *supra* note __ (quoting Ellis).

[183] 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 __, at 48 (stating that Ellis was targeted under the FBI's Counter Intelligence 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).

[184] Widener, *supra* note __, 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 __.

[185] SNS, *supra* note __, at 5.

[186] SNS, *supra* note __, at 5; THE GOVERNANCE AND JUSTICE GROUP, ERIC CADORA, http://www.governancejustice.org/eric-cadora.

[187] SNS, *supra* note __, at 5-6; Robert F. Moore, *On the Inside, Cons Wondered About Numbers*, N.Y. DAILY NEWS (Mar. 18, 2007), https://www.nydailynews.com/news/cons-wondered-numbers-article-1.216876 (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, 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 THEOR. CRIMINOLOGY 257, 259 (2016).

[188] Trevor Paglen, *Ways of Seeing: A New Book Examines How Mapping Technologies Shape Our View of the World*, BOOK FORUM (Apr./May 2013), https://www.bookforum.com/print/2001/a-new-book-examines-how-mapping-technologies-shape-our-view-of-the-world-11237 (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 (Jan. 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 __, at 187 (same).

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Laura Kurgan to map on a larger scale the home address of everyone held in New York state prison.[189] They attached a dollar figure to denote states that spent at least one million dollars a year to incarcerate residents of a single city block, coining the now-famed expression "million dollar blocks."[190] A 2003 map, for example, depicts that New York spent $17 million to incarcerate 109 people who lived on 17 blocks in Brownsville, a neighborhood in Brooklyn.[191] Brownsville has among the highest rates of poverty, unemployment, failing schools and infant mortality and the lowest life expectancy in New York City.[192]

The Think Tank's concept and method, made into visuals on Cadora and Kurgan's maps, "upended the prevailing narrative about crime and [punishment],"[193] shaping new perspectives about the purpose of criminal law and new ways of thinking and advocating for change. Maps were soon requested in other states, and neighborhood-to-prison mapping became a

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[189] Gray & Lämmerhirt, *supra* note __, 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.

[190] MacIntyre, *supra* note __ (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 PO. (July 30, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/07/30/how-mass-incarceration-creates-million-dollar-blocks-in-poor-neighborhoods/ (stating that this figure did not include money spent incarcerating people in federal prison or local jails). *Cf.* John Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 572 n. 10 (2018) (expressing skepticism on dollar value on the grounds that some prison costs are fixed and the marginal cost of locking up one more person is much less than the average).

[191] Kurgan, *supra* note __, at 186; Email from Laura Kurgan to author (Jan. 15, 2022).

[192] Ginia Bellafante, *New York City Can't Just Gentrify Its Way Back to Normal*, N.Y. TIMES (June 4, 2021), https://www.nytimes.com/2021/06/04/nyregion/nyc-pandemic-economy-poverty-brownsville-brooklyn.html ("[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), https://patch.com/new-york/brownsville/deadliest-neighborhood-new-york-city; *Brownsville BK 16*, NYU Furman Center, https://furmancenter.org/neighborhoods/view/brownsville; The Forgotten Fourth, Families for Excellent Schools 3-4 (2014), http://www.familiesforexcellentschools.org/wp-content/uploads/2014/10/TheForgottenFourth_V4.pdf; Community Health Profiles 2015, Brooklyn Community District 16, Brownsville, p. 7, NYC Health, https://www1.nyc.gov/assets/doh/downloads/pdf/data/2015chp-bk16.pdf.

[193] Noah Chasin, *Laura Kurgan*, BOMB (Dec. 15, 2016), https://bombmagazine.org/articles/laura-kurgan/.

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national initiative.[194] The data visuals showed the same stark pattern in cities across the nation, revealing "previously unseen dimensions" of the criminal legal system.[195] The spatial analysis created "a radically new understanding of crime, poverty, and imprisonment."[196] 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."[197]

The Think Tank's theory and research shifted attention from the limited (and limit*ing*) question of where crimes are committed to where people lived before entering prison, fundamentally redefining – and creating new metrics to measure – public safety. "The way in which data is collected

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[194] MacIntyre, *supra* note __; 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; Jennifer Gonnerman, *Million-Dollar Blocks,* THE VILLAGE VOICE (Nov. 9, 2004), https://www.villagevoice.com/2004/11/09/million-dollar-blocks/.

[195] Susan B. Tucker & Eric Cadora, *Justice Reinvestment*, OPEN SOCIETY INSTITUTE 2 (Nov. 2003) (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% of Cleveland neighborhoods are home to 20% of people in Ohio prisons); Chicago's Million Dollar Blocks, https://chicagosmilliondollarblocks.com/; Spatial Information Design Lab, Columbia University Graduate School of Architecture, Planning and Preservation, *The Pattern: Million Dollar Blocks* 10-33 (2008), http://www.spatialinformationdesignlab.org/MEDIA/ThePattern.pdf [hereinafter The Pattern] (depicting million dollar blocks in Phoenix, Arizona; Wichita, Kansas; and New Orleans, Louisiana); Columbia Center for Spatial Research, Projects, Million Dollar Blocks, https://c4sr.columbia.edu/projects/million-dollar-blocks [hereinafter Center for Spatial Research] (stating that the criminal legal system became the "predominant government institution in these communities").

[196] Paglen, *supra* note __ ("The project is a powerful critique of mass incarceration."); *see also* The Pattern, *supra* note __, at 4 ("The geography of incarceration differs considerably from that of crime."); Austin et al., *supra* note __, 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).

[197] Paglen, *supra* note __; The Pattern *supra* note __, at 5 (stating that 95% of people in prison are released and that most return to their home communities); Center for Spatial Research, *supra* note __ (stating that "roughly forty percent do not stay more than three years before they are reincarcerated"); Dana Goldstein, *The Misleading Math of 'Recidivism,'* THE MARSHALL PROJECT (Dec. 4, 2014), https://www.themarshallproject.org/2014/12/04/the-misleading-math-of-recidivism (clarifying that a large number of people return to prison not for new crimes but 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*, UC Irvine, Center for Evidence-Based Corrections THE BULLETIN 1-2 (Sept. 2005) (documenting that two-thirds of Californians are reimprisoned within three years, over half for parole violations, and partially attributing this high rate to California placing virtually all people released on parole supervision).

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often reflects something about the people who collect it."[198] Traditional crime mapping tools, such as the NYPD's COMPSTAT ("computerized statistics") software, are commonly used by law enforcement to detect crime "hot spots" in order to allocate law enforcement resources to reduce crime.[199] Crime mapping technology compiles data on the time, location, type and frequency of reported incidents.[200] Because these technologies measure data that is critical to *policing* success, metrics are chosen based on how law enforcement define public safety.[201] 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,[202] this shift in focus betrayed something more elemental: data "echoes its collectors."[203] "What data set to focus on, and how to frame it, is

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[198] Lena V. Groeger, *When the Designer Shows Up in the Design*, PROPUBLICA (Apr. 4, 2017), https://www.propublica.org/article/when-the-designer-shows-up-in-the-design.

[199] Compstat: A Crime Reduction Management Tool, INNOVATIONS IN AMERICAN GOV'T AWARDS (Jan. 1996) https://www.innovations.harvard.edu/compstat-crime-reduction-management-tool.

[200] *Id.*; Groeger, *supra* note __ (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).

[201] *See, e.g.*, *Statement of Principles of Democratic Policing*, POLICING PROJECT (2015), https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59dfa277a803bb57bb93252e/1510756941918/Democratic+Policing+Principles+9_26_2017.pdf ("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) [hereinafter Simonson, *Power Lens*] (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, to assess whether the reforms lead to a reduction in "crime rates"); Barry Friedman, *What is Public Safety?*, B.U. L. REV. (forthcoming 2021) (manuscript at 3, 15-21, 28-29) (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 205-247 (2001) [hereinafter HARCOURT, ILLUSION OF ORDER] (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) [hereinafter Akbar, *Abolitionist Horizon*] ("CompStat is now widely viewed as having incentivized the rise of stop and frisk in New York City.")

[202] *See* Chasin, *supra* note __ (interviewing Kurgan, who noted that the maps were prepared with government data but the stories they told were transformative).

[203] Groeger, *supra* note __ (reporting that Kurgan described typical crime mapping tools as "part of the problem of mass incarceration, because they frame crime in an oversimplified way"); *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 ("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.").

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a decision"[204] produced by normative choices and shaped by power, politics and enduring structural inequities.[205] Most data on imprisonment 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."[206]

Despite their dire circumstances in prison—yet, paradoxically, by reason of those circumstances—the Think Tank marshalled a theory and supporting data that prominent scholars and policy organizations have cited authoritatively[207] and whose reach has stretched beyond criminal law and policy, transforming research in public health.[208] The idea to collect the data

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[204] Groeger, *supra* note __.

