

ARTICLE

DISRUPTING PUBLIC DEFENSE: A TRANSITIONS THEORY APPROACH

by
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Public defense problems are well known, but a solution has been elusive. This Article analyzes public defense's adaptive features using the Multi-Level Perspective (MLP) for the first time. The MLP is a theoretical framework that is often employed to study institutional and societal barriers to innovative ideas, like climate change responses and clean energy transitions. This Article describes the MLP's theoretical model and uses it to examine why public defense reform consistently fails.

This Article then goes beyond the MLP framework to explore how transition management tools can be used to design and nurture new approaches to public defense. I focus my prescriptive analysis on holistic and participatory models, which are two emerging niches in public defense. The Article explains how innovation policy and transition management can also be used to support other law reform movements that offer transformative ideas.

Along with providing a new lens to understand public defense, this Article makes two other significant contributions. First, this Article introduces a new theoretical framework to legal scholarship that can be used to evaluate the impact of law and policy throughout society. Although I introduce transition

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theory concepts, this Article invites further discussion such as the best way to modify the MLP framework within the legal context and how legal analysis can enhance sustainable transition scholarship. Second, this Article offers new and practical strategies that can be used to nurture and advance other social justice movements or law reform projects.

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INTRODUCTION

At the 1893 World's Fair, Clara Foltz first expressed a radical idea: The government should provide a good lawyer for all poor people it accuses of a crime.¹

¹ Clara Foltz, Public Defenders—Rights of Persons Accused of Crime—Abuses Now Existing, Address to the Congress on Jurisprudence and Law Reform during the Chicago World's Fair (Aug. 1893), in 48 ALB. L.J. 248, 249 (1893) [hereinafter Foltz, Address at the Chicago World's Fair].

Foltz believed that a public defender was essential to equal justice and due process, and she proclaimed that the right to counsel was fundamental, far before the Supreme Court.² Her idea faced skepticism, resistance, and ridicule. The New York Times, for instance, dismissed her proposal as the “strange project” of “a female attorney . . . [An] absurd bill.”³

Foltz responded with persistent advocacy. She also received meaningful support from her connections to the women’s suffrage, racial justice, and progressive movements.⁴ Shortly after her World’s Fair speech, Foltz proposed a public defender statute, which ignited further public debate and legislative discussions across the nation.⁵ It failed to pass but created important and positive attention for the public defense movement.⁶ Then momentum stalled. It was more than 15 years before the first public defender office opened and even longer before public defense was a common profession.⁷

For a sweeping idea, public defense had a slow start. Establishing the public defender required more than articulating a workable vision. A visible, determined advocacy campaign and supportive social movements were important for the public defender, but still were not sufficient. The public defender took a long time to materialize—nearly three generations.⁸ Yet, it became a central feature of the justice system well before the Supreme Court’s ruling in *Gideon v. Wainwright*.⁹ This suggests a change in black letter law is not the defining feature of a successful law reform project, at least not in the startup phase.

² Compare *id.* at 249–50, and Laurence A. Benner, *The California Public Defender: Its Origin, Evolution, and Decline*, CAL. LEGAL HIST., 2010, at 173, 175, with *Gideon v. Wainwright*, 372 U.S. 335, 341–42 (1963) (holding that the Sixth Amendment’s guarantee of counsel is a fundamental right essential to a fair trial and applies to the states through the Fourteenth Amendment).

³ Editorial, N.Y. TIMES, Jan. 23, 1897, at 6.

⁴ Foltz was a prominent speaker and writer in support of public defense. For context on Foltz’s advocacy and place within the pantheon of the first women lawyers, see JILL NORGREN, REBELS AT THE BAR: THE FASCINATING, FORGOTTEN STORIES OF AMERICA’S FIRST WOMEN LAWYERS 107, 109, 112, 120, 131 (2013).

⁵ For an extensive discussion of Foltz’s contributions to the public defender movement, see Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM. CRIM. L. REV. 1267, 1269–77 (2006) [hereinafter Babcock, *Inventing the Public Defender*].

⁶ For the text of Foltz’s legislation, see *id.* at 1272–73 n.30.

⁷ *Id.* at 1272–74 (citing HISTORICAL AND CONTEMPORARY REVIEW OF BENCH AND BAR IN CALIFORNIA 109 (1926)).

⁸ See CONSORTIUM FOR THE NAT’L EQUAL JUST. LIBR., A BRIEF HISTORY OF PUBLIC DEFENSE IN THE UNITED STATES (2022) [hereinafter A BRIEF HISTORY OF PUBLIC DEFENSE IN THE U.S.], <https://legalaidhistory.org/wp-content/uploads/Public-Defense-History-2022.pdf>.

⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963); see Babcock, *Inventing the Public Defender*, *supra* note 5, at 1279.

From the modern perspective, public defense is probably the 20th century's most successful law reform project.¹⁰ Today, public defenders represent most criminal defendants.¹¹ Public defense is also a cautionary tale.¹² As every discussion of public defense has emphasized, public defenders have too little funding and too many cases.¹³ Along with the elegies, there are also many proposals to fix public defense, including recent scholarship on best practices for designing public defender systems.¹⁴ This Article examines the evolution of public defense from a niche idea to an institutional fixture, exploring its malleability and often improvised model.

Although I focus on the narrower question of public defense, this Article contributes to the broader law and society discussion about social justice movements and the role of legal scholarship to support change.¹⁵ There has been an ongoing call for literature on the “new criminal justice thinking”¹⁶ that examines substantive criminal law's enactment, not only its text.¹⁷ Recently, several prominent legal scholars have emphasized the need to collaborate with activists to support grassroots reform.¹⁸ Others have identified the tensions between legal structures (including legal

¹⁰ For a detailed history of the public defender, see SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* (2020) [hereinafter MAYEUX, *FREE JUSTICE*] (describing the development and eventual establishment of American public defense in the face of decades of staunch institutional resistance).

¹¹ About 80% of defendants are represented by a public defender. For the latest statistics, see CAROLINE WOLF HARLOW, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 5 (2000). For data on the ratio of public defense offices versus panel attorneys, see Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 254–57 (2023) [hereinafter Primus, *The Problematic Structure of Indigent Defense Delivery*].

¹² See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178–79 (2013).

¹³ E.g., Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 391–97 (2016).

¹⁴ See, e.g., Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1806–21 (2016) [hereinafter Primus, *Culture as a Structural Problem in Indigent Defense*].

¹⁵ E.g., Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825 (2021).

¹⁶ For a curated collection of calls for legal scholarship that demonstrates a new approach to criminal justice, see THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovich & Alexandra Natapoff eds., 2017).

¹⁷ See, e.g., Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice”*, 15 OHIO ST. J. CRIM. L. 619, 619–23 (2018); Sharon Dolovich & Alexandra Natapoff, *Mapping the New Criminal Justice Thinking*, in THE NEW CRIMINAL JUSTICE THINKING 1, 1–30 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

¹⁸ E.g., Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612–13 (2017).

scholarship) and law reform agendas.¹⁹ These contributions call attention to structural problems and emphasize ways to envision radical change.²⁰

Importantly, for people being arrested and shuffled through criminal court rooms, the importance of quality public defense is practical, not ontological. Consequently, this Article confronts two critical and related questions: Is there a way to shift public defense to a new path that improves the quality of representation? How can law reform projects that articulate transformative visions succeed?

What law lacks so far is a workable transition theory.²¹ This Article identifies and explains a useful theoretical framework that already exists. This Article builds on (and introduces to legal scholarship) the Multi-Level Perspective (MLP) theory, which is a framework to understand the dynamic relationship between legal institutions, social movements, and broader societal contexts.²²

Most frequently, the MLP is used to study how innovations emerge in complex systems and lead to larger transformations—for example, the transition to clean energy in response to climate change.²³ The MLP conceptualizes interactions between niches (where innovations emerge), regimes (established rules and practices), and landscapes (broader societal contexts).²⁴ This framework has been applied to problems in rich and poor societies and to analyze specific transitions in areas such as food, water, heat, buildings, cities, waste management, transportation, electricity,

¹⁹ E.g., Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2502–03, 2507 (2023).

²⁰ See, e.g., Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 412–14 (2018).

²¹ Existing legal theories stop short of a prescriptive framework to implement change. Cf. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1789–92 (2020) (offering a theoretical foundation to conceptualize transformation and guiding principles).

²² For an overview of the current state and future directions of sustainability transitions research, see Jonathan Köhler, Frank W. Geels, Florian Kern, Jochen Markard, Anna Wieczorek, Floorije Alkemade, Flor Avelino et al., *An Agenda for Sustainability Transitions Research: State of the Art and Future Directions*, 31 ENV'T. INNOVATION & SOCIETAL TRANSITIONS 1, 4–6 (2019). For an accessible introduction to transition studies, see Frank W. Geels, *Analyzing the Breakthrough of Rock 'n' Roll (1930–1970) Multi-Regime Interaction and Reconfiguration in the Multi-Level Perspective*, 74 TECH. FORECASTING & SOC. CHANGE 1411 (2007).

²³ See Cristian Pons-Seres de Brauwert, *Acceptance Dynamics of Innovation Diffusion: A Heuristic Framework for Analyzing Actor Reorientations in Sustainability Transitions*, ENERGY RSCH. & SOC. SCI., May 2024, at 1.

²⁴ For a detailed discussion of how ideas are translated, see Adrian Smith, *Translating Sustainabilities between Green Niches and Socio-Technical Regimes*, 19 TECH. ANALYSIS & STRATEGIC MGMT. 427 (2007).

and sustainable housing.²⁵ The MLP's core assumption is that transformation happens when developments align between all three levels.²⁶ In other words, regime destabilization or major landscape-level shifts—such as changes in public attitudes toward crime and punishment, fiscal constraints, or broader social movements—create windows of opportunity for a radical, niche idea to succeed.

Throughout this Article, I explain and demonstrate the utility of the MLP and transition management approaches in ways that are generalizable within the public defense community and to other law reform projects. As I apply the MLP to public defense, I describe how specific offices and new approaches represent the niche level.²⁷ These niches interact with established systems like defender and prosecutor offices, and courts, which represent the regimes within the landscape of laws, criminal justice policies, and public attitudes landscape.

I also use the MLP to situate public defense within the criminal justice system in a new way.²⁸ For instance, using the MLP helps highlight how professional and cultural norms shape public defense.²⁹ As public defense developed, competing visions have been conceived, mobilized, and institutionalized (or not) in different times and places.³⁰ This has created role conflict for public defenders. The lack of a shared vision, though, also helps explain the emergence of new approaches within public defense's niches.

Another benefit of the MLP framework is that it allows doctrinal analysis to be combined with the sociolegal reality of law as it is enacted. A prominent criticism of *Gideon v. Wainwright* provides a useful illustration: one thread in criminal procedure scholarship is that public defense's most successful moment, paradoxically, is the source of its handicaps.³¹ As many articles point out, the remedy for a Sixth Amendment violation offered in *Gideon* was vague.³² The Supreme Court avoided

²⁵ See Frank W. Geels, *The Multi-Level Perspective on Sustainability Transitions: Responses to Seven Criticisms*, 1 ENV'T INNOVATION & SOCIETAL TRANSITIONS 24, 26–27 (2011) [hereinafter Geels, *Multi-Level Perspective*].

²⁶ *Id.*

²⁷ For a discussion of niches, see generally Smith, *supra* note 24.

²⁸ I have chosen to use “criminal justice system” because it is the most common term. For a detailed discussion of alternatives and the ways that the term is misleading, see Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899 (2023).

²⁹ See Primus, *supra* note 14, at 1808, 1812–13.

³⁰ See Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 459–62 (2015) [hereinafter Natapoff, *Gideon's Servants*].

³¹ For a detailed argument that the Warren Court's criminal procedure decisions incentivized harsher substantive criminal law and the underfunding of indigent defense, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 26, 76 (1997).

³² See *id.* at 69–72.

addressing the quality of public defense or states' funding obligations.³³ This analysis is, however, often taken to mean that *Gideon* both established a Sixth Amendment right to counsel and is a central cause of public defense's failure. A descriptive emphasis on *Gideon* implies that there is a doctrinal solution for public defense and obscures the many avenues for reform.³⁴ Integrating doctrinal analysis within the MLP framework expands the scope of legal analysis to consider *Gideon*'s text along with its nuanced systemic effects in a way that moves the conversation beyond funding and caseload concerns that depict *Gideon*'s failed promise.

In MLP terms, *Gideon* was an important landscape shock that destabilized the criminal justice system. But it is only a small part of the ruleset that governs public defense and influences the criminal justice system.³⁵ The Supreme Court's analysis assumed that a criminal process rule would effectively regulate the institutions and actors that comprise the criminal system. This placed faith in public defenders and prosecutors to self-regulate, and in legislatures to provide adequate resources.³⁶ Failing to devise rules to enforce the right to counsel in *Gideon* was notoriously compounded by the Court's ineffective assistance of counsel doctrine in *Strickland*.³⁷

A consequence of the *Gideon-Strickland* framework is public defense lacks a central governance structure. Decentralization can be good and bad for new ideas.³⁸ One overlooked benefit of the Supreme Court's criminal procedure jurisprudence, however, is that there is a uniform criminal process across local jurisdictions, which should allow new approaches to be easier to adopt.³⁹ Another benefit is decentralization creates space to experiment with new approaches.⁴⁰ The downside of

³³ See, e.g., Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 471–73 (2022).

³⁴ For an example of this argument, see John H. Blume & Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 YALE L.J. 2126, 2137, 2142, 2147 (2013).

³⁵ See Daniel Rosenbloom, *Engaging with Multi-System Interactions in Sustainability Transitions: A Comment on the Transitions Research Agenda*, 34 ENV'T INNOVATION & SOCIETAL TRANSITIONS 336 (2020).

³⁶ See Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 70 (2016) [hereinafter Mayeux, *What Gideon Did*].

³⁷ *Strickland v. Washington*, 466 U.S. 668, 687 (1984). For a detailed discussion of the connected impact of *Gideon* and *Strickland*, see Pamela R. Metzger, *Fear of Adversariness: Using Gideon to Restrict Defendants' Invocation of Adversary Procedures*, 122 YALE L.J. 2550 (2013).

³⁸ See Adrian Smith & Rob Raven, *What is Protective Space? Reconsidering Niches in Transitions to Sustainability*, 41 RSCH. POL'Y 1025, 1027 (2012).

³⁹ In my experience representing indigent clients, every jurisdiction feels eerily similar. Courtroom cultures and operations vary as much between courtrooms within a jurisdiction as they do between jurisdictions.

⁴⁰ For more on how institutional plurality encourages experimentation, see Paula Bögel, Kateryna Pereverza, Paul Upham & Olga Kordas, *Linking Socio-Technical Transition Studies and Organizational Change Management: Steps Towards an Integrative, Multi-Scale Heuristic*, 232 J. CLEANER PROD. 359, 361 (2019).

decentralization is that scaling a good idea is more challenging when offices are siloed. This means scaling is possible even though public defense's decentralized structure makes it harder. This is why it is important to purposefully use transition management tools such as networks and advocacy to support niche ideas and movements.

Transition theory also posits that innovations undergo distinct transition phases.⁴¹ During an experimental phase, innovations emerge in protected spaces, like local offices.⁴² In the stabilization phase, innovations are improved—for instance when lawyers learn and explore a new and better way of doing things. During the diffusion and disruption phase, the use of an approach expands as it challenges established norms and structures.⁴³

Returning to this Article's focus on public defense, the MLP is used to examine how public defense has gone through several cycles of reform and resistance. Second, this Article identifies processes and mechanisms that have shaped public defense to explain the persistent tensions between public defense's ideals and reality. Third, this Article introduces transition management concepts such as scaling up and destabilization to illustrate how an innovation policy and management tools can support new public defense ideas and break public defense out of a reform and resistance cycle.

