

## NO JUSTICE, NO PLEAS: SUBVERTING MASS INCARCERATION THROUGH DEFENDANT COLLECTIVE ACTION

*Andrew Manuel Crespo\**

*The American penal system is a system of massive, racially unjust incarceration. It is also, to quote the U.S. Supreme Court, a “system of pleas.” The latter drives the former, as coercive plea bargaining makes it possible for the state to do two things that are otherwise hard to pull off at once: increase convictions and sentence lengths. Mass incarceration is a predictable result.*

*But while plea bargaining is intensely coercive when leveraged against individuals, the system of pleas has a structural weak point. That Achilles’ heel is exposed once we see people facing prosecution not as isolated individuals but rather as a potentially collective community of power. Organized to act together, this community has unique resources. Most notably, they have the power to say “not guilty” when asked “how do you plead?” If done together, this simple but profound act of resistance would bring the penal system to a halt. Courts and prosecutors simply do not have the resources to sustain mass incarceration while affording everyone accused of a crime the constitutionally guaranteed right to a trial. This fact is what makes plea bargaining so essential to mass incarceration in the first place. Plea bargaining unions, with their implicit power to threaten plea bargaining strikes, thus hold a potentially transformative power—a*

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\* Morris Wasserstein Public Interest Professor of Law, Harvard Law School; Executive Faculty Director, Institute to End Mass Incarceration. This Essay was prepared for the Colloquium entitled *Subversive Lawyering*, hosted by the *Fordham Law Review* and co-organized by the Center on Race, Law, and Justice and the Stein Center for Law and Ethics on October 15–16, 2021, at Fordham University School of Law. I am grateful to Michelle Alexander and Susan Burton for putting their ideas into the world, and for embracing this further exploration of their work. I received thoughtful feedback on this essay from Zohra Ahmed, Yochai Benkler, Niko Bowie, Bennett Capers, Guy-Uriel Charles, Sandra Correa, Manuel Crespo, Chris Desan, Premal Dharia, Dan Farbman, Bruce Green, Adriaan Lanni, Martha Minow, Daphna Renan, Bill Rubenstein, Guy Rubinstein, Ben Sachs, Abby Shafroth, Jocelyn Simonson, Joan Steffen, Nick Stephanopoulos, and Brittany White, as well as from participants in the *Subversive Lawyering* Colloquium, Duke Law School’s Judicial Administration Roundtable, and Harvard Law School’s faculty workshop. I am especially grateful to Oren Bar-Gill, who has helped sharpen my thinking on this topic in each of our many conversations over the years. Finally, I am grateful to Marshall Ganz, whose enduring lessons about people, power, and democracy shape much of the thinking here.

*decarceral power, a democratic power—that arises from the penal system’s massive overextension.*

*Susan Burton, a formerly incarcerated organizer, floated this idea in the pages of The New York Times with Michelle Alexander one decade ago. In the years since, it has never received focused academic attention and has seen only sporadic and isolated attempts at implementation. This Essay aims to conceptualize and test the limits of Burton’s idea, examining both its promise and its hurdles while marking key questions for future exploration.*

INTRODUCTION.....	2000
I. EXPOSING THE HEEL .....	2004
A. <i>The System’s Massive Scale</i> .....	2005
B. <i>The System’s Concentrated Harms</i> .....	2007
C. <i>The System’s Fragmentation</i> .....	2009
D. <i>The System’s (Conservative) Procedural Formalism</i> ....	2011
II. PRISONERS’ DILEMMAS .....	2016
III. DEFENDERS’ DILEMMAS .....	2022
CONCLUSION.....	2024

#### INTRODUCTION

Three years ago, I was sitting in the audience at an academic conference in lower Manhattan. I had recently written a paper on plea bargaining, the topic of the conference, and was slated to speak on the second panel. The panel before mine opened the day with remarks from practitioners, including a sitting federal circuit judge, a practicing public defender, and the head prosecutor for a major city in the Pacific Northwest. It was intended to set the tone for the rest of the day by asking the “big question.” *Plea bargaining, a necessary evil?*<sup>1</sup>

I listened with divided attention. In my mind, I had already answered that question for myself. Evil, yes. Necessary, no—unless the goal is to sustain American mass incarceration. Sitting in the third row, I jotted down some final thoughts about my own upcoming remarks as the panel got underway.

But as the prosecutor on the panel spoke, my eyebrows went up and my pen went down. I had been a public defender for a number of years before becoming a professor. I’d had conversations with prosecutors about the penal system before, including with some who had come to see it as deeply flawed. Still, I was not used to hearing a sitting prosecutor—let alone a head prosecutor for a major city—speak as candidly as this one was about what

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1. Panel One at Peter L. Zimroth Center on the Administration of Criminal Law Eleventh Annual Conference: Plea Bargaining: Reforming an (Un)Necessary Evil? (Apr. 8, 2019) [hereinafter Plea Bargaining Panel], <https://www.law.nyu.edu/centers/zimroth/events/plea-bargaining> [<https://perma.cc/P9C9-685K>].

plea bargaining is and why it exists. He said three things in particular that stand out in my memory today, years after the event.

First, he was not shy about describing plea bargaining practices, including those he had personally engaged in and that his office continued to deploy, as fundamentally coercive. “The judge will ask the defendant, ‘Has anyone made any threats or promises to you in order to get you to plead guilty?’” he recalled, reciting from memory a plea colloquy he had heard countless times over a decades-long career. He then shared his consistent internal reaction each time the question was asked: “In my mind, quietly, I was thinking, ‘*Of course we did! That’s what we’ve been doing for the last month.*’ The right answer is ‘No, no one did that.’ But it was all about threats and promises.”

Critics of plea bargaining say this all the time. To them (to us), plea bargaining is a series of threats used to coerce people facing prosecution into waiving their rights.<sup>2</sup> But prosecutors don’t usually say this part out loud.

Second, the prosecutor on the panel was forthright in answering the conference’s big question with an unequivocal *yes*. “Plea bargaining,” he said, “is necessary.” But here, too, his explanation was bracingly frank. “That’s my water,” he said. “I can’t swim without it.” The language was figurative, but the sentiment was literal. “Like a fish defending water, prosecutors,” he said, “cling to plea bargaining as a survival instinct.”

We can’t take 100 percent of these cases to trial. My office files about 7000 felony cases a year. We do four to five hundred trials. And we are *packed*. Our people can’t do more than that . . . . We’ve settled on an equilibrium in major city court systems where about a 3 percent trial rate is considered a healthy trial rate. And it’s really about all we can do.<sup>3</sup>

There again was the quiet part out loud. I was used to hearing plea bargaining defended by its proponents and its administrators as a way to promote individual responsibility, or perhaps even as a way to give people charged with crimes the “benefit” of a lower sentence.<sup>4</sup> I had not heard many prosecutors describe it as a way to win vastly more convictions than could ever be obtained in a system that actually afforded people the constitutional “right to a speedy and public trial.”<sup>5</sup>

And yet, while those first two remarks struck me with their candor, it was the third that caught my attention most of all. He said it almost as an aside, tacked onto another point: “I always wondered what would happen if, in

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2. See, e.g., Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1343–45 (2016) (analogizing plea bargaining to torture); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 3 (1978) (same); see also Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 246–47 (2006) (describing “coercive” and “involuntary” guilty pleas as “common phenomen[a] in the American criminal justice system”).

3. Plea Bargaining Panel, *supra* note 1.

4. See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1969–72 (1992); cf. Ben Grunwald, *Distinguishing Plea Discounts and Trial Penalties*, 37 GA. ST. U. L. REV. 261 (2021).

5. U.S. CONST. amend. VI.

solidarity, all the defenders got together and said, ‘We’re never going to plead another client. We’re taking all these cases to trial and just jamming the system.’” He then chuckled and said, “I’m not giving you an idea you haven’t already had, I’m sure.”

The audience laughed. I sort of blinked. And then I looked around to see if the event was being recorded.<sup>6</sup>

The blinking wasn’t because I’d never heard the idea before. On the contrary, whenever I teach criminal law to first-year students, we end the semester with the final reading on the syllabus: *Go to Trial, Crash the Justice System*.<sup>7</sup> Published in *The New York Times* exactly one decade ago, this essay was written by Michelle Alexander, one of the most famous contemporary critics of American mass incarceration. But the idea it sketches wasn’t hers. Rather, it came to her as a question posed by someone else—Susan Burton, a formerly incarcerated organizer, who asked:

What would happen if we organized thousands, even hundreds of thousands, of people charged with crimes to refuse to play the game, to refuse to plea out? What if they all insisted on their Sixth Amendment right to trial? Couldn’t we bring the whole system to a halt just like that?<sup>8</sup>

On first hearing Burton’s question, Alexander was “speechless” and “stunned.”<sup>9</sup> But as she thought it through, she concluded the answer was yes:

The system of mass incarceration depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation. . . . [T]he system would crash—it could no longer function as it had before. Mass protest would force a public conversation that, to date, we have been content to avoid.<sup>10</sup>

Burton herself wasn’t sure the idea would work. Alexander warned her about the harshly punitive things “prosecutors would do to people if they actually tried to stand up for their rights,”<sup>11</sup> including threatening severe sentences to break the strike. Still, Burton saw a tantalizing power in the idea.

