

THE PUBLIC VOICE OF THE DEFENDER

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For decades police and prosecutors have controlled the public narrative about criminal law. The news landscape features salacious stories of violent crimes while ignoring the more mundane but far more prevalent minor cases that clog the court dockets. Defenders, faced with overwhelming caseloads and fear that speaking out may harm their clients, have largely ceded the opportunity to offer a counternarrative based on what they see every day. Defenders tell each other about overuse of pretrial detention, intensive pressure to plead guilty, overzealous prosecutors, cycles of violence, and rampant constitutional violations—all of which inflict severe harm on defendants and their loved ones. But defenders rarely show the public the world they inhabit.

That approach hasn't stopped the carceral state from ballooning over the past fifty years; public defense budgets remain paltry, and clients suffer from too much law and too little justice in a system that disregards and dehumanizes them. This Article encourages defenders to go on the offensive, to seek transformative change toward a more just legal system. It builds on social media literature to analyze how defenders can strategically use social networking sites to add their expertise to ongoing public debates about crime and criminal justice policy. As the few existing efforts suggest, social media enables defenders to widely share the routine injustices they observe and to engage with local grassroots organizations to build coalitions. Defenders' strategic use of social media won't change policies overnight, but we are hopeful that it will augment public support for defenders and their clients and build power to transform the criminal legal landscape over decades.

INTRODUCTION

Breonna Taylor was killed by a police bullet during the execution of a no-knock warrant in the middle of the night at her home in Louisville, Kentucky.¹ Immediately following her death, the #SayHerName campaign on social media fueled protests that led not only to the prosecution of several officers involved in the raid,² but to numerous jurisdictions (including Louisville) making an important policy change: to prohibit or curtail no-knock searches.³

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1. Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Mar. 9, 2023), <https://www.nytimes.com/article/breonna-taylor-police.html>.

2. *Id.*

3. See, e.g., Barbara Campbell & Suzanne Nuyen, *No-Knock Warrants Banned in Louisville in Law Named for Breonna Taylor*, NPR (June 11, 2020, 9:40 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/11/875466130/no-knock-warrants-banned-in-louisville-in-law-named-for-breonna-taylor> [<https://perma.cc/U6BB-BWHA>]; Daniella Cheslow, *Virginia Gov. Northam Signs 'Breonna's Law'*

In 2018, after New York’s mayor and district attorney announced that the city would stop arresting and prosecuting most people for smoking marijuana,⁴ Brooklyn Defender Services represented a client who was arrested for and charged with vaping THC.⁵ A public defender from that office took to Twitter⁶ to question why smoking marijuana wouldn’t be prosecuted but vaping the same ingredient would be.⁷ That tweet grabbed the attention of two members of the city council, who then confronted the New York Police Department (NYPD).⁸ As a result, NYPD changed its policy to stop arresting for possession or consumption of THC oil.⁹

These vignettes demonstrate social media’s power to drive legal change.¹⁰ In this Article we argue that public defenders¹¹ ought to strategically create and maintain a social media presence to make more of that change happen in the United States.¹² Through social media, defenders can share their experiences of justice (and much more frequently, injustice) with people who otherwise might not know much about what happens in our courtrooms, jails, and overpoliced communities.¹³ More significantly, defenders can contextualize what might

Banning No-Knock Warrants, NPR (Dec. 8, 2020), <https://www.npr.org/local/305/2020/12/08/944231385/virginia-gov-northam-signs-breonna-s-law-banning-no-knock-warrants> [<https://perma.cc/E5TG-YRJV>].

4. Benjamin Mueller, *New York City Will End Marijuana Arrests for Most People*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/nyregion/nypd-marijuana-arrests-new-york-city.html>.

5. Lester Black, *Vaping While Black in NYC Gets You a Night in Jail*, STRANGER (Sept. 18, 2018, 10:45 AM), <https://www.thestranger.com/news/2018/09/18/32481269/vaping-while-black-in-nyc-gets-you-a-night-in-jail> [<https://perma.cc/CXC8-M9YQ>].

6. The social media platform Twitter was renamed X on July 23, 2023, and “tweets” were renamed “posts” shortly thereafter. The platform otherwise remains unchanged. Ryan Mac & Tiffany Hsu, *From Twitter to X: Elon Musk Begins Erasing an Iconic Internet Brand*, N.Y. TIMES (July 24, 2023), <https://www.nytimes.com/2023/07/24/technology/twitter-x-elon-musk.html>; Kate Conger, *So What Do We Call Twitter Now Anyway?*, N.Y. TIMES (Aug. 3, 2023), <https://www.nytimes.com/2023/08/03/technology/twitter-x-tweets-elon-musk.html>. We refer to the platform as “Twitter” when we discuss content predating the name change and as “X” after the change. Similarly, we use “tweet” for content before the name change and “post” for content after it.

7. Scott Hechinger (@ScottHech), TWITTER (Sept. 15, 2018, 10:04 AM), <https://twitter.com/ScottHech/status/1040979656655228935>.

8. Janon Fisher, *Pols Rip Cops over Busts for THC Vape Pens*, N.Y. DAILY NEWS, Dec. 4, 2018, at CS26.

9. Graham Rayman, *NYPD Will Curb Busts for THC Oil Possession*, N.Y. DAILY NEWS, Mar. 23, 2019, at CS2.

10. See, e.g., Marcia Mundt et al., *Scaling Social Movements Through Social Media: The Case of Black Lives Matter*, SOC. MEDIA + SOC’Y, Oct.–Dec. 2018; Tanisha Afnan et al., *Putting a Price on Social Movements: A Case Study of #MeToo on Instagram*, 56 PROC. ASS’N INFO. SCI. & TECH. 1 (2019).

11. We use “public defender,” “indigent defender,” and “defender” interchangeably to refer to attorneys appointed and paid by the government to represent people charged with crime. Privately retained counsel are excluded from this group, although their opinions and experiences might sometimes align with those of their appointed counterparts.

12. We recognize that social media can also spread hatred, interfere with national elections, and oversimplify a complicated world. But when some use social media for those ends already, our view is that defenders and others should use it to increase understanding and exposure to the criminal legal system as it actually exists.

13. John Pfaff, *Why Public Defenders Matter More Than Ever in a Time of Reform*, APPEAL (Apr. 18, 2018), <https://theappeal.org/why-public-defenders-matter-more-than-ever-in-a-time-of-reform-9b018e2184fe/> [<https://perma.cc/6BG7-XFJ2>] (explaining why public defenders are well situated to tell the stories of

seem like individual instances of government abuse, thereby bringing into sharp relief the realities of our everyday criminal legal system for thousands or millions of people. In so doing, they can “challenge the structural determinants of mass incarceration”¹⁴ that otherwise remain hidden from view.

Two examples illustrate how defenders can best use social media to advance systemic reform. Consider first the overturning of Adnan Syed’s conviction for murder in Maryland. When journalists reported that the trial prosecutor had failed to disclose evidence of an alternative suspect,¹⁵ it might have seemed to the public like a terrible injustice suffered by one unfortunate defendant.¹⁶ But defenders know better; they have seen plenty of prosecutors hide evidence of innocence.¹⁷ This Instagram post drives that point home with a cartoon.¹⁸

Prosecutors after seeing exculpatory evidence within Brady disclosure obligations:



Second, readers may recall Kalief Browder, who took his own life after being detained on Rikers Island awaiting trial on charges that he stole a backpack.¹⁹ While Browder’s story was particularly tragic, defenders see the suffering associated with pretrial detention and postconviction incarceration as a regular feature of the system, not as an isolated incident. For example, one defender used Twitter to highlight the “human rights crisis happening in San Francisco’s jails”; using fewer than 280 characters, he portrayed the lack of sunlight and fresh air inside jail cells as both criminogenic and soul-crushing.²⁰

injustice they routinely observe); Nicole Smith Futrell, *Please Tweet Responsibly: The Social and Professional Ethics of Public Defenders Using Client Information in Social Media Advocacy*, CHAMPION, Dec. 2019, at 12 (same).

14. Nirej Sekhon, *Defenders and Decarceration 11* (Feb. 1, 2023) (unpublished manuscript) (on file with authors).

15. See, e.g., Michael Levenson, *Judge Vacates Murder Conviction of Adnan Syed of ‘Serial,’* N.Y. TIMES (Oct. 11, 2022), <https://www.nytimes.com/2022/09/19/us/adnan-syed-murder-conviction-overturned.html>.

16. A prosecutor’s failure to disclose to the defense evidence of innocence implicates both the constitutional right to due process, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and ethics rules, MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS’N 1983) (requiring prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense”). It likely also violates state statutes governing prosecutorial disclosure obligations. See, e.g., MD. R. 4-263(d).

17. See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 431 (2001) (recognizing the prevalence of *Brady* violations); Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540 (2010) (same); *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).

18. @anxious_public_defender, INSTAGRAM (Dec. 6, 2021), <https://www.instagram.com/p/CXJMKpzLY2T/>.

19. See, e.g., Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

20. See, e.g., Peter Calloway (@petercalloway), TWITTER (Dec. 2, 2022, 4:21 PM), <https://twitter.com/petercalloway/status/1598804693698121729>.

Through posts such as these, indigent defenders can share their professional stories to reveal the breadth and frequency of problems their clients experience.²¹ As institutional players they can weave together what otherwise seem like disparate threads to reveal the fabric of injustice that enshrouds the criminal legal system.

We see the value in social media activity by both individual defenders and the organizations for whom they work because these two channels complement each other. Individual defenders' accounts of their day-to-day experiences can resonate because of their raw authenticity.²² Individual social media presence also does not require the resources of a large office. But because many individual defenders might feel constrained by time or individual client needs, the chief defender of the office (or a designee) should maintain a social media presence on behalf of the office.²³ Office posts should be used strategically to promote a consistent, long-term agenda rather than to highlight individual case narratives that might pose confidentiality concerns.²⁴ The Bronx Defenders, the Los Angeles Public Defender, the Cook County Public Defender, and Orleans Public Defender are already active in this space;²⁵ as we profile in more detail below, their posts spotlight a range of issues that resonate locally, regionally,

21. See, e.g., #TimeToLetThemGo Campaign, JUSTICE THRU STORYTELLING, INC., <https://jtsadvocates.com/> [<https://perma.cc/4EKB-TQTB>] (publishing and promoting accounts by incarcerated women who were survivors of domestic abuse); Micah Castelo, *Communications Professor Aims to Change the Crime Narrative Through Multimedia Storytelling*, ST. JOSEPH'S UNIV. (Apr. 22, 2021), <https://www.sju.edu/news/communications-professor-aims-change-crime-narrative-through-multimedia-storytelling> [<https://perma.cc/69QS-CXUF>]; see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989). In all of these instances, sharing individual client stories requires client consent, as we discuss in more depth later in the Article. See *infra* Part I.B.

22. In many places indigent defense is handled by contract lawyers rather than by an institutional public defender. See, e.g., Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1785–87 (2016). In such systems, posting by individual lawyers is the only available option.

23. Some chief defenders might rely instead on a chief deputy, social media staff liaison, or director of public relations. If a jurisdiction has a law or rule regulating public employees' engagement with social media, see, e.g., TOWN OF BROOKLINE, SOCIAL MEDIA POLICY (2017), <https://www.brooklinema.gov/DocumentCenter/View/20371/Social-Media-Policy> [<https://perma.cc/8H3U-6938>], office-level social media presence or attention to authorizing line defenders' social media presence is particularly important. Federal defender social media use might be regulated by the Hatch Act, enacted in 1939 to circumscribe political activities by federal employees. Pub. L. No. 76-252, 53 Stat. 1147 (1939). In subsequent years Congress narrowed both the scope of the prohibited activities and the categories of covered employees, most significantly in the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, § 6, 107 Stat. 1001, 1005 (1993), and the Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, 126 Stat. 1616 (2012), but it does extend to state and local employees working on projects that involve federal funding. See 5 U.S.C. §§ 1501(4), 1502.

24. See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2420 (1996) [hereinafter Taylor-Thompson, *Individual Actor v. Institutional Player*]; Kim Taylor-Thompson, *Effective Assistance: Reconceiving the Role of the Chief Public Defender*, 2 J. INST. STUDY LEGAL ETHICS 199, 200 (1999) [hereinafter Taylor-Thompson, *Effective Assistance*]. Posts by the office also avoid concerns that any individual defender is trying to exploit clients' stories to gain notoriety.

25. All of these organizations have worked with Zealous to develop and hone their public advocacy skills. Zoom Interview with Scott Hechinger, Exec. Dir., Zealous (June 23, 2023) [hereinafter Hechinger Interview].

and nationally.²⁶ How a particular office manages its social media presence will depend on its structure and the number of people employed who have training in social media or communications.

Social media use ought to supplement and complement other forms of public advocacy by defenders, such as op-eds and amicus briefs.²⁷ Some national groups like the National Association for Criminal Defense Lawyers (NACDL),²⁸ the American Bar Association (ABA),²⁹ and the American Civil Liberties Union (ACLU)³⁰ also speak, to some extent, about pathologies in criminal legal systems around the country. These are all good practices. But regular and routine social media presence by local defenders and defender organizations can amplify these efforts to help drive local change. Indeed, NACDL encourages defense lawyers and partner organizations to use social media to criticize the fifty-year failure that is mass incarceration, and it provides sample language and graphics for that purpose.³¹ While many issues transcend state borders, criminal law's pathologies carry local dimensions, which means problems require local solutions crafted by local actors. The social media literature shows how local online conversation can facilitate offline activism in communities—an important facet of using social media to build power at the local level.³² Moreover, social media helps set the agenda for conventional media.³³ There are currently more than 15,000 people working as public defenders across nearly 1,000 agencies in the United States, most of them at the local level;³⁴ they are well positioned to enter these local and national conversations.

Engaging with the public over social media carries some risk, such as consuming scarce time and generating backlash that might harm future clients. Kim Taylor-Thompson addressed these concerns almost twenty years ago

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

27. See, e.g., Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae in Support of Petitioners, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (No. 20-843); Avinash Samarth et al., *We Are Public Defenders. New York's Gun Laws Eviscerate Our Clients' Second Amendment Rights.*, SCOTUSBLOG (Oct. 28, 2021, 7:40 PM), <https://www.scotusblog.com/2021/10/we-are-public-defenders-new-yorks-gun-laws-eviscerate-our-clients-second-amendment-rights/> [<https://perma.cc/Y74U-TM27>].

28. See NAT'L ASS'N OF CRIM. DEF. LAWS., <https://www.nacdl.org/> [<https://perma.cc/J4FR-Q29X>].

29. See AM. BAR ASS'N, <https://www.americanbar.org/> [<https://perma.cc/MU2Y-CN32>].

30. See AM. CIV. LIBERTIES UNION, <https://www.aclu.org/> [<https://perma.cc/K8GB-MQW5>].

31. See *Commemorating 50 Years of Mass Incarceration Social Media Toolkit*, NAT'L ASS'N OF CRIM. DEF. LAWS., https://www.nacdl.org/Landing/Commemorating-50-Years-of-Mass-Incarceration-Socia?_zs=dwNgM1&_zl=Wg1B7 [<https://perma.cc/73SF-SHPY>].

32. See *infra* Part I.A.

33. Shannon C. McGregor & Logan Molyneux, *Twitter's Influence on News Judgment: An Experiment Among Journalists*, 21 JOURNALISM 597, 597, 606–08 (2020); Ezra Klein, *Why the Media Is So Polarized—And How It Polarizes Us*, VOX (Jan. 28, 2020, 8:30 AM), <https://www.vox.com/2020/1/28/21077888/why-were-polarized-media-book-ezra-news> [<https://perma.cc/8SH2-Z9G6>].

34. See LYNN LANGTON & DONALD J. FAROLE, JR., BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., PUBLIC DEFENDER OFFICES, 2007–STATISTICAL TABLES 1 (2010), <https://bjs.ojp.gov/content/pub/pdf/pdo07st.pdf> [<https://perma.cc/6EGM-LZVE>].

before social media took over the world.³⁵ As she recognized, public defenders subscribe to a client-centered model of representation grounded in ethics and professional training.³⁶ Putting time and resources into social media presence might draw already-scarce resources away from client representation.³⁷ Moreover, defenders worry that an overly aggressive argument in court will hurt a current or future client; they might worry more about bold out-of-court pronouncements or policy statements that could antagonize the bench or prosecutor's office.³⁸ Those risks and role constraints are not to be taken lightly,³⁹ but they ought not to shut down the possibilities for new forms of advocacy, for several reasons.

First, while defenders in some communities may be able to rely on surrogates to convey the decarceral message and thus avoid blowback against them or their clients, surrogate messengers may speak with less direct experience and may carry correspondingly less emotional power. And in some places, appropriate surrogates won't be available to deliver the sort of message that needs conveying. More importantly, defenders' choice to focus only on individual representation at the expense of broad policy conversation bears unseen risks too. It cedes the opportunity to supply the public and lawmakers with information about the way the criminal legal system actually operates⁴⁰ and has kept government funding for indigent defense to, at best, subsistence levels.⁴¹ And public advocacy can produce real benefits. In Santa Clara County, California, for example, public defenders working with a local participatory defense hub pressed political leadership for new funding that allowed the public defender's office to represent defendants at arraignment.⁴² Even when public advocacy does not prompt funding or legislative change directly, it might inspire

35. Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153 (2004) [hereinafter Taylor-Thompson, *Taking It to the Streets*]; see also Taylor-Thompson, *Effective Assistance*, *supra* note 24, at 206–15 (arguing that chief public defenders should view their role and their offices' role as engaging in political discourse around criminal law).

36. Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 156, 162.

37. See *id.* at 170–71.

38. *Id.* at 169.

39. See *infra* Part III.

40. Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 171. One commentator has memorably characterized state institutions as “juggernauts which sluice people into the State’s carceral machinery en masse.” Sekhon, *supra* note 14, at 7.

41. See Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 171. For discussion of the well-documented crisis in indigent defense, see generally, for example, Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389 (2016); Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331 (2010); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

42. ACJPDEBUB, *Santa Clara County Courts: Now Providing Legal Representation in Misdemeanor Court to Anyone Who Can't Afford Their Own*, ALBERT COBARRUBIAS JUST. PROJECT (Jan. 30, 2012), <https://acjusticeproject.org/2012/01/30/santa-clara-county-courts-now-providing-legal-representation-in-misdemeanor-court-to-anyone-who-cant-afford-their-own/> [https://perma.cc/GE4S-N3X5].

community members to contribute time or money to indigent defense.⁴³ It might shift public conversation away from the exclusive focus on high-profile tragedies to recognize instead the tragic mass processing of countless people for low-level crimes.⁴⁴ In short, public defenders are—almost by nature—fighters. We encourage them to extend the fight beyond the courtroom walls.⁴⁵

Will lasting change happen overnight? Of course not. The speed of change after Ms. Taylor's tragic death was unusual. But the chances of success over time seem more promising now than they did a generation ago, at least in some places. Instead of a national one-way upward ratchet, the current politics of criminal law have diverged across the country, with some jurisdictions embracing approaches grounded in leniency, proportionality, and fiscal responsibility.⁴⁶ For instance, reform-oriented legislatures have scaled back pretrial detention, shortened sentencing ranges, and limited, or even eliminated, mandatory minimums and recidivist enhancements.⁴⁷ Newly elected reformist prosecutors have reduced filing for low-level offenses, the use of cash bail, and the death penalty, while embracing more forms of diversion.⁴⁸ These are all signs of disruption that allow for defenders to advocate publicly in support of structural reform.

Defenders can also build on, amplify, and nurture the work of decarceral organizations like participatory defense hubs, courtwatching groups, and bail funds, where such organizations exist.⁴⁹ Consider this interplay between lawyers and activists that took place recently in New York City. A grassroots organization called Communities Not Cages organized an event called a Power Hour, bringing people together to discuss ways to combat mass incarceration.⁵⁰ The organization tweeted a photo in which it tagged the local public defender office, the legal aid society, and other local and national organizations.⁵¹ The defender office later retweeted the message, bringing it to a much larger audience.⁵² In areas without robust community groups, defenders' social media participation may help spur creation of community organizations that can serve

43. See Mundt et al., *supra* note 10, at 2; *OPD Launches Crowdfunding Campaign to Meet Funding Gap*, ORLEANS PUB. DEFS. (Sept. 14, 2015), <https://www.opdla.org/news/opd-launches-crowdfunding-campaign-to-meet-funding-gap> [<https://perma.cc/CXY6-3WRR>].

44. See, e.g., ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 25–28 (2018).

45. Hechinger Interview, *supra* note 25.

46. See Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 528 (2020).

47. See *infra* Part II.B.

48. See *infra* Part II.B.

49. See generally Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017); see also *infra* Part II.A.

50. Communities Not Cages (@Communities_NY), TWITTER (Nov. 16, 2022, 3:10 PM), https://twitter.com/Communities_NY/status/1592988613595123712.

51. *Id.*

52. *Id.* (retweeted by Bronx Defenders).

as allies in local reform efforts. Bills supporting leniency already “appear every year, in every state.”⁵³ If defenders assumed their rightful place in the public conversation, supported by allies, more of those bills might pass in some places.⁵⁴

In this Article we offer the first sustained template for defenders’ social media advocacy toward these ends.⁵⁵ We do so by relying on the communications literature that analyzes social media’s role in social movements and our own research into the relatively few defenders and defender organizations that have already developed their public voice via social media. We hope that increased public engagement by indigent defenders and defense services will activate⁵⁶ the citizenry, inspiring them to take measures to reform the criminal laws that operate in their name. An activated community member might reach out to neighbors, lobby legislators, attend a protest, contribute time or money to the underfunded cause of indigent defense, or even run for office. Such grassroots efforts, in various combinations, play an essential role in promoting social change.⁵⁷

Our argument proceeds in three parts. Part I analyzes the social media and social movements literature before considering what that literature offers to public defenders. We show how a few public defenders have already used social media and offer suggestions to defenders who want to undertake these efforts on specific platforms. Part II discusses why the timing is right for this disruptive shift—the ability to work with decarceral community groups and the opportunities presented by an increasingly textured criminal legal policy landscape. Part III acknowledges the risks of defenders assuming a broader public voice—risks that affect relationships with current clients, judges, and prosecutors—and explains why those concerns should not stop defenders from embarking on a new path forward.

53. Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143, 212 (2023).