One of the new public defense approaches that I spotlight is holistic defense, which emphasizes solving a client's underlying needs and integrating social services with public defense.⁴⁴ Community-based defense—often branded participatory defense—is the other model spotlighted in this Article. Community-based defense prioritizes public defender engagement with the communities they serve.⁴⁵ Holistic and participatory approaches are in an experimental phase, so there are emerging iterations of each approach.⁴⁶ I do not advocate that every public defender office should adopt one of these models, and I mention a few practical and conceptual concerns. The point is that new public defense models have the potential to transform public defense and the criminal justice system, and can best succeed with a proper

⁴¹ For a detailed discussion of transition phases, see Frank W. Geels & Johan Schot, *Typology of Sociotechnical Transition Pathways*, 36 RSCH. POL'Y 399, 400–05 (2007).

⁴² See *id.* at 400.

⁴³ *Id.* at 406.

⁴⁴ Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963–64 (2013).

⁴⁵ *Participatory Defense: What It Is and Why It Deserves Our Attention*, HARV. CIV. RTS - CIV. LIBERTIES L. REV.: BLOG (Oct. 20, 2021), <https://journals.law.harvard.edu/crcl/participatory-defense-what-it-is-and-why-it-deserves-our-attention/>.

⁴⁶ See, e.g., Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 716 n.3, 717 (2018).

understanding of how they interact as niches with public defense and the criminal justice system.⁴⁷

Another note of caution: I conceptualize Supreme Court holdings as a landscape-level event. Some readers may disagree with this decision and believe it would be more sensible to treat courts and public defender systems as separate, interacting regimes. As I discuss in Part I, this objection would have some merit. Although I have tried to consider many theoretical concerns, I expect others will spot ones I have missed. In this sense, I recognize introducing the MLP into legal scholarship is likely to lead to new questions and (hopefully) applications.

This Article proceeds in four parts. Part I introduces the MLP and transitions theory concepts like strategic niche management and transition governance. Part II traces the early history of the public defender movement from Foltz's era through the mid-20th century using the MLP framework. This Part also highlights the tensions between innovative ideas, resistance from established systems, and the influence of broader societal forces in shaping the evolution of public defense. Part III examines the current state of public defense, characterized by its integration into the criminal justice system while still grappling with underfunding and other systemic issues. Additionally, this Part discusses the emergence of new reform efforts, such as holistic and participatory defense models, that challenge the traditional public defense paradigm. In Part IV, I explore strategies for fostering and scaling up niche innovations in public defense, such as holistic and community-oriented models. This Part also discusses the importance of destabilizing the current regime to create opportunities for transformative change and aligning multi-level dynamics to achieve systemic reform. I conclude by emphasizing the need for strategic transition management in public defense reform.

I. THE MULTI-LEVEL PERSPECTIVE FRAMEWORK

The Multi-Level Perspective (MLP) is a theoretical framework that offers a fresh lens for examining complex societal transformations, including changes in legal institutions like public defense. The MLP is relatively new but has roots in evolutionary and developmental economics, institutional theory, sociology, anthropology, political science, and political ecology.⁴⁸ Originally developed to analyze sustainability transitions, the MLP conceptualizes change as emerging from interactions between three levels: niches (micro-level), regimes (meso-level), and

⁴⁷ Recent scholarship links public defense to criminal justice reform. *See generally* Primus, *The Problematic Structure of Indigent Defense Delivery*, *supra* note 11.

⁴⁸ Frank W. Geels, *Ontologies, Socio-Technical Transitions (to Sustainability), and the Multi-Level Perspective*, 39 RSCH. POL'Y 495, 497–99, 504 (2010).

landscape (macro-level).⁴⁹ It provides a framework on how existing systems constrain law reform movements, and how an innovation, like Foltz's idea for a public defender, can succeed and influence broader legal and societal transformations. This approach provides valuable insights for understanding the persistent challenges and potential pathways for reform in public defense.

Unlike traditional policy analysis, which often focuses on top-down reforms or isolated initiatives, the MLP emphasizes the complex, non-linear processes through which systemic transformations occur.⁵⁰ The MLP has been widely applied to studying sustainability transitions, such as the shift from coal to renewable energy or from industrial agriculture to organic farming.⁵¹ In these contexts, the MLP has helped to identify the key drivers and barriers of change, and the strategies and policies needed to accelerate transitions. For example, studies have shown how feed-in tariffs and other supportive policies have created protected niches for solar and wind power, how incumbent energy companies have resisted or co-opted these innovations, and how landscape factors like climate change and energy security have put pressure on the fossil fuel regime.⁵²

The MLP conceptualizes how innovative models of representation (niches) interact with established legal institutions and practices (regimes) against the backdrop of evolving constitutional doctrines and social movements (landscape). In some cases, change may be driven by top-down factors, such as landmark court decisions or legislative interventions, rather than bottom-up experimentation.⁵³ In other cases, change may be blocked or diverted by powerful actors and interests that benefit from the status quo, even in the face of landscape pressures or regime crises.⁵⁴ The MLP is particularly useful to analyze public interest institutions like public defense,

⁴⁹ For foundational insights into the MLP, see Frank W. Geels, *Technological Transitions as Evolutionary Reconfiguration Processes: A Multi-Level Perspective and a Case-Study*, 31 RSCH. POL'Y 1257 (2002) [hereinafter Geels, *Technological Transitions*].

⁵⁰ See, e.g., Thomas A. P. Sinclair, *Approaches to Teaching Public Policy: Analysis, Transformation, and Interpretation*, 4 J. PUB. AFF. EDUC. 157, 157, 160 (1998) (describing traditional public policy analysis as being a top-down approach).

⁵¹ Frank W. Geels, *From Sectoral Systems of Innovation to Socio-Technical Systems: Insights About Dynamics and Change from Sociology and Institutional Theory*, 33 RSCH. POL'Y 897, 916 (2004).

⁵² See Kejia Yang, *Spatial Diffusion and Niche Shielding Dynamics: Wind Power Development in China*, ENERGY RSCH. & SOC. SCI., Nov. 2023, at 1–2; David J. Hess, *The Politics of Niche-Regime Conflicts: Distributed Solar Energy in the United States*, 19 ENV'T INNOVATION & SOCIETAL TRANSITIONS 42 (2016).

⁵³ See Mayeux, *What Gideon Did*, *supra* note 36.

⁵⁴ Elizabeth Shove & Gordon Walker, *Caution! Transitions Ahead: Politics, Practice and Sustainable Transition Management*, 39 ENV'T & PLAN. A: ECON. & SPACE 763, 763, 767 (2007).

where policy solutions have consistently failed to achieve lasting, meaningful systemic change.⁵⁵

In the context of public defense, niches represent protected spaces where innovative practices and models emerge, such as the first public defender offices. Niches are also where innovative practices can develop, such as in today's holistic defense or community-oriented defender offices. These innovations often emerge in response to perceived deficiencies in the dominant system, offering new approaches to longstanding problems. For example, the Bronx Defenders' holistic defense model, which integrates criminal defense with civil legal services and social support, represents a niche innovation that challenges traditional approaches to indigent defense.⁵⁶

The regime encompasses the established rules, practices, and institutions that structure public defense, including court procedures, funding mechanisms, professional norms, and organizational structures of defender offices. This level captures the entrenched patterns and routines that often resist change, such as the persistent underfunding of public defense or the cultural norms that prioritize case processing instead of advocacy.⁵⁷

At the broadest level, the landscape refers to wider societal trends and events that shape public defense, such as political ideologies, fiscal policies, public attitudes towards crime and punishment, and social movements. Landscape developments like the war on drugs, mass incarceration, or more recently, growing awareness of racial disparities in the criminal justice system, create pressures and opportunities for change in public defense practices.⁵⁸

The MLP posits that significant transitions occur when developments at all three levels align to create windows of opportunity for systemic change.⁵⁹ For instance, landscape pressures like fiscal crises or shifts in public opinion about mass incarceration may destabilize existing regimes, creating openings for niche innovations to gain traction. The concepts of multi-level alignment, regime resistance, and destabilization provide a framework to understand why some reform efforts succeed while others fail, despite seemingly favorable conditions.

The MLP is a good theoretical fit for analyzing law reform movements because the MLP framework emphasizes the role of grassroots mobilization and cultural

⁵⁵ Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 449 (2009).

⁵⁶ Steinberg, *supra* note 44, at 963–64.

⁵⁷ Primus, *Culture as a Structural Problem in Indigent Defense Delivery*, *supra* note 14, at 1769–72.

⁵⁸ For an introduction into systemic problems, see JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 2–3 (2014).

⁵⁹ Geels & Schot, *supra* note 41, at 400.

framing in shaping legal norms and practices.⁶⁰ While the MLP has primarily been applied to technological and environmental transitions, public defense can be understood as a socio-technical system comprising interconnected legal, organizational, and social elements. The MLP framework allows analysis that goes beyond narrow doctrinal or policy focuses to explore how innovations in public defense practice interact with established institutional structures and broader societal forces to shape the evolution of indigent defense systems. The MLP also connects with institutional theories that highlight the resistance of entrenched organizational fields to disruptive innovations.⁶¹

A key concept in the MLP that is particularly relevant to public defense is the idea of protective spaces for niche innovations.⁶² Experimental programs or offices often require some degree of insulation from regime pressures to test new approaches. Analyzing how these protective spaces are created and maintained can provide insights into why some reform efforts gain traction while others falter. This perspective can help explain, for example, how innovative defender offices have been able to develop and refine new models despite operating within the constraints of the existing criminal justice system.

The MLP also provides a framework for understanding different pathways of transition. Several potential transition pathways have been identified in transitions theory, including transformation, reconfiguration, and technological substitution.⁶³ For public defense, a transformation pathway might involve gradual reforms to existing defender offices, while a reconfiguration pathway could entail more fundamental changes to the structure of indigent defense delivery, such as a shift towards community-based defense models.

Transition pathways, as conceptualized in MLP literature, describe different patterns of interaction between niche innovations, regimes, and landscape developments. Understanding these potential pathways can help in anticipating and shaping the trajectory of public defense reform efforts. By identifying which pathway that a particular reform effort might follow, advocates and policymakers can strategize how to support and sustain meaningful change. For public defense, relevant pathways might include:

- (1) Transformation, which is defined as the gradual change in public defender practices in response to external pressure, without fundamental

⁶⁰ Cf. Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & SOC. INQUIRY 360, 371–72, 379, 381, 403–04 (2018) (exploring the role of social movements and grassroots activism in shaping legal policy and norms over time).

⁶¹ For a detailed definition of a sociotechnical system, see Geels, *Multi-Level Perspective*, *supra* note 25, at 35.

⁶² Smith & Raven, *supra* note 38, at 1027.

⁶³ For more on the identification of transition pathways, see Geels & Schot, *supra* note 41, at 406.

shifts in system architecture. This might involve incremental improvements in training, caseload management, or client communication within existing organizational structures.

(2) Reconfiguration, which is when the adoption of niche innovations trigger cascading changes in the overall structure of indigent defense provision. For example, the widespread adoption of holistic defense practices could lead to broader reconfigurations in how defender offices are organized and funded.

(3) Substitution, when a radical new model of public defense rapidly replaces existing structures, possibly in response to a major crisis or court decision. While less likely in the legal context, this could occur if, for instance, a transformative Supreme Court decision mandated a fundamentally new approach to indigent defense.

(4) Dealignment and realignment scenarios, where multiple niche innovations compete to replace a destabilized regime, eventually leading to a fundamentally new system. This might occur if a major fiscal crisis or public outcry led to the collapse of existing public defense structures, opening space for various alternative models to compete for dominance.⁶⁴

The MLP allows a more nuanced conceptual map of the complex dynamics that have shaped public defense's evolution and obstructed reform efforts. The MLP framework also allows several potential leverage points to be identified. This includes several points that can catalyze change across multiple levels. This provides a pathway for public defense to move beyond just calls for increased funding or policy changes to consider how broader systemic transformations can be catalyzed and sustained.

The MLP also can be used to emphasize the role of agency and power dynamics in shaping transitions. While earlier iterations of the framework were criticized for neglecting these factors, recent scholarship has emphasized the importance of understanding how different actors navigate and influence multi-level dynamics.⁶⁵ In the public defense context, this means examining how key stakeholders such as defenders, judges, legislators, and community organizers strategically engage with and shape reform processes.

Applying MLP in the public defense context has some challenges. Applying MLP to legal analysis, particularly in the context of public defense, requires some adaptations. Like other complex systems, legal institutions are directly shaped by

⁶⁴ *Id.* at 408–09, 411.

⁶⁵ For an example of the role of agency in the MLP, see Frank W. Geels, *Regime Resistance Against Low-Carbon Transitions: Introducing Politics and Power into the Multi-Level Perspective*, 31 THEORY, CULTURE & SOC'Y 21, 23–24, 35–36 (2014).

policy principles, constitutional constraints, and complex power dynamics.⁶⁶ My impressionistic observation is that legal actors are more aware of how their behavior is shaped by rules. This awareness is at least observable in legal writing and scholarship. For example, scholars have argued that the use of a metaphor like “criminal justice system” has consequences because it influences how actors behave.⁶⁷ The use of systems thinking by the Supreme Court in its jurisprudence has also been criticized for encouraging the Court to implicitly assume the goal of the criminal justice system should be its operation.⁶⁸

Similarly, the role of agency in legal transitions may be more pronounced than in other societal shifts. Judges, legislators, and legal advocates can consciously shape rules in ways that may accelerate or impede transitions. The extensive rule-setting agency of legal actors suggests a need to integrate theories of legal change and institutional design more explicitly into the MLP framework when applying it to public defense reform.⁶⁹ For example, this Article specifically considers how strategic litigation and legislative advocacy can create landscape-level pressures or regime-level opportunities for niche innovations.

In adapting MLP to public defense in this Article, I have tried to foreground how legal doctrines, professional norms, and institutional practices interact across the niche, regime, and landscape levels. For instance, the concept of protective spaces in legal innovation might encompass not just physical or organizational spaces, but also doctrinal spaces created by court decisions or legislative carve-outs that allow for experimentation in legal practice.⁷⁰ These legal protective spaces could be extended to include specialized courts, pilot programs authorized by state legislatures, or even temporary restraining orders that create room for new practices to develop.

The MLP’s focus on niche-driven change may also overlook the importance of top-down, court-mandated reforms in the history of public defense.⁷¹ To accommodate the impact of case law, I make a deliberate choice to conceptualize Supreme

⁶⁶ Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1386 (2022).

⁶⁷ E.g., Sara Mayeux, *The Idea of “The Criminal Justice System”*, 45 AM. J. CRIM. L. 55 (2018) [hereinafter Mayeux, *The Idea of “The Criminal Justice System”*] (discussing how the phrase “criminal justice system” creates a conceptional framework that limits understanding and critique of the apparatuses for policing and punishment within American society).

⁶⁸ *Id.* at 90–91. For a critique of reductively closed systems thinking, see Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419 (2018).

⁶⁹ See, e.g., Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. & SOC. SCI. 653, 655 (2010).

⁷⁰ See generally Smith & Raven, *supra* note 38, at 1027.

⁷¹ It is common to emphasize the Supreme Court’s role in shaping public defense. See, e.g., Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1641–42 (2003).

Court decisions as landscape-level events. While these decisions emerge from within the legal system, their far-reaching impact on the practice of criminal defense, allocation of resources, and societal understanding of due process rights justifies their treatment as macro-level forces that significantly reshape the terrain on which public defense operates.

Besides MLP, transition theory also offers transition management insights. Transition management, such as Strategic Niche Management (SNM), is the governance approach and provides tools for influencing transition processes.⁷² Transition management tools include creating transition arenas, developing transition agendas, and fostering experimentation and learning.⁷³ These tools can be used to scale up and steer transitions towards desired outcomes by aligning activities at different levels and among different actors. In the context of public defense, transition management tools include creating forums for collaboration between innovative defender offices, policymakers, and community stakeholders; developing long-term visions for indigent defense systems; and supporting pilot programs that test new models of service delivery as discussed in Part IV.

