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Free-ing Criminal Justice

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FREE-ING CRIMINAL JUSTICE

*Bennett Capers**

FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA. By *Sara Mayeux*. University of North Carolina Press. 2020. Pp. xi, 271. $26.95.

INTRODUCTION

In the epilogue to her thought-provoking book *Free Justice: A History of the Public Defender in Twentieth-Century America*, legal historian Sara Mayeux[1] turns to a case that was unfamiliar to me, *Polk County v. Dodson*.[2] At first, I wondered if I'd not heard of the case because I teach Criminal Procedure: Investigations, rather than its counterpart, Criminal Procedure: Bail to Jail. That, and the fact that in my own scholarship, I've focused on the prosecutorial side of the coin—I was a federal prosecutor before joining the academy—rather than the defense side.[3] Or—sigh—that even as a somewhat-recognized criminal justice scholar, I was not well-read enough; an important case had escaped me. But as I read on, I realized Mayeux herself was describing the case as "obscure" (p. 187). So it wasn't just me. That said, her describing *Polk County v. Dodson* as "obscure" and saving its appearance for the epilogue to her book—she describes it as a case "that provides the most fitting ending" to her tracing of the "public defender's trajectory as a character in American legal culture"—only piqued my interest more (pp. 187–88). I found myself sitting up, intrigued.

Polk County, Mayeux tells the reader, involved a civil rights lawsuit brought in 1981 by an Iowa prisoner against the public defender who had been assigned to represent him on appeal (pp. 187–88). The defender declined to pursue the appeal, believing it frivolous.[4] This, Dodson argued, deprived him of his right to counsel and due process, entitling him to redress since federal law provides for compensation when a state official or someone acting "under color of state law" deprives a person of a constitutional right.[5]

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1. Associate Professor of Law and History, Vanderbilt Law School.
2. 454 U.S. 312 (1981).
3. *E.g.*, I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561 (2020).
4. *Polk County*, 454 U.S. at 312.
5. P. 188; *Polk County*, 454 U.S. at 315.

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But there was a threshold question. Are public defenders in fact state actors? In a way, the question seems to answer itself. Public defenders are, after all, public, as opposed to private, defenders. They work on the state's dime. And the state does so to fulfill the constitutional right to counsel established in *Gideon v. Wainwright*.[6] Beyond this, public defenders are counterparts to prosecutors, who are surely state actors.[7] But wary, perhaps, of what it would mean to recognize public defenders as state actors, the Court reached the opposite conclusion. Because a public defender "owes a duty of undivided loyalty to his client," he is necessarily independent and "free of state control."[8] Of course, "free of state control" may depend on how one views things; to some, the fact that the state holds the purse strings of public defenders *is* control. You know, whoever pays the piper calls the tune. But from the majority's point of view, the payer of the piper was irrelevant, or at least not determinative. "[A] public defender is not acting on behalf of the State."[9] Period. Indeed, "he is the State's adversary."[10]

Mayeux chooses to end with the *Polk County* case because, for her, the case "enshrined . . . the version of the public defender that the legal profession had settled upon by the time of *Gideon*" (p. 188). It is telling, Mayeux adds, that "[i]n all of the major right-to-counsel cases of the twentieth century, the counsel in question had been figured as the state's adversary" (p. 189).

Mayeux's take on the Court's view of public defenders is spot on, at least if one isn't too cynical about the Court. And the history she tells—of how the public defender, once regarded "as a socialist-style project" (p. 3), became "a quintessentially American institution" (p. 4)—is illuminating, as is her argument that the history of the public defender is inextricably tied to ideas of American democracy and elite lawyers' conception of American identity (p. 15). The story she tells is an important one, especially for anyone interested in criminal justice and how we got *here*. And yet as I read her book, I found myself thinking of other stories.

This Review focuses on two of those stories. In Part I, I turn to a story that precedes Mayeux's account—that of the rise of the public prosecutor—and the lessons we might learn from looking at the rise of prosecutors and public defenders in tandem. In Part II, I present yet another story, or at least another point of view. As Mayeux puts it, her book "yields an emphasis on the voices of elite lawyers" (p. 13). But what of criminal defendants? What type of defense did they want? Viewed together, Parts I and II suggest the turn to public defenders is less salutary than it may seem, calling into question the Court's view of the public defender as the state's adversary and the notion of "free" justice. Finally, in Part III, I imagine what public defense can still become.