54. See Amy X. Zhang & Scott Counts, *Modeling Ideology and Predicting Policy Change with Social Media: Case of Same-Sex Marriage*, 2015 CHI 2015: PROC. 33RD ANN. ACM CONF. ON HUM. FACTORS COMPUTING SYS. 2603, 2603 (showing a high correlation between social media attention and likelihood of legislative success). By analyzing state residents’ social media posts, the authors predicted which measures would eventually pass with approximately 80% accuracy. *Id.*

55. This article builds on a handful of articles that have discussed Twitter use by defenders. See Smith Futrell, *supra* note 13, at 13–15 (analyzing ethical constraints on public defenders’ use of social media); Jessica Jackson, *Clemency, Pardons, and Reform: When People Released Return to Prison*, 16 U. ST. THOMAS L.J. 373, 393 (2020) (recounting a new initiative from Brooklyn Defender Services to provide media training and movement building for public defenders); see also Alex Bunin, *Public Defender Independence*, 27 TEX. J. ON C.L. & C.R. 25, 41 (2021) (discussing a prosecutor trying to stop a public defender from using Twitter to accuse the prosecutor’s office of perpetuating racism and police brutality).

56. See Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 754 (2008) (discussing “activat[ing]” a new majority of citizens).

57. See, e.g., GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE 1–7 (1992); Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431, 449–54 (2021).

I. DEFENDERS DRIVING DISRUPTIVE CHANGE THROUGH SOCIAL MEDIA

The public sometimes hears about extreme miscarriages of justice, such as the vignettes we profiled in the Introduction. But in the absence of more information, it remains easy for the public to view these stories as aberrations in a functional system rather than the tip of an extraordinarily large pathological iceberg. Academics speak and write about system failures, but our words may not reach wider audiences. Defenders who work every day in these systems add depth to our understanding of the problems, based on first-hand expertise.

Defenders see cases involving mundane, tragic, or brutal crimes and endure slurs and slights directed at their clients. They see some defendants and their loved ones experiencing relief while others are suffering maltreatment and neglect. They watch prosecutors making impassioned pleas on behalf of victims who have suffered unbearable loss but also witness judges detaining clients because they are poor. Based on their on-the-ground exposure to the machinery of criminal case processing,⁵⁸ many defenders can precisely and passionately identify the places in which the fabric of the legal system is torn.⁵⁹

Defenders should share with the public both the minutiae and the large-scale behavioral patterns they observe in their local courthouses. Social media platforms offer important tools for them to do so, helping these attorneys reach communities and build alliances beyond the courthouse walls.⁶⁰ Platforms have shown themselves to be enormously helpful to social movements in various countries; we believe defenders in the United States can benefit from those experiences as they build their social media presences. Other scholars have conceptualized public defenders as movement lawyers;⁶¹ we build on that insight here.

In the pages below, we make the case for defenders to incorporate social media into their professional lives, leveraging the lessons drawn from social

58. Pfaff, *supra* note 13. Pfaff explained it like this:

[Defenders see] not just public hearings, some of which might be held in the middle of the night—but the behind-closed-doors plea bargaining processes that resolve about 95 percent of all cases. They see the charges that prosecutors threaten and then withdraw, [and] the factors that seem to shape prosecutors' decisions

Id.

59. *Id.*; Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 161; Taylor-Thompson, *Effective Assistance*, *supra* note 24, at 215; see also Katherine E. Kinsey, Note, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219, 255 (2014). We do not mean to imply anything about prosecutors' understanding of the harms of the carceral state compared to the lived experiences of defendants and their loved ones. Our view is that both have important (and somewhat different) vantage points.

60. See generally Stacey B. Steinberg, #Advocacy: Social Media Activism's Power to Transform Law, 105 KY. L.J. 413, 445–51 (2017) (discussing the various ways movement lawyers can take advantage of social media to advance their causes).

61. See, e.g., Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1199–223 (2005); Jonathan A. Rapping, *Retuning Gideon's Trumpet: Telling the Story in the Context of Today's Criminal-Justice Crisis*, 92 TEX. L. REV. 1225, 1226–27, 1238–40 (2014).

movements around the globe. Public defenders have already established a digital community on Reddit, which provides an inward-facing platform for defenders to commiserate, support, or provide advice to each other.⁶² That inward-facing defender community forum can serve as a starting point for defenders to organize before looking outward. Indeed, some of the defenders' discussion topics there—such as long hours and incredibly high caseloads⁶³—could provide new insights to an external audience whose views on criminal law are steeped in a brew of police and prosecutors' making,⁶⁴ laced with fictional portrayals that appear on television and in the movies.⁶⁵ Defenders and defendants will not necessarily share views or interests across all cases,⁶⁶ but we believe that across a wide array of cases, defenders are steadfastly committed to two imperatives: seeking the protections guaranteed by the Constitution, statutes, and case law for their clients and limiting the state's ability to impose unnecessary suffering.

In Subpart A we discuss the communications and public relations literature about social media and social movements, focusing on themes that defenders could find useful. This literature demonstrates that social media platforms increase an organization's ability to deepen connections, build shared narratives, expand networks, and connect online commentary with offline activities (such as protests or lobbying). In this Subpart we also explain the risks of social media use, such as the need to monitor one's sites to maintain consistent messaging and to combat hijacking (or co-optation) of one's message by opposing groups.

In Subpart B we move from the general to the specific. We provide details about four social media platforms that are widely used in the United States at the time of this writing: Facebook, X (formerly Twitter), Instagram, and TikTok. We briefly describe the strengths and weaknesses of each platform, and then we spotlight efforts by certain defenders and defender organizations to use these tools to bolster the public defense mission—offering suggestions

62. [r/publicdefenders, REDDIT, https://www.reddit.com/r/publicdefenders/](https://www.reddit.com/r/publicdefenders/) (last visited Sept. 20, 2023). The mission statement of this sub-Reddit group says the site serves as an online community for defenders to talk to each other. While outsiders can join, the posts that are currently visible consist of questions that insiders pose to each other. This sub-Reddit also has two moderators, one who identifies as a former PD and one who identifies as a current PD; they presumably keep out any posts and commentary that fail to advance the site's mission.

63. *E.g.*, [u/fungusprone, REDDIT \(Oct. 26, 2022, 11:19 PM\), https://www.reddit.com/r/publicdefenders/comments/yeciaba/new_pd_feeling_overwhelmed_need_to_vent/](https://www.reddit.com/r/publicdefenders/comments/yeciaba/new_pd_feeling_overwhelmed_need_to_vent/); [u/mysers4am, REDDIT \(Nov. 1, 2022, 7:28 AM\), https://www.reddit.com/r/publicdefenders/comments/yj7fgn/how_often_do_you_visit_your_incustody_clients/](https://www.reddit.com/r/publicdefenders/comments/yj7fgn/how_often_do_you_visit_your_incustody_clients/).

64. *See* Hessick, Wright & Pishko, *supra* note 53, at 155 n.36 (citing news articles in which prosecutors highlighted examples of particularly dangerous defendants).

65. TV shows about police are often called “copaganda” because they serve as police propaganda. *See Copaganda*, URB. DICTIONARY, <https://www.urbandictionary.com/define.php?term=copaganda> [<https://perma.cc/76WM-YFQZ>].

66. *See* Taylor-Thompson, *Individual Actor v. Institutional Player*, *supra* note 24, at 2432–44 (discussing examples where different public defender clients would benefit from the office taking opposing positions in their respective cases but urging a more coherent, issue-based vision for defender offices).

for other defenders who want to join in. We also address the power of the hashtag to construct community and shared narrative across platforms and to increase the visibility of posts made in individual places. We believe that investing in a cross-platform strategy offers the best opportunity for defenders and defender organizations to find and nurture (and in turn learn from) allies in the community.

A. *Social Media as a Tool of Social Movements*

A social movement can loosely be defined as “group action undertaken by social actors, including individuals, groups and organisations, for the purpose of affecting [sic] social and political change.”⁶⁷ Social media has assisted, supported, or influenced social movements in the United States and beyond for the past two decades—Black Lives Matter,⁶⁸ Me Too,⁶⁹ Occupy Wall Street,⁷⁰ the People’s Climate March,⁷¹ and Egyptian protests during the Arab Spring⁷² are prominent examples.

Social media helps social movements develop and succeed in ways that might prove fruitful for defenders and defender organizations.⁷³ Four themes emerge from this literature. First, social media can deepen and grow social networks. It can help build shared narrative and bring into closer contact people in existing networks while also connecting users with ideological compatriots who might join the network.⁷⁴ Second, social media platforms allow users to

67. Halim Rane & Sumra Salem, *Social Media, Social Movements and the Diffusion of Ideas in the Arab Uprisings*, 18 J. INT’L COMM’N 97, 98 (2012).

68. Mundt et al., *supra* note 10.

69. Afnan et al., *supra* note 10.

70. Mundt et al., *supra* note 10, at 2 (first citing Anastasia Kavada, *Creating the Collective: Social Media, the Occupy Movement and Its Constitution as a Collective Actor*, 18 INFO. COMM’N & SOC’Y 872 (2015); then citing Joel Penney & Caroline Dadas, *(Re)Tweeting in the Service of Protest: Digital Composition and Circulation in the Occupy Wall Street Movement*, 16 NEW MEDIA & SOC’Y 74 (2013) (both noting the significance of online platforms for collective identity formation and meaning-making)).

71. Mundt et al., *supra* note 10, at 2 (citing Kjerstin Thorson et al., *Seeking Visibility in a Big Tent: Digital Communication and the People’s Climate March*, 10 INT’L J. COMM’N 4784, 4800 (2016) (highlighting the range of groups that used digital platforms to frame the climate issue and to make those framings visible to other people)).

72. Mundt et al., *supra* note 10, at 2 (citing Sahar Khamis & Katherine Vaughn, “*We Are All Khaled Said*”: *The Potentials and Limitations of Cyberactivism in Triggering Public Mobilization and Promoting Political Change*, 4 J. ARAB & MUSLIM MEDIA RSCH. 145, 157 (2012) (noting the role of Facebook in disseminating information and mobilizing participants)); Steinberg, *supra* note 60, at 433–36 (discussing how social media has helped advance social movements).

73. We do not purport to provide a comprehensive view of the literature in this area but just to identify relevant themes.

74. Mundt et al., *supra* note 10, at 2 (first citing Wei Ling Nien, *What Is the Role of Social Media in Establishing a Chain of Equivalence Between Activists Participating in Protest Movements?*, ONLINE J. COMM’N & MEDIA TECHS., July 2017, at 182; then citing Hyesun Hwang & Kee-Ok Kim, *Social Media as a Tool for Social Movements: The Effect of Social Media Use and Social Capital on Intention to Participate in Social Movements*, 39 INT’L J. CONSUMER STUD. 478 (2015); and then citing Luis Fernando Baron, *The Power of Associations, Social Media, and Social Movements: Facebook in the Interactions of Social Movement Organizations* (2013) (Ph.D.

create and draw attention to overlooked stories, which connects to (and increases the significance of) the notion of shared narrative.⁷⁵ Third, social media most effectively advances social movements when it is used in conjunction with offline activism; social media can spread ideas and notifications about offline events to networks of people who then attend and post about them.⁷⁶ Fourth, activist users of social media must be aware of significant threats to their success: dilution of message by well-meaning but unschooled posters, inappropriate use of data, co-optation of message by opponents, and “slacktivism.”⁷⁷

Enriching Social Networks: As users of social media are well aware, platforms augment and enrich social networks in two main ways: they reinforce strong ties and generate weak ties.⁷⁸ Strong ties exist between people in one’s family and close friends; they are the bonds that developed before (and live outside of) the internet.⁷⁹ Weak ties are links to people and groups outside of one’s immediate social or professional circle.⁸⁰ Through weak ties, a person or organization gains access to information and viewpoints that are not available through relationships with family and close friends; the user might also find new like-minded people or organizations.⁸¹ Expanding a person’s (or organization’s) weak ties is the primary value of a social media campaign for a public interest organization. For example, in his study of the Yellow Vest Movement in France, Bart Cammaerts noted that social media’s networked structure mobilized the strength of weak ties and activated latent ties, which helped to establish “horizontal leaderless movements.”⁸² Scholars observed

dissertation, University of Washington) (on file with *ResearchWorks Archive*, University of Washington, <https://digital.lib.washington.edu/researchworks/handle/1773/25133> [<https://perma.cc/ZZ6P-AU6X>]).

75. Mundt et al., *supra* note 10, at 4 (citing Guobin Yang, *Narrative Agency in Hashtag Activism: The Case of #BlackLivesMatter*, MEDIA & COMM’N, Aug. 2016, at 13).

76. Steinberg, *supra* note 60, at 417–18 (discussing the way that social media can help promote sit-ins and protests).

77. *See id.* at 442–45 (explaining the term “slacktivism” and discussing concerns about it).

78. Mark A. Rademacher & Kevin Y. Wang, *Strong-Tie Social Connections Versus Weak-Tie Social Connections*, in ENCYCLOPEDIA OF SOCIAL MEDIA AND POLITICS 1213, 1215 (Kerrie Harvey ed., 2014).

79. *Id.* at 1213–14.

80. *Id.*

81. Journalists have observed, for example, that wives of men incarcerated in various prisons have identified each other and forged an online community via TikTok. *See* VICE News, *Prisoners are Going Viral on TikTok*, YOUTUBE (Nov. 12, 2020), <https://www.youtube.com/watch?v=d53jCvZ38NQ>.

82. Bart Cammaerts, *The New-New Social Movements: Are Social Media Changing the Ontology of Social Movements?*, 26 MOBILIZATION 343, 350 (2021). Cammaerts referred to these movements as “digitally mediated networked modes of organization” that thrive on “bottom-up, crowd enabled or loosely coordinated” leadership. *Id.*

similar patterns in the Battle of Seattle (regarding the WTO protests)⁸³ and the Arab Spring.⁸⁴

Spotlighting Overlooked Stories: Social media allows users and groups to share stories that are not receiving sufficient attention in the mainstream media. Nowhere is this dynamic more evident than with Black Lives Matter. After Derek Chauvin murdered George Floyd, cell phone videos taken on the scene and shared widely via social media allowed the world to see this act of gruesome violence, free from filters.⁸⁵ That widely shared video footage shed light on what actually happened even as police sought to describe a man who “appeared to be under the influence,” “physically resisted officers,” and was “suffering medical distress.”⁸⁶ Widespread circulation of a video likewise altered the legal repercussions of Ahmaud Arbery’s murder in southern Georgia.⁸⁷ In some places “citizen journalists” have emerged; these observers offer their own coverage of protests and commentary on political developments as they are ongoing, as happened in Guatemala during a campaign to oust the president.⁸⁸

Promoting Offline Events: Social media can inspire and facilitate participation in offline social movement activities, as network participants take to the streets to make their voices heard. Scholars have noted that high social media use tends to correlate with higher levels of intention to participate and actual participation in social movements.⁸⁹ But how does social media engagement actually contribute to offline activism? Social media platforms can “manage information, distribute functions, and enable users, or protesters, with online tools and information to organize protests.”⁹⁰ Others describe the benefits of social media by pointing to its cost-effective ability to strengthen outreach

83. Larry Elin, *The Radicalization of Zeke Spier: How the Internet Contributes to Civic Engagement and New Forms of Social Capital*, in *CYBERACTIVISM: ONLINE ACTIVISM IN THEORY AND PRACTICE* 97, 104–06 (Martha McCaughey & Michael D. Ayers eds., 2003).

84. Liz Else, *The Revolution Will Be Tweeted*, *NEWSIDENTIST* (Feb. 1, 2012), <https://www.newsidentist.com/article/mg21328500-400-the-revolution-will-be-tweeted>. Halim Rane and Sumra Salem argue that “social media was not responsible for the success of the revolutions but they did play an important facilitation role in terms of inter and intra-group communication as well as information dissemination.” Rane & Salem, *supra* note 67, at 97.

85. Audra D. S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, *N.Y. TIMES* (Nov. 24, 2021), <https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html>.

86. *Id.*

87. Char Adams, *‘They Almost Got Away with It’: How a Leaked Video Led to Convictions in the Ahmaud Arbery Case*, *NBC NEWS* (Nov. 24, 2021, 5:57 PM), <https://www.nbcnews.com/news/nbcblk/almost-got-away-leaked-video-led-convictions-ahmaud-arbery-case-rcna6690> [<https://perma.cc/6RS7-W58U>].

88. Summer Harlow, *Social Media and Social Movements: Facebook and an Online Guatemalan Justice Movement That Moved Offline*, 14 *NEW MEDIA & SOC’Y* 225, 227, 239 (2011).

89. Hwang & Kim, *supra* note 74, at 485–86; Dustin Kidd & Keith McIntosh, *Social Media and Social Movements*, 10 *SOCIO. COMPASS* 785, 787 (2016) (“Participants reported that social media played a central role in shaping the decisions that individuals made regarding whether to attend protests, the logistics of the events, and the likelihood of success.”).

90. Rodrigo Sandoval-Almazan & J. Ramon Gil-Garcia, *Towards Cyberactivism 2.0? Understanding the Use of Social Media and Other Information Technologies for Political Activism and Social Movements*, 31 *GOV’T INFO. Q.* 365, 366 (2014).

efforts, create feedback loops, and speed up communication.⁹¹ By employing some of these techniques, the Black Lives Matter movement was able to connect with groups who, in themselves, did not directly identify with the movement,⁹² but many of their members then joined offline activities in support of BLM.⁹³ The network effect has a multiplier effect too: connecting online with users who participate actively in social movements tends to make a user more active themselves.⁹⁴

Avoiding Pitfalls: Aside from documenting these benefits, researchers have recognized the potential downsides of social media—the ways in which its charms can be its weaknesses. If anyone can post, certain posters' rhetoric might not conform to the movement's ideology. This can lead to “diverse understandings of movement ideology,” which can disrupt “collective identity development.”⁹⁵ Other posters might try to exploit data collected from users or to use it “in insidious ways.”⁹⁶ Anonymous posting thus can be important for activists to freely express themselves, but it tends to thwart governance and monetization efforts.⁹⁷ More seriously, opponents might engage in counter-activism to “dampen and disrupt” the movement's mission,⁹⁸ as happened in Syria when the Syrian Electronic Army “attempted to drown out opposition messages on Twitter by using automated accounts to bombard users with photographs of Syrian landscapes.”⁹⁹ For the Black Lives Matter protests, counter-protesters sought to co-opt the movement by adopting the hashtag #AllLivesMatter.¹⁰⁰ While these challenges can slow the scaling-up process for a social movement, constant monitoring of spaces for disruptive comments, as

91. Jonathan A. Obar et al., *Advocacy 2.0: An Analysis of How Advocacy Groups in the United States Perceive and Use Social Media as Tools for Facilitating Civic Engagement and Collective Action*, 2 J. INFO. POL'Y 1, 13–16 (2012).

92. Mundt et al., *supra* note 10, at 7. Sometimes the pattern involves sharing of information between professional journalists, activists, and social media users; during the Tunisian and Egyptian uprisings, for example, journalists and activists posted, but then bloggers and other lay participants retweeted content. Kidd & McIntosh, *supra* note 89, at 786.

93. Mundt et al., *supra* note 10, at 7–9.

94. Hwang & Kim, *supra* note 74, at 486.

95. Mundt et al., *supra* note 10, at 3.

96. *Id.* (citing Zeynep Tufekci, *Facebook's Surveillance Machine*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html>). Social media design and policies sometimes create “tensions” between “activists and the commercial interests of the platform owners” (like Facebook, Google and Twitter). William Lafi Youmans & Jillian C. York, *Social Media and the Activist Toolkit: User Agreements, Corporate Interests, and the Information Infrastructure of Modern Social Movements*, 62 J. COMM'N 315, 315 (2012). When companies receive government requests for user data, they typically comply because “[b]usiness considerations may trump civic considerations.” *Id.* at 324.

97. Youmans & York, *supra* note 96, at 318.

98. *Id.* at 323. The authors describe the situation in Syria as an example of online hijacking. *Id.* They describe actions of the “Syrian Electronic Army” that purposely try to “bring down, deface, or otherwise target sites that host antiregime content.” *Id.*

99. *Id.*

100. Mundt et al., *supra* note 10, at 11.

well as active participation from members, will allow the movement to grow despite setbacks.¹⁰¹

Moreover, the movement itself must exist outside of its social media presence. If not, “slacktivism” will take over—a phenomenon in which users do nothing other than post and read, generating half-hearted, meaningless commentary.¹⁰² Manuel Castells emphasizes that even movements that start online must develop momentum in “occupied spaces”—the squares, parks, and streets where people gather not just to talk but to take action.¹⁰³ Summer Harlow’s work tracing the 2009 movement in support of then-Guatemalan President Alvaro Colom’s resignation demonstrates the necessary interplay between the online world and the offline world.¹⁰⁴ Her content analysis of Facebook postings revealed that comments were framed to motivate others to participate in protests but also had topical subframes that favored protest-related content and calls for action.¹⁰⁵ Instead of using the forum just for government criticism and discussions on justice, commentators organized protests, showed photos of protests, and showed support for the movement.¹⁰⁶ Scholars have argued that as social media continues to mature, the links between the online and offline worlds will become more strategic in the growth of activist movements.¹⁰⁷

B. *Defenders’ Strategic Social Networking*

In this Subpart we consider how defenders can use four of the most prominent social networking platforms: Facebook, X, Instagram, and

101. *Id.*

102. *Id.* at 10 (noting that virtual participation is not enough to achieve something). Movement leaders should post “specific action steps rather than just highlighting traumatic things happening in their community and describ[e] different ways in which individuals might get involved, for example, protesting or attending in-person events, writing letters, and making calls to legislators.” *Id.* at 8.

103. MANUAL CASTELLS, NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE 10 (2d ed. 2015).

104. Harlow, *supra* note 88, at 225. The movement began after prominent lawyer Rodrigo Rosenberg posthumously posted a video accusing Colom of killing him.

105. *Id.* at 238.

106. *Id.*

107. Sandoval-Almazan & Gil-Garcia, *supra* note 90, at 372–73, 375 (discussing the “I’m 132” campaign in Mexico).

TikTok.¹⁰⁸ These social networking sites¹⁰⁹ nicely facilitate the sort of connectivity that the social media and social movement literature describes: expanding and strengthening existing networks, adding first-hand observations that few others see, and helping construct shared movement identity and narrative.

