

OUTSIDER PUBLIC DEFENDERS AS ORGANIC INTELLECTUALS

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INTRODUCTION

Public defenders represent an inordinate number of Black, Latinx, and American Indian clients as compared to the number of white clients they represent.¹ This disparity is heightened by the fact that public defenders are disproportionately white.² If one enters a criminal court in many parts of the United States, most of the criminal defendants are people of color while most of the public defenders are white.³ This lack of diversity reflects socio-economic inequality in client representation and among public defenders, leads clients of color to distrust the justice system, isolates

1. See Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law*, 12 CALIF. L. REV. ONLINE 1 (June 2021) (noting that indigent clients represented by public interest organizations, including public defenders, are mostly racial and ethnic minorities), <https://www.californialawreview.org/the-racial-reckoning-of-public-interest-law/>.

2. See Deborah L. Rhode, *Law is the Least Diverse Profession in the Nation and Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that (“Eighty-eight percent of lawyers are white. Other careers do better: 81 percent of architects and engineers are white; 78 percent of accountants are white; and 72 percent of physicians and surgeons are white.”); Black people make up 13.4% of the United States population, but only 5% of licensed lawyers. Latinxs make up 18.3% of the U.S. population, and only 5% of licensed U.S. lawyers. Asians constitute 5.9% of the U.S. population, but only 2% of licensed U.S. lawyers. See U.S. CENSUS BUREAU, Quickfacts, <https://www.census.gov/quickfacts/fact/table/US/RHI425219>; A.B.A. NAT’ LAW. POPULATION SURV., https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf. I use “men” due to the gender imbalance in the legal profession. Sixty-four percent of U.S. lawyers are men and 36% women, yet women make up 50.8% of the population. See U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/fact/table/US/SEX255218#SEX255218>.

3. See U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *Defense Counsel in Criminal Cases* (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (last visited May 17, 2022) (showing that in the year 2000 public defense attorneys represented 77% of Black people and 73% of Latinxs in state prisons).

lawyers of color, perpetuates mainstream groupthink in defender offices, and signals a lack of democracy and racial progress among those tasked with upholding the Sixth Amendment.⁴

Diversity is important among all lawyers because it “closely relates to equality and reflects an effort to overcome bias and discrimination, which are core values of the legal profession and the rule of law.”⁵ Doing nothing to combat the lack of diversity in the profession weakens the core principles underlying “what it means to be a lawyer in the United States.”⁶ Lawyers are expected to be public servants and owe fiduciary duties to pursue equality, fairness, and justice.⁷ The lack of diversity among the bar, therefore, is more troubling than the lack of diversity in other professional fields.⁸ As public servants, public defenders must address the lack of diversity in the profession caused by inequalities, cultural perceptions, and discrimination that ultimately contradict the values the bar tries to sustain.⁹

An antidote to racial and gender homogeneity in public defense is the recruitment, hiring, and investment of lawyers of color (also referred to in this article as “outsiders”).¹⁰ Outsiders face barriers to enter the profession and public defender

4. See Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL’Y 1 (2008) (discussing the role of race in building attorney-client relationships); Shelley Taylor & Susan T. Fiske, *The token in the small group: Research findings and theoretical implications*, in J. Sweeney (ed.), *Psychology and Politics* (1976) (some studies have shown that when they are in the numerical minority in a group, women and people of color experience negative outcomes); Taylor Cox, CULTURAL DIVERSITY IN ORGANIZATIONS: THEORY, RESEARCH & PRACTICE 35 (1993) (“[C]ulturally diverse workforces have the potential to solve problems better because of several factors: a greater variety of perspectives brought to bear on the issue, a higher level of critical analysis of alternatives, and a lower probability of group think”); Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U.L. REV. 185, 193 (2005) (“[A]bsent the use of race in higher education, the Nation’s democracy might be weakened by a lack of diversity that would cause the Nation’s democracy to be perceived as illegitimate in the eyes of many citizens.”). As to diversity: Although no study encompasses racial imbalances among all public defenders, available evidence shows lack diversity. The Michigan Public Defense Workgroup collected data from twelve jurisdictions (Cook County, Illinois; Ohio; Minnesota; Wisconsin; Louisiana; Washington, DC; West Virginia; Kentucky; Montana; Nebraska; Maricopa County, Arizona; and Minnehaha County, South Dakota) and found that most employ a lower percentage of attorneys of color compared to the percent of people of color in their state or county. From this group only three jurisdictions employed attorneys of color at a comparable rate as their region’s population: Wisconsin, West Virginia, and Minnehaha County, South Dakota. Most jurisdictions do not have recruitment programs to target people of color. See CULTURAL COMPETENCE AND PUBLIC DEFENSE MICHIGAN WORKGROUP, BEYOND DIVERSITY: THE ROLE OF CULTURAL COMPETENCE IN AN EFFECTIVE MICHIGAN PUBLIC DEFENSE SYSTEM 1, 3 (Apr. 2011), <http://racialequitytools.org/resourcefiles/Culturalcompetence.pdf>. By my count in July 2020, the Arizona Federal Public Defender employed 40% of all trial and capital habeas lawyers as racial minorities. 51% of lawyers are women.

5. See Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 279 (2014) (lawyers should be ahead of other professions on diversity).

6. *Id.*

7. Model Rules Of Pro. Conduct pmb. ¶ 1 (2010) (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

8. See Nance & Madsen, *supra* note 5, at 280.

9. *Id.*

10. I use the term ‘outsider’ as Russell Robinson in *Uncovering Covering*, 101 Nw. U.L. REV. 1809, 1812 (2007). The term outsider refers to social groups whom society has disadvantaged, including people of color, women, and queer people. *Id.* A person may be an insider vis-à-vis one trait and an outsider vis-à-vis another. *Id.* See also Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1308 (2000) (“Insider” means white, heterosexual, and male. A person’s status as insider or outsider is relative and context dependent).

ranks, do not receive the attention they need on the job, and face unequal treatment and discrimination. Outsiders can, however, emerge as organic intellectuals (professionals from social classes that rarely produce professionals who remain connected to those classes) for indigent clients and their communities. To create successful public defender offices, supervisors must hire, properly mentor, and encourage outsiders. Developing outsiders as zealous advocates enables the creation of organic intellectuals who can, through a change in office culture, build hubs of democracy within an otherwise racist criminal justice system.¹¹

To support this argument, the article continues as follows. Part I explores ideas on how to prevent line attorney burnout by former public defenders Charles Ogletree and Abbe Smith. Ogletree and Smith's principles of aiming to improve practice while reducing turn-over are paralleled in the philosophical theory of organic intellectualism, or the thinking behind how lawyers from lower social classes remain connected to those classes as they represent indigent clients. Organic intellectuals are in it for the long haul. Part II supplies a distillation of the Gramscian philosophy of organic intellectualism and explains how public defenders can embody this ideal through the example of well-known indigent defense practitioners Jeff Adachi and Bryan Stevenson. Part III delves into the social psychology of professional identity formation, which is critical to understanding how lawyers of color pursue public defender work. It also includes a section on public defender narratives, including my personal narrative, to supply examples of outsider trajectories. Part IV offers recommendations to public defender offices and line attorneys about the implications of hiring and developing outsider public defenders.

I. SUSTAINING PUBLIC DEFENDERS: CHARLES OGLETREE AND ABBE SMITH

Charles Ogletree and Abbe Smith wrote influential law review articles on how public defenders can apply heroism, empathy, respect, professional craft, and a sense of outrage to create zealous defender practices and promote retention along lawyers.¹² Although both are former public defenders¹³ and outsiders—Ogletree is

11. Many writers have noted that the criminal justice system is racist. See Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 *FORDHAM L. REV.* 1473, 1509 (2000) (listing multiple law review articles and books contending that the criminal justice system is racist). The improvement of defense for the indigent accused improves the criminal justice system, thus improving democratic principles. See Victoria Nourse, *Gideon's Muted Trumpet*, 58 *MD. L. REV.* 1417, 1418 (1999) ("[T]he right to counsel does not serve to protect guilty defendants but to ensure equality and democracy for the rest of us. The lawyer is the individual's guarantor of a 'right of opposition,' and, as such, is essential to a process of democratization, a process in which all interests (even the government's) are subject to competition."); Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317, 1333 n.22 (1964) (discussing the authors' understanding of Gideon as ameliorating disenfranchisement of the poor).

12. At the time of this writing *Beyond Justifications* had 208 citations in Westlaw. Smith's article had 67.

13. Ogletree was a public defender for eight years with the District of Columbia's Public Defender Service (PDS). See Liz Mineo, *Honoring Charles Ogletree*, *THE HARVARD GAZETTE* (Oct. 3, 2017), <https://news.harvard.edu/gazette/story/2017/10/600-gather-to-celebrate-life-legacy-of-charles-ogletree-influential-law-professor/>. Smith was a public defender for the Defender Association of Philadelphia for eight years. See Susan Bozorgi, *Women Criminal Defense Attorneys: Interview with Abbe Smith*, *WCDA BLOG* (Mar. 26, 2014), <https://womencriminaldefenseattorneys.com/women-criminal-defense-attorneys-interview-with-abbe-smith/>.

Black and Smith is a woman—their law review articles do not discuss outsider identity.¹⁴ Ogletree writes about his awareness of heroism and empathy. He also explains how the Public Defender Service (PDS), where he spent eight years as a line attorney and supervisor, instills these values through training. Smith discusses craft, respect, and outrage, but extraneous of the outsider experience. When Smith discusses her work, it is never through her identity as a woman.¹⁵

Ogletree's and Smith's analyses frame an ideal for all advocates. As this article contends, outsider public defenders can embody these paradigms by developing an awareness of their own life experiences and employing zealous advocacy. Public defender offices can take Ogletree's and Smith's framework a step further by hiring more outsiders and changing office culture.

A. Charles Ogletree: Empathy and Heroism

Charles Ogletree addresses techniques to motivate public defenders to remain on the job by reducing “burnout.”¹⁶ Without these techniques lawyers become “disillusioned, depressed, and demoralized” because of their job responsibilities and working conditions.¹⁷ Ogletree argues that while legal scholars have failed to develop motivations for lawyers to practice criminal defense, empathy and heroism may provide the solution to both retain public defenders and attract future ones.¹⁸

1. Empathy

Practicing empathy requires that lawyers put aside their biases and prejudices to understand their client's perspectives.¹⁹ It requires public defenders to listen to their clients, understand their problems, and have compassion for their circumstances.²⁰ Thus, empathy includes “seeing the client as more than a criminal defendant and [] understanding the adverse conditions he endures and the bleak future he may well face.”²¹ This gives public defenders a perception of “shared humanity.”²² The result

14. Ogletree wrote about the police arresting him as a teenager. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1282 (1993) (“I myself was taken into custody several times as a juvenile.”). Ogletree also grew up in poverty and experienced discrimination. *Id.* at 1283. On the other hand, he does not apply these ideas outside of his personal experience.

15. By not addressing outsider identity head-on, Ogletree and Smith do not alienate minorities, but fail to capture experiences of discrimination, conscious and sub-conscious, that outsiders experience every day. These experiences are fundamental to understanding the makeup of outsiders and how they defend the indigent accused.

16. See Ogletree, *supra* note 14.

17. *Id.* at 1294 (surveying the attitudes of public defenders about their work, and their disillusionment due to adverse working conditions (citing LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 63-64, 77-91 (1987))).

18. Ogletree, *supra* note 14 at 1242. Traditional justifications include client centered justifications and systemic justifications. Because these do not offer a source of renewed vitality or commitment, Ogletree is interested in moving beyond them to heroism and empathy, which he says “inspire, and excite.” *Id.* at 1260.

19. *Id.* at 1271–72 (citing DAVID BINDER, PAUL BERGMAN, & SUSAN PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 40 (1991)).

20. Ogletree, *supra* note 14 at 1272 (citing Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987)).

21. Ogletree, *supra* note 14 at 1244.

22. *Id.*

allows the defender to relate to the client more closely and improves the defender's performance.²³

Empathy provides the public defender advantages in advocating for clients.²⁴ Empathy enhances a lawyer's skills in client interviews and negotiations with prosecutors.²⁵ Empathy improves a lawyer's critical thinking skills, for she can better assess the client's goals and integrate them into evaluating solutions.²⁶ Client engagement based on empathy positively influences motivation. It changes an attorney's perspective from one of wins and losses to one of a focus on improvement of the client's life.²⁷

Ogletree's application of empathy led him to take on actions outside of his role as a lawyer.²⁸ His relationship with clients approximated friendship because he answered phone calls at all hours, helped clients find jobs, got involved in their family problems, and attended clients' weddings and funerals.²⁹ When judges sentenced clients to prison, he stayed in contact with their families. Because he viewed his clients as his friends, he felt a powerful desire to do all that he could for them.³⁰

Ogletree shows that even though empathy is a universal human trait, outsider public defenders, by their backgrounds, have more in common with their clients compared to non-outsider public defenders. This makes it easier for them to relate to, communicate with, and best represent their clients.

2. Heroism

Ogletree's early life and law school experiences led him to want to become a hero for clients.³¹ He saw how people in his community were abused and imprisoned by the criminal justice system.³² Police took him into custody several times as a

23. *Id.* at 1243 ("It is difficult for public defenders to maintain a distanced perspective of their clients. Viewed dispassionately, most defendants are simply criminals. Thus, it is critical to look beyond the crime with which the government charges the client, to gain insight into the difficult, impoverished, and painful life that preceded the commission of the offense. If a public defender keeps distance, she might overlook her client's humanity — his positive attributes, the background, which may have led him to commit crimes, and the multiple needs that transcend his criminal case.").

24. *Id.* at 1274 (citing Lucie E. White, *Revaluing Politics: A Reply to Professor Strauss*, 39 UCLA L. REV. 1331, 1338 (1992)).

25. Ogletree, *supra* note 14 at 1274-75.

26. *Id.* (citing THE TASK FORCE OF LAW SCHS. AND THE PROFESSION: NARROWING THE GAP, SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASSOC., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM 142 (July 1992)).

27. Ogletree, *supra* note 14 at 1275 ("The attorney with a deeper understanding of and sensitivity to the client wants to help him, and this desire directly affects both her will to represent the client and the form that the representation itself takes. When she cares about the client as an individual, not only does she want to assist him through the complex maze of our legal system, but she also wants him to succeed; as a result, her defense is zealous.").

28. *Id.* at 1272.

29. *Id.*

30. *Id.* at 1271-72, 1274.

31. *Id.* at 1276, 1282 (stating that some people become criminal defenders because they "love the challenge, are competitive by nature, and have unusual personal curiosity. They like representing the underdog, where the system tips the scales against them, the prosecutor has all the resources, and they have virtually none." (quoting PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 69, 103 (1988))).

32. Ogletree, *supra* note 14 at 1282.

juvenile.³³ Some men talked to him about the consequences of his actions and he escaped this lifestyle.³⁴ He went to law school but recognized he could have become one of his clients.³⁵ In law school, Ogletree represented incarcerated people because he understood the suffering of criminal defendants.³⁶ He wanted to get close to the criminally accused and show that alternative paths exist.³⁷ Like most of his clients, he was young, Black, grew up in poverty, and faced discrimination.³⁸

At PDS, Ogletree and his public defender colleagues saw themselves as “heroes” of the oppressed who fought against all odds. They saw each other as Robin Hood figures who conquer what others cannot, and who need not conform to moral rules society reserves for others.³⁹ He explains that one element of the “hero” mentality is the thrill of winning, a desire that drives many public defenders.⁴⁰ Lawyers at PDS looked up to colleagues with excellent records of accomplishment of acquittals.⁴¹ They glorified the “David versus Goliath” challenge of fighting the government.⁴² The phrase he and colleagues used to describe a successful defense—“stealing” the case from the prosecution—invoked the image of Robin Hood of stealing from the rich to give to the downtrodden.⁴³

3. Empathy and Heroism at PDS

The PDS provides lawyers training and an atmosphere that fosters heroism and empathy.⁴⁴ PDS teaches young lawyers to view the client as a victim—someone who endured suffering and deprivation, and who would continue to suffer without the lawyer’s assistance.⁴⁵ Young public defenders were encouraged to immerse themselves in the reality of each client’s life; to get to know him, his background, and his family and friends.⁴⁶ Every lawyer’s caseload was limited to 50 to 60 criminal cases at a time, which enabled them to devote significant time to each client.⁴⁷

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 1275 (citing Jill Nelson, *Her Life Is Her Job*, WASH. POST MAG. (June 12, 1988), <https://www.washingtonpost.com/archive/lifestyle/magazine/1988/06/12/her-life-is-her-job/65898d3b-fb35-43a4-8199-6cbc074cfe06/>).