People should understand that simply exercising their rights would shake the foundations of our justice system which works only so long as we accept its terms. As you know, another brutal system of racial and social control once prevailed in this country, and it never would have ended if some people weren’t willing to risk their lives.<sup>12</sup>

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6. It was. See Plea Bargaining Panel, *supra* note 1.

7. Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at SR5.

8. *Id.* (quoting Burton).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* (quoting Burton).

I have taught this essay for years and have sat with its core idea for even longer, stretching back to before my time as a practicing criminal defense attorney.<sup>13</sup> So it wasn't the substance of the prosecutor's remarks on that plea bargaining panel that struck me. It was their casualness. Their offhand nature. Followed by his saying, "I'm sure you've thought of this before." The assumption seemed to be that he was articulating an open secret—a shared understanding among all who work in or study the penal system that the whole thing is just one big house of cards, a plea strike away from toppling down.

On a certain level, he was right. Many people have surely thought about the idea before. It is hard, after all, not to notice a *New York Times* op-ed by Michelle Alexander. And indeed, over the years I have seen the idea crop up among activists and, sometimes, in conversations with fellow academics. Typically, it is posed in the same far-off way it was floated on that panel. "I always wondered what would happen if . . ."

Tucked into that wonderment is a set of deep questions. *Could this work? Is it a good idea? Why hasn't it happened? What would it take to succeed?* Seven years removed from Michael Brown's death on the streets of Ferguson, these questions hang in the air pregnant with decarceral possibility—a static charge not yet lightning. But the idea is also unfocused and understudied. So far as I know, plea bargaining unions have received almost no attention from legal academics.<sup>14</sup> Likewise, they have seen only sporadic and isolated attempts at implementation, almost always in contexts far removed from the mine run of criminal prosecutions.<sup>15</sup> The idea thus hangs over our current decarceral moment like a vague adumbration, invoked only as a general shorthand for the notion that mass incarceration is bloated and, maybe, beatable—in a "what if . . ." sort of way.

This Essay is an effort to treat Burton's idea not as metaphor or symbol but as a concrete proposal. In future work, I hope to examine the theoretical, legal, ethical, and normative questions that plea unions pose, drawing lessons from related fields and from case studies of plea-solidarity efforts in the

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13. The idea itself goes back a ways. See HENRY T. LUMMUS, *THE TRIAL JUDGE* 44–46 (1937) ("The reality, as every experienced prosecutor and judge knows, is [that the] prosecutor must get rid of five hundred cases in a time sufficient for the trial of only one hundred. . . . If all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. . . . The truth is, that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty . . .").

14. The most detailed treatments come from Professor Jenny Roberts, who considered the idea in the context of low-level misdemeanor offenses, and Professor Albert Alschuler, who offered a broader but briefer treatment a few decades earlier. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2014); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1248–55 (1979). Two scholars of game theory have offered the most thorough account of the collective action challenges plea unions would confront. See Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737 (2009) (discussed *infra* Part II).

15. See *infra* Part II. Beyond the protester cases discussed later in this Essay, criminal defendants "seem almost never to employ the 'general strike.'" Alschuler, *supra* note 14, at 1250.

recent past.<sup>16</sup> Here, my goal is to begin laying a conceptual foundation by elaborating some key contours of Burton's idea.

The Essay has three main parts. First, in Part I, I begin by describing some of the central structural aspects of the American penal system that make it vulnerable to defendant collective action. The goal in this part is to expose with some detail the system's Achilles' heel, and in so doing to render Burton's idea both more plausible and more concrete. Next, turning from the idea's potential to its pitfalls, Part II centers the largest impediment to defendant collective action: the literal prisoners' dilemma confronting those who must decide whether to join a strike. As this part of the Essay explains, that hurdle is serious, but not insurmountable. Rather, drawing on lessons from the theory, practice, and history of community organizing, this Essay centers a practice that could make defendant collective action a reality. And it demonstrates the proof of that concept by identifying some recent instances in which plea strikes achieved remarkable success. Finally, connecting back to the theme of the Colloquium in which this Essay sits, I close by considering, in Part III, the role lawyers might play in a plea strike, with a particular focus on the potential public defenders hold to support such an effort—or to frustrate it.

### I. EXPOSING THE HEEL

Plea bargaining lies at the root of American mass incarceration. “By lowering the price of imposing criminal punishment, plea bargaining gave America more of it.”<sup>17</sup> An idea like Burton's, which tackles mass incarceration by attacking plea bargaining, is thus radical by definition.<sup>18</sup> And like many radical ideas, it is easy to dismiss as a rhetorical or symbolic move—an aspirational gesture rather than a concrete proposal.

One goal of this Essay is to render Burton's idea more concrete by taking it at face value and asking a straightforward question: could a plea strike actually work? Tactically, any such strike would surely draw myriad ripostes from system actors. The goal here is not to offer a complete game-theoretic account of all the many moves and countermoves that a strike could or would

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16. The academic project parallels work on experiential pedagogy and advocacy being developed in partnership with Premal Dharia, Executive Director of the Institute to End Mass Incarceration. See, e.g., Erin Peterson, “What Can We Do to Help Create 150 Years of Change in 10 Years?,” HARV. L. BULL., Summer 2021, at 26; Nancy Walecki, “Decarcerating” America, HARV. MAG. (Nov.–Dec. 2021), <https://www.harvardmagazine.com/2021/11/jhj-decarcerating-america> [<https://perma.cc/5D8A-P4MT>]; see also *Organizing Projects*, INST. TO END MASS INCARCERATION, <https://endmassincarceration.org/projects/> [<https://perma.cc/PV43-PYPA>] (last visited Mar. 4, 2022).

17. Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 705 (2013).

18. ANGELA Y. DAVIS, WOMEN, CULTURE & POLITICS 14 (1984) (reminding that “radical simply means ‘grasping things at the root’”). Of course, there are deeper roots. See generally, e.g., DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2009); RUTH WILSON GILMORE, GOLDEN GULAG (2007); REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT (2009). But at the level of practice—of the system's implementation and construction—plea bargaining is central.

entail. Rather, the goal is to offer a diagnostic overview of the modern penal system with this particular vulnerability in mind—a probing account of the system’s weak points that, when viewed together, make a plea strike seem not just plausible but a genuinely serious threat.

In particular, this part examines four such weak points: the system’s massive scale, its concentration of harm in discrete communities, its internal fragmentation, and its formal proceduralism. These four attributes share a common thread. Typically, they are cited as examples of the ways in which the American penal system is *flawed*, *failing*, or *unjust*. The suggestion here is thus not just that plea unions might work. Rather, it is that they might work precisely because they perform a version of tactical jiu-jitsu, exploiting aspects of the penal system’s overextensions and injustices and leveraging them to pursue decarceral ends.<sup>19</sup>

#### A. The System’s Massive Scale

The most obvious evil associated with mass incarceration is right there in its name. The United States incarcerates a *massive* number of people—more than any other country in the known history of the world.<sup>20</sup> It does so by relying almost entirely on plea bargaining. Research confirms the account offered by the prosecutor in this Essay’s introduction. Trial rates between 1 percent and 5 percent are common in cities and states across the country.<sup>21</sup> As these data make clear, and as the U.S. Supreme Court confirms, “criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>22</sup>

But plea bargaining is not just a defining attribute of the modern penal system. It is a necessary one. As a leading historian of the practice observes, “Prosecutors took up plea bargaining in part to escape the enormous burdens of their office.”<sup>23</sup> Professor Bill Stuntz offers the canonical account. “Like most of us,” he writes, prosecutors aim “to reduce or limit their workload

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19. The goal of this Essay is to examine one tactic that constituencies fighting mass incarceration might deploy—not to presume or press that plea strikes should be deployed. On the contrary, as Raj Jayadev and Pilar Weiss explain, a successful organizing-driven movement “situates the community as the drivers of what the ultimate realization of a new vision of justice, healing, and power will look like.” Raj Jayadev & Pilar Weiss, *Organizing Towards a New Vision of Community Justice*, LPE PROJECT (May 9, 2019), <https://lpeproject.org/blog/organizing-towards-a-new-vision-of-community-justice/> [<https://perma.cc/N67C-GEKJ>]; see also William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994).

20. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/N8Z6-AUXG>].

21. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1375 tbl.1 (2018) (reporting state-level trial rates between 1.5 percent and 5.5 percent across seventeen states, while also reporting much greater variation in dismissal rates, and thus in overall plea rates).

22. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (reporting that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas”).

23. George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 893 (2000).

where possible,” which means “limiting the cost of the process per case.”<sup>24</sup> The obvious way to do that “is to convert potential trials into guilty pleas,” which “are not simply cheaper than trials” but “enormously cheaper. And prosecutors’ bargaining strategies tend to ensure that this remains so.”<sup>25</sup>

Here, though, is the critical point. Even *with* the enormous resource savings prosecutors gain from plea bargaining, they and their local court systems are still maxed out. In many jurisdictions, “individual prosecutors handle more than one thousand felony cases per year.”<sup>26</sup> This translates into “hundreds of open felony cases at a time” and “*multiple . . . cases set for trial on any given day.*”<sup>27</sup> Of course, no single person can litigate multiple trials at once. Soaring caseloads also mean prosecutors cannot “thoroughly investigate cases, subpoena witnesses, meet with experts,” or complete other essential tasks.<sup>28</sup> The system as it currently stands thus denies prosecutors “the time and resources necessary to win at trial.”<sup>29</sup> Plea bargaining is the only way they can make ends meet, and the resource gap it bridges is huge.

