

# **The Line That I Did Not Know I Had: Why I Would Not Represent a January 6 Defendant As A Public Defender**

Lucius T. Outlaw III\*

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## **INTRODUCTION**

If I were a public defender today, would I represent a January 6 defendant?

It is a question that I have struggled with answering since the

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\* Lucius T. Outlaw III is an associate professor of law at Howard University School of Law (HUSL). Prior to joining HUSL’s faculty, Prof. Outlaw served as an assistant federal public defender with the Office of the Federal Defender of Maryland for over eight years. This Article was made possible by financial support provided by HUSL. Thank you to the editors of the Berkeley Journal of Criminal Law for their support and contributions. This Article is dedicated to my father, Lucius T. Outlaw, Jr., who taught me that until tested, principles are just hollow promises.

historic attack on democracy occurred. As a former public defender who remains one in heart and soul, that I struggle with this question presents its own struggle. There is an added layer to my struggle because I am a black former public defender.<sup>1</sup> During my eight-plus years as a public defender I represented, without pause or question, clients accused and convicted of a range of criminal conduct, including horrible and shocking anti-social criminal conduct. I represented people charged with sexually exploiting children to produce child pornography. I represented a person charged with violently killing a young child. I represented people charged with defrauding the elderly for money. I represented a manager of a seniors' living facility charged with purposefully neglecting and abusing the facility's elderly residents. I represented people who are racist, including one who made racist statements about me during a recorded jail call. For these clients, as well as the other hundreds of clients who I represented as a public defender, it never entered my mind that I would not represent them because of their alleged criminal conduct. My representation was never in question because I fully subscribed to public defender absolutism: the guiding principle of public defense that everyone is deserving of competent and zealous representation no matter the charge or alleged conduct. Indeed, the soul of public defense, put best by Bryan Stevenson, is that "Each of us is more than the worst thing we've ever done."<sup>2</sup> During my time as a public defender, I never grappled with whether a person's charged conduct crossed a moral, ethical, or some other line that rendered the person ineligible for my services as a defense attorney. I never grappled with it because I never had such a line.

The January 6th insurrection brought to light something I did not expect or anticipate: I do have a line, and that line is January 6th. My line is a white supremacist collective attack on democracy that sought (and continues to seek) to further deny black Americans full citizenship and from experiencing the American promise of life, liberty, and the pursuit of happiness. Driven by the racist "Big Lie," January 6 defendants attempted to stop the certification of the 2020 presidential election and prohibit the transfer of power from a president who embodied and celebrated their racist ideals. Their collective goal was to disenfranchise, after the fact, millions of black voters who had exercised their constitutional voting rights to tip the election away from former President

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<sup>1</sup> For consistency in this Article, "black" (not capitalized) is used when black is used as an adjective, while "Black" (capitalized) is used when it stands alone.

<sup>2</sup> BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17-18 (2018).

Trump.<sup>3</sup> This is where I have to draw a line.

My answer to the question posed at the start, therefore, is a steadfast “no.” As explained in this Article, my newly discovered line is less about principle or morality, and more about survival and sanity. As discussed throughout, my line emerges from an innate refusal to be a tool of my (and other black Americans’) undoing, subjugation, and possible extinction. To set the stage, the Article first summarizes the events of the January 6th insurrection and how it was fueled by a toxic mix of white supremacy, political extremism, and the racist big lie that the 2020 election was stolen from Trump. Next, the Article explores how public defenders individually and collectively are driven to do the difficult work by what I call “subinterests” – motivations such as racial justice and constitutional integrity. The Article concludes with the exploration and explanation of my conclusion that I would not represent a January 6 defendant as a public defender.

It is important to establish what this Article is not advocating. It is not arguing or even suggesting that January 6 defendants are not entitled to representation, be it retained or appointed. They are entitled to the full protections and guarantees of the Sixth Amendment.<sup>4</sup> This Article is solely about *my* conclusion and the struggle leading to it. I wrote it because I know others in the public defense community, including its alumni, are dealing with the same struggle of conscience and identity. This Article seeks to let public defenders (and defense attorneys generally) struggling with January 6th to know that they are not alone, and that it is okay to reach the conclusion I reached because of the unique and unprecedented nature of January 6th and the immediate and lethal danger to democracy it posed and continues to pose. In short, this Article seeks to reassure others in the public defense community that January 6th allows for a legitimate exception to public defender absolutism. Whether to invoke that exception is a personal decision of each public defender. This Article does not propose that public defenders, particularly black and

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<sup>3</sup> See John Eligon & Audra D.S. Burch, *Black Voters Helped Deliver Biden a Presidential Victory. Now What?*, N.Y. TIMES (Nov. 11, 2020); Adam Harris, *What Biden Owes Black Voters*, THE ATLANTIC (Nov. 11, 2020). To be clear, the collective goal of the January 6th insurrectionists was not limited to disenfranchising black voters. The collective goal included prohibiting all non-white, non-heterosexual, non-Christian Americans from achieving full citizenship rights, including voting rights.

<sup>4</sup> The Sixth Amendment guarantees that a criminal defendant will have “the Assistance of Counsel for his defense.” U.S. CONST. amend. VI. Inherent in this right is an obligation on the state to provide an attorney to a criminal defendant who is unable to afford an attorney. See *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

other public defenders of color, must or even should invoke the exception, but rather argues that they be allowed to without shame, ridicule, or rejection by the public defender community. In sum, this Article seeks to provide public defenders the space, grace, and legitimacy to invoke a January 6th exception to public defender absolutism.<sup>5</sup>

This is not an ivory-tower hypothetical matter concerning legal ethics and professional identity. It is a real-life circumstance. A substantial number of the January 6 defendants are represented by public defenders.<sup>6</sup> So many January 6 defendants have requested public defenders that the Office of the Federal Public Defender for the District of Columbia is straining to staff the cases with attorneys.<sup>7</sup> For many in the public defense community, particularly public defenders of color who make up an estimated 5.4% of all public defenders,<sup>8</sup> January 6 defendants represent an identity crisis that many of us thought impossible. It is a crisis that has important implications for the public defender cause and the public defender system, which together serve as a vital pillar to fulfilling our democracy's Sixth Amendment obligations. January 6 defendants present a problem for the public defender system, and like many problems within our criminal justice system, the problem is firmly grounded in race and this country's addiction to, and tolerance for, racism.

## I. THE JANUARY 6TH INSURRECTION<sup>9</sup>

“If you don’t fight like hell, you’re not going to have a country

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<sup>5</sup> This Article does not seek to establish an exception to public defender absolutism concerning people charged with any racially-motivated criminal offense. As discussed later, the exception proposed here is limited and specific to January 6th due to its unprecedented nature as a collective attempt to disenfranchise black Americans (among others), reduce and reverse gains made by black Americans (among others) towards full citizenship, and to further subjugate black Americans.

<sup>6</sup> See Erik Flack et al., *Oath Keepers, Proud Boys want public defenders. And the Constitution they sought to upend protects that right*, WUSA 9 (Feb. 28, 2021, 6:24 PM) (noting that 60 of the 200 of the January 6 defendants charged at the time were represented by public defenders or private counsel through the Criminal Justice Act); Marisa Sarnoff, *Jan. 6 ‘Bullhorn Lady’ Asks Federal Judge for Public Defender, Says She Can’t Afford to Pay Private Lawyer*, LAW & CRIME (Jan. 31, 2021) (noting a *New York Times* reporter’s research that 110 of the 650 January 6 defendants were represented by public defenders).

<sup>7</sup> Flack et al., *supra* note 6.

<sup>8</sup> See *Public Defender Demographics and Statistics in the U.S.*, ZIPPIA (Sept. 9, 2022), <https://www.zippia.com/public-defender-jobs/demographics/>.

<sup>9</sup> While this Article uses various labels for January 6 and its participants, this author firmly sees the event as an insurrection and the participants as insurrectionists.

anymore.”<sup>10</sup> To many, including those charged for crimes connected to the day’s events, these words among others from former President Trump during the “Save America” rally on the National Mall on January 6, 2021, were the key spark that ignited the insurrection.<sup>11</sup> The fuse had been building since the presidential election that past November, as Trump and his supporters repeated their unsupported and debunked claims that the election had been stolen from Trump and that president-elect Biden was illegitimate.<sup>12</sup> The culprits in their baseless conspiracy theories are millions of “illegal” votes cast by black and brown people.<sup>13</sup>

For weeks immediately preceding January 6, President Trump urged his supporters to join together in Washington, D.C. that fateful day and stop the certification of the election results by Congress.<sup>14</sup> The day

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<sup>10</sup> Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

<sup>11</sup> See Ewan Palmer, *Every Capitol Rioter Who Said Donald Trump Incited Them*, NEWSWEEK (Feb. 9, 2021), <https://www.newsweek.com/donald-trump-capitol-riot-incited-suspects-1567808>; Aaron Blake, *Several Capitol rioters are blaming Trump’s rhetoric. What’s in it for them?*, WASH. POST (Feb. 3, 2021); Jan Wolfe, *‘He invited us’: Accused Capitol rioters blame Trump in novel legal defense*, REUTERS (Feb. 2, 2021), <https://www.reuters.com/article/us-usa-trump-capitol-defense/he-invited-us-accused-capitol-rioters-blame-trump-in-novel-legal-defense-idUSKBN2A219E>.

<sup>12</sup> *Id.* More than 60 lawsuits seeking to overturn the 2020 presidential election filed by former President Trump, the Republican Party, and the allies and supporters of both have been rejected and summarily dismissed by multiple state and federal courts, including the Supreme Court. See Alison Durkee, *Supreme Court Kills Last Trump Election Lawsuit*, FORBES (Mar. 8, 2021); Reuters Staff, *Fact Check: Courts have dismissed multiple lawsuits of alleged electoral fraud presented by Trump campaign*, REUTERS (Feb. 15, 2021); William Cummings et al., *By the numbers: President Donald Trump’s failed efforts to overturn the election*, USA TODAY (Jan. 6, 2021).

<sup>13</sup> See Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020), <https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group>; Tarisai Ngangura, *Trump Wants to Steal the Election by Disenfranchising Thousands of Black Voters*, VANITY FAIR (Nov. 18, 2020); Jacob Shamsian, *Trump’s lawsuits are trying to throw out votes in counties with more Black people – even when they played by the same election rules as predominately white ones*, BUS. INSIDER (Dec. 14, 2020), <https://www.businessinsider.com/trump-election-lawsuits-target-black-voters-2020-12>; Kira Lerner, *The Real Reason Trump’s Lawsuits Disproportionately Target Black and Latino Voters*, SLATE (Nov. 24, 2020), <https://slate.com/news-and-politics/2020/11/trump-election-lawsuits-target-black-latino-voters.html>.

<sup>14</sup> See Lauren Leatherby et al., *How a Presidential Rally Turned Into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021); Will Steakin et al., *Trump allies helped plan, promote rally that led to Capitol attack*, ABC NEWS (Jan. 8, 2021), <https://abcnews.go.com/US/trump-allies-helped-plan-promote-rally-led-capitol/story?id=75119209>.

of, a few thousand of Trump supporters took the former president's words literally.<sup>15</sup> During and after the rally, they proceeded to the U.S. Capitol to stop Congress from certifying the presidential election. About 20 minutes before Trump's speech at the Ellipse in front of the White House ended, the first breach of the Capitol grounds occurred, involving a contingent of Trump supporters who overwhelmed police and barricades protecting the Capitol's outer perimeter and made their way to the Capitol's west-side steps.<sup>16</sup> After Trump ended his speech with a call to "walk down Pennsylvania Ave,"<sup>17</sup> thousands of his supporters made their way to the Capitol to join the others already engaging with the police guarding the building.<sup>18</sup>

What occurred over the next hours shook the country to its core. Massive crowds surrounded the Capitol, with those close to the protection barricades pushing through and climbing over the barricades and engaging in violent clashes with law enforcement.<sup>19</sup> Members of the growing mob assaulted officers with punches, kicks, various chemical sprays, and blunt objects, including officers' own batons, and even flagpoles bearing the American flag.<sup>20</sup> According to one D.C. Metropolitan police officer who was assaulted and injured by the mob, the "fighting . . . was nothing short of brutal."<sup>21</sup> Another officer described it as "a war scene," "carnage," and "chaos."<sup>22</sup>

Barely more than an hour after Trump finished his speech, the

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<sup>15</sup> See Jie Jenny Zou & Erin B. Logan, *Key facts to know about the Jan. 6 insurrection*, L.A. TIMES (Jan. 5, 2022) (noting that "several thousand" surrounded the Capitol prior to and during the breach).