II. THE EMERGENCE OF PUBLIC DEFENSE AS A NICHE INNOVATION: AN MLP ANALYSIS

A. *The Landscape of Criminal Justice in the Early 20th Century*

In the early 20th century, the United States was an urbanizing and industrializing society.⁷⁴ The criminal justice system was not equipped to handle these pressures.⁷⁵ For instance, criminal defense lawyers were available to the wealthy or occasionally through charity organizations.⁷⁶ There was only minimal state provision of counsel for anyone who was poor.⁷⁷ Until after World War II, it was up to states to decide if a defense lawyer was needed to ensure due process in a criminal case.⁷⁸

⁷² For an introduction into transition management theory, see Derk Loorbach, *Transition Management for Sustainable Development: A Prescriptive, Complexity-Based Governance Framework*, 23 GOVERNANCE 161 (2010).

⁷³ *Id.* at 167–68, 173.

⁷⁴ For more details on how urbanization impacted the criminal justice system, see LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 149–50 (1993).

⁷⁵ For more details on aspects of the turn of the century crime wave, see Jeffrey S. Adler, *Less Crime, More Punishment: Violence, Race, and Criminal Justice in Early Twentieth-Century America*, 102 J. AM. HIST. 34, 34 (2015).

⁷⁶ Babcock, *Inventing the Public Defender*, *supra* note 5, at 1266–67; Mayeux, *What Gideon Did*, *supra* note 36, at 28–33 (2016) (discussing the pre-WWII Volunteer Defenders Committee of Boston providing legal services for “less-than-wealthy” criminal defendants).

⁷⁷ Babcock, *Inventing the Public Defender*, *supra* note 5, at 1274–77.

⁷⁸ *Betts v. Brady*, 316 U.S. 455, 473 (1942) (discussing the fundamental fairness standard in criminal cases), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

In other words, a criminal lawyer was no guarantee for most people, and the system was marked with inequality. Given this context, the idea of a public defender was radical and potentially transformative. The system was obviously inadequate. From a multi-level perspective, the existing legal practices and rules that structured the field of criminal defense were a regime facing intense landscape level pressures.⁷⁹ The existing criminal defense norms were reinforced by broader landscape-level factors. These included prevailing ideologies of individual responsibility and limited government, and entrenched racial and class hierarchies.⁸⁰ The criminal defense system was beginning to fail, however, when faced with rapid urbanization, waves of immigration, and intensifying industrialization.⁸¹ These shifts created new challenges, such as rising caseloads, overcrowded jails, and language barriers between defendants and court personnel.⁸²

At the same time, racial and class biases deeply influenced the administration of justice. Poor and minority defendants often faced the harshest treatment.⁸³ These landscape pressures created instabilities in the existing way of doing things—these moments created opportunities for an idea like public defense to emerge.⁸⁴

Progressive Era reformers were advocating for more scientific and professional approaches to social problems, including crime and punishment.⁸⁵ The professionalization of law and the expansion of the administrative state created a social expectation that social services, including criminal defense, were becoming institutionalized.⁸⁶ Additionally, the absence of a reliable defense bar in many cities, especially for the poor, created a functional gap that a public defender could potentially fill.⁸⁷

The early public defender movement aligned with a broader reconceptualization of crime and punishment in the early 20th century landscape. Reformers and policymakers were beginning to think of crime and punishment as a system in need

⁷⁹ See Geels, *Technological Transitions*, *supra* note 49, at 1260–62.

⁸⁰ See Mayeux, *The Idea of “The Criminal Justice System”*, *supra* note 67, at 64; DAVID M. KENNEDY, *FREEDOM FROM FEAR* 33–34 (C. Vann Woodward ed., 1999); MICHAEL WILLRICH, *CITY OF COURTS* 282–83 (Christopher Tomlins ed., 2003).

⁸¹ Adler, *supra* note 75, at 36–37.

⁸² See *id.* at 34, 44; Nicholas Turner, *Reimagining Prison Web Report: American History, Race, and Prison*, VERA, <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> (last visited June 4, 2025).

⁸³ See Adler, *supra* note 75, at 34, 42; Foltz, *Address at the Chicago World’s Fair*, *supra* note 1, at 249.

⁸⁴ Babcock, *Inventing the Public Defender*, *supra* note 5, at 1267, 1271; see also Adler, *supra* note 75, at 34, 42.

⁸⁵ Adler, *supra* note 75, at 36–37, 40.

⁸⁶ Mayeux, *The Idea of “The Criminal Justice System”*, *supra* note 67, at 73.

⁸⁷ Foltz, *Address at the Chicago World’s Fair*, *supra* note 1, at 249.

of coordination.⁸⁸ The public defender idea both reflected and strengthened this emerging criminal justice system paradigm, positioning itself as a key component of a modernized, efficient machinery of justice. However, these facilitating factors did not make the public defender's institutionalization inevitable.

B. The Start-Up Phase: Early Public Defender Offices and Resistance

In response to the glaring inadequacies of the existing system, a revolutionary idea from Clara Foltz started the public discussion about the public defender.⁸⁹ Foltz envisioned an institutional defender that would be paid from "the public treasury" to represent indigent defendants as a full-time occupation, thereby ensuring more consistent advocacy while relieving the private bar of an increasingly onerous burden.⁹⁰ Foltz's vision was radical for its time: a publicly funded, institutionalized defender system that would provide professional, full-time representation to indigent defendants.

From an MLP perspective, Foltz's proposal was an emergent niche innovation. Niches, as conceptualized in the MLP, are protected spaces where radical innovations can develop without being subject to the full selection pressures of the existing system.⁹¹ In other words, the public defender was at the time an experimental model of legal representation that responded to problems in the existing system.

Drawing on her own experiences defending accused criminals and advocating for women's rights in California, Foltz framed the public defender as an essential counterweight to the public prosecutor, a safeguard against the conviction of the innocent, and a step towards greater gender equality in the legal profession.⁹² Foltz's public defender proposal also offered a fundamental reconceptualization of the state's role in criminal justice. It also embodied an intently adversarial conception of the public defender's role, in contrast to the compromising approach of many appointed counsel systems.⁹³

Foltz's framing of indigent defense as a systemic imperative and professional specialty aligned with the Progressive Era's faith in professionalism, bureaucracy, and good government as antidotes to urban dysfunction. Foltz also gained a larger professional audience through her work from prominent organizations like the Woman's Christian Temperance Union and her alliance with other legal

⁸⁸ See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 13, 73–74 (2007).

⁸⁹ BARBARA ALLEN BABCOCK, WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ 288–89 (2011) [hereinafter BABCOCK, WOMAN LAWYER].

⁹⁰ See Clara Shortridge Foltz, *Public Defenders*, 31 AM. L. REV. 393, 393–403 (1897) [hereinafter Foltz, *Public Defenders*].

⁹¹ Geels & Schot, *supra* note 41, at 400.

⁹² Babcock, *Inventing the Public Defender*, *supra* note 5, at 1282–84.

⁹³ *Id.* at 1274–75, 1283–84.

reformers.⁹⁴ Many Progressive Era reformers were concerned about the excesses of industrial capitalism and the corruption of democratic institutions. Foltz was also deeply connected to these reform networks and she drew on her connections to women's rights, labor, and progressive organizations to build support for her proposal.⁹⁵ This framing challenged the view that access to counsel was a matter of individual responsibility rather than state obligation.

By positioning public defense as a matter of systemic fairness and efficiency, rather than charity, Foltz tapped into emerging ideas about the role of government in addressing social problems.⁹⁶ This alignment between niche innovation and landscape developments was a factor in the public defender's success.⁹⁷ Similarly, connecting indigent defense to the women's rights movement allied public defense to the growing political clout of the suffrage movement. By enlisting allies in the legal elite, they exploited fissures within the bar around the need for professionalization.⁹⁸ And by focusing on experiments like the Los Angeles public defender office, they pursued an incremental approach that neutralized some opposition and provided a proof of concept for further expansion.⁹⁹

Foltz's model legislation to establish a statewide public defender system in California was introduced in the state assembly in 1897 but failed to pass.¹⁰⁰ Foltz spent decades advocating for public defender legislation, navigating a landscape of institutional inertia, professional skepticism, and political resistance.¹⁰¹

The early public defender movement exemplifies what transition scholars call the "acceleration phase" of a transition, characterized by experimentation, coalition-building, and efforts to gain legitimacy for a new socio-technical configuration.¹⁰² While the movement faced significant resistance from entrenched regime actors, it was able to leverage landscape-level shifts and build strategic alliances to create protected spaces for the public defender model to develop and demonstrate its viability.

The resistance Foltz encountered illustrates a key dynamic in socio-technical transitions: the tendency of existing regimes to resist fundamental change.

⁹⁴ See BABCOCK, WOMAN LAWYER, *supra* note 89, at 259–65.

⁹⁵ See *id.* at 288–89, 293–94.

⁹⁶ See Adler, *supra* note 75, at 37–38; Foltz, Address at the Chicago World's Fair, *supra* note 1, at 249.

⁹⁷ See, e.g., Geels, *Multi-Level Perspective*, *supra* note 25, at 27.

⁹⁸ See NORGREN, *supra* note 4, at 131.

⁹⁹ Babcock, *Inventing the Public Defender*, *supra* note 5, at 1274–77.

¹⁰⁰ See Babcock, *Inventing the Public Defender*, *supra* note 5, at 1273; Ingrid Eagly, Tali Gires, Rebecca Kutlow & Eliana Navarro Gracian, *Restructuring Public Defense after Padilla*, 74 STAN. L. REV. 1, 14 n.52 (2022).

¹⁰¹ Babcock, *Inventing the Public Defender*, *supra* note 5, at 1270–71, 1273–74.

¹⁰² See, e.g., Cameron Allen & Shirin Malekpour, *Unlocking and Accelerating Transformation to the SDGs: A Review of Existing Knowledge*, 18 SUSTAINABILITY SCI. 1939, 1949 (2023); Geels & Schot, *supra* note 41, at 400–03.

Incumbent actors, including judges and private attorneys, had vested interests in maintaining the status quo and were able to mobilize significant resources to block or delay the adoption of the public defender model. This resistance is a common feature of transition processes and often requires niche innovations to adapt and evolve in response to regime pressures.¹⁰³

C. *Competing Early Models of Public Defense*

Within the emerging public defender movement there were competing visions and approaches to indigent defense reform. Foltz's ideas were not controlling—the public defender model evolved in different directions based on the competing visions and interests of reformers and practitioners.¹⁰⁴ Debates about the public defender's organizational purpose during the era reflected the ongoing tension between the public defender's role as an advocate for the individual client and as an officer of the court, charged with ensuring the fair and efficient administration of justice. These battles indicate that public defense was a flexible concept. The norms of public defense were adapted to different reformers' assessments of the fundamental problems in the criminal justice system.¹⁰⁵ As a new idea, public defense needed to mature for it to have a distinct identity and stable mission.

Foltz's model of the public defender as an independent, adversarial advocate for the poor represented one pole in this debate. It emphasized the public defender's role as a check against state power and a bulwark against systemic injustice.¹⁰⁶ A competing vision of the public defender as a partner in the efficient administration of justice represented a more accommodationist approach.¹⁰⁷ A non-adversarial model reflected the broader goals of the Progressive Movement, which sought to use the power of the state to address social problems and promote the public good.¹⁰⁸

Many of the early public defender offices that emerged in the 1910s and 1920s often embodied a vision of indigent defense that was quite different from what Foltz had originally proposed. Rather than fiercely independent and adversarial advocates, many of these early public defenders saw themselves as partners with prosecutors and judges in the efficient administration of justice.¹⁰⁹ Reginald Heber Smith, a leading advocate for the public defender model in the 1920s, exemplified this vision.

¹⁰³ Smith & Raven, *supra* note 38, at 1030; Geels, *Sectoral Systems of Innovation*, *supra* note 51, at 910–13.

¹⁰⁴ Babcock, *Inventing the Public Defender*, *supra* note 5, at 1277–78.

¹⁰⁵ *See id.* at 1277–78.

¹⁰⁶ *See, e.g., id.* at 1271–72; Foltz, *Public Defenders*, *supra* note 90.

¹⁰⁷ *See* Mayeux, *What Gideon Did*, *supra* note 36, at 21, 30–32; *see also* Babcock, *Inventing the Public Defender*, *supra* note 5, at 1277 (noting the competing conceptions of the role of public defenders).

¹⁰⁸ Mayeux, *What Gideon Did*, *supra* note 36, at 30–31.

¹⁰⁹ *Id.* at 15, 30–32.

Smith's concept was verged on forms of socialized justice because it emphasized cooperation and coordination between defenders, prosecutors, and courts, although Smith preferred to highlight his work as promoting equal rather than socialized justice.¹¹⁰ Smith argued that public defenders should strive for teamwork and efficiency rather than adversarial zeal.¹¹¹ This vision expected public defenders to strive for cooperation and teamwork with prosecutors to achieve their clients' best interests.¹¹² In Smith's view, the public defender was not just an advocate for the individual defendant, but a socialized servant of the larger criminal justice system.

While Smith's vision helped make the public defender model more palatable to elite reformers and policymakers, it diluted its transformative potential. By emphasizing the public defender's role as a "team player" and "officer of the court," Smith's approach risked diminishing the interests of poor defendants to a demand for bureaucratic efficiency and social control.¹¹³ It also foreshadowed the ways in which the public defender model could be co-opted and constrained by the dominant carceral institutions.¹¹⁴

Another key debate concerned the role of plea bargaining in public defense. Many early public defender offices resisted plea bargaining, insisting on taking cases to trial as a matter of principle.¹¹⁵ However, as caseloads and costs rose, defenders increasingly acquiesced to a plea bargaining system.¹¹⁶ This shift aligned the practice of public defenders with that of private appointed counsel and contributed to the entrenchment of plea bargaining as a core feature of the criminal justice system.

Over time, as the public defender movement gained traction and institutional support, there was a process of niche convergence and consolidation. The Progressive vision of socialized justice and cooperation with the courts and prosecutors became the dominant approach within the public defender niche, while Foltz's more

¹¹⁰ See John M.A. Dipippa, *Reginald Heber Smith and Justice and the Poor in the 21st Century*, 40 CAMPBELL L. REV. 73, 91 (2018).

¹¹¹ In transition theory terms, these models competed as different "niches" within the larger landscape of indigent defense reform. Each niche had its own internal logic, resources, and strategies for engaging with (or challenging) the dominant regime of privatized legal aid. See, e.g., Geels, *Technological Transitions*, *supra* note 49, at 1260–62.

¹¹² REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 121–22 (1919).

¹¹³ For more on the criminal justice system's demand for efficiency, see Rachel Barkow, *The Criminal Regulatory State*, in *THE NEW CRIMINAL JUSTICE THINKING* 33, 36 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

¹¹⁴ This is arguably an interesting example of "elite capture." For a discussion on elite capture, see OLÚFÉMI O. TÁFŌ, *ELITE CAPTURE: HOW THE POWERFUL TOOK OVER IDENTITY POLITICS (AND EVERYTHING ELSE)* (2022).

¹¹⁵ See Babcock, *Inventing the Public Defender*, *supra* note 5, at 1271–72.