Taking these points together, a central insight emerges. Resource constraints—not law, not oversight, but resource constraints—are the major anti-carceral force capable of checking the modern American penal system. This is of course the central point animating Burton’s plea strike idea. But it bears noting that the observation is hardly limited to abolitionist imaginations. Consider the following passage, written in 2011 by then Professor Stephanos Bibas, prior to his appointment to the U.S. Court of Appeals for the Third Circuit by President Donald Trump:

In a world of overcriminalization, limited budgets are not all bad. The silver lining is that prosecutors cannot possibly pursue all of the new crimes that their legislative allies have created. Resource constraints and scarcity can force prosecutors to rank priorities, mitigating in practice the problem of overcriminalization on the books. Limited funds thus are not a bug but a design feature: they check prosecutors from prosecuting the entire universe of people who are technically guilty of something but do not especially deserve conviction and full punishment.<sup>30</sup>

Six years later, Bibas took the point a step further. Writing with Professor Richard Bierschbach, he urged reformers to go out and *create* “beneficial scarcity” by taxing system resources in ways that might “force police, prosecutors, judges, and other actors to do triage, focusing their efforts on the most socially beneficial interventions.”<sup>31</sup> Driving the point home, he urged

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24. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535 (2001).

25. *Id.* at 536–37.

26. Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262–63 (2011).

27. *Id.* at 263 (emphasis added).

28. *Id.* at 265.

29. *Id.*

30. Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors’ Scarce Resources*, 106 NW. U. L. REV. COLLOQUY 138, 139 (2011).

31. Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 193 (2017).



states to place “a cap on the number of people who could be sentenced to prison each year,” an approach that would “encourage prosecutors to use prison sparingly in favor of other, less costly sanctions.”<sup>32</sup>

Plea strikes carry this idea to its conclusion. If resource constraints can forestall incarceration by leveraging beneficial scarcity, then *massive* resource constraints can forestall *mass* incarceration: “Go to trial, crash the system.”<sup>33</sup> Indeed, plea strikes differ from Bibas and Bierschbach’s cap proposal mainly in the way they go about “drawing out, harnessing, and . . . creating scarcity.”<sup>34</sup> Rather than trust system actors to self-impose caps through legislation or internal policies, organizers like Burton would impose those caps from the outside, by leveraging the collective power of criminal defendants to make the costs of conviction skyrocket. Placed into such a vice, the reasonable prediction is that the prosecutor will recognize that she has a time-honored and familiar “mechanism to ease her own pain.”<sup>35</sup> She can start dismissing cases and declining to pursue new ones.<sup>36</sup>

Here’s the kicker. Given the massive scale of the penal system’s overextension, even a weakly supported strike could be highly successful. Recall the numbers. In most jurisdictions, the trial rate hovers between 1 percent and 5 percent of all cases. And at that low rate, the system is operating at full capacity. Crunching these numbers, a unionization campaign that successfully persuaded just 5 percent of the remaining defendants to insist on trials would *double* the resource demands on an overburdened system.<sup>37</sup>

Five percent. And the system comes to a halt.

### B. The System’s Concentrated Harms

The American penal system is defined not just by its massive scale, but also by the massively disproportionate harms it inflicts along racial and socioeconomic lines. As Professor Loïc Wacquant explains,

the stupendous expansion and intensification of the activities of the American police, criminal courts, and prison over the past thirty years have

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32. *Id.* at 229 (citing Cheryl Lero Jonson et al., *The Small Prison, in THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE* 215, 226–28 (Francis T. Cullen et al. eds., 2014)).

33. Alexander, *supra* note 7.

34. Bierschbach & Bibas, *supra* note 31, at 233. To be clear, Judge Bibas would get off the train well before its terminus. See Bibas, *supra* note 30, at 140 (“[P]rosecutors cannot simply stop prosecuting all misdemeanors; these charges help to keep our neighborhoods safe, orderly, and clean.”).

35. Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, a Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 145 (2011).

36. *Cf.* Bar-Gill & Ben-Shahar, *supra* note 14, at 739 (“[T]he plea bargain replaces a no-prosecution option. Due to the prosecutors’ resource constraint, these defendants would not have been prosecuted at all. A plea bargain, it turns out, is not an improvement for them.”).

37. Professors Angela J. Davis and Vida Johnson echo the point, noting that “even a small increase in the percentage of cases that are taken to trial” could “create chaos.” See Vida B. Johnson, *Effective Assistance of Counsel and Guilty Pleas—Seven Rules to Follow*, CHAMPION, Nov. 2013, at 24, 26; Alexander, *supra* note 7 (quoting Davis).

been finely targeted, first by class, second by race, and third by place, leading not to *mass* incarceration but to the *hyperincarceration* of (sub)proletarian African American men from the imploding ghetto.<sup>38</sup>

Taken together, Wacquant says, these triple filters of race, class, and place “point the penal dagger” at precise communities within our polity.<sup>39</sup> Indeed, the dagger typically cuts deepest in specific *neighborhoods* within cities, sometimes even targeting particular city blocks. Eddie Ellis, himself incarcerated for twenty-three years, reported in 1992 the striking statistic that 75 percent of New York State’s entire prison population came “from just seven neighborhoods in New York City.”<sup>40</sup> More recently, the Million Dollar Blocks project maps in vivid detail how specific blocks within cities drive mass incarceration.<sup>41</sup>

Wacquant surfaces this hyperincarceration to condemn it. And rightly so. But here, too, there is a flip side to the system’s injustice. “The extreme demographic concentration of punishment suggests *where* the most important effects can be felt,” and thus clearly demarcates the very communities that Burton’s plea bargaining unions would need to organize.<sup>42</sup>

From the perspective of a nascent organizing campaign, this geographic concentration holds potential advantages. For one, hyperincarceration clearly defines the constituency at the heart of the organizing effort. As organizing scholar and teacher Marshall Ganz instructs, the first question in organizing is “Who are my people?”<sup>43</sup> When it comes to a plea strike, hyperincarceration makes the answer to that question clear, focusing organizers’ attention on the neighborhoods at the point of the knife. Moreover, from the perspective of those communities, the concentrated *harms* of mass incarceration—ranging from over-policing, to poor public safety, to family destabilization, to wealth extraction and economic stagnation, to degradation of public health—create a focused set of “actionable ‘grievances’” that are “experienced as an injustice.”<sup>44</sup> As Ganz

38. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74, 74.

39. *Id.* at 78.

40. Francis X. Clines, *Ex-Inmates Urge Return to Areas of Crime to Help*, N.Y. TIMES, Dec. 23, 1992, at A1. Ellis’s findings were later confirmed by other scholars. See Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1568 (2003).

41. See *Million Dollar Blocks*, COLUM. UNIV. CTR. FOR SPATIAL RSCH., <https://c4sr.columbia.edu/projects/million-dollar-blocks> [<https://perma.cc/D57Z-8TLK>] (last visited Mar. 4, 2022). For an overview of the literature, see JESSICA T. SIMES, PUNISHING PLACES: THE GEOGRAPHY OF MASS IMPRISONMENT xii–3 (2021). As Simes emphasizes, the highest imprisonment rates are now in small cities, suburbs, and rural areas. *Id.* at 4.

42. SIMES, *supra* note 41, at 1.

43. Marshall Ganz, *Organizing: People, Power, Change 2* (2018) (unpublished notes) (on file with author); see Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 557 (2021) (“[O]rganizing tends to be most successful among people with shared identities and existing relationships.”).

44. Marshall Ganz, *Leading Change: Leadership, Organization, and Social Movements*, in HANDBOOK OF LEADERSHIP THEORY AND PRACTICE: A HARVARD BUSINESS SCHOOL CENTENNIAL COLLOQUIUM 509, 515 (Nitin Nohria & Raksh Khurana eds., 2010); cf. SIMES,

further explains, this shared experience of injustice, when combined with the hope that it can be overcome, is an essential component of what organizers call the “story of us,” a narrative account of shared values and purpose that help “a community to become a constituency—people able to ‘stand together’ on behalf of common concerns.”<sup>45</sup>

More pragmatically, the fact that hyperincarceration targets concentrated communities makes the workaday tasks of organizing easier. Organizing is physical work. It takes place in physical space. To succeed, organizers “train participants in some form of one-on-one meetings as well as ‘house meetings,’ a way to grow a movement utilizing preexisting relational networks.”<sup>46</sup> Even national campaigns structure themselves in nested geographic units, down to the ward or precinct levels, to focus their resources effectively and to leverage the social capital latent within existing locales. Hyperincarceration makes this work easier, insofar as a plea union might need to organize only a handful of such precincts to succeed.

Finally, beyond space, there is the matter of time. As Ganz emphasizes, organizers do not just motivate collective action; they help develop strategies to deploy collective resources effectively—resources like “not guilty” pleas. Successful strategies anticipate “the actions and reactions of other actors,” such as the prosecutors who will inevitably try to break the strike.<sup>47</sup> We will examine the tactics prosecutors are most likely to deploy in that effort in a moment. For now, it bears emphasizing that the geographic concentration of mass incarceration offers one of the most important strategic buffers against those strike-breaking ploys: organizers can do the long hard work of building solidarity *before* the moment of crisis and choice is at hand—that is to say, before people are arrested, charged, and asked to plead guilty.