Subpart 1 discusses how these four sites can each be used to grow and strengthen systemic advocacy on behalf of those charged with crimes, particularly by allowing defenders to connect with existing community groups. Subpart 2 examines the hashtag and other features that can increase links between organizations and individuals across platforms. While a relative handful of public defender organizations and individual public defenders already use social media to report what they are seeing in local courthouses, our objectives are to inspire many more attorneys and organizations to move in this direction and to give them a (fairly rudimentary) set of tools for doing so.¹¹⁰

The four social networking sites vary from each other in important ways. Some are better for organizing existing groups—in part to help drive online activism toward offline events¹¹¹—while others are better at expanding existing networks, and they vary in the audiences they reach. Some are better suited to articulate broad policy views from the chief defender, while others provide a launching pad for individual defenders' stories. When a lawyer wants to post not about systemic patterns but about a particular client's life, getting the client's consent is a prerequisite.¹¹² This will be less of an issue for posts emanating

108. There are several other social networking sites that we do not discuss here, including those that cater to an authoritarian, strongly right-leaning user base, such as Parler, Gab, or Truth Social. See, e.g., Allana Akhtar & Britney Nguyen, *Everything You Need to Know About Parler, the Right-Wing Social Media Platform Kanye West is Planning to Buy*, BUS. INSIDER (Oct. 20, 2022, 10:13 AM), <https://www.businessinsider.com/what-is-parler-app-social-media-twitter> [<https://perma.cc/F8L7-KA7W>] (discussing Parler); Travis M. Andrews, *Gab, the Social Network That Has Welcomed Qanon and Extremist Figures, Explained*, WASH. POST (Jan. 11, 2021, 6:33 PM), <https://www.washingtonpost.com/technology/2021/01/11/gab-social-network/> (discussing Gab); Stuart A. Thompson & Matthew Goldstein, *Truth Social's Influence Grows Despite Its Business Problems*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2022/11/01/technology/truth-social-conservative-social-app.html> (discussing Truth Social).

109. The social media landscape was shifting as we wrote this. With the emergence of new platforms like Mastodon, Cohost, Koo, Bluesky, and Threads, defenders likely will need to master additional platforms in the near future to stay current. Isabel Slone, *Facebook Is a Freak Show Ghost Town, and I'm Loving It*, N.Y. TIMES (Nov. 19, 2022), <https://www.nytimes.com/2022/11/19/opinion/facebook-meta-twitter.html>.

110. See Smith Futrell, *supra* note 13, at 13. She importantly highlights potential ethical concerns about defense lawyers sharing client-specific information via social media.

111. See, e.g., Harlow, *supra* note 88, at 230 (discussing the importance of using online activism to drive offline activism).

112. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 1983) (preventing lawyers from revealing client confidences without the client's informed consent); see also Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 5–7 (2000) (articulating concerns with scholars sharing actual clients' stories although recognizing that those stories are important); Smith Futrell, *supra* note 13, at 12 (raising these concerns regarding Twitter); Michael E. Lackey Jr. & Joseph P. Mintz, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 149–50 (2012) (same). We recognize that some clients might not be happy about their lawyers' involvement on social

from the office account, which will tend to focus on issues rather than on specific cases. Due to this variation, defenders and defender offices ought to use all of these sites strategically and in combination.

1. *Social Networking Sites*

This Subpart profiles four dominant sites in the United States—Facebook, X, Instagram, and TikTok—and describes key features of each. We first describe what each platform offers, in terms of (1) the type of content (text or visuals or both) that can be shared, (2) the audience for content (whether range is limited to existing contacts or is instead unbounded), and (3) the demographics of its users (paying particular attention to age, given our focus on seeding and nurturing generational change).¹¹³ We then offer suggestions for how defenders can use each platform to expand their reach. We begin with the largest and oldest platform, Facebook.

a. *Facebook*

i. *The Platform's Features*

Facebook users post text, images, and videos on individual pages.¹¹⁴ Their posts tend toward the autobiographical, as users respond to the prompt, “What’s on your mind . . . ?”¹¹⁵ Facebook users interact with each other’s content by commenting and liking, including in reaction to photos or videos, or by sharing links to externally generated content.¹¹⁶

Facebook has two key features that serve to strengthen and cohere existing networks, helping similarly minded individuals (or groups) find each other and connect. First, Facebook Groups allows users to curate discrete online

media. While clients are entitled to their views, we do not believe that a defender’s periodic posting on social media conflicts with his or her role as an advocate.

113. Scholars and strategists have previously suggested that “advocacy groups should shift their focus in order to meet the demands and expectations of the millennial generation.” Steinberg, *supra* note 60, at 432 (citing Denise McMahan, *Millennials: Free Agents of Fundraising and Advocacy*, NONPROFIT HUB (Apr. 18, 2014), <https://nonprofnhub.org/millennials-free-agents-fundraising-advocacy/> [<https://perma.cc/TT5T-CA3F>]). In contrast to older generations, “[m]illennials are more likely to get involved in organizations that utilize mobile technologies.” *Id.* We believe the focus now needs to shift to members of Gen Z, who have been raised with these kinds of technologies since birth.

114. *Share and Manage Posts on Your Profile*, FACEBOOK HELP CENTER, <https://www.facebook.com/help/1640261589632787> (last visited Aug. 21, 2023).

115. *Id.*

116. See, e.g., Harlow, *supra* note 88, at 238 (describing how these Facebook features were important to a social movement); see also *Like and React to Posts*, FACEBOOK HELP CTR., https://www.facebook.com/help/1624177224568554/?helpref=hc_fnav (last visited Sept. 18, 2023); *Share and Manage Posts on Your Profile*, FACEBOOK HELP CTR., https://www.facebook.com/help/1640261589632787?helpref=hc_fnav (last visited Sept. 18, 2023).

communities.¹¹⁷ Within a Group people can convey stories—whether their own lived experience or those they have learned of elsewhere—to help create shared narrative.¹¹⁸ This community can also drive online conversations into offline activism—encouraging members to attend events such as rallies or protests and to communicate what happened after the fact.¹¹⁹ Relatedly, through the Events feature, an individual or organization can promote an upcoming event, whether virtual or in-person.¹²⁰ Events that are set as “Public” are visible to a wider swath of people than those who are already connected to the organizers.¹²¹ But posting publicly about events also allows opponents of the cause to see the details of an upcoming event, enabling them to interfere, disrupt, or mobilize a counter-demonstration.

Facebook is more useful for sharing content across existing networks and for deepening the connections in those networks than for growing networks. Unlike X, Instagram, and TikTok users, Facebook users are much more likely to see content from their “friends”—users to whom they are already linked—than from strangers.¹²² While other platforms expose their users to strangers’ content that has gone viral, Facebook users are exposed only to content that their friends have shared (or posted) and to pages that they follow or like.¹²³ Users might take up a cause because one of their friends has shared content, but a mutual friend is necessary to serve as the conduit. This feature limits the reach of Facebook as a tool for generating weak ties.

Today, 69% of American adults (over 163 million people) use Facebook, making it the most widely used platform in the country;¹²⁴ moreover, about 70% of Facebook users use the site daily.¹²⁵ Although the user base skews somewhat toward women rather than men and toward those with a college degree rather than those without, there is a sizable number of users in all of

117. Some groups are private and limit access, while others are open to any Facebook user who wishes to join. *Groups: Post, Participate and Privacy*, FACEBOOK HELP CTR., https://www.facebook.com/help/530628541788770/?helpref=hc_fnav (last visited Sept. 18, 2023).

118. *Facebook Groups*, FACEBOOK, <https://www.facebook.com/creators/tools/groups> (last visited Aug. 21, 2023).

119. See Harlow, *supra* note 88 (recounting a case study in which activists used Facebook to organize protests and share photos of protests); Sandoval-Almazan & Gil-Garcia, *supra* note 90 (explaining that the “I’m 132” movement in Mexico used Facebook and Twitter to organize street protests).

120. *Create and Customize an Event*, FACEBOOK HELP CTR., <https://www.facebook.com/help/572885262883136> (last visited Aug. 21, 2023).

121. *Id.*

122. *How Feed Works*, FACEBOOK HELP CTR., <https://www.facebook.com/help/1155510281178725> (last visited Aug. 21, 2023).

123. *Id.*

124. John Gramlich, *10 Facts about Americans and Facebook*, PEW RSCH. CTR. (June 1, 2021), <https://www.pewresearch.org/fact-tank/2021/06/01/facts-about-americans-and-facebook/> [https://perma.cc/694R-DUXS]. However, forecasters predict that 1.4 million users will abandon Facebook this year, due to various missteps by the leadership and the emergence of new platforms. Slone, *supra* note 109 (referencing a prediction by eMarketer).

125. Gramlich, *supra* note 124.

these categories.¹²⁶ Facebook’s regular users tend to be forty-five and older.¹²⁷ This makes it a powerful tool to reach older Americans but less relevant for younger generations.

ii. *Defenders’ Use*

Defender organizations can (and sometimes do) maintain institutional Facebook pages that engage in public discourse around criminal law reform and seek to combat misinformation campaigns. A defender organization’s Facebook page can help promote stories that portray the criminal legal system—in a way that diverges from the narrative that police and prosecutors have dominated. For instance, the Cook County Public Defender’s Office Facebook page shown below highlighted a story about the state’s recent bail reforms and an event in which that topic would be discussed with the public—thereby providing accurate information on an important matter of public concern.¹²⁸ The Facebook Events feature is particularly good for promoting upcoming protests, organized bailouts, or other public events, as users may see that their friends plan to attend or participate.¹²⁹



126. *Id.*

127. Slone, *supra* note 109 (describing Facebook as a “thriving, active social network for the over-45 set,” but for younger people, “a mass exodus has left it the digital equivalent of an Old Western ghost town where tumbleweeds blow across an arid landscape”). Slone writes that “fewer than 15 percent of its users will be under the age of 25” in the near future. *Id.*

128. Cook County Public Defender’s Office, FACEBOOK (Nov. 4, 2022, 1:23 PM), <https://www.facebook.com/CookCoDefender/posts/508981384590087>.

129. *See, e.g.*, Cook County Public Defender’s Office, FACEBOOK (Oct. 21, 2022, 10:40 AM), <https://www.facebook.com/CookCoDefender/posts/497796142375278> (publicizing an upcoming event where the Public Defender will address bail reform).

Facebook also works well as a tool to amplify accurate mainstream media coverage. Taking up the bail issue in another setting, the Cook County office promoted John Oliver's coverage of misinformation campaigns run by opponents of bail reform.¹³⁰ Similarly, the Los Angeles Public Defender's Office used its Facebook page to share a local editorial discussing a ballot initiative that temporarily provided retroactive sentencing relief for minor drug crimes.¹³¹ The Facebook post also allowed the defender's office to publicize the substantial work it did under the state's resentencing law.¹³²

Cook County Public Defender's Office
October 31, 2022 · 🌐

Last night, [Last Week Tonight with John Oliver](#) exposed outrageous lies by opponents of bail reform across the country. Historic pretrial reforms go into effect in Illinois in January—and the stakes are high. Our communities will be safer and our pretrial system more fair after Illinois ends money bond.

Intentional misinformation campaigns shouldn't drive policymaking. Watch the full segment to learn more about how the same strategies are being used here and across the country:



YOUTUBE.COM

Bail Reform: Last Week Tonight with John Oliver (HBO)

With midterm elections approaching, John Oliver discusses the issue at the core of many repu...

👍👎 13

1 comment 9 shares

* * *

In sum, Facebook is the social networking site with by far the broadest reach across the American populace, even though it skews to an older demographic.¹³³ A Facebook presence is therefore important for defender offices who are seeking to engage in the public square. Facebook offers many opportunities for defender offices to connect with local grassroots organizations and for those organizations to build shared narrative, develop shared identity, and organize offline action—as with the bail reform event in Chicago. However, the site is better suited for strengthening existing networks than it is for growing them because a great deal of Facebook content is visible

130. Cook County Public Defender's Office, FACEBOOK (Oct. 31, 2022, 11:51 AM), <https://www.facebook.com/CookCoDefender/posts/505935118228047>.

131. Los Angeles County Public Defender, FACEBOOK (Nov. 4, 2022, 10:26 PM), <https://www.facebook.com/LACOUNTYPD/posts/458035236432515>.

132. *Id.*

133. *Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/93EQ-SC2Q>]. Moreover, older Americans continue to vote in much higher numbers than younger Americans. Adam Bonica & Jacob M. Grumbach, *Old Money: Campaign Finance and Gerontocracy in the United States* 12 (Aug. 29, 2023) (unpublished manuscript) (on file at *Working Papers*, JAKE GRUMBACH, <https://sites.google.com/view/jakegrumbach/working-papers?pli=1> [<https://perma.cc/P6R8-448S>]; see also Alexandria Symonds, *Why Don't Young People Vote, and What Can Be Done About It?*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/upshot/youth-voting-2020-election.html>.

only to the user's "friends."¹³⁴ For that reason, even a regularly updated Facebook page ought to be supplemented with other forms of social media activity.

b. X (Twitter)

i. The Platform's Features

X, like Facebook, has proved tremendously valuable to social movements already. Most importantly, it provides a public platform for citizens to report stories that traditional media outlets neglect or downplay. X users not only spotlight those stories but can sometimes trigger mainstream media attention.¹³⁵ Although its user base is much smaller than Facebook's,¹³⁶ X offers greater prospects for virality and expanding the reach of a narrative beyond existing networks.

X can and does host images and videos, but textual content dominates this platform.¹³⁷ With each post¹³⁸ limited to 280 characters,¹³⁹ X users engage in a form of microblogging, or crafting brief text blurbs for a public audience.¹⁴⁰ Other users then consume that content and respond to posts quickly,¹⁴¹ replying directly or reposting that content for their own followers, including with their own commentary.¹⁴² Those discussions will be visible to users who follow any of the participants or simply those whom the X algorithm thinks might be interested in the topic—perhaps based on hashtags or mentions of

134. None of the posts in the above examples were widely shared; the post about the bail event had the widest exposure and it only had nine shares. Cook County Public Defender's Office, FACEBOOK (Oct. 21, 2022, 10:40 AM), <https://www.facebook.com/CookCoDefender/posts/497796142375278>.

135. See, e.g., *Transcript: Ezra Klein Interviews Pippa Norris*, N.Y. TIMES (Nov. 1, 2022), <https://www.nytimes.com/2022/11/01/opinion/ezra-klein-podcast-pippa-norris.html>? (describing Twitter's "tremendous capacity to influence traditional media coverage" because "the people who are providing political information and making political decisions in all the other venues—the elites of the media, of politics, of technology—they're all jacked into Twitter all the time," which "increase[s] the salience of the debates that are dominant there").

136. One journalist has declared that "Twitter is tiny compared with Facebook or TikTok. But Twitter punches above its weight." Roger McNamee, *Musk's Twit Fiasco*, TIME, Dec. 5, 2022, at 31.

137. See Michael Haenlein et al., *Navigating the New Era of Influencer Marketing: How to Be Successful on Instagram, TikTok, & Co.*, CAL. MGMT. REV., Fall 2020, at 5, 10 (2020).

138. As a reminder, we use "posts" for content on X that post-dates the name change and "tweets" for content on Twitter that predates it. See *supra* note 6.

139. X users can "thread" posts—explicitly combining them in a particular order—which somewhat circumvents the character limitation.

140. Akshay Java et al., *Why We Twitter: Understanding Microblogging Usage and Communities*, 2007 PROC. 9TH WEBKDD & 1ST SNA-KDD 2007 WORKSHOP ON WEB MINING AND SOC. NETWORK ANALYSIS 56, 56, <https://dl.acm.org/doi/10.1145/1348549.1348556> [https://perma.cc/K7WP-DQ5A].

141. *Id.*

142. See *Repost FAQs*, X, <https://help.twitter.com/en/using-x/repost-faqs> (last visited Oct. 3, 2023).

other individuals or groups.¹⁴³ These series of posts-plus-responses (and counter-responses) become conversations that oftentimes “capture[] the public imagination.”¹⁴⁴

It is not our claim that all X conversations meet some sort of platonic ideal of nuance—far from it, and the 280-character limitation does not help in that regard.¹⁴⁵ But the ability to distribute information, build shared narrative, and connect with one another, even across disagreement, is quite important for building momentum for a political movement in the criminal justice reform space or elsewhere.

A substantial number of American adults say that they use X, or at least used its predecessor, Twitter, as of 2021—23%.¹⁴⁶ Nearly half of X users say that they use X at least once a day.¹⁴⁷ X users tend to be younger and more educated than the general public.¹⁴⁸ A sizable portion of X’s audience is between the ages of twenty-five and thirty-four (38.5%).¹⁴⁹ A third of college-educated American adults use X—a higher portion than in other education-based categories.¹⁵⁰

ii. *Defenders’ Use*

Public defenders can use X to “capture[] the public imagination”¹⁵¹ in several ways. They can serve as “citizen journalists”¹⁵² who—through posts—share stories that mainstream media overlooks, downplays, filters, or spins. They can participate in and help amplify networks that lift up traditionally marginalized voices, particularly people who have been charged with or

143. *Id.*; see also *Twitter’s Recommendation Algorithm*, TWITTER (Mar. 31, 2023), https://blog.twitter.com/engineering/en_us/topics/open-source/2023/twitter-recommendation-algorithm [<https://perma.cc/5AZE-JJNY>].

144. McNamee, *supra* note 136, at 32.

145. Emma Hinchliffe, *Twitter Actually Has a Pretty Good Reason for Its New Character Limit: Tweeting Across Languages*, MASHABLE (Sept. 27, 2017), <https://mashable.com/article/twitter-character-limit-languages> [<https://perma.cc/HT5Q-9F8W>].

146. *Social Media Fact Sheet*, *supra* note 133. But the users are not evenly distributed across the population. McNamee notes that “Twitter derives its power and value from three communities that depend on it: politicians, celebrities, and journalists.” McNamee, *supra* note 136, at 32. “For the rest of Twitter’s users, it provides the illusion of direct access to VIPs who would otherwise be beyond reach.” *Id.* Elsewhere in the article, he includes “activists” among the people who depend on Twitter the most. *Id.*

147. *Social Media Fact Sheet*, *supra* note 133.

148. Stefan Wojcik & Adam Hughes, *Sizing Up Twitter Users*, PEW RSCH. CTR. (Apr. 24, 2019), <https://www.pewresearch.org/internet/2019/04/24/sizing-up-twitter-users/> [<https://perma.cc/C5V2-FFNT>].

149. Stacy Jo Dixon, *Distribution of Twitter Users Worldwide as of April 2021, by Age Group*, STATISTA (Mar. 29, 2022), <https://www.statista.com/statistics/283119/age-distribution-of-global-twitter-users/> [<https://perma.cc/H4X5-4RSG>].

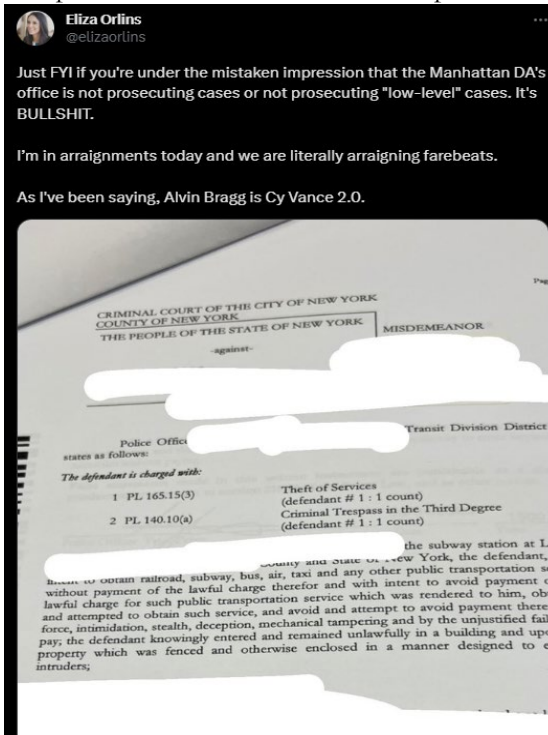
150. Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/> [<https://perma.cc/J8EZ-YAXW>].

151. McNamee, *supra* note 136, at 32.

152. Harlow, *supra* note 88, at 239.

convicted of crimes, or their loved ones. Some defenders already use X to report what they see in court or in the jails every day¹⁵³—a hugely important source of first-hand knowledge that might otherwise escape coverage in the mainstream media.¹⁵⁴ Zealous, an organization that trains defenders in public advocacy techniques, has developed a typology of posts—teaching defenders what sorts of posts make sense for different circumstances.¹⁵⁵

Individual defenders might use X to recount news from courtrooms where photographs or video are prohibited. They might, for instance, post from outside the courthouse when they see prosecutors violating their elected boss’s announced policies. After two consecutive Manhattan DAs promised not to prosecute subway riders for jumping turnstiles, a Manhattan public defender used Twitter to expose the difference between that promise and reality.¹⁵⁶



153. See, e.g., Peter Calloway (@petercalloway), TWITTER (Dec. 2, 2022, 4:21 PM), <https://twitter.com/petercalloway/status/1598804693698121729> (describing in a detailed, lengthy thread the “human rights crisis happening in San Francisco’s jails” that explains the overlapping poor jail conditions and lengthy court backlogs).

154. See Jackson, *supra* note 55, at 393 (explaining that Scott Hechinger, formerly Director of Policy for Brooklyn Defender Services, “regularly highlights in a populist fashion the daily outrages of unaffordable bail amounts being set for his clients to an audience of over 70,000 people”).

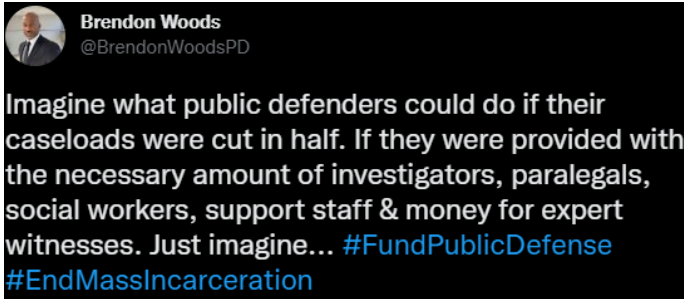
155. See Hechinger Interview, *supra* note 25.

156. Eliza Orlins (@elizaorlins), TWITTER (May 23, 2023, 5:21 PM), <https://twitter.com/elizaorlins/status/1661135316403593217>.