40. Ogletree, *supra* note 14 at 1275.

41. *Id.* at 1277.

42. *Id.* at 1276 (“Winning is ‘the only thing’ to most participants in the criminal justice system — just as it is to professional athletes.” (quoting ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xiv (1982))).

43. Ogletree, *supra* note 14 at 1277.

44. *Id.* at 1285–87.

45. *Id.* at 1286 (citing Monroe H. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U. L. REV. 331, 331 (1987)).

46. Ogletree, *supra* note 14 at 1286 (describing D.C. public defenders as “fighters who relish the opportunity to do battle” (quoting Keith Jenkins, *Urban Warriors*, BOS. GLOBE Mag, Jan. 7, 1990 at 24, 26))).

47. Ogletree, *supra* note 14 at 1287.

Obtaining superior results led to promotions within the office.⁴⁸ Lawyers helped each other, attended hearings, and cross-examined clients.⁴⁹

The PDS provided all entry-level lawyers comprehensive training.⁵⁰ Furthermore, experienced lawyers provided feedback to new lawyers.⁵¹ Lawyers practiced their opening and closing arguments in front of at least two supervisors before going to court.⁵² In this sense, the office stressed the importance of excellence in one's profession.⁵³ These practices fostered empathy for clients and inspired lawyers to attain a heroic ideal in the representation of their client.⁵⁴

B. Abbe Smith: Respect for the Client, Pride in Craft, and Sense of Outrage

In response to Ogletree's article, Abbe Smith analyzes whether empathy and heroism only work for short-term defenders in high-volume, urban settings.⁵⁵ Instead, she offers a model that includes these principles: respect for the client, pride in their craft, and a sense of outrage about inequality, injustice, and routine abuses of power.⁵⁶ Smith argues that defenders who apply these ideals can sustain careers despite systemic incentives to fail.⁵⁷ She also proposed that public defenders can care without becoming a client's friend.⁵⁸

1. Respect

Respect for the client is defined as respecting and embracing the client's dignity, autonomy, and humanity.⁵⁹ It means taking clients seriously and recognizing there is more to them than their criminal case.⁶⁰ Implicit in this respect is an acknowledgment that lawyers can never fully know a client's experience, walk in their shoes, and comprehend the forces that led them to where they are now.⁶¹

48. *Id.* at 1288.

49. *Id.* at 1288 ("If we have an ethic, it is mutual support. We attend each other's closing arguments, cross-examine one another's clients, handle court appearances for colleagues, commiserate, shoot the bull, and nibble at each other's food." (citing Randy Bellows, *Notes of a Public Defender*, in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 69,73 (1988))).

50. Ogletree, *supra* note 14 at 1289 (citing ROBERT HERMANN, ERIC SINGLE & JOHN BOSTON, *COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA* 125 (1977)).

51. Ogletree, *supra* note 14 at 1288 (citing Bellows, *supra* note 49, at 73).

52. Ogletree, *supra* note 14 at 1288.

53. *Id.*

54. *Id.* at 1289.

55. See Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1208 (2004).

56. *Id.*

57. *Id.*

58. *Id.* at 1225 ("One problem with the friendship model is that there are no clear bounds in friendship.").

59. *Id.* at 1244 ("The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process." (citing Jones v. Barnes, 43 U.S. 745, 763 (1983) (Brennan, J., dissenting))).

60. Smith, *supra* note 55 at 1244.

61. *Id.* at 1245.

Respectful advocates maintain boundaries with their clients.⁶² A defender need not feel everything the client feels but must respect a client's emotions.⁶³ Public defenders should do their best to understand how a client feels because it is their job to convey what it is like to be the client to a judge.⁶⁴

Smith contends that respect for the client is more sustaining than empathy or friendship. She argues respect is better suited for defenders and poverty lawyers⁶⁵ because lawyer-client relationships are "intense, short-term, and purposeful," not "lighthearted, long-term, or diffused."⁶⁶ However, Smith does not advocate for detachment from the client.⁶⁷

2. Professional Craft

Smith argues that defense work requires knowledge, skill, experience, creativity, tenacity, and passion.⁶⁸ There is craft in every aspect of defense work.⁶⁹ This includes interviewing, counseling, investigation, pre-trial litigation, plea negotiation, trial, sentencing, and appellate advocacy.⁷⁰ Defending may even go beyond craft and become art.⁷¹ The ability to size up a case and make choices about resource allocation is also a craft.⁷²

Craft and diligence are more important than case outcomes for a defender's success.⁷³ In describing how success should be measured for a defender, Smith quotes career defender Penny Khan:

"The measure of a performance must be the performance, not the outcome: 'I can win a case despite a lackluster closing argument, but that bad closing keeps me up at night. . . . When I try the hell out of a case and honestly could not have done a better job and lose, I feel bad for the client, but I don't have the regret.'"⁷⁴

62. *Id.* at 1247–48.

63. *Id.* at 1248.

64. *Id.*

65. *Id.* at 1252 ("What sustains me. . . is. . . having this person who basically has nothing. . . and showing them that there's someone who does respect them and cares about what happens to them. Showing them that there's someone who cares about the loss of liberty they're facing.").

66. *Id.* at 1252.

67. *Id.* at 1250.

68. *Id.* at 1251.

69. *Id.*

70. *Id.*

71. *Id.* ("I think we get to the point where defending - even at a high volume - becomes an art form. You get so good at it." (quoting Telephone Interview by Abbe Smith with Stuart Glovin, Head Deputy, Compton Branch, Pub. Def.'s Office, L.A., Cal. (May 1, 2003))).

72. Smith, *supra* note 55 at 1256-57 ("[Dealing with] volume needs an ability that is almost instinctive. You look at a given situation and you know how to respond to it. It is a matter of survival. It is amazing how people develop that talent. You can give good defenders a pile of cases and they can juggle it all, make sense of it, devise a method of attack, and keep it all straight in their heads." (quoting Telephone Interview with Stuart Glovin, *supra* note 71)).

73. Smith, *supra* note 55 at 1253.

74. *Id.*

Public defenders must redefine winning and instead develop craft, which includes the ability to advocate for an individual despite a crushing caseload.⁷⁵ If there is heroism in the work of defending, it is doing it well.⁷⁶

3. Sense of Outrage

The motivator that supplies energy for defenders is outrage.⁷⁷ One cannot be a defender without it.⁷⁸ This outrage can also be productive because it keeps defenders coming back for more and motivates them to continue putting themselves between clients and the threat to their loss of liberty.⁷⁹

Clients can also keep the outrage going.⁸⁰ Smith stresses that many defenders become outraged after witnessing the ravages of poverty and inequality up close.⁸¹ As a career criminal defense lawyer, she wrote, “I have been defending the poor for twenty-two years now. Yet, I still come back from court outraged. No matter how many times I have seen my clients mistreated by the system—no matter how many outrages I have seen my clients endure—I have not gotten used to it. I remain appalled and offended by injustice. It gets me every time.”⁸²

Ogletree and Smith supply competing ideas and practices for public defenders to avoid burnout in zealously representing clients. Their proposals provide paths for lawyers to stay vibrant in their careers. Antonio Gramsci’s philosophy of organic intellectuals is the ideological framework this Article uses to explain how outsider public defenders who practice Ogletree and Smith’s principles can reach their full potential by applying their life experience to successful client representation. In doing so, they become organic intellectual public defenders.

II. GRAMSCIAN FRAMEWORK

After introducing Antonio Gramsci and the concept of ideological hegemony, this Part defines his traditional versus organic intellectual paradigm. Ideological hegemony cannot be divorced from any Gramscian framework. The Part then explains how outsider public defenders can embody the ideal of organic intellectuals.

75. *Id.* at 1256-57 (“Sometimes you feel crushed by the case load . . . but it has never deterred me. That’s what I’m here for.”(quoting Telephone Interview with Stuart Glovin, *supra* note 71)).

76. Smith, *supra* note 55 at 1258 (citing Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 497-509 (1999)).

77. Smith, *supra* note 55 at 1259.

78. *Id.* at 1260 (“You can’t do this work without having a sense of injustice. . . .” (citing Telephone Interview with Penny Kahn, Chief of Juvenile Unit, Maryland Public Defender (Aug. 28, 2002))).

79. Smith, *supra* note 55 at 1263.

80. *Id.*

81. *Id.* at 1261 (“Having seen what I saw about jails and prisons [at the Civil Rights Division of the Justice Department and the ACLU Prison Project], I decided I wanted to keep people out . . . rather than try to clean things up once they’re already there.” (citing Telephone Interview with Shawn Moore, Trial Att’y, Fed. Pub. Def. for the District of Columbia (Nov. 6, 2002))).

82. Smith, *supra* note 55 at 1251.

A. Gramscian Analysis

1. Antonio Gramsci

Born in 1891 in Sardinia, Antonio Gramsci became the General Secretary of the Italian Communist Party in 1923.⁸³ Italian police arrested him on November 8, 1926 under “Exceptional Laws”⁸⁴ enacted by the fascist-dominated Italian legislature under Benito Mussolini.⁸⁵ After his trial in May 1928, the court imposed a twenty year sentence for trying to undermine the Italian state.⁸⁶ The prison granted him a conditional release after eleven years, but he died shortly after due to poor health, at age 46.⁸⁷ In prison, Gramsci authored the Prison Notebooks,⁸⁸ which attempted to explain how a ruling class controls society.⁸⁹ The central theme of the Notebooks was the development of a new Marxist theory applicable to the conditions of working capitalism.⁹⁰

Antonio Gramsci was one of the most original and influential Marxist thinkers of the twentieth century.⁹¹ His ideas influenced the social sciences, humanities, and law.⁹² Two influential concepts that Gramsci developed relevant to this Article are ideological hegemony and traditional versus organic intellectuals. One

83. See Frank Rosengarten, *An Introduction to Gramsci's Life and Thought*, MARXIST INTERNET ARCHIVE, <https://www.marxists.org/archive/gramsci/intro.htm> (last visited Aug. 20, 2020).

84. See Brendan Hogan, *Antonio Gramsci's The Prison Notebooks: A Humanist Reconstruction of Marxism*, in GREAT BOOKS WRITTEN IN PRISON: ESSAYS ON CLASSIC WORKS FROM PLATO TO MARTIN LUTHER KING, JR. 181 (T. Ward Regan ed., 2015) (Benito Mussolini ordered that Communist party members who sat as deputies in the Italian parliament should be “added to the list” of those who were to be expelled for “an abandonment of parliamentary work.” The government created the list as punishment for setting up an alternative government known as the Aventine secession, in protest to the authoritarian and dictatorial methods of Mussolini).

85. See Rosengarten, *supra* note 83.

86. See Christian Spurrier, *No Bar to Love*, THE GUARDIAN (Feb. 11, 2006), <https://www.theguardian.com/books/2006/feb/11/featuresreviews.guardianreview25>.

87. See Nerio Naldi, *La Liberazione Condizionale di Antonio Gramsci*, 54 STUDI STORICI 379, 385-87 (2013) (It.) (explaining Gramsci's conditional release process).

88. The Prison Notebooks encompass a wide variety of subjects, but Gramsci wrote almost nothing about law. His few comments about law are that it has a dual status, physical force, and hegemony. See Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 B.Y.U. L. REV. 515, 530 (2000). The repressive aspect of the law is clear from the presence of police, prisons, courtrooms with armed bailiffs, and the ever-ready National Guard, which governments call to restore the status quo when social disturbance arise. *Id.* Law is almost hegemonic by nature because it involves the imposition of an official code by the state onto the affairs of an individual. *Id.* at 546.

89. See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell-Smith eds., 1971).

90. See Barry Burke, *Antonio Gramsci, Schooling and Education*, THE ENCYCLOPEDIA OF PEDAGOGY AND INFORMAL EDUC. <https://infed.org/mobi/antonio-gramsci-schooling-and-education/#:~:text=Gramsci%20maintained%20that%20the%20notion,of%20class%20was%20a%20myth.&text=These%20are%20what%20we%20tend,a%20myth%20and%20an%20illusion>. (last updated Mar. 13, 2020).

91. See Daniel Kendie, *How Useful is Gramsci's Theory of Hegemony and Domination to the Study of African States?* 3 AFRICAN SOC. SCI. REV. 89, 89 (2006) (Scholars now recognize Antonio Gramsci as the greatest Marxist thinker since Karl Marx).

92. See Kaela Jubas, *Reading Antonio Gramsci as a Methodologist*, 9 INT'L J. OF QUAL. METHODS 224, 225 (2016).

must be familiar with ideological hegemony to understand the distinction between traditional and organic intellectuals.⁹³

2. Hegemony⁹⁴

The process of hegemony takes place when dominant social groups convey their values into the minds and everyday lives of subaltern⁹⁵ groups to achieve consent.⁹⁶ Dominant groups attain hegemony when subaltern groups consider those values and practices to be in their interests, even though the values work against them.⁹⁷ As Duncan Kennedy wrote about hegemony, “We all feel it. It’s an aspect of all of our lives that we ourselves are trapped within systems of ideas that we feel are false but can’t break out of.”⁹⁸

Gramscian applications of Marxist theory illustrate ideological hegemony.⁹⁹ Scholars have used it to explain how capitalist ruling classes secured social status in the twentieth century.¹⁰⁰ For example, in Eastern Europe and parts of Asia, governments relied on force and coercion to ensure compliance from their populace.¹⁰¹ In capitalist Western countries that lacked a strong state apparatus, elites relied on cultural and ideological mechanisms to secure consent and cooperation.¹⁰² Ruling classes in Western societies relied on highly developed mass media and educational institutions, rather than police or military force, to secure their position.¹⁰³ Subordinated social groups tolerated the status quo because they accepted ruling class

93. See Mike Wayne & Diedre O’Neill, *On Intellectuals*, in CONSIDERING CLASS, THEORY, CULTURE AND THE MEDIA IN THE 21ST CENTURY 170 (Deirdre O’Neill & Mike Wayne eds., 2018) (“To understand the concept of organic intellectuals, we have to first relate this concept to two other concepts in Gramsci’s work: the economic-corporative and hegemony.”).

94. Hegemony appeared as a central theme during the heyday of the Critical Legal Studies movement. See Litowitz, *supra* note 88, at 515. Hegemony deserves broader consideration from the legal academy because it generates profound insights about the law’s ability to induce submission to dominant worldviews. *Id.* at 516. The dominant framework forms our identities and makes us powerless to do anything else. *Id.*

95. Subaltern groups are made up of individuals outside the majoritarian value system. See David Tan, *Political Recoding of the Contemporary Celebrity and the First Amendment*, 2 HARV. J. SPORTS & ENT. L. 1, 34 (2011). Gramsci used the term ‘subaltern’ to refer to the economically dispossessed (first introduced in his Prison Notebooks). See GRAMSCI, *supra* note 89, at 52-55. Professor Gayatri Spivak clarified that the subaltern does not only refer to a marginal or oppressed group, but one that has no access to the benefits of cultural imperialism. See Leon de Kock, *Interview with Gayatri Chakravorty Spivak: New Nation Writers Conference in South Africa*, ARIEL: REV. OF INT’L ENG. LITERATURE 29, 29-47, (July 1992).

96. See Pablo Ciochini & Stefanie Khoury, *A Gramscian Approach to Studying the Judicial Decision-Making Process*, 26 CRITICAL CRIMINOLOGY 75, 76 (2018).

97. *Id.*

98. See Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 33 (1982).

99. See DAVID FORGACS, *THE ANTONIO GRAMSCI READER: SELECTED WRITINGS 1916-1935*, at 23-24 (2000).

100. See Katherine Beckett and Theodore Sasson, *The War on Crime as Hegemonic Strategy: A Neo-Marxian Theory of the New Punitiveness in U.S. Criminal Justice Policy*, in OF CRIME AND CRIMINALITY 63 (Sally S. Simpson ed., 2000).

101. *Id.*

102. *Id.* (citing Perry Anderson, *The Antinomies of Antonio Gramsci*, 100 NEW LEFT REV. 5 (1976-1977)).