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6. 372 U.S. 335 (1963).

7. *Cf.* Imbler v. Pachtman, 424 U.S. 409, 420–29 (1976) (extending official immunity under 42 U.S.C. § 1983 to prosecutors for their prosecutorial acts).

8. *Polk County*, 454 U.S. at 315, 322.

9. *Id.* at 323 n.13.

10. *Id.*

I. THE OTHER "FREE" JUSTICE: THE RISE OF THE PUBLIC PROSECUTOR

"Today," Mayeux observes, "public defenders form part of the American way of life in the literal sense" (p. 2). They are "now so ubiquitous in American courtrooms that it is easy to forget how recently the legal profession considered their very existence controversial" (p. 2). But there is another history that precedes the rise of public defenders, one that introduced another criminal justice actor. There is little historical record of the debates between elite lawyers regarding these actors, or of their views. Nor is there a game-changing opinion equivalent to *Gideon*. Yet this important history should complicate our views of public defenders.

I am referring to the rise of public prosecution. Like public defenders, public prosecutors are so ubiquitous that we take them for granted. They too seem "part of the American way of life" (p. 2). But in fact, public prosecutors are "[a] historical latecomer";[11] they may have preceded public defenders by a century, but they too are a recent development in the grand scheme of things.

As I have explored elsewhere, "[w]hile the notion of a crime victim pursuing criminal charges herself may seem 'alien to modern America,' throughout colonial America . . . private prosecution was the norm," just as it was in England.[12] Describing the practice of private prosecution, historian Joan Jacoby has written that "[t]he aggrieved victim, or an interested friend or relative, would personally arrest and prosecute the offender, after which the courts would adjudicate the matter much as they would a contract dispute or a tortious injury."[13] This is not to say there were no public prosecutors at all: the American colonies had the equivalent of attorneys general. However, as in England, their role was essentially limited to prosecuting matters that were of particular interest to the Crown. For everyday crime, "criminal prosecutions belonged to 'the people.' "[14]

Our now-ubiquitous public prosecutor owes his existence not to our English forebears, but more likely to the influence of the Dutch, who controlled the area now known as New York until 1674.[15] The Dutch criminal system included a *schout* whose duties included considering complaints, statements and evidence from aggrieved citizens as well as "presenting the case against the defendant and notifying all accused of the charges levelled against them."[16] When England seized control of the Dutch colony New Amsterdam and rechristened it New York, they retained the *schout* in a modified form.[17] And this is what led to the birth of the American prosecutor, with Connecticut—

11. John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 313 (1973).

12. Capers, *supra* note 3, at 1573 (footnote omitted).

13. JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 8 (1980).

14. Capers, *supra* note 3, at 1564.

15. JACOBY, *supra* note 13, at 14.

16. *Id.*

17. *Id.*

which had also been partly under Dutch control—being the first colony to abolish private prosecution and adopt instead a system of public prosecutors.[18] Other colonies and then states eventually followed suit in abolishing private prosecutions,[19] and part of the reason dovetails with Mayeux's story. For many, the inequity of private prosecution—that it benefited those who were already financially well off—was inconsistent with a certain vision of America.[20] Instead, as legal historian Lawrence Friedman speculates, "the concept of public responsibility for prosecuting criminals rang a bell in the colonial mind."[21] That said, the turn away from private prosecution was gradual; it continued to exist well into the eighteenth century,[22] and in some places well into the nineteenth century.[23]

Although there is much more that can be said about the rise of the public prosecutor, the larger point is that understanding the history of "free" prosecutors should give us pause in celebrating the rise of "free" defenders. Notwithstanding claims that the rise of the prosecutor was the "natural and logical result of the legal, social, and political developments that shaped the United States' judicial system,"[24] the development had less generous reasons as well. Perhaps most significantly, it facilitated the state's ability to designate itself as the harmed party, displacing actual victims.[25] Indeed, I have argued that the turn to public prosecutors has been anything but cost-free.[26] Instead of a crime victim—say, a victim of sexual assault or police violence—having the opportunity to pursue justice, or alternatively to decline prosecution, we have reduced the victim to a mere witness. Instead, we give "free" prosecutors "the unreviewable and monopolistic power . . . to say yea or nay" about whether prosecution should be pursued and, if so, what redress will suffice.[27] In short, the accumulation of power by public prosecutors has been accompanied by a diminution of power by actual crime victims, and by extension, all of us. Put differently, we the people originally had the power to decide whether or not to prosecute if victimized by crime. That power is now gone.