The brevity of a post can also lay bare fundamental truths about the criminal legal system, including this viral tweet that received more than 25,000 retweets and nearly 104,000 likes:¹⁵⁷



Defenders can publicize the fact that indigent defense lacks sufficient funds to accommodate the enormous caseload, in abstract or concrete ways.¹⁵⁸



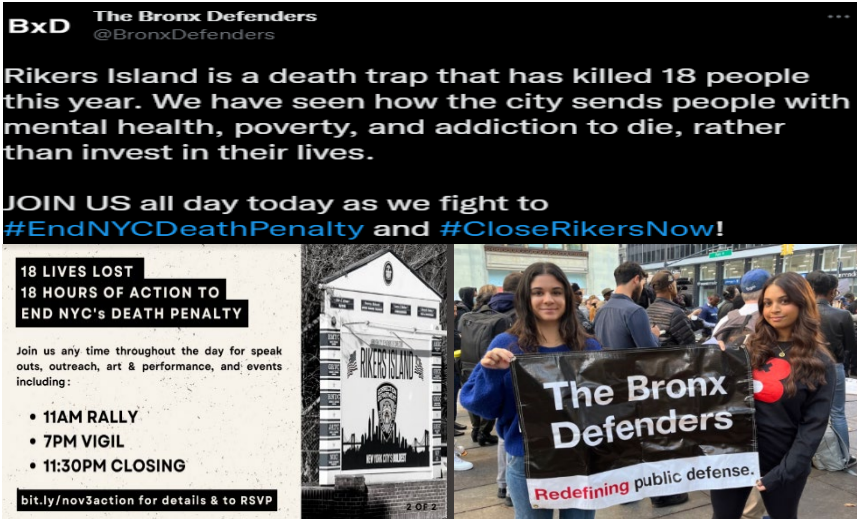
Some posts effectively highlight pathologies that are well-known to insiders but tend to be hidden from public view, such as courts' willingness to permit police to testify as experts based on their "training and experience."¹⁵⁹

157. SCA (@scasca16), TWITTER (June 17, 2021, 12:26 PM), <https://twitter.com/scasca16/status/1405577572864385031>.

158. Brendon Woods (@BrendonWoodsPD), TWITTER (Aug. 4, 2021, 10:51 AM), <https://twitter.com/BrendonWoodsPD/status/1422948367575908353>. SCA (@scasca16), TWITTER (June 29, 2021, 4:47 PM), <https://twitter.com/scasca16/status/1409992036183388160>.

159. Stephen Hardwick (@Nonfinality), TWITTER (Sept. 12, 2022, 10:47 AM), <https://twitter.com/Nonfinality/status/1569352030203822082>.

X is a useful platform for defender organizations too. This is so in part because its reach is greater than Facebook's.¹⁶⁰ The Bronx Defenders recently used Twitter to promote an upcoming protest in support of closing Rikers Island¹⁶¹—the New York jail in which eighteen people died in the first ten months of 2022.¹⁶² In its tweet, the Bronx Defenders mentioned or tagged several local grassroots organizations as well as two local public defender offices—helping build connections with those organizations.¹⁶³ Some public defenders helped amplify this message by retweeting or liking it.¹⁶⁴



Two features of the platform enable information posted by defenders or defense organizations to garner wide exposure. First, based on a user's past behavior, the X algorithm predicts additional content the user will like and sends those posts directly to the user.¹⁶⁵ As a result, a user whose feed includes other items about crime or public interest stories might well see posts by defenders or defense organizations courtesy of the algorithm. Second, X has a "Trending" panel, which shows all users what topics are currently trending across all users; through this feature, even users who did not originally plan to seek out content from defenders will be exposed to its existence if it gets

160. See *Twitter's Recommendation Algorithm*, *supra* note 143.

161. The Bronx Defenders (@BronxDefenders), TWITTER (Nov. 3, 2022, 5:38 PM), <https://twitter.com/BronxDefenders/status/1588299692479508480>.

162. Freedom Agenda (@FreedomAgendaNY), TWITTER (Nov. 1, 2022, 2:22 PM), <https://twitter.com/FreedomAgendaNY/status/1587525445519646723>.

163. When a post explicitly names another person or entity using their online handle, that is called a mention or tagging—the former for an in-text use and the latter when labeling an image. See *About Replies and Mentions*, X, <https://help.twitter.com/en/using-x/mentions-and-replies> (last visited Oct. 3, 2023).

164. The Bronx Defenders, *supra* note 161.

165. See *Twitter's Recommendation Algorithm*, *supra* note 143.

classified as “trending.”¹⁶⁶ Some of those users might then look further simply because the topic is trending. These features allow posts by defenders and defender organizations to reach wide audiences, possibly activating citizens who never gave much thought to the real-life workings of the criminal courts.

* * *

Although X’s fate is quite uncertain right now, it has helped advance social movements by elevating voices and stories that were not otherwise receiving adequate attention in the mainstream media.¹⁶⁷ In the American criminal legal system, X has been the primary tool for drawing attention to police brutality and police killings of Black people.¹⁶⁸ One lawyer took to Twitter to show the world a video of a police officer kneeling on her client’s neck; the ensuing public pushback prompted prosecutors to take action.¹⁶⁹ It has also been the site of organized pushback against deaths in police custody at Rikers Island and against misinformation about bail reform.¹⁷⁰ X (or whatever may come to fill this part of the market)¹⁷¹ is thus an important tool for public defenders to publicize facts that otherwise remain hidden, to connect with local grassroots organizations seeking criminal justice reform, and to help drive attendance at protests, rallies, and other public actions.

c. Instagram

i. The Platform’s Features

Instagram, the second-most widely used social networking site in the United States (after Facebook),¹⁷² is a visual-based platform where users post

166. See *X Trends FAQ*, X, <https://help.twitter.com/en/using-x/x-trending-faqs> (last visited Oct. 3, 2023).

167. See, e.g., Olayemi Olurin, *I’m Not Leaving Twitter. Neither Should You.*, NATION (Nov. 16, 2022), <https://www.thenation.com/article/society/not-leaving-twitter-elon-musk/> (“Twitter has been instrumental in the global rise of social justice movements and the widespread dissemination of news and information many otherwise would not have accessed.”).

168. *Id.*

169. *Id.* (citing Olayemi Olurin (@msolurin), TWITTER (Jan. 5, 2021, 6:40 PM), <https://twitter.com/msolurin/status/1346617602907512834>).

170. *Id.*

171. Meta has recently launched Threads, meant to serve as a microblogging, “real-time conversations online” platform to counter Twitter. Samantha Kelly, *Meta Officially Launches Twitter Rival Threads. 30 Million Have Joined Already*, CNN BUS. (July 6, 2023), <https://www.cnn.com/2023/07/05/tech/meta-twitter-threads-app-instagram/index.html> [<https://perma.cc/9DU7-T6AS>]. In the first twenty-four hours of its operation, the Threads app was downloaded 30 million times. *Id.*

172. See Katherine Schaeffer, *7 Facts About Americans and Instagram*, PEW RSCH. CTR. (Oct. 7, 2021), <https://www.pewresearch.org/fact-tank/2021/10/07/7-facts-about-americans-and-instagram/> [<https://perma.cc/N2H7-TUEV>].

still images and videos.¹⁷³ At its core, Instagram is a mobile app; it was built to encourage ordinary users to share snapshots on the go. Even in its display, Instagram promotes mobile use: most of the features on Instagram display vertically and the full-screen feature fits a phone screen.¹⁷⁴

There are five main features that enable an average user to build or find community on Instagram: Reels, Videos, Lives, Profile, and Stories. For video content, Instagram users can upload Reels or Videos or can livestream their video using the Lives feature.¹⁷⁵ Reels allow users to post short video clips, but users can post longer videos directly to their feed.¹⁷⁶ Both function similarly to a YouTube video: users cannot interact as the video plays but can engage with that content online after it has been posted through comment and like features.¹⁷⁷

Lives is Instagram's livestream feature. Unlike Reels or Videos, people can tune in and comment in real time.¹⁷⁸ When a user goes live, Instagram sends a push to that user's followers, which tends to increase visibility. Lives are archived and can be viewed later.¹⁷⁹ The Profile feature is a centralized page for each user that displays the content a person has posted as well as the users whom they follow and users who follow them.¹⁸⁰ Instagram Stories are meant to facilitate nearly instantaneous interaction with other users. Stories are posts that last for only twenty-four hours unless the user chooses to add that story to their profile.¹⁸¹

Instagram is known for its complicated (and often-changing) algorithms.¹⁸² In contrast to Facebook, where users see content only from those they follow, on Instagram users will also see content from people they do not follow based on the relevant algorithm for the relevant feature.¹⁸³ For this reason, Instagram

173. Although Instagram is a visual medium, users can post textual content. This is done most commonly by posting an image of a text-based statement such as a press release. *See, e.g.*, The Bronx Defenders (@bronxdefenders), INSTAGRAM (July 25, 2022), https://www.instagram.com/p/CgevkA_jOTqw/.

174. *Stories*, INSTAGRAM HELP CTR., <https://help.instagram.com/1660923094227526> (last visited Nov. 16, 2022).

175. *Share a Post*, INSTAGRAM HELP CTR., <https://help.instagram.com/488619974671134> (last visited Aug. 16, 2023); *Live*, INSTAGRAM HELP CTR., <https://help.instagram.com/272122157758915> (last visited Aug. 16, 2023).

176. *New Video Posts on Instagram Will Be Shared as Reels*, INSTAGRAM (July 26, 2022), <https://business.instagram.com/blog/instagram-video-now-instagram-reels> [<https://perma.cc/A4XH-YBXY>].

177. *Reels*, INSTAGRAM HELP CTR., <https://help.instagram.com/270447560766967> (last visited Aug. 16, 2023).

178. *Live*, *supra* note 175.

179. *Id.*

180. *Your Profile*, INSTAGRAM HELP CTR., <https://help.instagram.com/110121795815331> (last visited Nov. 16, 2022).

181. *Stories*, *supra* note 174.

182. Alyssa Hirose, *2023 Instagram Algorithm Solved: How to Get Your Content Seen*, HOOTSUITE (Apr. 12, 2023), <https://blog.hootsuite.com/instagram-algorithm/> [<https://perma.cc/52H9-T36G>].

183. *Id.*

is a more powerful tool than Facebook for expanding existing networks; the algorithm tries to direct content to users who would most like it, even when the poster and viewer have no preexisting relationship.¹⁸⁴ It resembles X in this regard.

In addition to what the algorithm already pushes to users, Instagram is searchable, which is another way that users can see content from relative strangers.¹⁸⁵ Users can search using hashtags,¹⁸⁶ geographic tags (geo-tags), tags for other users,¹⁸⁷ or simply keywords.¹⁸⁸

In 2021, 40% of American adults reported that they use Instagram.¹⁸⁹ Many of those who use the platform do so quite regularly: 59% of users say that they check the platform daily, and 38% say they use it multiple times a day.¹⁹⁰ Although the platform serves all demographic groups, Instagram is more popular among the young. Approximately 71% of Americans between the ages of eighteen and twenty-nine say they use Instagram,¹⁹¹ which is substantially higher than the 48% of people between the ages of thirty and forty-nine who use the platform.¹⁹² Instagram users also skew somewhat female, Black or Hispanic more than White, and urban or suburban rather than rural.¹⁹³

ii. *Defenders' Use*

In Instagram posts, defender organizations can take prominent stances on criminal justice policy matters, while individual defenders can share their experiences and perspectives. In terms of institutional defender accounts, the Orleans Public Defender (OPD) and the Bronx Defenders have been particularly active on Instagram, voicing positions on important issues in their respective communities. Indeed, they have done so in ways that make it easy for other users to either passively join a cause and help promote it digitally or

184. See Christina Newberry, *2023 Facebook Algorithm: How to Get Your Content Seen*, HOOTSUITE (Feb. 22, 2023), <https://blog.hootsuite.com/facebook-algorithm/> [<https://perma.cc/9UKP-E8QZ>].

185. *Search and Explore*, INSTAGRAM HELP CTR., <https://help.instagram.com/1482378711987121> (last visited Nov. 16, 2022).

186. The utility of hashtags for building and sustaining social movements is discussed in more detail in Part I.B, *infra*.

187. The usefulness of tagging other users in a post across several platforms is discussed in more detail in Part I.B, *infra*.

188. *Search and Explore*, *supra* note 185.

189. Schaeffer, *supra* note 172.

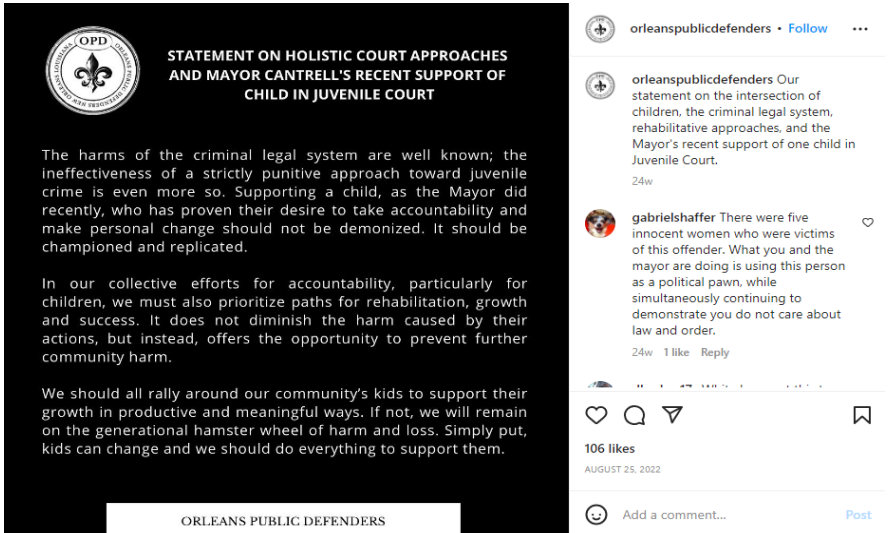
190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* We recognize that lower rural usage may relate to the reduced availability of broadband access in rural areas, *Broadband*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/broadband> [<https://perma.cc/93G2-96K9>]*—*a fact that will hopefully change due to recent infrastructure legislation, *e.g.*, Anna Read & Lily Gong, *States Considering Range of Options to Bring Broadband to Rural America*, PEW CHARITABLE TRS. (Mar. 29, 2022), <https://www.pewtrusts.org/en/research-and-analysis/articles/2022/03/29/states-considering-range-of-options-to-bring-broadband-to-rural-america> [<https://perma.cc/M6SQ-AFZ2>].

join offline actions. For instance, the OPD took to Instagram to support the mayor's decision to prioritize rehabilitation and accountability over punishment in a recent juvenile case.¹⁹⁴ The post helped generate some additional online conversation, both supportive and critical.¹⁹⁵ OPD also publicized a protest



challenging transfer of children to Louisiana's very dangerous Angola Prison—a protest organized jointly between OPD, local grassroots groups, and national criminal justice organizations.¹⁹⁶ OPD then posted a photograph of the protest.¹⁹⁷ OPD has used the comments section on its Instagram posts to provide ways for large numbers of users to passively show their support—posting links to a petition that users can sign electronically—paired with posts about their offline protests of the same action.¹⁹⁸

194. Orleans Public Defenders (@orleanspublicdefenders), INSTAGRAM (Aug. 25, 2022), <https://www.instagram.com/p/Chsta32LgmR/>.

195. *Id.*

196. Orleans Public Defenders (@orleanspublicdefenders), INSTAGRAM (Aug. 26, 2022), <https://www.instagram.com/p/ChvFOzcp9wK/>.

197. Orleans Public Defenders (@orleanspublicdefenders), INSTAGRAM (Aug. 30, 2022), <https://www.instagram.com/p/Ch5XblQJCFm/>.

198. *See id.*



orleanspublicdefenders Powerful morning at the #LaCapitol calling on @LouisianaGov to halt and abandon the transfer of kids to Angola. Honored to stand alongside @fflicia @lakidsrights @UbuntuNola and others leading this fight!

FFLIC ED Gina Womack: "Today we are here to fight against these systems, fight for our youth, fight for our families. Our children and youth need therapy, education, community and healing. They do not need more systems of harm."

You can still help by signing the petition:
<https://campaigns.organizefor.org/pet>

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orleanspublicdefenders • Follow ...



orleanspublicdefenders Join us Tuesday, August 30 to call on @LouisianaGov to halt the plan to move kids to Angola. Please also sign the petition in the flyer below. Event info: fb.me/e/3FNGxm5YU

12w

200

To: Governor John Bel Edwards

KIDS DON'T BELONG IN AMERICA'S WORST PRISON!



Campaign created by
**Families and Friends of Louisiana's
 Incarcerated Children**



The Governor's plan to house youth at Angola State Prison is cruel and outrageous. Angola is an adult facility built on former slave quarters that is historically known for horrific violence, abuse, and sexual assaults caused by institutional and systemic violence. To house children at this facility demonstrates the Governor's lack of understanding of developmentally-appropriate rehabilitation and commitment to dismantling systems of racism and oppression in Louisiana.

2,713 of 3,000 signatures

Christine A. signed 2 days ago Deborah G. signed 2 days ago Joan A. signed 7/19/2022

Sign the petition

First Name *

Last Name *

Email *

ZIP *

Phone Number

By providing your mobile number you consent to receive calls.

201

Some Instagram posts by defender organizations criticize prosecutors' repeated violation of defendants' basic rights, such as the post about prosecutorial disclosure failures displayed in the Introduction that garnered more than 1,000

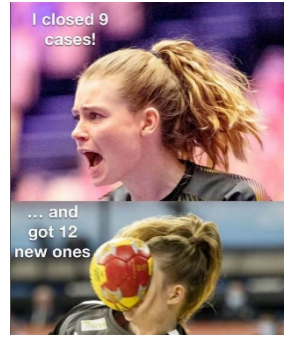
199. *Id.*

200. Orleans Public Defenders (@orleanspublicdefenders), INSTAGRAM (Aug. 26, 2022), <https://www.instagram.com/p/ChvFOzcp9wK/>.

201. *Kids Don't Belong in America's Worst Prison!*, ORGANIZE FOR, <https://campaigns.organizefor.org/petitions/stop-louisiana-governor-s-war-on-children> [https://perma.cc/ZT7T-5PKC].

likes.²⁰² The Bronx Defenders took to Instagram to contest a decision by Immigration and Customs Enforcement to transfer detainees out of a New York jail to unknown locations.²⁰³

In addition to criticizing case-level actions by law enforcement and prosecutors, defender offices and individual defenders have used Instagram to highlight the pervasive underfunding of indigent defense. OPD posted on Instagram an op-ed by a New Orleans Saints player, applauding a city ordinance that requires OPD to be funded at 85% of the district attorney's office.²⁰⁴ It used the comments section of the post to highlight excerpts from the article.²⁰⁵ A number of individual defenders have used Instagram to criticize their intolerably high caseloads, often by simply conveying the individual experience of being overworked.²⁰⁶ The light-hearted, tongue-in-cheek nature of some of these posts, including the one shown here, keeps with the nature of this platform and its younger user base.



* * *

Instagram allows defenders and defender organizations to portray injustice in their communities through powerful combinations of text and visuals. Instagram's algorithm makes it a superior platform for achieving virality than Facebook. Moreover, if defenders and their organizations can attract the attention of people with large Instagram followings, those influencers can help promote defenders' messages.²⁰⁷

Geo-tags—or the inclusion of location information underlying an Instagram post²⁰⁸—can also help public defenders connect more easily with their local community. Users searching for citizen journalism from their local area to supplement mainstream media coverage or who want to know what is

202. @anxious_public_defender, INSTAGRAM (Dec. 6, 2021), <https://www.instagram.com/p/CXJMKpzLY2T/>.

203. See, e.g., The Bronx Defenders (@bronxdefenders), INSTAGRAM (July 25, 2022), <https://www.instagram.com/p/CgcvkAjOTqw/> (posting an image of a press release).

204. Orleans Public Defenders (@orleanspublicdefenders), INSTAGRAM (Oct. 29, 2021), <https://www.instagram.com/p/CVnnZTdlL-K/>.

205. *Id.*

206. E.g., @anxious_public_defender, INSTAGRAM (June 23, 2021), <https://www.instagram.com/p/CQc75BwJo7Q/>; Public Pretender (@publicpretenderstory), INSTAGRAM (Mar. 26, 2022), <https://www.instagram.com/p/CblyLt2LN0F/>.

207. We do not mean that defenders should pay influencers to promote their brand or message but only that intermediaries with large followings help gain viewers on Instagram as on TikTok. See, e.g., Haenlein et al., *supra* note 137, at 10 (discussing the importance of influencer marketing on Instagram and TikTok).

208. Add a Location Before Sharing Your Post on Instagram, INSTAGRAM HELP CTR., <https://help.instagram.com/408972995943225> (last visited Sept. 20, 2023).

actually happening in their local criminal courts can more easily find local public defenders (or other local grassroots organizations). Growing a local following is especially important because this sort of network expansion translates most easily into offline actions.

d. *TikTok*

i. *The Platform's Features*

TikTok is a platform for posting and viewing short, user-generated videos.²⁰⁹ Speech-to-text content can be added to the videos, along with text generated by the user.²¹⁰ As soon as the app is opened, the videos on the user's For You page (which have been recommended by the algorithm) begin to play automatically.²¹¹ This is notably different from other platforms, whose content derives first (or exclusively) from user interactions and post interactions.²¹²

Like X (albeit in video rather than largely text form), TikTok can draw attention to stories that escape mainstream news coverage. And it does so in a format that allows users to feel like they're getting a glimpse into real stories from other people. Content has not been scrubbed and regulated by traditional media outlets.²¹³ As one scholar puts it, "Tik Tok seems to have perfectly understood what Generation Zers want."²¹⁴ This more intimate view in user-generated content can work to build community and raise awareness among localized groups.²¹⁵ Indeed, a Nielsen study found nearly 60% of TikTok users worldwide feel a sense of community on TikTok, and 53% trust others to be their authentic, genuine selves on the platform.²¹⁶

In much the same way that X posts and Instagram posts can cultivate a wide audience, TikTok is built to host content that will reach many viewers and achieve virality. Each user sees a page curated by the algorithm to suit (and

209. Aliaksandra Shutsko, *User-Generated Short Video Content in Social Media. A Case Study of TikTok*, in SOCIAL COMPUTING AND SOCIAL MEDIA: PARTICIPATION, USER EXPERIENCE, CONSUMER EXPERIENCE, AND APPLICATIONS OF SOCIAL COMPUTING 108 (Gabriele Meiselwitz ed., 2020).