<sup>16</sup> Leatherby et al., *supra* note 14.

<sup>17</sup> Naylor, *supra* note 10.

<sup>18</sup> Leatherby et al., *supra* note 14.

<sup>19</sup> *Id.*

<sup>20</sup> See Tom Dreisbach, *New Videos Show Alleged Assault On Officer Brian Sicknick During Capitol Riot*, NPR (Apr. 28, 2021, 5:26 PM), <https://www.npr.org/2021/04/28/991654947/new-videos-show-alleged-assault-on-officer-brian-sicknick-during-capitol-riot>; AJ Vicens, *At Least 81 Pro-Trump Rioters Are Charged With Assaulting Police on January 6*, MOTHERJONES (May 18, 2021), <https://www.motherjones.com/politics/2021/05/capitol-riots-insurrection-trump-assaults-police-kevin-mccarthy/>; Tal Axelrod, *FBI releases videos of 'horrificing assaults' on officers during Jan. 6 riot*, THE HILL (May 19, 2021, 3:20 PM), <https://thehill.com/policy/national-security/554399-fbi-releases-videos-of-horrificing-assaults-on-officers-during-jan-6/>.

<sup>21</sup> Vicens, *supra* note 20.

<sup>22</sup> Luke Broadwater, *'Trump Was at the Center': Jan. 6 Hearing Lays Out Case in Vivid Detail*, N.Y. TIMES (June 9, 2022).

rioters reached the Capitol's doors on both sides of the building.<sup>23</sup> At the time, the House and Senate had moved to their separate chambers to debate certifying the election vote.<sup>24</sup> The Senate chamber was breached first by rioters climbing through a broken window and a door on the Capitol's northwest side.<sup>25</sup> For the next couple of hours, hundreds of rioters ran amok inside the Capitol and clashed with police officers, while members of Congress and Vice President Pence (who was present for the certification) were led to safety or were sheltering in place in various offices.<sup>26</sup> Seven hours elapsed between when rioters first breached the Capitol's security perimeter and when the U.S. Capitol Police declared the building secure.<sup>27</sup>

The range of the rioters' conduct varied widely. Some engaged in criminal trespass by entering the Capitol, but doing nothing more than following along with the mob and perusing the inside of the Capitol.<sup>28</sup> Others engaged in more serious trespass—unlawfully entering members' offices and stealing official property, and forcefully entering the Senate well.<sup>29</sup> Members of the mob walked through the Capitol hallways screaming “Hang Mike Pence,” a call that represented the mob's disappointment that the former vice president did not use his authority (that he did not legally have) to stop the election result certification.<sup>30</sup>

Others engaged in verbal and “absolutely brutal” physical violence against police officers throughout the seven hours of the

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<sup>23</sup> Vicens, *supra* note 20.

<sup>24</sup> Leatherby et al., *supra* note 14.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See COMMITTEE ON HOMELAND SECURITY & COMMITTEE ON RULES AND ADMINISTRATION

GOVERNMENTAL AFFAIRS, EXAMINING THE U.S. CAPITOL ATTACK A REVIEW OF THE SECURITY, PLANNING, AND RESPONSE FAILURES ON JANUARY 6, 21 (2021).

<sup>28</sup> See generally Leatherby et al., *supra* note 14; George Petras et al., *Timeline: How the storming of the U.S. Capitol unfolded on Jan. 6*, USA TODAY (Jan., 6, 2021, 8:19 PM), <https://www.usatoday.com/in-depth/news/2021/01/06/dc-protests-capitol-riot-trump-supporters-electoral-college-stolen-election/6568305002/>; See also Kyle Cheney & John Gerstein, *Where Jan. 6 prosecutions stand, 18 months after the attack*, POLITICO (July 7, 2022, 4:30 AM), <https://www.politico.com/news/2022/07/07/jan-6-prosecutions-months-later-00044354>.

<sup>29</sup> *Highlights and analysis: Trump commits to ‘orderly transition’ after mob storms Capitol*, NBC NEWS (Jan. 7, 2021, 8:45 AM), <https://www.nbcnews.com/politics/congress/blog/electoral-college-certification-updates-n1252864>.

<sup>30</sup> Martin Pengelly, *‘Hang Mike Pence’: Twitter stops phrase trending after Capitol riot*, THE GUARDIAN (Jan. 10, 2021, 12:21 PM), <https://www.theguardian.com/us-news/2021/jan/10/hang-mike-pence-twitter-stops-phrase-trending-capitol-breach>.

insurrection.<sup>31</sup> Officers were threatened with violence while trying to prohibit the mob's advancement through the building.<sup>32</sup> Officers were attacked with chemical irritants, including bear spray and insecticide, that caused the officers to suffer burns, breathing and lung complications, and their eyes sealing shut from irritation.<sup>33</sup> Officers were pelted with a multitude of thrown objects, including frozen water bottles and bricks.<sup>34</sup> The rioters used security fences and racks as weapons to assault officers.<sup>35</sup> Insurrectionists assaulted officers with flag poles and other weapons, such as bats and knives.<sup>36</sup> Some of the rioters displayed guns and Tasers in a threatening manner.<sup>37</sup>

Approximately 140 law enforcement officers reported sustaining physical injuries during the January 6th insurrection.<sup>38</sup> Some of the more serious included brain injuries, cracked ribs, smashed spinal discs, and one officer losing an eye.<sup>39</sup> D.C. police officer Michael Fanone was shocked with a Taser, and then dragged by insurrectionists down the Capitol's front steps.<sup>40</sup> During the assault, Officer Fanone lost consciousness, suffered a heart attack and a traumatic brain injury, and was stripped of his badge and gun by the rioters.<sup>41</sup> Five officers lost their lives in connection to the attack, including three by suicide.<sup>42</sup>

January 6th was a violent attack on American democracy.<sup>43</sup> Not

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<sup>31</sup> COMMITTEE ON HOMELAND SECURITY & COMMITTEE ON RULES AND ADMINISTRATION GOVERNMENTAL AFFAIRS, *supra* note 27, at 27.

<sup>32</sup> *Id.* at 27-28; *see also* Pengelly, *supra* note 30.

<sup>33</sup> COMMITTEE ON HOMELAND SECURITY & COMMITTEE ON RULES AND ADMINISTRATION GOVERNMENTAL AFFAIRS, *supra* note 27, at 28.

<sup>34</sup> *Id.* at 28-29.

<sup>35</sup> *Id.* at 28.

<sup>36</sup> *Id.* at 30.

<sup>37</sup> *Id.* at 29.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See* Rachel Weiner & Peter Hermann, *In interrogation video, tearful Jan. 6 defendant apologizes for assault on officer*, WASH. POST (Dec. 1, 2021, 6:17 PM), <https://www.washingtonpost.com/dc-md-va/2021/12/01/danny-rodriguez-taser-fanone/>.

<sup>41</sup> *Id.*

<sup>42</sup> Chris Cameron, *These Are the People Who Died in Connection With the Capitol Riot*, N.Y. TIMES (Oct. 13, 2022), [nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html](https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html); *see also* COMMITTEE ON HOMELAND SECURITY & COMMITTEE ON RULES AND ADMINISTRATION GOVERNMENTAL AFFAIRS, *supra* note 27, at 29.

<sup>43</sup> *See generally* Erwin Chemerinsky, *Fixing America's Broken Democracy*, 26 LEWIS & CLARK L. REV. (2022); *see also* Ed Pilkington, 'US democracy will not survive for long': how January 6 hearings plot a roadmap to autocracy, THE GUARDIAN (Jul. 24, 2022, 2:00 PM), <https://www.theguardian.com/us-news/2022/jul/23/january-6-hearings-us-democracy-roadmap-autocracy>; The Editorial Board, *We All Have a Duty to Ensure That*



since British troops set fire to it in 1814, more than 200 years ago, has the U.S. Capitol been violently breached.<sup>44</sup> Blood was spilled inside and directly outside the Capitol because insurrectionists, many armed with weapons and items turned into weapons, sought to prevent the peaceful transfer of power that has marked this country since its founding.

## II. JANUARY 6, WHITE EXTREMISM, & RACIAL VIOLENCE

It is very clear who the “you” are when Trump declared on January 6 that “If you don’t fight like hell, you’re not going to have a country anymore.” He was preaching to a sea of MAGA hats on top of mostly white faces: white men and women waving Trump signs and flags, white men and women wearing clothing displaying far-right, Nazi, and white Christian supremacy antebellum symbols.<sup>45</sup> While there were some non-white members of the mob, they were far outnumbered by white people.<sup>46</sup> Many within the white mob proudly wore clothing and displayed accessories and symbols associated with far-right and racist groups, such as the Proud Boys and the Three Percenters.<sup>47</sup> Black law enforcement

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*What Happened on Jan. 6 Never Happens Again*, N.Y. TIMES (June 10, 2022), <https://www.nytimes.com/2022/06/10/opinion/january-6-hearing-trump.html>.

<sup>44</sup> Amanda Holpuch, *US Capitol’s last breach was more than 200 years ago*, THE GUARDIAN (Jan. 6, 2021, 7:59 PM), <https://www.theguardian.com/us-news/2021/jan/06/us-capitol-building-washington-history-breach>.

<sup>45</sup> See Washington Post Staff, *Identifying far-right symbols that appeared at the U.S. Capitol riot*, WASH. POST (Jan. 25, 2021, 2:56 PM), <https://www.washingtonpost.com/nation/interactive/2021/far-right-symbols-capitol-riot/>; Deena Zaru, *The symbols of hate and far-right extremism on display in pro-Trump Capitol siege*, ABC NEWS (Jan. 14, 2021, 2:01 AM), <https://abcnews.go.com/US/symbols-hate-extremism-display-pro-trump-capitol-siege/story?id=75177671>; Alan Feuer, *Fears of White People Losing Out Permeate Capitol Rioters’ Towns, Study Finds*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/us/politics/capitol-riot-study.html>.

<sup>46</sup> See Ricardo Kaulessar, *The Jan. 6 insurrection was not a solely white affair. What compelled others to join?*, NORTHJERSEY.COM (Oct. 25, 2021, 5:00 AM), <https://www.northjersey.com/story/news/2021/10/25/capitol-riot-jan-6-insurrection-not-solely-white-trump/5802462001/>; see also Robert A. Pape, *What an analysis of 377 Americans arrested or charged in the Capitol insurrection tells us*, WASH. POST (Apr. 6, 2021, 10:58 AM), [https://www.washingtonpost.com/opinions/2021/04/06/capitol-insurrection-arrests-cpost-analysis/\(noting that the analysis found that 95% of those arrested or charged are white\)](https://www.washingtonpost.com/opinions/2021/04/06/capitol-insurrection-arrests-cpost-analysis/(noting%20that%20the%20analysis%20found%20that%2095%20of%20those%20arrested%20or%20charged%20are%20white).).

<sup>47</sup> *Id.*; see also Susie Neilson & Morgan McFall-Johnsen, *Several groups of extremists stormed the Capitol today. Here are some of the most notable individuals, symbols, and groups present*, BUS. INSIDER (Jan. 7, 2021, 7:22 AM), <https://www.businessinsider.in/international/news/several-groups-of-extremists-stormed-the-capitol-today-here-are-some-of-the-most-notable-individuals-symbols-and-groups-present-/slidelist/80144599.cms>.

officers defending the Capitol that day describe feeling targeted because of their race and being repeatedly called the “N-word” by rioters.<sup>48</sup> Aptly put by one black officer protecting democracy that day, “we fought against not just people . . . that hated what we represented, but they hate our skin color also.”<sup>49</sup>

With each passing day it becomes clearer that January 6th was a particular type of attack on democracy. The goal of the attack was not dismantle or eliminate democracy to make way for the installation of a new form of government. Rather, it was an attack to claim (or reclaim depending on how you view history) American democracy for white America. “Stop the steal” is a call to arms based on Trump supporters’ belief, without any legitimate evidence, that their king lost the election because of illegal votes cast by black and brown people in key states.<sup>50</sup> January 6ers interpreted the call as a direct order from the country’s commander-in-chief to take immediate action to stop the election certification process.<sup>51</sup> Indeed, many January 6ers believe that the insurrection was the start of a new civil war.<sup>52</sup> For instance, on January 7, 2021, convicted January 6 defendant Daryl Johnson posted on social media: “Mark my words [y]esterday will be the beginning of the revolution . . . what happens when those same people decide to throw out the ‘elected officials.’ It will be hangings on the front lawn of the capital – that crowd is not messing around.”<sup>53</sup> After a week of reflection,

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<sup>48</sup> See COMMITTEE ON HOMELAND SECURITY & COMMITTEE ON RULES AND ADMINISTRATION GOVERNMENTAL AFFAIRS, *supra* note 27, at 28.

