Spring 2018

Participatory Defense: Humanizing the Accused and Ceding Control to the Client

Cynthia Godsoe
Brooklyn Law School, cynthia.godsoe@brooklaw.edu

Participatory Defense: Humanizing the Accused and Ceding Control to the Client

by Cynthia Godsoe*

I. INTRODUCTION

This contribution to the Mercer University School of Law's 2017 Symposium on Disruptive Innovation in Criminal Defense discusses two interrelated defense strategies: humanizing the accused and contextualizing their actions in a society plagued with racism and poverty, and ceding substantial control of the defense strategy and legwork to the accused, and their family and friends. The first strategy should not be, but is, disruptive; in a just (and sane?) criminal legal system, this would be a regular part of the process. In our current vast system of social control, however, focusing on the people in the system as anything other than numbers or "bad actors" is often not the norm, even by the attorneys defending them. The second strategy, empowering defendants' families to assist or even challenge defense attorneys, is truly radical. It shifts notions of expertise and questions deeply-embedded power structures between attorneys and clients. As such, it has the potential to not only shake up the public defense framework—one in which, the clients, low-income by definition, have particularly little

* Associate Professor of Law, Brooklyn Law School. Harvard Law School (J.D., cum laude, 1998). Harvard University (A.B., magna cum laude with distinction, 1993). Member, State Bar of New York and California. I appreciate the helpful comments and suggestions of Bruce Green, Janet Moore, Jenny Roberts, Jocelyn Simonson, Ellen Yaroshefsky, and the participants in the criminal law discussion at the Southeastern Association of Law Schools in 2017. I am especially grateful to Raj Jayadev, one of the participatory defense founders, who generously gave of his valuable time, sharing much insight into the movement's goals and implementation. Thanks are also due for the excellent research assistance of Sydne Schechter and Lauren Rayner Davis, and the thoughtful editing of Hannah Couch, Lead Articles Editor, and her colleagues at the Mercer Law Review.

power—but also to reinvigorate the attorney-client relationship more broadly.[1]

To illustrate these disruptive strategies, this Article centers on the participatory defense movement. The movement seeks to "transform the landscape of power in the court system" by training the families and friends of the accused in how the criminal system works and how to help with their defense.[2] Rather than merely relying on defense attorneys or other professional advocates, participatory defense sharply highlights the defendant as a person embedded in a community and focuses on empowering that community to successfully impact both individual cases and the broader court system.[3] As the movement's founder, Raj Jayadev, describes it, his community organization knew how to protest against over-criminalization and police misconduct but "[was] relinquishing power, arguably, at the most critical moment, which is when a case hit the courts . . . . Our thought was, 'We're not lawyers. That is not our arena to make change.'"[4] They decided to alter this perception and remedy this structural exclusion by recognizing the accused and their communities as sources of knowledge, defense strategies, and the potential to transform the criminal law system. As "change agents," defendants and their families would cease being the objects of a case and would become autonomous actors and subjects. The movement has met with great success in individual cases and is also leading to some larger reforms.[5]

Despite this success, the movement was not initially welcomed with open arms by all public defenders.[6] Indeed, the movement organizers

---

1. The vast majority—over 80%—of criminal defendants are poor and qualify for public defenders. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (2000).

2. Raj Jayadev, *What is "Participatory Defense,"* ALBERT COBARRUBIAS JUST. PROJECT, https://acjusticeproject.org/about/purpose-and-practice (last visited Sept. 29, 2017).

3. This is not to say that many defenders have not been using some of these approaches or strategies; this is particularly so for offices engaging in holistic defense, representing juveniles who are, by definition, embedded in a family and community, and those engaging in both individual defense and systemic advocacy. A few examples include the New York City Legal Aid Society Juvenile Defense Practice, Bronx Defenders, and the Georgia Justice Project.

4. Katti Gray, *Friends in Court: The Growing Impact of 'Participatory Defense,'* CRIME REP. (2017), https://thecrimereport.org/2017/03/29/friends-in-court-the-growing-impact-of-participatory-defense.

5. *See infra* notes 16, 19–22, & 25–26 (discussing impact in individual cases, as well as larger reforms such as increasing inclusion of the community in court proceedings, and recognizing the structural factors, such as poverty and racism, often underlying crime).

6. As I explain more fully below, my analysis here is overly simplistic, as there is inevitably a range of reactions even among defenders in the same office. See *infra* note 7. Nonetheless, I believe that there are some commonalities to innovations and institutional change about which we can draw some tentative insights. Here, I draw on my own

experienced "pushback in every scenario."[7] Some defenders feared additional tasks added to an already large workload, or confidentiality or privilege violations. Others raised the risks to effective individual defense in expanding client agency, and, particularly, to loosening the concept of a client to recognize that a defendant comes to her case in a particular context with family, friends, and community members.[8] These risks to confidentiality and case outcomes are real, as I elaborate further below, but they exist in every case, not just in participatory defense cases. I suspect that the resistance has, at least in part, had to do with the movement's central tenet of shifting expertise and case direction away from the lawyers and other professionals, something I say as a former defender myself.[9] As I outline further below, the structure of the criminal system, coupled with the disproportionate poverty and political powerlessness of most defendants, makes public defenders less accountable to their clients than most attorneys. Indeed, defendants must rely primarily on their attorneys' own zeal and internalized desire to practice ethically, rather than any external controls such as bar discipline or judicial action.[10] For although they seek to defend the accused, and usually, to reform the criminal law system, defenders are still part of the power structures that exclude non-lawyers and non-professionals from the court systems and silence the people most affected.[11]

Changing an institution is difficult, and those seeking to alter public defense practice face the intertwined challenges of bureaucratic

---

experience, conversations with many other defenders from numerous offices, and writings on the criminal law system and public defense, to sketch a picture of a common defender practice, recognizing "the contextual differences and informal norms that influence lawyers' decision making" in the defense context. Leslie C. Levin & Lynn Mather, *Why Context Matters, in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 3, 5–6 (2012).

7. Telephone Interview with Raj Jayadev, CEO, Silicon Valley De-Bug's Albert Cobarrubias Justice Project (Dec. 5, 2017). I also draw from my own experience and conversations with several current and former defenders to anticipate some of these reactions and concerns.

8. Participatory defense members hear these same two concerns over and over as they expand to new locations.

9. This Article reflects my own views informed by prior practice experience and by teaching and writing about attorney ethics. They are not necessarily Jayadev's views.

10. *See infra* notes 35–39.

11. *See* Liana Pennington, *An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office*, 14 OHIO ST. J. CRIM. L. 603, 604 (2017); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. UNIV. L. REV. 1609 (2017). With participatory defense, Jayadev describes how the criminal law system, and courts in particular, have been particularly siloed from community scrutiny and collective action compared to other public systems. Jayadev Interview, *supra* note 7.

resistance to change and the common, if often unconscious, desire of lawyers to hold onto their privilege over lay people, including their clients.[12] The focus on client agency in participatory defense means that tension between mainstream practice and newly empowered clients is not just likely, but actually inevitable—baked into the model itself. The movement organizers have been tremendously successful at overcoming these concerns, demonstrating that participatory defense can actually reduce risks and increase attorney resources. Tellingly, and to the surprise of the founders, public defender offices, initially wary, are now reaching out to them and embracing what participatory defense can offer.[13] Yet, the movement offers more than resources and better outcomes; instead its vision of zealous advocacy and client autonomy represents an overdue shift in power back to the client and reveals the tension between practice or ethical risks and participatory defense to be overstated.[14]

This Article unfolds in four parts. In Part II, I describe the participatory defense model and its focus on humanizing the accused, recognizing "lay expertise," and shifting control. Part III examines potential reactions by defenders to the movement, including both concern over risks to clients and case outcomes, and resistance to change on both an institutional and individual level. In particular, the goal of the movement—to empower clients to assist, direct, and even challenge their appointed counsel—shakes up the typical rubric of "lawyer as expert" driving the representation. In Part IV, I argue that, despite these risks and practice challenges, defenders should incorporate participatory

12. Numerous scholars have pointed out the tension between lawyers' privilege over their clients and client agency. *See, e.g.*, Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 634 (1986) ("Because of the large advantages over the client built into the lawyer's professional role, and because of the disadvantages and vulnerabilities built into the client's role, the professional must subordinate his interest to the client's."). Most notably, Gerald Lopez critiqued the traditional "regnant" lawyering model as elitist and paternalistic, undergirded by hierarchies and assumptions that devalued clients and non-mainstream views and approaches. *See* GERALD LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992). His seminal critique was particularly directed at public interest lawyers, given their clients were by definition low-income and often marginalized racially and in other ways. I discuss Lopez's work further at *infra* notes 56–57.