The strike, in other words, does not need to be organized inside the jail, when people are at their weakest and most vulnerable and when barriers to coordination are highest. Its foundations can be built instead in the community, while they are free—because we know in advance who is going to be arrested. That is hyperincarceration’s injustice and its opportunity.<sup>48</sup>

### C. *The System’s Fragmentation*

Researchers and reformers alike bemoan the American penal system’s fragmentation. For researchers, fragmentation makes it hard to know how the system works. For reformers, fragmentation makes it hard to combat

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*supra* note 41, at 151 (noting that an emerging “science of *punishment vulnerability*” views “intense formal social control as a hazard akin to industrial waste, toxins, floods, and natural disaster”).

45. Ganz, *supra* note 44, at 522–23, 525; *see also* Ganz, *supra* note 43, at 2.

46. Ganz, *supra* note 44, at 515.

47. *Id.* at 529–30.

48. As Ganz explains, organizers can help prepare people for collective action by “warning [them] that the opposition will threaten them with this and woo them with that. The fact that these behaviors are expected reveals the opposition as more predictable and thus less to be feared.” *Id.* at 518.

systemic injustices, which need to be tackled in a thousand different ways at once.

But here again there are opportunities that defendant collective action could exploit. Consider first the system's geographic fragmentation.<sup>49</sup> Generally speaking, prosecutor offices are both constituted and funded at the county level, with most prosecutions conducted by *independently* elected agencies that are legally and institutionally siloed from offices in neighboring counties.<sup>50</sup> As a result, if a given prosecutor's office becomes overwhelmed (by a plea strike), there is no readily available pool of backup attorneys who can easily slide in to relieve the pressure, even assuming leaders of neighboring offices are inclined to help.<sup>51</sup> At the same time, trial courts are structured geographically as well, which means prosecutors cannot easily relieve the pressure by moving striking defendants to other, less burdened courthouses.<sup>52</sup>

Within those trial courts, moreover, a second form of fragmentation occurs. For administrative reasons, many state trial courts assign judges to specific dockets, such that a given judge will only hear probate cases, or housing cases, and so forth. Sometimes these assignments are set by administrative rules and are transient; other times, the divisions are statutory, with judges specifically appointed to a certain type of court.<sup>53</sup> Notably, these subdivisions often occur *within* the criminal system, such that misdemeanor cases are institutionally segregated from mid-level felony cases, which are in

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49. See, e.g., Bierschbach & Bibas, *supra* note 31, at 195 (“[E]ven calling it a criminal justice system is a misnomer: it is a fragmented congeries of fifty states, thousands of counties, several thousand prosecutors’ offices employing tens of thousands of prosecutors, and more than twelve thousand police departments employing hundreds of thousands of officers.”).

50. See *id.* at 190.

51. State attorneys general operate statewide but are typically not staffed or structured to absorb the volume of cases handled by district attorneys in large cities, and in some states do not have general jurisdiction to prosecute such offenses. See, e.g., Erik Larson & Bob Van Voris, *Quirky N.Y. Law Prevented AG James from Charging Cuomo*, BLOOMBERG (Aug. 4, 2021, 1:20 PM), <https://www.bloomberg.com/news/articles/2021-08-04/quirky-n-y-law-prevented-attorney-general-from-charging-cuomo> [<https://perma.cc/D9ZU-EJP9>] (“Under New York’s executive law, the attorney general can’t open criminal investigations or bring charges without a green light from the governor or one of his department heads.”). The opposite is true at the federal level, which has a single, national Department of Justice. The difference matters: in the aftermath of one recent Supreme Court ruling that flooded courts in Oklahoma, “[f]ederal prosecutors and support staff from every corner of the country [came to help local] U.S. Attorneys’ offices . . . overwhelmed with case work.” Amy Slanchik, *Federal Prosecutors Move to Oklahoma to Help with Supreme Court Caseload*, NEWS ON 6 (Jan. 14, 2021, 10:05 PM), <https://www.newson6.com/story/600114a2dbdb4a0bc5b4ab55/federal-prosecutors-move-to-oklahoma-to-help-with-supreme-court-caseload> [<https://perma.cc/FS8W-CWX2>]. Federal plea strikes would thus be much harder to execute, and locally oriented strikes must strategize in the shadow of the potential federalization of local charges.

52. See WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 16 (6th ed. 2017) (discussing venue rules).

53. See *id.* §§ 1.6, 16.1(a); see also 51 THE COUNCIL OF STATE GOV’TS, BOOK OF THE STATES 202 tbl.5.7 (2019).

turn segregated from more serious felonies. The “penal pyramid,” in other words, is striated.<sup>54</sup>

And as a result, plea-strike organizers could choose *where to start the strike*, in a manner that maximizes their strategic advantage.<sup>55</sup> Perhaps they would start with low-level misdemeanor cases, which are both the largest in number and the most likely to garner public sympathy.<sup>56</sup> Perhaps they would target specific offenses.<sup>57</sup> Or perhaps they would start with defendants who are most insulated from coercive prosecutorial tactics.<sup>58</sup> The point here is not to try to answer this contingent strategic question in the abstract. Rather, it is simply to say that the answer to the question would be made by the strike organizers themselves, and to note that this fact alone is a strategic advantage that the system’s internal fragmentation affords.

#### D. *The System’s (Conservative) Procedural Formalism*

As Professors Lani Guinier and Gerald Torres teach, organizing campaigns are a form of “contentious politics.”<sup>59</sup> They aim to win victory for their constituencies by engaging in participatory democracy, and ultimately, by marshalling public will to their side. A plea strike operates in this register. As Alexander observes in her *New York Times* op-ed, the strike aims to “force a public conversation”<sup>60</sup> about whether plea bargaining and

54. See Alexandra Natapoff, *The Penal Pyramid*, in *THE NEW CRIMINAL JUSTICE THINKING* 71, 71 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

55. For one historical example of a localized plea strike, see Alschuler, *supra* note 14, at 1236–37 (describing a strike within a single “bastard courtroom[.]”). Alschuler reports that “the trials tie[d] up the courtroom and cause[d] other cases to be reassigned, thereby insuring that only a small number of defendants come before the insufficiently lenient judge.” *Id.* at 1237.

56. See Roberts, *supra* note 14, at 1090–91, 1109, 1129 (observing that “misdemeanors comprised 77.5% of the total criminal caseload in [some] courts” and arguing that they “may be less controversial as a focus of a coordinated defender community and defendant effort than other types of offenses, because they are usually victimless” and “tend to have lower direct criminal sanctions”); LUMMUS, *supra* note 13, at 50 (“[The prosecutor] dislikes to spend precious time in trying small cases, and an appellant in a petty case who stubbornly refuses to plead guilty stands a good chance of being offered a small penalty or being let off with none.”).

57. Cf. Alschuler, *supra* note 14, at 1251 (“[T]he public defender office in [Los Angeles] . . . had once refused to enter guilty pleas for defendants charged with prostitution. A number of private defense attorneys joined the strike, and for a two-week period, most prostitution cases went to trial. Ultimately, the courts ‘came around’ and revised their sentencing policies.”).

58. People facing extremely *high* sentences may be most open to going to trial because the prosecutor’s leverage is weaker. Cf. Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 *YALE L.J.* 2236, 2255 (2014) (observing that “[h]omicide offenses have one of the lower guilty plea rates” while also carrying “the highest statutory and [Federal Sentencing] Guidelines penalties”). These trials can also be the most resource intensive. Cf. Bar-Gill & Ben-Shahar, *supra* note 14, at 757 (noting that “some defendants are costlier to try”). On the other hand, these trials are smaller in number and the courtrooms into which they are siloed may thus have comparatively higher capacity.

59. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law & Social Movements*, 123 *YALE L.J.* 2740, 2744–50 (2014).

60. Alexander, *supra* note 7.

mass incarceration are consistent with what Guinier and Torres would call “the larger culture’s narratives of justice.”<sup>61</sup>

Plea strikes hold an advantage in this contest that other decarceral moves do not. They seek no more and no less than the fulfilment of a right expressly guaranteed in the U.S. Constitution. The strike, in other words, can be seen as an act of constitutional fidelity. In this way it is meaningfully different from decarceral strategies grounded in acts of civil disobedience.<sup>62</sup> The strategy here is instead a form of *uncivil obedience*, a type of “subversive law-following” that shows “extraordinary attentiveness to the rules on the books.”<sup>63</sup> Indeed, it is “subversive at least in part *because of its very attentiveness to law.*”<sup>64</sup>

When it comes to contentious politics, this feature of the strike allows plea unions to invoke narratives of justice with crosscutting ideological appeal. Consider first how the strike might appeal to political conservatives, and thus blunt some of the backlash that decarceral efforts often invite. Drawing on social psychology literature, Professors Jessica Bulman-Pozen and David Pozen explain the point:

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61. Guinier & Torres, *supra* note 59, at 2744 n.6 (citing SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 1–9 (2d ed. 1998)). Given the resource-focused nature of the strike, this contest would surely play out in budgetary battles too, which have their own narratives of justice. One response to a strike could be mass decarceration. *Cf.* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 *YALE L.J.* 862, 889–90 (2017) (reviewing NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* (2016)) (“If giving defendants the process they are due leads the system to grind to a halt, then perhaps this will put pressure on criminal justice system decision makers to rethink the policing practices and criminal justice policies that create the conditions of systemic triage in the first place.”). The obvious alternative is that opponents of the strike will insist that new resource constraints require more resources. *See* Bar-Gill & Ben-Shahar, *supra* note 14, at 741 (“It is plausible [that in the wake of the strike] . . . prosecutorial budgets would increase, to the detriment of defendants.”). Note, however, that the influx of resources needed to quash even a small strike would be enormous, as under current (no strike) conditions “modest budget increases would have little impact on the enormous overburdening” prosecutors already face. Gershowitz & Killinger, *supra* note 26, at 265. The resources needed to overcome a trial rate two, three, or ten times higher than current baselines would thus be massive, and the political will to raise such funds may not be present. *See* William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 *HARV. L. REV.* 2548, 2555 (2004) (“Even if the money is there, local governments are loath to tax it to support law enforcement.”); Bibas, *supra* note 30, at 139 (“[A]n extra dollar spent on criminal justice is a dollar less for other programs. At some point, criminal justice’s bottomless appetite must give way to other needs.”). And political will can itself be influenced by organizing. *Cf.* Marina Roberts, *Saving Austin*, *INQUEST* (Nov. 24, 2021), <https://inquest.org/saving-austin/> [<https://perma.cc/5QUY-FVZ2>].