<sup>49</sup> See Caroline Kelly, *Black US Capitol Police Officer Recounts January 6: ‘They Showed That They Hated Us and They Hated Our Skin Color,’* CNN (Mar. 17, 2021), <https://www.cnn.com/2021/03/17/politics/black-us-capitol-police-officer-don-lemon-cnntv/index.html>.

<sup>50</sup> See sources cited *supra* note 13.

<sup>51</sup> See Weiner & Hermann, *supra* note 40.

<sup>52</sup> See MacKenzie Ryan, ‘We must defeat them’: new evidence details Oath Keepers ‘civil war’ timeline, *THE GUARDIAN* (Oct. 9, 2022), <https://www.theguardian.com/us-news/2022/oct/08/oath-keepers-trial-evidence-civil-war>; Sarah N. Lynch & Chris Gallagher, *Oath Keeper spoke of ‘civil war’ ahead of Jan. 6 Capitol attack – U.S. prosecutors*, REUTERS (Oct. 3, 2022), <https://www.reuters.com/legal/oath-keepers-founder-goes-trial-over-us-capitol-riots-2022-10-03/>; Brad Dress, *Former Oath Keeper: ‘We came very, very close to having a civil war kick off on Jan. 6,’* THE HILL (July 13, 2022), <https://thehill.com/homenews/media/3557330-former-oath-keeper-we-came-very-very-close-to-having-a-civil-war-kick-off-on-jan-6/>.

<sup>53</sup> Sentencing Memorandum at 2, United States v. Daryl Johnson, No. 21-cr-407-DLF (D.D.C. May 25, 2022), 2022 WL 43523. Mr. Johnson was convicted of civil disorder pursuant to a plea agreement with the government. He was sentenced to 30 days of incarceration. Plea Agreement, *Daryl Johnson*, No. 21-cr-407-DLF; Minute Entry for Sentencing Held on June 1, 2022, *Daryl Johnson*, No. 21-cr-407-DLF.

Mr. Johnson sent a private Facebook message saying, “It’s going to get ugly and probably result in some version of a civil war.”<sup>54</sup> Less than a month after that, Mr. Johnson further expressed his hope and belief that another civil war was coming, and that he was ready to die fighting in it, when he posted on Facebook: “Bring it on Biden! I have no problem dying in a pool of empty shell casings.”<sup>55</sup> During the actual insurrection, American Phoenix Project<sup>56</sup> founder and January 6 defendant Alan Hostetter posted on social media a photograph of himself and other rioters on a Capitol terrace with the following caption: “This was the shot heard round the world! . . . the 2021 version of 1776. That war lasted 8 years. We are just getting started.”<sup>57</sup>

Some January 6ers used their belief (and hope) that a civil war was near to recruit like-minded people to their racist cause. Just days after the 2020 presidential election, Oath Keeper<sup>58</sup> founder and convicted January 6 defendant Elmer Rhodes III sent an encrypted text message to his followers urging them to not accept the election results and stated: “We aren’t getting through this without civil war . . . Prepare your mind, body, and spirit.”<sup>59</sup> The next month, Rhodes reinforced his civil war messaging by telling his followers that if Biden assumed the presidency, “It will be a bloody and desperate fight. We are going to have to fight. That can’t be avoided” and that “We will have to do a bloody, massively bloody revolution against them.”<sup>60</sup> Rhodes’s civil war readiness message was echoed by other Oath Keepers. “Commanders,” such as January 6 defendant Jessica Watkins, told a recruit that “Biden may still be our president. If he is our way of life is over. Our Republic would be over.

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<sup>54</sup> Sentencing Memorandum, *supra* note 53.

<sup>55</sup> *Id.*

<sup>56</sup> During the Spring of 2020, Hostetter “founded the American Phoenix Project to oppose government mandated restrictions arising from the COVID-19 pandemic,” and after the presidential election of 2020, the organization began “advocat[ing] violence against certain groups and individuals that supported the 2020 election results.” Indictment at 5, United States v. Alan Hostetter, No. 21-cr-392-RCL (D.D.C. June 9, 2021), 2022 WL 1802842.

<sup>57</sup> *Id.* at 16.

<sup>58</sup> Oath Keepers is a far-right, extremist, anti-government, militia-organization that launched in 2009 after the election of former President Barak Obama. *See Oath Keepers*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers>.

<sup>59</sup> Indictment at 10, United States v. Rhodes, et al., No. 22-cr-15-APM (D.D.C. Jan. 1, 2022), 2022 WL 2315554; *see also* Alan Feuer & Zach Montague, *Oath Keeper Leader Convicted of Sedition in Landmark Jan. 6 Case*, N.Y. TIMES (Nov. 29, 2022), <https://www.nytimes.com/2022/11/29/us/politics/oath-keepers-trial-verdict-jan-6.html>.

<sup>60</sup> *Id.* at 12, 13.

Then it is our duty as Americans to fight, kill, and die for our rights.”<sup>61</sup> These calls to arms for the next civil war made by January 6 defendants, and others like them.<sup>62</sup> And they are not hollow calls for civil war - those who have and continue to make these threatening calls have been preparing, training, and mobilizing for the next civil war, and many see January 6, 2021 as the start of that war.<sup>63</sup>

Indeed, the criminal investigation to date and the January 6 congressional hearings have revealed that January 6th was not just an impromptu event where over-enthusiastic rally attendees spontaneously transformed into a riotous mob. Rather the insurrection involved planning and coordination by extremists intent on preventing the certification of the presidential election, and possibly sparking a civil war.<sup>64</sup> Evidence from the criminal prosecutions show that members of the Oath Keepers and Proud Boys had communicated and coordinated their January 6th activities.<sup>65</sup> Even more troubling is the growing evidence that some Republican members of Congress were involved with the planning of January 6th obstructionist activities, including Representative Paul Gosar (R-AZ) who promised pardons for those arrested protesting and

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<sup>61</sup> First Superseding Indictment at 8, *United States v. Caldwell, et al.*, 581 F. Supp. 3d 1 (D.D.C. 2021) (No. 21-cr-28-APM).

<sup>62</sup> See Alan Feuer, *Witness in Oath Keepers Sedition Trial Says Leader Promoted Violent Approach*, N.Y. TIMES (Oct. 6, 2022), <https://www.nytimes.com/2022/10/06/us/politics/oath-keepers-jan-6-trial.html>; Lynch & Gallagher, *supra* note 52.

<sup>63</sup> See Mike Giglio, *A Pro-Trump Militant Group Has Recruited Thousands of Police, Soldiers and Veterans*, THE ATLANTIC (Nov. 2020), <https://www.theatlantic.com/magazine/archive/2020/11/right-wing-militias-civil-war/616473/>; Ewan Palmer, *Proud Boys Supporter Warns of 'Civil War' if Donald Trump Loses Election*, NEWSWEEK (Oct. 12, 2020), <https://www.newsweek.com/proud-boys-trump-civil-war-qanon-1538208>.

<sup>64</sup> See Barbara Sprunt, *Jan. 6 panel shows evidence of coordination between far-right groups and Trump allies*, NPR (July 12, 2022), <https://www.npr.org/2022/07/12/1111132464/jan-6-hearing-recap-oath-keepers-proud-boys>; Ryan J. Reilly, *New evidence reveals coordination between Oath Keepers, Three Percenters on Jan. 6*, NBC NEWS (May 28, 2022), <https://www.nbcnews.com/politics/justice-department/new-evidence-reveals-coordination-oath-keepers-three-percenters-jan-6-rcna30355>.

<sup>65</sup> *Id.*; see also Ryan Lucas, *New Evidence Points to Coordination Among Extremist Groups Ahead of Capitol Riot*, NPR (Mar. 24, 2021), <https://www.npr.org/2021/03/24/980754255/new-evidence-points-to-coordination-among-extremist-groups-ahead-of-capitol-riot>; Alan Feuer & Zach Montague, *Oath Keeper Leader Convicted of Sedition in Landmark Jan. 6 Case*, N.Y. TIMES (Nov. 29, 2022), <https://www.nytimes.com/2022/11/29/us/politics/oath-keepers-trial-verdict-jan-6.html>

obstructing the election certification process.<sup>66</sup>

The January 6th insurrection brought to the forefront of the national consciousness the present and growing threat to our national security and stability posed by violent white supremacy extremists. As U.S. Attorney General Merrick Garland recently told the Senate, “the top domestic violent threat [to the country] comes from ‘racially or ethnically motivated violent extremists, specifically those who advocate for the superiority of the white race.’”<sup>67</sup> U.S. Homeland Security Secretary Alejandro Mayorkas gave a similar warning, telling lawmakers that white supremacy is “the most persistent threat to the homeland.”<sup>68</sup> FBI Director Christopher Wray told the Senate Judiciary Committee on March 2, 2021, that the “top threat we face from [domestic violent extremists] continues to be those we identify as racially or ethnically motivated violent extremists . . . specifically those who advocate for the superiority of the white race, and who were the primary source of ideologically motivated lethal incidents of violence in 2018 and 2019.”<sup>69</sup>

These warnings, and the concerns behind them, are not new.<sup>70</sup> For the past few years, federal law enforcement and security agencies have monitored, tracked, and noted the activities of white supremacy extremists, and have issued similar warnings about how these extremists have become a top domestic threat. Take for instance the FBI’s and Homeland Security’s “Strategic Intelligence Assessment for 2017,” which concluded that “[domestic violent extremists] remained a persistent source of violence, with Racially or Ethnically Motivated Violent

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<sup>66</sup> See Hunter Walker, *EXCLUSIVE: Jan. 6 Protest Organizers Say They participated in ‘Dozens’ of Planning Meetings With Members of Congress and White House Staff*, ROLLING STONE (Oct. 24, 2021), <https://www.rollingstone.com/politics/politics-news/exclusive-jan-6-organizers-met-congress-white-house-1245289/>; see also Sprunt, *supra* note 64.

<sup>67</sup> Office of Public Affairs, *Attorney General Merrick B. Garland Remarks: Domestic Terrorism Policy Address*, U.S. DEP’T OF JUST. (June 15, 2021), <https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-remarks-domestic-terrorism-policy-address>.

<sup>68</sup> Alexandra Kelley, *Garland, Mayorkas warn white supremacy is not top security threat in country*, THE HILL (May 12, 2021), <https://thehill.com/changing-america/respect/equality/553197-garland-mayorkas-attorney-general-warn-white-supremacy-is/>.

<sup>69</sup> *January 6 Insurrection, Domestic Terrorism, and Other Threats: Hearing on Oversight of the Federal Bureau of Investigation Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (Statement of Christopher Wray, Director of the Fed. Bureau of Investigation).

<sup>70</sup> See Vida B. Johnson, *White Supremacy’s Police Siege on the United States Capitol*, 87 BROOK. L. REV. 557, 571-576 (Feb. 6, 2022).

Extremists (RMVEs) advocating for the superiority of the white race . . . presenting the greatest threats of violence.”<sup>71</sup> That year “[l]aw enforcement and racial minorities were prevalent [domestic violent extremist] targets . . . with race providing the principal focus for [racially/ethnically motivated violent extremists] espousing the superiority of the white race.”<sup>72</sup> The assessment for 2018 found that domestic extremists, particularly racially/ethnically motivated domestic extremists, remained a persistent and evolving threat.<sup>73</sup> The evolution was due in large part to extremists’ “use of the Internet, including social media platforms, which has increasingly enabled individuals to radicalize online and engage other [domestic violent extremists] without having to join organized groups.”<sup>74</sup> The 2018 assessment noted that of the six lethal attacks (resulting in 17 deaths) by domestic violent extremists acting alone (*i.e.*, the “lone offenders”), white supremacists were responsible for five of the attacks that resulted in 16 deaths.<sup>75</sup>

By the time of the 2019 assessment, the FBI and Homeland Security concluded that the persistent and evolving threat of domestic violent extremists advocating white supremacy had become “the most lethal [domestic violent extremist] threat to the Homeland.”<sup>76</sup> Both agencies expressed “high confidence in this assessment based on the demonstrated capability of [racially/ethnically motivated domestic extremists] in 2019 to select weapons and targets to conduct attacks, and the effectiveness of online [racially/ethnically motivated domestic extremist] messaging calling for increased violence.”<sup>77</sup> The assessment noted that “2019 represented the most lethal year for [domestic violent extremist] attacks since 1995, with five separate [domestic violent extremist] attacks resulting in 32 deaths, 24 of which occurred during attacks conducted by [racially/ethnically motivated violent extremists] advocating for the superiority of the white race.”<sup>78</sup> In sum, in the three years from 2017 to 2019, white supremacy extremism evolved from a “persistent threat of violence” to “the most lethal [domestic violent

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<sup>71</sup> FED. BUREAU OF INVESTIGATION & DEP’T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM (May 2021) at 6, [https://www.dhs.gov/sites/default/files/publications/21\\_0514\\_strategic-intelligence-assessment-data-domestic-terrorism\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/21_0514_strategic-intelligence-assessment-data-domestic-terrorism_0.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 7.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 7-8 (emphasis added).