[205] *See* THE POLITICS OF NUMBERS 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 __, at 34 (quoting Kurgan) ("when [crime] maps are made . . . they often stop at the very first element: what crimes were committed and where").

[206] MacIntyre, *supra* note __.

[207] *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 *New York Times* article on the Green Haven study group's seven neighborhood study); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 596 & nn.151-153 (2003) (observing that the spatial concentration of incarceration produces neighborhood effects) (citing VERA INST. OF JUSTICE, THE UNINTENDED CONSEQUENCES OF INCARCERATION, Foreword (1996) and Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 114-15 & n.33 (2001)) (both Vera and Wacquant cite to Green Haven's study as their source); 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/ (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).

[208] After seeing the Seven Neighborhood data, Columbia University Professor Robert 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"); Ellis Memorial, at 10 (stating, about his shift in research, that he "owe[s] it all to [the Think Tank's] pioneer[ing] contributions" because "[w]hen we looked at the data [Ellis] cited, it became clear that those were the [seven] neighborhoods with the highest rates of HIV/AIDS in [New York] city"). Increased attention to the high concentration of incarceration in neighborhoods thus carries the potential to guide

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was born in prison, by people surrounded by people in prison, contemplating their oppression within a framework rooted in the Black intellectual tradition. The study group initiated a decarceral praxis that opened up new routes to disrupt over-reliance on criminal punishment, engaged complex problems more intelligently and humanely, and guided the outside to more 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.[209]

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.[210] 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.[211] The maps created space to develop a neighborhood-driven

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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*, URBAN INSTITUTE 8 (2008) (concluding that attending to 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/ (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), https://nypost.com/2021/03/30/vaccine-efforts-still-lagging-in-poorer-nyc-neighborhoods/.

[209] *See, e.g.,* Eugenia C. South, *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 (describing large-scale empirical studies demonstrating that greening and cleaning vacant land in segregated, disadvantaged neighborhoods resulted in up to a 29% 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. REP. 6, 13-14 (2016) (describing the concept of reinvestment as "housed within an ideal of social justice"); *see also* Mack, *supra* note __ (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).

[210] Orson, *supra* note __ (explaining how the maps became a guide to targeting resources); *see also* Groeger, *supra* note __.

[211] Orson, *supra* note __ (interviewing Cadora, who described 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 __ (noting that Connecticut changed its spending priorities); *id.* (reporting that Louisiana's governor requested even more maps); MacIntyre, *supra* note __ (interviewing Cadora, who stated that New York legislators shifted from tough- or soft-

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safety agenda that Cadora and Susan Tucker, the founding director of OSI's After Prison Initiative, coined "justice reinvestment."[212] This 2003 proposal—divestment of monies from prisons and targeted investment in million-dollar blocks—was initially considered a "fantasy scenario."[213] The initiative soon gained momentum and attracted broad bipartisan support.[214]

In response to initial success by states piloting the model, the Justice Department teamed up with Pew Charitable Trusts in 2010 to launch the Justice Reinvestment Initiative ("JRI").[215] JRI states, however, have not made significant progress to reduce prison populations.[216] They have instead channeled reinvestment largely into law enforcement and criminal law agencies, including community corrections, with virtually no neighborhood investment, "stripp[ing] [justice reinvestment] of its core purpose."[217] As scholars and advocates have argued, one "key but missing element" of justice reinvestment is an organized, sustained demand for prison reductions and neighborhood re-investment rooted in the long-term interests, priorities and

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on-crime rhetoric to "What are we going to do about Bed[ford]-Stuy[vesant]?" (a neighborhood in Brooklyn)); Austin et al., *supra* note __, at 24-26 (discussing how incarceration mapping helped states develop ideas for shifting spending).

[212] Tucker & Cadora, *supra* note __, 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.").

[213] *Id.* at 2, 4 (stating that the initiative seeks community-level solutions); Gonnerman, *supra* note __; *see also* Ed Chung & Betsy Pearl, *How to Reinvest in Communities When Reducing the Scope of Policing*, CENTER FOR AMERICAN PROGRESS (July 29, 2020).

[214] Chung & Pearl, *supra* note __; Austin, Clear & Coventry, *supra* note __, at 7.

[215] Chung & Pearl, *supra* note __; Justice Reinvestment Initiative (JRI), BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE (2012). JRI is a multi-million 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.*; Chung & Pearl, *supra* note __.

[216] Austin et al., *supra* note __, at 16; Chung and Pearl, *supra* note __ (stating that thirty-five states have participated in JRI); Austin, Clear & Coventry, *supra* note __, 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 14 (expressing concern that justice reinvestment, as practiced to date, may have helped to institutionalize high rates of imprisonment).

[217] Austin et al., *supra* note __, 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 re-entry services, while laudable, cannot alone produce meaningful reductions in prison populations); Austin, Clear & Coventry, *supra* note __, at 6, 11-13 (describing a strong literature on the long-term social and economic benefits of community investments but noting that JRI restricts states to investments in "proven" strategies with speedy crime reduction outcomes); Jeremy Welsh-Loveman & Samantha Harvell, *Justice Reinvestment Initiative Data Snapshot: Unpacking Reinvestment*, URBAN INSTITUTE 1-2, 7 (2018).

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visions of local communities.[218] Absent early partnerships with local officials, grassroots leaders and residents to develop a decarceral strategy responsive to the needs of those most affected, scholars have argued, JRI will not achieve long-term and continuing reductions in prison populations.[219]

The Think Tank's animating goals were to reorient the criminal legal system to address social and economic problems.[220] 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 entrench carceral practices.[221] 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 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.[222] 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 plaguing scholars, policymakers 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

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[218] *See* Austin et al., *supra* note __, at 4-5, 8, 19; *see also* Tucker & Cadora, *supra* note __, at 4 ("The solution to public safety must be locally tailored and locally determined.").

[219] *See* Austin et al., *supra* note __, 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 and Pearl, *supra* note __. As a result, JRI reinvestment strategies have reflected the priorities of state policymakers. *Id.* (advocating for community control over redirected investments); *see also* Tucker & Cadora, *supra* note __, at 5 (envisioning localities making their own decisions on how to spend reallocated dollars).

[220] Greaves, *supra* note __; *see also* McLeod, *Beyond the Carceral State*, *supra* note __, at 706 (arguing that decarceration requires more transformative visions that reorient the state and the law "from punitive to social ends").

[221] *See* McLeod, *Beyond the Carceral State*, *supra* note __, at 665, 670-71 (describing decarceration driven primarily by cost-cutting as "neoliberal penal reform"); Gottschalk, *supra* note __, at 5 ("[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.").

[222] *See, e.g.,* Tucker & Cadora, *supra* note __, at 5 (advocating to "mobilize 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 __, 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]"); *id.* at 4, 21 (discussing role of local stakeholders and residents in discussions about reinvestment).

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their finished research but ignoring the potential on the inside for the unfinished—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"[223] turns a blind eye to the possibilities that people in prison can generate valuable or even better interventions than traditional "experts."[224]

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, 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 because generations of leaders from Black and Brown communities were sent to prison.[225]

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[223] SNS, *supra* note __, 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." Clinton Lacey, former Deputy Comm'r, New York City Dep't of Probation, *A Memorial for Edwin "Eddie" Ellis*, at 12-13, CENTER FOR NULEADERSHIP ON URBAN SOLUTIONS (Sept. 12, 2014), https://www.nuleadership.org/assets/downloads/Hyperlink_EddieEllisBio_EEmemorialProgramFINAL.pdf [hereinafter Ellis Memorial].

[224] *Cf.* Goodman and Smith, *supra* note __, at 103-04 (interviewing Ellis, discussing the next generation of the Think Tank and ideas generated in lifers' groups in other prisons around community safety); Burton, *supra* note __, 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").

[225] *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*, THE ATLANTIC (Oct. 2015), https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/ (describing the "American tradition of criminalizing Black leadership" well before COINTELPRO); Widener, *supra* note __, at 49 (indicating that COINTELPRO used the legal system to remove people with "undesirable political views" into prison). The incarceration of leaders of color has persisted over the decades, though the

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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 health of 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 [we]re tied up with those communities."[226] This was not a reference just to back-end or in-prison programming but to tightening the relationship between people in prison and their neighborhoods.[227] Because 95% of people in prison will return to their home communities, the study group insisted that "what [is] do[ne] in the prisons can't be done in the abstract, removed from these neighborhoods."[228] Their insight to enhance this connection remains unfinished.

