

## MAKE THEM HEAR YOU: PARTICIPATORY DEFENSE AND THE STRUGGLE FOR CRIMINAL JUSTICE REFORM\*

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### I. INTRODUCTION

This article introduces participatory defense as a powerful new model for reforming public defense and challenging mass incarceration. 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. Participatory defense 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.

As a grassroots response to the public defense crisis, participatory defense offers new insights and perspectives that are unavailable through reform models described as client-centered, holistic, and community-oriented.<sup>1</sup> To be sure, when those models are supported with adequate resources for implementation, they can dramatically improve the “meet-’em-and-plead-’em” norms that infect many overloaded, underfunded public defense systems.<sup>2</sup> Nevertheless,

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<sup>1</sup> See, e.g., Community Oriented Defender. (2010). *Statement of principles*. New York, NY: Brennan Center for Justice. Retrieved from <https://www.brennancenter.org/analysis/community-oriented-defender-cod-statement-principles>; Lee, C. G., Ostrom, B. J., & Kleiman, M. (2015). The measure of good lawyering: Evaluating holistic defense in practice. *Albany Law Review*, 78, 1215–1238.

<sup>2</sup> See, e.g., *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

participatory defense examines justice systems from a different set of perspectives—from the perspectives of the people who are facing charges, their loved ones, and their communities.

Part II introduces the principles and goals of the participatory defense movement. Parts III through VI analyze participatory defense from doctrinal, theoretical, and empirical perspectives. Part III connects participatory defense with the crisis-ridden constitutional history of the right to counsel, and with that doctrine's deep roots in the due process right to be *heard*. Part IV frames participatory defense within a democracy-enhancing theory of criminal justice. This approach emphasizes equality in the generation and administration of the governing law, and pairs effective self-governance with a shrinking carceral state. Part V applies these insights to recent reform litigation and policy advocacy, arguing that reformers should invoke due process and use new evidence of system failure that is exposed by the participatory defense movement. Part VI offers additional ways to obtain that evidence through rights-information and satisfaction-feedback tools.

## II. PARTICIPATORY DEFENSE: COMMUNITY ORGANIZING FOR REFORM

Participatory defense is a powerful community organizing model for people who face criminal charges as well as for their families and their communities. The term was coined by Raj Jayadev, a coauthor of this article, and describes a collective, grassroots effort begun in 2007 to improve public defense and check the spread of mass incarceration. The movement's success has led Jayadev to train defenders and communities around the country on its core principles and strategies, with the goal of embedding the approach into a national, reform-oriented culture. This article aims to spread the message while offering doctrinal, theoretical, and empirical analysis of this new approach to justice reform.

The first step of the participatory defense movement is for people who face criminal charges, their families, and their communities to transform themselves from service recipients to change agents. As discussed below in Parts II.A–C, they do so through three forms of mutual support. The first form of support is the family justice hub, where community members guide and coach each other through the stress, confusion, and frustration of confronting criminal charges. The second form of support changes “time served to time saved” as community members help defenders obtain the best possible outcome in specific cases. The third form of support is public

protest and celebrations, through which community members expose systemic flaws, force systemic change, and honor transformational successes.

These core principles and strategies of participatory defense are an evolution in public defense. They allow people facing charges, their families, and their communities to reciprocate and strengthen efforts of client-centered, holistic, and community-oriented defenders. They do so in two interrelated ways. First, participatory defense shifts the focus more fully from the agency of lawyers and other professionals to the agency of people and communities harmed most directly by the public defense crisis. Second, participatory defense offers a broader set of goals.

Participatory defense aims to rebalance power disparities in criminal justice systems. The movement forces greater transparency, accountability, and fairness from those systems for the people who have disproportionately high system contact, but disproportionately little voice in system creation and administration. Pivoting perspective on the identity of systems changers and what they can do—empowering the millions who face prison or jail each day along with their families and their communities through participatory defense—can transform people from fodder being fed into the criminal justice machine into change agents fated to bring the era of mass incarceration to its rightful end.

#### A. *Family Justice Hubs*

The best way to understand participatory defense is to participate. Opportunities arise each week during family justice hub meetings. These meetings occur at community centers and churches, and are coordinated through the Albert Cobarrubias Justice Project of Silicon Valley De-Bug in San Jose, California. De-Bug is a cutting-edge collaborative through which people use media, entrepreneurship, and politically-savvy advocacy to improve lives, strengthen communities, and promote justice reform.<sup>3</sup>

On entering a De-Bug family justice hub meeting, you might see thirteen-year-old Tony sitting shyly at the edge of a conference table next to his mother. Tony was just released after ninety-nine days in

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<sup>3</sup> De-Bug was engaged with the meetings and family organizing for several years when, in 2010, one of their members, Albert Cobarrubias, was killed in a random act of violence. De-Bug named the project after Albert so he would be present in each step forward toward greater justice.

juvenile hall. He responds respectfully to the “congratulations” and “welcome homes” directed to him from strangers around the table. Although these supporters have never met Tony, they know him through his mother’s stories and from seeing his name on the family justice hub whiteboard.