103. *Id.* (citing CARL BOGGS, *THE TWO REVOLUTIONS: GRAMSCI AND THE DILEMMAS OF WESTERN MARXISM* 180-185 (1984)).

definitions of social reality that painted capitalist society as “the most free, democratic, egalitarian, and productive social arrangement.”¹⁰⁴

Twentieth century examples of ideological hegemony include the use of white supremacist ideologies in apartheid South Africa and “national security doctrines” prevalent in dictatorships in Latin America, Asia, and Africa.¹⁰⁵ Societies face these forces when dominant classes resorted to coercion rather than a “strategy of hegemonic consensus building.”¹⁰⁶

An example of hegemony in the United States is the manner political elites depicted the poor during the twentieth century, which led to the War on Drugs.¹⁰⁷ The imagery of the poor shifted from the prototypical white and rural in the imagery of the Great Depression and War on Poverty,¹⁰⁸ to Black and urban, in the iconography of the Wars on Drugs.¹⁰⁹ Politicians and media shifted from depicting the poor as people in trouble, to people who make trouble.¹¹⁰ They described the poor from “deserving” to “underserving.” The sense that the poor were dangerous and menacing, rather than sympathetic, legitimized the expansion of the police, courts, and prisons.¹¹¹

3. Traditional and Organic Intellectuals

Antonio Gramsci wrote that all men are intellectuals, but not all men have the function of intellectuals.¹¹² He used the term “intellectual” broadly to include lawyers, academics, politicians, scientists, and journalists.¹¹³

a. Traditional Intellectuals

Traditional intellectuals stand for a “historical continuity uninterrupted even by the most complicated and radical changes in political and social forms.”¹¹⁴

104. See Beckett & Sasson, *supra* note 100 at 64.

105. See Peter McLaren et al., *The Specters of Gramsci: Revolutionary Praxis and the Committed Intellectual*, 33 J. THOUGHT 9, 15 (1998).

106. *Id.*

107. The War on Drugs includes actions tending toward prohibition of illegal drug trade, adopted by the U.S. government along with foreign military aid and aid of participating countries to define and to end the import, manufacture, sale, and use of illegal drugs. See *War on Drugs Law and Legal Definition*, U.S. LEGAL, <https://definitions.uslegal.com/w/war-on-drugs/> (last visited June 28, 2020). The War on Drugs oversaw the imprisonment of mostly low-level drug offenders, including couriers. See Smith & Montross, *supra* note 76, at 456 (1999) (describing how the War on Drugs has contributed to the massive influx of poor non-whites into the criminal justice system.).

108. The term ‘war on poverty’ refers to a set of initiatives proposed by Johnson’s administration, passed by Congress, and implemented by his Cabinet agencies. As Johnson put it in his 1964 State of the Union address announcing the anti-poverty effort, “[o]ur aim is not only to relieve the symptoms of poverty, but to cure it and, above all, to prevent it.” See Dylan Matthews, *Everything You Need to Know About the War on Poverty*, WASH. POST (Jan. 8, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/01/08/everything-you-need-to-know-about-the-war-on-poverty/?utm_term=.005532010721.

109. See HERBERT GANS, *THE WAR AGAINST THE POOR* (1995) and MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989).

110. See Joseph Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, [15, No. 2] SOC. PROBS. 175, 183 (1967).

111. *Id.*

112. See GRAMSCI, *supra* note 89, at 12.

113. *Id.*

114. See GRAMSCI, *supra* note 89, at 3-23.

Autonomy and independence from dominant social groups are key characteristics of traditional intellectuals.¹¹⁵ They “possess a certain technical capacity” linked to a profession.¹¹⁶ University professors, lawyers, priests are traditional intellectuals.¹¹⁷

Traditional intellectuals “are directly involved in the production and reproduction of ideological forms that reinforce domination by classes that control political and economic power.”¹¹⁸ One of their responsibilities is to socialize successive generations to accept the dominant ideology and power relations within the existing social order.¹¹⁹ They think of themselves as independent of ruling groups.¹²⁰ Traditional intellectuals maintain existing hegemonic power by remaining allied to and aiding the ruling group in society.¹²¹

b. *Organic Intellectuals*

Organic intellectuals can also be doctors, lawyers, or priests who rise “to that level from within a social class that does not normally produce [traditional] intellectuals” and stay “connected to that class.”¹²² Organic intellectuals come from the “most oppressed and exploited social classes and groups within society” and “articulate class consciousness in politics and in social relations.”¹²³ Organic intellectuals have, at most, tenuous connections with the elites who control the economy and government.¹²⁴ Hence, their class position conflicts with dominant players in society.¹²⁵

As economic production generates new classes, it creates “organically, one or more strata of intellectuals which give it homogeneity and an awareness of its own function.”¹²⁶ These are organic intellectuals. In this definition Gramsci includes scholars, writers, or anyone who can transfer ideas within civic society and between civic society and government.¹²⁷

115. See Burke, *supra* note 90.

116. See César Cuauhtémoc García Hernández & Marc-Tizoc González, *Latcrit XV Symposium Foreword: Fifteen Years of Reconstructing the World*, 14 HARV. LATINO L. REV. 243, 245 (2011) (citing ANTONIO GRAMSCI, PRISON NOTEBOOKS 199 (Joseph A. Buttigieg ed. & trans., 1996)).

117. See ALFONSO GONZALES, REFORM WITHOUT JUSTICE: LATINO MIGRANT POLITICS AND THE HOMELAND SECURITY STATE 24 (2013).

118. See Michael K. Jordan, *Colored People and Affirmative Action: The Colored Man Standing by the Punch Bowl*, 5 N.Y. L. REV. 175, 201 (2002) (citing MANNING MARABLE, BLACK LEADERSHIP FOUR GREAT LEADERS AND THE STRUGGLE FOR CIVIL RIGHTS 98 (1998)).

119. *Id.*

120. See Burke, *supra* note 90.

121. See also JOHN M. CAMMETT, ANTONIO GRAMSCI AND THE ORIGINS OF ITALIAN COMMUNISM 204 (1967).

122. See <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100253736> (last visited Apr. 20, 2020).

123. See MARABLE, *supra* note 118 at 99.

124. *Id.*

125. *Id.*

126. See GRAMSCI, *supra* note 89, at 5.

127. See Walter L. Adamson, HEGEMONY AND REVOLUTION: A STUDY OF ANTONIO GRAMSCI'S POLITICAL AND CULTURAL THEORY 143 (1980). Some scholars of race or critical praxis have used the idea of the organic intellectual. See, e.g., Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1012-15 (1990) (arguing that Dr. King was an organic intellectual).

The role of the organic intellectual, as “the thinking and organizing element[s] of a particular fundamental social class,” is to “organize the social hegemony of a group and that group’s domination of the state.”¹²⁸ Working class organic intellectuals try not only to resist hegemonic processes, but also replace “old hegemonic” orders by leading the groups they represent to better understand how capitalism exploits people.¹²⁹ Organic intellectuals become paragons who supply a new vision to their class for more equitable social organization.¹³⁰

Organic intellectuals can also serve the bourgeois. Gramsci believed that the key trait of any group vying for social dominance is the ability to ideologically absorb and assimilate traditional intellectuals.¹³¹ However, he noted that “this assimilation and conquest is made quicker and more efficacious the more the group in question succeeds in simultaneously elaborating its own organic intellectuals.”¹³²

Examples of organic intellectuals include Black scholars like Cornel West and Henry Louis Gates, Jr.¹³³ They use commercial media to reach their own communities and the white dominant society.¹³⁴ West and Gates remain firmly grounded in Black traditions and popular culture while working with European models of intellectualism.¹³⁵ Despite leaving their communities of origin and returning as top-down authorities, these Black intellectuals are viable spokespersons because of their shared experience of racial oppression.¹³⁶

B. How Outsider Public Defenders Can Embody Organic Intellectualism

Jeff Adachi,¹³⁷ before his passing, and Bryan Stevenson,¹³⁸ are examples of organic intellectuals. They share backgrounds as outsiders, galvanized public support

128. See GRAMSCI, *supra* note 89, at 200-01.

129. See McLaren et al., *supra* note 105, at 28 (citing GRAMSCI, *supra* note 89, at 5).

130. See McLaren et al., *supra* note 105, at 28.

131. See Ciocchini & Khoury, *supra* note 96, at 77.

132. See GRAMSCI, *supra* note 89, at 6.

133. See LAURA GRINDSTAFF, *THE MONEY SHOT: TRASH, CLASS, AND THE MAKING OF TV TALK SHOWS*, 231 (2002).

134. *Id.*

135. *Id.*

136. *Id.*

137. Jeff Adachi was head of the San Francisco Public Defender’s Office for 15 years before his death in February of 2019. He has written and spoken on myriad issues in indigent criminal defense, including drug arrests, see Jeff Adachi & Tal Klement, *The War on Crumbs*, 91 OR. L. REV. 1319 (2013) (criticizing expenditures on drug arrests and unlawful police conduct); Jeff Adachi, *Sentencing Bill Would Worsen State’s Prison Crisis*, L.A. Daily J., Mar. 26, 2007 (sentencing reform); Press Release, SAN FRANCISCO PUBLIC DEFENDER, *SF Public Defenders Stand Up to Money Bail* (Oct. 25, 2017), <https://sfpublicdefender.org/news/2017/10/sf-public-defenders-stand-up-to-money-bail/> (last visited Aug. 23, 2020). The National Association of Criminal Defense Lawyers President Elect Nina Ginsberg described Adachi as “a visionary who helped transform the face of public defense. He fought tirelessly to make the promise of equal justice a reality for all his clients and for the racially and economically marginalized communities he proudly served.” See Norman L. Reimer, *The Loss of a Crusader for A New Paradigm Jeff Adachi (1959-2019)*, THE CHAMPION, Mar. 2019, at 5. The City of San Francisco named a street by the San Francisco Public Defender’s Office after him. Amanda Peterson, *Friends, family gather for renaming of street named in honor of Jeff Adachi*, SF EXAM. (Feb. 26, 2020), <https://www.sfexaminer.com/photo-galleries/friends-family-gather-for-renaming-of-street-named-in-honor-of-jeff-adachi/>.

138. Bryan Stevenson is the founder of the Equal Justice Initiative, a non-profit organization, based in Montgomery, Alabama. EQUAL JUST. INITIATIVE, <https://eji.org/about>. In addition to death penalty work, he is a best-selling author and clinical professor of law at New York University School of Law, see

for indigent criminal defense, and raised awareness of the injustices in the criminal system.

Jeff Adachi is a fourth generation Japanese American, whose father worked as an auto mechanic and mother as a laboratory assistant.¹³⁹ He worked at age nine and had poor grades because he spent so much time working instead of focusing on school.¹⁴⁰ The United States government sent his grandparents and parents to an internment camp during World War II.¹⁴¹ Bryan Stevenson, a Black man raised in a poor rural community in Delaware, experienced racial discrimination.¹⁴² Specifically, he noted that “there was this break in the world, and if you grew up on one side of that crack, it was definitely different than if you grew up on the other side of it.”¹⁴³ Through their legal practice, scholarship, public speaking, and writing, they have made more Americans aware of mass incarceration and racial disparities in criminal justice.¹⁴⁴

Adachi and Stevenson are well-known, but organic intellectuals need not be household names.¹⁴⁵ Most industrious public defenders committed to zealously representing clients do not appear on television or popular media.¹⁴⁶ They can be organic intellectuals despite lack of exposure in popular media.

All outsider public defenders can become organic intellectuals by being “heroes” for their clients, as articulated by Charles Ogletree.¹⁴⁷ As champions of indigent criminal defendants, they become victors for their clients’ poor and marginalized communities.¹⁴⁸ This undertaking inspires other defenders to do the

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<https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.biography&personid=20315>.

139. *Jeff Adachi: This is the Most Important Case of My Career*, KQED: PRESUMED GUILTY (2002), <https://www.pbs.org/kqed/presumedguilty/1.1.0.html> (last visited May 21, 2020).

140. *Id.*

141. See Michael Kranish, *Kamala Harris ‘grew up’ with Jeff Adachi. Then tragedy struck*, WASH. POST (Mar. 26, 2019), https://www.washingtonpost.com/politics/kamala-harris-grew-up-with-jeff-adachi-then-tragedy-struck-/2019/03/06/2b8e93f2-3c70-11e9-a06c-3ec8ed509d15_story.html (last visited May 21, 2022).

142. See *Bryan Stevenson*, GRUBER FOUND., <https://gruber.yale.edu/justice/bryan-stevenson> (last visited May 21, 2022).

143. *Id.*

144. PBS featured Jeff Adachi in a 2002 documentary, *Presumed Guilty*. See Katy St. Clair, *Roxie Theater screens ‘Presumed Guilty’ to help Jeff Adachi Legacy Fund*, S.F. BAY VIEW NAT’L BLACK NEWSPAPER (Mar. 30, 2019), <https://sfbayview.com/2019/03/roxie-theater-screens-presumed-guilty-to-benefit-jeff-adachi-legacy-fund/>. Bryan Stevenson wrote a New York Times bestseller, *Just Mercy*, and founded a museum to recognize the victims of lynching in Montgomery, Alabama, The National Memorial for Peace and Justice. See Campbell Robertson, *A Lynching Memorial is Opening. The Country Has Never Seen Anything Like it*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/us/lynching-memorial-alabama.html> (last visited May 22, 2020).

145. See RACE AND HEGEMONIC STRUGGLE IN THE UNITED STATES: POP CULTURE, POLITICS, AND PROTEST 95 (Michael G. Lacy & Mary Triece, eds., 2014) (“For subaltern groups (i.e., poor Black women), organic intellectuals are defined in terms of their degree of connection to the particular group they purport to represent. The organic intellectual combines both a ‘feeling’ and a ‘knowing,’ that, both ‘passion’ and ‘understanding.’ For an individual to represent the people she is leading, there must be an ‘organic cohesion in which feeling-passion becomes understanding.’”). This process does not need popular knowledge or fame.

146. In my experience public defenders get calls from local and sometimes national media about cases, but it is rare to see public defenders appearing on local TV news or national TV news to discuss issues of mass incarceration, for example.

147. See *supra* Part I.A.2.

148. See Monica Bell et al., *Toward A Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1482 (2020) (noting the poverty and marginalization of criminal defendant’s communities).

same. Through zealous advocacy,¹⁴⁹ outsider public defenders can expose police and prosecutor misconduct and help judges and jurors come to sensible legal and factual decisions during trial. Outsiders, because of similarly shared experiences of struggle and connection to disadvantaged communities, may be more adept to be zealous advocates.

Most indigent criminal defendants and outsider public defenders have strong roots in subaltern groups.¹⁵⁰ This makes communication easier between clients, witnesses, family, friends, and co-workers. Thus, Public defender offices should recruit lawyers with strong connections to these segments of the underclass. This may not be easy to do but recruitment efforts need to be stronger among public defenders.¹⁵¹

To be a zealous advocate, the outsider public defender must know the socio-historical context where cases arise.¹⁵² Facts in a criminal case are imperative.¹⁵³ Facts include not only events that led to a traffic stop, but the reasons for the traffic stop, or specific details of a self-defense claim. Outsider public defenders know that all actions in a community occur within a historical and sociological context.¹⁵⁴ Understanding the dynamics of police, witnesses, and suspects is paramount.¹⁵⁵ Defendants must understand witnesses' motivations, biases, and criminal record.¹⁵⁶ Often, public defenders cannot do this without community ties.¹⁵⁷ Members of a client's community may not trust someone who does not come from the same area.¹⁵⁸ They may take longer to trust a lawyer, investigator, or mitigation specialist who does not share something in common with them.¹⁵⁹

Outside of their caseloads, public defenders should amplify and interact with issues affecting their clients. Public defenders should engage with police reform and

149. See Model Rules of Pro. Conduct pmb1 §2 (“As an advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”).

150. See Bell et al., *supra* note 148, at 1482. See also Susan Grover, *Personal Integration and Outsider Status as Factors in Law Student Well-Being*, 47 WASHBURN L.J. 419, 421 (2008) (observing that being an ‘outsider’ entails connection to groups outside the mainstream).

151. See Rick Pfeiffer, *Critics question public defender hiring, lack of minorities*, NIAGARA GAZETTE (Jan. 9, 2020), https://www.niagara-gazette.com/news/local_news/critics-question-public-defender-hiring-lack-of-minorities/article_a0e1066e-dfa1-53dc-a414-92d1aec3e215.html (local official in Niagara County admits that hiring minorities requires effort, such as recruitment at local law schools and placing advertisements in newspapers).