210. See *Effects*, TIKTOK, <https://support.tiktok.com/en/using-tiktok/creating-videos/effects> (last visited Sept. 20, 2023).

211. See *How TikTok Recommends Videos #ForYou*, TIKTOK (June 18, 2020), <https://newsroom.tiktok.com/en-us/how-tiktok-recommends-videos-for-you> [https://perma.cc/5DGX-VGEB].

212. Laura Cervi, *Tik Tok and Generation Z*, 12 THEATRE, DANCE & PERFORMANCE TRAINING 198, 200 (2021).

213. John Krumm et al., *User-Generated Content*, IEEE PERSASIVE COMPUTING, Oct.–Dec. 2008, at 10, 10–11.

214. Cervi, *supra* note 212, at 199.

215. Krumm et al., *supra* note 213, at 11.

216. *Nielsen Study Shows TikTok Ideal Place for "Discovery," Content More "Authentic,"* TIKTOK FOR BUS. (Oct. 20, 2021), <https://www.tiktok.com/business/en-US/blog/nielsen-study-tiktok-discovery-content-authentic> [https://perma.cc/L7AM-MYUT].

deepen and shape) their interests.²¹⁷ The algorithm suggests content based on the user's prior interactions within the app; commenting or following an account helps the algorithm determine the content a user will like.²¹⁸ How much time a user spends watching a video also contributes to the algorithm.²¹⁹

Demographically, TikTok's U.S. user base skews quite young: One study reports that a third of its users are nineteen or younger and about two-thirds are twenty-nine or younger.²²⁰ Another study puts 20% of TikTok's user base at age seventeen or younger, with close to half of its user base age twenty-four or younger.²²¹

ii. *Defenders' Use*

TikTok is particularly well-suited to fostering generational change because of its young audience—TikTok provides a punchy, colorful platform that reaches young people who are still forming their political views and who will become an important voting bloc in the future. Moreover, because it hosts video content rather than text, it can be a powerful tool for defenders to tell stories about the forms of injustice that they see every day. For example, some public defenders have posted TikTok videos discussing the unjust treatment their clients have received—such as the court detaining an HIV-positive transgender client in jail when even the prosecutors did not request bail.²²²

217. Louise Matsakis, *TikTok Finally Explains How the 'For You' Algorithm Works*, WIRED (June 18, 2020, 1:00 PM), <https://www.wired.com/story/tiktok-finally-explains-for-you-algorithm-works/> [<https://perma.cc/2GQ8-DZ63>].

218. *How TikTok Recommends Videos #ForYou*, *supra* note 211.

219. *Id.*; see also Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html>.

220. *TikTok Statistics—Updated Sep 2023*, WALLAROO, <https://wallaroomedia.com/blog/social-media/tiktok-statistics/> [<https://perma.cc/P97K-ZXCV>]; see also Auxier & Anderson, *supra* note 150 (showing that a much larger percentage of eighteen- to twenty-nine-year-olds use TikTok than the percentage of users in any older age category).

221. L. Ceci, *Distribution of Monthly Active TikTok Users in the United States as of April 2022, by Age Group*, STATISTA (May 31, 2022), <https://www.statista.com/statistics/1095196/tiktok-us-age-gender-reach/> [<https://perma.cc/XM82-MGWZ>].

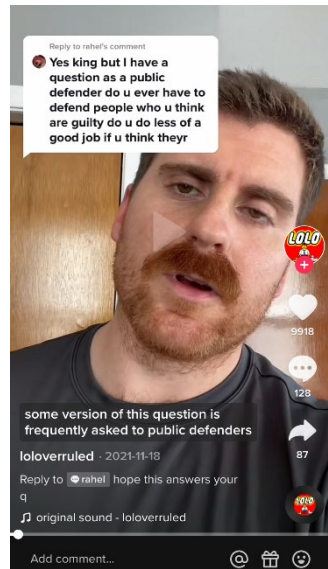
222. Eliza Orlins (@elizaorlins), TIKTOK (Oct. 2, 2022), https://www.tiktok.com/@elizaorlins/video/7149790576739749162?is_from_webapp=1&sender_device=pc&web_id=7166284442947126826. It bears repeating our view that lawyers should obtain client consent before discussing specific clients.

Restrictions on video recording in courtrooms curtail defenders' ability to post actual footage of judicial proceedings on TikTok or any other platform. Accordingly—and in our view quite sensibly—much of #PublicDefender TikTok involves lawyers recording themselves rather than their clients and often steering away from revealing individual client stories.

One public defender with more than 750,000 followers explains in a video that it does not matter to him whether his clients are innocent or guilty “because they’re poor people who are constantly getting screwed over by an overly punitive system that [is] out to get them from the get go.”²²³ Another public defender video explains why public defenders play such an important role in our criminal legal system—defending poor people from accusations by their governments, accusations as to which they are supposed to be presumed innocent until proven otherwise.²²⁴ That video has received nearly 120,000 likes as of this writing.²²⁵ Some public defender TikToks take up the point that, while judges say they are imposing confinement to promote public safety, jails and prisons do not create safety.²²⁶ This brings to a large public audience a complaint that has long simmered in the academic literature about how bail is used.²²⁷

Some defenders make TikTok videos to explain the massive caseload pressure that they face and how little time they have to spend on individual cases—explicitly challenging the narrative of public defenders as lazy.²²⁸

These short videos can also be posted to a defender's Facebook page, but they are more



223. Alex Peter (Lolo) (@loloverruled), TIKTOK (Nov. 18, 2021), https://www.tiktok.com/@loloverruled/video/7031998836876954927?is_copy_url=1&is_from_webapp=v1.

224. Eliza Orlins (@elizaorlins), TIKTOK (Jan. 26, 2022), https://www.tiktok.com/@elizaorlins/video/705768229802773231?is_copy_url=1&is_from_webapp=v1&item_id=7057682298027773231.

225. *Id.*

226. *E.g.*, Eliza Orlins (@elizaorlins), TIKTOK (Sept. 14, 2022), https://www.tiktok.com/@elizaorlins/video/7143116570515131694?is_from_webapp=1&sender_device=pc&web_id=7166284442947126826.

227. *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017); Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143 (2021).

228. *See, e.g.*, @rachel_diane, TIKTOK (Apr. 29, 2022), https://www.tiktok.com/@rachel_diane/video/7092209747948080426?is_copy_url=1&is_from_webapp=v1&lang=en&q=%23publicdefender&t=1669130891646.

likely to reach diverse audiences through TikTok’s algorithmic distribution. Similarly, these short videos could be (and probably should be) cross-posted to Instagram Reels or Videos²²⁹ or linked to an X post;²³⁰ posting in multiple locations would ensure the widest exposure. They can also be combined with still-photo posts on Instagram or Facebook to capture multiple dimensions of an issue.

As the examples suggest, TikTok is a better platform for individual defenders to share their stories—and, with sufficient caution, care, and consent, their clients’ stories too—than it is for institutional voice. A chief defender could tell the stories of several of the office’s clients in a way that abstracts out the specifics, but TikTok is not as well suited to sweeping policy statements as are some of the other platforms. Storytelling is the coin of the realm.

* * *

Time and space limitations prevent us from discussing other platforms, most notably YouTube. YouTube hosts long-form videos (in contrast to the short form videos posted on TikTok).²³¹ Although YouTube’s huge audience allows certain videos to reach virality, we believe it is a better tool for one-way communication than for movement building through connectivity and conversation.²³² Moreover, due to its user base, YouTube may have more potential than other social networking sites to create backlash.²³³ We invite future scholars to take up the question of how YouTube might become a profitable part of the defender’s social media portfolio.

229. Tom Taulli, *TikTok: Why the Enormous Success?*, FORBES (Jan. 31, 2020, 6:38 PM), <https://www.forbes.com/sites/tomtaulli/2020/01/31/tiktok-why-the-enormous-success/?sh=2ea582c965d1> (quoting an analyst who explains that sharing TikTok videos on Instagram has helped grow TikTok’s popularity).

230. See, e.g., Eliza Orkins (@elizaorkins), TWITTER (May 23, 2023, 5:40 PM), <https://twitter.com/elizaorkins/status/1661140072836784129> (including a link to her own TikTok video in a Twitter thread).

231. See, e.g., Johan Moreno, *Short Social Video Showdown: TikTok Just Beat YouTube in This Key Metric*, FORBES (May 31, 2022, 12:02 AM), <https://www.forbes.com/sites/johanmoreno/2022/05/31/short-social-video-showdown-tiktok-just-beat-youtube-in-this-key-metric/?sh=795c69357007> (noting the differences in maximum video lengths between YouTube and TikTok).

232. One case study of the “I’m 132” election protests in Mexico explained how YouTube provided an important tool for presenting facts and sparking a viral reaction, but that the movement needed Facebook and Twitter for organizing offline actions. Sandoval-Almazan & Gil-Garcia, *supra* note 90, at 375; see also Haenlein et al., *supra* note 137, at 10 (“[M]any consider YouTube more an entertainment site . . . than a social media platform.”).

233. See Megan A. Brown et al., *Echo Chambers, Rabbit Holes, and Algorithmic Bias: How YouTube Recommends Content to Real Users* 19–22, 25–26 (Nov. 11, 2022) (unpublished manuscript) (SSRN) (finding that YouTube’s algorithm only mildly steers users toward ideological content they are likely to favor and that it steers all users slightly toward more politically conservative content); see also Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 169 (discussing fear of backlash that has kept defenders from participating in the public sphere).

2. *Interactive Features Available Across Platforms*

The previous Subpart explained some particular tools that these four platforms offer to defenders who seek to embrace a broader role in the virtual public square. This Subpart discusses tools available *across* platforms to enhance those efforts—namely, hashtags and the ability of a user to explicitly mention or tag other users in their posts.

For the uninitiated, a hashtag is a word or phrase—perhaps an entire sentence—preceded by the hashtag symbol (#) that identifies and assembles related materials across social networks.²³⁴ Some very prominent examples include #BlackLivesMatter or #MeToo; other “routine” hashtags include something as simple as #climate.²³⁵ Hashtags have become so central to social media activism that their use in this capacity has garnered its own term: hashtag activism.²³⁶

Hashtags’ most basic function is to help delineate a topic of conversation by grouping together related posts.²³⁷ “The hashtag serves as an indexing system in both the clerical sense and the semiotic sense. In the clerical sense, it allows the ordering and quick retrieval of information about a specific topic.”²³⁸ In so doing, the hashtag creates an interpretive frame for a particular comment or story while locating that text in a broader conversation.²³⁹

Hashtags’ functions extend well beyond cataloguing. First, hashtags can shape a counternarrative. Prevalent use of a hashtag can call attention to stories that have been overlooked by mainstream media.²⁴⁰ Consider the origin story of #BlackLivesMatter, for example. After George Zimmerman was acquitted in the killing of a Black teenager named Trayvon Martin, three people posted #BlackLivesMatter to their social media sites as a way to “offer an alternative[—][a]n inspirational message.”²⁴¹ Relatedly, after Officer Darren Wilson killed Michael Brown in Ferguson, Missouri, activists intentionally developed and deployed #Ferguson so that it would trend on Twitter.²⁴² In the

234. Hashtags “have been a part of computer technology since the 1980s, [but] they first appeared on Twitter in 2007.” Steinberg, *supra* note 60, at 431 (internal citations omitted).

235. Yang, *supra* note 75, at 14.

236. Diana Zulli, *Evaluating Hashtag Activism: Examining the Theoretical Challenges and Opportunities of #BlackLivesMatter*, PARTICIPATIONS J. AUDIENCE & RECEPTION STUD., May 2020, at 197, 198; see also Jenn Fang, *In Defense of Hashtag Activism*, 2 J. CRITICAL SCHOLARSHIP ON HIGHER EDUC. & STUDENT AFFS., no. 1, 2016, at 138, 138 (“Hashtag activism has, in essence, revolutionized the fight for social change.”).

237. The bulk of the studies about hashtags have examined their use on Twitter, so we necessarily borrow from that literature here in speaking about hashtag use across multiple platforms.

238. Yarimar Bonilla & Jonathan Rosa, *#Ferguson: Digital Protest, Hashtag Ethnography, and the Racial Politics of Social Media in the United States*, 42 AM. ETHNOLOGIST 4, 5 (2015).

239. *Id.*

240. Yang, *supra* note 75, at 15 (“[Hashtags] often challenge narratives in mainstream media.”); Zulli, *supra* note 236, at 200 (“Digital technology generally, and hashtags specifically, provide a unique opportunity for counterpublics to emerge in the online world.”).

241. Zulli, *supra* note 236, at 202 (quoting one of the creators of the hashtag, Alicia Garza).

242. Bonilla & Rosa, *supra* note 238, at 7.

twelve days following George Floyd's murder, #BlackLivesMatter was tweeted nearly 48 million times.²⁴³ Social media hashtags have also brought much-needed attention to sexual violence against women (#MeToo; #YesAllWomen) and to all forms of violence against Black women (#ProtectBlackWomen; #SayHerName) and Native American women (#NotInvisible; #MMIW).²⁴⁴ As these examples make clear, the ability to craft a counternarrative is especially empowering for people from traditionally marginalized groups.²⁴⁵ One study found that student activists of color used hashtag activism “to challenge their own on-campus invisibility.”²⁴⁶ By bringing people together and increasing visibility for shared suffering or passion, hashtags can help to create and sustain a sense of movement identity.²⁴⁷

Second, hashtags facilitate virality—drawing more eyes to each particular post.²⁴⁸ This occurs in part because X, Instagram, and TikTok show what topics are currently trending, regardless of a user's interests. Moreover, because each platform allows hashtags, users who see on one platform content about which they are curious or passionate might go to other platforms to learn more. They might start on X but then move to Instagram or TikTok to seek out more visual and personal presentations of similar stories. They might be troubled by an Instagram post and then search a hashtag on X to tap into the most live, ongoing conversation about the issue. Searching by a hashtag what they found on one platform allows users to more easily find related content elsewhere.²⁴⁹

Third, geography-specific hashtags serve multiple purposes that advance social movements. They can promote a specific action happening in the local community or bring together for a large public event people who may not otherwise find each other—serving the important purpose of transforming

243. Monica Anderson et al., *#BlackLivesMatter Surges on Twitter after George Floyd's Death*, PEW RESEARCH CENTER (June 10, 2020), <https://www.pewresearch.org/fact-tank/2020/06/10/blacklivesmatter-surges-on-twitter-after-george-floyds-death/> [https://perma.cc/E4FC-X35M].

244. See generally Sarah J. Jackson et al., *Women Tweet on Violence: From #YesAllWomen to #MeToo*, ADA: J. GENDER, NEW MEDIA, & TECH., Feb. 2019, at 1 (discussing how feminist hashtags have been used to aggregate support and to bring attention to violence and victimhood).

245. Zulli, *supra* note 236, at 201; Ying Xiong et al., *Hashtag Activism and Message Frames Among Social Movement Organizations: Semantic Network Analysis and Thematic Analysis of Twitter During the #MeToo Movement*, 45 PUB. RELS. REV. 10, 12 (2019) (“This shift away from the media as the primary source of issue framing implies that the power to establish the salience of particular issues now rests with online users through hashtag activism.”); see also Steinberg, *supra* note 60, at 426 (when “marginalized individuals” “attempt legal reform [on their own], the path is often paved with high costs, power imbalances, and confusion”) (citing David Dominguez, *Redemptive Lawyering: The First (and Missing) Half of Legal Education and Law Practice*, 37 CAL. W.L. REV. 27, 45–46 (2000)).

246. Fang, *supra* note 236, at 140.

247. See Mundt et al., *supra* note 10, at 2 (describing the shared sense of movement identity that social media can help create).

248. Zulli, *supra* note 236, at 201.

249. Cf. HSLA-CHING CHANG & YUAN ZHANG, *DISCOVERING HASHTAG TRAILS WITH CROSS-PLATFORM HASHTAG SEARCH ENGINES: A STATE-OF-ART ANALYSIS* (2016), <https://www.ideals.illinois.edu/items/91551> [https://perma.cc/362B-GPNL] (discussing tools that allow users to search a hashtag across multiple social media platforms simultaneously).

online activism into offline activity.²⁵⁰ For instance, the Bronx Defenders used #Rikers to draw attention to protests about Rikers Island.²⁵¹ When a post mentions #StopAsianHate²⁵² and #Atlanta, it can inspire people in Atlanta who care about the cause to band together in support of the victims of a mass shooting in that city, but it can also connect people and organizations outside of Atlanta who may not have otherwise known of each other's existence.

While hashtags can draw awareness to events that mainstream media has largely ignored, they might not have the staying power necessary to keep attention focused on a broader phenomenon over time.²⁵³ MeToo emphasizes that after five years, it is “[m]ore [t]han [just] a [v]iral [h]ashtag.”²⁵⁴ It is “a [m]ovement for [j]ustice and [h]ealing” for victims of sexual violence.²⁵⁵ Using multiple hashtags in the same post can address the simultaneous need to be currently relevant and to build staying power. A post that includes both #Weinstein and #MeToo, for instance, can draw acute attention to a Hollywood producer's sexual assault convictions and connect it to the larger, ongoing conversation about sexual assault and its prevalence.²⁵⁶ Or perhaps a user wants to post a story about the violent conditions in Alabama's horrifically dangerous prisons (#AlabamaPrisons); this story can also be found under the more general hashtags #BlackLivesMatter, #CriminalInjustice, or #MassIncarceration.

In sum, hashtags are an important tool for unifying seemingly disparate stories across multiple platforms into a broader narrative. So too do they help build, expand, and connect grassroots movements, enabling the success of offline public actions. There are already well-used hashtags that identify and consolidate a national community of public defenders, including #publicdefender, #publicdefenderlife, and #publicdefenderproblems.²⁵⁷ More

250. See Xiong et al., *supra* note 245, at 20.

251. Freedom Agenda (@FreedomAgendaNY), TWITTER (Nov. 1, 2022, 2:22 PM), <https://twitter.com/FreedomAgendaNY/status/1587525445519646723>.

252. E.g., @stopaapihate, INSTAGRAM, <https://www.instagram.com/stopaapihate/> (last visited Sept. 20, 2023); Bob Marcotte, *Twitter Shows Splits over #StopAsianHate Hashtag*, FUTURITY (May 24, 2021), <https://www.futurity.org/anti-asian-hate-hashtags-twitter-2570382-2/> [<https://perma.cc/6NE2-UU9E>].

253. Zulli, *supra* note 236, at 207.

254. Press Release, Me Too, 5 Years Later, #MeToo is More Than a Viral Hashtag; It's a Movement for Justice and Healing for Sexual Violence Survivors (Oct. 12, 2022), <http://metoomvmt-staging.fcbwork.com/stay-informed/press/5-years-later-metoo-is-more-than-a-viral-hashtag-its-a-movement-for-justice-and-healing-for-sexual-violence-survivors/> [<https://perma.cc/GA48-FH8Z>].

255. *Id.*

256. See Billy Carson (@4biddenknowledge), INSTAGRAM (Feb. 24, 2020), <https://www.instagram.com/p/B89m-mfHKfs/>.

257. See #publicdefender, INSTAGRAM, <https://www.instagram.com/explore/tags/publicdefender/> (last visited Aug. 8, 2023); #publicdefenderlife, INSTAGRAM, <https://www.instagram.com/explore/tags/publicdefenderlife/> (last visited Aug. 8, 2023); #publicdefenderproblems, INSTAGRAM, <https://www.instagram.com/explore/tags/publicdefenderproblems/> (last visited Aug. 8, 2023); #publicdefender, TIKTOK, <https://www.tiktok.com/tag/publicdefender?lang=en> (last visited Aug. 8, 2023); #publicdefenderlife, TIKTOK, <https://www.tiktok.com/tag/publicdefenderlife> (last visited Aug. 8, 2023); #publicdefenderproblems, TIKTOK, <https://www.tiktok.com/tag/publicdefenderproblems> (last visited Aug. 8, 2023).

prolific use of hashtags that draw attention to some of the underlying injustices that defenders and their clients face would magnify defender efforts to engage with the community.

In addition to hashtags, social networking platforms allow users to explicitly mention other users in the text of a post or to tag other users in a photo or video. Users can also reply to content that they see, including in ways that are visible to others and that can lead to extended discussions. Although the visibility of such discussions varies by platform, all of these tools allow users or groups to explicitly connect their content to other users or groups in hopes of amplifying their message and extending their reach. These techniques offer defenders important ways to connect with local decarceral grassroots organizations or other local residents to promote each other's messages.²⁵⁸

* * *

Before we leave this topic, a note of caution is in order. Our main conceptual points—how defenders can use social networking systems to grow the depth and breadth of existing networks, to exchange stories, to build shared narrative, and to convert online activism into offline activities—should remain valid for quite some time. But the particulars of how to use these specific platforms will likely shift in the coming years. Platform interfaces and algorithms change regularly. As Meta (Facebook's parent company) and X shrink the size of their respective workforces,²⁵⁹ the FBI Director raises concerns about TikTok as a security risk,²⁶⁰ the federal government bans TikTok on devices used by federal contractors,²⁶¹ and Montana bans the platform entirely,²⁶² new ways of using these existing platforms—or ways to use new or newly prominent platforms—are sure to emerge.²⁶³

258. We offer more details on these interactions in Part B, *infra*.

259. Jennifer Liu, *Thousands at Meta, Twitter, Salesforce Lost Jobs This Week—The Shock Could Ripple Through the Economy for Months*, CNBC (Nov. 10, 2022, 4:39 PM), <https://www.cnbc.com/2022/11/10/meta-twitter-salesforce-tech-layoffs-impact-on-the-economy.html> [<https://perma.cc/93E8-GDTS>].

260. Eric Tucker, *FBI Director Raises National Security Concerns About TikTok*, AP NEWS (Dec. 2, 2022, 3:41 PM), <https://apnews.com/article/technology-china-united-states-national-security-government-and-politics-ac5c29cafaa1fc6bee990ed7e1fe5afc> [<https://perma.cc/2QBX-D9QH>].