¹¹⁶ Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6 n.18, 34 (1979).

adversarial model was marginalized.¹¹⁷ This process of niche realignment helps to explain how the public defender system took shape in the early-to-mid 20th century, and how it was both enabled and constrained by the broader political, economic, and ideological currents of the Progressive Era.¹¹⁸

By the eve of *Gideon v. Wainwright*,¹¹⁹ the public defender movement had made significant strides in establishing a foothold within the criminal justice system and in advancing the principle of publicly funded indigent defense.¹²⁰ While Clara Foltz and her allies succeeded in establishing a foothold for the public defender model, their efforts were repeatedly contested and constrained.¹²¹ What was an innovative idea had become shaped and constrained by the dominant institutional and ideological frameworks, from the new “criminal justice system” paradigm to the fiscal, political, and professional pressures of the era. The result was a public defense system that was chronically underfunded, institutionally marginalized, and co-opted by the broader imperatives of the criminal justice system.¹²²

In this sense, the story of public defense in the early 20th century is a story of innovation and progress that depicts backlash, co-optation, and resistance. It also demonstrates how radical and insurgent ideas can be defeated and co-opted in entrenched legal institutions and ideologies.¹²³ In any event, the public defender model demonstrated resilience, adaptability, and early signs of how it could inspire reformers and advocates.

D. *The Acceleration Phase: The Expansion of Public Defense and the Impact of Supreme Court Cases*

The breakthrough came in 1914, when Los Angeles established the nation’s first public defender office. This milestone was achieved through the skillful alliance-building of a carefully created, organized, and united group of Progressive activists, legal aid societies, and women’s rights groups.¹²⁴

¹¹⁷ Mayeux, *What Gideon Did*, *supra* note 36, at 69–70.

¹¹⁸ *Id.* at 23–24.

¹¹⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹²⁰ Mayeux, *What Gideon Did*, *supra* note 36, at 21–22.

¹²¹ See Babcock, *Inventing the Public Defender*, *supra* note 5, at 1310; Mortimer D. Schwartz, Susan L. Brandt & Patience Milrod, *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 548, 557, 562 (1976).

¹²² See Babcock, *Inventing the Public Defender*, *supra* note 5, at 1311–12, 1314.

¹²³ See, e.g., Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1495–1506 (2017) (describing how lawyers altered the landscape of immigration law through creative legal and social advocacy during a time when immigration enforcement was heightened).

¹²⁴ See Babcock, *Inventing the Public Defender*, *supra* note 5, at 1274–75, 1396.

The establishment of the Los Angeles public defender office represents a critical moment in the transition process, what MLP scholars would consider a breakthrough at the local level.¹²⁵ Establishing an office demonstrated the viability of the public defender model and created a foothold for the niche innovation within the existing regime. It also illustrated the importance of strategic agency in transitions, as reformers skillfully navigated the complex landscape of early 20th century politics and professional networks to advance their cause.

The first public defender office's public statements often emphasized the importance of working harmoniously with the prosecution and obtaining the most favorable disposition of the case through plea bargaining and other forms of negotiation.¹²⁶ This non-adversarial approach aligned with the vision of public defense advanced by reformers, who desired teamwork between defenders, prosecutors, and courts.¹²⁷ A lot like in specialty courts today, the office's mission was to promote efficiency and rehabilitation, rather than to challenge the power of the state.¹²⁸

The Los Angeles model was soon replicated in other cities and counties across the country, as the public defender idea spread through the networks of progressive reform. By the 1930s, public defender offices had been established in several major cities, including Los Angeles, San Francisco, Chicago, and New York.¹²⁹ This expansion marked the beginning of what transition theorists call an acceleration phase, where niche innovations gain momentum and start to challenge the dominant regime or system.¹³⁰

The growth of public defense during this period was shaped by the evolving rules of constitutional criminal procedure. A series of landmark Supreme Court decisions began to recognize a constitutional right to counsel in criminal cases, creating new support for public defense even as they underscored the resilience of the traditional regime. These cases can be understood as landscape-level developments that created both opportunities and constraints for the emerging public defender niche.

The first doctrinal breakthrough came in *Powell v. Alabama* in 1932 where the Court held that the Fourteenth Amendment's Due Process Clause required the appointment of counsel in capital cases.¹³¹ This decision, while limited in scope,

¹²⁵ Geels & Schot, *supra* note 41, at 400.

¹²⁶ See Sara Mayeux, *The Case of the Black-Gloved Rapist: Defining the Public Defender's Role in the California Courts, 1913–1948*, 5 CAL. LEGAL HIST. 217, 227–29 (2010).

¹²⁷ See SMITH, *supra* note 112, at 118–22.

¹²⁸ *Id.* at 117–20. This is often called therapeutic jurisprudence. For more on the culture of specialty courts, see Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595 (2016).

¹²⁹ Sara Mayeux, "An Honest but Fearless Fighter": *The Adversarial Ideal of Public Defenders in 1930s and 1940s Los Angeles*, 36 L. & HIST. REV. 619, 627 n.33, 628 (2018); MAYEUX, FREE JUSTICE, *supra* note 10, at 50.

¹³⁰ See Köhler et al., *supra* note 22, at 13.

¹³¹ *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

signaled a growing recognition of the fundamental importance of legal representation to a fair trial. The Court's analysis also indicated that the principles of due process and fundamental fairness could override the traditional presumption that defendants were responsible for retaining their own lawyers.¹³² This approach resonated with Progressive ideas about the need for a more socialized, responsive model of criminal justice, attuned to the individual circumstances of offenders.

Powell represented a significant landscape shift that created new opportunities for the public defender niche. By establishing a constitutional basis for appointed counsel, even in limited circumstances, the decision legitimized the idea of state-provided defense and opened new avenues for advocacy and expansion. However, the decision highlighted the resilience of the existing regime, as it stopped well short of mandating a comprehensive system of public defense. It was narrowly limited to capital cases and special circumstances, leaving intact a model that provided virtually no assistance for low-income defendants.¹³³ The "special circumstances" rule also vested considerable discretion in trial judges to decide what those circumstances were, allowing ample room for racial bias and paternalism to shape the provision of counsel.¹³⁴ In practice, many states simply ignored the decision or construed it narrowly.¹³⁵

In the decades that followed, the Court continued to grapple with the contours of the right to counsel. In *Johnson v. Zerbst* in 1938, the Court extended the Sixth Amendment right to counsel to all federal criminal proceedings, holding that no person could be deprived of life or liberty without the assistance of counsel unless that right was knowingly and intelligently waived.¹³⁶ This decision marked a significant expansion of the right to counsel in federal courts, although it did not directly apply to the states. Notably, the Supreme Court grounded the right to counsel in the text of the Sixth Amendment, rather than in the more general concept of due process.¹³⁷

However, the promise of *Powell* was soon constrained by the Court's decision in *Betts v. Brady* in 1942, when the Court declined to extend the Sixth Amendment right to counsel to state criminal proceedings.¹³⁸ *Betts* involved a request for appointed counsel by a non-capital defendant in Maryland who was denied

¹³² *Id.* at 68–69.

¹³³ Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 WASH. U. L.Q. 317, 319–20, 322–23 (2001).

¹³⁴ The *Powell* opinion referred to the defendants as "the negroes" and described them as ignorant and illiterate youths in need of help. See *Powell*, 287 U.S. at 49–51, 71.

¹³⁵ See MAYEUX, FREE JUSTICE, *supra* note 10, at 101.

¹³⁶ *Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938).

¹³⁷ *Id.* at 462.

¹³⁸ *Betts v. Brady*, 316 U.S. 455, 471–72 (1942).

representation.¹³⁹ The Court held that the Fourteenth Amendment's Due Process Clause did not categorically require states to appoint counsel in all felony cases.¹⁴⁰ Instead, the Court endorsed a case-by-case special circumstances rule similar to *Powell*, finding that the defendant's age, intelligence, and prior experience in court had enabled him to navigate his trial without a lawyer.¹⁴¹

The *Betts* decision seemed to entrench a two-tiered system of justice where the worthy poor facing extreme punishments might be entitled to counsel, but the unworthy poor facing routine felony charges had no such guarantee.¹⁴² This dual regime denied counsel to most poor defendants, and stigmatized those who did receive aid as objects of pity rather than bearers of rights.¹⁴³

The Court's early right to counsel cases had significant impacts on the landscape of public defense, creating both opportunities and constraints for the emerging niche. They helped to establish the idea that the appointment of counsel was a fundamental component of a fair trial, and that the state had an obligation to provide counsel to indigent defendants in certain circumstances. These cases sketched a constitutional framework for evaluating the adequacy of indigent defense systems and a normative basis for claims to public provision of counsel.

These cases also reinforced elements of the existing system—particularly *Betts*—illustrating the ongoing resilience of the existing regime and the challenges faced by niche innovations in gaining broader acceptance. The special circumstances rule reaffirmed the dominant view that counsel was not a universal right but a discretionary benefit, to be provided only in exceptional cases.¹⁴⁴ This framing helped to contain the disruptive potential of the public defender model and preserve key elements of the existing system.

Some states responded to *Betts* by voluntarily extending the right to counsel beyond capital cases.¹⁴⁵ This expansion created new opportunities for public defender offices, which could now justify their existence in terms of compliance with state law, not just charitable obligation.¹⁴⁶ Some offices seized on *Betts* to lobby their legislatures for more funding and personnel, arguing that a categorical right to

¹³⁹ *Id.* at 456–57.

¹⁴⁰ *Id.* at 471–72.

¹⁴¹ *Id.* at 472.

¹⁴² For more on the “worthy/unworthy” defendant trope in early 20th century legal aid rhetoric, see Mayeux, *What Gideon Did*, *supra* note 36, at 21–22.

¹⁴³ *Id.* at 39–40.

¹⁴⁴ Note, *The Indigent Defendant in the State Criminal Proceeding: Betts v. Brady is Interred*, 38 IND. L.J. 623, 628 (1963).

¹⁴⁵ See *McNeal v. Culver*, 365 U.S. 109, 119–21 (1961) (Douglas, J., concurring) (listing 35 states that provided a right to counsel to all indigent defendants who were charged with any felony crime).

¹⁴⁶ Mayeux, *What Gideon Did*, *supra* note 36, at 50–51.

counsel, while not federally required, was still good policy.¹⁴⁷ In this way, *Betts* provided an argument for public defenders to push for incremental improvements, even as it constrained their constitutional claims.

These state-level developments highlight the complex dynamics of niche-regime interactions in transitions. While federal constitutional doctrine remained limited, some states created more hospitable environments for public defender innovations, allowing for experimentation and learning that would later inform broader systemic changes.¹⁴⁸ This pattern of state-level innovation preceding federal mandates has frequently been seen as a product of federalism and theorized in legal scholarship through interest convergence theory, but it is a distinctive feature of transitions, which offers a different lens for understanding how law influences and responds to changes in institutions and society.¹⁴⁹

Despite the limitations of the Court's early right to counsel cases, they helped to establish the idea that the appointment of counsel was a fundamental component of a fair trial, and that the state had an obligation to provide counsel to indigent defendants in certain circumstances. This created a potential opening for public defenders to reframe their mission as fulfilling a constitutional mandate.

E. Another Round of Regime Resistance

The period from the 1930s to the early 1960s was a critical phase in the transition of public defense from a niche innovation to an increasingly institutionalized component of the criminal justice system. While progress was uneven and constrained by the resilience of the existing regime, the public defender model gained important footholds and built momentum for more transformative change. The stage was set for a potential breakthrough, which would come with the landmark *Gideon v. Wainwright* decision in 1963.

As the public defender model gained momentum, it still encountered significant resistance from defenders of the status quo. This resistance took a variety of forms, from overt hostility and opposition to more subtle efforts at cooptation and control. Efforts to create a more institutionalized and professionalized public defender system faced significant headwinds. Reformers had to contend not only with

¹⁴⁷ *Id.* at 48–49.

¹⁴⁸ *Id.* at 23, 50, 60–62.

¹⁴⁹ For a discussion of federalism and innovation, see, for example, Hannah J. Wiseman & Hari M. Osofsky, *Dynamic Energy Federalism*, 72 MD. L. Rev. 773 (2013) (discussing how state experimentation in energy policy often precedes federal action); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

the fiscal and political constraints of the era, but also with the deep-seated resistance of the legal profession and the broader criminal justice system to systemic change.¹⁵⁰

One key line of resistance was the persistent opposition of much of the private bar to expanding public defender offices. Many lawyers saw public defenders as a threat to their livelihoods and professional autonomy.¹⁵¹ They worried that public defenders would monopolize cases that could be handled by private appointed counsel, depriving them of income and experience.¹⁵² Some lawyers also questioned the competence and zeal of public defenders, suggesting they would provide inferior representation to poor clients.¹⁵³ In some cases, private attorneys sought to limit the scope or jurisdiction of public defender offices, or to ensure that they would not compete with private attorneys for clients or resources.¹⁵⁴ These arguments resonated with a long tradition of skepticism towards government-provided legal services among American lawyers.¹⁵⁵

These forces of resistance and stabilization illuminate the persistence of the charity model of indigent defense, even as the public defender ideal gained traction in the early- to mid-20th century. The charity model, which relied on volunteer attorneys or low-paid court-appointed counsel, was deeply entrenched in the legal profession and the broader culture of the criminal justice system. It was seen as one way for the legal profession to fulfill its ethical obligation to provide pro bono representation, while also maintaining the traditional model of private, individualized representation.¹⁵⁶

To counter this opposition, public defender leaders pursued several strategies. They sought to win over skeptics in the bar by emphasizing their professionalism, efficiency, and cost-effectiveness.¹⁵⁷ They argued that public defenders could relieve private lawyers of the “burden” of court appointments while also providing more systematic and expert representation.¹⁵⁸ They cultivated allies among elite lawyers and judges who were sympathetic to the cause of criminal justice reform.¹⁵⁹ And they lobbied for legislation that would permit, but not require, counties to establish

¹⁵⁰ See Mayeux, *What Gideon Did*, *supra* note 36, at 31; Köhler et al., *supra* note 22, at 13.

¹⁵¹ See Babcock, *Inventing the Public Defender*, *supra* note 5, at 1310.

¹⁵² Mayeux, *What Gideon Did*, *supra* note 36, at 30.

¹⁵³ Matthew Clair, *Unequal Before the Law*, THE NATION (Dec. 14, 2020), <https://www.thenation.com/article/society/sara-mayeux-free-justice-public-defenders/>.

¹⁵⁴ See Mayeux, *What Gideon Did*, *supra* note 36, at 30–31 (noting that in 1912, the private bar in New York rejected the public defender model and preferred the voluntary defender model that was funded by wealthy philanthropists).

¹⁵⁵ Clair, *supra* note 153.

¹⁵⁶ See Mayeux, *What Gideon Did*, *supra* note 36, at 30–31.

¹⁵⁷ See Babcock, *Inventing the Public Defender*, *supra* note 5, at 1271, 1276–77.

¹⁵⁸ See *id.* at 1271–72, 1312.

¹⁵⁹ Mayeux, *What Gideon Did*, *supra* note 36, at 49, 50.

public defender offices, assuaging fears of a state-mandated system.¹⁶⁰ These efforts had some success in muting the opposition of the bar, but they also required public defenders to adopt a more conciliatory posture that limited their ability to challenge the underlying premises of the charity model.¹⁶¹

Another key resistance line came from the judiciary. Many judges were skeptical of the need for a special cadre of public defenders, seeing them as a threat to judicial control over the appointment and compensation of counsel.¹⁶² They worried that public defenders would complicate the efficient processing of cases and strain court budgets with excessive demands for trials and appeals.¹⁶³ Some judges also believed that the charity model was sufficient to meet the needs of most defendants, and that public defenders would only encourage undeserving defendants to contest their guilt.¹⁶⁴ This skepticism was reinforced by the Supreme Court's special circumstances rule, which vested wide discretion in trial judges to determine which defendants deserved appointed counsel.¹⁶⁵

Public defenders responded to this judicial resistance in part by pursuing closer collaborative relationships with judges.¹⁶⁶ They sought appointments to court-sponsored committees and advisory boards, where they could build trust and influence court policies and practices.¹⁶⁷ They courted influential judges as allies and patrons, seeking their endorsement and support for public defender legislation.¹⁶⁸ At the same time, they also worked to establish their independence from the judiciary, lobbying for public funding and insulation from judicial control over their budgets and operations.¹⁶⁹ This balancing act reflected the dual role of public defenders as both officers of the court and advocates for their clients.