13. Jayadev Interview, *supra* note 7.

14. The Model Rules of Professional Conduct, specifically Rule 1.2, are somewhat ambiguous about how to implement client direction, particularly as to means and strategies. *See infra* note 36. Indeed, a case heard by the Supreme Court of the United States in January 2018 highlights the ambiguities in this area. *See* McCoy v. Louisiana, 138 S. Ct. 53 (2017) (considering criminal defense attorney obligation to follow client direction). *See infra* note 89, at 37.

defense tenets into their practice. Indeed, they *must* because the model is consistent with, even required by, the ethical rules governing lawyers. I conclude that participatory defense has the potential not only to transform the criminal law system, but also to change the defender practice model, and return us to the zealous advocacy and client autonomy at the heart of lawyering.[15]

II. THE PARTICIPATORY DEFENSE MODEL

Founded within the last decade, participatory defense is a grass-roots movement to empower families and communities in their loved ones' criminal defense and organize both for individual case outcomes and systemic change.[16] The movement's founder, Raj Jayadev, with co-authors Janet Moore and Marla Sandys, describes the goal of the movement as follows:

> Participatory defense amplifies the voices of the key stakeholders—people who face criminal charges, their families, and their communities—in the struggle for system reform. [It] empowers these key stakeholders to transform themselves from recipients of services provided by lawyers and other professionals into change agents who force greater transparency, accountability, and fairness from criminal justice systems.[17]

To this end, the movement trains families and community members in gathering evidence; dealing with police, judges, and other court players;

---

15. The constitutional dimensions of the right to counsel in criminal cases, although beyond the scope of this analysis, render these concerns even more pressing. *See, e.g.*, Brief for A.B.A., as Amicus Curiae Supporting Petitioner at 7, McCoy v. Louisiana, 138 S. Ct. 53 (2017) (No. 16-8255) (connecting attorney ethical obligations to respect client autonomy to the Sixth Amendment right to counsel and quoting high court case law that the Constitution "'grants to the accused personally the right to make his defense,' because it is the defendant 'who suffers the consequences if the defense fails'"). *See also* Brief for Ten Law School Professors and the Ethics Bureau at Yale as Amici Curiae Supporting Petitioner at 11, McCoy v. Louisiana, 138 S .Ct. 53 (2017) (noting in case construing criminal defense attorney obligation to follow client direction that "[w]hile not every violation of the Rules of Professional Conduct has a constitutional dimension, the ethical failures in this case do. [The attorney] usurped Mr. McCoy's constitutionally guaranteed right to define the objectives of the representation.").

16. Jocelyn Simonson has situated participatory defense within a larger framework of grass-roots collective resistance to the carceral state. *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. UNIV. L. REV. 1609 (2017) (describing other examples such as court-watching, cop-watching, and community bail funds).

17. Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281 (2014).

making social biography videos; and other skills to best help their loved ones being charged. They also assist them to "work strategically" with overworked and under-resourced defense attorneys to ensure zealous advocacy in their family members' cases.[18] Finally, participatory defense also encourages people to connect individual cases to larger systemic problems in the criminal law system, including racial bias and over-incarceration. The movement has spread to a number of locations throughout the country and has had considerable success in reducing sentences, lowering charges, and raising awareness of over-criminalization.[19] Despite this, as discussed further below, public defenders have not always been as welcoming as one might expect.

A. Humanizing and Contextualizing the Accused

A central tenet of participatory defense is humanizing defendants and contextualizing their actions. As I noted earlier, this strategy should not be disruptive—juries and judges should consider those before them as individual people embedded in a community, who come to the criminal system with unique histories and potential for rehabilitation.[20] Unfortunately, our current system often does not allow for this, but instead, operates as an assembly line.[21] Humanizing individual accused people enables decision-makers and players in the system to understand the defendants and account for past trauma or other experiences that can

18. David Bornstein, *Guiding Families to a Fair Day in Court*, N.Y. TIMES (May 29, 2015), https://opinionator.blogs.nytimes.com/2015/05/29/guiding-poor-families-to-a-fair-day-in-court.

19. Albert Cobarrubias Project estimates 1,862 saved years of prison time by 2015 in the one location. *See* Jayadev, *supra* note 2; Jamilah King, *This Defense in Court Has Saved People 1,862 Years in Prison*, MIC (Dec. 21, 2015), https://mic.com/articles/130479/this-defense-in-court-has-saved-people-1-862-years-in-prison#.njMmPgZ3y ("[T]he method has been used for nearly nine years in Santa Clara County, and its fiercest supporters say that it's saved people more than 1,862 years in prisons and jails.").

20. This strategy has some doctrinal roots, at least for juveniles. The recent Supreme Court decisions in a trilogy of cases requires individualized consideration of a juvenile's culpability and potential rehabilitation, as well as the context of his family and environment, in certain sentencing contexts. *See* Miller v. Alabama, 567 U.S. 460 (2012). Scholars have persuasively argued that these cases have a broader import, that their "language, logic, and science" make possible "truly revolutionary changes in juvenile justice policy and practice." *See* Cara H. Drinan, *Miller Revolution*, 101 IOWA L. REV. 1787, 1789–90 (2016).

21. *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013).

help to explain their actions and shed light on culpability and appropriate punishment.[22]

Participatory defense trains family members and others to make "social biography" videos, depicting the daily life and community of accused people through workshops on topics such as "Effective Strategies for Telling Client's Story through Video." These videos force prosecutors, judges, and other decision-makers to look at defendants as individual people and not just numbers in a vast system. The videos also reveal those in the system to be multidimensional and more than just "bad acts." As one trial judge put it, these videos "humanize defendants, destroy [often racial] stereotypes, and leave [us] with a far better understanding of the persons standing before [us]."[23]

The videos have been very effective in individual cases. One defender noted that the court explicitly referenced the video in his client's sentencing:

> The client faced a guideline range of 91 to 120 months; the government recommended a guideline sentence, probation recommend four years and the Court imposed a sentence of six months incarceration that included 90 days of home detention. I have no doubt that the video . . . played a determinative role in that outcome.[24]

Another noted the video helped convince the prosecutor to agree to a lesser charge because "[the defendant] was no longer an anonymous person whose fate he was deciding. The video humanized her, and her family and I think [the prosecutor] couldn't help but be affected by it."[25]

These strategies also have an impact beyond any individual case. Humanizing the accused and their families highlights the real harm done to these people by harsh policies, such as mandatory minimum sentences.[26] Further, offering a life history that demonstrates the impact

---

22. One caveat: As I describe further below, sometimes the defendants' history of trauma can be used against them and result in more restrictive sentencing or monitoring. *See infra* notes 27, 46, & 47.