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18. *Id.* at 10.

19. *Id.*

20. For more reasons for the rise of public prosecution, see Capers, *supra* note 3, at 1578–81.

21. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 30 (1993) (emphasis omitted).

22. Capers, *supra* note 3, at 1578.

23. *See, e.g.*, ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880, at 29–30 (1989).

24. JACOBY, *supra* note 13, at 6.

25. Capers, *supra* note 3, at 1581–84.

26. *Id.* at 1579–86.

27. *Id.* at 1571. The inability of victims, once the machinery of prosecution begins, to unilaterally exercise mercy or choose restorative justice or some other means of redress is particularly troubling. Indeed, one of the benefits of downsizing public-prosecutor offices and returning power to the people is precisely this: that it increases the potential for mercy. *Id.* at 1596–1604.

Given this bargain, it makes sense to rethink what we have exchanged for "free" defense. Although we have not given public defenders a full monopoly, we have given them a partial monopoly of sorts.[28] In doing so, one could argue that we have lost the benefits of affinity-based mutual-aid associations that once represented the indigent and cared not only about the accused but also the accused's community.[29] We have certainly ensconced and further naturalized inequality, creating a two-track justice system that grants first-class treatment to those who can afford to hire retained counsel and second- or third-class treatment to those who cannot.[30] Paul Butler has persuasively argued that the flaws and inequalities we see in the criminal justice system are not bugs but features[31] or, in other words, that the criminal "system is working the way it is supposed to."[32] If that is true, and I increasingly think it is, then our turn to public defenders undoubtedly facilitates the inequalities that Butler identified. After all, they are now part of the criminal justice machinery; indeed, they keep it running, flaws and all. All of this prompts a question: Can public defenders truly push back against harmful, systemic state practices when their very existence, not to mention their budget, is controlled by the state?[33] More broadly, what has "free" justice cost us? Perhaps more importantly, who is working to buck the criminal system that now seems flawed at its core?[34]

II. LISTENING TO DEFENDANTS

There is another story that was noticeably absent as I read Mayeux's book: the story of the intended beneficiaries of this "free" justice.

Mayeux concedes that her history is top-heavy. It rehearses the debates of "elite lawyers—men who, like Harrison Tweed, attended prestigious universities and then spent their careers at corporate law firms" (p. 13). We learn of

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28. *See* Thomas H. Cohen, *Who Is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. JUST. POL'Y REV. 29, 35 (2014) (noting that in 2004 and 2006, about 80 percent of defendants charged with a felony in the nation's seventy-five most populous counties reported having public defenders or assigned counsel).

29. *See, e.g.*, Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1682–90 (2019) (discussing the history of affinity-based legal-aid societies).

30. *See, e.g.*, Erin York Cornwell, *The Trials of Indigent Defense: Type of Counsel and Case Outcomes in Felony Jury Trials*, 78 ALB. L. REV. 1239, 1239–40 (2014) (noting that defendants represented by public defenders are more likely to be found guilty at trial than those represented by hired counsel).

31. Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016).

32. *Id.* at 1456.

33. *See* Irene Oritseweyinmi Joe, *Defend the Public Defenders*, ATLANTIC (Mar. 13, 2021), https://www.theatlantic.com/ideas/archive/2021/03/defend-public-defenders/618001 [perma.cc/AU4G-SB9X].

34. To be sure, there are activists trying to reimagine justice and public safety. One of the most well-known is Mariame Kaba. *See generally* MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021).

Mayer C. Goldman, a "Manhattan lawyer wearing a suit, tie, and Teddy Roosevelt-style pince-nez," and perhaps "the public defender's most relentless promoter" (pp. 24–25). Per Goldman, allowing for free defense would put the prosecution and defense "on an equal footing," "raise 'the tone' of criminal trials," and bring them into "modern civilization" (p. 24).