Of course, most decarceral ideas seeded by people in prison will be unfinished; their status and isolation deprives them of resources, power, access, credibility and significance to comprehensively advance, let alone implement, their visions. Allegra McLeod has argued that the unfinished quality of alternatives to criminal law reform is not a flaw but "a source of

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connection is "not [always] immediately legible as political." Burton, *supra* note __, at 4-6 (stating that imprisoning Panthers facilitated the emergence of revolutionary consciousness in prisons); Greaves, *supra* note __ (interviewing Ellis, who projected that in the 21st Century, Black and Latino community leaders are going to come out of the universities and prisons); Ben Brazil, *Ferin Kidd Went From Prison to Fighting for Black Voices in Orange County*, L.A. TIMES (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 (profiling community activist in Orange County, California who first had access to Black male role models in prison); Eugenia C. South, *If Black Lives Really Matter, We Must Invest in Black Neighborhoods*, WASH. PO. (Mar. 16, 2021), https://www.washingtonpost.com/opinions/2021/03/16/black-neighborhoods-parks-safety/ (stating that "mass incarceration extracts resources and talent from Black communities").

[226] Burton, *supra* note __, at 153 (quoting Ellis at 1990 Green Haven Seminar).

[227] *See* Clines, *supra* note __ (noting that Ellis taught classes in the seven neighborhoods while on work release).

[228] Clines, *supra* note __ (quoting Ellis). The study group submitted a proposal to the legislature to require housing, education and crime-prevention duties as a condition of parole and to receive community development training in prison. *Id.* (describing classes by Ellis encouraging people in prison to become creatively involved in community interventions); Widener, *supra* note __, at 51; Ellis, Non-Traditional Approach, *supra* note __, at 99, 105 (advocating for collective action between people in prison and the community); Goodman & Smith, *supra* note __, at 104 (interviewing Ellis, who stated that "what takes place in [the prison] shapes what takes place in the community").

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critical strength and possibility."[229] Aspirational ideas to reduce reliance on incarceration can transform into more conceivable, and even essential, possibilities for change.[230] 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."[231]

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 non-carceral community-driven violence interventions can dramatically reduce involvement in gun and extreme violence.[232] Recognized as a pioneer in the violence reduction field,

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[229] Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 113-14, 123 (2012-2013) [hereinafter McLeod, *Unfinished Alternatives*] (calling on law scholars to engage seriously with partial, aspirational and in-process alternatives to conventional criminal law administration and explaining that this 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) ("the alternative lies in the unfinished, in the sketch, in what is not yet fully existing").

[230] *See* McLeod, *Unfinished Alternatives*, *supra* note __, 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.").

[231] MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 150-51 (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 __, at 103 (interviewing Ellis, who was able to disseminate the concept because he was released from prison, who emphasized that the model was formulated and developed not by him alone but by many members of the Think Tank who remained inside); 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 (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").

[232] *See, e.g.,* Roge Karma, *How Cities Can Tackle Violent Crime Without Relying on Police*, VOX (Aug. 7, 2020), https://www.vox.com/21351442/patrick-sharkey-uneasy-peace-abolish-defund-the-police-violence-cities ("We now have a pretty well-established base of evidence telling us that residents and local organizations are at least as effective as

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Eddie Bocanegra today "runs one of the most innovative violence-prevention programs in the country."[233] His initial vision for a novel intervention, which laid the foundation for his current work, was spurred by a generative conversation in prison.[234]

In 2005, twenty-nine-year-old Bocanegra, who had been in prison since age eighteen, received a visit from his brother Gabriel.[235] A decorated Army veteran, Gabriel had just returned from his second tour in Iraq.[236] Gabriel struggled with combat-related trauma and advised Bocanegra that he, too, was experiencing the traumatic effects of violence.[237] Along with the stabbings and suicides in prison, Bocanegra had been exposed to household violence, violence unfolding in school, and fatal shootings during his childhood in Little Village, Chicago.[238] "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.[239]

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

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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 et al., *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOC. REV. 1214, 1234 (2017); Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUSTICE 5 (July 2017) (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*, BOSTON REVIEW (Nov. 1, 2021), https://bostonreview.net/articles/making-communities-safe-without-the-police/ ("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 CENTER (Sept. 27, 2021), https://www.brennancenter.org/our-work/analysis-opinion/addressing-violent-crime-more-effectively.

[233] 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.

[234] Audie Cornish, *Chicago Teens and Combat Veterans Join Forces to Process Trauma*, NPR (Jan. 25, 2016), https://www.npr.org/transcripts/463875598?storyId=463875598.

[235] *See* Kotlowitz, *supra* note __; 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/.

[236] Golden, *supra* note __; Cornish, *supra* note __.

[237] *See* Sharon Cohen, *Vets, Kids Scarred by Gangs Help Each Other*, ASSOC. PRESS (Sept. 27, 2014), https://www.ksl.com/article/31694208/war-vets-kids-scarred-by-gangs-help-each-other.

[238] *See* Cornish, *supra* note __; Golden, *supra* note __.

[239] Cohen, *supra* note __.

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committed, witnessed and survived violence.[240] Gazing across the visit room table at the Bronze Star on Gabriel's uniform, he wondered how Gabriel's acts of violence were valorized.[241]

Sparked by his brother's wisdom and 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.[242] Through a local church, Bocanegra mentored kids who were in the same street gangs in which he was involved at a young age.[243] 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.[244] Reflecting on his meeting with Gabriel, he began to think about new ways to conceptualize and promote the value of urban youth, whom criminal law and society labeled as "thugs."[245]

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

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[240] *See* Golden, *supra* note __.

[241] Golden, *supra* note __.

[242] Cohen, *supra* note __; Golden, *supra* note __. In retaliation for a shooting that left his friend paralyzed, eighteen-year-old Bocanegra fatally shot another eighteen-year-old, whom he thought was in a rival gang. Golden, *supra* note __; Katie Mingle, *After Committing Murder as a Teen, a Chicago Man Dedicates His Life's Work to His Victim,* WBEZ CHICAGO, 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. Bocanegra was convicted of murder and sentenced to 29 years in prison. Cohen, *supra* note __.

[243] Golden, *supra* note __; Telephone Interview with Eduardo Bocanegra, Senior Director, READI Chicago (Nov. 11, 2021).

[244] Golden, *supra* note __. 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; Karma, *supra* note __; Ashley Luthern, *Gun Violence as a Public Health Issue: How Does the "Cure Violence" Interrupter Model Work?*, MILWAUKEE JOURNAL SENTINEL (Sept. 25, 2019), https://www.jsonline.com/story/news/special-reports/milwaukee-violence/2019/09/25/public-health-how-cure-violence-interrupts-shootings/2390180001/ (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 LEGISLATION (Dec. 9, 2021), https://www.fcnl.org/updates/2021-12/violence-interrupters-key-element-justice-reform (noting that the model can re-traumatize interrupters); *see also* Gimbel & Craig, *supra* note __, at 1520 (arguing that Cure Violence "does not pretend to offer solutions to the underlying social problems giving rise to pervasive violence in the first place").

[245] *See* Golden, *supra* note __.

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from an early age.[246] This constant exposure to trauma, he began to understand, fueled neighborhood violence.[247] Joining a gang meant protection and ownership over their lives.[248] 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.[249] Building a connection to the violence in warfare, Bocanegra understood urban youth in communities with high rates of gun violence as "child soldiers," and the inner-city streets of Chicago as "kind of a combat zone."[250]

Any effort to interrupt this cycle of trauma and violence and equip adolescents with some tools to begin to heal would require them to recognize signs of their own trauma and its roots in the exposure to violence.[251] Understanding the barriers to youth engagement, Bocanegra thought war veterans might be uniquely qualified to mentor young people in CeaseFire zones.[252] He reasoned that neighborhood youth joined gangs, and young adults enlisted in the armed forces, for a similar reason: identity.[253] To check

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[246] *See id.*

[247] *See* Golden, *supra* note __; 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/ (discussing this intergenerational cycle of trauma and violence); Erica J. Adams, *Healing Invisible Wounds: Why Investing in Trauma-Informed Care for Children Makes Sense*, JUSTICE POLICY INST. 1 (July 2010) (stating that between 75 and 93 percent of youth entering the juvenile justice system each year have experienced some degree of trauma).

[248] *See* Golden, *supra* note __ (interviewing Bocanegra, who described becoming involved in street gangs at an early age for safety purposes, including to protect his siblings).

[249] Jocelyn Fontaine, et al., *"We Carry Guns to Stay Safe": Perspectives on Guns and Gun Violence from Young Adults Living in Chicago's West and South Sides*, URBAN INSTITUTE 4-5 (Oct. 2018); Annie Sweeney, *Veterans Help Chicago Teens Through "War" Times*, CHI. TRIBUNE (July 11, 2014), https://www.chicagotribune.com/news/ct-urban-warriors-met-20140711-story.html.