23. Moore et al., *supra* note 17, at 1286 (quoting *Social Biography Videos*, ALBERT COBARRUBIAS JUST. PROJECT (June 4, 2014), http://acjusticeproject.org/social-biography-vidoes/).

24. *We Beat a 10 Year Sentence in New York with a Social Biography Video!*, ALBERT COBARRUBIAS JUST. PROJECT (Jan. 27, 2015), https://acjusticeproject.org/2015/01/07/we-beat-a-10-year-sentence-in-new-york-by-sharing-a-family-story-through-video.

25. *Atlanta Public Defender Cuts a 25 Year Sentence to 3 With Use of Our Social Biography Video Process!*, ALBERT COBARRUBIAS JUST. PROJECT (Nov. 9, 2014), https://acjusticeproject.org/2014/11/09/atlanta-public-defender-cuts-a-25-year-sentence-to-3-with-use-of-our-social-biography-video-process.

26. Thanks are due to Jenny Roberts for this insight.

of mental illness, poverty, and foster care on people in the system emphasizes societal problems that begin in childhood and "demand[s] system responses that help heal the roots of their crimes [like trauma and poverty]... [and] chip away... at our system of mass incarceration."[27]

B. Recognizing "Lay" Expertise and Shifting Control

Other key, and more radical, tenets of participatory defense are expanding the notion of expertise to include laypeople, such as community members, and empowering accused people to truly exercise their autonomy and direct their cases. The community meetings and trainings often exclude attorneys, instead relying on peers and family members who have gone through the system themselves to train newcomers. As one proponent describes, "There are no lawyers in the room, but in many respects, that is the point. From a movement-building sensibility, the case outcome is not the only measuring stick, but also important is whether the process transformed someone's sense of power and agency."[28] Otherwise, old habits would continue with attorneys taking the lead as the "experts," and clients and their families relying on the attorneys rather than recognizing their collective "community intelligence" and taking matters into their own hands.[29]

In a fascinating extension of this redefinition of expertise, the movement has proffered community members as gang experts to counter police or other professional experts' testimony for the prosecution. For instance, in one case, "Julio" was charged with a potential life sentence crime for gang activity. Julio's family members did the following to advocate for his innocence and counter the standard narrative of gang activity in communities of color:

> Dissected and countered the gang packet that labeled Julio as a gang member
>
> Consistently met with attorney
>
> Offered community leaders who knew Julio and the community to counter the 'gang expert' produced by the District Attorney
>
> Assisted the attorney in creating a presentation to the District Attorney.[30]

---

27. *Protect Your People: A Public Defender's Reflection on Participatory Defense*, ALBERT COBARRUBIAS JUST. PROJECT (May 23, 2017), https://acjusticeproject.org/2017/05/23/protect-your-people-a-public-defenders-reflection-on-participatory-defense.

28. *See* Jayadev, *supra* note 2.

29. *See* Jayadev Interview, *supra* note 7.

30. *See* Jayadev, *supra* note 2.

As a result, the prosecutor dropped the charges, something that would likely not have been possible without the involvement of Julio's community via participatory defense.

Even more disruptive to current norms in the criminal law system is the movement's goal of shifting control within the attorney-client relationship to the client. Inspired both by the resource scarcity plaguing public defenders and by a model of grass-roots empowerment, participatory defense has always envisioned defenders as clients' allies, while aiming to transform the relationship to one of equals, rather than the attorney as giver and the client as passive recipient.[31] To this end, the movement aims to enable clients to direct their cases and participate in advocacy, making the families and community around the accused "an essential and effective part of the defense team."[32] They do so by serving as "lay-experts," as described above, performing investigations, and strategizing with the attorney and the accused about witnesses and defenses. In short, participatory defense is "not about the person receiving a better service, it [is] about becoming the agent of change themselves."[33]

Client autonomy is inherently connected to attorney performance. Rather than being passive recipients of public defenders' services, defendants and their families are advised to sometimes "push [their defense attorneys] if needed."[34] Defenders with their high caseloads and triage mindset may not return phone calls promptly or take the time to explain the process other than telling their clients to show up in court. The movement's organizers encourage people to demand more frequent and better communication, giving them specific tactics like copying an office supervisor on an email, that these marginalized communities may not have known were available to them. In this manner, the low-income clients churned through the criminal system are put on a more equal

31. Indeed, the attorney-client relationship is really something different than a partnership, as the clients in a criminal case are the holders of right to counsel, with the attorneys serving to implement that but having no standing on their own.

32. Pennington, *supra* note 11, at 604.

33. Raj Jayadev, *The Story of Participatory Defense*, SILICON VALLEY DE-BUG (May 22, 2015), http://archives.siliconvalleydebug.org/articles/2015/05/22/story-participatory-defense. Part of this is receiving better information and advocacy from defenders. *See, e.g.*, Maura Ewing, *How Prisoners' Family Members Can Assist Overworked Public Defenders*, THE ATLANTIC (July 5, 2017), https://www.theatlantic.com/politics/archive/2017/07/a-replacement-for-overworked-public-defenders/532476 (reporting one case where a mother involved in participatory defense was not receiving return phone calls from her son's defender and went to a supervisor to advocate for better communication). Founder Jayadev has noted both the lack of resources and the "indifferen[ce]" of some defenders. *See* Gray, *supra* note 4.

34. *See* Jayadev, *supra* note 2.

playing field with paying clients, who can vote with their wallets. As Moore, Sandys, and Jayadev theorize, "[t]hrough this productive tension [between attorneys and empowered clients and families], participatory defense presses to improve standards of attorney performance."[35]

This community monitoring of public defenders' practice is essential because numerous structural factors render them less accountable to their clients than most attorneys. Their clients are non-paying. Who pays the bills is not supposed to influence attorney practice, [36] but in reality, it sometimes does. Public defense clients are often incarcerated and have little access to phone or email to ask questions or issue directives. Those involved in the criminal legal system are also disproportionately less educated and have little access to political and other avenues of power. Many are juveniles, whose attorneys sometimes explicitly disregard their stated interests, or very young adults who are similar to juveniles in their unfamiliarity with the system and potential inability to easily assist in their own defense.[37] Overwhelming caseloads and scarce resources compound the barriers to effective attorney-client communication, which is essential to quality representation.[38]

---

35. Moore et al., *supra* note 17, at 1300.

36. MODEL RULES OF PROF'L CONDUCT r. 1.8 cmt. 11 (AM. BAR ASS'N 1983) ("Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.").

37. I have previously critiqued this Guardian Ad Litem representation model for representing juveniles as paternalistic and harmful. *See* Cynthia Godsoe, *All in the Family: Towards a New Representational Model for Parents and Children*, 24 GEO. J. LEGAL ETHICS 303 (2011). As to the latter concern, the Supreme Court recently acknowledged it in *Graham v. Florida*. 560 U.S. 48, 78 (2010) ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense.").

38. Moore et al., *supra* note 17, at 1296–97 ("For attorneys who strive to provide not merely constitutionally effective but high quality defense services, onerous workloads and fee caps create agonizing choices."). Scholars have described the complicated role and challenges to effective communication that public defenders face, which result in "grim expectations and experiences of [the] representation on the part of defendants and defenders alike." Janet Moore, Ellen Yaroshefsky & Andrew L.B. Davies, *Privileging Public Defense Research*, 69 MERCER L. REV. 769 (2018).