62. *Cf.* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 679–80 (1995).

63. Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 *COLUM. L. REV.* 809, 811, 818 (2015).

64. *Id.* at 825. In a related but distinct way, plea strikes are emblematic of what Professor Jocelyn Simonson calls *agonism*, “a politics that respects conflict and adversarialism, but seeks to channel it through democratic channels.” Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 *NW. U. L. REV.* 1609, 1614 (2017).

[P]olitical conservatives value deference to established authority, as such, more than political liberals do. Whereas psychological foundations of fairness and care are paramount for self-identified liberals, . . . “intuitions about authority and the importance of respect and obedience” critically inform the moral systems of self-identified conservatives. . . .

Uncivil obedience . . . cloaks dissent in behavior that is, at least superficially, respectful of established authority. . . . Like the civil disobedient, [the uncivilly obedient] is out to change the system, but she does so by mastering the system’s rules. She does so from the inside. That alone may render uncivil obedience a more comfortable practice for conservatives . . . .<sup>65</sup>

And indeed, supporters of plea strikes exist on the political left and right.<sup>66</sup>

At the same time, the fact that plea strikes speak the language of rights can motivate people to join them. As social-movement theorists observe, “law has the capacity to serve as a powerful collective-action frame,” with civil rights laws in particular often operating as a “master frame” that resonates “deeply across social movements and protest cycles.”<sup>67</sup> Professor Jennifer Gordon puts the point this way, describing the role of legal rights in labor organizing: “The idea that employers were *supposed* to be acting differently—that in paying so little and demanding so much they were ignoring a set of established norms, codified as rights—suggested a less individualized, more systemic explanation of the problems,” which in turn highlighted for those seeking to combat those problems the “need to respond in kind.”<sup>68</sup> The same can be said of prosecutors and the penal system. People are *supposed* to “enjoy the right to a speedy and public trial, by an impartial jury.”<sup>69</sup> The fact that almost no one actually does enjoy that right suggests a deep systemic problem in need of a systemic response.

But importantly, the plea strike’s constitutional fidelity is more than just a rhetorical device or a narrative frame. The legal rights it leverages are *real* rights and are immensely valuable *resources*.<sup>70</sup> As Stuntz once observed, it is the constitutional law of criminal procedure that makes trials so expensive

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65. Bulman-Pozen & Pozen, *supra* note 63, at 869–70 (quoting JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 168 (2013)).

66. *See, e.g.*, Alexander, *supra* note 7 (quoting Timothy Lynch of the Cato Institute); Clark Neily (@ConLawWarrior), TWITTER (Nov. 7, 2020, 8:06 AM), <https://twitter.com/conlawwarrior/status/1325061962565185536> [<https://perma.cc/X4ZA-MCBU>].

67. Andrias & Sachs, *supra* note 43, at 592 (quoting Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women’s Movement in the 1960s*, 111 AM. J. SOC. 1718, 1725 (2006)); *see also* TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63* (1988).

68. JENNIFER GORDON, *SUBURBAN SWEATSHOPS* 171–72 (2005); *see also* Andrias & Sachs, *supra* note 43, at 594 (noting that a codified set of rights “signifies legal legitimation of and thus legal support for the . . . effort to organize” around those rights).

69. U.S. CONST. amend. VI.

70. *Cf.* Andrias & Sachs, *supra* note 43, at 595 (“While . . . accounts of mobilization and organization stress symbolic factors, the literature suggests that resources of various kinds are equally important.”); Ganz, *supra* note 44, at 510 (noting that organizing “forges a social movement community and mobilizes its resources, a primary source of social movement power”).

for prosecutors in the first place. Plea bargaining exists to try to neutralize those rights, by getting the defendant to waive them.<sup>71</sup> But if defendants refuse to waive their rights en masse, all those deferred costs come crashing due.

As practicing lawyers know well, the costs can be substantial. Consider just some of the rights that striking defendants can invoke to make each trial in the deluge a costly endeavor. Most importantly, the right to a trial itself—in many cases by jury—is hardwired into the Constitution, which means the “not guilty” plea can’t just be eliminated by the state, even if its collective use threatens system overload.<sup>72</sup> Juries, meanwhile, can take significant time and energy to summon and select. Before they arrive, defendants have the right to receive and review any favorable information about their case held by the prosecution, which triggers not only labor-intensive file review and disclosure obligations but also time-consuming litigation if those obligations are not met.<sup>73</sup> Defendants also have the pretrial right to challenge the admission of any evidence they say the police unlawfully acquired, which usually entails an evidentiary hearing with one or more witnesses and can also entail written briefing on various issues.<sup>74</sup> Once trial starts, defendants have the right to force the prosecutor to summon every witness needed to prove every element of every charge.<sup>75</sup> This includes eyewitnesses (whom the prosecutor must track down and prepare to testify) and more mundane witnesses, such as the lab technician summoned simply to testify that “these really are drugs.”<sup>76</sup> Finally, defendants have the right to cross-examine each of those many witnesses (often at length), to summon and question their own witnesses, and to present closing arguments on their own behalf.<sup>77</sup>

To effectuate each of these rights, the defendant is guaranteed a lawyer—at the *state’s* expense.<sup>78</sup> That lawyer will surely know (or can learn) how to press the defendant’s rights in order to impact the pace of litigation, in a manner consistent with the strike’s overarching strategy. Of course, defense lawyers themselves could get overwhelmed by the strike. But notably, the Constitution is asymmetrical in its protections. Defendants have a right to the *effective* assistance of counsel. So if the defense bar cracks alongside the prosecution, the striking defendants could seek dismissal of their charges on the ground that the government lacks the resources to fulfill its obligations to

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71. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) (“[C]ourts have raised the cost of criminal investigation and prosecution . . . . [G]uilty pleas avoid most of the potentially costly requirements that criminal procedure imposes.”).

72. See U.S. CONST. amend. VI.

73. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

74. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

75. See *In re Winship*, 397 U.S. 358, 364 (1970); *Holland v. United States*, 348 U.S. 121, 126 (1954).

76. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

77. See *Herring v. New York*, 422 U.S. 853, 858–61 (1975); *Davis v. Alaska*, 415 U.S. 308 (1974); *Washington v. Texas*, 388 U.S. 14, 23 (1967).

78. See *Gideon v. Wainwright*, 372 U.S. 335, 342–46 (1963).



provide them with an adequate public defense.<sup>79</sup> On the other hand, if the local defense bar becomes co-opted or pressured into a position hostile to the strike, the defendants enjoy the right to select independent pro bono counsel of their own choosing if collaborating nonprofits are available, or even to represent themselves.<sup>80</sup>

Finally, the Constitution limits the prosecution's ability to work its way out of the vice. A combination of venue rights and speedy trial rights makes it difficult to spread the striking defendants out across less burdened jurisdictions or across time.<sup>81</sup> Likewise, if the prosecution attempts to cut corners (say, by withholding favorable evidence or making improper arguments to the jury), due process protections can lead to a mistrial or a dismissal of charges. Most importantly, a core cluster of rights blocks the prosecution from securing a conviction unless a jury drawn from the local community unanimously agrees that the prosecutor proved every element of the charges at a public trial with proof beyond a reasonable doubt. Taken together, these essential rights ensure that the local community—which could itself be organized to support the strike—has an opportunity not only to monitor the prosecution's actions but also to directly negate its most effective strike-breaking device: the threat of prison.<sup>82</sup>

Make no mistake. The point in describing these rights is not to suggest that they will forever stand as impenetrable bulwarks of protection. Nor is it to suggest that in their current form they are robust enough to guarantee a strike's success. Far from it. Even with these rights in place, a plea strike would be a major undertaking with substantial hurdles to overcome.<sup>83</sup> And judicial precedents can be narrowed or overturned.

Here, though, is the key point. Each of the rights discussed above is, at present, firmly established in long-standing and unquestioned constitutional law. Most are grounded in the Constitution's express text and history and reaffirmed in opinions written by leading conservative jurists. In other words, the strike's constitutional bona fides are strong. Call it a "Sixth Amendment Strike" and it might be the one union action the late Justice Antonin Scalia could love.

Will a strike put pressure on these rights? Absolutely. Might some of them buckle or erode in time? Maybe, if appellate courts eventually take that

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79. See, e.g., *Kuren v. Luzerne Cnty.*, 146 A.3d 715, 743 (Pa. 2016).

80. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *Faretta v. California*, 422 U.S. 806 (1975); cf. *Bar-Gill & Ben-Shahar*, *supra* note 14, at 765 (observing that if public defenders are "too successful" in supporting "effective plea bargain strikes[,] the state can replace this system with a different one").

81. See *LAFAVE ET AL.*, *supra* note 52, §§ 16, 18 (discussing venue and speedy trial).

82. As Professor Niko Bowie observes, successful unions in the past have "dramatically increased the[ir] leverage" by building essential alliances with a broader coalition comprising "organized church leaders, college students, and urban residents," and thus building an "experimental 'cross between being a movement and being a union.'" Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 186 (2021) (quoting MIRIAM PAWEL, *THE CRUSADES OF CESAR CHAVEZ* 116 (2014)).

83. See *infra* Part II.

step.<sup>84</sup> But this much is clear: the existing legal structure would not collapse in a day, or a week, or a month—and in no world would the entire edifice simply topple all at once. A strike can thus, at minimum, leverage these valuable resources at the outset of its campaign, when they are arguably most important. And it can defend them as the effort marches on, supported by lawyers fighting each step of the way.

## II. PRISONERS' DILEMMAS

The foregoing part outlines resources and structural advantages that could be leveraged by striking defendants and thus offers some reasons to be optimistic about a strike's success. But there is, of course, another side to the analysis. The prosecutors have resources, too. And they are substantial. The purpose of this part is to focus on the most significant tool prosecutors have at their disposal, what Professors Oren Bar-Gill and Omri Ben-Shahar call the "divide and conquer" strategy.<sup>85</sup>

The basic idea is straightforward. Massachusetts Supreme Court Justice Henry Lummus put it this way in 1937: "The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him, but each individual in the mob fears that he might be one of those shot during the rush."<sup>86</sup> Bar-Gill and Ben-Shahar build on the analogy to pinpoint the problem. It is not just that each person fears being shot. Rather, it is

that it is in the interest of any single [one of them] to duck, to defect from the front line, and to let others mount the charge. A smart opponent would cultivate this temptation of his enemies to defect one by one, by threatening to strike the first one who charges. It might be enough for this opponent to have a single bullet to prevent the uniform charge and to force the entire [group] . . . to surrender.<sup>87</sup>

Put more simply, "Defendants are trapped in a collective action problem, and this collective action problem allows the prosecutor to leverage a limited budget into many harsh plea bargains."<sup>88</sup>

Crucially, for Bar-Gill and Ben-Shahar, trapped really means trapped. The nature of the problem, they say, is such that "defendants *cannot* coordinate

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84. Note, though, that unlike trial courts directly facing the strike, appellate courts will not directly feel the resource crash. And they will know they are crafting rules that apply well beyond the striking jurisdiction.

85. Bar-Gill & Ben-Shahar, *supra* note 14, at 767.

86. LUMMUS, *supra* note 13, at 46.

87. Bar-Gill & Ben-Shahar, *supra* note 14, at 740; *see also id.* at 752–54 (modeling the "unraveling" of the strike: "The prosecutor's threat to take D<sub>1</sub> to trial is credible, and, therefore, D<sub>1</sub> accepts. Now that D<sub>1</sub> is out of the picture, having accepted the prosecutor's plea offer, the prosecutor's threat to take D<sub>2</sub> to trial becomes credible, and, therefore, D<sub>2</sub> accepts. And so on.").

88. *Id.* at 740.

and *cannot* join forces and unite against the prosecutor.”<sup>89</sup> Plea strikes, in other words, are “doomed to fail.”<sup>90</sup>

There is much truth to Bar-Gill and Ben-Shahar’s analysis. The divide and conquer strategy is real. Indeed, it is the chief hurdle plea bargaining strikes would need to overcome. The central question is thus whether the problem is truly insurmountable, as Bar-Gill and Ben-Shahar suggest.

This Essay will not convince every skeptic that plea strikes can succeed. Truth be told, I doubt any academic essay could do that. People will believe that the hurdles confronting defendant collective action can be overcome when they see them overcome, which will take more than words on a page. Still, words can help, in part by giving people a basis for believing that strategic action aimed at building and deploying defendant solidarity is not inevitably bound to fail. That is what I aim to offer here: some grounds to believe that Bar-Gill and Ben-Shahar are less right than they suggest.

Specifically, there are two reasons to believe that they overstate the impossibility of defendant collective action, one theoretical and one historical. Consider first the conceptual point. Bar-Gill and Ben-Shahar present an illuminating conceptual model that forecasts how prosecutors will attempt to defeat defendant collective action. But their theory’s major oversight is that it fails to consider where such collective action comes from in the first place. Indeed, while the model games out potential moves by prosecutors, defense lawyers, and (briefly) defendants, it omits organizers from the picture altogether.<sup>91</sup>

This is no small oversight. As a theory and a practice, community organizing aims to build group solidarity in the face of the very collective action challenges that Bar-Gill and Ben-Shahar identify. Professors Kate Andrias and Ben Sachs capture the point well:

A chief obstacle for many individuals is fear of reprisal. As sociologists have demonstrated, fear of retaliation can jeopardize collective action, particularly in high-risk environments. Among low-income populations, the risk *is* high. For workers, tenants, debtors, and benefit recipients, retaliation might mean the loss of livelihoods, shelter, future creditworthiness, and emergency support.

[But] [r]etaliatiion and repression do not always defeat organization. Movement identity, solidarity, and social bonds can help individuals resist

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89. *Id.* at 759 (emphasis added).

90. *Id.* at 763.

91. *See, e.g., id.* at 754–58 (modeling prosecutor behavior); *id.* at 760–65 (modeling defense attorney behavior). Bar-Gill and Ben-Shahar do explore ways that a “public defender’s office could help overcome some of the impediments to coordination,” though they ultimately conclude that the lawyers’ ethical obligations will be a major impediment to their playing such a role: “The public defender’s office can solve the collective action problem that plagues its clients only if each public defender forgoes her duty of loyalty to the individual client.” *Id.* at 760–61. As I explain in Part III of this Essay, I think Bar-Gill and Ben-Shahar are right on this score. Public defenders (and criminal defense lawyers more generally) cannot be the driving force of a plea strike, and indeed any effort on their part to do so would be ethically and normatively troubling. A successful strike thus requires organizers—not public defenders playing the part of organizers and lawyers at the same time.

and challenge authority. Rick Fantasia, for example, illuminates how organizing and strikes foster a culture of solidarity that makes it possible for workers to persist, even in the face of antiunion campaigning, intimidation, and arrests. Jeff Goodwin and Steven Pfaff show that intimate social networks, mass meetings, collective identities, shaming, and appeals to divine protection all helped mitigate fears of police repression and encouraged movement participation during both the Civil Rights movement and the East German Opposition movement.<sup>92</sup>

In part, organizing does this by moving beyond the cool game theory rationality that Bar-Gill and Ben-Shahar deploy. Organizing does not disregard the important strategic questions such analysis surfaces. But, as Marshall Ganz explains, it pays equal attention to the affective dimension of human decision-making:

When we consider responding to a challenge with purposeful action, we ask ourselves two questions: why and how. Analytics helps answer the “how question”—how to use resources efficiently, detect opportunities, compare costs, and so on. But to answer the “why question”—why this matters, why we care, why we value one goal over another—we turn to narrative. The why question is not why we think we *ought* to act, but rather, why we *do* act, that which actually moves us to act, our motivation, our values.

. . . [B]ecause we make choices based on values we experience via emotion, making moral choices without emotional information is futile.<sup>93</sup>

Deploying emotion and narrative to *build* the motivation Ganz describes, in the face of threats and hardships, is what organizers do. As he goes on to explain, by crafting and deploying “public narrative, social movement leaders—and participants—can move [people] to action by mobilizing sources of motivation, constructing new shared individual and collective identities, and finding the courage to act.”<sup>94</sup>

Organizing, in short, is a practice and a craft that helps build the capacity and the courage that collective action requires. It can also directly engage the threats of retaliation that Bar-Gill and Ben-Shahar emphasize.<sup>95</sup> In part,

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92. Andrias & Sachs, *supra* note 43, at 620–21 (citing RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 138–60 (1988); Jeff Goodwin & Steven Pfaff, *Emotion Work in High-Risk Social Movements: Managing Fear in the U.S. and East German Civil Rights Movements*, in PASSIONATE POLITICS: EMOTIONS AND SOCIAL MOVEMENTS 282, 284–85 (Jeff Goodwin et al. eds., 2001)).

93. Ganz, *supra* note 44, at 516 (citing JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 11–25 (1986); MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2001)).

94. *Id.* at 527.