152. See Margaret Samadi & Steven Rineberg, *Weaving A Stronger Fabric*, 53 TRIAL, June 48, 51 (2017) (“Listen to and engage your clients—empower them. Ask questions, but do not do all the talking. Focus on your client’s experiences—shared and foreign. Shared experiences are relatable. Foreign experiences are instructive. By doing these things, you can tease out your client’s life story. More important, you will find the chapters of that story; within those chapters are the crucial details relevant to your client’s case.”)

153. See Honorable Edward D. Re, *Stare Decisis*, 79 F.R.D. 509, 511 (1978) (“Of course, the issues raised in a case stem from the facts presented. The facts of the case, therefore, are of the utmost importance.”).

154. Sociologist C. Wright Mills referred to how we understand the relation between self and society as the sociological imagination. See C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 3 (1959).

155. See Ralph Norman Haber, *Experiencing, Remembering and Reporting Events*, 6 PSYCH. PUB. POL’Y & L. 1057, 1064 (2000) (discussing the systematic errors in memory that are especially likely to occur in courtroom testimony, including witness motivations).

156. *Id.*

157. See Marcia Pennington Shannon, *Cultivating the Art of Effective Client Communications*, LAW PRAC. MAG., 2011.

158. This observation is based on this author’s professional experience.

159. This observation is based on this author’s professional experience.

anti-mass incarceration movements.¹⁶⁰ Public defenders can talk to local newspapers and news stations, write blogs, op-eds, articles in magazines, law review articles, books, participate in teaching efforts about ending mass incarceration, promote efforts to increase funding for public defenders, and be in and create documentaries.¹⁶¹

The public defender as an organic intellectual digs deep into her clients' lives, investigates facts, and files professionally written motions.¹⁶² By telling the story of her clients in court and to the media, she champions subaltern communities. These practices transform ordinary line public defenders into organic intellectuals. By being an example to their communities, these role models can even inspire young men and women to attend law school and pursue similar work.¹⁶³

Jeff Adachi and Bryan Stevenson exemplify Antonio Gramsci's organic intellectual model. Outsider public defenders can also apply this to their practice. Identity formation is imperative to take the model a step further. Through understanding their professional identity formation, the outsider public defender can better connect to the clients and communities they represent.

III. IDENTITY AND OUTSIDER PUBLIC DEFENDER NARRATIVES

The outsider public defender's experiences make it easier to relate to clients and thus enable her to continue successfully defending. But outsiders must understand how they develop their identity, including the obstacles they face, to understand the formation of organic intellectualism. This understanding gives them insight and prevents burnout.

Outsiders, before they become public defenders, go through life with a feeling of not fitting in mainstream white culture.¹⁶⁴ They go through a process of identity formation in undergraduate school, law school, and as early career professionals. This part introduces the process of professional identity formation and explains the barriers outsiders face as young lawyers navigating their outsider perspectives. The concept of professional identity formation is imperative to understand because it supplies a mechanism for knowing how outsiders achieve a

160. See Martin Austernuhle, *Here's What Black Lives Matter D.C. Is Calling For, And Where the City Stands*, NPR (June 9, 2020), <https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands> (describing how Black Lives Matter has an agenda that would reform the criminal justice system).

161. Examples of public defender in film media include GIDEON'S ARMY (Trilogy Films in association with Motto Pictures 2013), PRESUMED GUILTY: TALES OF THE PUBLIC DEFENDERS (KQED & Skylight Pictures 2002), and the adaptation of Bryan Stevenson's book, *Just Mercy*, into a major motion picture, starring Oscar-winning actor Jamie Foxx. JUST MERCY (Participant Media & Warner Bros. Pictures 2019).

162. Three oft-neglected obligations by non-zealous public defenders are the duties to investigate, seek discovery, and research and litigate pre-trial motions. See Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 169 (2009).

163. See Melinda S. Molina, *Role Models: Theory, Practice, and Effectiveness Among Latina Lawyers*, 25 J. C.R. & ECON. DEV. 125, 138 (2010) (discussing benefit of role models and the effect Justice Sotomayor's appointment to the Supreme Court will have on young Latinas to enter the legal profession).

164. See Thomas M. Kersen, *Insider/Outsider: The Unique Nature of the Sociological Perspective and Practice*, 10 J. APPLIED SOC. SCI. 104, 107 ("The idea of insider/outsider is not new. Consider Georg Simmel's (1950) 'The Stranger' who is a member of a group but may still experience some social distance from other members of the group. Such a person might be the best to see patterns of social life that group members might not see.").

sense of self in work and life. One cannot know oneself without understanding one's identity formation.¹⁶⁵

The end of this Part supplies real-life examples of outsider public defender stories through summaries of interviews. It includes my story. By digesting real-life experiences of zealous defenders, one can understand how identity fits into making an organic intellectual—one whose social context connected, compelled, and impassioned her about clients and client communities.

A. Professional Identity

The identity of the outsider public defender, when recognized, is what sets them apart from others. Identity is the distinguishing character or personality of a person.¹⁶⁶ It consists of one's subjective psychological experience, rather than an objective reality of the 'true self.'¹⁶⁷ An individual's identity appears when a person is born and psychologists divide it into stages, with late adolescence and early adulthood "being particularly important."¹⁶⁸

Identity has two parts: personal and social.¹⁶⁹ Personal identity is the "individuated self—those characteristics that differentiate one individual from others."¹⁷⁰ On the other hand, social identities are "categorizations of the self into more inclusive social units that depersonalize the self-concept."¹⁷¹ Examples of social identities are race, gender, or organizational membership.¹⁷² A struggle develops as the demands of social identities infringe upon the uniqueness of personal identity.¹⁷³ Social identity derives from a person's balance between individual identity and maintaining group identity—a similarity to others and a need for individuation and uniqueness.¹⁷⁴

Work identities, including but not limited to professional identities, are those meanings that individuals attach to themselves in work.¹⁷⁵ Professional identity is a "representation of self, achieved in stages over time" during which the individual internalizes "characteristics, values, and norms" of a profession, leading them to think, act, and feel like a professional.¹⁷⁶ It is "an individual's image of who they are as a

165. See DEREK LAYDER, *SOCIAL AND PERSONAL IDENTITY: UNDERSTANDING YOURSELF* 1-6 (2004).

166. *Identity*, MERRIAM-WEBSTER DICTIONARY (last visited May 21, 2020) <https://www.merriam-webster.com/dictionary/identity>.

167. See BRIANNA B. CAZA & STEPHANIE CREARY, *THE CONSTRUCTION OF PROFESSIONAL IDENTITY*, 5 (2016) <http://scholarship.sha.cornell.edu/articles/878> (citing Vivian L. Vignoles et al., *Beyond Self-Esteem: Influence of multiple motives on identity construction*, 90 J. PERS. SOC. PSYCH. 308 (2006)).

168. See Sylvia R. Cruess & Richard L. Cruess, *From Teaching Professionalism to Supporting Professional Identity Formation: Lessons from Medicine*, 68 MERCER L. REV. 665, 675 (2017).

169. Glen E. Kreiner et al., *Where is the "Me" Among the "We"? Identity Work and the Search for Optimal Balance*, 49 ACAD. OF MGMT. J. 1031, 1032 (2006).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Marilyn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERSONALITY & SOC. PSYCH. BULL. 475, 477 (1991).

175. See Jane E. Dutton et al., *Pathways for positive identity construction at work: Four types of positive identity and the building of social resources*, 35 ACAD. OF MGMT. REV. 265 (2010).

176. See Sylvia R. Cruess & Richard L. Cruess, *From Teaching Professionalism to Supporting Professional Identity Formation: Lessons from Medicine*, 68 MERCER L. REV. 665, 685 (2017) (citing

professional: a constellation of attributes, beliefs, values, motives, and experiences that people use to define themselves in their professional capacity.”¹⁷⁷

In law, professional identity is a “lawyer’s personal morality, values, decision-making process, and self-consciousness.”¹⁷⁸ It consists of “certain attitudes and habits of heart and mind that are thought critical to the practice and culture of the profession.”¹⁷⁹ As a cognitive mechanism, it influences one’s attitudes, affect, and behavior in work settings and beyond.¹⁸⁰ Studies show that professional identification also has positive performance outcomes, such as career success.¹⁸¹

Professional identification is related to a professional’s commitment and work satisfaction.¹⁸² Research on professional identity construction presumes workers are active in forming their professional identity and that mentors and role models play a more passive part.¹⁸³

1. Professional Identity Construction, Identity Theory, and Socialization

Professional identity construction is part of a process of identity formation that involves identity work, or “interpretive activity involved in reproducing and transforming self-identity.”¹⁸⁴ Workers draw meaning from personal characteristics, group membership, and work roles to ascribe sense to who they are and what they do in the workplace.¹⁸⁵ They build their social or work identities from aspects of their profession or organization.¹⁸⁶ Intensive interaction with mentors is imperative to developing professional identities.¹⁸⁷ An individual may have more than one identity at work that can be at different stages of construction.¹⁸⁸ How a person defines herself in her professional role becomes a crucial way to understand and define herself and her life’s purpose.¹⁸⁹

Richard L. Cruess et al., *Reframing Medical Education to Support the Development of Professional Identity Formation*, 89 ACAD. MED. 1446 (2014).

177. See CAZA & CREARY, *supra* note 167, at 4 (citing Holly S. Slay & Delmonize A. Smith, *Professional identity construction: Using narrative to understand the negotiation of professional and stigmatized cultural identities*, 64 HUM. RELS. 85 (2011)).

178. See Jan L. Jacobowitz, *Cultivating Professional Identity & Creating Community: A Tale of Two Innovations*, 36 U. ARK. LITTLE ROCK L. REV. 319, 321 (2014).

179. *Id.* (citing Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 117, 118 (2001)).

180. See CAZA & CREARY, *supra* note 167, at 4.

181. *Id.* at 7 (citing MICHAEL B. ARTHUR ET AL., HANDBOOK OF CAREER THEORY (1989)).

182. *Id.* at 10.

183. *Id.* at 12.

184. *Id.* at 11 (citing Mats Alvesson and Hugh Willmott, *Identity Regulation as Organizational Control: Producing the Appropriate Individual*, 39 J. OF MGMT. STUDIES 619 (2002)).

185. *Id.* at 4 (citing Ashforth et al., *Identification in organizations: An examination of four fundamental questions*, 34 J. OF MGMT. 325 (2008)).

186. *Id.* at 4 (citing John Van Maanen & S.R. Barley, OCCUPATIONAL COMMUNITIES: CULTURE AND CONTROL IN ORGANIZATIONS (1984)).

187. See Charlotte S. Alexander, *Learning to Be Lawyers: Professional Identity and the Law School Curriculum*, 70 Md. L. Rev. 465, 466 (2011) (citing William M. Sullivan et al., THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, *Educating Lawyers: Preparation for the Profession of Law* 135 (2007)).

188. See CAZA & CREARY, *supra* note 167, at 5.

189. *Id.* at 5.

People subconsciously arrange work and non-work identities according to their prominence.¹⁹⁰ Strong identification suggests the person regards a social group or role to be an important characteristic of who he or she is as an individual.¹⁹¹ Psychologists positively relate identification to an individual's self-esteem.¹⁹² Employees with higher levels of professional identification get more satisfaction from work.¹⁹³

Socialization, or the "social learning process by which a person acquires specific knowledge and skills that are required in a professional role," affects identification.¹⁹⁴ In socialization, a person "internalizes the norms, values, behaviors and attitudes" of a new job.¹⁹⁵ In doing so, he or she forms an identification with a profession.¹⁹⁶ It "allows individuals to learn and practice the behavioral expectations" of their new professional selves.¹⁹⁷

Socialization is the glue that attaches social ties and professional groups to the person.¹⁹⁸ Society exposes professionals to strenuous socialization periods to intensify their identification with the profession.¹⁹⁹ There is a positive correlation between the selectivity of a profession in terms of entry and how likely a person will identify with it.²⁰⁰ The socialization process influences how people relate to their profession.²⁰¹

2. The Decision to Become Public Defenders

People treat occupations as jobs, careers, or callings.²⁰² Based on my fifteen years of experience, public defenders fall somewhere in the last two categories. Most public defenders do not go into the practice for extrinsic material rewards. Most go into it and remain because of intrinsic rewards. Many public defenders stay on the job for potential career advancement, but also see the job as a calling.²⁰³

190. *Id.* at 8 (citing Sheldon Stryker & Peter J. Burke, *The past, present, and future of an identity theory*, 63 SOC. PSYCH. Q. 284 (2000)).

191. *Id.* (citing Richard Serpe & Sheldon Stryker, *The construction of self and reconstruction of social relationships*, in ADVANCES IN GROUP PROCESSES (Edward Lawler & Barry Markovsky eds., 1987)).

192. *Id.* at 9 (citing Blake E. Ashforth and Fred Mael, *Social identity theory and the organization*, 14 ACAD. OF MGMT. REV. 20 (1989)).

193. *Id.* ("Additionally, high levels of professional identification are associated with more satisfied employees, and more extra-role supportive behaviours.")

194. *Id.* (citing D.T. Hall, *Careers and Socialization*, 13 J. OF MGMT. 301 (1987)).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (citing Roderick J. Watts, *Development of professional identity in Black clinical psychology students*, 18 PRO. PSYCH.: RSCH. AND PRAC. 28 (1987)).

200. *Id.* (citing Andrew Abbott, *Status and Status Strain in the Professions*, 86 AM. J. SOC. 819 (1981)).

201. *Id.* at 10.

202. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985). See also Amy Wrzesniewski et al., *Jobs, Careers, and Callings: People's Relations to Their Work*, 31 J. OF RSCH. IN PERSONALITY 21, 22 (1997).

203. Occupations that encourage a sense of "calling" present powerful "identity demands," which tend to "push individuals toward a high degree of overlap between personal and occupational identity." See Kreiner et al., *supra* note 169.

Some scholars have even compared the decision to become a public defender to a religious calling.²⁰⁴ Indigent criminal defense practice draws certain lawyers, consciously or not, because of deeply held values and convictions.²⁰⁵ This contrasts with the perspective law students expressed when pursuing paths in corporate law, as documented in a study by Professor John Bliss: “being a lawyer is not central to my being at all, I want to be a lawyer just so that I can provide for the things that I want out of life.”²⁰⁶ In my experience, public defenders come into indigent defense with strong convictions about the justice system. They speak about the decision with conviction, thoughtfulness, and sometimes emotion. This makes them different from lawyers in other fields, such as corporate law.

Outsiders who become public defenders often do so through examining their life, circumstances, beliefs, and experiences.²⁰⁷ Indigent defense work draws outsiders because by helping clients, they help the community they came from or communities like the one they came from.²⁰⁸ Indigent defense also draws outsiders because coming from working-class backgrounds can fuel passion for working with underprivileged clients.²⁰⁹ Research shows that working-class backgrounds among students can “encourage a politicized and integrated view of professional identity by fueling empathy for disadvantaged people and a priority on distributive justice goals.”²¹⁰ Ultimately, law students or young lawyers, including outsiders who become public defenders, embrace a professional identity.²¹¹ They seek to “find in their practice an opportunity to lead an unalienated professional life, to find something to believe in.”²¹²

3. Hurdles for Outsider Public Defenders

Outsiders face professional difficulties once they enter a profession. These include a sense of not belonging, the negative influence of stereotypes, difficulties seeking help for mental health problems, poor treatment in professional settings, and “covering.”

a. Sense of Not Belonging

The outsider public defender’s sense of not belonging begins at an early age and continues in law school and early years of practice. For instance, women-identifying and non-binary people, members of lower socioeconomic classes, and

204. See John P. Gross, *Case Refusal: A Right for the Public Defender but Not a Remedy for the Defendant*, 95 WASH. U.L. REV. 253, 259 (2017) (citing Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999)).

205. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 452 (1999).

206. See John Bliss, *Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in A Period of Market Crisis*, 42 L. & SOC. INQUIRY 855, 875.

207. See *infra*, Part III.B.1.

208. *Id.*

209. Antony S. R. Manstead, *The Psychology of Social Class: How socioeconomic status impacts thought, feelings, and behavior*, 57 BRIT. J. OF SOC. PSYCH. 267, 267 (2018) (“Working-class people score higher on measures of empathy and are more likely to help others in distress.”).

210. See Bliss, *supra* note 206, at 870.

211. *Id.* at 861 (citing STUART A. SCHENGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004)).