A final line of resistance came from the established legal aid societies and other elite philanthropic organizations involved in the charity model of indigent defense.

¹⁶⁰ For Foltz's view on her legislation, see Foltz, *Public Defenders*, *supra* note 90, at 393–94.

¹⁶¹ See MAYEUX, *FREE JUSTICE*, *supra* note 10, at 51–55.

¹⁶² See Babcock, *Inventing the Public Defender*, *supra* note 5, at 1277–78 (noting the opposition of judges to the public defender model).

¹⁶³ See generally David Mars, *Public Defenders*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 199 (1955) (summarizing various objections to the public defense model in favor of the legal aid or charity model).

¹⁶⁴ *Id.*

¹⁶⁵ *Betts v. Brady*, 316 U.S. 455, 462–64 (1942) (articulating the special circumstances rule for the appointment of counsel); see Tracey L. Meares, *What's Wrong with Gideon*, 70 U. CHI. L. REV. 215, 222 (2003)).

¹⁶⁶ See MAYEUX, *FREE JUSTICE*, *supra* note 10, at 41, 50, 136–37 (discussing the strategies used by public defenders to build alliances with judges).

¹⁶⁷ See generally *id.* (discussing numerous committees with public defense advocates on their board that worked with courts and legislators to shape local policies).

¹⁶⁸ See *id.* at 117–18.

¹⁶⁹ See *id.* at 132.

These organizations were often skeptical of the public defender idea, seeing it as a radical departure from their traditional focus on deserving clients and voluntary service.¹⁷⁰ They feared public funding would undermine their independence and autonomy, subjecting them to political influence and bureaucratic control.¹⁷¹ They also feared competition from public defenders for scarce resources and prestige, and the loss of control over the selection and training of defense counsel.¹⁷²

Initially, public defenders sought to win over legal aid societies as allies, emphasizing their common mission and the potential for collaboration.¹⁷³ In cities like New York and Philadelphia, they experimented with hybrid models that combined public funding with private management, hoping to get the best of both approaches. But these efforts often foundered due to ongoing tensions over control, funding, and eligibility criteria.¹⁷⁴ As public defenders became more established, they increasingly differentiated themselves from legal aid, arguing that a fully public model was necessary to ensure universal representation and systemic reform.¹⁷⁵ This shift put them in more direct competition with the charity model, even as they continued to rely on its personnel and resources.

The public defense concept again demonstrated resilience in the face of challenges from the public defender movement. Through a combination of political influence, institutional entrenchment, and adaptive flexibility, legal aid societies and elite bar organizations were able to limit the scope and pace of public defender expansion. To survive in this environment, public defenders had to make accommodations and compromises that blunted their more radical aspirations. They framed their work in terms of efficiency and neutrality rather than adversarial zeal, and they relied on a patchwork of local funding and volunteer labor rather than robust state support.¹⁷⁶ The result was a gradual and uneven shift towards public provision of defense counsel, constrained by the enduring power of the charity model.¹⁷⁷

These overt forms of opposition were compounded by the fiscal and political constraints of the Progressive Era. As crime rates rose, public sentiment turned against Progressive reforms.¹⁷⁸ These tensions came to a head in the 1920s and 1930s, as the public defender movement collided with the growing fiscal and

¹⁷⁰ See *id.* at 58–64.

¹⁷¹ *Id.* at 82, 132.

¹⁷² MAYEUX, FREE JUSTICE, *supra* note 10, at 30–31, 36.

¹⁷³ Mayeux, *What Gideon Did*, *supra* note 36, at 37–38.

¹⁷⁴ MAYEUX, FREE JUSTICE, *supra* note 10, at 131–34.

¹⁷⁵ See *id.* at 51–52, 135.

¹⁷⁶ See Mayeux, *What Gideon Did*, *supra* note 36, at 33–34, 38, 40–41.

¹⁷⁷ *Id.* at 49–51.

¹⁷⁸ See Ryan S. Johnson, Shawn Kantor & Price V. Fishback, *Striking at the Roots of Crime: The Impact of Social Welfare Spending on Crime During the Great Depression* 10 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12825, 2007).

political pressures of the Great Depression. This backlash limited the spread of public defender offices and led some jurisdictions to cut funding or revert to assigned counsel systems. Many public defender offices struggled to secure adequate funding and political support, particularly as state and local governments slashed budgets and prioritized “law and order” responses to rising crime rates.¹⁷⁹

In response, some public defender leaders sought to reframe their work as part of the larger project of criminal justice reform and expanding the welfare state.¹⁸⁰ They argued that public defenders were not just advocates for individual clients, but agents of systemic change who could help to address the root causes of crime and promote rehabilitation. This vision aligned with the broader goals of the New Deal and the emerging criminal justice system paradigm, and helped to secure new sources of funding and legitimacy for public defender offices in some jurisdictions.¹⁸¹

However, this strategy also carried risks and limitations. By linking themselves to the New Deal state and the “criminal justice system” paradigm, public defenders became more vulnerable to the shifting political winds and policy priorities of the federal government.¹⁸² They also found themselves increasingly enmeshed in the same bureaucratic and managerial systems they had once sought to challenge.¹⁸³

F. *The Modern Public Defender Starts to Emerge*

The public defender movement continued to grow in the years after World War II. This growth was enabled by the efforts of reformers to adapt their strategies to the political and institutional constraints of the post-war era while also building new alliances and articulating more expansive visions of reform.

One key driver of this growth was the increasing demand for indigent defense services in the post-war years.¹⁸⁴ The rising crime rates, expanding criminal dockets, and more punitive policies of the 1950s put new strains on the charity model and highlighted the need for a more systematic approach to providing counsel.¹⁸⁵ In some jurisdictions, private bar associations began to express concern about the quality and availability of appointed counsel, lobbying for public funding to ease the burden on their members.¹⁸⁶ Local and state governments also came under pressure

¹⁷⁹ MAYEUX, *FREE JUSTICE*, *supra* note 10, at 133; A BRIEF HISTORY OF PUBLIC DEFENSE IN THE U.S., *supra* note 8.

¹⁸⁰ Mayeux, *What Gideon Did*, *supra* note 36, at 30–33.

¹⁸¹ *See id.* at 30–33 (discussing the impact of the New Deal on criminal justice federalism).

¹⁸² *Id.* at 38–39.

¹⁸³ *See id.* at 50–54.

¹⁸⁴ *See id.* at 28–29.

¹⁸⁵ Clair, *supra* note 153; *see also* H.R. 3490, 82nd Cong. (1951) (creating harsher sentencing requirements for drug convictions).

¹⁸⁶ Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 628–29 (1987).

to provide counsel to follow new procedural rights handed down by the Supreme Court, such as the right to a transcript on appeal.¹⁸⁷ These pressures created openings for public defenders to expand their operations and make the case for a more comprehensive defense system.

In response to these challenges, public defenders developed new organizational and political strategies.¹⁸⁸ In some jurisdictions, they formed alliances with local bar associations and legal aid societies to jointly advocate for public defender legislation.¹⁸⁹ These coalitions emphasized the shared interests of public and private defenders in ensuring the quality and legitimacy of indigent representation, while also carving out distinct roles for each group. Public defenders also cultivated new allies among criminologists, social workers, and other experts concerned with modernizing the criminal justice system.¹⁹⁰ Allies provided scientific and professional legitimacy for the defender cause and helped to reframe it as part of a broader agenda of criminal justice reform.

Public defenders also adapted their arguments and strategies to the shifting politics of the post-war era.¹⁹¹ Recognizing the power of anti-communist sentiment, they distanced themselves from the class-based rhetoric of earlier reformers and emphasized their patriotic commitment to providing a fair trial for all.¹⁹² They also embraced the emerging language of constitutional rights, framing their work as protecting the fundamental liberties of the accused against state abuse.¹⁹³ At the same time, they continued to emphasize the practical benefits of the public defender model in terms of cost savings, efficiency, and systemic improvement. These flexible and pragmatic arguments helped build a broader base of support for public defense in an era of ideological polarization and technocratic reform.

As the public defender movement gained momentum in the 1950s, it began to articulate more expansive visions of reform. Some defenders, drawing inspiration from the successes of the Civil Rights Movement, began to frame access to counsel as a fundamental constitutional right that should be guaranteed to all defendants regardless of income.¹⁹⁴ Many lawyers argued that the special circumstances rule was

¹⁸⁷ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (establishing a constitutional right to a free transcript for indigent criminal appellants); Comment, *The Effect of Griffin v. Illinois on the States' Administration of the Criminal Law*, 25 U. CHI. L. REV. 161, 170–71 (1957).

¹⁸⁸ Mayeux, *What Gideon Did*, *supra* note 36, at 37–40 (describing coalitions between public defenders, bar associations, and legal aid societies in the post-war period).

¹⁸⁹ See, e.g., *About NLADA*, NAT'L LEGAL AID & DEF. ASS'N, <https://www.nlada.org/about-nlada> (last visited June 4, 2025); *History*, METRO. PUB. DEF., <https://mpdlaw.com/history/> (last visited June 4, 2025).

¹⁹⁰ MAYEUX, *FREE JUSTICE*, *supra* note 10, at 35–36.

¹⁹¹ *Id.* at 88–93.

¹⁹² *Id.*

¹⁹³ *Id.* at 151–54.

¹⁹⁴ *Id.* at 88–89.

inherently arbitrary and discriminatory, and that a categorical right to counsel was necessary to ensure equal justice.¹⁹⁵ Other defenders, influenced by the “rehabilitative ideal” of post-war criminology, saw themselves as part of a broader movement to provide individualized treatment and support to offenders.¹⁹⁶ They envisioned a holistic model of defense that would address the social and psychological roots of crime, linking legal advocacy with social services and community-based interventions.

These emerging visions of public defense as a constitutional right and a social service challenged the narrow conception of indigent defense under the charity model. They implied a far more expansive and affirmative role for the state in ensuring access to counsel, one that would require significant new investments in personnel, training, and facilities. At the same time, they began to erode the traditional distinctions between the deserving and undeserving poor, the worthy and unworthy defendant. By linking the right to counsel with broader notions of social citizenship and rehabilitative justice, these visions paved the way for a more universal and egalitarian conception of public defense.

III. THE INSTITUTIONALIZATION OF PUBLIC DEFENSE

By the 1960s, the public defender movement had gained significant traction, establishing a presence in many jurisdictions and challenging the prevailing charity model of indigent defense.¹⁹⁷ However, the concept of public defense remained fragmented, with competing visions and approaches vying for dominance. The movement’s ultimate success would hinge on its ability to capitalize on the broader currents of social and political change sweeping across American society, from the Civil Rights Movement to the War on Poverty.

A. *The Supreme Court’s Landscape Shock in Gideon*

*Gideon v. Wainwright*¹⁹⁸ provided a landscape shock. Decided in 1963 against the backdrop of the Civil Rights Movement and the Warren Court’s rights revolution, *Gideon* held that the Sixth Amendment guaranteed a categorical right to appoint counsel for all felony defendants, regardless of income.¹⁹⁹ Despite its limited immediate impact, *Gideon* marked a decisive symbolic and jurisprudential break

¹⁹⁵ *Id.* at 80–81; Mayeux, *What Gideon Did*, *supra* note 36, at 47–48.

¹⁹⁶ See Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. CRIMINOLOGY AND POLICE SCI. 226, 226 (1959) (describing the rehabilitative ideal as rehabilitation that considers an offender’s “own happiness, health, and satisfaction,” as well as “the interest of social defense”).

¹⁹⁷ Mayeux, *What Gideon Did*, *supra* note 36, at 47–51, 73.

¹⁹⁸ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁹⁹ *Id.* at 342–44.

with the charity model of indigent defense.²⁰⁰ It enshrined the principle of equal justice at the heart of the public defender ideal and inaugurated a new era of constitutional regulation of state criminal procedure. This created new opportunities for reformers to contest the meaning and practice of indigent defense, even as it also unleashed new challenges and resistance.

Gideon was more than a top-down pronouncement from the Supreme Court. It was the culmination of a decades-long struggle by public defenders and their allies to challenge the charity model and establish a more expansive conception of the right to counsel.²⁰¹ That struggle was marked by significant advances but also ongoing resistance and retrenchment, as the public defender movement sought to navigate the shifting landscape of politics, law, and social change in post-war America.²⁰² *Gideon* represented less of a clear-cut victory than an opening salvo in the continuing battle over the meaning and practice of indigent defense.

The path to *Gideon* was not a linear march towards progress, but a contingent and contested process of struggle over the meaning and practice of indigent defense. This process entered a new and even more contentious phase in the post-*Gideon* era, as public defenders sought to translate the abstract promise of the right to counsel into a concrete institutional reality on the ground.

B. Contextualizing *Gideon*

After *Gideon*, the public defender system increasingly reflected the entrenched practices and power relations of the criminal justice system.²⁰³ Public defense also adapted to landscape shifts from social and political change in the 1960s and 1970s. Many states actively resisted implementing *Gideon*'s requirement to ensure legal counsel for poor defendants. One strategy was limiting *Gideon*'s scope and impact through narrow interpretations and minimal compliance.²⁰⁴

Even as public defender offices proliferated, they remained chronically underfunded and understaffed, struggling to meet the growing demand for their services in the face of rising crime rates and punitive policy responses.²⁰⁵ The institutional entrenchment of public defense in the post-*Gideon* era can be understood as a process of niche-regime accommodation and co-optation.

²⁰⁰ Mayeux, *What Gideon Did*, *supra* note 36, at 54.

²⁰¹ *See id.* at 47–51.

²⁰² *See id.* at 30–31.

²⁰³ *Id.* at 80–82.

²⁰⁴ Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 *FORDHAM L. REV.* 1461, 1462–63 (2003).

²⁰⁵ *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 *N.Y.U. REV. L. & SOC. CHANGE* 427, 429–30 (2009); Mayeux, *What Gideon Did*, *supra* note 36, at 84; SIMON, *supra* note 88, at 6–7.

Public defense also was forced to adapt to landscape shifts from social and political change in the 1960s and 1970s: the rise of mass incarceration, the War on Drugs, and the criminalization of poverty.²⁰⁶ As public defender offices became a permanent fixture of the criminal justice system, they were both shaped by and reinforced the problems of mass incarceration and overcriminalization in the broader criminal system. The right to counsel provided a safeguard for individual defendants, while also legitimizing and entrenching a system of racialized mass punishment.²⁰⁷

In recent years, the public defender system has found itself caught between *Gideon*'s aspirational promise and the punishing realities of the carceral state.²⁰⁸ On one side, a growing chorus of scholars, advocates, and policymakers have been calling for a fundamental rethinking of the public defender's role and a renewed commitment to the principles of client-centered, community-based representation.²⁰⁹ The holistic defense and participatory defense models draw insights from movement lawyering and challenge the dominant paradigm of public defense as a narrow, individualized service.²¹⁰ These models express a more expansive and politically engaged model of practice. They are also forging new alliances with grassroots organizers, policy advocates, and directly-impacted communities to tackle the root causes of mass criminalization and build power for transformative change.²¹¹

The entrenched forces of mass incarceration and austerity continued to exert a powerful drag on the public defense system, constraining its ability to fulfill even the basic requirements of *Gideon*. In many jurisdictions, public defenders remained chronically underfunded, overworked, and marginalized within the broader criminal justice apparatus, struggling to provide even minimally adequate representation to their clients.²¹²

²⁰⁶ See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 1, 9, 271–73, 298 (2011).

²⁰⁷ See Butler, *supra* note 12, at 2178.

²⁰⁸ See generally Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1384–87 (2022).

²⁰⁹ Premal Dharia, *A Crisis of Purpose in Public Defense*, LPE PROJECT (Apr. 10, 2024), <https://lpeproject.org/blog/a-crisis-of-purpose-in-public-defense/>.