261. FAR 52.204-27 (2023).

262. Ayana Archie, *Montana Becomes the First State to Ban TikTok*, NPR (May 18, 2023, 3:29 AM), <https://www.npr.org/2023/05/18/1176805559/montana-tiktok-ban> [<https://perma.cc/ZAH4-U2N2>].

263. See Kidd & McIntosh, *supra* note 89, at 792 (warning that we should not underestimate the capacity of social media users to create new tools and to invent new ways to use old tools to further activist goals). Another potential destabilizing force was calmed for now as the Supreme Court declined to decide the extent to which Section 230 of the Communications Decency Act shields internet companies from suit over their algorithms. *Gonzalez v. Google LLC*, 598 U.S. 617, 622 (2023) (*per curiam*).

II. WHY SPEAK UP NOW?

The time is right for more defenders to develop a public voice over social media because of two developments: the growth of decarceral grassroots organizations and the changing political landscape in some jurisdictions. Both of these trends offer opportunities for defenders to forge alliances and publicly challenge the criminal justice policies and structures that have wreaked havoc on poor people of color for decades.

First, defenders in some cities can add their voices to those of grassroots organizations who support criminal justice reform in their communities. Jocelyn Simonson, writing at the forefront of this field, has spotlighted the work of courtwatching organizations, community bail funds, and participatory defense hubs as examples of this phenomenon.²⁶⁴ Through these organizations, members of the public have already been participating in—and sometimes disrupting—everyday practices in the criminal legal system, helping to fundamentally restructure power dynamics and promote lasting change.²⁶⁵

The other (perhaps related)²⁶⁶ opportunity derives from recent shifts in the political landscape. After decades of nearly uniform policies favoring excess and overreaction, the present landscape in some places appears somewhat more complex and textured than in years past. Certain elected officials, including prosecutors, judges, and legislators, have taken steps to reduce the footprint of the criminal legal system in their communities. Their willingness to work with—rather than at cross-purposes to—the defense bar to achieve some policy goals provides a window of opportunity that was previously only imagined. We discuss the contours of these trends in the pages below, arguing that these developments signal some communities' emerging receptiveness to public advocacy by defenders.

A. Working with Community Groups

Various community organizations can serve as natural allies in defenders' efforts to keep criminal justice reform front and center in public discourse and

264. See, e.g., Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 251, 288–89 (2019); Simonson, *supra* note 227; JOCELYN SIMONSON, *RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION* viii–xi (2023) [hereinafter SIMONSON, *RADICAL ACTS OF JUSTICE*].

265. See, e.g., Simonson, *supra* note 49, at 1612.

266. We do not take a strong position on whether building power through these grassroots organizations has *caused* legislative and other change, but building political power certainly is important for creating lasting change.

help them build power: courtwatchers, bail funds, and participatory defense hubs.²⁶⁷

Courtwatchers: Courtwatchers are organized groups of local citizens who watch the goings-on of their local courtrooms to improve accountability of system actors.²⁶⁸ But audience members do more than simply observe some of what would otherwise be opaque about their local criminal courts' practices; they convey what they have seen to others.²⁶⁹ In Brooklyn, for example, courtwatchers noted that line prosecutors routinely found ways to request bail in misdemeanor cases, despite contrary instructions from the elected DA; that story was then covered by a local news organization and broadcast widely.²⁷⁰ Organized courtwatching groups also link community members to each other and sometimes to larger movements for social and legal change.²⁷¹ Some of these courtwatching organizations, such as Court Watch NYC, were created in part by a coalition of public defenders.²⁷² Even courtwatching groups that are formed separate and apart from indigent defense offices provide an important grounding for some of the claims in this Article insofar as these groups aim to provide the sort of detailed, on-the-ground information to the community about the local criminal courts that public defender offices are similarly well positioned to provide over social media, albeit with a wider lens.²⁷³

Community Bail Funds: Community bail funds, which collect money from community residents to pay bail for people who have been arrested,²⁷⁴ represent another natural ally for public defenders.²⁷⁵ Bail funds respond to the reality

267. We focus here on organizations that operate largely in the adjudicative phase of criminal procedure rather than copwatching groups or others that monitor policing. *See generally* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016).

268. The presence of an audience can help hold system actors accountable for their treatment of the accused. *E.g.*, Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 469–70 (2011).

269. Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2182, 2231 (2014); Simonson, *supra* note 49, at 1618.

270. Zoe Azulay, *Court Watchers Hold "Progressive" DAs Accountable*, WNYC NEWS (July 24, 2018), <https://www.wnyc.org/story/court-watchers-hold-progressive-das-accountable> [<https://perma.cc/XEH5-ZQPU>].

271. Simonson, *supra* note 269, at 2183.

272. Pfaff, *supra* note 13; Nazgol Ghandnoosh, *How Defense Attorneys Can Eliminate Racial Disparities in Criminal Justice*, CHAMPION, June 2018, at 36, 38.

273. Pfaff, *supra* note 13; Smith Futrell, *supra* note 13, at 12. D.C. Public Defender Service recently hosted their local courtwatching organization to talk to their "staff . . . about the importance of 'community support for loved ones facing charges.'" The Public Defender Service for the District of Columbia, FACEBOOK (July 12, 2023, 2:10 PM), <https://www.facebook.com/pdsdc/posts/885495853213052>.

274. *See* Simonson, *supra* note 227, at 587. There are also periodic drives to bail out large numbers of people all at once; the Black Mamas Day Bailout that has operated since 2017 is one good example. *See* SIMONSON, *RADICAL ACTS OF JUSTICE*, *supra* note 264, at 22–23.

275. Although community bail funds have become far more prevalent in recent years, they have a much older history too. Robin Steinberg, Lillian Kalish & Ezra Ritchin, *Freedom Should Be Free: A Brief History of Bail Funds in the United States*, 2 UCLA CRIM. JUST. L. REV. 79, 82–84 (2018) (discussing the ACLU's bail fund in the 1920s to respond to prosecutions brought during the Red Scare). Before the Civil War, Black families often raised money to bail out family members, which was a prototype of a community bail fund. Cynthia A.

that overuse of cash bail for those who cannot afford it severely harms defendants and their loved ones and substantially increases defendants' chance of conviction²⁷⁶—insights that defenders, but perhaps few others, understand well.²⁷⁷ In fact, public defenders helped create some of the earliest community bail funds in New York and elsewhere.²⁷⁸ In addition to providing bail for individual defendants, bail funds sometimes engage in more systemic reform efforts too.²⁷⁹

Over the past few years, community bail funds have boomed in all respects—in the number of organizations, the number of donors, and the amounts raised. Looking just at 2020, bail funds received more than ten million individual donations, totaling approximately \$100 million²⁸⁰ and benefitting approximately 10,000 people.²⁸¹ The Minneapolis Freedom Fund alone received more than 900,000 individual donations in four days that year, totaling more than \$31 million.²⁸² By 2021, there were almost 100 standalone bail funds in the United States,²⁸³ and the national Bail Project had teams in twenty-eight different cities.²⁸⁴

Participatory Defense Hubs: Some community members further systemic reform by assisting defendants (and defenders) in individual cases.

Golembeski & Matthew Bakko, *Community Bail Funds: The Answer to Inequitable Cash Bail?*, BALT. SUN (July 26, 2022, 11:24 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-07xx-community-bail-funds-20220726-bwczccihncbxm63t2j3uk34a-story.html>.

276. Logan Abernathy, *Bailing Out: The Constitutional and Policy Benefits of Community and Nonprofit Bail Funds*, 42 L. & PSYCH. REV. 85, 86–87 (2018); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 747 (2017); Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 225 (2018).

277. See Simonson, *supra* note 227, at 587; see also Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 528 (2019) (“Community bail funds involve members of a community posting bail for strangers, demonstrating that the community would be better served if some defendants who are now detained were afforded pretrial liberty.”).

278. The Bronx Defenders office launched a community bail fund in 2007. SIMONSON, RADICAL ACTS OF JUSTICE, *supra* note 264, at 22.

279. See, e.g., Malik Neal & Christina Matthias, *Broken Promises: Larry Krasner and the Continuation of Pretrial Punishment in Philadelphia*, 16 STAN. J. C.R. & C.L. 543, 546 (2021) (director and board member of Philadelphia Bail Fund: “We see paying bail as a disruption of Philadelphia’s cash bail system and as a form of resistance against a system that criminalizes race and poverty.”).

280. SIMONSON, RADICAL ACTS OF JUSTICE, *supra* note 264, at 27–28, 43.

281. Mary Hooks & Jocelyn Simonson, Opinion, *The Power of Community Bail Funds*, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/2020/08/23/opinion/bail-funds.html> (“At least 10,000 protesters and ordinary people have been freed from jail and immigrant detention facilities after months of uprisings in which millions of dollars have been donated to nearly 80 community bail funds nationwide.”).

282. Golembeski & Bakko, *supra* note 275; SIMONSON, RADICAL ACTS OF JUSTICE, *supra* note 264, at 43. That level of giving was in no small part due to the murder of George Floyd, but under any circumstances, this is substantial participation to protest the status quo. See Sam Rosen, *Bail Fund Co-Optation and the Purpose of Cash Bail*, CRIM. JUSTICE, Summer 2021, at 28, 28 (recounting that bail funds received \$70 million in donations in the month after Mr. Floyd was murdered).

283. See Golembeski & Bakko, *supra* note 275 (noting that ninety bail funds belong to the National Bail Fund Network).

284. SIMONSON, RADICAL ACTS OF JUSTICE, *supra* note 264, at 28.

“Participatory defense” describes this burgeoning²⁸⁵ movement of direct citizen engagement.²⁸⁶

On an individual case level, participatory defense includes community members working with defendants and their lawyers to help fight the charges, secure pretrial release, or reduce the possible sentence exposure. For instance, community members might create social biography videos that humanize the defendant for the prosecutor or the judge²⁸⁷ or attend felony bail hearings to collect information that the defender can use later to advocate more effectively for pretrial liberty.²⁸⁸ Sometimes community members painstakingly examine discovery and police reports from the defendant’s case—a task that overworked public defenders often cannot do in sufficient detail.²⁸⁹ Community members might also have more and better access to relevant information about the accused, the victim, or the crime scene than do defenders because of their community and familial connections.²⁹⁰ When defenders and hubs work together on structural issues too, good things can happen: as we mentioned in the Introduction, when the Santa Clara Public Defender’s Office partnered with a participatory defense hub, they convinced politicians to provide funding for representation at arraignment where previously there had been zero interest in such a move.²⁹¹

285. There are now dozens of participatory defense hubs across the country. SIMONSON, RADICAL ACTS OF JUSTICE, *supra* note 264, at 99.

286. Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1288 (2015); Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 720 (2018) (“[P]articipatory defense also encourages people to connect individual cases to larger systemic problems in the criminal law system, including racial bias and over-incarceration.”); *see also* SIMONSON, RADICAL ACTS OF JUSTICE, *supra* note 264, at 105 (“[T]he aim is to combine collective advocacy in individual cases with the building of power to change public conversations and policies . . .”).

287. Moore, Sandys & Jayadev, *supra* note 286, at 1286.

288. SIMONSON, RADICAL ACTS OF JUSTICE, *supra* note 264, at 105.

289. Moore, Sandys & Jayadev, *supra* note 286, at 1285; *see also* *HipHop Is Not a Crime: How a Community Beat a Gang Enhancement Charge by Picking Apart a Detective’s Report*, ALBERT COBARRUBIAS JUST. PROJECT, <https://acjusticeproject.org/keycases/hiphop-is-not-a-crime/> [<https://perma.cc/YU34-WNYR>]; *Beating a Life Sentence: How a Family Proved the Innocence, and Won the Release of, a Young Father Facing Life*, ALBERT COBARRUBIAS JUST. PROJECT, <https://acjusticeproject.org/keycases/false-murder-arrest/> [<https://perma.cc/NQE6-G5WS>].

290. *See, e.g.*, Eli Salomon-Abrams, Note, *Remaking Public Defense in an Abolitionist Framework: Non-Reformist Reform and the Gideon Problem*, 49 FORDHAM URB. L.J. 435, 462–63 (2022) (“Participatory defense is rooted in the understanding that public defenders operating under holistic and client-centered practice models may be trained to try to humanize their clients to courts but are not as capable of doing so as those accused of crimes, their families, and communities.”); Maura Ewing, *How Prisoners’ Family Members Can Assist Overworked Public Defenders*, ATLANTIC (July 5, 2017), <https://www.theatlantic.com/politics/archive/2017/07/a-replacement-for-overworked-public-defenders/532476/> (quoting a judge whose decision was affected by the defendant’s mother’s testimony about his life circumstances: “Oftentimes, the loved ones are the best historians.”); *see also* Liana Pennington, *An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office*, 14 OHIO ST. J. CRIM. L. 603, 620 (2017) (describing a missed opportunity to pursue these factual discrepancies in a participatory defense organization).

291. *See supra* Introduction.

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Defenders and defender offices should neither replace nor dominate community groups' social media presence; they should rather add their perspective to existing conversations, try to ignite new ones, and help lift up other voices. Where the opportunity exists, defenders can look to community organizations or other decarceral interest groups to carry their message—a strategy that does not risk backlash against the client. But appropriate surrogates are not yet available everywhere. Courtwatching groups, bail funds, and participatory defense hubs are growing, but they are far from ubiquitous. Defenders' public voice might be what is needed to help seed and then build like-minded community organizations.

Moreover, defenders' public contributions should not end with relying on surrogates because defenders' voices are qualitatively different from those of lay activists or persons accused of crime, even when their agendas align. Activists' and defendants' stories may carry particular emotional power by recounting first-hand the carceral experience and the toll it has inflicted on them and their loved ones.²⁹² But defenders are better able to contextualize these powerful individual stories, explaining how individual acts of maltreatment, neglect, or injustice evince systemic problems that they see every day. On the other hand, although defenders can identify as systemic problems that seem aberrational to those with less experience, defenders nonetheless must restrain their advocacy to comply with ethical rules and to avoid provoking backlash from prosecutors or judges.²⁹³ Activists are non-attorney commentators who are not constrained in these ways.

In addition to the qualitative differences, attorneys' and activists' posts will tend to reach different audiences because of their varying networks. That is to the good. If all of these actors develop a social media presence and share each other's posts, they can expose to the broadest possible audience both the individual pain experienced by justice-involved people and the pathologies that characterize the whole system. This kind of overlapping coverage is necessary to counter the state's pervasive and long-standing dominance of the narrative about criminal law.

In communities that do not yet have these sorts of community groups, defenders (and defender offices) may be the sole voice advocating for compassion and restraint, at least in that region. In such a location, increased public advocacy by defenders and defense organizations might help spur the creation of new community groups or help interested community members find each other or counterparts in other locales. What begins as a loose network

292. See, e.g., VICE News, *supra* note 81 (reporting on the popularity of prison TikTok and including videos made by incarcerated persons and their loved ones revealing their experience).

293. See *infra* Part III.B (discussing the risks of backlash from judges and prosecutors who might feel targeted by defenders' bold pronouncements about how the system works).

based on weak ties might soon develop into a robust network of strong ties between like-minded people.

To help concretize our points, consider a hypothetical example of defenders collaborating with grassroots organizations, using interactive features of social media to build power both online and offline.²⁹⁴ Imagine a defender who sees a judge overreacting to a minor crime allegedly committed by a young person, imposing high bail without regard for the accused's ability to pay. After leaving the courthouse, the defender posts about her frustrations with how bail is used in her county; in the post she mentions the local courtwatching group and the community bail fund. Those groups repost and schedule a community meeting to discuss the issue. The courtwatching group creates an upcoming event on Facebook; they publicize it on Instagram and X (including hashtags and mentioning the other organizations), which gets picked up through algorithms and sent well beyond these groups' email lists. A hundred people attend. The chief public defender of the jurisdiction appears at the meeting as an invited guest speaker. The public defender office discusses the meeting on its office Facebook page and uploads photos and video from the meeting to its Instagram account; both the Facebook page and the Instagram photos include geo-tags to alert others as to where this meeting took place and to build more local support. They also tag the photos of business and community representatives who attended to signal to the wider community which thought leaders are already involved in this issue.

Following the meeting, an assistant public defender makes a thirty-second TikTok explaining her boss's points about the injustice of the cash bail system. Seeing that video, a teenager makes another TikTok, recording a short song about cash bail that goes viral—getting thousands of likes. One of those likes comes from a local community college student, who joins a participatory defense hub. Another like is posted by a recently retired librarian, who decides to contact his local state representative to explain that he hates having his tax dollars spent to incarcerate people who are presumed innocent. A group of high school friends in the community also sees the viral video, which inspires them to start a “Know Your Rights” club at their high school. After learning from their teenaged children that their public defender's office cannot afford to represent people at arraignments, the parents donate money to the public defender's office—through a “Donate” button on the Facebook page, website, or a linked crowdfunding platform. On and on this cycle of engagement continues, spreading information and inspiration with each turn of the wheel to new corners of the community and new audiences who are still forming their views about criminal law. Over decades, knowledge grows and political power builds.

294. We alluded to some uses of hashtags and mentions in a few examples above. See *supra* Part I.B.

B. *Taking Advantage of Political Shifts*

Although a detailed analysis of the current moment in the politics of criminal law is well beyond the scope of this Article, a few examples indicate that decarceral reform has become more acceptable, at least in some communities,²⁹⁵ which provides openings for defender advocacy. “[A] racial justice movement, fiscal pressures, [and] the personal impact of mass incarceration and criminalization on millions of people” have prompted some changes.²⁹⁶ The changes are not uniform or consistent, however. This appears instead to be a moment of “political transition . . . in which public preferences on criminal justice policy are shifting, causing palpable electoral effects—not radically, and not everywhere, but to a degree and across a sufficient number and diversity of jurisdictions that serious observers can reasonably describe as new political trends.”²⁹⁷

Meaningful shifts have appeared in all three branches of government, as certain executive, legislative, and judicial actors are expressing willingness to part ways with the “business as usual” approach that dominated for decades. To begin, “progressive prosecutors” have sought and won office not only in coastal left-leaning cities—such as Los Angeles, Boston, and Philadelphia—but also in smaller jurisdictions around the country, including St. Louis (both the city and the county), Durham, Orlando, Minneapolis, and Des Moines.²⁹⁸ While prosecutors who identify as progressive do not subscribe to a formulaic platform,²⁹⁹ their reforms typically include not prosecuting some low-level

295. See, e.g., Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 748–51 (2020) (discussing the virtues of localism in bail reform); Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211 (2012) (explaining the persistence of local practice even amidst statewide reform).

296. Rachel E. Barkow, *Promise or Peril? The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 261 (2023).

297. Ouziel, *supra* note 46, at 528.

298. For a sampling of the literature about newly elected progressive prosecutors, see generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2020) (profiling elected prosecutors in, among other places, San Francisco, Chicago, and Brooklyn); I. India Thusi, *Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795 (2022) (discussing progressive prosecutors in San Francisco, Los Angeles, Orlando, Baltimore, and St. Louis); Chris Geidner, *Why “Progressive Prosecutor” Wins in the Heartland Matter*, MSNBC.COM (Nov. 8, 2022, 11:12 PM), <https://www.msnbc.com/2022-midterm-elections/results/live-blog/midterm-elections-live-updates-2022-rcna52820> [<https://perma.cc/Q8WC-DGJ8>] (discussing progressive prosecutor electoral victories in Minneapolis and Des Moines); Joanna Slater, *Rachael Rollins Wants to Remake the Criminal Justice System. Republicans Have Vowed to Block Her Path.*, WASH. POST (Oct. 27, 2021, 6:00 AM), <https://www.washingtonpost.com/nation/2021/10/26/rachael-rollins-us-attorney/> (discussing progressive prosecutor in Boston); Thomasi McDonald, *Durham’s DA Featured in New Book About Reform-Minded Prosecutors*, INDY WEEK (Nov. 1, 2022), <https://indyweek.com/news/durham/durham-da-deberry-featured-in-new-book-reform-minded-prosecutors/> [<https://perma.cc/DN5V-KABE>] (discussing Durham, North Carolina’s progressive prosecutor).

299. Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021) (criticizing the coherence of the term “progressive prosecutor”).

crimes and marijuana possession.³⁰⁰ Others have refused to pursue capital murder charges.³⁰¹ Secondly, certain legislatures have scaled back the reach of the formal criminal legal system in their jurisdictions, particularly with regard to lower-level offenses. Most prominently, New York substantially reduced judges' ability to set cash bail—a practice that previously led to many people being jailed on a mere accusation of wrongdoing simply because they couldn't afford their release.³⁰² Other jurisdictions have limited pretrial detention legislatively or judicially, or simply eliminated cash bail.³⁰³ Federal- and state-level sentencing reform has also emerged, particularly limiting sentences for drug offenses.³⁰⁴ In the judicial branch, some courts have placed renewed emphasis on concepts like due process and equal protection when considering issues related to police procedures, bail, and sentencing—invoking both state and federal constitutional principles to guide their critique of long-standing practices.³⁰⁵

300. FAIR AND JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 8, 10 (2018), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [<https://perma.cc/YL52-R5VH>]; Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391, 398–400, 402–05 (2022); MIRIAM ARONI KRINSKY, CHANGE FROM WITHIN: REIMAGINING THE 21ST-CENTURY PROSECUTOR (2022); Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor's Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169 (2020).

301. Katie Mettler, *Florida Prosecutor Refuses to Seek Death Penalty for Alleged Cop Killer, Defies Gov. Rick Scott's Order to Step Aside*, WASH. POST (Mar. 21, 2017, 5:50 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/21/floridas-first-black-prosecutor-a-death-penalty-boycotter-defies-gov-rick-scott/>.

302. Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained> [<https://perma.cc/3Y7-D2PD>]. However, New York partially rolled back bail reform within a fairly short time. Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, MARSHALL PROJECT (Apr. 23, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states> [<https://perma.cc/9ZNL-JRJA>].

303. *E.g.*, Jerry Nowicki, *What Happens When Cash Bail Ends Next Year in Illinois?*, ST. LOUIS PUB. RADIO (Sept. 17, 2022, 11:56 AM), <https://news.stlpublicradio.org/government-politics-issues/2022-09-17/what-happens-when-cash-bail-ends-next-year-in-illinois> [<https://perma.cc/4MUX-X7CQ>]; DIST. ATT'Y'S OFF., DURHAM CNTY., N.C., 16TH PROSECUTORIAL DISTRICT INTERNAL PRETRIAL RELEASE POLICIES (2019), <https://www.scribd.com/document/411746062/Pretrial-Release-Policies-16th-Prosecutorial-District> [<https://perma.cc/3567-LMZG>]; CIR. CT. OF COOK CNTY., ILL., GENERAL ORDER NO. 18.8A: PROCEDURES FOR BAIL HEARINGS AND PRETRIAL RELEASE (2017), <http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf> [<https://perma.cc/RMF8-M56E>].