212. *Id.*

students of color experience an “identity dissonance” as they transition into the profession.²¹³ Identity dissonance can cause underperformance, which can lead to stress and behaviors such as increased alcohol consumption, dressing inappropriately, and avoiding professional school setting interactions.²¹⁴ White males with moderate political views “experience consonance between their professional identities as lawyers and their previous identities.”²¹⁵

Women and marginalized students experience an “elevated dissonance with professional identity” because of law schools’ “normative ‘upper-middle-class white male’ habitus.”²¹⁶ The transition for women and people of color is often traumatic and alienating as these students “tended to suffer from feelings of inauthenticity, recognizing that they were attempting to play a role rather than doing something that came naturally.”²¹⁷ New minority and women public defenders experience the same feelings when they step into mostly white male offices without support and mentor systems.²¹⁸

b. Negative Stereotypes

People of color and women often perceive themselves as subject to negative stereotypes. In turn, they feel the need to do more identity work to mitigate those stereotypes.²¹⁹ Most public defender offices value effort and intellectual ability. A Black male public defender, for example, perceives that negative stereotypes about him exist.²²⁰ To push against the negative stereotype of the “lazy Black man,” he works longer hours than normal.²²¹ This behavior backfires because it creates the impression he needs to work longer hours than others to do the same work (he is less competent).²²² The real-life example of Black federal district court judge²²³ illustrates this point. During points in his career, he felt he had to stay in the office late, come in earlier than others in the morning, and project an image to combat negative stereotypes of Blacks as lazy and less deserving than whites.²²⁴

213. *Id.* at 862 (citing CARIE YANG COSTELLO, PROFESSIONAL IDENTITY CRISIS: RACE, CLASS, GENDER, AND SUCCESS AT PROFESSIONAL SCHOOLS (2005)).

214. See Lynn V. Monrouxe, *Identity, Identification and Medical Education: Why Should We Care?* 44 MED. EDUC. 40, 42 (2010).

215. See Bliss, *supra* note 206, at 862.

216. *Id.* at 884.

217. *Id.*

218. See *infra* Part III.B.7. This is true for Nancy Stallworth. She experienced low-grade racism, or liberal racism. People told her that “you got here so now you can be quiet,” or they presumed that because she was Black, she came from a horrible social background. These experiences took place in public defender offices that management populated with a white demographic of lawyers and where there was no training on implicit bias or racism in the workplace.

219. See Carbado & Gulati, *supra* note 10, at 1262.

220. *Id.* at 1292.

221. *Id.*

222. *Id.*

223. Although this Article is about outsider public defenders, the example of the judge is illustrative of the experience of outsiders in any profession, including law clerks, appellate lawyers, transactional lawyers, and mediators. See Adia Harvey Wingfield, *Being Black—but Not Too Black—in the Workplace*, THE ATLANTIC (Oct. 14, 2015), www.theatlantic.com/business/archive/2015/10/being-black-work/409990/ (Minority professionals in a variety of fields share similar experiences such as treading cautiously to avoid upsetting the majority group’s sensibilities).

224. *Id.*

Supervisors in public defender offices subconsciously use stereotypes when assigning cases and work responsibilities.²²⁵ They are likely to assign outsider defenders more cases compared to white male defenders.²²⁶ Supervisors may also more frequently assign higher profile cases that can generate promotions and higher salaries to white males.²²⁷ Outsider line attorneys are familiar with negative stereotypes about them.²²⁸ For example, an outsider line attorney may think that if they say no, they may lower her chances for promotion or raise.²²⁹

The existence of stereotypes in public defender offices not only affects what outsiders say and do, it also affects what supervisors say and do regarding their outsider line attorneys.²³⁰ Because of stereotypes, outsiders are more likely to be asked to perform certain tasks such as covering hearings and handling more routine cases. They are also more likely to say yes (including accepting more case assignments).²³¹ Ultimately, the cost of taking on too many tasks undermines an outsider's ability to succeed within the workplace.²³²

c. *Difficulty Receiving Mental Health Assistance*

Outsider attorneys may not only feel pressure to overperform, overcome negative bias, and prove that they “belong” in the profession, but they also may face difficulties obtaining help for mental or substance abuse problems.²³³ Research shows that racial and ethnic minorities, along with members of the LGBT community, face greater barriers to getting help.²³⁴ Even after controlling for factors such as health insurance and socioeconomic status, ethnic minority groups still have higher unmet mental health needs than non-Hispanic whites.²³⁵

225. See Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR L. REV. 103, 111 (2000) (“Even if the employer’s engagement with such employees is not consciously based on the realization of unequal bargaining power, the employer may still end up over-allocating work to outsiders.”).

226. Although no empirical research has been conducted on public defender case assignments and minority lawyers, empirical research supports this conclusion in other contexts, see Robert K. Christensen et al., *Race and Gender Bias in Three Administrative Contexts: Impact on Work Assignments in State Supreme Courts*, 22 J. OF PUB. ADMIN. RSCH. & THEORY 625, 637 (2012) (explaining biases in the assignment of majority opinion-writing in state supreme courts, with the graduates of “elite” educational institutions more likely to receive majority opinion-writing assignments on salient cases, while both female and minority justices are less likely to receive such assignment).

227. See Hermina Ibarra, Nancy M. Carter & Christina Silva, *Why Men Still Get More Promotions Than Women*, HARV. BUS. REV., (Sept. 2010), <https://hbr.org/2010/09/why-men-still-get-more-promotions-than-women> (women have less chances at promotion even though have the same or greater abilities than men).

228. See Carbado & Gulati, *supra* note 225, at 111-112.

229. *Id.* (“If an employee perceives that, because of stereotypes, the employer thinks that she (the employee) is likely to be lazy, the employee is likely to say yes to the employer’s request that the employee take on additional projects, even when she is already busy. To put the point a little differently, the existence of stereotypes diminishes an employee’s workplace bargaining power, and thus, her ability to negotiate workload.”)

230. *Id.* at 112.

231. *Id.*

232. *Id.*

233. See Jayne Reardon and Bree Buchanan, *Lawyer Well-Being: An Uncharted Path to Increasing Diversity and Exclusion*, ABA (Feb. 19, 2018).

234. *Id.*

235. *Id.* (“Racial and ethnic minorities —as well as lesbian, gay, bisexual and transgender people—face greater barriers to getting help.”).

Different ethnic and minority groups face varying challenges. Researchers have found that Asian Americans have stronger negative implicit attitudes toward mental illness than white Americans.²³⁶ Another study found that the cultural stereotype of the “strong Black woman” promotes “unflagging toughness, strength, self-reliance, and denial of self-needs, and has a distinct cultural history in tension with seeking help.”²³⁷ Complicating matters is that a person’s faith community may not be supportive of seeking help outside of prayer.²³⁸ Distrust for the healthcare system, unfortunately, is also prevalent among some minority and immigrant groups.²³⁹

d. Poor Treatment in the Courthouse

Outsider lawyers are more likely to experience instances of disrespect in courthouses.²⁴⁰ Clerks, court reporters, bailiffs, and even judges are more prone to question a person of color’s identity as the lawyer compared to those of white lawyers. Minority lawyers are also more likely to feel ignored or not listened to in the courthouse because of their race.²⁴¹ For example, a female Black lawyer who participated in a survey in the D.C. Circuit said she experienced opposing counsel and others in the courtroom treating her as a spectator or court reporter, even though she wore a suit, carried a briefcase, and sifted through a stack of papers.²⁴² A white lawyer was present, but no one asked her if she was a court reporter or spectator.²⁴³ This experience happened on multiple occasions.²⁴⁴ A Black lawyer noted a judge assumed he was a criminal defendant and that courtroom clerks “all the time ask me . . . ‘Who is your lawyer?’”²⁴⁵ Bryan Stevenson, the well-known Black death penalty lawyer, founder of the Equal Justice Initiative, and clinical professor at New York University Law School, reported that in a courtroom in the Midwest, a judge asked him to go to the hallway until his lawyer arrived.²⁴⁶ Mr. Stevenson said that he was the lawyer, and everyone laughed about the misunderstanding.²⁴⁷

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. I have personal experience in a situation like this. A younger Latina colleague and I visited a client at a local prison. Prison officers repeatedly thought she was an assistant, paralegal, or probation officer.

241. *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias Special Committee on Race and Ethnicity*, 64 GEO. WASH. L. REV. 189, 278 (1996).

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. See Corey G. Johnson, *Bryan Stevenson on Charleston and Our Real Problem with Race*, THE MARSHALL PROJECT (June 24, 2015), <https://www.themarshallproject.org/2015/06/24/bryan-stevenson-on-charleston-and-our-real-problem-with-race>. See also *Brief but Spectacular*, PBS NEWS HOUR, <https://www.pbs.org/newshour/brief/212675/bryan-stevenson>.

247. See Johnson, *supra* note 246.

e. *Covering*

Covering originates from Erving Goffman's theory on "how individuals use 'fronts' to provide observers with desired impressions."²⁴⁸ Outsider lawyers are more likely to "cover up," or "downplay racial identity" during interactions to "gain acceptance, negotiate other identities, or remain psychologically intact."²⁴⁹

Racial covering includes:

- Learned bargaining
- Silence
- Acquiescence
- Dress
- Speech
- Distancing from the racial community
- Overstating or understating academic achievement
- Not responding to a racialized atmosphere
- Prioritizing other identities over race (i.e., religion or ethnicity)
- Embracing a non-activist identity
- Privileging cultures stereotypically associated with white identity instead of those stereotypically associated with racial group identity²⁵⁰

The following are further examples of covering outside of race:²⁵¹

- A Christian employee who hides a cross pendant under a blouse.
- A new parent who avoids talking about children to avoid beliefs he or she may be less devoted to work.
- A gay employee who does not challenge a homophobic joke made by a coworker because he or she does not want to seem to overreact to it.
- A white man married to a Black woman who does not bring her to work-related functions because he does not want coworkers to know he is in a mixed-race marriage.

Outsider public defenders "cover" while in front of people of power like supervisors but uncover with other communities, such as outsider public defenders, clients of color, or female clients.²⁵² I have seen outsider public defenders annoy other lawyers and supervisors when they decide not to cover. During a team meeting, a Black female public defender laughed loudly.²⁵³ This visibly upset a white female

248. Sunita Patel, *Performative Aspects of Race: "Arab, Muslim, and South Asian" Racial Formation After September 11*, 10 ASIAN PAC. AM. L.J. 61, 70 (2005) (citing Erving Goffman, *The Presentation of Self in Everyday Life* 83 (1959)). See also Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (considering the intersections of race, gender, and gay identity performances).

249. *Id.* at 70.

250. *Id.*

251. *Id.*

252. Covering is something done to hide a person's identity and culture, who they really are. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 76-79 (2006).

253. See Nicola Corbin et al., *Trapped between justified anger and being the strong Black woman: Black college women coping with racial battle fatigue at historically and predominantly white institutions* 31 INT'L J. QUAL. STUD. EDU. 1 (2018) (Black women find themselves on the defensive when encountering everyday racial microaggressions in predominantly and historically white spaces).

supervisor. Although this example appears superficial, it is symptomatic of more systemic problems of implicit racial bias, stereotyping, and microaggressions.²⁵⁴

B. *Narratives of Minority Public Defenders*

Minority public defender narratives illustrate principles of Gramscian organic intellectuals. I devote this section to my story and experiences of other outsider public defenders.²⁵⁵ I interviewed public defenders for this Article and outlined their experiences below. Recurring themes in these interviews are feelings of exclusion or oppression. Their trajectories explain why they help the indigent accused. Each lawyer captures what it means to be zealous defenders. They embody the practice of organic intellectualism.

I included my story because I know myself better than anyone and consider myself an outsider. I became a public defender largely because of my outsider status. The eight public defender narratives illustrate the diversity of outsider stories and shows how identity connects to work choice.

1. My Story

a. *Formative Years and Educational Background*

I was born in Guarulhos, part of the metropolitan area of São Paulo, Brazil. I have European facial features and am brown skinned, with brown eyes. My parents, siblings, and I lived in São Paulo until August 1986, two weeks before I turned nine years old. Due to my father's work in sales with the industrial products division of the Goodyear Tire & Rubber Company, we moved to Akron, Ohio and lived there until I was ten and a half years old. We then lived in Valencia, Venezuela for two years; and finally, Mexico City for four years, before returning to Dallas, Texas where I completed my senior year of high school. I attended private American schools in Venezuela and for a semester in Mexico City. I attended three and a half years at Greengates School Mexico,²⁵⁶ a British international school in Mexico City. Our family traveled, experienced new cultures, and learned English and Spanish. These were privileged experiences.²⁵⁷

I grew up in a family that valued education, but not to the same degree compared to families of friends in the private, elite schools I attended. I lagged in verbal skills because English was a second language. After leaving Brazil my father spoke little English at home. Although my mother learned English, she did not speak it with our family. This made it harder to improve my English writing and reading skills. I also do not have memories of my parents reading to me as a child. My parents

254. See Roxanne A. Donovan et al., *Impact of Racial Macro- and Microaggressions in Black Women's Lives: A Preliminary Analysis*, 38 J. OF BLACK PSYCH. 185 (2012) (outlining microaggressions against Black women).

255. I use pseudonyms to preserve anonymity.

256. See GREENGATES SCHOOL, <https://www.greengates.edu.mx/> (last visited May 22, 2022).

257. Most people, even among the American middle class, do not get to travel to multiple countries, learn new languages, and experience diverse cultures. See Amelia Freedman, *America's Lacking Language Skills*, May 10, 2015, THE ATLANTIC, <https://www.theatlantic.com/education/archive/2015/05/filling-americas-language-education-potholes/392876/>, (noting that advisors discourage students, especially those in college, from language courses or studying abroad because of stringent requirements in another subject matter).

were supportive of learning, and the atmosphere at home was conducive to it, but members of my family are not highly educated. They do not have advanced degrees. I also know no one in my extended family with an advanced degree. Relatives told me that a great uncle was a lawyer, but I never met him, making me a first-generation college student.

When we moved to Akron, Ohio, I attended Fairlawn Elementary School during the fourth and half of the fifth grade. I took English as Second Language classes. Fortunately, Goodyear paid for private tutors to help with learning English. In Valencia, Venezuela I attended the Colegio Internacional de Carabobo, an American school. In Mexico I attended the American School Foundation for a semester and Greengates School for three and a half years. I graduated from Richardson High School in Richardson, Texas, part of the Dallas metropolitan area. A below average verbal score in the SAT but above average scores in math reflected my deficits with the English language.

Even as an outsider, I enjoyed college, graduate school, and law school. I attended Southwestern University, a private liberal arts college in Georgetown, Texas. I applied myself and performed well academically, graduating *cum laude*, but lagged in my writing and reading skills. I applied to and received notices of acceptance from several master's degree programs in Latin American Studies, including UCLA. I ultimately went to the University of Arizona for law school because they offered a tuition waiver. However, the cultural shock of the institution tainted my experience there, and I could not apply myself to the best of my ability. Unlike the experience of other students and young lawyers at the start of my legal career, I had no financial help from my family after my undergraduate schooling at age twenty-one.²⁵⁸ To combat the financial strain of graduate school, I taught Spanish and Portuguese in the Department of Modern Languages at the University of Arizona.

b. Social Upbringing

I am grateful for the privilege of not having grown up low-income. My mother and father always provided well for our family, and we enjoyed a stable, privileged, middle-class life with its material rewards everywhere we lived.²⁵⁹ I have extended family who were always part of the working-class in São Paulo.²⁶⁰ Some of my cousins stopped attending school and became addicted to drugs. One of them died from AIDS. It is difficult to avoid poverty and suffering in developing countries and I saw it in Brazil, Venezuela, and Mexico. Slums are ubiquitous and poor beggars fill the streets in cities. I remember seeing swaths of small shacks in hills as we made our way from Caracas to Valencia when we first arrived in Venezuela.

258. Several friends in law school confided that their mothers and fathers paid all or substantial parts of their undergraduate and graduate expenses, including helping with mortgages and cars. My parents helped with undergraduate tuition as much as they could, paid for a leased car (although I worked after the summer of my first year and gave most of the money to my father). My father bought me a car after my junior year of college.

259. My father earned a good income as an executive for an American multinational corporation. As described here we vacationed to different cities and countries, learned new languages, ate in good restaurants, lived in spacious houses, and attended respected schools.

260. My oldest aunt lived on the same property as my maternal grandmother. She worked at a factory as a blue-collar worker for decades. She was supportive of the Brazilian Worker's Party. I also have an older cousin who was an English teacher. Another uncle was a truck driver. A cousin close in age was a manager at a supermarket for a period.