[250] Golden, *supra* note __ (quoting Bocanegra, noting 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. [hereinafter Rhee, *Veterans*] (quoting Bocanegra, stating that NGOs provide aid to child soldiers). Studies reflect striking parallels between the experiences of child soldiers and gang-involved youth. Patricia K. Kerig, et al., *America's Child Soldiers: Toward a Research Agenda for Studying Gang-Involved Youth in the United States*, 22 J. OF AGGRESSION, MALTREATMENT & TRAUMA 773, 775-77 (2013).

[251] *See* Golden, *supra* note __.

[252] Rhee, *Veterans*, *supra* note __; Michelle Miller, *Urban Warriors: Stemming the Tide of Street Violence*, CBS NEWS (July 31, 2016), https://www.cbsnews.com/news/urban-warriors-stemming-the-tide-of-street-violence-2/.

[253] Telephone Interview with Bocanegra, *supra* note __; Golden, *supra* note __ (interviewing Bocanegra, who stated that, with few employment opportunities and role models in the community upon which to model his future, identity formation was key to his involvement with street gangs).

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his bias, he administered an informal survey to a dozen urban youth.[254] The survey asked, "Who do you respect?" followed by twenty or thirty options: firefighters, police, teachers, coaches, doctors, lawyers, veterans, street gangs and more.[255] The top two responses were, overwhelmingly, veterans.[256] 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.[257]

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.[258] He shared his concept for a youth violence intervention and an evidence base to cement it.[259] The 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

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[254] Telephone Interview with Bocanegra, *supra* note __.

[255] Telephone Interview with Bocanegra, *supra* note __; Taylor Brown, *Urban Warriors: The Unexpected Pair*, COMMUNITY REC MAGAZINE (Jan. 8, 2021), https://communityrecmag.com/urban-warriors-the-unexpected-pair/; Rhee, *Veterans*, *supra* note __; Cornish, *supra* note __.

[256] Telephone Interview with Bocanegra, *supra* note __; Brown, *supra* note __.

[257] Telephone Interview with Bocanegra, *supra* note __; Rhee, *Veterans*, *supra* note __; Cornish, *supra* note __.

[258] Telephone Interview with Bocanegra, *supra* note__ (stating that post-release, he was a community organizer, through which he built connections with state representatives, and the YMCA was familiar with his community work); Nissa Rhee, *Healing is Prevention*, U. OF CHICAGO MAG. (May-June 2015), https://mag.uchicago.edu/law-policy-society/healing-prevention# [hereinafter Rhee, *Healing*] (noting that Bocanegra was featured in the 2011 documentary, *The Interrupters*); *see generally* THE INTERRUPTERS (Kartemquin Films 2011).

[259] Telephone Interview with Bocanegra, *supra* note__ (stating that he 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 in social work, where he began to incubate his idea with social scientists who studied trauma. *Id.* Skeptical, the YMCA performed more formal pre-assessments of its youth. *Id.* The results echoed the findings in Bocanegra's informal surveys. Brown, *supra* note __. 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), https://www.propublica.org/article/the-ptsd-crisis-thats-being-ignored-americans-wounded-in-their-own-neighbor (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); *id*. (citing research that people with PTSD may be more likely to carry a weapon to "restore feelings of safety"); Jill Tucker, *Children Who Survive Urban Warfare Suffer From PTSD*, Too, SAN FRANCISCO CHRONICLE (Aug. 25, 2007), https://www.sfgate.com/education/article/Children-who-survive-urban-warfare-suffer-from-2524472.php#ixzz2KKiW4CXq (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).

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with adolescents from Chicago neighborhoods with the highest levels of poverty and violence.[260] The program was piloted in Little Village, Bocanegra's childhood neighborhood.[261]

Feeling an instant bond, the veterans shared how experiencing violence affected them, providing guidance on processing and responding to trauma.[262] The teens gradually opened up: some expressed being on high alert after a shooting, hearing a loud vehicle drive by, or seeing someone selling drugs on the street.[263] This hypervigilance was common among veterans returning home.[264] A pre-assessment instrument administered by the University of Chicago found that many youth in the pilot program had more symptoms of PTSD than their veteran mentors.[265] Since completing the program, some teens expressed a greater sense of self-worth, were no longer

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[260] Brown, *supra* note __; Cornish, *supra* note __. The YMCA identified youth from the juvenile system and housing projects, targeting those in gangs or on probation, and received referrals from the courts and schools. Sweeney, *supra* note __; Rhee, *Healing*, *supra* note __. 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, *Veterans*, *supra* note __ (stating that some youth experienced physical or sexual abuse and some were homeless). The military veterans Bocanegra recruited grew up in the same neighborhoods as the youth. Brandis Friedman, *Urban Warriors*, WTTW CHICAGO (Mar. 18, 2015), https://news.wttw.com/2015/03/18/urban-warriors. Some were once involved with gangs and some were not much older than their mentees. Miller, *supra* note __; Rhee, *Veterans*, *supra* note __ (stating that veterans and youth came together on a weekly basis, for sixteen weeks, for team building, talking, playing games, field trips, and teaching strategies for coping with trauma and loss).

[261] Sweeney, *supra* note __.

[262] Rhee, *Veterans*, *supra* note __; Sweeney, *supra* note __ (stating that the veterans "kn[e]w well the struggle of surviving a dangerous place"); Cornish, *supra* note __; Miller, *supra* note __. The program also provided a sense of purpose that veterans struggle to find, giving veterans a chance to "model healing." Brown, *supra* note __; Rhee, *Veterans*, *supra* note __; Sweeney, *supra* note __; *War Vets, Kids Scarred by Gangs Help Each Other*, THE COLUMBIAN (Nov. 22, 2014), https://www.columbian.com/news/2014/nov/22/war-vets-kids-scarred-by-gangs-help-each-other/. Some mentees said it was the veterans who motivated them to come back. Friedman, *supra* note __.

[263] Cornish, *supra* note __; Rhee, *Veterans*, *supra* note __ (stating that of the 435 people killed in Chicago in 2014 (the year the program launched), 46 percent were between the ages of fifteen to twenty-four).

[264] Cornish, *supra* note __ ; Rhee, *Veterans*, *supra* note __; *see also* Lois Beckett, *supra* note __ (discussing "chronic hyperarousal," a severe symptom of PTSD).

[265] Telephone Interview with Bocanegra, *supra* note__; Golden, *supra* note __; *see also* Tucker, *supra* note __ (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); Leslie Morland, et al., 31 PTSD RESEARCH QUARTERLY 1, U.S. DEP'T OF VETERANS AFFAIRS (2020), https://www.ptsd.va.gov/publications/rq_docs/V31N3.pdf (stating that decades of research has found "a robust relationship between the incidence of PTSD [in veterans] and elevated rates of anger, aggression and violence").

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involved in gangs, returned to high school, and spoke of plans to go to college.[266]

The innovative research-based model gained national attention.[267] It was "on the cutting edge of what emerging science [wa]s telling us about the effects of trauma."[268] The MacArthur Foundation awarded the program a $400,000 grant.[269] 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."[270] 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.[271]

The innovation disrupted the prevailing narrative on neighborhood violence, shaping new ideas and inspiring a wide array of stakeholders to think differently about 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 of understanding—and thus reducing—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.[272]

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[266] Rhee, *Veterans*, *supra* note __; Miller, *supra* note __; Sweeney, *supra* note __; 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/ (stating that outcomes have been mostly anecdotal).

[267] Rhee, *Veterans*, *supra* note __.

[268] Rhee, *Veterans*, *supra* note __ (quoting Professor Deborah Gorman-Smith, director of The Chicago Center for Youth Violence Prevention). 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), https://www.vice.com/en/article/d3933m/should-growing-up-in-compton-be-considered-a-disability (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).

[269] Friedman, *supra* note __; YMCA OF METROPOLITAN CHICAGO, MACARTHUR FOUNDATION, https://www.macfound.org/grantee/ymca-of-metropolitan-chicago-440/.

[270] Rhee, *Veterans*, *supra* note __. Since its formation, Urban Warriors has served more than 400 youth across genders in multiple Chicago neighborhoods. Brown, *supra* note __.

[271] Rhee, *Veterans*, *supra* note __; Telephone Interview with Bocanegra, *supra* note__.