Effective assistance of counsel sets a very low bar, as do malpractice doctrines in most states.[39] There is little public will to change the quality of defense, or increase resources, based in part on the widespread feeling that people accused of crimes are largely deserving of punishment. Practically speaking, the main thing that indigent criminal defense clients, who comprise an estimated 80% of all criminal defendants,[40] can rely on for good representation is the attorney's personal ethics and zeal. This is often, but certainly not always, enough.

Participatory defense seeks to redress this imbalance by empowering defendants and their families to reach out to attorneys and become actively involved in their loved ones' cases. They encourage families to "seek a personal meeting with their attorney, something many families don't know they can do."[41] More broadly, trainings teach community members about how the criminal system works, what to expect in court, and connect newly charged people with others who have been through the system. This information flow allows the accused and other families, previously excluded from the "inside baseball" of the system, to better direct their cases, and hold their attorneys accountable for quality advocacy.

III. RISKS AND RESISTANCE TO CHANGE

In this Part, I recognize the reasons for hesitation by some defenders to adopt participatory defense. These include both concern over risks the

39. The bar for ineffective assistance set by the Supreme Court in *Strickland v. Washington* is notoriously low, finding to be effective attorneys who slept or were intoxicated during trials, or who failed to do the most rudimentary of investigations or client counseling. *See, e.g.*, David Cole, *Gideon v. Wainwright* AND *Strickland v. Washington*: BROKEN PROMISES, IN CRIMINAL PROCEDURE STORIES 101 (Carol S. Steiker ed., 2006) (arguing that *Strickland* essentially created a gross negligence standard given its significant deference to trial counsel decision-making, refusal to incorporate ethical practice guidelines, and focus on prejudice as a likely different outcome at trial). Indeed, numerous commentators argue that this low bar significantly erodes the right to counsel, particularly for indigent defendants. *See id.* at 102 ("If *Gideon* offers the promise of justice winning out over poverty, *Strickland* breaks that promise, allowing the forces of inequality to triumph as only the empty symbol of equality survives."). Malpractice is also an almost unachievable bar. In most jurisdictions, to succeed in a malpractice claim in a criminal case, a former client must show actual innocence or obtain exoneration of the criminal conviction by appeal or post-conviction relief. *See, e.g.*, Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex. 1995) (stating this requirement even where defense attorney violated the ethical rules or otherwise engaged in harmful misconduct).

40. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES (2000) (estimating that 82% of criminal defendants facing felony charges cannot afford to hire counsel).

41. Bornstein, *supra* note 18. As one defender pointed out to me, such a meeting is something some attorneys think of as too time-consuming, and may "blow off."

model presents, as well as territoriality and institutional inertia. I conclude that the benefits of participatory defense outweigh the costs for defenders, particularly since the ethics rules governing attorneys accord with the movement's central principles. Indeed, this practice shift is overdue because a holistic reading of the Model Rules of Professional Conduct (the Rules) suggests a model like participatory defense is ethically required.

Perhaps not surprisingly, given its focus on disrupting the static representation model, public defenders initially were not uniformly enthusiastic about participatory defense. As Jayadev explains, "At first, [they] weren't sure what to make of us."[42] Some were (understandably) concerned about adding to their already large workload and using up scarce resources. Others feared that it was "merely a watchdog group," which would scrutinize or even criticize their conduct.[43] Many were concerned, again, understandably, that the movement's tenets would compromise effective defense. Indeed, at every new site, the organizers continue to hear significant concern about risks. I will flag two here—the risk that disclosing too much information about the accused can backfire, and the risk that a client or his family will insist on strategies that will ultimately undercut his defense.[44] Finally, a less visible but, I suspect, still present reason for hesitation, is the resistance of public defenders' offices, like any institution, to change and particularly to ceding control to their clients.

A caveat is warranted; there is a huge range among public defenders, even within the same office. Each attorney brings personal perspectives, as well as prior experiences with clients or courts or community groups, and some will have varying levels of comfort with incorporating new people and elements into their practices. Some attorneys are more connected—by race, background, or living circumstances—to their clients.[45] Accordingly, even if the leadership of a particular office

42. This is not to minimize the potential problems with giving information to family members, such as confidentiality or privilege breaches, as well as conflicts. Pennington, *supra* note 11, at 611–12 (outlining some of these ethical pitfalls). None of these, however, are fatal to implementing the model.

43. Geoff Burkhart, *How to Improve Your Public Defense Office*, 31 CRIM. JUST. 56, 57 (2016).

44. There are also other disclosure risks. For instance, attorney-client privilege does not apply if third parties, including parents and other family members, are present during conversations. Accordingly, a prosecutor could subpoena a parent to testify to these conversations—something I think is ethically problematic, but permitted under the law. My thanks to Bruce Green for this insight.

45. To this end, Lopez encouraged progressive lawyers to live in the neighborhoods where their clients lived. *See* Gerald P. Lopez, *The Rebellious Idea of Lawyering Against Subordination* 187, 194–95, *in* LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A

endorses participatory defense, the organizers have to get buy-in from individual attorneys for it to work. Some may never embrace it, but the more widespread it becomes, the easier it becomes for new or even experienced attorneys to accept it as the norm.

First, the risks. Humanizing clients can have unintended punitive consequences. I have previously cautioned against an unquestioning presentation of a client's traumatic history.[46] Probation interviews with family members were one of the most difficult challenges I faced in practice, as a client's parent or sibling might unwittingly provide information about a young person's family history or substance abuse that would lead probation and other professionals to find them in need of more restrictive measures pending trial or after an adjudication.[47] Judges may find people in need of further incarceration for services, such as attending school or job training, mental health, or even for their own safety.[48] Presenting histories of trauma can also perpetuate negative community stereotypes about family dysfunction and substance abuse among groups disproportionately involved in the criminal law system, as well as harm client autonomy and dignity.[49] These risks are not fatal; the grass-roots structure of participatory defense may mitigate the last concern, and certainly humanizing people in the system should at least be considered in every case.

The second, and even more pressing, risk is that ceding more control to the client, and his or her family and community, will force the defender into strategies that might undercut the client's case. The participatory defense organizers hear plenty of concern about this in each location

---

CRITICAL READER (Susan D. Carle ed., 2005) (describing one public interest lawyer who lives in the neighborhood where she works, a predominantly low-income community of color, which "appears to make all the difference in the world" to her lawyering).

46. Cynthia Godsoe, *Balancing Client Dignity and Mitigation in Juvenile Defense* (draft on file with Author).

47. Or even deliberately—the scared straight approach still has surprising resonance despite the clear evidence that placing a young person in the juvenile or criminal justice systems does not end up helping them. *See* Bill Kilby, *Why Scaring Kids Out of Committing Crimes Doesn't Work*, VICE (Nov. 5, 2015), https://www.vice.com/en_us/arti cle/kwxxba/why-scaring-kids-out-of-committing-crimes-doesnt-work-1105 (citing studies reporting the ineffectiveness and possibly crimogenic effects of these studies, while noting that "localities and families around the nation continue to spend their own money terrifying young people about crime in spite of the evidence that it may cause more harm than it prevents").

48. I have previously criticized this punitive paternalism in the context of prostituted girls and young women. *See* Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313 (2015).