My grandmother's household in Guarulhos, São Paulo, had an enormous influence on me. I spent time with her on weekends before we moved to Akron. She took me to Methodist Church on Sundays, where I intermingled and got to know children of multiple races and backgrounds in youth groups. There were white, Black, and multiracial children. The church was in a lower middle-class part of town. These experiences taught me respect for less wealthy people. All children and members of that church, from varying races and backgrounds got along, loved, and supported each other.

My father was the only connection our family had to wealth because he worked for a multinational corporation. Because of this, my experiences of material wealth were varied. For example, on the weekends, I would spend time in a working-class neighborhood in Guarulhos with my cousins, where we played with old soccer balls in the street, and then I would go to one of my father's friend's houses in a well-off part of the city. Seeing the stark differences in material wealth made an indelible impression on me; I became aware and more critical of socio-economic inequality from an early age. This, unconsciously, may have led me to pursue work as a public defender.

In Akron I became friends with Black students in elementary school. All the Black children rode the bus and bought a "hot lunch" at school. I took solidarity with the Black students because even though my mother drove or walked us to school, she insisted I buy a "hot lunch." The parents of white children drove them to school and only a couple bought a "hot lunch." Instead, most of the white children brought their lunch from home.

Moving between countries four times between the ages of eight and sixteen had positive and negative effects. I adapted quickly to different environments but had little stability with friends. At the age of seventeen, I had a period of depression that lasted a few months. Moving from Mexico City after my junior year in high school meant I had to leave behind close social networks. Fortunately, I used the experience in a positive way by focusing on how much I learned, quickly adapted, and the benefits of exposure to different geographies and cultures.

c. *Racist Experiences*

Racism in Brazil differs from racism in the United States.²⁶¹ Being "white" in Brazil does not have the same meaning as in the United States, and vice-versa,²⁶² a person considered "white" in Brazil may not pass for white in the United States.²⁶³ Race in Brazil is more fluid, based on physical appearance rather than ethnic origin.²⁶⁴ Therefore, as a person of Portuguese roots, but also indigenous blood on the paternal side of the family, I do not remember experiencing explicit racism as a child in São Paulo.

261. See generally Thomas E. Skidmore, *Bi-Racial U.S.A. vs. Multi-Racial Brazil: Is the Contrast Still Valid?*, 25 J. LATIN AM. STUD. 373 (1993).

262. See Frances Negrón-Muntaner, *Are Brazilians Latinos? What their identity struggle tells us about race in America*, THE CONVERSATION, (Dec. 20, 2016), <https://theconversation.com/are-brazilians-latinos-what-their-identity-struggle-tells-us-about-race-in-america-64792>.

263. See Cleuci de Oliveira, *Brazil's New Problem with Blackness*, FOREIGN POLICY (Apr. 5, 2017) <https://foreignpolicy.com/2017/04/05/brazils-new-problem-with-blackness-affirmative-action/>.

264. See Edward Telles & Tianna Paschel, *Who Is Black, White, or Mixed Race? How Skin Color, Status, and Nation Shape Racial Classification in Latin America*, 120 AM. J. OF SOC. 864 (2014).

Nor was I the direct target of explicit racism in high school or college. But I had a white college roommate, now a medical doctor, who made racist remarks about people of color. I recall his comments about the behavior and accent of Black people he ran into when shopping at a local Wal-Mart. He also spoke of how certain Mexicans were the “right kind” of Mexicans, even though his then-girlfriend and now-wife is Mexican American. He imitated their accent and spoke negatively about their demeanor. He and another roommate, also a medical doctor, were critical of affirmative action, believing they would not get into the medical school of their choice but someone of color, despite having lower grades or MCAT scores, would. They also did not like the Latinx student organizations on campus and spoke negatively about them.

No student nor professor ever recruited or invited me to join any minority student organization. This is because there were few such organizations, but also because I may have passed as “white” to some people, or that I didn’t present as the stereotypical “Latino.”²⁶⁵ I became more aware of class and race issues during my junior and senior years of college. The change was attributable to my history classes, various research papers, and an increasing awareness of the historical power of race that remains pervasive today. My relationship to more affluent students and how I compared myself to them also influenced my awareness.

d. Law School and Public Defender

My decision to attend law school came after my first year as a master’s student in the Latin American Studies Department at the University of Arizona. I was in Salvador, Brazil, in the summer of 2000. The Latin American Studies Department had awarded me a Tinker Field Research Grant²⁶⁶ to conduct archival research for a study of slavery in nineteenth century Brazil. I ran into one of the department’s history professors, but I did not feel he was supportive or enthusiastic about my work. I was only twenty-two years old and not a superb student. I did not feel I had support to continue with a Ph.D. in Latin American history. Further, I knew I would have to move to a different part of the country for an academic job. Given my options, I chose the geographic and financial stability of a law career. I did not decide to become a public defender until after my second year of law school. Throughout my master’s program and law school I set my mind on a job where I could advocate for the poor and disadvantaged. I knew the work of defending those most downtrodden would be both intellectually stimulating and rewarding.

e. Racialized Experiences and Indigent Defense Practice

My race and foreign last name are obvious and make it easier for me to relate to indigent clients of color. Some clients do not care about the demographic background of their lawyer, but others do, often because whites have discriminated against them.

265. Brazilians in the United States have multiform identities. Americans perceive them and they perceive themselves in multiple ways. See Negrón-Muntaner, *supra* note 262.

266. See TINKER FOUNDATION, <https://tinker.org/field-research-grants/> (last visited Aug. 29, 2020).

The extra effort I had to exert to perform well made it easier for me to work hard for clients. My lower English verbal skills prevented me from putting in normal study hours in college. As I was accustomed to longer hours, I found it easier to exert more effort for clients. I also wanted them to obtain full justice. I had a chip on my shoulder. I did not want colleagues from more privileged backgrounds to outperform me. Finally, the lack of people of color in the legal profession motivated me to work hard.

2. Matthew Trent

Matthew Trent is half-Black and half-white. He grew up in a lower middle-class home in Pasadena, California with a single-parent and family that valued education. He performed well in school, began college at a highly ranked public university, but later transferred to a prestigious liberal arts college. He recalls being one of a handful of Black students at the liberal arts college, making him feel out of place. As a Peace Corps volunteer in the Dominican Republic, Mr. Trent was able to “pass” as Dominican because of his skin tone. For the first time in his life, he felt like a normal person, not an outsider. As a bi-racial person, however, Mr. Trent has experienced anger from both Black people and white people. Black people sometimes felt he was not Black enough; whites did not see him as white.

After law school Mr. Trent became a public defender. His life experiences led him to see criminal cases and the law from a unique perspective. For instance, he believes white people see community safety differently from how minorities in poor neighborhoods perceive it. But even as a Black American, Mr. Trent knows he must be alert about his own implicit biases towards clients of color.

That Mr. Trent’s mother raised him as a single parent, without earning a high income, makes class more powerful than race when he works with his clients. When representing the indigent, he makes deeper connections with clients based on this family background. Mr. Trent sometimes talks about personal life experiences to connect with clients, which helps create a deeper rapport.

3. Ronald Martin

Ronald Martin is a Black public defender raised in a family of modest means. He grew up in public housing before moving to southern Arizona. On his mother’s side, he is a first-generation college student.

Mr. Martin and his family members experienced racism and socioeconomic challenges. For example, he has had police officers pull him over and first ask whether he had drugs in the car. The government wrongfully convicted one of his older cousins of sexual assault in the 1980s. Fortunately, DNA testing later exonerated his cousin. Mr. Martin had cousins who dealt drugs, went to jail, had mental illnesses, and suffered similar hardships as Mr. Martin’s indigent clients.

Mr. Martin had difficult experiences in law school but became a public defender when he participated in the criminal defense clinic, his favorite course in law school. In his first year, a well-known torts professor asked if he should quit law school during an office hour meeting to discuss a low practice exam score. This incident is one of several that made Mr. Martin feel he could relate better with clients he represented in the criminal defense clinic than his peers in law school.

As a minority public defender, with experiences similar to that of his clients, Mr. Martin relates to them in a more familiar, understanding way. He perceives judges and prosecutors to lack the ability to relate to his clients' decision-making and positions. Mr. Martin's life experiences led him to look at a client's criminal history in a unique way. He understands that much of it results from over-policing certain neighborhoods, racial profiling, and the racist nature of law enforcement. Although he works hard to get superior results for individual clients, he often wonders whether he can have a bigger impact in criminal policy work than continuing as a public defender. Mr. Martin believes that he could work toward wider social change, affecting more people beyond his individual clients.

4. Gloria Vidal

Ms. Vidal's mother comes from a Mexican, working-class family. She is not completely an outsider, however, because her father was a white federal district court judge appointed by Jimmy Carter. Ms. Vidal is therefore both bi-racial and a semi-outsider. She grew up in a wealthy, white neighborhood in Des Moines, Iowa, but spent summers in Mexico, with her mother's family. One of her cousins runs a taco stand in Tampico. These experiences, along with learning Spanish from an early age from her mother, led her to connect closely with clients from Latin America. Ms. Vidal can empathize with poor Mexican clients because of her experiences with family members in precarious economic situations. This empowers her to work in public defense to improve the lives of clients. Although from a privileged socio-economic background on her father's side, Ms. Vidal always connected with students of color in school. She has been able to easily navigate both worlds, American and Mexican.

5. Alessandra Morales

Ms. Morales was born in Tucson and grew up in southern Arizona and Sonora, Mexico. In Mexico, she attended school in Hermosillo. She experienced academic difficulties because her parents did not speak English at home. She felt like an outsider in law school composed of mostly white students but was lucky to have Black professors who understood her outsider perspective and experiences. Having attended a newer law school, Ms. Morales saw that many students did not return after their first year. This scared her but she nevertheless persisted.

After law school, Ms. Morales clerked for a Superior Court judge and experienced belittling treatment when given feedback about writing. The judge talked to her about her work product as if she were his young son in elementary school. Ms. Morales feels that if she were white the judge's feedback would have been more respectful.

After her clerkship, Ms. Morales started an immigration law practice before eventually joining a public defender office. As an immigration lawyer, she saw immigration judges make what she considers racist statements from the bench. For example, one commented on the fact that Hispanic parents in immigration court never cared to participate or become involved in their children's education until the parents fought deportation.

6. Leonid Castillo

Leonid Castillo, a light skinned Latino, moved to Texas as a two-year old from Ecuador. His father worked in the United States as a petroleum engineer and became a lawful permanent resident. Mr. Castillo grew up in small towns in Texas but attended Tulane University for undergraduate school and Vanderbilt University for law school.

Experiences during his formative years shaped his views of racism in the United States. When he worked at a Kroger supermarket in high school, co-workers openly said Latinx people were lazy, not realizing Mr. Castillo is Latino because of his light skin complexion. In Texas, Mr. Castillo also saw whites harass Latinxs who spoke Spanish in public. While at law school in Nashville, Mr. Castillo became enraged at the harassment that Latinx communities experienced, mostly in racial profiling by police officers. Mr. Castillo believes most legal immigrants in the United States are not of the opinion that the treatment of undocumented migrants, especially Latinx migrants, is a problem that affects them. He believes that society treats immigrants as a nuisance. Although Mr. Castillo does not consciously bring his personal life experiences and identity as a Latino when representing minority clients, he understands the racial disparity that Latinxs experience in all phases of the criminal trial process. Mr. Castillo, as public defender, does the best he can to challenge the status quo through zealous advocacy, including an aggressive motion practice. Mr. Castillo embodies what it means to be a change agent as public defender.

7. Nancy Stallworth

Nancy Stallworth is Black. She grew up in Houston but attended an all-women's college in Virginia. She was a public defender for 12 years before starting her own practice, handling court appointed cases. Personal turning points for Ms. Stallworth were the Los Angeles riots in 1992, when she was a first-year college student, and the O.J. Simpson trial in 1994 and 1995. She knew from early on that society stacks the cards against Black people. From then on, she set out to do whatever she could to help the fight as a public defender.

Ms. Stallworth's family background provided her with a framework for articulating her identity as a Black woman. Ms. Stallworth's mother was born in the Jim Crow south and was forced to sit in the back of the bus to accommodate whites. One of her uncles disappeared when she was young, and only 20 years ago did the family discover what happened to him. The uncle believed someone would lynch him, so he fled to Florida and kept a low profile.

Despite attending a law school in a large metropolitan area, Ms. Stallworth experienced racism during these years. At the South Texas College of Law, she heard an attack on affirmative action from a white student, "You are only here because you are Black, you took the place of a more deserving white student." White students asked her, "How do you feel taking the place of a more deserving white student?"

After working in southern Arizona and Houston, Texas, as public defender, she worked for two and a half years in the Maricopa County Public Defender's Office, where there were small numbers of Black lawyers. The Maricopa County Public Defender is one of the largest public defender offices in the country. This experience highlighted her outsider status even among lawyers who represent mostly indigent minority clients in a large city.

These experiences informed the way Ms. Stallworth practices. She works to ensure that her work will reflect the best on the Black community. Ms. Stallworth therefore works with incredible diligence and perseverance when representing clients. As a superb trial lawyer, she won the 2008 Rising Star Award by the Arizona Public Defender Association.

8. Nia Scott

Nia Scott is a Black public defender whose experiences with racism date to her elementary school days. Ms. Scott's family was the only Black family in her street. Sometimes police officers would approach and ask what she was doing on that street. Her calculus teacher called her the "N" word during her senior year because Ms. Scott could not understand a concept in calculus and the teacher had to explain it more than one time. This was not the first time someone called her this word. When Ms. Scott tried out for the cheerleading team in high school the cheerleading judges said she did not make the team. Ms. Scott performed well and qualified, but judges did not want her as cheerleader because she was Black. They wanted an all-white cheerleading team. She became part of the team, but cheerleaders called her the "N" word. The cheerleading coach told her mother, "You better make sure that she can wear high ponytails."

Ms. Scott's parents recommended her to attend Xavier University, in New Orleans, an HBCU, over an Ivy League university because they feared racism at a mostly white campus. While attending the Indiana University Robert H. McKinney School of Law, a Black male law professor told her she had to choose between being a mother or a lawyer when she was pregnant with her first child. Ms. Scott already had one child, but this was the professor's response to her question about balancing school/work and parenthood. Ms. Scott also dealt with racism from classmates. Before attending law school, medical schools accepted her application for admission, but when she told this to one of her classmates he said, "White students that are deserving are denied for Black people."

Growing up, Ms. Scott also saw that police searched a disproportionate number of Black men. She also learned that police officers beat her mother during the 1970s, which helped change policing laws in Lenoir, North Carolina, where her mother was from. These experiences helped Ms. Scott become a public defender to fight zealously for indigent clients. Today she heads a federal public defender office.

How public defenders construct professional identity is a formalized process. Personal life experiences influence outsiders' decisions to become public defenders and helps them relate to clients and improve practice. The remaining question is practical: how can public defender offices benefit from outsider experience—for office culture and the individual line attorney?

IV. PRACTICAL IMPLICATIONS FOR INDIGENT DEFENSE OFFICES AND OUTSIDER PUBLIC DEFENDERS

Indigent defense offices must do the challenging work of changing office culture by not only realizing the benefits of heterogeneity among lawyers but investing in them through proper mentoring. The mindset of white lawyers must also change to

accommodate a more open playing field for workers and clients. This section offers suggestions begin this process.

A. *Benefits of Hiring Outsiders*

The American Bar Association's standards for criminal defense address diversity. Along with promoting excellence, working to keep skilled public defenders, and paying them and staff appropriately, standard 4-1.13 states "In selecting personnel, a public defense office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of defenders and staff that reflect that community."²⁶⁷

A diverse public defender office benefits both staff and clients in a variety of ways.²⁶⁸ People who report positive personal contacts with Black people are less likely to have negative beliefs about their criminality and violence.²⁶⁹ Defenders with a diverse group of colleagues are more likely to be more tolerant of minority clients.²⁷⁰ Having more diverse lawyers also improves communication between attorneys and clients and leads to better representation and increased community confidence in public defense systems.²⁷¹

Significant positive contact with individuals who do not fit popular stereotypes about their group can reduce implicit biases.²⁷² Diversity reduces biases because it "increases opportunities for positive interactions between racial group members of equal status, helps create positive associations, and motivates people to make more exact, non-stereotyped judgments."²⁷³

Higher numbers of minorities in the legal profession, like gender, likely increases awareness of racial disparities and keeps the issue at the forefront of decision makers' mind in the adjudication process.²⁷⁴ Researchers found that students and teachers more often discuss different perspectives on race and law in classrooms where there is diversity among students.²⁷⁵ Similarly, public defender offices can expose

267. See Standard 4-1.13 Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Public Defense Counsel, ABA Standards for Criminal Justice 4-1.13.