²¹⁰ See Steinberg, *supra* note 44, at 963–64; Scott Cummings, *Movement Lawyering*, 2017 UNIV. ILL. L. REV. 1645, 1658 (2017); Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 629–32, 634–35 (2020).

²¹¹ See James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 825–26 (2019).

²¹² See Jonathan A. Rapping, *Retuning Gideon's Trumpet: Telling the Story in the Context of Today's Criminal-Justice Crisis*, 92 TEX. L. REV. 1225, 1225–26 (2014).

C. *The Role of Ineffective Assistance of Counsel Cases as Forces of Destabilization and Resistance*

In the decades after *Gideon*, the public defender became further entrenched within the criminal justice bureaucracy, struggling to fulfill its mission amidst rising caseloads, underfunding, and punitive policy responses.²¹³ This institutionalization of public defense, while securing its place within the system, also led to its co-optation by the prevailing carceral logic, often prioritizing efficiency and case processing instead of zealous advocacy.²¹⁴

The limitations of the *Gideon* paradigm became increasingly apparent in the 1980s and 1990s, as the politics of crime control and austerity led to further cut-backs in funding for public defense and the erosion of procedural protections for defendants.²¹⁵ The Supreme Court's decision in *Strickland v. Washington*²¹⁶ with its stringent standard for proving ineffective assistance of counsel, effectively shielded many overburdened and under-resourced public defenders from accountability, perpetuating a system where substandard representation went unchecked.²¹⁷ The decision's emphasis on finality and efficiency over substantive justice further entrenched the challenges faced by indigent defendants seeking meaningful legal assistance.²¹⁸

While the *Strickland* standard proved difficult for many defendants to meet, it also provided a framework for challenging the systemic failings of public defense and holding states accountable for the quality of representation they provided.²¹⁹ Subsequent cases like *Wiggins v. Smith*²²⁰ and *Rompilla v. Beard*²²¹ built on the *Strickland* precedent, finding ineffective assistance where defense counsel had failed to investigate and present mitigating evidence in capital cases. These decisions put pressure on states to provide more resources and training for public defenders, particularly in death penalty cases.

More recently, Supreme Court decisions like *Padilla v. Kentucky*²²² have offered a glimmer of hope for disrupting the post-*Gideon* inertia by expanding the scope of the right to counsel to include advice on collateral consequences, such as deportation

²¹³ See Mayeux, *What Gideon Did*, *supra* note 36, at 50–60.

²¹⁴ See Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1067–68, 1073 (2013) [hereinafter Natapoff, *Gideon Skepticism*].

²¹⁵ See Metzger, *supra* note 37, at 2552–53.

²¹⁶ *Strickland v. Washington*, 466 U.S. 668 (1984).

²¹⁷ See Metzger, *supra* note 37, at 2558.

²¹⁸ *Id.* at 2554, 2565.

²¹⁹ Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1259, 1276, 1278 (1986).

²²⁰ *Wiggins v. Smith*, 539 U.S. 510, 534–38 (2003).

²²¹ *Rompilla v. Beard*, 545 U.S. 374, 393 (2005).

²²² *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

for noncitizen defendants. In *Padilla*, the Court held that defense counsel had a duty to advise non-citizen clients about the immigration consequences of pleading guilty, expanding the scope of the Sixth Amendment right to counsel beyond the traditional bounds of the criminal case.²²³

Padilla had the potential to destabilize the traditional, narrow conception of public defense and pave the way for a more holistic approach that recognizes the interconnectedness of criminal and immigration law. However, the implementation and enforcement of *Padilla* has been uneven, with many public defender offices struggling to provide adequate immigration advice due to lack of resources and expertise.²²⁴ As a result, *Padilla* instead sent a few ripples through the criminal justice system. The challenges in implementing *Padilla* highlight the persistent tension between the aspirational goals of the right to counsel and the harsh realities of an underfunded and overburdened public defense system.²²⁵

While some jurisdictions have embraced innovative models like holistic defense to address these challenges,²²⁶ the dominant paradigm remains one of triage and compromise, often at the expense of defendants' rights and well-being. The struggle for a truly just and equitable public defense system continues, requiring ongoing advocacy, innovation, and a commitment to challenging the structural barriers that perpetuate inequality.

D. Public Defense Adaptations

Despite lacking substantive teeth, ineffective assistance of counsel cases have helped reimagine the public defender's role, from a narrow focus on criminal adjudication to a broader concern with the holistic well-being of clients and communities. This shift in perspective has suggested that the Sixth Amendment right to counsel could be a powerful tool for challenging not just individual instances of ineffective representation, but the wider set of social, economic, and legal barriers that trapped so many criminal defendants in a cycle of poverty and marginalization.²²⁷

Several recent innovations in public defense, such as the incorporation of immigration counsel and social workers, reflect a growing need for a more holistic and

²²³ *Id.*

²²⁴ See Mikaela Wolf-Sorokin, Liz Bradley & Whitney Viets, *Padilla's Broken Promise: Pennsylvania Case Study*, 26 J. CONST. L. 1046, 1084–86 (2024).

²²⁵ See generally STEPHANOS BIBAS, *THE MACHINERY OF JUSTICE* (2012) (noting some of the tensions and problems within the criminal justice system as it exists today).

²²⁶ *E.g.*, *Mission and Story*, BRONX DEFS., <https://www.bronxdefenders.org/who-we-are/> (last visited June 4, 2025).

²²⁷ See Ahmed, *supra* note 33, at 446–47.

interdisciplinary approach to representing marginalized communities.²²⁸ These specialized roles help address the complex social, economic, and legal needs of clients. The growing inclusion of immigration counsel, in particular, responds to the increasing entanglement of criminal and immigration law in the era of mass incarceration and deportation.²²⁹ Similarly, the integration of social workers into defense teams recognizes the importance of addressing issues like mental health, substance abuse, and trauma that often intersect with criminal system involvement.²³⁰ These developments indicate a gradual shift towards a more contextual and community-oriented vision of public defense, even as they remain constrained by the dominant paradigm of individualized case representation.

The rise of specialized units and practice areas within public defense, such as those focused on mental health, drug policy, or juvenile justice, represents another form of niche innovation and experimentation.²³¹ By developing targeted expertise and strategies in these areas, specialized defenders can challenge prevailing assumptions and practices within the broader system and demonstrate the viability of alternative approaches. However, the proliferation of specialization can also be seen as a response to the increasing complexity and fragmentation of the carceral state, rather than a fundamental challenge to its logic.²³² The tensions between specialized advocacy and holistic representation, and the risks of co-optation and marginalization, underscore the complex trade-offs and dilemmas that public defenders face in seeking to transform their institutional environment.²³³

The transformative potential of these cases was constrained by the deeply entrenched nature of the carceral state and the resistance of key actors and institutions to systemic change.²³⁴ Many public defender offices have failed to meaningfully respond to *Padilla* because they lack the resources and expertise to provide comprehensive immigration advice to all their clients.²³⁵ Courts also proved reluctant to

²²⁸ Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034, 1076–79 (2016).

²²⁹ *Id.* at 1034, 1040, 1038, 1043.

²³⁰ See C. ROSS HATTON, RESEARCH ON THE EFFECTIVENESS OF HOLISTIC DEFENSE MODELS & SOCIAL WORKERS IN PUBLIC DEFENDER OFFICES 1 (2023), https://cjil.sog.unc.edu/wp-content/uploads/2023/12/Research-on-Impact-of-Social-Workers_2023.12.19.pdf.

²³¹ Ayesha Delany-Brumsey, *Public Defenders can Open the Door to Health Services*, VERA (Apr. 29, 2015), <https://www.vera.org/news/breaking-point/public-defenders-can-open-the-door-to-health-services>.

²³² See Natapoff, Gideon's Servants, *supra* note 30, at 460–62.

²³³ See *id.* at 461–62.

²³⁴ See Ahmed, *supra* note 33, at 490–92.

²³⁵ Kwon, *supra* note 228, at 1075.

extend the logic of *Padilla* to other contexts, limiting its impact to the specific realm of deportation consequences.²³⁶

Of course, the focus on ineffective assistance, and more broadly the Supreme Court's Sixth Amendment doctrine, to solve public defense carries its own risks and limitations. By locating the problem of substandard representation in the individual failings of defense counsel, the ineffective assistance emphasis obscures the deeper structural and systemic issues that produced those failings in the first place.²³⁷ It also prioritizes a narrow set of legal outcomes, such as overturning convictions or reducing sentences, over the broader goals of empowering clients and communities and challenging the root causes of mass incarceration and over-criminalization.²³⁸

There is arguably a fundamental re-envisioning of the public defender's role and a bold new paradigm for indigent defense reform. Rather than simply seeking to patch the holes in the *Gideon* safety net or tinker at the margins of a broken bureaucratic system, public defenders often ask more radical questions about the very purpose and nature of their work.²³⁹

Grappling with these questions required public defenders to confront the limitations of the *Gideon* paradigm and the ways in which their own institutions and practices were shaped by the imperatives of the carceral state. This demanded a willingness to question long-held assumptions about the boundaries of the defender's role and to imagine new possibilities for solidarity, struggle, and transformative change. Most fundamentally, the criminal justice system has called for a deep moral and political reckoning with the daily realities of racialized criminalization and the complicity of the legal profession in perpetuating a fundamentally unjust social order.

In the face of crisis and opportunity, the public defense community faced a choice: to continue fighting for survival within the constraints of the system as it existed, or to join with the movements fighting to transform that system from its very foundations. While some offices experimented with innovative approaches to holistic representation and community engagement, most remained mired in a culture of triage and burnout, as defenders struggled to manage ever-increasing case-loads with ever-diminishing resources.²⁴⁰ The stubborn persistence of these challenges reflects the fundamental tension of public defense: the struggle to promote and protect individual rights within a system that systematically denies them.

²³⁶ Joanna Rosenberg, *A Game Changer? The Impact of Padilla v. Kentucky on the Collateral Consequences Rule and Ineffective Assistance of Counsel Claims*, 82 FORDHAM L. REV. 1407, 1410 (2013).

²³⁷ See Stuntz, *supra* note 31, at 15–17.

²³⁸ See Ahmed, *supra* note 33, at 474–76.

²³⁹ JUST. POL'Y INST., SYSTEM OVERLOAD: THE COST OF UNDER-RESOURCING PUBLIC DEFENSE 33 (2011) [hereinafter SYSTEM OVERLOAD], https://justicepolicy.org/wp-content/uploads/2022/02/system_overload_final.pdf.

²⁴⁰ See Kwon, *supra* note 228, at 1102, 1105–06.

The politics of austerity has also constrained the ability of public defenders to provide effective representation and has contributed to the erosion of adversarial process in favor of plea bargaining and mass processing.²⁴¹ Public defenders have long been viewed skeptically, and faced hostility from judges, prosecutors, and sometimes clients.²⁴² This perceived marginalized position is too often viewed as limiting the ability of public defenders to challenge systemic inequities and abuses or exist in a state of dependency on the goodwill and cooperation of other system actors.²⁴³ The inherent tension within the current public defense system is also illustrated by the simultaneous presence of calls for both expanding the scope of public defense to address collateral consequences and a growing skepticism towards the efficacy of the traditional model in achieving meaningful change.²⁴⁴

The growing unionization of public defenders in recent years represents another important development in the landscape of public defense reform.²⁴⁵ By providing a collective voice and bargaining power for defenders, unions have the potential to challenge the top-down management structures and bureaucratic constraints that often inhibit innovation and advocacy within public defense organizations.²⁴⁶ Similarly, the resistance that public defender unions have faced from some administrators and policymakers reflects the entrenched power relations and institutional inertia of the criminal justice system.²⁴⁷ The contested nature of public defense unionization highlights both the transformative potential and the structural barriers to change in this field.

While public defense has struggled to stabilize, the criminal justice system has become more destabilized.²⁴⁸ The post-*Gideon* era also saw the emergence of new criticism and reform efforts that sought to challenge the dominant regime of public defense and envision alternative models of indigent representation. In the 1970s and 1980s, radical lawyers and activists articulated a vision of “movement lawyering” that emphasized the role of legal advocacy in supporting grassroots struggles for social and racial justice.²⁴⁹ This vision inspired the creation of a number of

²⁴¹ See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2631–32 (2013).

²⁴² Rapping, *supra* note 212, at 1225–26 (discussing the cultural antagonism and distrust experienced by public defenders); see also Matthew Lippman & Ronna Wineberg, *In Their Own Defense: A Profile of Denver Public Defenders and Their Work*, 1 JUST. PROF. 45, 45 n.1, 55, 64–65 (1986).

²⁴³ Rapping, *supra* note 212, at 1228.

²⁴⁴ Natapoff, *Gideon Skepticism*, *supra* note 214, at 1051–54.

²⁴⁵ Malia Brink, *Trend in Public Defense: Unionization*, CRIM. JUST., Spring 2020, at 39, 39.

²⁴⁶ *Id.*

²⁴⁷ Metzger, *supra* note 37, at 2555; see also David Brand, *Queens Defenders Won't Recognize Staff Union, Setting Up Lengthy Legal Process*, QUEENS DAILY EAGLE (Dec. 23, 2020), <https://queenseagle.com/all/queens-defenders-declines-to-recognize-staff-union-setting-up-lengthy-legal-process>.

²⁴⁸ See SYSTEM OVERLOAD, *supra* note 239, at 21.

²⁴⁹ Cummings, *supra* note 210, at 1658.

community-based public defense organizations, such as the Neighborhood Defender Service of Harlem and the Bronx Defenders, which sought to provide holistic and participatory representation to clients and their communities.²⁵⁰

The fiscal crises and austerity politics of the 1990s and 2000s catalyzed new advocacy efforts supporting public defense. In 1999 and 2000, public defense guidelines from organizations such as the National Legal Aid and Defender Association (NLADA) gained prominence—they emphasized the importance of manageable caseloads, adequate resources, and independence from political interference.²⁵¹ In 2002, the American Bar Association (ABA) adopted the Ten Principles of a Public Defense Delivery System, which called for the establishment of independent oversight boards and the use of workload controls to ensure quality representation.²⁵²

While these reform efforts have achieved some notable successes, they have also faced significant challenges and limitations. The implementation of national standards and best practices has been uneven and often inadequate, as many jurisdictions continue to prioritize cost-cutting over quality.²⁵³ Efforts to challenge systemic deficiencies through litigation and legislative advocacy have also been met with resistance and backlash from entrenched interests.²⁵⁴

The enduring presence of these challenges highlights the inherent contradiction at the core of public defense: the public defender's mission is to protect individual rights within a system that systematically undermines them. The public defense crisis is both a symptom and an enabler of the broader crisis of incarceration and racialized punishment that has come to define the American criminal justice system since *Gideon*.

²⁵⁰ See Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123–25, 127–28 (2004) (discussing the holistic, client-centered approach of the Bronx Defenders); Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 158–62 (2004) (discussing the community-based approach of the Neighborhood Defender Service of Harlem).

²⁵¹ See OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE xvii–xviii (2000), <https://www.ojp.gov/pdffiles1/Digitization/187491NCJRS.pdf>.

²⁵² STANDING COMM. ON LEGAL AID & INDIGENOUS DEF., AM. BAR. ASSOC., TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1, 3–4 (2023) [hereinafter TEN PRINCIPLES], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-ten-princ-pd-web.pdf.

²⁵³ See SYSTEM OVERLOAD, *supra* note 239, at 8.

²⁵⁴ Mark Pickett, *Public Defense Reform Continues to be a Political Wedge Issue*, 39 CRIM. JUST. 53, 53–54 (2024).