<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

extremist] threat” faced by our country.<sup>79</sup> On January 6, this threat reached the halls of the Capitol.

### III. THE CALLING – A PUBLIC DEFENDER’S SUBINTERESTS

“Today, public defenders form part of the American way of life in the literal sense.”<sup>80</sup> Public defenders and the constitutional ideal that every person facing prosecution by the government is entitled to an attorney regardless of wealth or ability to pay for an one, are firm, immovable, and taken for granted notions in the American consciousness.<sup>81</sup> Today there are 81 authorized federal defender organizations that employ more than 3,700 attorneys, investigators, and support staff.<sup>82</sup> At the state and county level, an estimated 15,000 public defenders handle over 4 million cases each year.<sup>83</sup>

A public defender’s central and predominant interest is the client.<sup>84</sup> Representing and serving the client and her interests dictates the public defender’s focus, thinking, decision-making, advocacy, and

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<sup>79</sup> *Id.* at 6, 8.

<sup>80</sup> SARA MAYEUX, *FREE JUSTICE 2* (Heather Ann Thompson et al. eds., 1st ed. 2020).

<sup>81</sup> *See* Gideon v. Wainwright, 372 U.S. 335, 339 (1963) (holding that that the Sixth Amendment requires states to provide attorneys to criminal defendants who are financial unable to retain an attorney). But it was not always this way. Indeed, “both the modern interpretation of the right to counsel and the public defender as an institution were twentieth-century developments.” MAYEUX, *supra* note 80, at 7. For most of the twentieth century and before, the concept of publicly funded attorneys representing criminal defendants was far from accepted or seen as a viable and necessary means to achieving the full promise of the Sixth Amendment. *Id.* at 2-3, 24-56. Many lawyers rejected the public defender idea seeing it “not as a safeguard for individual rights, but as a socialist-style project of coopting lawyers into a centralized government program.” *Id.* at 3. The dominating view at the time was that indigent criminal defendants were best served through private initiative (*i.e.* attorneys working pro bono, funding provided by charities, non-profits, and private individuals, organizations, and businesses) rather than public means. *Id.* at 2-3, 24-56; *see also* *Defender Services*, U.S. Cts., <https://www.uscourts.gov/services-forms/defender-services> (last visited Nov. 21, 2022) (“Before the enactment of the Criminal Justice Act (CJA) [in 1964] . . . there was no authority to compensate appointed counsel for their services or litigation expenses, and federal judges depended on the professional obligation of lawyers to provide pro bono public representation to defendants unable to retain counsel.”).

<sup>82</sup> *Id.*

<sup>83</sup> LYNN LANGTON & DONALD FAROLE, JR., BUREAU OF JUST. STATS., NCJ 228229, CENSUS OF PUBLIC DEFENDER OFFICES: STATE PUBLIC DEFENDER PROGRAMS, 2007, at 3, tbl. 1 (Sept. 2010).

<sup>84</sup> *See* Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to their Clients*, 75 MO. L. REV. 715 (2010) (discussing how the rules of professional conduct put the client at the center of the obligations that must be met by an appointed attorney representing an indigent criminal defendant).

actions. But floating just below the client's interests are other interests that have great influential force, which I call "subinterests." Subinterests are the interests that drive and motivate a public defender to do the *work* of public defense.<sup>85</sup> There is no standard set of subinterests. They are individual to each public defender. Subinterests are a public defender's calling to the profession.

Ask a public defender why she does the job, and you will learn her subinterest(s). A common subinterest is maintaining the integrity of the Constitution and our criminal justice system. That is, the American criminal justice system and the Constitution, particularly the Sixth Amendment's guarantee of legal representation, are frauds absent attorneys willing to represent anyone facing criminal prosecution by the government no matter how disturbing the alleged conduct.<sup>86</sup> Together, racial justice and civil rights have increasingly become a widely shared subinterest. Those sharing this subinterest see the criminal justice system as the next key battleground for racial justice and civil rights because of the system's disproportionate and discriminatory impact on communities and persons of color.<sup>87</sup> For some, the subinterest goal is severing the correlation between wealth, legal representation, and outcomes in our criminal justice system. For others, their subinterest is tied to the personal experience of witnessing a family member or friend churned through the criminal justice system.

These are just a sample. A public defender's calling to the job may involve one or a combination of subinterests. They are not stagnant and may change during a public defender's time on the job. There is no set hierarchy, other than they should always be second to the client's interests. They can often change in priority within a public defender's mind. Some may fall by the wayside or emerge later during a public defender's tenure. They often overlap and even subsume each other.

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<sup>85</sup> For an excellent and detailed exploration of different motivations that lead people to be public defenders: Charles J. Ogletree Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (April 1993); see generally HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Friedman eds., 1st ed. 2013).

<sup>86</sup> Ann Roan, *'Those People' Are Us*, in HOW CAN YOU REPRESENT THOSE PEOPLE?, *supra* note 85, at 121-138; see also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

<sup>87</sup> Vida Johnson, *Defending Civil Rights*, in HOW CAN YOU REPRESENT THOSE PEOPLE?, *supra* note 85 at 81-91.



#### IV. WHY I WOULD NOT REPRESENT JANUARY 6 DEFENDANTS

My refusal to represent a January 6 defendant rests on two pillars: (1) fidelity to my racial justice/civil rights subinterest; and (2) refusing to be a tool in my (and other black Americans') subjugation.

##### 1. Preservation of My Racial Justice/Civil Rights Subinterest

Most of the time, a public defender's subinterests are aligned, complementary, and pose no threat to the client's representation. But what happens when subinterests conflict, and do so in a way that compromises a public defender's ability to serve her north-star interest, the client? This is the situation that I would be in as a public defender tasked with representing a January 6 defendant.

During my time as a public defender, my primary subinterests were racial justice/civil rights and Constitution/system integrity. I pursued both equally. There was no hierarchy among them. Asking me to choose a priority or favorite is akin to asking which I like better: my lungs or my heart.

In fact, when I was a public defender, there was no separation between my racial/civil rights and constitutional integrity subinterests. Like many civil rights activists, my pursuit of racial justice was and remains inextricably intertwined with my pursuit of constitutional integrity. I continually believe that the Constitution is simultaneously the means and the end for achieving racial justice and equality. That is, my allegiance to the Constitution is connected to my strategic belief that by demanding that judges and prosecutors remain faithful to the Constitution's words and ideals, I can "shine light on the evil practices inflicted in the name of the Constitution."<sup>88</sup> Stated another way, I believed (and still do) that by fulfilling the Sixth Amendment's promise of legal representation as a public defender, I could also bring to light the injustices inflicted on black people stemming from the over-policing of black communities<sup>89</sup>, the sentencing law and policies that generate racial

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<sup>88</sup> Dorothy E. Roberts, *The Meaning of Black's Fidelity to the Constitution*, 65 FORDHAM L. REV. 1761, 1768 (1997).

<sup>89</sup> See e.g., India Thusi, *Policing is Not a Good*, 110 GEO. L.J. 226 (2022); Brandon Hasbrouck, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239 (Summer 2021); Jelani Jefferson Exum, *Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence*, 64 HOW. L.J. 301 (Winter 2021); Lucius T. Outlaw III, *Unsecured (Black) Bodies: How Baltimore Foreshadows the Dangers of Racially Targeted Dragnet Policing Let Loose by Utah v. Strieff*, 50 N.M. L. REV. 25 (Winter 2020); Liyah Kaprice Brown, *Officer or Overseer?: Why Police Desegregation Fails as an Adequate Solution to Racism*,

disparities in prison sentences (e.g. crack versus powder cocaine sentencing laws),<sup>90</sup> the twisting of criminal statutes and precedents to fuel the mass incarceration of black people<sup>91</sup>, and the degradation of Fourth Amendment rights to allow invasive and abusive policing of Black people's bodies and property.<sup>92</sup>

Representing January 6 defendants would cause me to suffer a violent separation of my symbiotic subinterests, and place them at odds with one another. As a black public defender, my two subinterests could not co-exist when representing a January 6 defendant. For reasons explained below, to represent a January 6 defendant would require me to not only prioritize my constitutional integrity subinterest, but also temporarily abandon my racial justice/civil rights subinterest. This prioritization would come with a heavy cost, not just to my sanity, but it would also add to my despair (discussed later) and realization that Black people likely will never achieve full citizenship and acceptance in this country. To prioritize the constitutional rights of a January 6er over and despite the continued subjugation of black Americans would be to betray and endanger my racial justice/civil rights subinterest. This betrayal cost is one that I would not be willing to endure to represent a January 6 defendant.

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*Oppressive, and Violent Policing in Black Communities*, 29 N.Y.U. REV. L. & SOC. CHANGE 757 (2005); see generally PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (1st ed. 2017); POLICING THE BLACK MAN (Angela Davis ed., 2018).

<sup>90</sup> See, e.g., Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627 (2021); Daniel Harawa, *Black Redemption*, 48 FORDHAM URB. L.J. 701 (2021); Lucius T. Outlaw III, *Time for a Divorce: Uncoupling Drug Offenses From Violent Offenses in Federal Sentencing Law, Policy, and Practice*, 44 AM. J. CRIM. L. 217 (2017); Ashlee Riopka, *Equal Protection Falling Through the Crack: A Critique of the Crack-to-Powder Sentencing Disparity*, ALA. C.R. & C.L. L. REV. 121 (2015); see generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

<sup>91</sup> *Id.*

<sup>92</sup> See generally, ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS (2021); see also Devon W. Carbado & Jonathan Feingold, *Rewriting Whren v. United States*, 68 UCLA L. REV. 1678 (2022); Ric Simmons, *Race and Reasonable Suspicion*, 73 FLA. L. REV. 413 (2021); Daniel Harawa & Brandon Hasbrouck, *Antiracism in Action*, 78 WASH. & LEE L. REV. 1027 (Summer 2021); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH. L. REV. 245 (Fall 2010); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

## 2. Refusing to be a Tool for Subjugating Black Americans

The white supremacist patriarchy is currently winning the fight for the soul and direction of this country. This is not hyperbole. In the form of MAGA fever, it has seized the Republican party.<sup>93</sup> Through manipulation (in particular, the denial of a Supreme Court confirmation vote for Merrick Garland<sup>94</sup>), it has captured the Supreme Court,<sup>95</sup> which is reaping bountiful rewards such as firmly establishing that the patriarchy defines and dictates the boundaries of a woman's body autonomy.<sup>96</sup> Through its fraudulently constructed majority on the high court, the white supremacist patriarchy is taking aim to remove or dilute other rights and legal precedents that have put black people, women, and LGBTQ+ Americans on the road to enjoying full citizenship and its benefits.<sup>97</sup> It is successfully rolling back voter protections and voting access to disenfranchise black Americans.<sup>98</sup> It has so inflamed white anxiety with a

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<sup>93</sup> See David Smith, *How Trump captured the Republican party*, THE GUARDIAN (June 10, 2018, 9:27 AM), <https://www.theguardian.com/us-news/2018/jun/09/donald-trump-republican-party>.

<sup>94</sup> Karoun Demirjian, *Republicans refuse to budge following Garland nomination to Supreme Court*, WASH. POST (Mar. 16, 2016, 5:18 PM), <https://www.washingtonpost.com/news/powerpost/wp/2016/03/16/republicans-refuse-to-budge-following-garland-nomination-to-supreme-court/>.

<sup>95</sup> Carl Hulse, *Mitch McConnell's Court Delivers*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/us/politics/mitch-mcconnell-supreme-court.html>; Tyler Olsen, *How Mitch McConnell playing 'long game' shaped the Supreme Court and led to the end of abortion landmark Roe*, FOX NEWS (June 29, 2022, 8:10 AM), <https://www.foxnews.com/politics/mitch-mcconnell-dark-lord-shaped-supreme-court-led-end-abortion-landmark-roe>.