Not that all the elite lawyers in the debates were white men of means. Mayeux includes the story of Clara Foltz, the first woman admitted to the California bar (p. 25). Foltz developed a detailed public-defender proposal and toured the country for decades promoting her "Defender Bill" (p. 29). Mayeux also includes the story of Roderick Ireland and Wally Sherwood, two Black attorneys who, while still in their twenties, launched the Roxbury Defenders Committee, "a community-based alternative to the state public defender agency" that had largely neglected communities of color (pp. 159, 175). The Roxbury Defender Committee was supervised by its own board, which included Black lawyers and members of Black community organizations (p. 175). Their defenders prided themselves on their adversarial stance towards the State (p. 175). As Ireland later put it, being a part of the Roxbury Defenders was like a "post-graduate education in subjects law schools do not teach, such as 'Fighting with the Judiciary 101' " (p. 175). Still, even if the elite lawyers in Mayeux's telling weren't all white men of means, they were all still elite, or perhaps at least elite-ish. As such, their perspective on what free justice should look like was very top-down, very privileged, and perhaps redolent of the idea of noblesse oblige. Or as the sociologist Matthew Clair puts it in his astute review of *Free Justice*, Mayeux "tells the history of the public defender system as it was conceived and viewed by the elite lawyers and policy-makers who would likely never have to rely on it."[35]

Consider Mayeux's description of the National Defender Project, which was formed following the Court's *Gideon* decision and generously funded by the Ford Foundation (p. 113):

> Upon receiving the Ford grant, the first order of business for the National Defender Project was to assemble "a prestigious governing body." There was no prestige in being a poor person, so poor people were not included. The project's National Advisory Council was chaired by the corporate law firm partner and [National Legal Aid and Defender Association] leader Orison Marden, and comprised seven judges, including one retired Supreme Court justice; four law school professors; seven leaders of the American Bar Association; one district attorney; and one former public defender. . . . They asked shrewd questions about the grant proposals they were asked to review. Still, they presumably asked different questions than the "indigent accused" themselves would have asked. (p. 162)

What questions might the "indigent accused" have asked? Mayeux never speculates. Nor does she speculate about what type of free justice the accused

35. Matthew Clair, *Unequal Before the Law*, NATION (Dec. 14, 2020), https://www.thenation.com/article/society/sara-mayeux-free-justice-public-defenders [perma.cc/JVN3-4KSG] (reviewing *Free Justice*).

may have wanted. In *Free Justice*, as in the creation of public-defender offices, the defendants themselves remain the subject of conversation but are never the speakers themselves. Their thoughts remain absent. One is tempted to channel Gayatri Chakravorty Spivak and ask, "Can the subaltern speak?"[36]

To be clear, I do not blame Mayeux for this absence. After all, it was the elite who "toured the nation" and wrote books (p. 25) and led various legal-aid organizations (pp. 87–88). Undoubtedly, Mayeux relies on the extant record: the historical archive. And unfortunately, because we have never done a very good job of listening to defendants, or even asking them what they think,[37] there is likely little record to recover, especially as to what defendants might have wanted from a system of justice.

Let me rephrase this. There is likely an extensive record *about* the defendants. If criminal prosecution during this period was anything like it is now, then each defendant was likely the subject of multiple case files. The police likely had a case file on the defendant, as did the prosecution and the defense. And if the defendant was incarcerated, the jail or prison likely had a case file too. We have always done a good job of surveilling, marking, and recording criminal defendants. We even use the expression "the defendant has a record." But their thoughts? They are spoken about, but defendants are rarely permitted to speak, nor are they listened to when they do.

The absence of defendants in the history of the public defender speaks to a larger problem I have been thinking about recently: the myriad ways we silence defendants, and what we lose in consequence.[38] With *Miranda*, we make clear to suspects that anything they say may be used against them in a court of law. And then, in the federal system at least, the judge repeats this at the defendant's initial appearance.[39] And of course their attorneys are invariably telling them the same: "Shut it and keep it shut." Indeed, the defense lawyer likely also advises the defendant to "shut it" in general, since calls from jails can be recorded and even a trusted cellmate might be a jailhouse snitch. The defense lawyer may even encourage a type of attorney-client silence, since knowing too much might ethically tie the defense lawyer's hands.