[272] Rapid Employment and Development Initiative (READI)-Chicago, RESULTS FOR AMERICA (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 [hereinafter READI, Results for America] (stating that Chicago experienced a 58% increase in homicides and a 43% increase in non-fatal shootings

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The lab brought the idea to Heartland Alliance, an anti-poverty and human rights organization.[273] Partnering with local community-based organizations, Heartland launched "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.[274]

In 2017, Heartland recruited Bocanegra to build, lead and implement READI.[275] Bocanegra hired a team whose members were predominantly from the same neighborhoods as prospective participants to make recommendations on outreach and engagement.[276] Barriers 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 existing programs or social services, or were homeless.[277] Few, if any, public

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in 2016); *Chicago Ends Year With 762 Killings, the Most in 2 Decades,* ASSOC. PRESS (Jan. 1, 2017), https://www.nytimes.com/2017/01/01/us/chicago-2016-killings.html (noting that the bulk of the shootings were in five neighborhoods); MAX KAPUSTIN, ET AL., GUN VIOLENCE IN CHICAGO, 2016, U. CHICAGO CRIME LAB 13 (Jan. 2017) (stating that Black men ages 15 to 34 are four percent of Chicago's population but over 50% of its homicide victims).

[273] READI, Results for America, *supra* note __.

[274] READI CHICAGO: A COMMUNITY-BASED APPROACH TO REDUCING GUN VIOLENCE, U. CHICAGO CRIME LAB 2 (Sept. 2021) [hereinafter READI, Community-Based Approach] (stating that participants have access to an additional six months of coaching, support services and CBT sessions to help transition to unsubsidized employment). 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 (June 8, 2018) [hereinafter Press Release, Heartland Alliance] (stating that READI is funded primarily through private philanthropy). The 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 __; Working Together Toward Safer Communities: Reflections from READI Chicago, A Heartland Alliance Program 7-8 (2021) [hereinafter Working Together] ("The men READI Chicago serves come from communities that have faced decades of disinvestment and generational trauma.")

[275] READI, Results for America, *supra* note __.

[276] Heartland Alliance, *Outreach Workers: Using Their Past to Help Others Become Better Men*, https://www.heartlandalliance.org/outreach-workers-using-their-past-to-help-others-become-better-men/; Heartland Alliance, *Putting a Face to the Numbers*, https://www.heartlandalliance.org/putting-a-face-to-the-numbers/; Telephone Interview with Bocanegra, *supra* note __. Bocanegra manages over one hundred staff to implement the initiative. *Id.*; Tia Carol Jones, *READI Chicago Receives $2 Million Investment,* CITIZEN NEWSPAPER GROUP, https://citizennewspapergroup.com/news/2021/may/26/readi-chicago-receives-2-million-investment/.

[277] Press Release, Heartland Alliance, *supra* note __; Nissa Rhee, *Radical New Program Finds Men Most Likely to be Shot—and Hires Them*, BLOCK CLUB CHICAGO (July 26, 2018), https://blockclubchicago.org/2018/07/26/radical-new-program-finds-men-most-likely-to-be-shot-and-hires-them/.

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institutions served READI's target population.[278]

Despite many obstacles, fifty-five percent of individuals who were offered READI participated, an "incredible" success rate considering they "have been disappointed so many times in their lives by different social systems."[279] The levels of violence experienced by READI participants are staggering. Ninety-six percent have been arrested and 80% have been victims of violence.[280] Of the individuals referred, over one-third had been shot.[281] The average READI participant has been arrested seventeen times.[282] Since its launch, over 800 people have enrolled.[283] READI participants worked 75% of the weeks available to them during in-person programming and are highly engaged.[284]

A randomized control trial to evaluate READI is still in progress, but as of September 2021, READI participants have 79% fewer arrests for shootings and homicides.[285] In June, 2021, President Biden invited Bocanegra to the White House to discuss investing in community-based violence interventions.[286] In July, Attorney General Merrick Garland and

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[278] *See* Patrick Smith, *Anti-violence programs are working. But Can They Make a Dent in Chicago's Gun Violence?*, WBEZ CHICAGO (Nov. 1, 2021), https://www.wbez.org/stories/chicago-anti-violence-efforts-succeed-but-shootings-rise/07af00be-03ae-4a4d-adba-71e688301a60 (stating that the only public institution many have any sustained connection with is the criminal legal system). READI identifies prospective participants through referrals from community partner organizations, re-entry 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. READI, Community-Based Approach, *supra* note __ at 1-2; READI, Results for America, *supra* note __; *see also* Working Together, *supra* note __, at 8 (noting that participants are predominantly Black men ages 18 to 32); *id.* at 4-5 (stating that 87% of shooting victims in Chicago in 2016 were 18 and older).

[279] Smith, *supra* note __ (quoting Cornell University Professor Max Kapustin); READI, Community-Based Approach, *supra* note __ at 2.

[280] Working Together, *supra* note __, at 8, 14.

[281] READI, Community-Based Approach, *supra* note __ at 2.

[282] READI, Community-Based Approach, *supra* note __ at 2.

[283] READI Chicago, A Heartland Alliance Program, Impact, https://www.heartlandalliance.org/readi/impact/.

[284] READI, Community-Based Approach, *supra* note __ at 2.

[285] READI, Community-Based Approach, *supra* note __ at 1.

[286] Eddie Bocanegra Meets with President Biden, Heartland Alliance, https://www.heartlandalliance.org/eddie-bocanegra-meets-with-president-biden/. 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,* White House Briefing Room (June 23, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/. This followed President Biden's call on Congress to invest $5 billion in evidence-based community violence interventions. *FACT SHEET: More Details*

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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.[287] Other cities across the nation have reached out to discuss adapting READI to their jurisdictions.[288]

II. Looking to the Inside

The preceding Part reveals that people who are incarcerated have generated and found ways to bring about, during their incarceration, ideas that expand possibilities, incrementally,[289] to move toward a noncarceral state. A range of system and non-system 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 further our democracy.

A. Resisting 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—

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on the Biden-Harris Administration's Investments in Community Violence Interventions, White House Briefing Room (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/.

[287] Innovative Initiative, *supra* note __; Heartland Alliance, READI Chicago, Attorney General Merrick Garland, Sen. Dick Durbin Visit READI Chicago; Dick Durbin, *Op-ed: At the Heart of Chicago Gun Violence is Poverty and Trauma*, CHI. TRIBUNE (July 29, 2021), https://www.chicagotribune.com/opinion/commentary/ct-opinion-dick-durbin-chicago-gun-violence-20210729-p65ii3uy4feyfgefissottgx6a-story.html.

[288] *Innovative READI Chicago Initiative Brings Hope Amid Heartbreak of Gun Violence*, U. CHICAGO NEWS (Sept. 15, 2021), https://news.uchicago.edu/story/innovative-readi-chicago-initiative-brings-hope-amid-heartbreak-gun-violence [hereinafter Innovative Initiative]; Kotlowitz, *supra* note __; Golden, *supra* note __.

[289] JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 229 (2017) ("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. 101, 111 (forthcoming 2022) ("Mass incarceration was built piece by piece and must be dismantled the same way.").

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manifests what scholar and activist Angela Y. Davis calls the ideological work of the prison.[290]

Davis observes that "the prison is present in our lives and, at the same time, it is absent from our lives."[291] It is difficult to imagine a world without prisons but we are reluctant to think about what takes place inside them.[292] 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.[293] This *de jure* segregation produces a banishment from civic life[294] that exiles people from sight, thought and significance. The prison this accomplishes both a material and a symbolic separation.[295] It "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."[296] Thinking alongside people in prison to confront this process resists and refuses the ideological function of the prison.

The phenomenon described in these 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,[297] it necessarily requires confronting the ways we think—and don't think—about people in prison. Engaging in collaboration with people on the inside holds

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[290] DAVIS, ARE PRISONS OBSOLETE?, *supra* note __, 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").

[291] *Id.* at 15 (2003) ("It is as if prison were an inevitable fact of life, like birth and death."); *see also* Decarceration Nation, *Episode 106 – David Sklansky*, 7:47 (June 7, 2021), https://decarcerationnation.com/106-david-sklansky/ (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).

[292] DAVIS, ARE PRISONS OBSOLETE?, *supra* note __, at 15.

[293] *See* Akbar, *Abolitionist Horizon*, *supra* note __, at 1805; Beatrix Lockwood & Nicole Lewis, *The Long Journey to Visit a Family Member in Prison*, THE MARSHALL PROJECT (Dec. 18, 2019), https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison; 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).

[294] *See* M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1194-95 (2020); Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96-98 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

[295] *See* ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT 22 (2016) [hereinafter DAVIS, FREEDOM IS A CONSTANT STRUGGLE] ("The very existence of the prison forecloses the kinds of discussions that we need in order to imagine the possibility of eradicating [violence].").

[296] DAVIS, ARE PRISONS OBSOLETE?, *supra* note __, at 16.

[297] *See supra* notes __ and accompanying text.