<sup>96</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade* and holding that the Constitution does not confer a right to an abortion).

<sup>97</sup> *Id.* at 2301 (Thomas, J. concurring) (“[W]e should reconsider all of this Court’s substantive due process precedents,” including those that established the right to contraception, the right to engage in private consensual sex acts, and the right to same sex marriages). See also Opinion, *‘Abortion is Just the Beginning’: Six Experts on the Decision Overturning Roe*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/interactive/2022/06/24/opinion/politics/dobbs-decision-perspectives.html>.

<sup>98</sup> See Richard Fausset et al., *Why the Georgia's G.O.P.'s Voting Rollbacks Will Hit Black People Hard*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/us/politics/georgia-black-voters.html?searchResultPosition=1>; Edward Lempinen, *Stacking the deck: How the GOP works to suppress minority voting*, BERKELEY NEWS (Sept. 29, 2020), <https://news.berkeley.edu/2020/09/29/stacking-the-deck-how-the-gop-works-to-suppress-minority-voting/>; *The Impact of Voter Suppression on Communities of Color*, BRENNAN CTR. FOR JUST. (Jan. 10, 2022), <https://www.brennancenter.org/our-work/research-reports/impact-voter-suppression-communities-color>.

distorted take on critical race theory that is quickly becoming a prohibited act to teach American children that the true history of this country includes exploitation and subjugation of non-white people.<sup>99</sup>

On January 6, the white supremacy patriarchy showed that it is ready and comfortable using brute force, violence, coercion and intimidation to achieve its goals. In doing so, it drew a clear line: either you are with the white supremacist patriarchy, or you are not – no neutral ground exists. Black Americans cannot afford to ignore the line or pretend it does not exist. From slavery, to Jim Crow, to the epidemic of killings by police officers, black Americans are well-versed in the painful repercussions of being on the other side of the white supremacy line. That “Black Lives Matter” is a controversial statement embodies the continuing struggle of black Americans to be recognized and appreciated as human beings and full citizens of this country.

To represent a January 6 defendant, I would cross that line and become a tool in my own subjugation. I would be using my skills, intellect, experience, and energy to protect the constitutional rights of someone who is part of a collective active effort to halt and regress gains by black Americans toward full citizenship. This is simply something I could not and would not do, and I suspect many black attorneys feel the same.<sup>100</sup>

The subjugation basis of my conclusion embodies the struggle of “two-ness” explored by W.E.B Du Bois. As Du Bois explained, a black American forever “feels his two-ness, — an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn

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<sup>99</sup> See Liz Crampton, *GOP sees ‘huge red wave’ potential by targeting critical race theory*, POLITICO, (Jan. 5, 2022, 4:31 AM), <https://www.politico.com/news/2022/01/05/gop-red-wave-critical-race-theory-526523>; David Smith, *How did Republicans turn critical race theory into a winning electoral issue?*, THE GUARDIAN, (Nov. 3, 2021, 2:38 PM), <https://www.theguardian.com/us-news/2021/nov/03/republicans-critical-race-theory-winning-electoral-issue>; Eesha Pendharkar, *Efforts to Ban Critical Race Theory Could Restrict Teaching for a Third of America’s Kids*, EDUC. WEEK (Feb. 4, 2022), <https://www.edweek.org/leadership/efforts-to-ban-critical-race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01>; Fabiola Cineas, *Critical Race theory bans are making teaching much harder*, VOX (Sept. 3, 2021, 11:30 AM), <https://www.vox.com/22644220/critical-race-theory-bans-antiracism-curriculum-in-schools>.

<sup>100</sup> This Article is not to suggest that as a public defender that I would refuse to represent a person charged with any racially-motivated crime. As I explain later in this Article, the line of refusal drawn here is due to uniqueness of the January 6th insurrection as a racism-motivated collective attack on democracy and the enfranchisement of black people (among others).

asunder.”<sup>101</sup> January 6 brings this dual consciousness struggle to the forefront for a black public defender. In the black public defender’s mind, the American consciousness that values the Sixth Amendment guarantee of legal representation no matter the criminal offense, crashes in full-force against the conscious awareness that January 6 is a pivotal step in the white supremacist patriarchy’s effort to extend this country’s historical subjugation of black people. For me, the crashing results in the former having to yield to the latter. It is simply a matter of self-preservation.

#### V. CONSTITUTIONAL FIDELITY & THE DESPAIR COSTS OF REPRESENTING A JANUARY 6 DEFENDANT

Professor Dorothy E. Roberts’ acclaimed article, *The Meaning of Blacks’ Fidelity to the Constitution*, informs the dilemma of focus here, and my conclusion that I would not represent a January 6 defendant.<sup>102</sup> Professor Roberts’ article explores black Americans’ allegiance and fidelity to the Constitution even though it was “structured to enslave them, and has been interpreted time and time again to keep them subjugated to whites.”<sup>103</sup> More specifically, Professor Roberts discusses the “paradox of blacks’ fidelity to the Constitution: Blacks have no reason to have faith in the Constitution that was designed to exclude them; yet they have remained faithful to the Constitution in the struggle for citizenship by relentlessly demanding its interpretation live up to its highest principles and follow its strictest requirements.”<sup>104</sup> Professor Roberts concludes that black Americans’ “constitutional fidelity is not the faith that the Constitution will end racism,” but instead in a vision of an ideal Constitution that fuels a liberation movement for full citizenship.<sup>105</sup> For black Americans, “[t]he ideal Constitution *must* reach the deep and profound injustice of denying blacks’ equality or it is useless.”<sup>106</sup>

As Professor Roberts explores, fidelity to the Constitution, despite

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<sup>101</sup> W.E.B. Du Bois, *Strivings of the Negro People*, THE ATLANTIC (Aug. 1897), <https://www.theatlantic.com/magazine/archive/1897/08/strivings-of-the-negro-people/305446/>.

<sup>102</sup> Roberts, *supra* note 88, at 1761-65.

<sup>103</sup> *Id.* at 1761; see also J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1707 (1997) (discussing how the “protection of slavery was very much built into [the Constitution’s] structure” with Article I’s counting of slaves as three-fifths a person to bolster southern representation in the House of Representatives and the Electoral Congress, Article V and Article I together prohibiting the abolishment of the slave trade before 1808, and Article IV’s fugitive slave clause).

<sup>104</sup> Roberts, *supra* note 88, at 1768.

<sup>105</sup> *Id.* at 1771.

<sup>106</sup> *Id.* at 1766 (emphasis in original).

its faults and its use by white supremacists to achieve a social order contrary to its words, comes at a cost for white and black Americans.<sup>107</sup> For white “woke” Americans, the cost is the guilt-ridden cognitive dissonance that derives from pledging fidelity to the Constitution while simultaneously believing it is “riddled with evil.”<sup>108</sup> Black Americans, as Professor Roberts notes, do not have the luxury of such guilt; instead, black Americans must believe in the existence of the ideal Constitution that grants full citizenship rights and benefits on black Americans, or else “the game is over [and we m]ight as well collect our chips and go home.”<sup>109</sup> The fidelity cost for black Americans, as Professor Roberts explains, relying on the scholarship of Derrick Bell, is psychological despair. This despair “stems from the realization that the strategy of constitutional fidelity will fail to make blacks full citizens because white supremacy is too powerful a force to vanquish.”<sup>110</sup>

The only reason why I would represent a January 6 defendant is my fidelity to the Sixth Amendment. However, to maintain fidelity in this way is to willingly subject myself to the despair described by Professor Roberts and Derrick Bell. Serving as vital role in a January 6 defendant receiving the full benefits and protections the Constitution provides in criminal cases, while knowing from personal and professional experience that black Americans are denied those same benefits and protections, would be too much to despair to bear. I simply could not endure the psychological costs of using my intellect, skill, and experience to fulfill the Sixth Amendment rights of a January 6 white supremacist who seeks to strip me and all black Americans of our full citizenship and constitutional rights.

### 1. Restraint in the Face of White Violence

How January 6ers have been treated, perceived, and prosecuted to date provide plenty of cause for such despair. First, there is how January 6th insurrectionists were treated on the actual day. Many black Americans (and non-black Americans) believe that if the insurrectionists were Black, they would have been met with a more forceful, violent, and deadly response from law enforcement.<sup>111</sup> Many believe hundreds of black

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<sup>107</sup> *Id.* at 1765-1769.

<sup>108</sup> *Id.* at 1765 (quoting and citing Balkin, *supra* note 103, at 1731).

<sup>109</sup> *Id.* at 1766.

<sup>110</sup> *Id.* at 1770.

<sup>111</sup> See, e.g., Nandita Bose & Makini Brice, *If rioters were Black, ‘hundreds’ would have been killed: Washington reflects on Capitol rampage*, REUTERS (Jan. 8, 2021, 4:06 AM), <https://www.reuters.com/article/us-usa-election-inequality/if-rioters-were-black->

Americans would have been killed in contrast to the one January 6th insurrectionist who was shot and killed by a capitol police officer.<sup>112</sup> The sight of white insurrectionists being escorted from the Capitol premises after forcefully breaching its security, and not being put in handcuffs or subject to a violent law enforcement response, has reinforced the reality that there is a racial double-standard and tiered citizenship in America.<sup>113</sup> When “officer safety” and “posed a deadly threat” have been used to justify the killings of Breonna Taylor, Michael Brown, and too many other black Americans, it is beyond comprehension that law enforcement did not kill many more January 6ers as they attempted to harm elected officials performing their constitutional duties, screamed for the violent death of the vice president, and assaulted scores of police officers. President Biden acknowledged that if Black Lives Matter protestors had stormed the Capitol that day they would have been “treated very differently . . . We all know that is true.”<sup>114</sup> Even conservative Senator Ron Johnson (R-Wisc), who denies that January 6th was an attempted insurrection, admitted that if the mob was made up of Black Lives Matters instead of the white Trumpers, he “might have been a little concerned.”<sup>115</sup>

## 2. The Parade of Misdemeanors

The next source of despair is the charges that many January 6 defendants face. Some January 6 defendants have been charged with felonies, including sedition, exposing them to significant terms of

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hundreds-would-have-been-killed-washington-reflects-on-capitol-rampage-idUSKBN29D1HM; Jeff Beer, *One year after the January 6 Capitol attack, a campaign asks ‘What if they were Black?’* FAST CO. (Jan. 5, 2022), <https://www.fastcompany.com/90710628/one-year-after-the-january-6-capitol-attack-a-campaign-asks-what-if-they-were-black>.

<sup>112</sup> See Shaun R. Harper, *The U.S. Capitol Insurrection Was a Case Study in White Privilege. Teach It That Way*, EDUC. WEEK (Jan. 5, 2022), <https://www.edweek.org/teaching-learning/opinion-the-u-s-capitol-insurrection-was-a-case-study-in-white-privilege-teach-it-that-way/2022/01>.

<sup>113</sup> See, e.g., Aaron Morrison, *Race double standard clear in rioters’ Capitol insurrection*, ASSOCIATED PRESS (Jan. 7, 2021), <https://apnews.com/article/congress-storming-black-lives-matter-22983dc91d16bf949efbb60cdda4495d>.

<sup>114</sup> Rachel Chason & Samantha Schmidt, *Freedom to Assemble In Two Acts: Lafayette Square, Capital rallies met starkly different policing response*, WASH. POST (Jan. 14, 2021), <https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison/>.

<sup>115</sup> Amy B. Wang, *GOP Sen. Johnson says Capitol rioters did not scare him – but might have had they been Black Lives Matter protestors*, WASH. POST (Mar. 14, 2021), <https://www.washingtonpost.com/politics/2021/03/13/gop-sen-johnson-says-capitol-rioters-didnt-scare-him-might-have-had-they-been-black-lives-matter-protesters/>.

imprisonment.<sup>116</sup> However, they are the outliers. Of the 701 federal January 6 defendants charged as of January 2022, nearly half (334) have been charged with only misdemeanor offenses.<sup>117</sup> These charging decisions were the subject of blistering critique this past fall by Chief Judge Beryl Howell of the United States District Court for the District of Columbia.<sup>118</sup> According to Chief Judge Howell, the decision to only charge low-level misdemeanors for so many January 6 defendants is a key contributor to the national confusion “about whether what happened on January 6 at the Capitol was simply a petty offense of trespassing with some disorderliness, of shocking criminal conduct that represented a grave threat to our democratic norms.”<sup>119</sup>

A common response to Chief Judge Howell’s statement is that the federal criminal code lacks offenses that match and criminalize the conduct of those January 6ers who did not assault police officers that day. This is a blatant copout. During my time as a federal public defender, I witnessed first-hand the creativity and ingenuity of prosecutors to stretch criminal statutes to reach criminal conduct far outside the original intent and focus of the statutes.<sup>120</sup> If federal prosecutors want to prosecute

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<sup>116</sup> See, e.g., Alan Feuer et al., *Proud Boys Charged with Sedition in Capitol Attack*, N.Y. TIMES (June 6, 2022), <https://www.nytimes.com/2022/06/09/us/politics/proud-boys-charged-sedition-capitol-attack.html>.