This silence continues through nearly every pretrial court appearance. The defense lawyer speaks, but the defendant is silenced. Should the defendant elect to go to trial, a constellation of rules encourages silence, from evidentiary rules regarding impeachment by prior conviction[40] and the rule of relevancy

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36. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

37. Even this pair of Reviews replicates a top-down approach. While I applaud the editors for bringing multiple perspectives to Mayeux's book—that of a former prosecutor and a former defender—I cannot help but wonder how a criminal defendant, or a formerly incarcerated person, may have reviewed her book.

38. *See* Bennett Capers, Listening to Defendants (Oct. 14, 2021) (unpublished manuscript) (on file with the *Michigan Law Review*).

39. *See* FED. R. CRIM. P. 5(d)(1)(E).

40. *See* FED. R. EVID. 609.

to Supreme Court cases permitting impeachment by pre-*Miranda* silence[41] and by statements taken in violation of *Miranda* or the Sixth Amendment,[42] "special scrutiny" jury instructions that kick in when a defendant testifies,[43] and the defendant-specific threat of perjury charges.

Reading *Free Justice* prompts me to think of "listening to defendants" in a different way. How might the evolution of public defense have differed had the voices of the accused been added to the debates? Or had actual defendants been included in the National Defender Project's "prestigious governing body" (p. 162)? What might the accused have thought with respect to institutional design? More specifically, how might they have responded to Mayer Goldman's insistence on equal justice during his campaign for public defenders, where he argued that free lawyers should be provided not only to the poor but to the rich as well? Would they have found his argument for compulsory public defenders persuasive, a step toward securing the equality the Court hinted at in *Griffin v. Illinois* when a plurality stated that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has"?[44] Might they have signed on to Robert Ferrari's proposal that such defenders "would also 'owe . . . a duty to the state,' "[45] or Goldman's insistence that they would "zealously defend the innocent, but would limit their services for the guilty to 'obtaining a just and fair punishment' "?[46] Or might they have favored the more adversarial stance—alongside a commitment to being a community resource—championed by Ireland and Sherwood?

What did these debates look like from their point of view, and how might they have contributed to these debates or even redirected them? What did defendants think of the Court's decision in *Polk County v. Dodson*? Or, for that matter, *Gideon*? We know that defendants have complained that defenders are little more than "government lawyers" (p. 144). The Black Panther Eldridge Cleaver even described them as "penitentiary deliverers."[47] But that still leaves the question of what most defendants thought in 1963 when *Gideon* was decided. And since the criminal system has always been entangled with race—indeed, has been a means of maintaining racial hierarchies in general and

41. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 240 (1980); Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam).

42. *E.g.*, Harris v. New York, 401 U.S. 222, 226 (1971); Michigan v. Harvey, 494 U.S. 344, 353–54 (1990).

43. *See* Reagan v. United States, 157 U.S. 301, 305 (1895); *see also* Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309 (2020).

44. 351 U.S. 12, 19 (1956) (plurality opinion).

45. P. 38 (quoting Robert Ferrari, *The Public Defender: The Complement of the District Attorney*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 704, 707 (1912)).

46. P. 38 (quoting Mayer C. Goldman, *The Necessity for a Public Defender*, 5 J. AM. INST. CRIM. L. & CRIMINOLOGY 660, 663 (1915)).

47. P. 149; *Playboy Interview: Eldridge Cleaver*, PLAYBOY, Dec. 1968, at 89, 96.

Black precarity in particular[48]—how might those Black folks on "the bottom"[49] (i.e., all of us who have been cast, since Emancipation especially, as "a problem"[50]) have thought about designing a system of criminal defense? Along those lines, can we learn anything from how folks on the bottom were conceptualizing other "free" services, like the Black Panthers' and other grassroots groups' free health services to address illnesses and preventive medical programs to ensure our future survival?[51] In other words, might those on the bottom have gone beyond simple defense, which is reactive, to something more proactive, something more liberating, something more free-ing? Might their vision of public defense have included a mission to reduce the drivers of crime, such as wealth disparities and unequal access to housing and jobs and even citizenship?