IV. TRANSITION MANAGEMENT TOOLS FOR A SUSTAINABLE PUBLIC DEFENSE TRANSITION

Transition management provides a framework and tools for understanding and influencing the complex process of systemic change.²⁵⁵ Transition management is a tool used to “analyze and to structure or ‘manage’ ongoing governance processes in society.”²⁵⁶ It emphasizes the importance of multi-level alignment, where developments at the niche, regime, and landscape levels converge to create windows of opportunity for transformation.²⁵⁷ It also recognizes the need for regime destabilization, strategically challenging the existing system to create space for new models to emerge and flourish.²⁵⁸ Transition management concepts underscore the importance of experimentation and learning, fostering an environment where niche innovations can be tested, refined, and scaled up.²⁵⁹

The growing adoption of new public defense models illustrates the transition process of niche accumulation, where small-scale experiments and local successes gradually build momentum and legitimacy for a new approach, creating the potential for broader system transformation.²⁶⁰ Public defense stakeholders can actively contribute to shaping the future of the field by adopting a transition management approach to public defense innovation. This involves supporting the development and implementation of holistic and participatory defense models and strategically engaging with the broader criminal justice ecosystem to create a more conducive environment for innovative ideas.²⁶¹

This Part explores specific transition management tools and strategies that can be employed to achieve public defense and law reform goals, and discusses the public defense models that are frontrunners for disrupting the traditional model of public defense.

The holistic defense model, for instance, recognizes that effective representation extends beyond the courtroom to addressing the broader social, economic, and psychological needs of clients that often contribute to their involvement in the criminal justice system.²⁶² By integrating legal advocacy with social work, community outreach, and policy reform, holistic defense seeks to redefine the public defender’s role from a narrow legal advocate to a comprehensive champion for client well-being

²⁵⁵ See Loorbach, *supra* note 72, at 162–63.

²⁵⁶ *Id.* at 163, 168–69.

²⁵⁷ *Id.* at 167–68.

²⁵⁸ See generally Geels, *Technological Transitions*, *supra* note 49, at 1260–61.

²⁵⁹ Shove & Walker, *supra* note 54, at 766.

²⁶⁰ See Smith & Raven, *supra* note 38, at 1027.

²⁶¹ Loorbach, *supra* note 72, at 167–68.

²⁶² See Steinberg, *supra* note 44, at 963–64.

and social justice.²⁶³ In contrast, the participatory defense model challenges the traditional public defense paradigm of attorney-led advocacy by empowering clients and communities to take an active role in their own defense, encouraging a sense of agency and collective resistance against the criminal justice system.²⁶⁴ These niche approaches are still in their nascent stages.²⁶⁵

Holistic and participatory models face challenges in terms of scalability and resource constraints—and will encounter resistance from entrenched interests within the existing regime—but they can also contribute to a broader transformation of public defense and a more just and equitable criminal justice system. To navigate obstacles, stakeholders should consider strategic approaches identified by transition studies.

A. *Emerging Public Defense Niches*

In the face of persistent challenges such as underfunding, overwhelming case-loads, and the limitations of the traditional adversarial model, a growing number of public defenders are exploring alternative approaches to indigent representation that are more holistic, community-oriented, and politically engaged.²⁶⁶ These emerging approaches offer protected spaces for experimentation and learning and foster the development of new practices and strategies that can improve public defense.²⁶⁷ These public defense models can potentially disrupt the criminal justice system by redefining the public defender's role.²⁶⁸

The holistic defense model, pioneered by organizations like the Bronx Defenders and the Neighborhood Defender Service of Harlem, represents a significant departure from traditional public defense practices.²⁶⁹ Holistic defenders work in interdisciplinary teams that include social workers, civil attorneys, and community advocates to address clients' legal and non-legal needs comprehensively.²⁷⁰

The holistic model sees the public defender's core role both as a legal advocate and as a facilitator in addressing these underlying issues. Holistic defenders integrate

²⁶³ Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215, 1218–19 (2015).

²⁶⁴ Godsoe, *supra* note 46, at 725.

²⁶⁵ *Id.* at 716–17.

²⁶⁶ See MOIRA DENIKE & DANIEL MACALLAIR, CTR. ON JUV. & CRIM. JUST., EQUITABLE DEFENSE: HOLISTIC DEFENSE FOR COURT-APPOINTED COUNSEL CASES 3 (2024), https://www.defendyouthrights.org/wp-content/uploads/equitable_defense.pdf.

²⁶⁷ Smith & Raven, *supra* note 38, at 8.

²⁶⁸ See generally Geels, *Technological Transitions*, *supra* note 49, at 1260–62.

²⁶⁹ See Steinberg, *supra* note 44, at 986–88; James M. Anderson, Maya Buenaventura, & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 825, 827 (2019).

²⁷⁰ Steinberg, *supra* note 44, at 986–88.

legal advocacy with social work, civil legal services, and community outreach to promote client well-being and social justice.²⁷¹

For instance, the Knox County Public Defender's Community Law Office in Tennessee has embedded social workers within their defense teams, leading to improved client outcomes and increased rates of pretrial release.²⁷² In response to clients' immigration needs, Brooklyn Defender Services operates a specialized immigration unit to address the complex intersection of criminal and immigration law for non-citizen clients.²⁷³ In another example, the Neighborhood Defender Service of Harlem has experimented with a mental health project that provides specialized representation and support for clients with mental health needs.²⁷⁴

Similarly, the Bronx Defenders employs a team-based structure where each client is assigned a criminal defense attorney, a civil attorney, and a social worker or advocate.²⁷⁵ This allows the office to address the immediate criminal case and related issues such as housing instability, immigration consequences, or untreated mental health conditions that may contribute to a client's system involvement.²⁷⁶

Recent studies have indicated that the holistic approach benefits clients.²⁷⁷ One study of the Bronx Defenders found that their holistic model reduced the likelihood of a jail or prison sentence by 16% and decreased sentence length by 24% compared to traditional public defense.²⁷⁸ Additionally, clients represented by holistic defender offices have reported high levels of satisfaction and trust in their legal representation, highlighting the positive impact of this approach on the attorney-client relationship.²⁷⁹

²⁷¹ *Id.* at 988.

²⁷² Clay Duda, *Knox County Public Defender's Unique Approach to Reducing Recidivism Earns it a National Profile*, KNOXVILLE MERCURY (Aug. 26, 2015), <https://www.knoxmercury.com/2015/08/26/knox-county-public-defenders-unique-approach-to-reducing-recidivism-earns-it-a-national-profile/>.

²⁷³ *See Criminal Defense*, BROOKLYN DEFS. SERVS., <https://bds.org/our-work/criminal-defense> (last visited June 4, 2025).

²⁷⁴ *Why it Matters*, NEIGHBORHOOD DEF. SERV., <https://neighborhooddefender.org/why-it-matters/> (last visited June 4, 2025).

²⁷⁵ Steinberg, *supra* note 44, at 988.

²⁷⁶ *See* Natapoff, Gideon's *Servants*, *supra* note 30, at 460–61.

²⁷⁷ Cory R. Lepage, *Measuring Effectiveness of Holistic Defense: Social Service Provision and Justice System Outcomes*, 24 CRIMINOLOGY CRIM. JUST., L. & SOC'Y 38, 48 (2023); *see also* Kimberly M. Davidson, Brian J. Ostrom & Matthew Kleiman, *Client Perspectives of Holistic Defense: Strengthening Procedural Justice Through Enhanced Client Trust*, 43 JUST. SYS. J. 128 (2022) (exploring how holistic defense approaches enhance client trust in their attorneys and the justice system, thereby strengthening perceptions of procedural justice).

²⁷⁸ Anderson, Buenaventura & Heaton, *supra* note 211, at 823.

²⁷⁹ *See* Davidson, Ostrom & Kleiman, *supra* note 277 (comparing Henneppin and Ramsey Counties in Minnesota, which, "despite being part of the same statewide system, deploy different modalities of public defense delivery: Hennepin County Public Defender Office has adopted

Another example of niche innovation in public defense is the growing adoption of participatory defense and community-oriented defense models.²⁸⁰ The participatory defense model challenges the traditional, adversarial approach to public defense advocacy by encouraging families and communities to play an active role in the defense process.²⁸¹ The participatory model shifts the power dynamics within the legal system by building the capacity of directly impacted communities to advocate for themselves and their loved ones, fostering a sense of agency and collective resistance against the criminal justice system.²⁸² It challenges the traditional hierarchies of the legal system, which often marginalize the voices and experiences of those most directly affected by the criminal justice system.²⁸³ Participatory defense programs often operate outside of traditional public defender offices, in partnership with grassroots community organizations and advocacy groups.²⁸⁴

Similarly, the community-oriented defense model emphasizes the importance of building strong relationships and collaborations between defenders and the communities they serve.²⁸⁵ This model is based on the idea that public defenders are not just legal advocates but also integral members of the communities they represent.²⁸⁶ Community-oriented defense prioritizes engaging with community members, organizations, and leaders, so public defenders can gain a deeper understanding of the social context in which their clients live and work and provide more effective and culturally competent representation.²⁸⁷ The community-oriented model also encourages public defenders to go beyond individual case representation through advocacy, such as know-your-rights training, policy advocacy, and community organizing.²⁸⁸

These emerging models represent a significant departure from the traditional public defender norm by encouraging public defenders to provide more than an

principles of holistic defense while Ramsey County Public Defender Office practices a more traditional style of public defense”).

²⁸⁰ Godsoe, *supra* note 46, at 718; Steinberg, *supra* note 44, at 963–64.

²⁸¹ See Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281–82 (2015).

²⁸² *Id.* at 1283.

²⁸³ *Id.* at 1302.

²⁸⁴ *Id.* at 1284–85. For a specific example, see *Nation's First Youth Participatory Defense Hub Opens this Week in Philadelphia*, DEFS. ASSOC. OF PHILA., <https://phillydefenders.org/nations-first-youth-participatory-defense-hub-opens-this-week-in-philadelphia/> (last visited June 4, 2025) (describing the Defender Association of Philadelphia's partnership with the Youth Art & Self-Empowerment Project).

²⁸⁵ See Alexis Hoag-Fordjour, *Community Responsive Public Defense*, 92 FORDHAM L. REV. 1309 (2024).

²⁸⁶ *Id.* at 1315.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1325.

individualized, case-centered service (or triage). The peripheral status of these niche innovations, however, underscores the challenge of advancing more holistic and politicized approaches to public defense within a system structured around criminal procedure.

While these niche innovations in public defense have demonstrated promise in improving client outcomes and promoting a more just and equitable approach to representation, their transformative potential remains constrained by the broader landscape of the criminal justice system.²⁸⁹ The dominant model of public defense resists and undermines these alternative models based on traditional views of adversarialism and hesitancy from high caseloads and funding constraints.²⁹⁰ The broader landscape, shaped by fiscal austerity, political resistance, and entrenched cultural attitudes about crime and punishment, further limits the scalability and sustainability of these niche innovations.²⁹¹ The expansion of these new models faces significant hurdles, requiring strategic navigation of the complex power dynamics and institutional inertia within the criminal justice system.

B. Nurturing and Scaling Niche Innovations

Transition management tools, particularly strategic niche management (SNM), can guide reforms by identifying and leveraging strategies for overcoming barriers to innovation and conceptualizing transition pathways. SNM involves creating protected spaces (niches) where innovative practices and models can be nurtured and developed, shielded from the pressures of the dominant regime.²⁹² These niches are spaces for experimentation, learning, and the refinement of new approaches, allowing a niche idea to gain legitimacy and momentum before being scaled up and integrated into the broader system.²⁹³ SNM emphasizes the importance of building strong social networks around niche innovations, aligning them with broader landscape developments, and strategically managing expectations and learning processes.

One strategy for cultivating niche innovations is to focus on building internal momentum through learning, experimentation, and network-building.²⁹⁴ This

²⁸⁹ See, e.g., McGregor Smyth, “*Collateral*” No More: *The Practical Imperative for Holistic Defense in a Post-Padilla World . . . Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 141–42 (2011) (discussing “the proven results from an integrated model of defense services,” which “use[s] knowledge of clients . . . to obtain better outcomes in criminal cases from bail to plea to sentencing, manage risk, . . . and build better relationship with clients.”).

²⁹⁰ Primus, *Culture as a Structural Problem in Indigent Defense*, *supra* note 14, at 1771–74.

²⁹¹ See Geels, *Multi-Level Perspective*, *supra* note 25, at 29–30.

²⁹² Smith & Raven, *supra* note 38, at 1027.

²⁹³ *Id.* at 1028.

²⁹⁴ See *id.*

could involve an emphasis on creating more opportunities for public defender innovators to share knowledge and best practices, collaborate on joint projects, and develop a shared vision for the future of the field. In the past, the National Association for Public Defense (NAPD) has played an important intermediary role in exchanging ideas by creating a platform for defenders to learn from innovations and build a collective identity around more transformative models of practice.²⁹⁵ The growing movement to end mass criminalization has also created new opportunities for public defenders to align with decarceration and criminal justice reform advocates that can act as boundary spanners.²⁹⁶ In transition theory terms, boundary spanners facilitate interactions and knowledge exchange, bridging the gap between niche innovations and the dominant regime, and enabling the translation and diffusion of new practices and ideas.²⁹⁷

Public defense movements need to sustain the momentum from wider social justice movements by finding more ways to link niches to larger landscape-level shifts. Public defenders have an opportunity to leverage supportive social and political environments for niche innovations with institutional advocacy. One tactical suggestion is to secure adequate funding that is not tied to caseloads or increases in prosecutor's budgets.²⁹⁸ Another is publicly supporting other criminal justice reform efforts and social movements to amplify the collective voice for change and create a broader coalition for reform.²⁹⁹ Public defenders need to engage in public education and narrative change efforts to shift public perceptions and expectations around the role of public defense, fostering greater understanding and support for alternative models.³⁰⁰ This is outside of the traditional role for public defenders, but it is

²⁹⁵ See, e.g., NAT'L ASS'N FOR PUB. DEF., KENT COUNTY INDIGENT DEFENSE ASSESSMENT, (2023), https://content.govdelivery.com/attachments/KENTCOMI/2024/04/19/file_attachments/2853386/NAPD%20Kent%20County%20Indigent%20Defense%20Assessment.pdf (detailing how the NAPD drew on a broad range of sources in assessing improvements that Kent County could make in delivering indigent defense services).

²⁹⁶ Dharia, *supra* note 209.

²⁹⁷ See Julia M. Wittmayer, Sabine Hielscher, Karoline S. Rogge & K. Matthias Weber, *Advancing the Understanding of Social Innovation in Sustainability Transitions: Exploring Processes, Politics, and Policies for Accelerating Transitions*, 50 ENV'T INNOVATION & SOCIETAL TRANSITIONS 1, 4–5 (2024).

²⁹⁸ Too often public defense budgets are tied to increases in the prosecutor's office. This is self-defeating because it leads to higher caseloads which do nothing to improve the quality of public defense. TEN PRINCIPLES, *supra* note 252, at 3.

²⁹⁹ Building alliances with other reform movements can create a broader coalition for change and amplify the collective voice for public defense reform. See Godsoe, *supra* note 46, at 719 (citing Moore, Sandys & Jayadev, *supra* note 281, at 1281).

³⁰⁰ See Hoag-Fordjour, *supra* note 285, at 1325. The importance of creating a supportive external environment for niche innovations is emphasized in transition management literature. See Smith & Raven, *supra* note 38, at 1031.

embraced as a core competence of the emerging public defense model—one reason they offer the most transformative potential for the criminal justice system.