<sup>117</sup> Rachel Weiner et al., *Judges have declined U.S.-proposed sentences in two-thirds of Jan. 6 cases so far*, WASH. POST (Jan. 6, 2022), <https://www.washingtonpost.com/dc-md-va/2022/01/06/jan6-sentencings-judges/>.

<sup>118</sup> Rachel Weiner, *Chief judge in D.C. assails ‘muddled’ Jan. 6 prosecutions: ‘The rioters were not mere protestors,’* WASH. POST (Oct. 28, 2022), [https://www.washingtonpost.com/local/legal-issues/judge-howell-capitol-riot-case/2021/10/28/8f6da2c2-3809-11ec-9bc4-86107e7b0ab1\\_story.html](https://www.washingtonpost.com/local/legal-issues/judge-howell-capitol-riot-case/2021/10/28/8f6da2c2-3809-11ec-9bc4-86107e7b0ab1_story.html).

<sup>119</sup> *Id.*

<sup>120</sup> Take for notable instance the Hobbs Act (18 U.S.C. §§ 1951, 924(c)). The Hobbs Act prohibits extortion or robbery by use of force or fear to affect interstate commerce. The law was passed in 1946 in response to labor union engaging in extortion tactics against trucking companies who used non-union drivers to transport goods over the highways. See *United States v. Miles*, 122 F.3d 235, 244 (5th Cir. 1997) (DeMoss, J., concurring). The original focus and target of the law, therefore, was criminal conduct that was undeniably interstate in nature and effect. Federal prosecutors, with the blessing of federal judges, have stretched the law’s reach to prosecute local robberies that have a marginal, and often only theoretical, impact on interstate commerce. Today, a *de minimus* effect on interstate commerce is sufficient. See *United States v. Rivera-Rivera*, 555 F.3d 277, 286 (1st Cir. 2009). This low bar, far from the original intent of the law, has allowed federal prosecutors to use the law to prosecute the robbery of a pizza restaurant because the restaurant used ingredients from outside the state (*United States v. Baylor*, 517 F.3d 899, 903 (6th Cir. 2008)), to prosecute a defendant for stealing cars from a garage because some of the cars featured out-of-state license plates (*United States v. Farrish*, 122 F.3d 146, 149 (2d Cir. 1997)), and to prosecute the robbery of business owners in their homes



particular conduct as a felony, they find a way. I wholeheartedly believe that had the January 6ers been mostly Black, the Justice Department's creativity with the federal criminal code would be on display and at full capacity in constructing felonies to prosecute for well more than half of the rioters.

This belief is based on precedent. I saw up close how federal prosecutors mix power with creativity when the U.S. Attorney's Office for the District of Maryland targeted black Baltimoreans who participated in the riots that gripped the city in 2015 following the police custody death of Freddie Gray.<sup>121</sup> One of the targets for prosecution was Gregory Butler, a young black man with no criminal record, who was caught by CNN cameras using a knife to puncture two holes in a firehose that was being used to suppress a fire engulfing a CVS pharmacy.<sup>122</sup> Gregory played no role in starting the fire, and by all accounts (including from firefighters on

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because the money stolen would have been used to purchase goods in interstate commerce to support the business (United States v. Powell, 693 F.3d 398, 402 (3d Cir. 2012)).

<sup>121</sup> On April 12, 2015, at about 8:45 a.m., Mr. Gray while standing on a street in his neighborhood, made eye contact with patrolling police officers, and according to the charging documents filed by the police, Mr. Gray then fled unprovoked. After a brief foot chase, police apprehended and searched Mr. Gray, finding a knife clipped to the inside one of Mr. Gray's pants pocket. Mr. Gray was then arrested. According to the official police report about the incident, Mr. Gray was arrested without force or incident. But a witness to the arrest alleged that the arresting officers forcefully folded Mr. Gray like "a piece of origami," with one officer putting his knee in Mr. Gray's back while another bent Mr. Gray's legs backward. All the while, according to the witness, Mr. Gray was "screaming for his life." Mr. Gray was placed in the police transport van with his hands handcuffed and his legs shackled. He was placed head first on the floor, on his stomach, and not secured or buckled-in. At some point between his arrest and a long-ride in the police van through West Baltimore, Mr. Gray suffered a serious spinal injury. He was transported to the hospital where he had surgery. Seven days later, April 19, Mr. Gray died, and his death was ruled a homicide. His death sparked a massive protest that transformed into rioting that gripped the city for days. See Eyder Peralta, *Timeline: What We Know About the Freddie Gray Arrest*, NPR (May 1, 2015), <https://www.npr.org/sections/thetwo-way/2015/05/01/403629104/baltimore-protests-what-we-know-about-the-freddie-gray-arrest>; Peter Hermann et al., *After peaceful start, protest of Freddie Gray's death in Baltimore turns violent*, WASH. POST (Apr. 25, 2015), [https://www.washingtonpost.com/local/baltimore-readies-for-saturday-protest-of-freddie-grays-death/2015/04/25/8cf990f2-e9f8-11e4-aae1-d642717d8afa\\_story.html](https://www.washingtonpost.com/local/baltimore-readies-for-saturday-protest-of-freddie-grays-death/2015/04/25/8cf990f2-e9f8-11e4-aae1-d642717d8afa_story.html); See Holly Yan & Dana Ford, *Baltimore riots: Looting, fires engulf city after Freddie Gray's funeral*, CNN (Apr. 28, 2015), <https://www.cnn.com/2015/04/27/us/baltimore-unrest/index.html>

<sup>122</sup> See Jessica Anderson, *Man accused of slashing a firehose during riots faces federal charges*, BALT. SUN (Dec. 3, 2015), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-greg-butler-20151203-story.html>.

the scene) Gregory's conduct caused minimal disruption of the firefighters' effort and did not exacerbate the fire.<sup>123</sup> Yet, as part of their strategy to punish rioters to the fullest extent possible, federal prosecutors charged Gregory with arson, an offense carrying a five-year mandatory minimum prison sentence.<sup>124</sup> They charged the arson offense even though months earlier they had secured the conviction of the person who actually started the CVS fire, and who had been sentenced to less than five years in prison (48 months) as called for by his plea deal with the government.<sup>125</sup> In short, federal prosecutors pursued a five-year mandatory minimum sentence for Gregory even though they had already sent to prison for less time the person who actually started the fire.

The response from federal prosecutors to the Freddie Gray riots further supports the view that prosecuting January 6ers for serious felonies is a matter of will, not ability or capability. There is justified concern about whether the Justice Department and its U.S. Attorney's Offices want to employ the same level of creativity to prosecute January 6 defendants that they have used to prosecute gangs, street-level drug dealing, local robberies, violent crime in our cities, and non-white rioters. Recent reporting that there is an ongoing fierce debate within the Justice Department about whether to bring *any* charges against some January 6ers reinforces the doubt that the will to prosecute is there.<sup>126</sup> To their credit, federal prosecutors have brought serious charges against many January

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<sup>123</sup> See Baynard Woods, *Tale of two Baltimores: why Freddie Gray protestor may face tougher sentence than officer on trial*, THE GUARDIAN (Dec. 13, 2015), <https://www.theguardian.com/us-news/2015/dec/13/freddie-gray-haunts-court-case-baltimore-gregory-butler-william-porter>.

<sup>124</sup> Indictment, United States v. Gregory Lee Butler, Jr., No. 15-cr-00615-JFM (D. Md. Dec. 1, 2015). I had the honor of being part of the public defender team that represented Gregory. Thankfully, due to the talents and skills of the lead attorney (Elizabeth Oyer, Esq.) and a motion drafted by another talented attorney on the team (Joanna Silver), we were able to get the arson count dismissed. Gregory subsequently plead guilty to impeding firefighters during a civil disobedience (in violation of 18 U.S.C. § 231(a)(3)) and was sentenced to probation, which he successfully completed.

<sup>125</sup> See Plea Agreement at Ex. A, United States v. Raymon Carter, No. 15-cr-00400-ELH (D. Md. Sept. 16, 2015); see also Dana Hedgpeth, *Man sentenced to 4 years in prison for setting fire to CVS during Baltimore riots*, WASH. POST (Nov. 18, 2015), [https://www.washingtonpost.com/local/public-safety/man-sentenced-to-4-years-in-prison-for-setting-fire-to-cvs-during-baltimore-riots/2015/11/18/1a2e1bae-8df1-11e5-acff-673ae92ddd2b\\_story.html](https://www.washingtonpost.com/local/public-safety/man-sentenced-to-4-years-in-prison-for-setting-fire-to-cvs-during-baltimore-riots/2015/11/18/1a2e1bae-8df1-11e5-acff-673ae92ddd2b_story.html).

<sup>126</sup> See Devlin Barrett & Spenser S. Hsu, *Justice Department, FBI debate not charging some of the Capitol rioters*, WASH. POST (Jan. 23, 2021), [https://www.washingtonpost.com/national-security/doj-capitol-rioters-charges-debate/2021/01/23/3b0cf112-5d97-11eb-8bcf-3877871c819d\\_story.html](https://www.washingtonpost.com/national-security/doj-capitol-rioters-charges-debate/2021/01/23/3b0cf112-5d97-11eb-8bcf-3877871c819d_story.html).

gers, including sedition charges.<sup>127</sup> The issue of my concern is where and how the line has been drawn between who to charge for misdemeanors as opposed to felonies, and whether race, directly or implicitly, has influenced where the line is drawn.<sup>128</sup>

### 3. D.C. Jail is Suddenly a Horrible and Inhumane Place

Another source of despair, and stark evidence of the protected elevated status of white privilege in America, is the uproar of concern for the well-being of the January 6 defendants held in pretrial detention in Washington, D.C.'s jail. Consistent with due process, judges ordered the pretrial detention of a number of January 6 defendants because the defendants presented a flight risk and/or a danger to the community.<sup>129</sup> It is the same process that has been used to detain the thousands of (mostly black) defendants in the jail (formally named the Central Detention Facility) since it opened in 1976. On average, 87 percent of the jail's detainees are Black, and just three percent are white.<sup>130</sup>

For decades, black detainees in the jail, their defense attorneys, and local advocates have complained about the jail's inhumane conditions and have pushed for the government and judges to take notice and institute corrective measures and reforms.<sup>131</sup> For years, they have documented and complained about the jail's failing plumbing and sewage capabilities; the severe uncleanness of the facility; the inedible and nutrient-lacking food served to detainees; the abusive treatment by the facility's guards; the jail's physical disrepair; the infestation of the jail by roaches, rats, mice, and other creatures; mold growing on the jail's walls and other places; detainees having to wash their clothes in their cell sinks due to lack of adequate laundry equipment; the lack of air movement which causes the

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<sup>127</sup> See, e.g. Feur et al., *supra* note 116.

<sup>128</sup> Apparently there is a debate within the Department of Justice about whether to bring any charges against the some January 6ers. See Barrett & Hsu, *supra* note 126.

<sup>129</sup> See 18 U.S.C. § 3142(e) (requiring a judge to order the pretrial detention of a defendant who the judge determines to be a flight risk or danger to the community).

<sup>130</sup> Andrew Beaujon, *The January Sixers Have Their Own Unit at the DC Jail. Here's What Life is Like Inside*, WASHINGTONIAN (Jan. 5, 2022), <https://www.washingtonian.com/2022/01/05/the-january-sixers-have-their-own-unit-at-the-dc-jail-heres-what-life-is-like-inside/>.

<sup>131</sup> See Madeline Carlisle, *The Crisis at the D.C. Jail Began Decades Before Jan. 6 Defendants Started Raising Concerns*, TIME (Jan. 8, 2022), <https://time.com/6137882/dc-jail-conditions-january-6/>; see also Serge F. Kovalski, *D.C. Finds Dangers in Ailing Jail*, WASH. POST (Sept. 17, 2000), <https://www.washingtonpost.com/archive/politics/2000/09/17/dc-finds-dangers-in-ailing-jail/c1795a71-92d9-4693-892c-5f0b054628ea/>.

facility to trap in airborne diseases and push the jail's internal temperature to hazardous highs; and the inmate violence triggered by overcrowding in the deteriorating facility.<sup>132</sup> In 2015, the Washington Lawyers' Committee for Civil Rights and Urban Affairs issued an investigation report that recommended permanently closing the jail and building a new facility from scratch, largely due to the facility's serious recurring and structural problems.<sup>133</sup> While some judges took notice of the complaints, issued orders to improve the jail's conditions, and appointed special masters to monitor the jail's operations, the jail and its conditions continued to deteriorate. Throughout it all, people, mostly Black, continued to be housed in the facility.