Given the lack of an historical record of what defendants or other marginalized peoples wanted, it is little wonder that they play no role in Mayeux's telling of the history of public defense. That said, I do find myself thinking of scholars outside of history departments who have refused to be bound by the extant record. Saidiya Hartman, a professor of English and comparative literature at Columbia University and MacArthur genius recipient, writes that

> [f]act is simply fiction endorsed with state power . . . to maintain a fidelity to a certain set of archival limits . . . . Are we going to be consigned forever to tell the same kinds of stories? Given the violence and power that has engendered this limit, why should I be faithful to that limit? Why should I respect that? [52]

Instead of being forever confined to archival limits, Hartman has responded to this absence by engaging in "critical fabulation," a practice that draws on historical accounts and the evidence that remains to creatively recover the stories of the missing.[53] Doing so allows Hartman to bring to light the interior lives and experiences that lead readers to reimagine the past and, as a result, the present.[54]

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48. *See, e.g.*, Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. (forthcoming 2022).

49. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (defining "[l]ooking to the bottom" as "adopting the perspective of those who have seen and felt the falsity of the liberal promise").

50. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 3–4 (Yale Univ. Press. 2015) (1903).

51. *See* Mary T. Bassett, *Beyond Berets: The Black Panthers as Health Activists*, 106 AM. J. PUB. HEALTH 1741 (2016); *see also* Jessica Jerome, *Much More Than a Clinic: Chicago's Free Health Centers 1968–1972*, 38 MED. ANTHROPOLOGY 537 (2019).

52. Alexis Okeowo, *How Saidiya Hartman Retells the History of Black Life*, NEW YORKER (Oct. 19, 2020), https://www.newyorker.com/magazine/2020/10/26/how-saidiya-hartman-retells-the-history-of-black-life [perma.cc/QL7H-W4ZT].

53. *Id.*

54. SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF SOCIAL UPHEAVAL, at xiii–xv (2019).

Returning to the history of public defense and faced with an inadequate archive—a failed archive—I find myself wondering what it might mean to imagine the unheard voices of the accused. What would it mean to imagine a "fugitive text," to borrow Hartman's terminology?[55]

I do not profess to have Hartman's skills, so I will stop short of attempting to recover what actual defendants thought about "free" justice and what they might have contributed to its design had they been asked. But I do have doubts that they would have considered it "free," let alone "justice." "Here is someone who will represent you and speak for you" may sound great. But then you realize you have to surrender your own ability to speak in exchange. And that the lawyer representing you for "free" is paid, and paid poorly, by the state. And that the cases are captioned *The People v. you*, or the *State v. you*, which seems less like a fair fight and more like a way to tip the scales so that jurors already know whose side they should be on.[56] And that the rules are decided by a Supreme Court that hasn't had a justice with real criminal-defense experience in nearly three decades.[57] And that the same Supreme Court calls the process adversarial and casts the public defender as the state's adversary,[58] as if, despite all evidence to the contrary, it is a fair fight. And that we have the solicitor general to represent prosecutors before the Court, but no equivalent on the defense side.[59] And that the imbalances are so many that it would take pages to list them all. Free? Justice? I imagine defendants collectively thinking, "Nah. Hell nah."

III. LOOKING FORWARD

Instead of excavating the past, I have been imagining the future, engaging in legal futurism, or more specifically, Afrofuturism.[60] Prompted by projections that the United States will likely be a "majority-minority" country by the

55. *Id.* at xiv. In *Wayward Lives*, Hartman uses this methodology to excavate and examine Black intimate life in Philadelphia and New York at the beginning of the twentieth century. Okeowo, *supra* note 52. *See generally* HARTMAN, *supra* note 54.

56. *Cf.* Jocelyn Simonson, Essay, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 250–57 (2019) (exploring and challenging the assumption that prosecutors represent the people); *see also* Capers, *supra* note 3, at 1595 (noting how the public has been disciplined into aligning itself with prosecutors).

57. Dara Lind, *There Hasn't Been a Criminal Defense Lawyer on the Supreme Court in 25 Years. That's a Problem.*, VOX (Mar. 22, 2017, 10:54 AM), https://www.vox.com/2016/3/28/11306422/supreme-court-prosecutors-career [perma.cc/7DMG-73WP]; Sarah Fair George, *There Are Too Many Prosecutors on the Bench. Take It from Me, a Prosecutor*, APPEAL (Jan. 8, 2021), https://theappeal.org/there-are-too-many-prosecutors-on-the-bench-take-it-from-me-a-prosecutor [perma.cc/DJG6-HGL6].