304. Barkow, *supra* note 296, at 261 n.63 (citing reforms by U.S. Sentencing Commission and state sentencing commissions); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005) (discussing state sentencing commission structures that have proven to be most successful in enacting reforms).

305. *See, e.g., In re Humphrey*, 482 P.3d 1008, 1018–22 (Cal. 2021) (holding that courts must consider defendant's ability to pay bail to be faithful to due process and equal protection); *State v. Henderson*, 27 A.3d 872, 919–21 (N.J. 2011) (holding that courts must more deeply interrogate identification practices for substantive due process violations and give specific jury instructions about reliability). We also note the bold move toward reducing California's prison population, driven by the Supreme Court's decision in *Brown v. Plata*, 563 U.S. 493 (2011). California's reforms in this regard are collectively termed "realignment." *See* MAGNUS LOFSTROM & BRANDON MARTIN, PUB. POL'Y INST. CAL., PUBLIC SAFETY REALIGNMENT: IMPACTS SO FAR (2015), https://www.ppic.org/wp-content/uploads/content/pubs/report/R_915MLR.pdf [<https://perma.cc/2JBF-4K93>].

Popular media has helped further these trends. Podcasts and documentaries have brought the tragedy of wrongful convictions into American homes, dorm rooms, and coffeehouses, leading to increased donations to innocence projects and to courtroom successes. Most prominently, Adnan Syed, of *Serial* fame,³⁰⁶ has now been released after his murder conviction was vacated and prosecutors declined to recharge him,³⁰⁷ although the status of his case remains somewhat uncertain.³⁰⁸ Curtis Flowers, who was tried six times by the state of Mississippi for murder, won his most recent appeal to the Supreme Court on *Batson* grounds after his case was profiled on the podcast *In the Dark*.³⁰⁹

Lastly, a few jurisdictions have addressed the connection between the institutional home of the defender and the ability to provide zealous advocacy. To that end, they have created models of indigent defense organizations that exist outside of the executive or judicial branch. The Bronx Defenders, for example, is a nonprofit organization³¹⁰ that receives some government money but also receives private donations.³¹¹ This structure enables it to experiment with public advocacy to a greater extent than its institutional counterparts in other locations. Similar community defender organizations³¹² were created in King County (Seattle), Washington, although they have since been re-organized into the King County Department of Public Defense with four subdivisions.³¹³ With these structural innovations, defenders in these locations no longer need to fear that bold advocacy will offend the entity that controls their funding.

306. See generally *Season One*, SERIAL (Oct. 3, 2014–Dec. 18, 2014), <https://serialpodcast.org> [<https://perma.cc/TE6A-TZ6A>]; *The State v. Adnan Syed Episodes*, UNDISCLOSED (Apr. 12, 2015–Sept. 15, 2022), <https://undisclosed-podcast.com/episodes/season-1/> [<https://perma.cc/A6TF-RWWU>].

307. Emily Davies & Omari Daniels, *Adnan Syed is a Free Man, Eyeing Exoneration. Here's What We Know*, WASH. POST (Oct. 13, 2022, 9:19 AM), <https://www.washingtonpost.com/dc-md-va/2022/10/13/adnan-syed-serial-q-and-a/>.

308. *Lee v. State*, 292 A.3d 348, 388 (Md. App. Ct. 2023) (reinstating conviction and remanding for new hearing regarding vacating Syed's conviction that affords adequate notice to the victim's family).

309. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019); see also *id.* at 2254 (Thomas, J., dissenting) (accusing the Court of bowing to pressure wrought by the podcast); *In the Dark: Season 2*, APM REPORTS (May 1, 2018–Oct. 14, 2020), <https://features.apmreports.org/in-the-dark/season-two/> [<https://perma.cc/E3S6-6X4D>].

310. *We are Public Defenders*, THE BRONX DEFENDERS, <https://www.bronxdefenders.org/who-we-are/> [<https://perma.cc/B7M4-CTDD>].

311. *Support the Bronx Defenders*, THE BRONX DEFENDERS, <https://www.bronxdefenders.org/get-involved/give/> [<https://perma.cc/G68B-BZJJ>]. In the interest of disclosure, one of the authors of this paper is a monthly contributor to the Bronx Defenders.

312. See *Defender Services*, U.S. CTS., <https://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/ZZZD-U8TW>] (describing community defender organizations as “non-profit defense counsel organizations” that “operate under the supervision of a board of directors and may be a branch or division of a parent non-profit legal services corporation that provides representation to the poor in state, county, and municipal courts”).

313. *King County Department of Public Defense*, KING CNTY., <https://kingcounty.gov/depts/public-defense.aspx> [<https://perma.cc/BHP5-WMU2?type=image>]; *Four Divisions Provide Legal Representation*, KING CNTY., https://kingcounty.gov/depts/public-defense/About_DPD/Divisions.aspx [<https://perma.cc/FS2D-4L4J?type=image>].

III. RISKS AND REWARDS OF PUBLIC ADVOCACY

We see the criminal legal system landscape as more hospitable toward reform than it once was, but the sustainability of that trend is hard to predict in the absence of lasting changes in political power.³¹⁴ We therefore encourage defenders to seize the opportunity created by this more textured political landscape, where allied community organizations are already working for reform and social media platforms make it possible to connect with the public cheaply and easily. Such activity by defenders can generate significant shifts in the legal landscape over time. But we acknowledge that the strategy we suggest faces some headwinds, and those headwinds feel like risks to defenders whose ethics and training have long led them to focus exclusively on individual client advocacy.³¹⁵ To put it simply, defenders may fear that engaging in public advocacy in support of systemic reforms will harm their clients.³¹⁶

We reject this binary approach to defense advocacy: putting public pressure on other system actors to curb problematic behavior and rectify systemic abuses can be fully consistent with serving the interests of one's clients. The ethic of individual representation is enshrined in this field by both practicing lawyers and academics who write in this space,³¹⁷ but defenders cannot make any headway on countering the abuses of the system by litigating one case at a time.

314. For example, Chesa Boudin was elected in San Francisco but subsequently was recalled and replaced by a prosecutor who is committed to a course reversal. Jeremy B. White, *San Francisco District Attorney Ousted in Recall Election*, POLITICO (June 8, 2022, 12:17 AM), <https://www.politico.com/news/2022/06/08/chesa-boudin-san-francisco-district-attorney-recall-00038002> [<https://perma.cc/V736-2HSR>]. We agree with Rachel Barkow that legislative changes are necessary for reforms to outlast any given administration. Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1367 (2021).

315. Salamon-Abrams, *supra* note 290, at 465–66 (“In general, public defenders are constrained to arguments and strategies that do not push boundaries—a norm which inherently undercuts defenders’ ability to point out broader systemic flaws or address the need for systemic change while advocating for individual clients.”); Esther Nir & Siyu Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 518–29 (2021) (describing, through qualitative interviews, how defense attorneys temper their advocacy at times to preserve working group relationships).

316. See, e.g., Taylor-Thompson, *Individual Actor v. Institutional Player*, *supra* note 24 (advocating an institutional vision of public defender offices—rather than an aggregation of individual defenders—whereby the office takes particular positions on particular issues rather than its lawyers taking conflicting positions when a single position on a particular issue helps some clients but hurts others); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2197, 2202 (2013) (explaining that defense attorneys can help individual clients, albeit expressing skepticism about their ability to achieve broader reform); Miller, *supra* note 112, at 45 (discussing “the subtle ways in which lawyers are forced to weigh the need of one client against other clients, and make tradeoffs that may compromise the interests of some clients”); Martin Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13 (1986) (describing the conflicts inherent in public defense representation between the interests of multiple clients in a repeat-player setting); Charles J. Ogletree & Randy Hertz, *The Ethical Dilemmas of Public Defenders in Impact Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 23 (1986) (considering the way in which a certain position on a legal issue will help some clients and hurt others); Salamon-Abrams, *supra* note 290, at 465–66.

317. “Academic and popular commentary about public defense tends to relentlessly recirculate the individualized ideal.” Sekhon, *supra* note 14, at 4; see also Taylor-Thompson, *Individual Actor v. Institutional Player*, *supra* note 24, at 2421 (observing that the individualized role of defender is entrenched in the profession).

Legislators continue to short-change indigent defense budgets and hollow out whatever remains of *Gideon's* promise, all while providing strong support to police and prosecutors who generate and pursue cases.³¹⁸ By staying silent about this stark imbalance of power and funding, indigent defenders may appear to be publicly propping up a criminal legal system that many of them privately perceive as fundamentally illegitimate.³¹⁹

In this Part, we explore two principal reasons why defenders' risk calculus traditionally leads them to avoid the public eye: (1) their limited resources, ethical obligations, and training as courtroom lawyers emphasize individual adjudication as the sole focus of the job, and (2) structural relationships—both in the courtroom and in the government organizational chart—bind them to judges and prosecutors in an unholy trinity. We explain how each reduces defenders' willingness to comment publicly (in court or out) about the regular injustices their local court system perpetrates, let alone on systemic matters like funding or salary disparities between prosecutors and public defenders. In the concluding Subpart, we explain why those risks seem overstated, particularly in light of the benefits public advocacy could bring to the public defense mission.

A. *Losing the Client Focus*

Public defenders typically view their role as individual lawyers who zealously advocate for the interests of each individual client they represent.³²⁰ In this model, the defender's role is litigation-focused; it requires serving each client as well as possible on the matter that is the subject of the representation.³²¹ Publicly voicing the injustices that so many clients face may

318. Taylor-Thompson, *Individual Actor v. Institutional Player*, *supra* note 24, at 2422–23.

319. Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 176 (2021) (“No matter how much a defender may be ideologically opposed to the criminal legal system, the simple act of carrying out defense representation can provide a veneer of legitimacy to the entire process.”); Etienne, *supra* note 61, at 1226 (arguing that many indigent defense lawyers view their role in a way consistent with cause lawyering but pointing out that they also prop up the system whose dismantling is often the cause they pursue); Salamon-Abrams, *supra* note 290, at 458 (“A public defender motivated to abolish the carceral system will find herself, on a daily basis, taking part in the process of filling its cots and cages.”).

320. See Taylor-Thompson, *Individual Actor v. Institutional Player*, *supra* note 24, at 2420; Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 162–63; see also Smith Futrell, *supra* note 319, at 165.

321. For strong evidence of this orientation, see interviews with defenders in Chicago, conducted by Lisa McIntyre. LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* (1987). Holistic defense organizations attempt to help their criminal defense clients with other needs related to their criminal case, such as housing or immigration concerns. See, e.g., Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 984–97 (2013). We also draw the reader's attention to the “motivational triangle” of the defender, a term coined by Jeff Sherr of the National Criminal Defense College. He describes defenders as variously motivated by a “warrior” mentality (aiming to challenge the power of the state), a “social worker” mentality (aiming to help decision-makers to see the entirety of the person who has been charged and convicted), and/or a “movement builder” mentality (aiming to accomplish systemic change). See OFFICE OF PUBLIC INTEREST PROGRAMS, UCLA SCHOOL OF LAW, CAREERS IN PUBLIC DEFENSE 20 (2017), <https://law.ucla.edu/sites/default/files/PDFs/Careers/Careers%20in%20Public%20Defense%20Guide%20UCLA%20S>

feel, for some attorneys, peripheral to the “real work” of defending clients.³²² The perceived inconsistency between public and private advocacy stems from many origin points, as we discuss below.

First, defenders face indefensibly high caseloads,³²³ which leaves them limited time to work each existing case. There isn’t enough time to do a thorough job on matters they already handle. Suggesting that defenders maintain an active social media presence asks for more of their time and leaves somewhat less time to spend on individual cases.

Second, even aside from the time shortage issue, public advocacy enlarges the professional role of the defender in a way that might seem uncomfortable or problematic for some lawyers. Legal ethics rules and professionalism scholars widely embrace the notion that criminal defense lawyers owe each client a duty of zealous advocacy,³²⁴ a duty that prioritizes responsibility to the client over a lawyer’s other institutional obligations.³²⁵ The obligation could be framed as one of “undiluted loyalty.”³²⁶ That “individualized vision lies at the core of public defenders’ thinking and action in the United States.”³²⁷

Third, public defenders’ professional training steers them toward courtroom advocacy in individual cases—not media savvy or grassroots

chool%20of%20Law%209517%20v2.pdf [https://perma.cc /XE3G-SF6S] (discussing Sherr’s work). The public advocacy we discuss in this Article directly furthers the “movement builder” mentality, but indirectly furthers the other two mentalities as well.

322. Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 169–70; *see also* Nir & Liu, *supra* note 315, at 518 (quoting a defense attorney: “The only power I have derives from the Constitution and how I can implement it in individual cases.”); Salomon-Abrams, *supra* note 290, at 465 (“Public defenders are generally restricted from directly attacking the system’s cruelty by ethical rules and strategic concerns.”); *cf.* Lackey Jr. & Minta, *supra* note 112, at 155–58 (discussing lawyers’ duty of confidentiality in the context of social media posting). *But cf.* Smith Futrell, *supra* note 319, at 178–80 (arguing that “public defenders should not merely professionalize and legitimize the system reflexively; rather, they should practice in solidarity with the people they represent, who are directly affected by the ‘social cancer’ of the carceral state right now” although recognizing that “public defense practice does not completely square with carceral abolition”).

323. Joe, *supra* note 41, at 394; Primus, *supra* note 22, at 1771.

324. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 2020) (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

325. *See, e.g.*, CRIM. JUST. STANDARDS FOR THE DEFENSE FUNCTION 4-1.2(b) (AM. BAR ASS’N 2017) (“The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients’ counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected”); *see also, e.g.*, Primus, *supra* note 22, at 1769 (starting from the premise that defenders should “provide zealous, client-centered defense advocacy”); Charles J. Ogletree Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1250–54 (1993) (linking client-centered representation to zealous advocacy by public defenders); Rapping, *supra* note 41, at 332 (valorizing D.C. Public Defender Service because of its commitment to “client-centered values” and expectations that lawyers will be “fiercely zealous advocates”); Mihailis E. Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1, 50 (“[T]he law relies, as needed, on the zealous advocacy of public defenders to make the best case on their client’s behalf.”).

326. Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 162.

327. *Id.* A public defender’s office, to the extent it gets any thought at all, is viewed “as an aggregate of individual actors.” Taylor-Thompson, *Individual Actor v. Institutional Player*, *supra* note 24, at 2420; Taylor-Thompson, *Taking It to the Streets*, *supra* note 35, at 162.

coalition building.³²⁸ One empirical study found that public defender training emphasizes “performance at trial and the preparation necessary to be ready for effective representation at trial.”³²⁹ They receive scant (if any) training on public advocacy or social movements work. A look at continuing education programs from the National Association of Criminal Defense Lawyers shows programs focused on understanding developments in science or legal doctrine and defending particular types of cases by subject matter; they do not appear to include public advocacy.³³⁰ Nor do the ABA’s Ten Principles of a Public Defense Delivery System speak to public advocacy as an important part of what defender offices should do.³³¹

Law schools too largely focus on training students to be courtroom lawyers rather than activists or social movement leaders.³³² Gerald López’s book *Rebellious Lawyering* describes how lawyers conventionally learn to seek change incrementally and through litigation.³³³ As an opening example, López describes the activist lawyers who arrived in East Los Angeles in the 1960s as limited by their view that litigating a case was “‘naturally’ what it meant to work on a problem.”³³⁴ As a result, these lawyers overlooked the value of building coalitions, engaging with concerned residents, or “mount[ing] public educational campaigns in order to mobilize sensible community pressure.”³³⁵ There now are law school courses devoted to social change or law and organizing³³⁶ and some law school clinics that discuss ways to achieve larger-scale change,³³⁷ but the law school curriculum in most places remains largely

328. We recognize that we are painting with an extremely broad brush here, but we think this generalization holds true much more often than not.

329. Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1464–65 (2016).

330. See *NACDL Live Event Calendar*, NAT’L ASS’N OF CRIM. DEF. LAWS. <https://www.nacdl.org/Content/meetings> [<https://perma.cc/K28L-FD4C>].

331. AM. BAR ASS’N, *Ten Principles of a Public Defense Delivery System*, STANDING COMM. ON LEGAL AID AND INDIGENT DEF. (2023), <https://www.nacdl.org/Document/ABA10PrinciplesPublicDefense> [<https://perma.cc/VA8U-H5QN>].

332. Alexi Freeman & Lindsey Webb, *Yes, You Can Learn Movement Lawyering in Law School: Highlights from the Movement Lawyering Lab at Denver Law*, 5 HOW. HUM. & CIV. RTS. L. REV. 55, 57 (2020); see also, e.g., Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 145–46 (2020) (“I, too, knew that by deciding to go to law school, I had already left behind my most radical self, furthering the professionalization of organizing and social movements.”); Ramzi Kassem & Diala Shamas, *Rebellious Lawyering in the Security State*, 23 CLINICAL L. REV. 671, 705 (2017) (“[W]e still realize on some level that, by going to law school, people choose to leave their most radical selves behind . . .”).

333. LÓPEZ, *supra* note 57.

334. *Id.* at 3.

335. *Id.*

336. Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 27 n.4 (2011) (listing course descriptions about law and organizing or social change); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2740 (2014).

337. See Smith Futrell, *supra* note 319, at 175. Two long-standing clinics at Emory Law School have a public policy focus for this reason; Emory clinic students work on children’s issues in the Barton legislative

grounded in the Langdellian case method and studying case-by-case adjudication.³³⁸ All told, from law school through CLE courses, public defenders do not get many chances to carefully assess the benefits and risks of looking beyond the individual client's interest to engage in public advocacy. They simply resist it as antithetical to the *Gideon* ideal.

The debate around whether to “crash the system,” an idea advanced by several defense-minded scholars, sheds light on how a client-centered ethos limits public defenders' willingness to take sweeping reform positions.³³⁹ According to proponents, coordinated action by defense attorneys to take every case to trial rather than accept guilty pleas could “crash the system” and force reform.³⁴⁰ Of course, taking every case to trial would also require much more of defenders' scarce time. Despite its potential benefits, risk-averse public defenders worry that such an approach would disserve clients in the immediate term, as they may face retaliation from prosecutors and judges who want the conviction machine to run more smoothly.³⁴¹ Thus, even if crashing the system might spur broad productive social change and help future clients, the obligation of zealous advocacy on behalf of current clients makes crashing the system unthinkable (or unethical) to many public defenders.³⁴²

B. *Risking Antagonism*

Public defenders' desire to reach the best outcome for each individual client not only discourages them from taking steps to crash the system but also tempers their willingness to make overly aggressive arguments in court, as they fear provoking backlash from the prosecutor or judge in ways that ultimately might harm a current or future client.³⁴³ Many defenders fear making bold arguments even in cases where they might concretely help a particular client,³⁴⁴ so it is not hard to see why they would shy away from speaking in the public square—a context in which it may be harder to see whether a particular client would benefit.

In what we might think of as the core space for zealous advocacy for individual clients—the adjudicative process—defenders sometimes hesitate to

and policy clinics and on environmental law and policy issues at the Turner Clinic. See *Clinics*, EMORY L. SCH., <http://www.law.emory.edu/clinics> [https://perma.cc/V859-ZPJG].

338. See Harold Anthony Lloyd, *Raising the Bar, Razing Langdell*, 51 WAKE FOREST L. REV. 231, 231–33 (2016).

339. See Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html>; Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013).

340. See Alexander, *supra* note 339.

341. See Etienne, *supra* note 61, at 1235–36.

342. Salamon-Abrams, *supra* note 290, at 458 & n.134.

343. *Id.* at 465–66 & nn. 189–90.

344. See Ogletree, *supra* note 325, at 1239.

make arguments that are too broad, sweeping, or combative from fear that they will anger temperamentally conservative judges or prosecutors and thus harm the client. For example, defense lawyers sometimes do not file meritorious suppression motions because they worry that the prosecutor will withdraw a favorable plea deal or the judge will impose unfavorable sentencing consequences.³⁴⁵ As one defense attorney explained it:

If you filed a suppression motion, and argued it, any plea negotiations went off of the table. Like your client might have a really good motion but if he fought it and you lost, the DA would then pull all deals, kind of like a punishment for exercising your right.³⁴⁶

In federal court, a prosecutor who does not like a certain argument made during litigation might refuse to authorize a substantial assistance downward departure at sentencing—a departure that the prosecutor wholly controls.³⁴⁷ Tenacious or courageous advocacy might also lead prosecutors to retaliate by filing sentencing enhancements or charges with mandatory minimums.³⁴⁸ In short, defenders often have to balance the prospects of winning a bold argument with the serious risk—and sentencing consequences—of losing.³⁴⁹

What makes this dynamic more challenging is public defenders' repeat player status; they represent many clients before a stable set of judges (and prosecutors) and will represent many more clients in the future before those same people. As repeat players they thus see the present and the future linked in a problematic vortex—action taken on behalf of today's client might come

345. See Nir & Liu, *supra* note 315, at 521–29; see also Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 429–31 (2004) [hereinafter Etienne, *The Declining Utility*]; Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103 (2003) (articulating the theoretical and doctrinal bases on which federal defense lawyers might restrain their advocacy to avoid sentencing consequences for their clients).

346. Nir & Liu, *supra* note 315, at 523.

347. Etienne, *The Declining Utility*, *supra* note 345, at 462–68.

348. *Id.* at 468–70; see also Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 28 n.121 (2010) (“Some defense attorneys claim that the threat of mandatory minimums is regularly used to dissuade defendants from filing motions to suppress evidence, or to waive their rights to appeal the sentence, attack it collaterally, move for resentencing . . . , and forego arguments for a lower sentence”); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 78 (1993) (explaining that mandatory minimum sentences “pressure defendants, who otherwise might test the state’s evidence, into accepting guilty pleas”); National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 31 FED. SENT’G REP. 331, 332 (2019) (arguing that prosecutors “should not be permitted to use mandatory minimum sentences to retaliate against an accused person’s decision to exercise her or his constitutional or statutory rights,” such as when a defendant rejects a plea offer in favor of going to trial).