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promise to transform how the law and the legal profession think about 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, and the criminal legal system more generally, hides—and the decarceral imaginations in prison reveal—another source of knowledge. Almost all the decarceral moves in Part I—challenging the 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, as such, was compelled by circumstances, but the prison served as more than a site that, by its nature, motivated decarceral moves; it acted as an access point to a text—the people locked inside it.[298] That access occasioned a deep reflection that produced analysis and action[299] directed toward transformative, decarceral ends. For Duncan it was over-exposure to unexhausted and what appeared to be factually inaccurate split-jury convictions; for Bocanegra it was over-exposure to hypervigilance that appeared rooted in cycles of trauma and violence; for the people in Green Haven it was over-exposure to neighborhood saturation that appeared to be pervasive. This is just a slice of the trends they observed and analyzed in confinement.[300] The wisdom, sustained exposure, insight to understand the problems they theorized and observed as structural, resistance to their circumstances and deep humanity created an alchemy to analyze problems differently and combine theory and action to challenge the enduring narratives that land people in prison.

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[298] This notion of a "text" is inspired by Jennifer Gordon's work about 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 immigrant workers center that employed popular education techniques pioneered in Latin America 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 which would have been inadequate to tackling the workers' needs).

[299] *See id.* at 435.

[300] Widener, *supra* note __, 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 Mattes, *supra* note __ (noting that Duncan had access to information that the outside did not because he was "embedded" within the prison diaspora); *see supra* note __ (stating that Duncan brought the "10-6ers" to the attention of prosecutors in Louisiana who were unaware of this longest-serving and forgotten contingent).

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A serious willingness to entertain strategies for decarceration outside the institutional framework should mean finding ways, as equal partners, to think alongside people in prison.[301] To decline to discover and develop decarceral imaginations inside prison walls, particularly after already making tremendous use of the groundbreaking ideas birthed within, enables the prison to continue to lock us into a carceral mindset 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,[302] 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 rich perspectives on decarceral strategies beyond the limited imaginations conceived in law's perch,[303] different sources of and methods to collect and measure data, 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.[304] Collective envisioning also holds the potential to transform how people in prison think about their own power to make change.[305]

The inside moves 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

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[301] This notion of equal partnership with people in prison is inspired by Angela Y. Davis's writings on prison abolition. *See* DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note __, at 26 ("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.")

[302] Video Interview with Robert Fullilove, Professor of Clinical Sociomedical Sciences, Columbia University, Mailman School of Public Health (Nov. 5, 2021) (stating that his scholarly career was based on the research and wisdom produced by the Think Tank); Ellis Memorial, *supra* note __, at 10 (same).

[303] *See* 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.'").

[304] *Cf.* McLeod, *Beyond the Carceral State*, *supra* note __, at 658-59 (arguing that even limited initiatives can serve as an opening toward more transformative ends); Simonson, *Power Lens*, *supra* note __, at 853 (arguing that directly impacted people "might also seek data and information from less traditional sources").

[305] *Cf.* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2786-87, 2790 (2014) (discussing the lawmaking potential of social movements); Gordon, *supra* note __, at 410.

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shaped and continue to shape long-term and near-term transformation. Given the isolation of carceral punishment, collective processes are essential. Collective imagining enables different understandings to become more visible, creating the potential to build more transformative possibilities.[306] The next Part identifies a gap, and an opening, in legal scholarship to pursue this collective challenge.

B. Prison's AntiDemocratic Paradox

Looking to the inside to envision decarceral futures recalls Mari Matsuda's famous call to legal scholars to "look to the bottom" as "a new epistemological source."[307] Matsuda encouraged critical legal scholars to listen to those with the least advantage and study and support the organized struggles and campaigns of people of color who have experienced subordination.[308] Matsuda argued that adopting the perspective of "grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression," or what Antonio Gramsci called "organic intellectuals,"[309] can lead to concepts and theories about law that are "radically different from those generated at the top."[310]

In the over three decades since Matsuda's seminal article, legal scholars have echoed this demand, recognizing that bottom-up visions and interventions born within grassroots movements and marginalized groups directly impacted by the system 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

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[306] Collective imagining is part of a long tradition in legal scholarship of thinking alongside and engaging with grassroots struggles. *See generally* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 832-42 (2021) (detailing decades-long history of critical scholars inspired by or cogenerating ideas with social movements). *See also infra* notes __-__.

[307] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323, 324-26, 346-47 (1987) ("Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist 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).

[308] Matsuda, *supra* note __, at 324-325, 349 (calling on scholars to look to "the actual experience, history, culture, and intellectual tradition of people of color in America").

[309] A. Gramsci, *The Intellectuals*, in SELECTIONS FROM THE PRISON NOTEBOOKS 5 (1971).

[310] Matsuda, *supra* note __ at 325-26, 362, 373 (discussing reparations as a "legal concept generated from the bottom"); Akbar, Ashar & Simonson, *supra* note __, at 839 ("For decades now, Matsuda has distilled brilliance born within collective struggle.").

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expansive, grounded and transformative framework for change.[311] Law scholars have since encouraged turning beyond *studying* movement critiques to cogenerating ideas and producing scholarship in conversation *with* grassroots struggles.[312]

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. Looking to 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 between looking to "the bottom" and looking to "the inside" in the manner proposed in this Article. I raise these distinctions not to distance the moves, which I see as complementary, but to argue why the moves should be theorized separately.

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[311] *See, e.g.,* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 408, 410, 426, 476, 479 (2018) [hereinafter Akbar, *Radical Imagination*] ("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, *Abolitionist Horizon*, *supra* note __, at 1837-46 (explaining why legal scholars should take abolitionist organizing seriously); Jocelyn Simonson, *The Place of "the People" in Criminal Procedure,* 119 COLUM. L. REV. 249, 266-70, 287-97 (2019) [hereinafter Simonson, *The Place of "the People"*] (describing bottom-up forms of communal contestation and their effect on everyday criminal adjudication); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1613, 1623 (2017) [hereinafter Simonson, *Democratizing Criminal Justice*] (calling for bottom-up forms of agonistic participation in criminal justice policymaking); McLeod, *Beyond the Carceral State*, *supra* note __, 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 __, 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 (2007) (discussing the change-making capacity of immigrant workers, whom Gordon describes as "non-citizen citizens").

[312] *See* Akbar, Ashar & Simonson, *supra* note __, at 844-45, 881 (calling on legal scholars to cogenerate ideas alongside grassroots struggles seeking to transform the status quo); Akbar, *Radical Imagination*, *supra* note __, at 408, 410, 426, 476, 479 (calling on legal scholars to "imagine collaboratively" with social movements); 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, coauthored with a movement leader who developed the participatory defense framework); Simonson, *Power Lens*, *supra* note __, at 830-48 (supporting the movement demand to shift governance and policymaking power downward to populations most harmed by mass incarceration and the domination of everyday policing).

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First, when law 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.[313] There are exceptions. Jocelyn Simonson has shown how people in prison engage in bottom-up interventions in the form of hunger and labor strikes.[314] These acts of collective contestation have influenced changes in prison conditions, destabilized the prison's complete control over those it confines, and raised public consciousness on degrading conditions of confinement, forced labor, and larger dynamics of mass incarceration.[315] I aim to propose something distinct: looking to people who are unfree as partners in decarceration. The circumstances and contemplation of freedom on the inside can produce reflections, analyses and strategies that, by design or in effect, direct toward decarceral ends.

This brings me to a second distinction. Scholars who study and work alongside grassroots struggles engage perspectives from the bottom both to produce alternative frameworks of change and to "democratize" criminal law.[316] The concept I propose—looking to the inside to discover, develop

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[313] *See supra* notes __-__. 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 __, at 389-90. Among those on the bottom, as well, 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, *Radical Imagination*, *supra* note __, 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 __, at 851 n.113 (describing Black & Pink, an abolitionist organization that is rooted in working with queer and trans people who are incarcerated).

[314] *See, e.g.,* Simonson, *Democratizing Criminal Justice*, *supra* note __, at 1619-20; *see also* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 88 (2022) (describing how the Pelican Bay class-action lawsuit that ended indefinite solitary confinement in California prisons "resulted from, and interacted with, a prisoners' movement that conducted three mass hunger strikes and garnered national and international attention").

[315] Simonson, *supra* note __, 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); Lobel, *supra* note __, at 92, 114, 157 (describing how people in prison participated, in partnership with lawyers, in directing the Pelican Bay class-action litigation and how that active, collaborative, non-hierarchical framework was crucial to the success of the litigation).