95. My goal here is not to refute each premise of Bar-Gill and Ben-Shahar’s model, which does a powerful job demonstrating the hurdles a plea strike would have to overcome. It is worth observing, though, that the model misapprehends some important points and thus likely overstates the height of those hurdles. For example, Bar-Gill and Ben-Shahar are skeptical of defendant collective action in part because, they say, “such multilateral coordination requires that all relevant parties be identified in advance,” which is hard to do in this context because “most defendants do not know each other.” Bar-Gill & Ben-Shahar, *supra* note 14, at 759. But this argument ignores the upside of hyperincarceration discussed in Part I.B above: mass

organizing does this by helping identify creative strategies that maximize defendants' resources while blunting prosecutors'.<sup>96</sup> The diagnostic map of the penal system's weak points offered in the preceding part of this Essay exemplifies some modes of thinking that organizers might deploy in this vein. Just as critically, organizing can generate *new* resources from within the organized community and can deploy them to help people overcome or weather the blows leveled by the opposition.<sup>97</sup>

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incarceration targets specific communities with preexisting social networks that could and would be leveraged as central resources in a strike. Likewise, as noted earlier, those networks could be leveraged well in advance of the strike, which undercuts Bar-Gill and Ben-Shahar's assumption that defendants will not "be able to communicate—to get together and agree on the commitment strategy" before it is time to act. *Id.* Once such agreements are forged, moreover, Bar-Gill and Ben-Shahar overstate the ease with which strike participants could defect. Specifically, they assert that "plea bargainers are often invisible" and that their defection can thus "often pass unnoticed." *Id.* at 760. But the opposite is true: every guilty plea must be entered in open court where there is a constitutionally guaranteed right of public access and observation—a right that court-watching organizers have already proven adept at using in related contexts. *Cf.* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014). Important questions remain about the tactics strike organizers might use (and disavow) to encourage solidarity while preserving individual agency. *Cf.* Andrias & Sachs, *supra* note 43, at 630 ("Protests must be peaceful, eschewing both destruction of property and violence against individuals."). But Bar-Gill and Ben-Shahar are wrong to think defection could or would be invisible. At the same time, they also underestimate the material support that plea unions could offer striking defendants (what Bar-Gill and Ben-Shahar call "side payments") to mitigate the hardships of prosecutor reprisal. *See infra* note 97. Finally, and perhaps most importantly, Bar-Gill and Ben-Shahar give insufficient attention to the temporal dimension of the strike. As Alexander writes in her *New York Times* op-ed, the central feature of the strike is its sudden crashing impact, what she calls a "tsunami of litigation." Alexander, *supra* note 7. It is not at all clear that prosecutors' divide and conquer strategy—in which they methodically march through *D*<sub>1</sub>, then *D*<sub>2</sub>, then *D*<sub>3</sub>, and so on, picking off each strike participant with threats of harsh sentences—could "unravel" the tsunami before the deluge swamps the system, especially given that it would take only about a 5 percent solidarity rate for the strike to succeed. *See supra* Part I.A; *cf. supra* note 87 and accompanying text.

96. *Cf.* Ganz, *supra* note 44, at 530 ("In fixed contexts in which rules, resources, and interests are given, strategy can be assessed in the analytic terms of game theory. But in settings in which rules, resources, and interests are emergent—such as social movements—strategy has more in common with . . . an ongoing creative process of understanding and adapting new conditions to one's goals.").

97. As Andrias and Sachs observe, successful organizers work hard to address material "barriers to movement participation." Andrias & Sachs, *supra* note 43, at 621. In other settings, these barriers can include childcare obligations or transportation needs that make it hard to engage in collective action. In the context of a plea strike, material hardships could be substantially exacerbated, especially for individuals incarcerated prior to trial or sentenced following a conviction. "Some social movements have had success by providing material assistance and family support so that members are free to participate." *Id.* As community organizer Brittany White stresses, a successful plea solidarity effort would need to devote substantial energy to this facet of the campaign. *See* Brittany White, Keynote Discussion at the National Association of Criminal Defense Attorneys Presidential Summit on the Constitutional Right to Trial (Dec. 9, 2021) ("Will you walk with me while I carry this bid? Will you walk with my family, every day that I'm here?"). Bar-Gill and Ben-Shahar recognize a version of this point, arguing that "side payments play an important role in facilitating coordination." Bar-Gill and Ben-Shahar, *supra* note 14, at 763. In fact, they concede that the prosecutor's divide and conquer strategy "could be prevented if side payments were possible." *Id.* But again, because they ignore organizing, they give insufficient consideration to the possibility that the movement itself could be a source of material assistance.

In sum, as Andrias and Sachs conclude, “history and social-science research leaves little doubt that disruptive concerted action,” like a strike, can achieve success in the face of serious power imbalances and threats of reprisal—and have in fact been “essential for working-class and poor people to have a reasonable chance of success at achieving a redistribution in political (and economic) power.”<sup>98</sup> None of which is to say that a plea strike will succeed. Clearly, “repressive action by state and private actors frequently prevails, impeding successful organizing.”<sup>99</sup> It is thus essential to pay heed to the power that prosecutors would deploy to try to break a strike—power that Bar-Gill and Ben-Shahar helpfully map and distill.<sup>100</sup> Where they go wrong is simply in assuming that prosecutorial power is unbeatable—an estimation error that flows directly from their failure to consider the role community organizing could play in motivating and sustaining collective action. Indeed, by ignoring organizers altogether, Bar-Gill and Ben-Shahar unintentionally assume away the core of what Susan Burton’s idea really is: not just a plea bargaining *strike*, but a plea bargaining *union*.<sup>101</sup>

Beyond this conceptual point, there is one final and more fundamental rejoinder to Bar-Gill and Ben-Shahar’s pessimism. They cannot be right that plea strikes are doomed to fail, because plea strikes have succeeded in the past. In fact, on the few occasions in which they have been attempted, their success has been remarkable. Consider the #J20 prosecution. On January 20, 2017, 230 people who protested the inauguration of Donald Trump were arrested on the streets of Washington, D.C., and charged with a cluster of crimes, including a felony conspiracy charge carrying the threat of years in prison.<sup>102</sup> As a group, the #J20 defendants quickly recognized the power of their numbers: the D.C. court system had conducted only 226 jury trials the

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98. Andrias & Sachs, *supra* note 43, at 627–28, 631 (citing William A. Gamson, *The Success of the Unruly*, in READINGS ON SOCIAL MOVEMENTS: ORIGINS, DYNAMICS AND OUTCOMES 518, 526 (Doug McAdam & David A. Snow eds., 2d ed. 2010) (noting that “unruly groups” that use insurgent tactics like strikes “have better than average success”); FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 181–84 (1979) (noting that insurgent actions are critical to movement success)).

99. *Id.* at 621.

100. Proponents of plea strikes of course focus on this issue, too. See Alexander, *supra* note 7; Roberts, *supra* note 14, at 1129.

101. This distinction highlights a related and important point. A strike campaign could succeed in building enduring, collective power—like the hybrid union-movement Bowie describes, see Bowie, *supra* note 82, at 186—even if the strike itself ultimately “fails” in the narrow sense of “crashing” the plea bargaining system. Cf. Jayadev & Weiss, *supra* note 19 (distinguishing between tactics and goals).

102. See Elizabeth King, *J20, One Year Later: What It’s Like to Face Decades in Prison for Protesting*, ROLLING STONE (Jan. 20, 2018, 4:17 PM), <https://www.rollingstone.com/culture/culture-features/j20-one-year-later-what-its-like-to-face-decades-in-prison-for-protesting-117207/> [<https://perma.cc/8AH2-7KTS>]; Adam K. Raymond, *Charges Dropped Against Remaining J20 Inauguration Day Protesters*, N.Y. MAG. (July 6, 2018), <https://nymag.com/intelligencer/2018/07/charges-dropped-against-all-j20-inauguration-day-protestors.html> [<https://perma.cc/Z6BL-AVHW>].

entire preceding year, fewer than the total number of #J20 defendants.<sup>103</sup> Working together as an organized collective, the #J20 defendants leveraged this strength to tremendous effect. Within weeks, they launched a joint defense strategy, complete with defendant-led coordinating committees and—most notably—an agreement signed by more than half of the members to stand together in their demands for trials. In the end, of the 230 people charged, only twenty pled guilty. Most remarkably, *everyone else* saw their charges dismissed, most without ever going to trial. In other words, after sinking major resources into these high-profile cases, the prosecution did not win a single conviction against the entire collective. In fact, it lost more than just its cases in court. When all was said and done, it was the prosecutors who found themselves under investigation for withholding exculpatory evidence.<sup>104</sup> And the city ultimately agreed to pay \$1.6 million to the protesters to settle a civil rights lawsuit stemming from their arrests.<sup>105</sup>

The #J20 case is not an isolated example. Similar stories of successful defendant collective action can be found in prosecutions of protesters arrested following the Seattle World Trade Organization protests in 1999, the Republican National Convention protests in 2000, the Dakota Access Pipeline protests at Standing Rock, and more.<sup>106</sup> Clearly, these histories hold essential lessons for those attempting to organize plea strikes in other settings. Just as clearly, those lessons would need to be adapted. Protesters united by a shared mission and ideology are not the same as people united by shared oppression within their local penal systems and shared marginalization within their local democracies. Delving into these histories is part of this project's future work. For present purposes, though, the simplest lesson they offer is also the most important: we know plea strikes can succeed because they have.

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103. See D.C. CTS., STATISTICAL SUMMARY 12 (2016), <https://www.dccourts.gov/sites/default/files/matters-docs/Statistical-Summary-CY2016-Final.pdf> [<https://perma.cc/7UE9-2WY6>].

104. See Sam Adler-Bell, *Prosecutors Withheld Evidence That Could Exonerate J20 Inauguration Protesters, Judge Rules*, INTERCEPT (May 23, 2018, 2:45 PM), <https://theintercept.com/2018/05/23/j20-trial-project-veritas-video/> [<https://perma.cc/PC7Q-5CKQ>].