49. Godsoe, *supra* note 46 (quoting one defender describing the difficulty in "portraying our younger clients as victims of terrible upbringings while also respecting the dignity of their lives and their loving families").

where they work.[50] There are two aspects to this. First, the client may make unwise or self-defeating choices that the attorney will be bound to follow. Second, the client's wishes may be subsumed by the needs of his community or the movement. One example of this is the tension between individual case outcomes, such as pleading guilty for various personal and pragmatic reasons, and the movement's explicit focus on systemic change, which may entail challenging the police and prosecution at trial, potentially bringing a sentencing "trial penalty" to the defendant. These are real risks that must be considered and taken into account. What about the mother of a defendant who wants the probation officer or judge to understand how hard she has struggled to escape abuse and drug addiction, and the trauma her son has faced as a result?[51] Or the teenager who, encouraged by his community, wants to serve as an alibi witness for his brother, although doing so will expose him to a perjury prosecution and a violation of probation charge?[52]

Another less legitimate reason for hesitation by defenders is institutional resistance to change. Public defenders' offices, however radical amongst the bar and liberal compared to prosecutors' offices, are still bureaucratic institutions with the characteristic inertia and particular reluctance to cede power.[53] This is reflected in the tendency by some offices to be willing to incorporate the movement only if it could be shown to help their own practice—a version of "What's in it for me?" that seems inconsistent with principles of client autonomy and choice that underlie attorney ethics. [54] Inertia is a problem endemic to any large

---

50. *See* Jayadev Interview, *supra* note 7.

51. I have previously warned of the potential risks of revealing an accused's trauma; while mitigating in one sense, judges and other authorities often view it as evidence of greater risk and the need for more intrusive monitoring, treatment, or even incarceration. *See* Godsoe, *supra* note 46.

52. Both of these examples are based on cases I had. There are many more iterations of potential risks. To cite just one more example, what of the cousin, trying to help, who interviews a prosecution witness, which the witness interprets as coercive, and gives the prosecution an opening to argue witness tampering or intimidation. Thanks are due to Jenny Roberts for this example.

53. In his seminal account of the modern state, sociologist Max Weber described the bureaucratic organization as an "iron cage" confining people with its many rules and hierarchical relations of obedience and stifling innovation. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM xviii (1905). Because "organizational members favor[] self-continuity and fe[el] threatened by change," theorists have subsequently described bureaucracies as "poor at innovating or at embracing new ideas." ABY JAIN, USING THE LENS OF MAX WEBER'S THEORY OF BUREAUCRACY TO EXAMINE E-GOVERNMENT RESEARCH 2 (2004).

54. Ewing, *supra* note 33, at 4 (quoting one county chief public defender that acceptance can only come with showing defenders participatory defense is not just "another

office; tellingly, the supervisor of my division of eighty plus lawyers used to quote to us from "Who Moved My Cheese?," a business best-seller about overcoming resistance to change.[55]

Coupled with institutional resistance is many individuals' desire to hold on to privilege and hierarchy. Lawyers have advantages over even sophisticated or affluent clients, by virtue of their profession and education; the gap between defenders and their clients, who are low-income, disproportionately of color, and frequently marginalized in other ways, is vast. In his seminal critique of lawyers, Gerald Lopez recognized that even public interest or "progressive" lawyers are constrained by their privilege and the elitist norms of the profession that cast them as "heroes" to their helpless and incapable clients.[56] Lopez urged lawyers to learn about the lived experiences of their clients, and to recognize clients' and communities' value in achieving justice and social change.[57] His theory of rebellious lawyering has a lot of resonance with the participatory defense movement, although, it is still somewhat top-down, and driven by lawyers, as opposed to truly grass-roots from the community of lay people.[58]

Criminal defense attorneys are certainly not immune to privilege; indeed, the high stakes of these cases and disempowered position of their clients may render them particularly susceptible to thinking they know best and feeling like a "parent" to their clients.[59] Some attorneys' discussion of participatory defense suggests a hierarchical paradigm of

---

thing to do" but can help them better do their jobs). To be clear, this is an understandable reaction in a world of scarce resources and extremely limited time.

55. SPENCER JOHNSON, WHO MOVED MY CHEESE? (1998). The book sold 28 million copies worldwide and "became a publishing phenomenon and a workplace manual that preached how flexibility in the face of changing times will reward people." Richard Sandomir, *Spencer Johnson, 'Who Moved My Cheese?' Author Dies at 78*, N.Y. TIMES (July 7, 2017).

56. Lopez, *supra* note 12, at 13–24. *See also* E. Tammy Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 219 n.20 (2009) (building on Lopez's work and advising that "the rebellious call to reject lawyer-client hierarchy and to respect the cultural and communal factors that shape our lawyering remains important. Social justice lawyers must be vigilant against the creep of privilege (whether based on education, class, race, gender, sexuality, or language) and the temptation to dominate the client.").

57.. Lopez, *supra* note 12, at 24–26.

58. *See* Jayadev, *supra* note 2 (not allowing attorneys into the initial participatory defense meetings).

59. *See* Nicole Martorano Van Cleve, *Reinterpreting the Zealous Advocate*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 301, 304 (Levin & Mather eds., 2012) (quoting Chicago defense attorneys from an empirical study describing each other and themselves as "egotistical[ly]" making decisions about a case rather than seeking real input from a client, and as "fill[ing] a parental role" for "slow" clients).

the attorney-client relationship with the attorney on top. For instance, one bar leader specifies that the defendants, their families, and friends, "recognize they are *not* lawyers, but want to take an active role in their defense."[60] It is unclear what would happen if people did *not* recognize that they are not attorneys—would they challenge the attorney's decisions on tactics, or their perceived authority and expertise? Similarly, it is unclear why a watchdog organization, if participatory defense were limited to that, should be so threatening. I think some of the hesitation, and, again, I say this as a former defender myself, is best explained by territoriality and a desire (even subconscious) to hold onto privilege. Defenders, despite their underdog status representing individuals against the massive power of the state, are still "insiders" in the vast and complex criminal law bureaucracy.[61]

IV. SHAKING UP THE ATTORNEY-CLIENT RELATIONSHIP

Despite the initial hesitation, however, defenders have increasingly embraced the participatory defense movement. Some even proactively reach out to the movement, which is something its founders "never expected to happen."[62] The movement organizers addressed defenders' concerns about time by showing how participatory defense could in fact save time by harnessing family and community members into helpful members of the team and making them more educated and efficient consumers of attorney time and expertise. Also, the organizers were called upon to allay attorney's fears about the risks of this practice over and over, and they successfully did so by emphasizing that the risks of families interfering and harming the case will always be there, and that participatory defense in fact mitigates these risks by making families better informed and more strategic about their interactions with the criminal system players. Once these hurdles are overcome, and attorneys see how the movement helps them and their clients, it is more and more accepted. At the same time, it requires what Jayadev diplomatically

60. Burkhart, *supra* note 43, at 57 (emphasis added).

61. Jocelyn Simonson, *What is Community Justice?: Mama's Bailout Day and Other Bottom-Up Interventions in Everyday Justice*, N+1 (July 10, 2017), https://nplusonemag.com/online-only/online-only/what-is-community-justice/ (describing the system as "anti-democratic" in part because it "is run and maintained by privileged insiders: police, prosecutors, defense attorneys, judges"). *See also* Van Cleve, *supra* note 59, at 296 (describing the "central players who have an ability to affect case disposition" as a "courtroom working group", which exists in every criminal court and includes prosecutors, defense attorneys, judges, and bailiffs/court officers).