[316] *See, e.g.,* Akbar, Ashar & Simonson, *supra* note __, at 827 ("We are interested in social movements for their potential to democratize our politics and embolden our visions for change."); Simonson, *Democratizing Criminal Justice*, *supra* note __, at 1612 (arguing

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and co-envision decarceral moves—is not premised on making criminal law more democratic; it is grounded in decarceral aims. I raise this distinction to emphasize the democratic tension in looking to the inside. People in American prisons, in every practical sense, have virtually no democratic existence.[317] The vast majority are also denied, by law or in effect, any meaningful role in civic society. 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 agents of decarceral change is, in part, the work of American democracy. Yet, refusing to accept the carceral state's antidemocratic function,[318] some people in prison have converted their oppression and subjugation into "theor[ies] for future action"[319] that have had transformative effects on law, discourse and society. Although excluded from our democracy, their work, ideas and

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that bottom-up modes of agonistic participation in criminal justice developed and led by marginalized groups are "crucial for *democratic* criminal justice"); Simonson, *Power Lens*, *supra* note __, 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, *The Place of "the People"*, *supra* note __, at (valuing contestatory participation over consensus-based methods of gathering popular input); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1376 (2017) (defining "democratizing criminal justice" as making criminal law "more community focused and responsive to lay influences"); *see also* Symposium, *Democratizing Criminal Law*, 111 NW. U. L. REV. 1367 (2017) (including a collection of essays on the theme of democratizing criminal law).

[317] *See* Hansi Lo Wang, *Most Prisoners Can't Vote, But They're Still Counted in Voting Districts*, NPR (Sept. 26, 2021), https://www.npr.org/2021/09/22/1039643346/redistricting-prison-gerrymandering-definition-census-congressional-legislative; 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/ (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).

[318] *See* Simonson, *Democratizing Criminal Justice*, *supra* note __, at 1610 (describing three levels of the antidemocratic nature of the criminal legal system); Akbar, *Abolitionist Horizon*, *supra* note __, at 1805 (describing the anti-democratic nature of the carceral state); Roberts, *supra* note __, at 1604 (arguing that criminal law's antidemocratic function requires an abolitionist approach).

[319] Gordon, *supra* note __, at 450; *see also* Burton, *supra* note __, at 154 (asserting that Think Tank members presented themselves "as part of a legitimate political constituency").

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struggles 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, less violent, less in need of prisons, and enabled our democracy to advance, aspire to change and do better. The inside decarceral moves this Article describes not only complicate the antidemocratic nature of the carceral state but also expose 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 insight, knowledge, training or skills into the mantle of expertise.[320] 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.[321] This approach 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.[322] Many scholars have challenged the idea that engaging experts will lead to more "rational" decisions, deconstructing the ways in which policy analysis and scientific method, often portrayed as neutral and objective

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[320] *Cf.* Pierre Schlag, *Expertopia: The Rule of Expertise and the Rise of the New Technocrats* (manuscript at 68) ("[E]xpertise has but one move, or one tendency: to reduce everything to the order of expert knowledge.").

[321] *See, e.g.,* BARKOW, supra note __, at 165-85 (calling for "expert bodies that use empirical data and studies to guide their decisions about criminal justice policy"); Rappaport, *supra* note __, 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").

[322] *See* BARKOW, *supra* note __, 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").

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tools, necessarily involve normative and political choices at every inflection point.[323] In that, "[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."[324]

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 from experience about the harms of policing, criminalization and incarceration.[325] Jocelyn Simonson argues that opening the concept of

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[323] *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) (noting popular view of the expert as "embodying neutrality" and "operating according to an ethical code 'beyond good and evil'"); *Introduction*, *in* THE PHILOSOPHY OF EXPERTISE 3 (Evan Selinger & Robert P. Crease eds., 2006) ("the authority so conferred on experts . . . risks elitism, ideology, and partisanship sneaking in under the guise of value-neutral expertise"); THE POLITICS OF NUMBERS, *supra* note __, 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]the 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. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 100 (2017) (arguing that expertise "can offer insight, but not resolution").

[324] Rahman, *supra* note __, 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 __, 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.").

[325] Simonson, *Power Lens*, *supra* note __, at 850-52 ("[They] do not just become important subjects of policing governance; they become *experts themselves*"); *see also* Akbar, *Radical Imagination*, *supra* note __, at 425 (arguing that the Movement for Black Lives "is about a vision to imagine expertise very differently than law scholarship"); Monica

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expertise in this way brings in knowledge that is missing and engages deeper critiques that can destabilize the status quo.[326] Shifting and expanding the definition of expertise also shifts power to define and measure safety and security.[327] 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."[328]

In their competing, yet somewhat complementary, visions of good governance, both camps—described by scholars as "bureaucratizers" and "democratizers"—lay a claim to expertise.[329] The implications for decarceration are far less clear. As Benjamin Levin has argued, the traditional expert's footprint is embedded in the carceral state.[330] Both proponents and critics of expanding traditional notions of expertise have surfaced a tension between a more equitable process for popular participation in criminal policymaking and the goals of decarceration.[331] Siloed from both

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C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 208 (2019) ("as 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 __, at 712.

[326] Simonson, *Power Lens*, *supra* note __, at 853-54.

[327] *Id.* at 851, 853-55 (arguing that these experts "might also seek data and information from less traditional sources"); *see also* Ngozi Okidegbe, *The Democratizing Potential of Algorithms*, 53 CONN. L. REV. (manuscript at 37-40, 45) (forthcoming 2021) (calling for communal expertise in the production of pretrial algorithms).

[328] Simonson, *Power Lens*, *supra* note __, at 850-53. *Cf.* Levin, *supra* note __ (manuscript at 7, 57-59) (describing 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 the vocabulary of "expertise").

[329] *See* Kleinfeld, *supra* note __, at 1399 (separating scholars into "democratizers" and "bureaucratic professionalizers"); Levin, *supra* note __ (manuscript at 4, 11) (describing both sides as adopting a "shared appeal to the language of experts or expertise").

[330] Levin, *supra* note __ (manuscript at 4-8, 34, 42) (arguing that vocational and educational experts "have been key players in constructing the carceral state"); *id.* at 34 n.166 (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 actually have operated as significant drivers of mass incarceration and the new penology"); *id.* at 41 ("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 15-17, 21, 42 (arguing that the turn to education-based expertise is in many ways a response to what some commentators see as the "resounding failure" of "a system steeped in vocational expertise" of police, corrections and crime labs whose "false claims to expertise" contributed to mass incarceration).

[331] *See* Simonson, *Power Lens*, *supra* note __, at 789 (recognizing that communities are not monolithic and power-shifting on its own does not guarantee any particular outcome);

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camps are people in prison, all of whom are democratically exiled and have no traditional credentials, but some of whom have made important, difficult decarceral moves. 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, is relevant to decarceration.

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 does 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.[332] Anna Lvovsky disrupts this "virtue-based vision of expertise."[333] Complicating the familiar association between expertise and deference in the context of policing, Lvovsky exposes a counterintuitive phenomenon: case law where conceded claims of expertise did not insulate police conduct from scrutiny but drove adverse judgements

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Simonson, *The Place of "the People*," *supra* note __, at 303-306 (hypothesizing that opening up criminal procedure to popular input from below has the potential to lead down a path toward decarceration but noting that drawing a direct line between the two "requires more study"); Rappaport, *supra* note __, at 719-20, 759 nn.276-78, 760 nn.279-82, 808-09 (2020) (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. FORUM 798, 800-01 (2021) ("The ends—crime policy transformation—should stand as the priority, well ahead of notions of egalitarian process."); Levin, *supra* note __ (manuscript at 51-56) (questioning whether shifting power will serve decarceral ends).

[332] *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 __, 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").

[333] Lvovsky, *supra* note __, at 481, 555, 559 (2021) (describing the virtuous view as "imagin[ing] expertise as a presumptive institutional good").

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against the state.[334] Across a range of disputes, 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.[335] 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."[336] The courts' embrace of concededly expert policing as "a source of active *mistrust*,"[337] Lvovsky persuasively argues, "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."[338]

The "deceptive allure" of expertise that wrests uncritical judicial deference across a range of doctrines[339] also infiltrates our processes for social change. In these final pages, I conclude 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 to understanding inside decarceral moves. I then propose a different way of thinking about inside decarceral work.

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[334] *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").

[335] Lvovsky, *supra* note __, 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").

[336] Lvovsky, *supra* note __, 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.

[337] *Id.* at 559-61 (emphasis in original) (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").

[338] *Id*. at 534, 558-61 (emphasis in original) ("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).

[339] Lvovsky, *supra* note __, at 482, 555.