When the facility started receiving white January 6 detainees, a national spotlight was placed on the jail. Suddenly, the condition of the jail and the treatment of its detainees were of national concern. After visiting the January 6 detainees, Representative Marjorie Taylor Greene (R-Ga.) publicly claimed the detainees were "suffering greatly" and that the jail resembled a "prisoner of war camp."<sup>134</sup> The inadequate medical care provided to a January 6 defendant detained at the facility led one federal judge to hold D.C.'s director of corrections and the jail's warden in contempt. The judge also asked the Department of Justice to investigate whether the jail was violating the civil rights of the January 6 detainees.<sup>135</sup> Within days of the judge's order, the United States Marshals Service, the federal agency that oversees federal detainees, opened an inquiry into the jail, which included a surprise inspection.<sup>136</sup> A bipartisan group of senators issued a letter demanding that the Department of Justice investigate the "grotesquely poor sanitation, mistreatment of inmates, and misconduct by [jail] staff" revealed by the marshals' surprise

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<sup>132</sup> *Id.*

<sup>133</sup> WASH. LAW.'S COMM. FOR C.R. & URB. AFFS., D.C. PRISONERS: CONDITIONS OF CONFINEMENT IN THE DISTRICT OF COLUMBIA 48 (2015), [https://www.washlaw.org/pdf/conditions\\_of\\_confinement\\_report.PDF](https://www.washlaw.org/pdf/conditions_of_confinement_report.PDF).

<sup>134</sup> Emily Zantow, *Majorie Taylor Greene visits Jan. 6 detainees at D.C. Jail, says they are 'suffering greatly,'* WASH. TIMES (Nov. 5, 2021), <https://www.washingtontimes.com/news/2021/nov/5/marjorie-taylor-greene-visits-jan-6-detainees-dc-j/>.

<sup>135</sup> See Spencer S. Hsu, *Judge Calls for Justice Dept. civil rights probe into D.C. jail's treatment of Jan. 6 detainees*, WASH. POST (Oct. 13, 2021), [https://www.washingtonpost.com/native/legal-issues/dc-jail-conditions-contempt-investigation/2021/10/13/65292cd0-2ba1-11ec-985d-3150f7e106b2\\_story.html](https://www.washingtonpost.com/native/legal-issues/dc-jail-conditions-contempt-investigation/2021/10/13/65292cd0-2ba1-11ec-985d-3150f7e106b2_story.html).

<sup>136</sup> See Alan Feuer, *Problems at D.C. Jail Were Ignored Until Jan. 6 Defendants Came Along*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/us/politics/dc-jail-jan-6.html>.

inspection.<sup>137</sup> It was not lost on many legal veterans of the D.C. community that the race of the January 6 detainees played a key role in the flurry of action and concern.<sup>138</sup> As Attorney General for the District of Columbia Karl Racine testified at a city council hearing, “Recent reports about squalid conditions in the district’s jails are unfortunately not new. . . [C]oncerns about the conditions at the jail received little attention until they were raised by mostly white defendants accused of perpetrating the Jan. 6 insurrection.”<sup>139</sup>

#### 4. Treating Sedition as Legitimate Political Protest

Another source of despair: embracement of the January 6 defendants and the minimizing of the insurrection by members of Congress and a significant portion of the public. More alarming than sad, the January 6 insurrection has not drawn universal condemnation or even recognition as a seditious attack on American democracy. Representative Andrew Clyde (R-Ga.) equated the mob that breached the Capitol to a “normal tourist visit,” despite photographs showing him helping barricade a House chamber door as rioters tried to force their way in.<sup>140</sup> Senator Ron Johnson (R-Wis.) said that he never felt threatened by the rioters because he “knew those are people that love this country, that truly respect law enforcement, and would never do anything to break the law.”<sup>141</sup> Representative Paul Gosar (R-Ariz.) characterized the Justice Department’s investigation and prosecution of January 6ers as “harassing peaceful patriots across the country.”<sup>142</sup> Some members of Congress, such as Representative Ralph Norman (R-S.C.), Representative Matt Gaetz (R-Fla.), Representative Paul Gosar, (R-Ariz.), and Representative Mo Brooks (R-Ala.), have tried to sow doubt that January 6ers were Trump supporters, and have suggested that the rioters were members of Antifa—

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<sup>137</sup> Press Release, Sen. Dick Durbin, Durbin, Grassley, Cardin Press DOJ on Egregious Conditions At Prison Facility in Nation’s Capitol (May 6, 2022), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-grassley-cardin-press-doj-on-egregious-conditions-at-prison-facility-in-nations-capitol>.

<sup>138</sup> See Feuer, *supra* note 136; see also Carlisle, *supra* note 131.

<sup>139</sup> Feuer, *supra* note 136.

<sup>140</sup> Brittany Shammass, *A GOP congressman compared Capitol rioters to tourists. Photos show him barricading a door*, WASH. POST (May 18, 2021), <https://www.washingtonpost.com/politics/2021/05/18/clyde-tourist-capitol-riot-photos/>.

<sup>141</sup> Wang, *supra* note 115.

<sup>142</sup> Colby Itkowitz, *‘Normal tourist visit’: Republicans recast deadly Jan. 6 attack by pro-Trump mob*, WASH. POST (May 12, 2022), [https://www.washingtonpost.com/politics/trump-riot-capitol-republicans/2021/05/12/dcc03342-b351-11eb-a980-a60af976ed44\\_story.html](https://www.washingtonpost.com/politics/trump-riot-capitol-republicans/2021/05/12/dcc03342-b351-11eb-a980-a60af976ed44_story.html).

the anti-fascist movement—or left-leaning groups.<sup>143</sup>

The denial and obscuration are pushed by the Republican party at the national level. This past February, the Republican National Committee officially declared the January 6 attack “legitimate political discourse,” and censured two Republican lawmakers for participating in the House investigation of the event.<sup>144</sup> And, unsurprisingly, Trump happily wraps January 6 insurrectionists in the flag of patriotism. “We love you. You’re very special,” was his message to the rioters after two hours of them breaching and storming the Capitol while assaulting police officers.<sup>145</sup> During a rally on January 29, 2022, Trump called the January 6 prosecutions “a disgrace” and declared that, if he was re-elected, his administration would “treat [January 6 defendants] fairly” even if that meant pardons.<sup>146</sup> With each passing day, more of the public is ready to forgive and forget the insurrection. Polling done this past January, one year after the insurrection, found that 35 percent of Americans believe that “too much” attention is focused on January 6, and 45 percent thought it was time to move on.<sup>147</sup> Nearly half of Republican voters oppose the Justice Department continuing to identify and prosecute January 6 rioters and those responsible for the rioting.<sup>148</sup>

Finally, conservative media, politicians, and judges equating the

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<sup>143</sup> *Id.*; see also Meg Anderson, *Antifa Didn’t Storm The Capitol. Just Ask the Rioters*, NPR (Mar. 2, 2021), <https://www.npr.org/2021/03/02/972564176/antifa-didnt-storm-the-capitol-just-ask-the-rioters>.

<sup>144</sup> Jonathan Weisman & Reid J. Epstein, *G.O.P. declares Jan. 6 Attack ‘Legitimate Political Discourse,’* N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html>.

<sup>145</sup> Erin Mansfield, *Trump ignored a script and went ‘off the cuff’ to tell Jan. 6 rioters ‘We love you,’* USA TODAY (July 22, 2022), <https://www.usatoday.com/story/news/politics/2022/07/22/trump-script-jan-6/10124205002/?gnt-cfr=1>; Alexandra Petri, *We love you. You’re very special. Go home,* WASH. POST (Jan. 7, 2021), <https://www.washingtonpost.com/opinions/2021/01/07/trump-we-love-you-capitol-mob/>.

<sup>146</sup> Tyler Pager, *Trump suggests that if he is reelected, he will pardon Jan. 6 Capitol rioters,* WASH. POST (Jan. 29, 2022), <https://www.washingtonpost.com/politics/2022/01/29/trump-jan6-protesters/>.

<sup>147</sup> Jean Yi, *Americans Are Moving On From Jan. 6 – Even if Congress Hasn’t*, FIFTYTHREE (Apr. 22, 2022), <https://fivethirtyeight.com/features/americans-are-moving-on-from-jan-6-even-if-congress-hasnt/>.

<sup>148</sup> See Mike Dorning & Billy House, *Capitol Riot Apologist Go Unpunished as Memories of Horror Fade*, BLOOMBERG (June 5, 2022), <https://www.bloomberg.com/news/articles/2022-06-05/capitol-riot-apologists-in-gop-go-unpunished-as-jan-6-memories-fade>.

January 6 insurrection to the protests and rioting sparked by the police killing of George Floyd invokes additional despair. The narrative pushed by (mostly white) conservatives is that the two circumstances are comparable in scope, harm, and criminal conduct involved, but the federal government, for liberal political and “woke” reasons, is only interested in prosecuting and punishing January 6ers.<sup>149</sup> U.S. District Court for the District of Columbia Judge Trevor McFadden, a Trump appointee, has not only publicly vocalized this comparison, but he has accused the Justice Department of enforcing a double standard, saying during the sentencing of a January 6 defendant: “I think the U.S. attorney would have more credibility if it was even-handed in its concern about riots and mobs in this city.”<sup>150</sup>

This comparison is a plainly false equivalent. The George Floyd protests, sparked by a brutal and unjustified public killing by police officers, were a demand to end centuries of systemic racism, particularly in the policing of black people. Occasionally the protests turned violent, and looters and vandals used the protests as an opportunity to commit criminal harm.<sup>151</sup> In contrast, fueled by the racist stolen election lie, January 6th was a violent attack on the federal legislative branch to preserve white supremacy. Moreover, this false equivalence implies that George Floyd/racial justice protestors escaped criminal prosecution. Across the country, law enforcement made an estimated 14,000 arrests of people engaged in civil disobedience activities, looting, and violence during the protests.<sup>152</sup> At least 300 people have been charged with federal

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<sup>149</sup> See Julie Watson, *Comparison between Capitol siege, BLM protests denounced*, ASSOCIATED PRESS (Jan. 14, 2021), <https://apnews.com/article/donald-trump-capitol-siege-race-and-ethnicity-violence-racial-injustice-afd7dc2165f355a3e6dc4e9418019eb5>.

<sup>150</sup> Colleen Long & Michael Kunzelman, *Judge questions whether Jan. 6 rioters are treated fairly*, ASSOCIATED PRESS (Oct. 1, 2021), <https://apnews.com/article/donald-trump-courts-riots-capitol-siege-sentencing-cdf0e335122218ab8ce43a886132a006>. Moreover, at the end of a two-day bench trial, Judge McFadden acquitted January 6th defendant Matthew Martin, finding that Martin’s defense that he believed that Capitol police had allowed him and others to enter Capitol was plausible and provided sufficient reasonable doubt. See Josh Gerstein & Kyle Cheney, *Judge issues first outright acquittal of Jan. 6 riot defendant*, POLITICO (Apr. 6, 2022), <https://www.politico.com/news/2022/04/06/judge-issues-first-outright-acquittal-of-jan-6-riot-defendant-00023493>.

<sup>151</sup> See Watson, *supra* note 149 (noting that Princeton University’s analysis “of more than 7,750 demonstrations in 2,400 locations across the country found that 93% happened with no violence”).