268. See Laure Clarke, 8 *Amazing See Benefits of Cultural Diversity in the Workplace*, 6Q <https://inside.6q.io/benefits-of-cultural-diversity-in-the-workplace/> (last visited Aug. 28, 2020).

269. See B. Michelle Peruche & E. Ashby Plant, *The Correlates of Law Enforcement Officers' Automatic and Controlled Race-Based Responses to Criminal Suspects*, 28 BASIC & APPLIED SOC. PSYCH. 193, 196 (2006).

270. See Elizabeth Levy Paluck & Hana Shepherd, *The Salience of Social Referents: A Field Experiment on Collective Norms and Harassment Behavior in a School Social Network*, 103 J. OF PERSONALITY & SOC. PSYCH. 899 (2012) (showing the importance of collective norms to changing behavior).

271. See CULTURAL COMPETENCE AND PUBLIC DEFENSE MICHIGAN WORKGROUP, *supra* note 4, at 16.

272. See Shaki Asgari et al., *When Does Contact with Successful Ingroup Members Change Self-Stereotypes? A Longitudinal Study Comparing the Effect of Quantity vs. Quality of Contact with Successful Individuals*, 41 SOC. PSYCH. 203 (2010).

273. See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2643 (2013) (citing Linda R. Tropp & Thomas F. Pettigrew, *Differential Relationships Between Intergroup Contact and Affective and Cognitive Dimensions of Prejudice*, 31 PERSONALITY & SOC. PSYCH. BULL. 1145 (2005)).

274. Ryan D. King et al., *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 LAW & SOC'Y REV. 1, 8 (2010).

275. *Id.* (citing GARY ORFIELD & DEAN WHITLA, DIVERSITY AND LEGAL EDUCATION: STUDENT EXPERIENCES IN LEADING LAW SCHOOLS (1999)).

attorneys to discussions of racial disparities in the justice system when and where there is greater heterogeneity.²⁷⁶ Coincidentally, disparities in the administration of justice are likely to attenuate with increased minority representation in the profession.²⁷⁷ For example, sentencing disparities are lower where the proportion of minority attorneys is higher.²⁷⁸

Less diversity can decrease trust and credibility with client populations. Minority defendants feel skeptical about the integrity and reliability of the criminal justice system and its actors when less diverse lawyers represent them.²⁷⁹ The absence of minority representation in a profession allows decision makers to act on stereotypes and assumptions about race and criminality.²⁸⁰

B. Ways to Achieve Diversity

For public defender offices to achieve diversity, they must recruit and hire minority and women lawyers. One way is to form relationships with minority bar associations, local law schools, and the local bar.²⁸¹ Public defender offices can also use summer clerkships as hiring opportunities.²⁸² If the heads of public defender offices have difficulty recruiting minority or women lawyers, they can talk to heads of other offices to see where they are looking for new employees.²⁸³

It helps public defender offices that minority students, compared to whites, are three times more likely to say that their goal is to serve poor communities.²⁸⁴ Although there are less minority students available for hire, minorities are more interested in public sector work compared to corporate law.²⁸⁵ This is inspiring for offices interested in a more diverse workforce because it means larger pools of potential recruits.

276. *See id.* at 8.

277. *Id.*

278. *Id.* at 7-8.

279. *See* American Bar Association, Criminal Justice Section, Section of Individual Rights and Responsibilities, and Council on Racial and Ethnic Justice, *Building Community Trust: Improving Cross-cultural Communications in the Criminal Justice System*, 3, 2010 <https://www.sbnm.org/Portals/NMBAR/docs/Committees/Diversity/ABABuildingCommunityTrust.pdf?ver=EWkfcUGK0OfceFWoq39w%3D%3D>.

280. *See* King et al., *supra* note 274, at 8.

281. The law firm Beasley, Allen, Crow, Methvin, Portis & Miles, has the highest percentage of Black law firm partners in the country and is one of the top 10 firms for Black attorneys. They have a summer internship program with the local minority bar association and local bar to hire law student and mentor them. *See* Kate Halloran, *Q&A: Diversity in the Workplace: Hiring Minority Lawyers*, AMERICAN ASSOCIATION FOR JUSTICE, (2017). <https://archive.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/qa-diversity-workplace-hiring-minority>.

282. *See* Harrison Barnes, *Top 14 Ways Law Firms Can Recruit and Retain Minority Attorneys*, BCG ATTORNEY SEARCH, <https://www.bcgsearch.com/article/900042973/Top-14-Ways-Law-Firms-Can-Recruit-and-Retain-Minority-Attorneys/#> (last visited May 23, 2022).

283. The Institute for Inclusion in the Legal Profession has a website that gives tips to law firms looking to hire minority lawyers. One tip is to “contact corporate counsel in other companies for recommendations.” The heads of public defender offices can do the same. *See* THE INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION, <http://www.theiilp.com/about>, (last visited May 23, 2022).

284. *See* Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 580 (2004).

285. *Id.*

The Federal Public Defender for the Western District of Washington sets a goal to hire women and minority applicants.²⁸⁶ Its website states, “The Defender shall make an effort to personally reach out to individuals and organizations which may have information about qualified and interested minority and women applicants.”²⁸⁷ Besides posting advertisements for hiring on the usual defender and bar association websites, the office must also supply them to various women and minority bar associations.²⁸⁸ Other hiring requirements include inviting non-lawyer staff to participate in the hiring committee, discussing implicit bias as part of the hiring process, and using objective criteria when reviewing writing samples.²⁸⁹ Hiring committees shall include at least one woman and at least one minority attorney and include minority and women applicants in the interview pool.²⁹⁰ Lastly, “if the Committee concludes that none of the minority and women applicants meet the requirements of the position as advertised, the Defender shall attempt a second effort at recruitment before interviews are scheduled.”²⁹¹

C. *Mentorship for Outsider Public Defenders*

Because minority lawyers face obstacles within and outside legal practice, mentorship is imperative to their development, growth, and ability to aid future members of the profession. First, few have preexisting family or friends in the legal profession to rely on for guidance and networking opportunities.²⁹² Second, law office management implicitly disfavors minorities and outsiders from promotions and professional development opportunities at higher rates compared to insiders.²⁹³ In one study, when partners graded an identical memo by associates with an identical name and resume, they gave the presumed white associate a 20 percent higher evaluation than that of the Black associate.²⁹⁴ Minority attorneys also do not get the same encouragement about their work compared to whites.²⁹⁵ These facts highlight the need for mentoring programs designed for minority public defenders.²⁹⁶

286. See *Attorney Diversity Hiring Plan*, FED. PUB. DEF., W. DIST. OF WASH., <https://waw.fd.org/careers/attorney-diversity-hiring-plan> (last visited May 23, 2022).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. See Jessica Tomer, *First-generation law students: struggles, solutions and schools that care*, NAT'L JURIST (Mar. 22, 2019), <https://www.nationaljurist.com/national-jurist-magazine/first-generation-law-students-struggles-solutions-and-schools-care> (“First-generation law students are also more likely to be older, less affluent, and from a multicultural background.”).

293. See Marc Bendick Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. OF SOC. ISSUES. 238, 243-49 (2012) (noting net rates of twenty to forty percent discrimination in employment tester studies).

294. See Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS 2-3 (2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf>.

295. See Kate Halloran, Q&A: Diversity in the Workplace: Hiring Minority Lawyers, TRIAL (May 2017), <https://archive.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/qa-diversity-workplace-hiring-minority>.

296. Mentorship in the legal profession is vital to keeping and developing women and minority attorneys. See Theresa M. Beiner, *Legal Mentoring*, 57 U. LOUISVILLE L. REV. 329, 329 (2019). Mentorship can also help minority and female attorneys feel less like outsiders. See Ida O. Abbott & Rita S. Boags,

Experienced lawyers can serve as mentors but need to understand the complexities involved in collaborating with junior lawyers of color.²⁹⁷ Because racism deeply affects people of color, mentors of minorities need to approach mentoring differently than they do with their white protégés.²⁹⁸ This education can begin with offices offering continuing legal education classes that teach mentors about implicit bias, racial stereotypes, and the importance of developmental relationships that lawyers need at different points in their career.²⁹⁹ These classes can also help supervisors understand how to collaborate with subordinates, including minorities, to prepare them for future opportunities.³⁰⁰ One example of an obstacle for white mentors to overcome in training is letting go of negative racial stereotypes.³⁰¹

A rich mentoring area is involvement in minority bar associations. Local minority bar associations can be places for providing service to the profession and cultivating relationships with peers with similar experiences.³⁰² In this Author's professional experience with the Arizona Minority Bar Association, young lawyers of color meet more experienced lawyers of color who serve as mentors, even if they do not work in the same office or practice in the same area of law.

D. Encouragement for White Lawyers to Think About Race

Most public defender offices comprise largely white staff.³⁰³ White lawyers do not think about race because most white people think of themselves as neutral.³⁰⁴ Additionally, white lawyers commonly deny the influence of their race in their work.³⁰⁵ This leads to lower quality representation compared to when white lawyers

Creating Pathways to Diversity, MINORITY CORP. COUNS. ASS'N 14-15 (2003), <https://www.mcca.com/wp-content/uploads/2017/04/Book7-Yellow.pdf>.

297. See David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, HARV. BUS. REV., 98, 104 (2001). Although Thomas addresses a study of engineers of color, many of the same issues apply across professions.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. See Nareissa Smith, *Top 5 Reasons to Join a Minority Bar Association*, AFRICAN AMERICAN ATTORNEY NETWORK, <https://aaattorneynetwork.com/top-5-reasons-to-join-a-minority-bar-association/>. See also Standard 4-1.2 Functions and Duties of Defense Counsel, ABA Standards for Crim. Just. 4-1.2, encourages involvement in bar organizations. These standard states that defense counsel should supply services to the community, such as involvement in public service and Bar activities, and Bar leadership positions. The standard states, "A public defense organization should support such activities, and the office's budget should include funding and paid release time for such activities."

303. U.S. DEP'T. OF JUST., Expert Working Group Report: International Perspectives on Indigent Defense 5 (2011), 7, <https://www.ncjrs.gov/pdffiles1/nij/236022.pdf> (An expert working group participant "noted that these individuals often feel alienated from the criminal justice system because it is managed predominantly by white prosecutors, public defenders, and judges.")

304. See Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2090 (2005) ("Most whites tend to see themselves as the neutral norm, rather than as a particular racial identity. Race is for people of color") Race neutrality or "colorblindness," is the principle that if we ignore race, particularly in making decisions in which the state is implicated, we will end racism and its pernicious effects. Simply put, the best way to eradicate racism and persistent racial inequality is to erase race. See also Cheryl I. Harris, "Too Pure an Air:" *Somerset's Legacy from Anti-Slavery to Colorblindness*, 13 TEX. WESLEYAN L. REV. 439, 451 (2007).

305. See Pearce, *supra* note 304, at 2089.

are more conscious of the influence of their identity in practice.³⁰⁶ This approach to lawyer-client relations in indigent defense is flawed.³⁰⁷

To minimize the negative influence of colorblindness, public defender offices should promote interactive training sessions for white lawyers to realize the pitfalls of race-neutrality. The following vignette, inspired from a real-life case, illustrates some of these perils: two white students supervised by a law school clinical program represented a Black man facing a misdemeanor charge of disturbing the peace from a traffic stop.³⁰⁸ Police said the man told them police stopped him “because he was Black.”³⁰⁹ In court, the judge described him as “hollering racism.”³¹⁰ Even though the white clinical professor suspected that what happened was a “racial incident,” he did not talk about the case that way, and stopped thinking of the case racially.³¹¹ The law professor and the students did not discuss the racial dimension of this case with either their client or with the court.³¹² After the prosecution dismissed the case, the client angrily assailed the law professor and the students for patronizing him and treating him as the other white authority figures had.³¹³

Two things are worth discussing in this hypothetical during training. First, the client did not share his thoughts about the racialization of the case to his lawyers,³¹⁴ maybe because he thought they would be as skeptical. Second, the professor and his students did not consider the racial issues because as lawyers they automatically turned to “race neutral” explanations.³¹⁵

But race affected the professor’s and the student’s thoughts and actions.³¹⁶ They assumed colorblindness.³¹⁷ This prevented them from raising the possibility that race played a role in their relationship with their client.³¹⁸ Their expectation that the Black client would raise issues of race if they existed suggests the white lawyers might have applied the assumption that race is an issue for people of color and not for whites.³¹⁹ Their white identity prevented them from following up on evidence showing they should explore how race influenced the case.³²⁰ For example, the police report indicated the client complained the contact was racially biased.³²¹ The judge commented that the client had an attitude problem because he raised race as a factor

306. *Id.*

307. *Id.* at 2092-93 (“[Q]uality lawyering requires attention to race on the part of all lawyers, not just white lawyers, and in all situations, not just cross-racial ones. The dominant professional paradigm of ‘bleaching out’ race (and other differences) is wrong both as a matter of description and as a matter of maximizing the effectiveness of a lawyer’s work.”).

308. *Id.* (citing Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992)).

309. *See id.* at 1370.

310. *Id.*

311. *Id.*

312. *Id.* at 1375.

313. *Id.* at 1329-30.

314. *See* Pearce, *supra* note 304, at 2092.

315. *Id.* (citing Cunningham, *supra* note 308, at 1371, 1377).

316. Pearce, *supra* note 304, at 2092.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

in his arrest.³²² The professor thought the case had clear racial overtones but did not pursue his intuition.³²³ Training sessions that include these fact patterns can educate white lawyers about the pitfalls of applying the default race-neutral approach.

A second way to minimize colorblindness is to teach lawyers about the concept of reflexive antiracism, a novel approach to learning about the pernicious impact of racism that encourages people to reflect on their emotions and actions.³²⁴ To develop reflexive antiracism, white people need to:

1. Avoid essentializing minorities as ‘good’ and white people as ‘bad.’
2. Recognize how they receive help from privilege without guilt and anxiety.
3. Accept the ‘fact’ of their whiteness.
4. Recognize how their need to keep an antiracist identity affects the way they conceptualize interactions.
5. Act to counter racial oppression.³²⁵

Reflexive antiracism can counter the negative effects of essentialism, the idea that races have a fundamental character or “essence.”³²⁶ It also reduces the negative emotional reactions that come with working through racial biases and stereotypes through racialization and reflexivity.³²⁷

Third, applying the “integration-and-learning” approach in public defender offices also helps white males to think more about race.³²⁸ White males dominate the legal work force, hence the focus on this demographic. “Integration-and-learning” is an idea from organizational research developed by business school professors David Thomas and Robin Ely.³²⁹ It differs from what Thomas and Ely describe as “discrimination-and-fairness”³³⁰ paradigms present in most legal organizations. Through application of “integration-and-learning,” organizations see differences

322. *Id.*

323. *Id.*

324. See Emma Kowal, Hayley Franklin & Yin Paradies, *Reflexive Antiracism: A Novel Approach To Diversity Training*, 13 ETHNICITIES 316, 324-329 (2013).

325. *Id.* at 329-330 (“This article explores the two major critiques of diversity training - essentialism and the elicitation of negative emotions - and proposes the alternative approach of reflexive antiracism. This approach addresses critiques of diversity training by drawing on insights from critical race theory, social psychology, Whiteness studies, and literature on intersectionality, and through incorporating the concepts of constructivism, racialization, and identity formation.”).

326. See Kenneth B. Nunn, “*Essentially Black*”: *Legal Theory and the Morality of Conscious Racial Identity*, 97 NEB. L. REV. 287, 289 (2018).

327. *Id.*

328. See Pearce, *supra* note 304, at 2083.

329. See David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV. (Sept.-Oct. 1996), <https://hbr.org/1996/09/making-differences-matter-a-new-paradigm-for-managing-diversity>.