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To be clear, I do not mean to oppose the role or value of "experts" who hold traditional academic credentials to advance decarceration. Indeed, imaginations formulated inside prison have come to fruition in conversation and collaboration with those who bear traditional markers of expertise, and 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.[340] Rather, I seek to question the instinctive pull to "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 value of expertise in the project of decarceration—I surface three limits of 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 value of an expert is typically cabined to insights in the domain in which the expert has expertise.[341] 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. People in prison have shaped legal and social change. Their knowledge extends beyond prison walls, to law, politics, public health, neighborhood priorities, violence reduction, peer relations and more.[342] Their engagement has awakened public consciousness, shaped the evolution of constitutional meaning and deepened popular and policy discourse. "[T]he law's

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[340] Simonson, *Power Lens*, *supra* note __, at 851; Levin, *supra* note __ (manuscript at 6-7) (arguing that expanding the meaning of expertise "highlights the politicized project of selecting experts in the first place and denaturalizes experts' privileged status).

[341] *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.").

[342] *Cf.* Lobel, *supra* note __, at 150, 153-54, 159 (describing Pelican Bay hunger strikers' vast knowledge beyond the prison regime, including on strategy and tactics central to the class-action lawsuit, and stating that some had mastered the law, were widely read in philosophy, science, politics, and Black consciousness, or closely analyzed social relations in a carceral setting and together "offer[ed] the[ir] lawyers such a wealth of knowledge," but describing this knowledge as "expertise").

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infatuation with expertise"[343] may even partially contribute to why we do not think of people in prison as agents in progressing to a noncarceral state.

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.[344] This concept ties into the aura that experts are a source of infallible truth.[345] Many policies and practices of "infallible" experts, whose expertise has expanded the power of the carceral state, have been discredited.[346] Meanwhile, some "fallible" people in prison have produced

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[343] Lvovsky, *supra* note __, at 492.

[344] *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 __, 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.'").

[345] *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. *U.S. v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) ("voiceprint" expert); *see also U.S. v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) (eyewitness expert); Lvovsky, *supra* note __, at 487-88 (noting that prosecutors invoke credentials of police to "bathe their observations in the aura of authority"). This halo creates a substantial risk of distracting factfinders, both technicist-minded judges and lay jurors, from rigorous scrutiny over claims of expertise. Lvovsky, *supra* note __, at 486, 536, 559 (suggesting that the "mysticism of police expertise" may explain judicial warnings against "second guessing" police decisions); *State v. Young*, 35 So.3d 1042, 1050 (La. 2010) (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*, 262 SCI. AM. 46, 48 (May 1990) ("the 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").

[346] *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, ILLUSION OF ORDER, *supra* note __, at 163 (describing how broken windows policing turns entire classes of people into "subjects that need to be controlled"); Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, WASH. PO (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-b510-962fcfabc310_story.html (reporting that nearly every examiner in an elite FBI forensic unit gave flawed testimony in over 95% 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 ACADEMY OF SCIENCES, NAT'L RESEARCH COUNCIL, 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

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pioneering decarceral-oriented change. If expertise operates as a gateway to deference and authority—privileges that people in prison have rarely, if ever, enjoyed[347]—sublimating people in prison to its perch risks colluding in the frame's "flawless" ideology.

Third, expertise finds its purchase in a hierarchy of knowledge.[348] 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.[349] He calls this "local knowledge."[350] It was, in part, local knowledge that produced the innovative decarceral ideas described in these pages, sometimes alongside advocates and scholars with traditional credentials. To label this cross-pollinated phenomena "expertise" conspires in the frame's appeal to superior and exclusive knowledge, risking sidelining the difficult and often collective struggles within exile. As a consequence, adopting its frame reifies the status quo and runs up against what Marie Gottschalk describes as "the convulsive politics from below that we need to dismantle the carceral state and ameliorate other gaping inequalities."[351] In that, to silo the ideas produced in confinement as the work

supermax prisons); Lvovsky, *supra* note __, at 496 (noting that the most touted examples of police knowledge are "often grounded less in reliable data than in hunches" and racial bias).

[347] *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 __, at 541; *id.* at 494 (arguing that the mantle "devalues more informal authorities").

[348] "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 __ (manuscript at 58) ("[T]he power of the expertise claim generally rests on its exclusivity.").

[349] Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521-22 (1945).

[350] *Id.*

[351] Gottschalk, *supra* note __, 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, as complementary, a move to "reveal 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 __ (manuscript at 59) ("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.* (manuscript at 42) ("dismantling 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.");

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of "experts" undercuts the communal consciousness that is essential to movements for freedom.[352] As organizer and activist Derecka Purnell stated, "the idea of being an abolitionist *expert* feels counter to the communal politics of abolition."[353] Expertise creep is a particular concern for decarceration, a relatively new, aspirational mission that has only tentative ideas from many quarters.

There is another reason to rethink the frame of expertise, traditional or expanded, in decarceration. On the traditional end, inside moves expose the limits of professional judgment in a carceral state. Imaginations behind bars produced important decarceral steps precisely because people in prison are not "neutral" or detached.[354] In that, Supreme Court "experts" could have brought the same issues to the high court; some, in fact, tried to no avail. Traditional experts certainly could have designed a study of which zip codes send people to prison. What emboldens people in confinement to study the law to bring cases to courts, sometimes tirelessly, with no counsel and limited resources? And for many, to bring cases that have no impact on them? What motivates them to design a research study to understand an issue that has confounded advocates, law enforcement, researchers and policymakers? Expertise seems inadequate to capture the contemplation that perseveres in shackles. On this point, inverting expertise also comes up short. While lived experience is one source of the wisdom on the inside, and inside moves are certainly shaped by the social and economic oppression that preceded confinement, lived experience does not explain mastery or critiques of the law, a proposal 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.

There is a capacity in common to the moves by people discussed in Part I: 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

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Akbar, *Abolitionist Horizon*, *supra* note __, 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, *Power Lens*, *supra* note __, at 860 ("Nor should we look to the usual experts to create roadmaps for transformational change.").

[352] *Cf.* DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note __, 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.").

[353] Derecka Purnell (@dereckapurnell), TWITTER, https://twitter.com/dereckapurnell/status/1273375358298009601 (emphasis added).

[354] *Cf.* Burton, *supra* note __, 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)).

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knowledge of the broader reasons they are in prison and the deep incentive to resist those logics. Their contemplation and resistance to how law and society understand them generates work and ideas to oppose the laws and social circumstances that land them in prison, tapping into an organic intellect and agency to chip away at the carceral state's power. Inside pursuits may be driven by oppression,[355] elevated yet subjugated[356] knowledge, deep humanity, and the capacity to think, create and believe in ideas that circumstances render more conceivable on the inside than on the outside. This brings to mind what Antonio Gramsci called "an optimism of the will."[357] While 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."[358]

Thinking about the mobilization of ideas inside the walls as unmoored to expertise, but anchored in resistance, has implications for how people in prison think about their own agency and for valuing more collective processes between legal scholars, traditional experts, and people in prison. Resisting 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, but with distinct implications that help those on the outside see complex social problems differently and that expose how the law thinks (and does not think) about who it sends to prison—an ambition that connects to how the law understands violence.

It is important to note that some people in prison 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

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[355] *Cf.* Lobel, *supra* note __, at 153 ("Ironically, the [Pelican Bay hunger strikers'] extreme isolation in oppressive conditions induced them to study law").

[356] *See* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977 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").

[357] SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 175 & n.75 (Quintin Hoare & Geoffrey Nowell-Smith eds., 1971) (combining the "pessimism of the intelligence" with an "optimism of the will"). Allegra McLeod describes this maxim, written while Gramsci was imprisoned by Mussolini, as "the courage to try to alter [current] possibilities" to "attempt difficult things despite the odds." McLeod, *Beyond the Carceral State*, *supra* note __, at 657 n.22.

[358] 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 __ ("[W]e asked ourselves: Do we want to change our conditions, or do we want to change our circumstances?") (quoting Norris Henderson, imprisoned in Angola for nearly thirty years).

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(which, for some, was a direct result of their inside work, which accelerated partnerships on the outside) that enabled them to focus on continuing the work begun on the inside. Still, generating, and having someone on the outside invest in generating, these moves while in prison was critical to the success of their work and their visions, particularly when release was all but uncertain. This is not to suggest that most people in prison will have good legal or social interventions or that we can reach all who do. The next task is to work through the logistics of this proposal, a task that may not always be easy given the logics of carceral punishment.[359] This is an analysis for another day. For now I conclude by recognizing the obvious: disconnecting from the frame of expertise will be difficult. As Anna Lvovsky argues, the credentials, designations and social 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."[360] 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.

CONCLUSION

Sociologist Tony Cheng has argued that the participation of the public in police-community meetings often becomes "input without influence."[361] 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 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 direct to 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.

[359] *Cf.* DAVIS, FREEDOM IS A CONSTANT STRUGGLE, *supra* note __, 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.")

[360] Lvovsky, *supra* note __, at __541-42.

[361] 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 reinforcing 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.").

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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, different actors and different partners. 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 on the inside as decarceral partners. The test is whether we have the will to do so.

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