<sup>152</sup> *Id.*

crimes connected to George Floyd protests.<sup>153</sup> Of those, 120 people have been convicted of federal crimes, including rioting, arson, and conspiracy.<sup>154</sup> The average prison sentence for the convicted is 27 months, with at least ten defendants receiving a sentence of five years or more.<sup>155</sup> This includes one man who was sentenced to 16 months in federal prison for breaking a bank window and entering the bank during a protest event.<sup>156</sup> In contrast, of the 190 January 6 defendants sentenced as of early June 2022, only 20 were convicted of felonies, with the rest convicted of misdemeanors punishable by no more than one year in prison.<sup>157</sup> Federal prosecutors sought prison sentences in 70% of the 190 cases — a request that judges have granted in only 45% of the cases with prison terms ranging from nine days to five years in prison.<sup>158</sup> In what may be seen as ironic, the toughest sentencer to date has been a former public defender, U.S. District Court for the District of Columbia Judge Tanya Chutkan, an Obama appointee.<sup>159</sup> As of June 2022, Judge Chutkan had sentenced all eleven January 6 defendants who came before her to prison time, including four defendants for whom federal prosecutors did not request prison time.<sup>160</sup>

In sum, there is a lot of despair that a black public defender has to endure to zealously advocate for a January 6 defendant. For me, it would be too much to shoulder. The despair would be particularly toxic and crippling because the Sixth Amendment foundation of public defense would transform me into the portal of my despair—a black attorney enforcing the constitutional rights of a January 6er who seeks to deny me those same rights and uphold white supremacy. Personally, it would also transform the Sixth Amendment and the remainder of the Constitution

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<sup>153</sup> Alanna D. Richer et al., *Records rebut claims of unequal treatment of Jan. 6 rioters*, ASSOCIATED PRESS (Aug. 30, 2021), <https://apnews.com/article/records-rebut-claims-jan-6-rioters-55adf4d46aff57b91af2fdd3345dace8>.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See Josh Gerstein & Kyle Cheney, *Judge rejects comparison between Jan. 6 riot and George Floyd unrest*, POLITICO (Nov. 5, 2021), <https://www.politico.com/news/2021/11/05/judge-rejects-comparison-between-jan-6-riot-and-george-floyd-unrest-519723>.

<sup>157</sup> See Michael Kunzelman & Alanna D. Richer, *In Jan. 6 cases, 1 judge stands out as the toughest punisher*, ASSOCIATED PRESS (June 12, 2022), <https://apnews.com/article/capitol-siege-only-on-ap-donald-trump-government-and-politics-sentencing-de394dd56b3251aac5a50014f4d6afa7>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (noting that the prison sentences imposed by Judge Chutkan ranged from 14 to 45 days).



into a tool of evil, which is “dangerous not simply because fidelity furthers the work of evil,” *i.e.*, white supremacy and the subjugation of black Americans, “but because of what fidelity does to the faithful.”<sup>161</sup> Remaining faithful to the Sixth Amendment to represent a January 6 defendant would indeed plunge me into a deep state of despair – and there is no guarantee that I would emerge from it. More frightening is the thought that I *could not* emerge from it.

## VI. INDIVIDUAL VS. THE GROUP/MOVEMENT

As a public defender, I regularly appealed to judges to consider my convicted client’s individual story when determining what sentence to impose. I continually pushed for the judge to not lump my client in with a category of offenders, but to see my client as an individual with a life story and qualities that separated him from others convicted of similar conduct. My client was not just another convicted drug offender, but someone whose life story was marked by trauma and included positive accomplishments. In short, my client was capable of redemption and worthy of mercy.

So why can I not make that same cognitive leap when it comes to January 6 defendants? Indeed, the line I draw here raises the natural question – does the line extend to any white defendant accused of a racially motivated crime? Is racially motivated crime a legitimate exception to public defender absolutism, especially for public defenders of color?

This Article does not advocate extending the line drawing to reach any white person charged with a racially-motivated crime. Instead, the answer to the natural question is that the January 6th insurrection was such a unique criminal event that threatened democracy and black Americans’ progression toward full citizenship, that a January 6th exception is not only legitimate, but necessary for non-white public defenders. This limited exception is needed because January 6th was *collective* racially-motivated criminal conduct and violence that threatened the citizenship and enfranchisement of black Americans (as well as non-heterosexual, non-Christian, and nonwhite Americans) *en masse*.

When representing a client as a public defender, I was not endorsing or legitimizing the client’s alleged criminal conduct. I certainly was not trying to perpetuate the criminal conduct. By representing people charged with drug or sex offenses, my goal was not to stimulate and support such offenses and the societal harms connected to them. I was

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<sup>161</sup> Balkin, *supra* note 103, at 1726.

fulfilling a constitutional duty, not engaging in a campaign to increase and further criminal conduct and its consequential harms. On the clients' side of the ledger, there was no common "cause" shared by clients charged with drug, sex, and other common criminal offenses. Nor was there a shared end-game of them enjoying the full benefits of American life, while simultaneously denying those outside their group the same.

January 6 defendants are far different. January 6 defendants are too intertwined with white supremacy to allow the same disassociation between their conduct and the harm. January 6ers are *collectively* bound together in a cause, which is to deny non-whites full constitutional citizenship and its benefits. It is a *collective* cause that links January 6ers with all white supremacists, and, in turn, allows white supremacy to retain and yield almost immovable and unyielding power since the founding of the country. January 6ers cannot "associate with [the] ignorance [of white supremacy] without sharing its shade."<sup>162</sup> Simply put, there is no daylight between January 6ers and the *collective* white supremacy that has dominated this country and its history. To support and protect the former is to support and protect the latter. The expected rebuttal is that a key purpose of a public defender is to search beyond the objectionable conduct and motivations associated with the criminal charges to find and highlight the client's humanity – to show that client is more than their criminal conduct and what motivated it. It is a purpose I served religiously as a public defender. But again: January 6ers are different for me. Because an individual and collective priority goal of January 6ers is the subjugation of black Americans. To paraphrase Frederick Douglass, a January 6er, kind or cruel, is a January 6er still.<sup>163</sup>

Requiring black attorneys to protect the rights of January 6ers who seek to use the Constitution to continue the subjugation of black Americans is a manifestation of Derrick Bell's critique of the ascendancy of Clarence Thomas to the Supreme Court: such a requirement "replicates the slave masters' practice of elevating to overseer and other positions of quasi-power those slaves willing to mimic the masters' views, carry out orders, and by their presence provide a perverse legitimacy to the oppression they aided and approved."<sup>164</sup> To state it another way, it is the height of white privilege to expect black attorneys (and black Americans generally) to actively insist that the criminal justice system remain faithful

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<sup>162</sup> See FREDERICK DOUGLAS, MY BONDAGE AND MY FREEDOM 59 (Penguin Classics, 20th ed. 2003).

<sup>163</sup> See *id.* at 208 ("The slaveholder, kind or cruel, is a slaveholder still—the every hour violator of the just and inalienable rights of man . . .").

<sup>164</sup> See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 370 (Winter 1992).

to the Constitution for a January 6 defendant, when the system refuses to confer the same benefit on black Americans.

### **VII. WHAT ABOUT A BLACK JAN. 6 DEFENDANT?**

But what about black January 6 defendants? While they are likely few in number, I assume at least one exists (or will exist in the future). Does consistency require that I would have to refuse to represent them as well?

Admittedly, a black January 6 defendant presents a unique challenge to the line that I have drawn here. Theoretically, my subinterests of racial justice, survival for Black people, and constitutional integrity align in representing a black January 6 defendant; however, the alignment is an illusion. My representation of a black January 6 defendant harms, rather than advances, my racial justice and survival subinterests. A black January 6 defendant seeks to undermine my racial justice and survival subinterests, which prevents me from achieving both. In doing so, a black January 6er forfeits his claim for racial justice and black survival. A consequence of this forfeiture is that he is precluded from the benefit of my legal services. If a black person wants to be a combatant in the army seeking to continue and expand the subjugation of black people in this country, I will not be there to defend him when he's captured.

### **VIII. JANUARY 6 & PUBLIC DEFENDER ABSOLUTISM**

A foundation of the public defense system is public defender absolutism: public defenders represent, without pause or question and no matter the charges or alleged conduct, anyone who is charged with a crime but is without the financial means to retain an attorney. This particular brand of absolutism is seen as necessary for public defenders to be the safety net that achieves the full promise of the Sixth Amendment. But as my struggle and ultimate conclusion reflect, January 6 defendants raise significant questions about the limits of, and justifications for, public defender absolutism.

In short, are public defenders allowed to have lines when it comes to who they will represent, or is absolutism the only course? As with all things deemed "absolute," public defender absolutism is not universally absolute or followed without exception. There are public defenders who draw lines and refuse to represent people charged with particular crimes (e.g., crimes that involve violence inflicted on children or animals). But they are largely, in my experience, exceptions to the absolutism that is the bedrock of public defense. To the absolutism purist, line drawing is not only unacceptable, but it undermines the public defender system and

devalues the Sixth Amendment. To allow representation line-drawing, the purists would argue, is to open the door to line drawing about what criminal charges and behavior are and are not worthy of public defender services, which ultimately will result in some people not having access to legal representation even though they desperately need it, such as those charged with child pornography and abuse crimes, sex crimes, and other universally despised criminal behavior.

It is a fair criticism and concern, and one that I generally share. And admittedly, I can offer no answer or explanation beyond that as a black American (who is also a criminal defense attorney), January 6 is different. To white Americans who abhor what happened, January 6 is part of a growing threat to American democracy.<sup>165</sup> To black Americans, the insurrection is much more – it is part of, and reflects, the growing existential threat to black Americans. For me to represent a January 6er, therefore, is to be an accomplice in my own extinction as an American citizen due all the rights and privileges granted by the Constitution.

Does my choice of self-preservation over fidelity to the Sixth Amendment mean that I am not truly a public defender in heart and soul? Many in the public defense community will say that is exactly what my choice means – that I am not fully committed to the public defense community and cause. My response is to ask the following questions: As a black American, must I remain committed to a constitutional ideal when doing so puts me, my family, and other black Americans in danger and jeopardy?<sup>166</sup> Do you expect unwavering fidelity to the Constitution by black Americans when such fidelity could lead to our undoing in this country? How far must black Americans go to prove our love for this country and its Constitution when neither returns our love in close to equal measure? Does our love fall short if we refuse to defend the rights of those who seek to subjugate us? You are asking us to protect the slave master when the union soldiers attack the plantation. It is too much of an ask.

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<sup>165</sup> See, e.g., Joan E. Greve, *Historians mark January 6 with urgent warning on threats to US democracy*, THE GUARDIAN (Jan. 6, 2022), <https://www.theguardian.com/us-news/2022/jan/06/us-capitol-attack-historians-democracy-threat>.

<sup>166</sup> I would also note that I am not calling for *all* public defenders to not represent a January 6 defendant. I firmly believe that January 6 defendants have a Sixth Amendment right to counsel, and the appointment of counsel if they cannot afford counsel. I am not even calling for black public defenders to refuse to represent a January 6 defendant. In this Article, I am explaining why I would not represent a January 6 defendant, and how my decision is driven by the illusive constitutional promise of full equality and citizenship for black Americans.

## CONCLUSION

Some may view this as merely a theoretical exercise about how January 6 defendants present an existential dilemma for public defenders, particularly public defenders of color. To me, it is more – it is a dilemma that is tied to the survival of black Americans and our enduring quest for full citizenship under the Constitution. For black Americans, particularly black public defenders, January 6th is a collision of constitutional fidelity and self-preservation that will deeply scar us forever.

As Professor J.M. Balkin observes, “the practice of constitutional fidelity creates social and psychological pressures on us because the Constitution exists in a political system that is certainly not completely just and may in fact be very unjust.”<sup>167</sup> For black public defenders, who are acutely aware of this country’s use of the Constitution to justify and maintain black subjugation, these pressures present a unique challenge that is exhausting. January 6th transformed this exhaustion into despair. It also made many of us realize that, despite our fidelity to the Constitution and our daily fight to achieve its full potential, Derrick Bell’s declaration that “Black people will never gain full equality in this country” is likely true.<sup>168</sup> If white privilege is so formidable that it protects white people who, in order to preserve and further white supremacy, are willing to attack the heart of democracy itself, then full citizenship and equality for black people is truly unattainable.

Reaching the conclusion that I would not represent a January 6 defendant as a public defender is a painful one. I never thought that I would deny someone my legal services because of the criminal conduct alleged. But that is the power of racism: it effectively and efficiently corrodes principles, subverts commitment to the rule of law, and renders hollow the promises of the Constitution. For current and former black public defenders, it also undermines our fidelity to the Constitution by making us wonder if our constitutional allegiance is an act of insanity, self-destruction, and/or the result of indoctrination in support of white supremacy. January 6th was the culmination of this country’s history of black subjugation mixed with the Trump administration’s single-minded focus on limiting full citizenship and constitutional benefits solely to white Americans. To be the Sixth Amendment sword and shield for those who sought to preserve white supremacy in America by attacking the Capitol to disenfranchise millions of black voters is something I simply could not and cannot do and remain sane.

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<sup>167</sup> Balkin, *supra* note 103, at 1704.

<sup>168</sup> See Bell, *supra* note 164, at 373.