330. Under the discrimination-and-fairness paradigm, one measures diversity progress by “how well the company achieves its recruitment and retention goals rather than by the degree to which conditions in the company allow employees to draw on their personal assets and perspectives to do their work more effectively.” *Id.* at 80. The paradigm emphasizes colorblindness as well as gender blindness because it promotes the notion that “we are all the same,” or “we aspire to be the same.” See Tyler W. Garvey, *Law Firm Diversity: Scholarships: Good Intentions, Incomplete Solutions Suggestions from the Eyes of A Diverse Candidate*, 16 BERKELEY J. OF AFR.-AM. L. & POL’Y 80, 90 (2014).

among staff as a “source of learning and competitive advantage.”³³¹ It is ideal for organizations that want to obtain the most benefit from a diverse group of lawyers.³³²

The first step in “integration-and-learning” is for offices to realize the workplace is not a collection of atomistic individuals.³³³ People do not come to workspaces and perform independently of relationships with colleagues and clients, frameworks of class, race, gender, or other social predictors.³³⁴ To combat traditional ways of thinking that fail to take this reality into account, offices can apply empirical learning, consciousness raising, and community building.³³⁵

1. Empirical Learning

The concept of empirical learning, introduced by Professors Russell Covey, Eli Wald, and Sweetha S. Ballakrishnen, seeks to improve diversity in law firms.³³⁶ It requires offices to keep data and track racial measures.³³⁷ Public defender managers and supervisors should periodically review data concerning case assignments, training, mentoring, and team interactions to ensure there are no disparities among members of different identity groups.³³⁸ Managers and supervisors should audit how the public defender office promotes equity and inclusion, including the extent to which non-white lawyers receive support for professional development.³³⁹ Public defender offices should also interview lawyers in different career stages (junior, mid-career, and senior level) to understand the impact of identity in the workplace and better promote equality.³⁴⁰

2. Consciousness Raising

By examining their institutions from within, public defender managers can reevaluate ideas of consciousness and begin a commitment to change.³⁴¹ This process requires stakeholders to question and relearn assumptions of “good,” “right,” and

331. See George B. Cunningham, *Occupational Segregation of African Americans in Intercollegiate Athletics Administration*, 2 WAKE FOREST J.L. & POL’Y 165, 171 (2012).

332. See Russell G. Pearce et al., *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2442 (citing Thomas & Ely, *supra* note 329, at 260-65 (organizations employing this approach performed at a significantly higher level in equity and inclusion, as well as in productivity and revenue)).

333. See Eli Wald, *Biglaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2522 (2015).

334. *Id.*

335. See Pearce et al., *supra* note 332, at 2445–51.

336. *Id.*

337. *Id.* at 2445-46.

338. *Id.*

339. See R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1530 (2011) (proposing the use of “race audit[s],” which are “voluntary, evaluative measure[s] designed to identify the sources of persistent racial inequality that can be productively deployed by localities”).

340. This is like the Rooney Rule in the National Football League. See Bram A. Maravent, *Is the Rooney Rule Affirmative Action? Analyzing the NFL’s Mandate to Its Clubs Regarding Coaching and Front Office Hires*, 13 SPORTS L. J. 233, 236-45 (2006) (describing the history of the Rooney Rule). The policy, issued by the NFL’s Committee on Workplace Diversity to “promote diversity in the league’s head coaching and front office positions,” states that: “[A]ny club seeking to hire a head coach will interview one or more minority applicants for the position. The one exception occurs when a club has made a prior contractual commitment to promote a member of its own staff and no additional interviewing takes place.” *Id.* at 240.

341. See Pearce et al., *supra* note 332, at 2446.

“valuable.” For example, consider work standards for people in the modern public defender office: the modern public defender, like most legal offices, is set up for the 1950 male executive with a wife to take care of the house.³⁴² This antiquated standard remains the norm for some twenty-first century male lawyers who continue to share household chores disproportionately with female working partners.³⁴³ This discrepancy forces professional women to devote less time to work, thus impeding equal progress.³⁴⁴

Public defender offices require all lawyers to dedicate a set number of hours and energy to work, but this discriminates against women because they generally assume greater responsibilities at home. Typically, the office promotes a type of worker without open discrimination but assumes this worker is male and with little to no family demands.³⁴⁵ Raising managers’ and supervisors’ consciousness about these differences at the institutional level can build more inclusive workspaces.³⁴⁶

3. Community Building

Public defender offices should endeavor to see institutional changes not as “diversity issues” but as structural “office issues.”³⁴⁷ Effective community building requires that public defender offices welcome new entrants such as women and people of color with openness and inclusion.³⁴⁸ It also involves including white male lawyers and children in conversations about change because work hours impact the entire family.³⁴⁹ Public defense offices should examine their structures to identify ways to ensure that they nurture new members as well as they nurture dominant workers.³⁵⁰ Successful community building also requires expanding the pool of people who feel invested in this change.³⁵¹

Proponents of community building maintain that while deliberate discrimination has become less prevalent, women and people of color still face “second generation” forms of discrimination related to organizational structures and cultural assumptions in the workplace.³⁵² Combating these less visible forms of discrimination requires training and education on topics of inclusion and diversity for men, women, whites, and minorities to help understand how these processes function and can be resisted/changed.³⁵³

342. *Id.*

343. *Id.* (citing Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731, 1772 (1991) (“Women continue to assume about 70% of the domestic responsibilities in an average household and employed wives spend twice as much time on family obligations as employed men.”)).

344. *Id.* at 2447.

345. See Pearce et al., *supra* note 332, at 2447 (citing Herminia Ibarra et al., *Women Rising: The Unseen Barriers*, *HARV. BUS. REV.*, Sept. 2013, at 5-6).

346. *Id.*

347. *Id.* at 2450.

348. *Id.*

349. See generally SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013); Anne-Marie Slaughter, *Why Women Still Can’t Have It All*, *THE ATLANTIC* (June 13, 2012, 10:15 AM), <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020>.

350. See Pearce et al., *supra* note 332, at 2449.

351. *Id.* at 2450.

352. *Id.*

353. *Id.*

E. Practical Implications for the Outsider Public Defender

The outsider public defender should be aware that they are an outsider.³⁵⁴ She should ask how she felt as a student in high school, college, graduate school, law school, and in practice. Part of self-reflection includes asking oneself why going into indigent criminal defense was important to them. This self-reflection is the best way to learn one's personal history.³⁵⁵ Journaling is an effective method of engaging in this self-reflection.³⁵⁶

A practical tip for the public defender is to realize the benefits of outsider status. It can supply a perspective many do not have. The outsider may question the status quo and find opportunities that insiders do not see. A useful comparison to understand this principle are immigrants who come to the United States from developing countries that have been war-torn or have extreme poverty.³⁵⁷ Many come to the United States and because they have a unique perspective, can take advantage of opportunities Americans take for granted. Public defenders who identify as outsiders also have a distinct experience, a unique perspective, and likewise should not take for granted opportunities before them.³⁵⁸

354. See generally PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos trans., 1970) (describing process of conscience building as awareness of life surroundings). Freire articulated the concept of “conscientização,” or critical awareness. Conscientización indicates that a person is aware of the historical social and political implications of an aspect of one's life or identity, especially in terms of the discrimination, subordination and oppression of a person based on that aspect of their life. It also includes a critical assessment of power dynamics, in terms of privilege and oppression, involved with that aspect of life or identity. The roots of conscientização are in life experiences. People develop their consciousness because of their life struggles, but they can learn and develop consciousness and awareness from theory shared in academic classes or amongst communities, families, friends, and other allies. See Anita Tijerina Revilla, *Raza Womyn Mujerstoria*, 50 VILL. L. REV. 799, 807 (2005) (discussing the growth of a woman's movement at UCLA and the members' quest to develop a “woman-centered ideology”).

355. See Cam Caldwell, *Identity, Self-Awareness, and Self-Deception: Ethical Implications for Leaders and Organizations*, 90 J. BUS. ETHICS, 393, 406 (2009) (“By understanding more about ourselves and our unconscious tendencies to self-deceive, we can improve our ability to build relationships, strengthen organizations, and confront the fears that cause us to live beneath our potential”).

356. See Hayley Phalen, *What's all this About Journaling?* N. Y. TIMES, Oct. 25, 2018 (“Journaling about traumatic or disturbing experiences specifically has the most measurable impact on our overall well-being.”).

357. People around the globe look to rebuild their lives in a different country. Some leave to get a job or an education; others flee persecution or human rights violations such as torture. Millions flee from armed conflicts or other crises or violence, while some no longer feel safe and might have been targeted just because of who they are or what they do or believe – for example, for their ethnicity, religion, sexuality, or political opinions. See *Refugees, Asylum Seekers, and Migrants*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> (last visited Aug. 23, 2020).

358. Immigrants who come to America see benefits to starting their own companies. See Stuart Anderson, *55% of American's Billion-Dollar Startups Have an Immigrant Founder*, FORBES (Oct. 25, 2018), <https://www.forbes.com/sites/stuartanderson/2018/10/25/55-of-americas-billion-dollar-startups-have-immigrant-founder/#29a7a7a48ee8>. From 1995 to 2005, 52% of Silicon Valley startups had immigrant founders, but immigrants only make up about 13% of the total population of America. See Sabrina Tavernise, *U.S. Has Highest Share of Foreign-Born Since 1910, With More Coming from Asia*, N.Y. TIMES, (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/us/census-foreign-population.html>. Finally, immigrant business accounted for 28 percent of all new small businesses in 2011. See Ted Hesson, *Why American Cities Are Fighting to Attract Immigrants*, THE ATLANTIC (July 21, 2015), <https://www.theatlantic.com/business/archive/2015/07/us-cities-immigrants-economy/398987/> [<https://perma.cc/9VQA-LFSF>] (recounting how immigrants are contributing to local economies).

David Foster Wallace articulated a parable on perspective useful for framing this reasoning:³⁵⁹ two little fish are swimming in the water, and a big fish says to them “Good morning boys, how’s the water?” They swim away, and after a few minutes, one of the little fishes says to the other “What the heck is water?” The two fish did not know where they were. They lacked perspective there was even such a thing as water, because it was the only surrounding they had ever experienced.

For many people born in the United States who grew up with privilege, the suffering of poor people in their communities and in developing nations or war-torn areas is unknown.³⁶⁰ Some know it but have misperceptions of it.³⁶¹ Many, but not all immigrants who have seen the other side of poverty, daily struggle, limited resources, and have had these challenges, step into the ‘water’ of America and think “wow, this is water.” They may take advantage of all there is to offer with an unfamiliar perspective compared to someone who has had the “water” of America their entire life. The same can be true for an outsider public defender who enters an office and sees a wealth of opportunity available that insiders take for granted or simply did not notice. It can give these public defenders a perspective that others do not have. Outsider public defenders can question the status quo and find opportunities for helping their clients that the insiders just do not see.

Professor Mari Matsuda has written that critical or outsider viewpoints in law school classes improves the development of legal skills among students.³⁶² She argues that developing outsider perspectives creates a “multiple consciousness” for lawyers to understand and practice law.³⁶³ By “multiple consciousness” Matsuda means multiple viewpoints of race, class, and gender.³⁶⁴ Outsiders likely have internalized the viewpoint of insiders. Law school culture and discourse is insider culture.³⁶⁵ Likewise, starting at a typical public defender office can be like entering a place with insider values.³⁶⁶ The outsider has different perspectives about law and legal

359. See David Foster Wallace, *Plain Old Untrendy Troubles and Emotions*, THE GUARDIAN, (Sept. 19, 2008), <https://www.theguardian.com/books/2008/sep/20/fiction>.

360. See Ilya Somin, *Public ignorance about economic inequality*, WASH. POST (June 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/public-ignorance-about-economic-inequality/>.

361. See Vladimir Gimpelson & Daniel Treisman, *Misperceiving Inequality* 5-21 (NAT’L BUREAU OF ECON. RSCH., Working Paper No. 21174, 2015), <http://www.nber.org/papers/w21174> [<https://perma.cc/56KD-UHJ8>] (presenting survey findings of the public misperception of inequality).

362. See Michael R. Siebecker, *To Be or Not to Be . . . Out in the Academy*, 22 LAW & INEQ. 141, 157 (2004) (citing Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 8-10 (1989) (“Outsider scholars have recognized that their specific experiences and histories are relevant to jurisprudential inquiry.”)).

363. *Id.*

364. *Id.*

365. Dominant law school culture can be disempowering for many students and has a devastating impact on marginalized groups of students. See Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1, 14 (2015) (citing DEAN SPADE, *For Those Considering Law School* 6-7, <http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School-Nov-2010.pdf> (“The traditional pedagogy of law school relies on humiliating students if they bring in other ways of thinking or knowing about the world, thereby whittling them down to a shadow of their former selves and reshaping them to make them think inside a very narrow box . . . Critical dialogue is made impossible in such an environment, and ostracism of people who fall outside the norms is par for the course.”)).

366. I have met public defenders from all over the country and have seen that few are aware of implicit bias as a force in office operations. Many are not open to institutional change. Most public defenders

practice.³⁶⁷ An example is the ability to understand society's treatment of people as outsiders.³⁶⁸ The outsider may have an easier time understanding minority clients who police mistreated.

Outsiders can also develop a unique sense of pride, confidence, and realization they can do more in her career than they expected of themselves. Once an outsider becomes a public defender and proves her reputation, they recognize the accomplishment. Societal inequities and law school culture made their journey here harder than those with people in the system helping along the way³⁶⁹

CONCLUSION

The lack of racial diversity in workplaces is an endemic problem in American criminal justice institutions.³⁷⁰ It is more troubling, however, in indigent defense because society has charged these organizations with representing mostly people of color.³⁷¹ Criminal defendants, already weary of the criminal justice process, may become jaded after learning the office where their lawyer works has racial disparities.³⁷² To ameliorate this problem, offices must equalize opportunities by devoting more attention to outsiders. This levels the playing field among professionals. Such democratization in the office cannot happen without managers implementing programs for diversification, but merely implementing these programs is not enough. Once they hire outsiders, they must also work to change the mindset of all white and minority lawyers.³⁷³

The outsider defender also has work to do. They more than likely experienced hardships clients can understand. The outsider public defender's awareness of their history in comparison with that of their client can only improve client representation. The process of self-awareness makes it easier for lawyers to relate to clients more closely. Coupled with zealous advocacy, this self-awareness can be a starting point for changing public defender office culture.

I have met mean well and are open-minded, but most have not adopted the values and principles this Article advances.

367. See Kathryn A. Sabbeth, *Capital Defenders as Outsider Lawyers*, 89 CHI-KENT L. REV. 569, 588–89 (2014) (“An outsider lawyer’s perspective can be positive in its lack of attachment to the past and the high expectations it sets for social justice goals, but the flip side of this approach can be arrogance and carelessness.”).

368. GERHARD FALK, *STIGMA: HOW WE TREAT OUTSIDERS* 330 (2001).

369. See Ball, *supra* note 365, at 14.

370. For racial disparities among judges, see TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC’Y FOR L. AND POL’Y, *THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?* 1 (Dec. 2014). See also *Exposing the Gavel Gap*, WASH. POST, <https://www.washingtonpost.com/brand-studio/goliath/exposing-the-gavel-gap/>. For racial disparity among other court related institutions see U.S. GOV’T ACCOUNTABILITY OFF., *Racial Disparities in Federal Employment, Lending, and Housing*, July 1, 2020, <https://blog.gao.gov/2020/07/01/racial-disparities-in-federal-employment-lending-and-housing/>.

371. See *supra* Part I, note 1.

372. Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, LAW & CONTEMP. PROBS., Winter 1995, at 81, 87–88 (1995) (explaining criminal defendant discontent at public defenders). See also Kenneth P. Troccoli, “*I Want a Black Lawyer to Represent Me*”: *Addressing A Black Defendant’s Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 LAW & INEQ. 1, 4 (2002) (noting that dissatisfaction among criminal defendants of color because most public defenders are white are “likely to be widespread given that cross-racial representation is the norm, not the exception.”).

373. When public defenders commit to this type of change, they commit to antiracism. See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019) (defining antiracism as working towards creating equity among races).

While a strong literature has developed for sustaining zealous practices and long careers as *public defenders*, women and racial minority practitioners have not received attention among scholars of indigent defense practice.³⁷⁴ Through awareness of the paths and travails of outsider lawyers, public defender offices can better nurture and mentor them to help them reach full potential. As outsider lawyers get close to their full potential, they embody Antonio Gramsci's model of organic intellectuals.³⁷⁵ The organic intellectual model aids outsiders, their communities, and supplies hope for the future by raising awareness of mass incarceration, implicit bias, and racial disparities.³⁷⁶ The organic intellectual public defender embodies these characteristics and serves as a champion for their clients; they improve criminal defense.

374. *See supra* Part I.A-B.

375. *See supra* Part II.A-B.

376. *Id.*