349. Etienne, *The Declining Utility*, *supra* note 345, at 449–50; Nir & Liu, *supra* note 315, at 509–10; see also Guggenheim, *supra* note 316, at 21 (arguing that the best lawyers in institutional settings have to balance zealous advocacy for each individual client with maintaining institutional relationships necessary to serve other clients).

back to bite a future client.³⁵⁰ Some also see themselves as “weak members” of the court community who stand against powerful judges, prosecutors, and police in defense of not just people but also constitutional rules and ideals.³⁵¹ Those institutional dynamics add a further layer of caution when it comes to taking daring positions—both in court and out.³⁵² In New Mexico, for instance, a judge held the chief defender in contempt of court when the chief ordered his staff to stop taking on new cases because they could not constitutionally handle more than their existing caseloads.³⁵³ The district attorney blasted the defender’s decision as an “abdication of their statutory duty.”³⁵⁴

The risk of antagonism extends beyond the individual courthouse, as defenders may feel constrained based on their placement in the organization chart that structures the branches of government (whether state or federal). Irene Oritseweyinmi Joe has observed that a state’s decision to place the public defender’s office inside the executive branch or the judicial branch of government—rather than making it a truly independent agency—makes public defenders hesitant to publicly sound an alarm about the criminal legal system.³⁵⁵ Their worry intensifies if the office is not sufficiently insulated from other actors in that branch.³⁵⁶ Even though placing public defender offices in the state government executive branch is likely to provide more adequate and stable funding than the county-by-county model,³⁵⁷ such placement risks the

350. Melissa L. Breger, Gina M. Calabrese & Theresa A. Hughes, *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C.L. REV. 303, 338 (2003) (warning of risk that today’s advocacy might compromise future clients by alienating prosecutor or judge); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC’Y REV. 15, 18–24 (1967).

351. Nir & Liu, *supra* note 315, at 515, 518–19.

352. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 31 (2012) (describing “insider” defense attorneys as embodying a “collaborative” stance in their “working groups”); *see also* JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 19–30 (1977) (discussing “courtroom workgroups”); Barbara Glesner Fines, *Almost Pro Bono: Judicial Appointments of Attorneys in Juvenile and Child Dependency Actions*, 72 UMKC L. REV. 337, 362 (2003) (discussing the importance of courthouse culture, including regarding norms that urge many juvenile defense attorneys to “go[] along” and not be too adversarial); David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76, 84 (1999) (discussing how public defender organizations’ role “in larger institutional structures” “shape and constrain” their conduct); Guggenheim, *supra* note 316, at 14 (“[T]he most dedicated and loyal defense attorney representing a large number of clients is faced with significant built-in conflicts of interest that cannot help but affect the way she conducts business.”).

353. Fernanda Santos, *When Defendants Cannot Afford a Lawyer, and Neither Can New Mexico*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/us/new-mexico-lawyer-shortage.html>. This is not unique to New Mexico. Eve Primus has documented how the quality of indigent service across the United States is connected to funding level and how indigent defense services are organized in the jurisdiction. Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. (forthcoming 2023).

354. Santos, *supra* note 353.

355. Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 153 (2020).

356. *Id.*

357. *Id.*

defender's objectives being swamped by actors and officials in the executive branch, whose interests do not align with those of the defender.³⁵⁸

An alternative is to locate the public defender organization in the judicial branch of the government organization chart. With that structure, defenders will likely feel more at liberty to criticize prosecutors, police, or prisons than if they worked in the same branch as those actors.³⁵⁹ But placing public defenders in the judicial branch means that defenders might lack sufficient berth to oppose judicial action, especially if judges control defenders' budgets³⁶⁰ or if judges appoint the Chief Defender of the jurisdiction. Defenders whose budgets or jobs rise and fall in accordance with their ability to get along with the administrative office of the courts may find themselves becoming institutionalists, subordinating client-centered incentives to further stabilize relationships with the system actors who possess money and clout.

The metaphorical fire might flare beyond the courthouse doors too. Social media conversation has the potential to inflame the passions of those who view criminal defendants as evil wrongdoers and defenders as callously representing "those people."³⁶¹ But there is already plenty of inflammatory conversation on social media about the criminal legal system and the evildoers who seek to escape responsibility.³⁶² So the relevant inquiry for our proposal has two dimensions: whether adding to that conversation the perspective of people who represent defendants will inflame those passions further, and whether the corresponding benefit exceeds that added cost.

C. *Recalculating Risks and Rewards*

The fears described in the prior Subpart are far from baseless. Real-world examples of retaliation, like the overreach by the judge in New Mexico referenced above or the threat from a Santa Clara County prosecutor to file a whistleblower complaint against a defender who protested too loudly,³⁶³ are

358. *Id.*

359. *Id.* at 156–57.

360. *Id.*; *Funding For Expert, Investigative, and Other Professional Services*, FD.ORG, <https://www.fd.org/cja-resources/funding-expert-investigative-and-other-professional-services> [https://perma.cc/H5YD-TAFK] (explaining that in order for conflict defenders to be paid in the federal courts, they need court approval for each expense); *Criminal Justice Act Guidelines*, U.S. CTS., <https://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines> [https://perma.cc/CDT7-YZ9H] (same).

361. See HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Freedman eds., 2013); see also *supra* Part I.A (discussing counter-movements on social media).

362. See, e.g., u/cocainoh, *Criminal Defense Lawyers Are Bad People*, REDDIT (June 7, 2020, 12:28 AM), https://www.reddit.com/r/unpopularopinion/comments/gy6ls3/criminal_defense_lawyers_are_bad_people/?rdt=51799.

363. Radley Balko, *California DA Threatens Whistleblower Complaint Against Public Defender over Protest Blog Posts*, WASH. POST (June 19, 2020, 5:12 PM), <https://www.washingtonpost.com/opinions/2020/06/19/california-da-threatens-whistleblower-complaint-against-public-defender-over-protest-blog-posts/>; Santos, *supra* note 353.

sadly all too easy to find.³⁶⁴ And social media presence runs some risk of antagonizing already-hostile members of the public, to be sure, especially in an era of increasing political polarization and threats by public figures against those who vex them. It is also undeniable that defenders are overworked, and adding public advocacy to their case responsibilities will require somewhat more time, at least occasionally. Such concerns have prompted defenders to be relatively quiet, complacent members of their courtroom workgroups, focused on clients' needs one-by-one, for decades.³⁶⁵

But what has that strategy yielded? What have decades of going along and getting along meant for the mission of public defense and for the defenders' individual clients? Precious little. Offices everywhere remain underfunded and overworked. Legislatures have woefully shortchanged the constitutional right to counsel—ever more so as the burdens on defense counsel increase and budgets for law enforcement swell almost without interruption.³⁶⁶ For example, Oregon's indigent defense system needs more than four times as many lawyers as it has to adequately handle its caseload—it is short by 1,296 full-time lawyers.³⁶⁷ New Mexico, the location in which the judge sanctioned the chief defender for having his deputies speak up about chronic underfunding, needs more than *triple* the number of indigent defense lawyers it can employ under current appropriations.³⁶⁸ These staggering deficits persist and even worsen while clients' rights (and the clients themselves) are swallowed by the machinery of the criminal legal system. Defenders cannot continue to avoid the

364. As these examples show, the risk of creating a public voice is not just limited to social media practice; more conventional forms of advocacy can also produce blowback. For example, public defender office leaders in Montgomery County, Pennsylvania, were fired for writing an amicus brief in a case about bail reform. Joshua Vaughn, *Pennsylvania Public Defenders Not Reinstated Despite Public Outcry Over Firing*, THE APPEAL (Mar. 6, 2020), <https://theappeal.org/pennsylvania-public-defenders-not-reinstated-despite-public-outcry-over-firing/> [https://perma.cc/2SMU-ZT64]. But if the mission of the public defender includes doing whatever is ethically possible to identify and fight systemic forms of injustice, as Scott Hechinger argues, public advocacy is essential to the task. Hechinger Interview, *supra* note 25.

365. See, e.g., Jenny E. Carroll, *If Only I Had Known: The Challenges of Representation*, 89 FORDHAM L. REV. 2447, 2460 (2021) (discussing having to be “part of” the unfair justice system focused on efficiency and being told the courtroom was “not the forum” to advocate for social causes).

366. Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2685–86 (2013) (explaining that the burden on indigent defense has “increased tremendously” since *Gideon* because of increases in criminalization and prosecution); Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 911 (2010) (“[I]ncreases in state felony prosecutions, which have pushed incarceration rates upward, have outpaced funding for defense counsel.”); see also Amy F. Kimpel, *Violent Videos: Criminal Defense in a Digital Age*, 37 GA. ST. U. L. REV. 305, 382–85 (2021) (explaining that caseload limits for defenders should be reduced since “digital technology [has] exploded into criminal practice”).

367. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEF. & MOSS ADAMS LLP, THE OREGON PROJECT: AN ANALYSIS OF THE OREGON PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 4, 26–28 (Jan. 2022); see also *id.* at 35 (“The single most important conclusion from this report is that Oregon has a massive gulf between the number of cases currently in the public defense system and the number of attorneys available.”).

368. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEF. & MOSS ADAMS LLP, THE NEW MEXICO PROJECT: AN ANALYSIS OF THE NEW MEXICO PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 4, 4–5 (Jan. 2022).

conversations that offer the chance to disrupt or weaken these oppressive structures over time.

Moreover, positioning the choice as a zero-sum game (where the defender is *either* promoting systemic change *or* furthering the interests of her client) creates a false binary. Both interests can be pursued simultaneously. Speaking up publicly against systemic injustice has the capacity to help current clients, as some defenders' actions reveal. For example, some criminal defense lawyers affirmatively share information with and through the media in individual cases when they think it will help the client.³⁶⁹ They may hold press conferences or grant interviews to individual journalists, aiming to sway the prosecution toward a dismissal or subtly shape the jury pool in the defendant's favor.³⁷⁰ Some speak openly on podcasts such as *Serial* and *Undisclosed*, aiming to provide the public with true stories of wrongful conviction to garner resources and momentum for a courtroom battle that will secure the client's freedom.³⁷¹ Still others raise concerns through op-eds, which can get picked up by traditional journalists, leading to more media coverage that government officials can't ignore. Speaking publicly through press conferences, podcasts, or op-eds may be uncomfortable for some attorneys,³⁷² but as long as it stays within the bounds of ethics rules³⁷³ and judicial gag orders it should not present professional risk.

By refusing to engage, defenders also miss the opportunity to redirect the conversation. While the public's attention is drawn to high-profile, tragic felonies, low-level crimes dwarf serious felonies in the American criminal legal system when it comes to sheer numbers.³⁷⁴ As we wrote this, much public attention focused on the trial of Robert Bowers, who was recently convicted for horrifically murdering eleven people as they worshipped in a Pittsburgh

369. Roscoe C. Howard Jr., *The Media, Attorneys, and Fair Criminal Trials*, 4 KAN. J.L. & PUB. POL'Y 61, 63 (1994).

370. See, e.g., Chris McGreal, *Kathleen Zellner: The Making a Murderer Lawyer You Want on Your Side*, THE GUARDIAN (Oct. 28, 2018, 9:00 AM), <http://www.theguardian.com/global/2018/oct/28/meet-kathleen-zellner-the-making-a-murderer-lawyer-you-want-on-your-side> (explaining that defense lawyer Kathleen Zellner participated heavily in a Netflix documentary to make more publicly salient concerns about her client's innocence); Kathleen Zellner (@ZellnerLaw), TWITTER (Sept. 20, 2022, 3:09 PM), <https://twitter.com/ZellnerLaw/status/1572317076706197504> (one of many tweets by defense lawyer Kathleen Zellner about her client Steven Avery's case).

371. See *supra* notes 306–08 (discussing Adnan Syed and Curtis Flowers). Other notable wins include Joey Watkins, whose murder prosecution in Rome, Georgia was profiled on *The State v. Joey Watkins Episodes, UNDISCLOSED* (July 11, 2016–May 18, 2017), <https://undisclosed-podcast.com/episodes/season-2/> [<https://perma.cc/7BXG-H4JP>]; his conviction was recently vacated, *Joey Watkins*, GEORGIA INNOCENCE PROJECT, <https://www.georgiainnocenceproject.org/cases/active-cases/joey-watkins/> [<https://perma.cc/L8N2-7SEM>].

372. Howard, *supra* note 369.

373. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N, amended 2020); Ty Alper, *Criminal Defense Attorney Confidentiality in the Age of Social Media*, CRIM. JUST., Fall 2016, at 4, 6.

374. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 764 (2018); Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 256 (2015).

synagogue; some people even live-tweeted as the trial progressed.³⁷⁵ Rather than trying to reframe the public conversation to make the defendant somehow more sympathetic (a task we regard as impossible), defenders could try to move the conversation in a new direction, to get the public to understand just how far from the usual offense Bowers's crimes are and how different his pathway through the criminal legal system is from that taken by most defendants who get caught in its web. High-profile capital crimes are newsworthy but quite unrepresentative of how our criminal courts regularly function.³⁷⁶ Likewise, the criminal legal system experience of former President Donald Trump (and his alleged co-conspirators) is a far cry from that of most people accused of serious felony crimes: the detailed indictments, the government's willingness to let the defendants surrender and remain out of custody, and the extensive production of documents early in the proceedings all mark these cases as the rare exception, rather than the rule.³⁷⁷ Defenders could—and should—remind the public of these truths.

Lastly, defenders already advocate beyond their own clients' interests in the criminal courthouse. As Nirej Sekhon has persuasively argued, attorneys who raise a *Batson*³⁷⁸ challenge during voir dire invoke the equal protection right of the dismissed juror as much as their client's right to a fair trial.³⁷⁹ Counsel who complain of a public trial violation when the judge closes the courtroom in violation of *Waller*³⁸⁰ fortify the right of the public to witness the court hearing as much as they protect their client's right to have sunlight on his case.³⁸¹ Even Fourth Amendment suppression arguments succeed only if they help some potential future client avoid a violation of their rights; providing a remedy to the client at the defense table is irrelevant.³⁸² As these examples demonstrate,

375. E.g., Campbell Robertson, *Pittsburgh Synagogue Shooting Trial: What to Know as Jurors Recommend a Death Sentence*, N.Y. TIMES (Aug. 2, 2023), <https://www.nytimes.com/article/tree-of-life-shooting-trial.html>; Justin Vellucci (@JVTheTrib), TWITTER (June 12, 2023, 2:55 PM), <https://twitter.com/JVTheTrib/status/1668346382975918080>; see also Paula Reed Ward (@PaulaReedWard), TWITTER (June 12, 2023, 7:45 AM), <https://twitter.com/paulareedward/status/1668238031038324739?S=46> (recapping the prior week in the Bowers trial).

376. Natapoff, *supra* note 374, at 256.

377. Christopher Robertson & Russell M. Gold, *Donald Trump Is Right – He Is Getting Special Treatment, Far Better than Most Other Criminal Defendants*, THE CONVERSATION (Aug. 9, 2023, 8:30 AM), <https://theconversation.com/donald-trump-is-right-he-is-getting-special-treatment-far-better-than-most-other-criminal-defendants-210934> [<https://perma.cc/67G2-YPBY>].

378. *Batson v. Kentucky*, 476 U.S. 79 (1986).

379. Nirej Sekhon, *Representative Defendants*, 81 OHIO ST. L.J. 19, 29–33 (2020). Defenders may challenge a prosecution strike of a juror even when that juror and the defendant do not identify the same way racially. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

380. *Waller v. Georgia*, 467 U.S. 39 (1984).

381. Sekhon, *supra* note 379, at 40–41.

382. *Id.* at 34–39; *Davis v. United States*, 564 U.S. 229, 236–37 (2011); *United States v. Calandra*, 414 U.S. 338, 347 (1974).

defenders regularly protect more than just the interests of their individual clients, and such activities are fully consistent with zealous advocacy.³⁸³

We return here to the serious concern that defenders are already overworked and do not have time to add social media to their workload. We are not suggesting that defenders need to post or make TikTok videos for hours each day. Rather, our view is that hundreds of defenders spending five minutes or less each week documenting and sharing their own experiences could shift the public conversation. At least some defenders experience significant downtime in the courtroom while waiting for their cases to be called; during those periods they could take notes about what they see and hear, to be used in Instagram or X posts at the end of the day or workweek. The point is that many lawyers posting occasionally about what they already observe would not require an inordinate amount of time from any one person, but this new volume of informational content across platforms could make a difference in the public square. In large offices, a non-lawyer may be able to manage much of the social media presence of the organization, taking even less time away from the lawyers' casework.³⁸⁴

What is more, we suspect that many individuals who work as defenders already have social media accounts in their personal capacity and are thus familiar with how to use this technology. For these attorneys, creating a professional account would not require significant time nor the learning of new skills. To the extent that defenders do not already know how to use social media effectively for these purposes, an organization called Zealous supports and trains public defenders in that effort.³⁸⁵ Zealous has assisted thousands of attorneys in offices across the country—including defenders in Alameda County, New Orleans, Brooklyn, Harris County (Texas), and Cook County (Illinois)—sharing ideas and strategies for how to engage in public advocacy.³⁸⁶ With support from office leadership, public defenders in these regions have expanded their skill portfolios and their conception of what it means to fight on behalf of freedom. Many even report that they find public advocacy “cathartic”—they can blow off steam in a more productive way than simply

383. These strategies are fully consistent with simultaneously adopting the “warrior mentality” and the “movement builder” mentality described by Jeff Sherr, as we discuss *supra* note 321.

384. Some of this work might even be done by interns, as a few offices have recognized. *E.g.*, *Social Media Internship, Job Opportunities at PDS, PUB. DEF. SERV. FOR D.C.*, <https://www.pdsdc.org/careers/job-opportunities/social-media-intern> [<https://perma.cc/4L8D-AYW4>] (advertising for a non-lawyer intern to manage social media presence); *Communications & Digital Media Internship, ARCHCITY DEFS.*, <https://www.archcitydefenders.org/wp-content/uploads/2022/08/Communications-and-Digital-Media-Internship.pdf> (advertising for a non-lawyer communications and digital media intern).

385. ZEALOUS, <https://zealo.us/> [<https://perma.cc/RJ6V-PRKL>].

386. Hechinger Interview, *supra* note 25.

complaining to each other.³⁸⁷ With help from organizations like Zealous, defenders everywhere can equip themselves to do this work.³⁸⁸

CONCLUSION

Eradicating the structures that led to mass incarceration will not happen without the voices of the institutional actors whose expertise and incentives have largely been missing from public discourse—indigent defenders. Individual defenders and their offices should look beyond courtroom advocacy to become strategic, active participants on social media; in that forum they can educate, engage with, and learn from community members who share their interest in criminal justice reform. Over time, coalitions formed between defenders and community activists can generate a set of voices to counter the police and prosecutor narratives about public safety and American criminal law that have dominated for decades. Developing a public voice is, in our view, an important part of effective legal advocacy for defenders in the twenty-first century.

Defenders may naturally shy away from participating in public discourse because they are overworked or fear that they will harm an individual client or prompt a backlash. While we understand the reluctance, we believe that defenders cannot afford to sit on the sidelines any longer. Rather, their contributions to public narratives about criminal law and their ability to connect with ideological allies can help many future clients in large-scale ways. When police and prosecutors control the narrative without defenders' contributions, legislatures feel little pressure *not* to cut the indigent defense budget or *not* to expand the criminal law—making it ever truer that police can find crime wherever they look for it, and persons accused of such crime face long odds in court. The more than 15,000 indigent defenders in our country should use the tools of social media to show their communities the routine but unjust realities of criminal courtrooms, jails, and overpoliced communities, and to emphasize how far that reality diverges from media accounts.

Defenders' voices should not stand alone nor displace the voices of other reformers; defenders should be in conversation with and amplify the voices of others in their communities who prioritize compassion (or fiscal responsibility) over fear, hostility, excess, and revenge. Through their posts and TikTok videos,

387. *Id.*; see also Irene Oritseweyinmi Joe, *When the Public Defender Falls Short*, 54 U.C. DAVIS L. REV. 1763, 1770–71 (2021) (discussing secondary trauma for public defenders); Ronald Tyler, *The First Thing We Do, Let's Heal All the Law Students: Incorporating Self-Care into a Criminal Defense Clinic*, BERKELEY J. CRIM. L., Fall 2016, at 1, 4 (discussing secondary trauma among public defenders and recounting a recent study); Carroll, *supra* note 365, at 2463–65 (explaining the frustrations of a former public defender with the narrowness of the court advocacy role).

388. See also *50 Years of Failure*, NAT'L ASS'N OF CRIM. DEF. LAWS., https://www.nacdl.org/Landing/Commemorating-50-Years-of-Mass-Incarceration-Socia?_zs=dwNgM1&_zl=Wg1B7 [https://perma.cc/73SF-SHPY].

defenders might fortify participatory defense hubs or help create bail funds. They might inspire citizens to complain to government officials about the state of the existing law or encourage them to donate to their local public defender's office. As a model for joining with grassroots organizations, recall that in New Orleans, when the governor of Louisiana planned to send children to a dangerous adult prison, local grassroots organizations, OPD, and national criminal justice organizations responded with online activity and offline protests.³⁸⁹ Although that effort did not succeed in the moment, that campaign reveals the potential for productive fusion of lawyers and activists working together to help reshape the reform landscape over decades. Defenders who make themselves and their mission visible over social media can help nurture and expand these efforts.

While success is far from assured, patience is essential. Changes in public opinion about criminal justice (to say nothing of public policy) may take decades to manifest in many places, much as we have seen with the climate movement.³⁹⁰ Sustaining that effort requires defenders to engage across geographic and demographic borders, using modern techniques, bold graphics, and accessible language to reach a wide audience of people whose political and worldviews may be in flux. That sort of coalition-building, with defenders adding their voices to those of other interested constituencies through strategic use of social media, is the path to transformative growth.

389. Orleans Public Defenders (@orleanspublicdefenders), INSTAGRAM (Aug. 26, 2022), <https://www.instagram.com/p/ChvFOzcp9wK/>.

390. Peter Jackson, *From Stockholm to Kyoto: A Brief History of Climate Change*, UN CHRONICLE (June 2007), <https://www.un.org/en/chronicle/article/stockholm-kyoto-brief-history-climate-change> [<https://perma.cc/HN2T-BSXU>] (detailing long history of climate change efforts).