62. Jayadev Interview, *supra* note 7.

terms a "reorientation" of public defense practice and the attorney-client relationship more broadly.[63]

I argue here that this reorientation is overdue. Defenders should embrace the participatory defense model not only because it is effective and beneficial to both their clients and themselves as advocates, but also because it is consonant with the Rules, likely even ethically required. Specifically, the movement's vision of empowered and assertive defendants working with their counsel is consistent both with the spirit of zealous advocacy and the mandate of client autonomy embodied in the Rules, even if this ideal is not always translated into practice on-the-ground.[64] As the American Bar Association (ABA) recently declared, "[Its] policies governing the allocation of authority in [the] attorney-client relationship . . . [derive from the] principle . . . that the attorney is an assistant to the client."[65] Put another way, the client is in charge. The risks are real, but careful counseling and close adherence to confidentiality and conflict rules can help to manage them, facilitating effective defense along with community involvement and client autonomy.[66]

---

63. The range of criminal cases is too vast and varied to argue that this model, and particularly every strategy, is essential for every case. Nonetheless, I maintain that the tenets of client engagement, autonomy, and dignity underlying the participatory defense movement can effectively serve both clients and their attorneys in most cases.

64. The Rules are more useful for some practice contexts than others. *See* Leslie C. Levin & Lynn Mather, *supra* note 6, at 3 ("While there are continuities across fields, we also find that each practice area has its own particular norms and challenges, shaped not only by substantive, procedural, and ethical legal rules, but also by clients, practice organizations, economics, and culture."). Numerous scholars have called for more specialized rules to address certain types of practice, often beginning with the criminal field. *See, e.g.*, Bruce A. Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers*, 29 GEO. J. LEGAL ETHICS 527 (2016) (summarizing the arguments on both sides and concluding that attorneys in certain areas need more specialized guidance, whether via amended rules or other mechanisms). Despite scholars making such arguments for over twenty-five years, policymakers are reluctant to impinge upon the (now outdated) vision of a homogenous and unitary lawyering model. *See, e.g.*, David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1216 (1993) (persuasively arguing in the early 1990's that the "final death knell [had been sounded] for the traditional model of legal ethics" and arguing for more specialized and context-specific professional guidance). The only specialized Model Rules of Professional Conduct is Rule 3.8, for prosecutors.

65. ABA Amicus Brief, *supra* note 15, at 6.

66. An additional benefit to this model is the process-based advantages where people feel fairly treated and engaged in a system. Community engagement thus can give defenders' offices greater legitimacy within the communities they try to work with. *C.f.* Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117 (2000) (arguing that the manner in which disputes are handled affect participants' evaluation of the court system as well as perceptions of the fairness of outcomes).

A. Zeal

Zealously representing a client is a key attorney function, and nowhere is this more important than in criminal defense where the odds are so stacked against the mostly indigent defendants. Although much has been made of the move of the word *zeal* from the text of the rules to the comments, courts and scholars continue to emphasize its centrality to the lawyering role.[67] Most significantly, ABA ethics opinions emphasize that, although the wording of the obligation may have changed, zeal remains a key component of the attorney's role: "The Model Rules have supplanted 'zeal' with requirements of competence (Rule 1.8) and diligence (Rule 1.3), but the result [for attorney loyalty and advocacy] is the same."[68]

Zealous advocacy is particularly significant because it is connected to client dignity and autonomy. As renowned ethicist Monroe H. Freedman put it, zeal is the attorney's chief value, essential to the goal of enforcing the "basic rights that recognize and protect the dignity of the individual in a free society."[69] Dignity comes not only through advocacy, but also through the lawyer following the client's direction and empowering the client. This last part too often gets lost in the public defense world of overwhelming case volume, scant resources, and systemic inertia.

The participatory defense framework increases zeal and helps defenders do a better job in part by humanizing clients to their attorneys, as well as to other court players. Public interest lawyers can become overwhelmed by the tragedies of their clients' lives, seeing only deficits, rather than resilience, or losing sight of the individuals in the mass

67. *See, e.g.*, Bacon v. Mandell, 2012 U.S. Dist. LEXIS 132231 (D.N.J. Sept. 14, 2012) (emphasizing that "a lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"). *See also In re* Agola, 484 F. App'x 594 (2d Cir. 2012) ("[A] lawyer has a duty to represent his or her client 'zealously.'"); *In re* Welcome, 58 V.I. 604, 612–13 (V.I. 2013) (characterizing zeal and competence, as per Rule 1.3, as "among the most important ethical duties owed by a lawyer . . . to [his client] and to the legal profession itself"). As to scholarship, *see, e.g.*, Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006).

68. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 367 (1992); *see also* ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 411 (1998) (citing Rule 1.3 and its comment for "[t]he duties of a lawyer to be a competent, diligent, and zealous advocate for the interests of her clients.").

69. Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 467 (1992). *See also* Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 760–61 (1987) (defining client autonomy to include the "exercise of [the] capacity for choice").

system of injustice.[70] One defense attorney describes how making a social biography video for her client's sentencing also changed their relationship:

> Thinking through the story, the presentation, and the content we wanted for the video was invigorating and enlightening. I learned more about Jim, I gained respect and admiration for him. The people we interviewed, the most important people in Jim's life, grew to know us and respect us . . . . I learned a lot while making the video and representing my client in a new, creative way let me see my job a little bit differently too.[71]

B. Client Autonomy

An even bigger challenge for defenders is truly living up to the vision of an empowered client directing the representation. The difficulties in communicating with many clients, who may be incarcerated or face other barriers, coupled with the time and resource constraints of public defense offices, are formidable challenges to adequately informing and counseling clients to truly drive the case.[72] Moreover, allowing the accused and those around them to make choices, particularly about strategy and means, can implicate many of the risks flagged above. Yet, participatory defense, more than the run-of-the-mill defense practice, most fully embodies the attorney-client paradigm infusing the Rules. I discuss two Rules to illustrate my point.

It may seem odd to begin with Rule 1.14,[73] which governs the representation of clients with diminished capacity.[74] This rule applies to clients who have diminished capacity because they are minors or have a disability.[75] Let me be clear that I am *not* saying that all public defense clients are of diminished capacity.[76] Instead, I am using this Rule, which applies to minors, the elderly, and those with disabilities or other factors that render them not fully capable of directing representation, to

---

70. Godsoe, *supra* note 46 (discussing the seminal article by Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990)).

71. *South Carolina Attorney Reflects on Power of Making Social Biography Video!*, ALBERT COBARRUBIAS JUST. PROJECT (Jan. 29, 2015), https://acjusticeproject.org/2015/01/30/south-carolina-attorney-reflects-on-power-of-making-social-biography-video.

72. *See* discussion, *supra* note 24.

73. MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 1983).

74. *Id.*

75. *Id.*

76. Some are, of course, if they are minors, or sufficiently developmentally delayed, or mentally ill.

illustrate the extremely thick notion of client agency underlying the Rules. Rule 1.14 mandates that lawyers "shall, as far as reasonably possible, maintain a normal client-lawyer relationship" with clients of diminished capacity, continuing to take direction from them, even as to bad decisions.[77] Protective measures are only to be taken in extreme cases. The Comments to the Rule emphasize the importance of client decision-making and agency by referencing the fact that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight" in custody cases.[78] My experience representing children and young people reinforces this insight; with proper interviewing and counseling, even very young children can give clear opinions about their preferred outcomes and issues of importance to them.

Accordingly, the Rule strongly discourages paternalism, long a problem in criminal defense.[79] It emphasizes the decision-making abilities of even the very young or disabled, an ability that the lawyer must work to empower and adapt: "[T]he normal client-lawyer relationship [which also applies to those with diminished capacity] is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."[80] In other words, it takes time and skill on the lawyer's part to explain the court system and counsel clients of all types to help them reach decisions in their cases. But this is what lawyers must do, no matter how difficult it may be for clients who are frequently unavailable to meet, less educated, or unfamiliar with the law.