The goal of transition management in public defense is to catalyze a systemic shift in how legal services are delivered to indigent defendants.³⁰¹ This requires nurturing and scaling up niche innovations, and actively engaging with the broader regime and landscape to create a more conducive environment for change.³⁰² It is also likely contingent on the ability of public defense stakeholders to build strong social networks, advocate for supportive policies and funding, and foster a cultural climate that embraces innovation and experimentation.³⁰³

C. *Destabilizing the Current Regime*

Even with focused and strategic management, innovative ideas might still require a system shock to replace a dominant model. The history of public defense in the U.S. illustrates the stickiness of the legal system and the difficulty of dislodging entrenched practices, even when they are recognized as problematic or dysfunctional.³⁰⁴ The gap between *Gideon*'s inspiring constitutional principles and the sobering realities of public defender offices overwhelmed by crushing caseloads and lacking in resources and respect is the basic evidence.³⁰⁵ The challenges facing public defense reformers, in part, reflect a historical failure to institutionalize a universal vision.³⁰⁶ Efforts to reform public defender systems have often focused on incremental changes within the existing regime, such as increasing funding or reducing case-loads.³⁰⁷ While these efforts are important, they may not be sufficient to overcome the deeper structural barriers to change. Transition theory suggests that destabilizing the current regime, which consists of intentional efforts to weaken or dismantle existing regimes to create space for alternative pathways, is often necessary for transformative reform.³⁰⁸

The challenges of dismantling and replacing entrenched systems are widely recognized in the literature on social change and institutional reform.³⁰⁹

³⁰¹ See Loorbach, *supra* note 72, at 162–63.

³⁰² See Smith & Raven, *supra* note 38, at 1031.

³⁰³ See, e.g., *Mission, Vision & Core Values*, WASH. DEF. ASS'N, <https://defensenet.org/about/core-values-strategic-goals/> (last visited June 4, 2025).

³⁰⁴ See, e.g., Stuntz, *supra* note 31, at 3–4.

³⁰⁵ See SYSTEM OVERLOAD, *supra* note 239, at 6.

³⁰⁶ See, e.g., Rapping, *supra* note 212, at 1227–28.

³⁰⁷ TEN PRINCIPLES, *supra* note 252, at 3–4.

³⁰⁸ Laura van Oers, Giuseppe Feola, Ellen Moors & Hens Runhaar, *The Politics of Deliberate Destabilisation for Sustainability Transitions*, 40 ENV'T INNOVATION & SOCIETAL TRANSITIONS 159, 160–61 (2021).

³⁰⁹ See *id.*; see also Geels, *Multi-Level Perspective*, *supra* note 25, at 31 (arguing that niche innovations alone are often insufficient to trigger regime change).

As MLP transition scholars caution, niche innovations alone are unlikely to overturn a dominant regime, however dysfunctional it may be.³¹⁰ Regimes have tremendous lock-in, which creates path dependency, because of the self-reinforcing nature of dominant regimes and the challenges of deviating from established practices and structures.³¹¹ Path dependency stems from the ways that dominant regimes are entrenched and reinforced by law, policy, professional training, cultural norms, and the material realities of existing infrastructures and practices.³¹² The entrenchment of a dominant (and limited) approach to public defense is supported by the *Gideon* framework, policy decisions, professional norms, and cultural attitudes.

Transition theory suggests ways to destabilize a system, or at least call attention to a system's instability. A destabilization strategy focuses on identifying and exploiting the cracks and contradictions within the dominant system to create openings for transformative change.³¹³ For public defense, this involves litigation, policy advocacy, and public education campaigns to challenge the legitimacy and sustainability of the current system, while also developing alternative models and practices that can offer a compelling vision for a more just and equitable future.

The ongoing movement to end cash bail provides an instructive example of how public defenders can engage in regime destabilization.³¹⁴ By highlighting the injustices of wealth-based detention and developing community-based alternatives, public defenders and their allies have successfully pushed for policy changes in multiple jurisdictions and shifted public discourse around pretrial justice.³¹⁵ When confronted by data, narratives, and constitutional arguments to illuminate the costs and harms of wealth-based pretrial detention, the carceral state was placed on the defensive.³¹⁶ The goal is to create a sense of urgency and momentum for reform, define the failings of the current system, and illustrate potential benefits of embracing alternative models.

The current resistance to change can also be challenged through civil rights litigation that targets the structural deficiencies of underfunded and overburdened public defender systems.³¹⁷ The goal of caseload litigation is to create constitutional pressure for major overhauls by demonstrating how high caseloads, lack of

³¹⁰ See Geels, *Multi-Level Perspective*, *supra* note 25, at 31–32.

³¹¹ *Id.* at 27–28.

³¹² See, e.g., Primus, *Culture as a Structural Problem in Indigent Defense*, *supra* note 14, at 1771–74.

³¹³ Smith & Raven, *supra* note 38, at 1030; van Oers et al., *supra* note 308, at 161.

³¹⁴ See, e.g., Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

³¹⁵ See *id.* at 302–05.

³¹⁶ See *id.*

³¹⁷ See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1879 (1994).

investigative resources, and other barriers to effective representation violate defendants' Sixth Amendment right to counsel.³¹⁸ The *Hurrell-Harring v. State* litigation in New York, for example, successfully argued that the state's public defense system was so deficient that it systematically denied indigent defendants their right to effective assistance of counsel.³¹⁹ The resulting settlement agreement mandated significant reforms, including reduced caseloads, increased funding, and improved training and supervision for public defenders.³²⁰

More recently, lawsuits have been filed in several states, including Missouri,³²¹ Louisiana,³²² and New York,³²³ alleging that these conditions violate defendants' Sixth Amendment right to effective assistance of counsel. Some of these cases have resulted in court-ordered reforms or settlement agreements that mandate increased funding, caseload limits, or other changes to the structure and operation of public defender systems.³²⁴

D. *Aligning Multi-Level Dynamics for Systemic Change*

Transformation in the criminal justice system requires a strategic approach and awareness of the complex interdependencies and feedback loops within the criminal justice system and its dominant institutional regimes.³²⁵ One of the chronic challenges facing public defense reform is the parochialism and insularity of many defender organizations, which can inhibit the diffusion of innovations and best practices across jurisdictions.³²⁶ Compounding this fragmentation is the traditional nature of legal representation. While public defenders' ethical commitments to

³¹⁸ The argument that structural deficiencies in public defense can violate defendants' Sixth Amendment rights is central to many civil rights lawsuits in this area. See, e.g., *Hurrell-Harring v. State*, 930 N.E.2d 217, 221–22 (N.Y. 2010).

³¹⁹ *Id.* at 219–20.

³²⁰ The settlement agreement in *Hurrell-Harring* mandated a range of reforms aimed at improving the quality of public defense representation in New York. Stipulation and Order of Settlement at 10–11, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct., 2014).

³²¹ *Church v. Missouri*, 913 F.3d 736 (8th Cir. 2019).

³²² *Yarls v. Bunton*, 231 F. Supp. 3d 128 (M.D. La. 2017).

³²³ *Hurrell-Harring*, 930 N.E.2d 217.

³²⁴ See Amy Roe, *ACLU Legal Victory Prompts Governments to Shore Up Indigent Defense*, ACLU WASH. (Mar. 2, 2015), <https://www.aclu-wa.org/blog/aclu-legal-victory-prompts-governments-shore-indigent-defense>; *Hurrell-Harring Statewide Implementation & Settlement Implementation Reports*, N.Y. STATE OFF. INDIGENT LEGAL SERVICES, https://www.ils.ny.gov/research_data_reports/ils_reports_presentations/hh_statewide_settlement_implementation.php (last visited June 4, 2025).

³²⁵ For an example, see Rob Raven & Geert Verbong, *Multi-Regime Interactions in the Dutch Energy Sector: The Case of Combined Heat and Power Technologies in the Netherlands 1970–2000*, 19 TECH. ANALYSIS & STRATEGIC MGMT. 491 (2007).

³²⁶ See Mark H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, 29 N.Y.U. REV. L. & SOC. CHANGE 83, 90 (2004).

confidentiality and zealous advocacy are, of course, part of effective representation, they can also limit the degree of transparency, coordination, and knowledge-sharing across offices.³²⁷ This is another reason why the shift towards a more collectivist, politicized, and movement-embedded approach to public defense is so promising—it has the potential to break down public defense’s organizational silos in the name of a shared mission of systemic transformation.

Overcoming this fragmentation will require a concerted effort to build networks and collaborations that can facilitate knowledge-sharing and collective action, such as the work of national organizations like the NAPD, specialized litigation organizations, and organizations that support emerging niches like the Participatory Defense Network.³²⁸ Public defense stakeholders should also cultivate a leadership and organizational culture that is more collaborative, adaptive, and politically engaged. This will require investing in the leadership development and political education of public defenders at all levels, from new hires to senior management, and creating opportunities for ongoing reflection, strategic planning, and collective action. It will also mean breaking down silos and building bridges between public defense and other sectors, from social services and public health to community development and grassroots organizing.

At the landscape level, reformers should seek to build broad-based support for public defense reform among policymakers, the media, and the public. This might involve framing the issue in terms of fundamental fairness, equal justice, and the rule of law, rather than just the technical details of caseloads and funding. It may also require forging alliances with other criminal justice reform movements, such as those focused on sentencing reform, alternatives to incarceration, or racial justice. The ACLU’s Smart Justice campaign, with its emphasis on how public defense is essential to ending racist mass incarceration, and building safe and healthy communities, exemplifies this approach.³²⁹

At the regime level, reformers should identify ways to help destabilize the current system by challenging its legitimacy and demonstrating the viability of alternative models. This might involve strategic litigation, as discussed above, and advocacy and public education campaigns that highlight the failures of the current system and the potential benefits of reform. It may also require building coalitions with sympathetic actors within the regime, such as progressive prosecutors or judges, who can help to create space for experimentation and change. The growing adoption of diversion programs and problem-solving courts across the country is leading to new opportunities for public defenders to push for decriminalization and treatment or

³²⁷ Rayza B. Goldsmith, *Is it Possible to be an Ethical Public Defender?*, 44 N.Y.U. REV. L. & SOC. CHANGE 13, 46 (2019).

³²⁸ See generally *Participatory Defense: A Community Organizing Model*, PARTICIPATORY DEF. NETWORK, <https://www.participatorydefense.org/about> (last visited June 4, 2025).

³²⁹ *Smart Justice*, ACLU, <https://www.aclu.org/issues/smart-justice> (last visited June 4, 2025).

prevention rather than punishment.³³⁰ Public defenders can successfully foreground community safety and recidivism reduction by offering compelling data and success stories and building internal relationships and credibility with systems stakeholders. This injects a more rehabilitative, non-punitive ethos into the core of the criminal justice system's bureaucratic culture.

At the niche level, reformers should focus on developing and testing innovative public defense models that can serve as the building blocks for a new regime. This might involve creating pilot projects or demonstration sites that can generate evidence of the effectiveness and scalability of new approaches. It may also require building networks and partnerships among niche actors, such as public defender offices, community organizations, and research institutions, to facilitate learning and knowledge sharing.

A transition to a more sustainable and equitable public defense system will require more than just a shift in practices or policies. The growing experimentation with participatory defense and community-rooted models of representation is particularly promising. A robust evaluation literature is starting to emerge documenting the positive individual and systemic impacts of these grassroots approaches, from more favorable case outcomes to increased community trust and engagement in the criminal legal process.³³¹ These data points can be leveraged to build legitimacy and momentum for a new paradigm of public defense among system actors and the public.

Public defense reform also requires networks and partnerships among niche actors, such as public defender offices, community organizations, and research institutions, to facilitate learning and knowledge sharing. Public defense organizations also need to develop a more robust infrastructure for community engagement and partnership, one that prioritizes the leadership and expertise of directly impacted communities in shaping the priorities and strategies of indigent defense. This includes collaborating with grassroots organizations and movements on campaigns for systemic reform.

E. Transition Pathways: Charting a Course for the Future of Public Defense

Based on the current state of development of public defense niches and the broader landscape of criminal justice reform, it seems likely that these innovations will follow a reconfiguration pathway, rather than a wholesale substitution of the

³³⁰ See, e.g., Wendy L. Schiller, Zoe Livengood & Moriah Taylor, *5 Ways Prosecuting Attorneys and Public Defenders can use Public Health Data and Resources to Address Substance Use Disorders*, COMPREHENSIVE OPIOID, STIMULANT, & SUBSTANCE USE PROGRAM (Nov. 30, 2020), https://ntcr.org/wp-content/uploads/2021/10/5_Ways_Prosecuting_Attorneys_andPublic_Defenders_Can_Use_Public_Health_Data_andResources_toAddress_Substance_Use_Disorders.pdf.

³³¹ Cory R. LePage, *Measuring Effectiveness of Holistic Defense: Social Service Provision and Justice System Outcomes*, 24 CRIMINOLOGY CRIM. JUST. L. & SOC'Y 38, 39, 41–42 (2023).

existing system.³³² The holistic defense, participatory defense, and community-oriented defense models are not currently challenging public defense as a basic concept—they challenge the dominant norms and routine practices. The goal is to improve (not reject) the public defense model by injecting new approaches into the existing institutional framework.

A reconfiguration path will depend on the ability of niche actors to navigate the complex dynamics of power and resistance within the system, building alliances and momentum for change while also preserving the integrity and autonomy of their transformative visions.³³³ It will require a sustained commitment to experimentation, reflection, and adaptation, as public defenders seek to respond to the evolving needs and challenges of the communities they serve.

A transition towards a more sustainable and equitable model of public defense cannot be divorced from broader efforts to transform the criminal justice system. Public defense exemplifies the nature of grassroots, niche-driven innovation to create systemic transformation. Now, new niche innovations have become spaces for testing new ideas, practices, and relationships, and for building the proof points and momentum needed to challenge the dominant regimes of public defense and criminal justice.

For other areas of law reform, such as the movement to end mass criminalization and over-incarceration, this suggests that a focus on cultivating and scaling niche innovations may be more productive than top-down, one-size-fits-all solutions. By identifying and supporting promising experiments and alternative models at the grassroots level, reformers can create a more diverse and resilient ecosystem of change, one that is responsive to local contexts and needs.

The history of public defense also highlights the challenges and limitations of niche-driven change in the face of entrenched regimes and landscapes. Despite the growing recognition of a more holistic and community-oriented approach to public defense, the dominant system remains largely intact, shaped by powerful institutional and ideological forces that resist fundamental reform. While bottom-up innovation and reform are necessary for a transition to happen, it probably is never sufficient by itself to achieve transformative change, at least sustainably and at scale.

Rather than focusing energy only on projects like abolition, the lessons from transition studies suggest that it may be more productive to focus on building alternative systems and institutions that can gradually replace and reconfigure the incumbent regime. This should involve a mix of policy reforms, movement building, and niche innovation, all aimed at shifting the underlying logics, incentives, and power structures of the criminal justice system over time.

³³² Geels & Schot, *supra* note 41, at 406–07, 411.

³³³ See generally Akbar, *supra* note 20 (theorizing law's role in social movement visions of transformative change).

CONCLUSION

Public defense remains an unfinished project. This Article's goals are to encourage readers to think about public defense as part of a complex system and to consider its role in criminal justice reform as part of a long-term, sustainable development challenge. In other words, to look beyond isolated solutions and to consider the complex interplay of factors that shape the evolution and effectiveness of public defense over time. The most probable transition pathway for public defense reform is nurturing and integrating innovative approaches that can gradually transform the existing institutional framework, rather than a complete, sudden replacement.

The MLP analysis of public defense shows a way to transform knowledge about the public defense's evolution and ecosystem into actionable reforms. The MLP framework illustrates how radical ideas can emerge and sustain transitions even in a harsh environment like the criminal justice system, and that sustained transformation requires nurturing new iterations that challenge public defense stasis and its entrenched problems. The MLP also helps explain why reform approaches that focus on increasing funding for public defense or seeking pay parity with prosecutors, while seemingly beneficial, can paradoxically be counterproductive because they reinforce existing institutional problems and obstruct broader transformation.

This Article finally challenges stakeholders to go beyond ideas. Visions, encouragement, and new case law are not sufficient to reform public defense or transform the criminal justice system. For an idea to gain traction, a transition policy helps overcome inertia. Committing to sustained experimentation, fostering resilient niche innovations, building broad-based alliances, and strategically navigating the dynamics of resistance and opportunity are needed for a more effective and transformative public defense system.