58. Polk County v. Dodson, 454 U.S. 312, 322 n.13 (1981); *see also* p. 189.

59. For a cogent argument in support of the creation of a "defender general" position to serve as a counterpart to the solicitor general, see Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469 (2020).

60. *See* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019) [hereinafter Capers, *Afrofuturism*]; Bennett Capers, Essay, *The Law School as a White Space*, 106 MINN. L. REV. 7 (2021).

year 2044, I have been exploring what criminal justice might look like then, or in the ensuing years when people of color wield political and economic power.[61] I have even been picturing a Supreme Court that reflects the full diversity of the population along a variety of lines, including race, sex, sexuality, class, and disability, perhaps even led by *Chief* Justice Sonia Sotomayor.[62] In a sense, I have been engaging in what Edward Bellamy does in *Looking Backward*—a novel Mayeux discusses in which Bellamy imagines a future world and considers the role of criminal justice within it—but through the lens of race,[63] and specifically critical race theory and Afrofuturism.

All of this prompts to me wonder what system of criminal defense people of color will adopt when they control not only the doors to the courthouse but the keys to the prison. Like Bellamy, I imagine a significant reduction of crime in this future world. I also envision a societal distaste for prisons and preference for rehabilitation.[64] My work argues that wealth redistribution and technology will reduce the incentive for criminal activity and that other "crimes" will be decriminalized.[65] But for the small amount of crime that remains, what will public defense look like, beyond insisting on equal funding for prosecutors and defenders, which seems a given? Having experienced the brunt of inequality, will we insist on compulsory public defense? (I say "we" because, if you have not guessed already, I am a Black man. Like Patricia Williams, I am also a firm believer that "subject position is everything."[66]) Will we go a step further and allow defendants to select who defends them rather than sticking them with assigned counsel? How might doing so allow for defendants to account for the reality of the Court's finding in *Polk County* that "[a]dministrative and legislative decisions undoubtedly influence the way a public defender does [her] work"?[67] Will we change the balance of power between the accused and the lawyers who purport to represent them? Will we see the specialization and professionalization of lawyers, even criminal lawyers, for what it is—self-interested—and move instead for lay-oriented courts, as the Norwegian criminologist Nils Christie has persuasively advocated?[68]

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61. Capers, *Afrofuturism*, *supra* note 60.

62. *Id.* at 49.

63. P. 26–28. Interestingly, Bellamy's novel "forgets" race altogether. *See* Yeonsik Jung, *"Forgetting" Race in Edward Bellamy's* Looking Backward, 2000–1887, 29 ANQ 145, 146 (2016).

64. Capers, *Afrofuturism*, *supra* note 60, at 55–57.

65. *Id.* at 39–48.

66. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 3 (1991) ("Since subject position is everything in my analysis of the law, you deserve to know it's a bad morning."). Speaking of which, I opened this Review by noting that I am a former federal prosecutor. If you have not guessed by now, I am also a repentant one.

67. Polk County v. Dodson, 454 U.S. 312, 321 (1981).

68. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 11–12 (1977). Christie analogizes legal conflict to property and describes how courts and professionals remove conflicts from the communities where they occur. *Id.* at 4. Christie emphasizes the negative impacts and missed opportunities that result from this practice and suggests a possible remedy of having

Will we give defendants more voice in the process? Returning to *Polk County*, will we move away from Justice Powell's vision of the defender as the state's adversary, a vision that was never entirely true and that in any event is inconsistent with a new goal of restorative justice? More broadly, will we look to defendants to reimagine public defense? I certainly hope so.

CONCLUSION

For me, this is the real strength of *Free Justice*. By telling a history of the public defender in twentieth-century America, Mayeux prompts the reader—or this reader at least—to imagine the future of the public defender in twenty-first-century America. And to imagine a justice that really is free.

more nonlawyers involved in the dispute-resolution process. *Id.* at 7–8, 11–12. Doing so counteracts the specialization and subsequent professionalization that has allowed conflicts to be removed and caused communities to suffer. *Id.*