Rule 1.2 applies more broadly to lawyers representing all types of clients, and emphasizes the lawyer's obligation to follow the client's direction.[81] The Rule clearly puts the client in the driver's seat, beginning with the mandate that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."[82] Indeed, the Rule drafters specifically declined to adopt language which would give

77. MODEL RULES OF PROF'L CONDUCT r. 1.14(a) (AM. BAR ASS'N 1983).

78. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 1 (AM. BAR ASS'N 1983).

79. *See* Van Cleve, *supra* note 59 (describing defense attorneys reporting they take a "parental role" to advise their clients). For an early critique of attorney paternalism, see Monroe H. Freedman, *Lawyer Doesn't Always Know Best—The Client's Wishes Must Not Be Ignored Because of the Profession's Love Affair With Its Own Mysteries*, 7 HUM. RGTS. 28 (1978).

80. *Id.* This entails a robust view of client counseling. *See* Godsoe, *supra* note 46, at 12 (quoting Abbe Smith).

81. MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

82. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983).

blanket authority to attorneys to "determine the means" without mandating client consultation.[83] The Comments to Rule 1.2 elaborate further on this relationship, wherein the client has "the ultimate authority to determine the purposes to be served by legal representation," and note that lawyers usually defer to clients on such means, with questions as to the costs of representation (not a possibility in indigent defense) and concern for third parties who might be affected.[84]

I am confident most lawyers abide by the first part of the Rule 1.2 mandate, at least as to major decisions such as whether to plead guilty.[85] I am less confident, however, that all discuss other less obvious objectives with their clients,[86] and, particularly, strategize around the means. The Comment to Rule 1.2 implicitly encourages this, and undercuts the client direction and consultation mandated by the Rule itself, by reinforcing the notion of attorney expertise over the views of the interested party: "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters."[87] This

83. Brief for Ten Law School Professors and the Ethics Bureau at Yale, *supra* note 15, at 14 (interpreting this history to mean that the Rule requires that "the lawyer's strategic decisions must conform to the client's objectives").

84. MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 1 (AM. BAR ASS'N 1983).

85. Although the on-the-ground reality of "'meet-'em-and-plead-'em' norms" in many overworked and underfunded defender offices casts doubt on how meaningful and informed a choice the client has in some circumstances. *See* Moore et al., *supra* note 17, at 1281.

86. One example is relationships with family and community that would be disrupted by incarceration.

87. MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS'N 1983). Most courts construing the respective boundaries of client and attorney decision-making have been highly deferential to attorney expertise as to a wide swath of decisions deemed strategic. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 418 (1998) (stating that a lawyer usually has "full authority to manage the conduct of the trial."). *But see* Jones v. Barnes, 463 U.S. 745, 758–59 (1983) (Brennan, J., dissenting) (opining that "'the assistance of counsel' carries with it a right, personal to the defendant, to make [tactical decisions, such as which non-frivolous issues to raise on appeal], against the advice of counsel if he chooses," and noting that "the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant"). Moreover, the ABA and other attorney professional organizations have suggested that trial conduct is a more limited category. *See, e.g.*, NACDL Amicus Brief, *supra* note 15, at 8, 10 (characterizing the attorney decision-making realm as "plain-vanilla strategic decision[s]" and citing case law and practice standards to conclude that attorneys "may not demand that the defendant follow what counsel perceives as the desirable course because, ultimately, the defendant is entitled to make those fundamental trial decisions that are so critical to his fate"); ABA Amicus Brief, *supra* note 15, at 15–16 (outlining such decisions including "how to craft and respond to motions, . . . whether and how to conduct cross-examination, what jurors to accept or strike," etc.).

language is unusual in the Rules for positing what clients do, rather than what attorneys must or should do, and to what clients are entitled. It also stops short of prescribing any means to resolve such disagreements thus trying to provide much guidance to lawyers when disagreements over means arise.[88]

A case currently before the Supreme Court of the United States highlights the difficulties in drawing the line between client autonomy and attorney expertise. In *McCoy v. Louisiana*,[89] a capital case, the defendant's attorney admitted his client's guilt in court, despite the client's stated desire to claim his innocence.[90] Although this case seems clearer than many, in that it involved a decision arguably carved out by the Rule itself, the Louisiana Supreme Court affirmed the attorney's conduct as ethical, even required.[91] Ethics experts and attorney organizations including the ABA, however, have uniformly argued that the attorney overstepped his authority and reiterated the principles of client autonomy underlying attorney ethics, particularly in criminal cases. [92] At oral argument, the justices reportedly suggested they will agree with this latter interpretation. For instance, Justice Gorsuch questioned whether we can even "call it assistance of counsel . . . when a lawyer overrides [the client's] wishes."[93]

The Rule itself signals that client autonomy is particularly important in the high-stakes criminal defense context; the only specific example included is that a defense lawyer must "abide by a client's decision" whether to plead guilty, waive a jury trial, and testify or not.[94] Yet, the

88. *See also* Van Cleve, *supra* note 59, at 296 (describing Rule 1.2 as providing only "vague guidance" about decision-making). The Rules do permit an attorney to withdraw from a case if her disagreement with a client is "fundamental," but this standard is very high, particularly for court-appointed counsel such as public defenders. Accordingly, it does not provide much of a remedy.

89. 138 S. Ct. 53 (2017).

90. State v. McCoy, 218 So.3d 535, 549 (La. 2016).

91. *Id.* at 569.

92. Brief for Ten Law School Professors and the Ethics Bureau at Yale, *supra* note 15, at 12 (arguing, *inter alia*, that Rule 1.2 as well as the lawyer's role as a client's agent "reflect an underlying commitment to placing the defendant front and center, in control of his defense," while acknowledging that attorneys must and can make "forensic decisions" about strategy during the trial). *See also* Brief for NACDL, *supra* note 15, at 12 ("Defense counsel enjoy latitude regarding certain trial tactics. Such discretion, however, may not overcome the fundamental rights of the accused."); Brief for ABA, *supra* note 15, at 7 ("The attorney, as an assistant, is obliged to respect the client's autonomy to make fundamental decisions about his or her case.").

93. *See, e.g.*, Adam Liptak, *Supreme Court Skeptical of Lawyer's Conduct in Death Penalty Case*, N.Y. TIMES (Jan. 17, 2018).

94. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983).

practice reality for most defense attorneys, the public defenders representing indigent clients, likely render it more difficult for them to meaningfully follow client direction outside of this iconic triad of choices. Their immense caseloads, coupled with the presumption of being the sole bearer of expertise in the legal system, can lead defenders to overlook the value of an accused person and his community to defense strategy.

Indeed, ethics scholars have recognized how practice context may greatly influence compliance with Rule 1.2. Ann Southworth describes how public defenders with many, many clients "may struggle to reconcile a duty to abide by a client's decisions concerning the objectives of the representation with the realities of a severely underfunded criminal justice system in which many clients are impaired by addiction and/or mental illness." She contrasts public defenders with lawyers working for corporations who "hardly need to be reminded . . . to defer on aspects of their interactions not squarely within lawyers' primary areas of expertise."[95] In short, it is far easier for attorneys with paying clients and ample resources to implement client autonomy.

An anti-paternalistic world view lies at the heart of the participatory defense movement. The movement's core aim is to challenge the dominant practice framework of a largely passive criminal defense client outlined above. By explicitly *not* deferring to the professional elite, challenging the status quo, and positing a novel view of expertise, participatory defense directly takes on the means question that the Rules leave ambiguous. Accordingly, disagreements over strategies and tactics will not just sometimes arise in this context; rather, they are virtually inevitable. Defenders who embrace this model—and I argue here that they should—have to come up with a more coherent approach to disputes over means and strategies than the Rules provide.