105. Spencer Hsu & Peter Hermann, *D.C. to Pay \$1.6 Million to Settle Mass Arrest Lawsuits from 2017 Trump Inauguration*, WASH. POST (Apr. 26, 2021, 6:22 PM), [https://www.washingtonpost.com/local/legal-issues/trump-inauguration-arrests-settlement-dc/2021/04/26/cf42f2d8-a6a2-11eb-8d25-7b30e74923ea\\_story.html](https://www.washingtonpost.com/local/legal-issues/trump-inauguration-arrests-settlement-dc/2021/04/26/cf42f2d8-a6a2-11eb-8d25-7b30e74923ea_story.html) [<https://perma.cc/QES3-BAH8>].

106. See KRIS HERMES, CRASHING THE PARTY: LEGACIES AND LESSONS FROM THE RNC 2000 (2015); Kris Hermes, *Collective Action Behind Bars*, UPPING THE ANTI (June 28, 2016), <https://uppingtheanti.org/journal/article/18-collective-action-behind-bars> [<https://perma.cc/8ALS-YGTT>]. Beyond these protester cases, Alschuler describes anecdotal examples (cited by Bar-Gill and Ben-Shahar) of plea strikes initiated by defense attorneys in more run-of-the-mill prosecutions, while also noting that such defendants “seem almost never to employ the ‘general strike.’” Alschuler, *supra* note 14, at 1250. It bears emphasis, though, that Alschuler’s examples are different in kind from the defendant-led efforts in the protester cases described above. Indeed, while the protester efforts offer a model that Burton’s plea strike organizers could emulate, Alschuler’s lawyer-led strikes offer cautionary tales of practices to be avoided. See *infra* Part III.

## III. DEFENDERS' DILEMMAS

And what of lawyers? Might they have a role to play in supporting a strike, alongside the organizers described above? A role to play in leading it?

To the extent lawyers' actions have been examined by legal scholars in this context, the fear has always been that they will do *too much* to bring a strike about. That fear is real and important and ought not be ignored. One need only read Professor Albert Alschuler's anecdotal report of a plea strike led by defense attorneys to be left with a pit in the stomach. Describing one such incident, he recalls a lawyer who, upon seeing a judge hand down a harsh sentence, leaped up and said, "That's it! Jury trial on the whole list! If the judge asked us why, we'd bluntly tell him: 'Because you gave the last guy ten years.'"<sup>107</sup> Nowhere in this story is there any suggestion that the lawyer's clients were consulted in the decision, let alone given a meaningful opportunity to exercise genuine agency over a decision central to the future course of their lives. Alschuler is right to condemn such behavior as forcing individual defendants to "suffer an attorney-inflicted sacrifice on behalf of their fellow defendants," and to view the attorney's action as a violation of trust and loyalty that turned his clients into "especially victimized victims of our system of criminal justice."<sup>108</sup>

And yet, real as these concerns of overbearing defense lawyers may be, there is also an opposite risk: not that defense lawyers will be too quick to force their clients into a strike, but that they will be too insistent in talking them out of collective efforts.

For a former public defender like me, this is where things get both more complicated and more uncomfortable. Before becoming a law professor, I worked in a well-regarded public defender office widely thought to "do public defense right." From my first day of training, I was steeped in a practice known as client-centered advocacy, a core article of faith of the modern-day criminal defense bar.<sup>109</sup> And I practiced it faithfully with over one hundred clients over the course of my career.

So, it was with some real discomfort that I sat, listening to that prosecutor on that spring morning panel, as he explained why, actually, he isn't at all worried that a plea strike will happen anytime soon. Turning to the public defender seated to his right, he said, perceptively, "It's only because of your individual responsibility to your individual client to want to do the best for that individual client that makes people not want to jam the system."<sup>110</sup>

Three times in the span of six seconds he repeated the word, *individual*. And I knew there was truth in what he said. Client-centered advocacy is a bedrock principle of modern-day criminal defense. It is also a fundamentally

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107. Alschuler, *supra* note 14, at 1251–52.

108. *Id.* at 1237.

109. See generally Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

110. Plea Bargaining Panel, *supra* note 1.



individualistic ethic. “My job,” I told my clients time and again, “is to protect *you*. Not anyone else—you.”

In this respect, the animating ethos of criminal defense work stands in sharp tension with a collectivist campaign like a plea bargaining strike. Had I been assigned to represent one of the #J20 defendants and heard her say that she was on a group text chain with dozens of other defendants organizing mass resistance and swapping trial strategies, alarm bells would have been ringing loudly in my head. All of my training would have led me to caution her against the risk of her group’s being infiltrated. More fundamentally, I would have warned her strenuously against the risk of betrayal from within, and would have urged her to be careful—withholding, really—with her trust. I don’t think I would have been atypical among my colleagues in this reaction.

“Protect yourself” is hardly a message of solidarity, even if it is an instinct many defenders will feel somewhere close to their soul. Lawyers trained in client-centered advocacy will thus be especially primed to *exacerbate* the prisoners’ dilemma that plea unions would need to overcome if they are to succeed.<sup>111</sup> All of which suggests a dilemma of a different sort. Might it be that Burton’s potentially transformational idea, rooted in the power of collective action, could be subverted not just by the strike-busting tactics of prosecutors, but also by the zealous, individualistic, client-centered advocacy of defense lawyers?

This is a question that I can only mark here, with a gesture to a response that a future essay will have to take up. That gesture is the same gesture made earlier—not toward public defenders, or even lawyers, as the essential actors in a plea bargaining strike, but toward the clients themselves and toward the organizers who might catalyze their collective power.

For all the candid and perceptive things he got right, this is where the prosecutor on that panel got it wrong. The question is not whether “the *defenders*” will get together and say, “We’re never going to plead another client.”<sup>112</sup> It is whether the people facing prosecution will get together

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111. *Cf.* Quigley, *supra* note 19 (“[Lawyering practices that] individualize or compartmentalize the problems of the poor and powerless by not addressing their collective difficulties and lack of power . . . employ many hard-working and dedicated advocates, [but] even when successful in achieving their defined mission . . . empowerment will not occur.”); Alschuler, *supra* note 14, at 1252–53 (“[T]he lawyer’s traditional duty to serve his client without reservation may become a device for quieting opposition to injustice and for perpetuating unfairness from one case to the next.”); Marisol Orihuela, *Crim-Imm Lawyering*, 34 *GEO. IMMIGR. L.J.* 613, 652 (2020) (“[I]n criminal defense, the prevailing theory is that the lawyer is accountable to the individual. This, for some, calls into question how a lawyer practicing a movement lawyering model could maintain accountability to an individual client.”).

112. *See* Plea Bargaining Panel, *supra* note 1. The assumption that defense lawyers will be the key actors in sparking a strike is commonplace. *See, e.g.*, LUMMUS, *supra* note 13, at 47 (“[C]ourts are not free, and never have been free, from the pressure in favor of criminals that the very volume of criminal business exerts. The defenders of criminals know this perfectly. It is their principal asset.”); Roberts, *supra* note 14, at 1097 (describing backlash to Michelle Alexander’s essay, including from those who argue that “criminal defense attorneys cannot reform the system on the backs of individual clients”); Alschuler, *supra* note 14, at 1251–52

themselves—like the bus riders of Montgomery, like the farm workers of Delano—in an act of collective agency that seeks to deprive the penal system of “the cooperation of those it seeks to control.”<sup>113</sup>

Building such collective power is not primarily the work of public defenders. It is the work of organizers. But its success would also require a fundamentally new model of public defense. One that is closely aligned with and deeply literate in the theory and practice of organizing. One that shares insiders’ system knowledge generously with organizers as they develop campaign strategies outside the context of individual cases. And one that, within those individual cases, suppresses the knee-jerk instinct to caution clients against trusting one another—and that learns instead to listen closely when clients express interest in or curiosity about banding together. Most of all, these new public defenders would need to counsel those clients thoughtfully, honestly, and ably, not just about the risks of such solidarity, but about its potentially dramatic decarceral power, too.<sup>114</sup> Simply put, if your clients are in a union, the client-centered thing to do is to support their collective action.

#### CONCLUSION

Susan Burton was on to something when she posed her powerful question to Michelle Alexander ten years ago. Just how powerful that idea might be remains to be seen. This much, though, is clear: The American penal system—marked by massive overextension, hyperincarceration, fragmentation, and procedural formalism—is more vulnerable to defendant collective action than it might seem. Just as importantly, while the obstacles to such action are undeniably real, they could also be surmountable, especially if organizers and defense attorneys learn to operate in tandem, supporting each other and learning from one another, with organizers in the lead.

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(“When a public defender sends a meritless case to trial as part of a ‘strike,’ he disregards the probability that his client could have secured more lenient treatment by pleading guilty.”); Bar-Gill & Ben-Shahar, *supra* note 14, at 761.

113. Alexander, *supra* note 7.

114. *Cf.* Roberts, *supra* note 14, at 1100 & n.44 (“Defense attorneys cannot force their clients to go to trial or decline to plead guilty; nor can they coerce clients to do so. But they can offer zealous representation that allows clients to make truly voluntary choices, and that representation can include an invitation (in appropriate cases) to participate in a collaborative effort to change the system by forcing it to bear some of the real costs of mass misdemeanor processing.”); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103, 1123 (1992) (“People’s membership in groups is often itself an expression of their individual autonomy.”).