What could this look like? There are numerous possible scenarios, but let us assume the dispute is not over an issue that the attorney knows is a sure loser. Instead, it centers on a strategy about which the attorney may know more in the aggregate, such as putting on certain witnesses or arguing certain defenses, but about which a particular defendant may have more insight into his own case and certainly cares more.[96] This is a tricky area for attorneys who must give clients an accurate sense of the risks and benefits and advise clients against well-intentioned choices that can harm their case.

---

95. *See* Ann Southworth, *Our Fragmented Profession*, 30 GEO. J. LEGAL ETHICS 431, 437 (2017).

96. *See supra* note 87 (outlining ABA and NACDL description of attorney sphere of very technical strategic decisions, but noting that even these decisions can only be made after consultation with the client).

At the end of the day, however, I argue that these remain the client's choices. The anti-paternalism principle embodied in the Rules outweighs the typical deference clients may afford attorneys over means questions. Counseling is essential to ensure that a client makes informed choices with awareness of the risks. This sometimes entails very heavy-handed counseling; an attorney should pull out all the stops when he believes that a client's choices risk serious consequences, such as conviction or incarceration, that may otherwise be avoidable. In my experience, and in the much more robust experience of criminal defense clinical teachers and supervisors, this almost always works.[97] For instance, one long-time public defender supervisor noted that careful client interviewing and counseling have resulted in his staff of attorneys "getting the client on board with whatever we are going to do. I can't think of an episode where we have [not come to agreement over strategy]."[98]

Let us return to our two case examples. A mother who wants to tell the judge or probation officer her story and the trauma her son has experienced could be informed about the risks of this information sharing, both for her and her son. It is important for the defender to also remind the mother that, although she is an important and respected member of the defense team, her son is the client, and it is ultimately up to him to decide what information is shared. The attorney often will need to meet with the family members separately to preserve client confidentiality and ensure that the client is free of undue influence and really comprehends the risks and benefits of various strategies. Finding other ways for the mother to feel heard, for instance talking to the defender and other members of his office, such as social workers, will also go a long way towards alleviating the desire or need to "spill the beans." In her conversations with authorities, such as the probation officer, the mother can be encouraged to focus on the resilience that she and her son have demonstrated to deter criminal system officials who sometimes treat paternalistically defendants and families struggling with poverty, addiction, and other similar issues.[99] Finally, referrals to services that

97. *See, e.g.*, Abbe Smith, *"I Ain't Taking No Plea:" The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 26 (2007) (reporting also that she "seldom worr[ies] about exerting too much pressure . . . [and] worr[ies] instead about failing to exert enough").

98. *See* Godsoe, *supra* note 46, at 12 (quoting a longtime public defender supervisor).

99. These families are disproportionately involved in the criminal system for a variety of reasons, including the lack of a social safety net, but the façade of individual culpability and choice continues to permeate prosecutorial, judicial, and other decision-making.

can support her, her son, and the rest of their family are an essential part of a holistic defense practice.[100]

The second case of the teenager (the defender's client in another case), who wants to serve as an untruthful witness for his brother, despite the fact that doing so potentially exposes him to liability for perjury and a probation violation, requires even more delicate handling. The client is being pressured by his family to help his brother, and the youth also wants to help out of loyalty. The attorney's job, however, is to best counsel the client as to his own choices and to minimize risk to that client. Here, that means meeting with the boy separately and using strong-arm tactics—what criminal defense expert Abbe Smith describes as "pestering and 'hocking,' bullying and manipulation," to convince him that he should not perjure himself and take these risks.[101] It is often useful to bring in another attorney, particularly a more senior one, to give the client this advice as well, in case the client feels that his own attorney is exaggerating. The teen's attorney could also try to meet with the family and community members pressuring the boy, as well as the brother's attorney, to convince them of the seriousness of the consequences should the teen testify falsely for his brother.

Although in these cases my colleagues and I were able in the end to get to an agreement with clients and their families, there may be cases where, even after counseling, the client still wants to pursue a different path than the attorney. In such cases, the attorney must do his best to help the client take those steps. Fortunately, this should rarely happen when defenders are adequately trained and given sufficient time and other resources to interview and counsel clients and their family and community members.

V. CONCLUSION

Participatory defense is a promising new model to reduce over-criminalization, both on an individual and systemic level. It also enables overburdened defenders to satisfy their ethical mandates and best fulfill the accused's right to counsel. Ceding control over strategy and expertise is not always easy; in fact, it is counterintuitive to the way many attorneys, perhaps particularly public defenders with crushing caseloads and non-paying clients, generally operate.

---

100. Part of a defender's job is to find services that are not connected to the juvenile or criminal law systems, ones that do not bring the same surveillance. This is an extremely difficult task, but essential to keep defendants and their families out of the system as much as possible.

101. Smith, *supra* note 97, at 24.

Of course, many more things need to change to address the problems with our criminal law system; we need bail reform, fewer arrests, services instead of knee-jerk incarceration, to name just a few. Nonetheless, the culture and strategy of public defense is very important to any systemic reform.[102] Participatory defense is doing some real work in this regard. In the decade since its inception, organizers have already seen "massive change" in the practice as defenders become more inclusive and "look beyond the four corners of a case" to engage with the client and his family, as well as with the community more broadly, for systemic change.[103] Overcoming power imbalances within the lawyer-client relationship itself, as well as within the criminal law system itself, is essential to truly transforming the structural inequities that perpetuate our racialized criminal legal system.

****

As this Essay was going to press, the Supreme Court issued its decision in *McCoy v. Louisiana*, with the majority holding that the lawyer's admission of a defendant's guilt over the defendant's objection was structural error necessitating a new trial.[104] Although I wish it had gone even further in endorsing the human dignity of defendants, an issue raised at oral argument, Justice Ginsburg's opinion does declare a robust view of client autonomy, even the autonomy to make what may seem like unreasonable or self-defeating choices: "Here. . . the violation of McCoy's

102. Other scholars have looked to defender culture and institutions as a means to broad reforms, for instance Jenny Roberts powerfully argues that defenders should "crash the system" by refusing to quickly plead out their clients. *See* Roberts, *supra* note 21, at 1131 ("[R]efusing to process individuals quickly through the lower criminal courts will impose some of the real cost of mass misdemeanor processing on that system . . . [which] would grind to a halt under its own weight."). Other scholars have argued that the right to counsel (*Gideon*) has done little, and can do little, to accomplish systemic change. *See, e.g.*, Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2178, 2195 (2013) (arguing that the most serious problem with the criminal system is that it targets and punishes poor, usually of color, people, a dynamic the right to counsel does not address, and in fact "bears some responsibility for legitimating . . . and diffusing political resistance to" and noting that the real problem is not "about the right to a lawyer in a criminal case . . . [but rather about] the kind of conduct that gets defined as crime, the racialized exercise of police discretion, or why punishment is the state's central intervention for African-American men"). These arguments are persuasive, but counsel can still make a difference in individual cases, as Butler acknowledges. Moreover, on a systemic level, defenders working within a participatory defense model can become part of a communal effort which helps to erode the individualistic "diffus[ion] of solidarity" the American rights-based discourse and system creates. *Id.* at 2196.

103. Jayadev Interview, *supra* note 7.

104. 584 U.S. __ (May 14, 2018)..

protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative [i.e. the admission of guilt]." Citing Rule 1.2, the opinion dismisses the dissenters' argument that a client either cedes control to the expert, his attorney, or can appear pro se—"the choice is not all or nothing. To gain assistance, a defendant need not surrender control entirely to counsel." This important decision further strengthens the mission of participatory defense, and should bolster efforts by public defenders to empower the defendants they represent as people with their own agency, community, and voice.