These meetings connect families whose loved ones are facing criminal charges. Tony is participating in the first of several ceremonies that were created by and are distinctive to the participatory defense movement. When a family brings a loved one home by helping defense lawyers obtain dismissals, acquittals, or a reduced sentence, the loved ones erase their names from the whiteboard.

The crowd of twenty people breaks into applause when Tony takes the eraser to his name. Tony’s mother thanks the community who walked with her and her son through the darkest ninety-nine days of their lives. She is in tears. Tony was facing years of incarceration, but due to her advocacy and the public defender’s lawyering, her son will be able to have his fourteenth birthday at home.

If tradition holds, Tony’s mother will continue attending the family justice hub meetings. She will help other families who find themselves in the frightening, stressful, and confusing position she once occupied. She will share with them what she learned from others in the participatory defense movement.

There is tremendous power in bringing a community organizing ethos to the otherwise deeply isolating experience of facing charges in a criminal or juvenile courtroom. The family justice hub meetings are now facilitated by people who first came for their own cases or cases involving their loved ones. The process has transformed volunteers like Gail Noble and Blanca Bosquez. Once isolated, anguished mothers who felt forced to sit idly as their sons were chewed up by the courts, Gail and Blanca are now vocal advocates who encourage other families and help them navigate daunting, complicated court processes. They travel and train communities across the country, speaking as both mothers and organizers who have learned the power and possibility of participatory defense.

In light of those developments, it is important to emphasize that the participatory defense movement has never conducted outreach to drum up attendance at the family justice hub meetings. People usually hear about the meetings from other families, often when they are visiting their loved ones at the local jail. There is a

common yearning among these families for support and help navigating criminal justice systems. They also share an inclination for discovering ways to help change the outcome of their loved one's case.

It also is important to emphasize that family justice hub meetings are not legal clinics. There are no lawyers in the room. In many respects, that is the point of this new reform model. From a movement-building perspective, the case outcome is not the only measuring stick. Instead, it is equally or even more important that the process transform each participant's sense of power and agency.

For this reason, the participatory defense movement shuns the word "client." That label reduces people into recipients of services, actions, or change provided or caused by another. In the participatory defense model, the key actors responsible for creating change are the people who face charges, along with their families and their communities. Therefore, when families first enter a justice hub meeting, they hear a consistent refrain. While the system intends to give their loved ones time served—that is, time incarcerated and away from family and community—they can turn time served into time saved. Participatory defense empowers families and communities to bring their loved ones and neighbors home.

Through the family justice hubs, participatory defense is therefore a pay-it-forward training for families and communities in how best to partner with or push the lawyers appointed to defend their loved ones. Participants learn to dissect, use, and challenge information in police reports and court transcripts. They learn to create social biography videos and use other media to obtain fairer and more productive case outcomes. They learn to engage in effective public protests that secure new resources for defenders facing overwhelming caseloads. Most importantly, they learn to build a sustained community presence in the courtroom to let judges and prosecutors know the person facing charges is not alone.

### *B. From Time Served to Time Saved*

As incarceration rates balloon to astronomical levels, with one out of every 100 adult Americans locked up,<sup>4</sup> participatory defense may

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<sup>4</sup> See Badger, E. (2014, April 30). The meteoric, costly and unprecedented rise of incarceration in America. *Washington Post*. Retrieved from <http://www.washingtonpost.com/bl ogs/wonkblog/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/>.

be the most productive way for affected communities to challenge mass incarceration and have the movement-building dynamic of seeing timely and locally relevant results of their efforts. Participatory defense penetrates the one domain that facilitates people going to prisons and jails, yet has been left largely unexplored by the movement to end mass incarceration. That domain is the courtroom. Participatory defense knows that there are Tonys across the country waiting to come home and communities that, if equipped with the necessary knowledge, skills, and strategies, can intervene in the courtroom domain to bring each Tony home.

Therefore, participatory defense uses strategies that are accessible to the people who are most directly affected by criminal justice systems. Social biography videos are an excellent example. Sometimes called mitigation videos, these films are a practical advocacy method that families and communities use to bring their loved ones home from court. These films vividly tell the life history of the person facing criminal charges. The videos can be made quickly and inexpensively. As demonstrated by accolades from judges and attorneys alike, they have helped to improve outcomes at every stage of the criminal process, from pretrial release through plea negotiations and sentencing.

Indeed, social biography videos allow families to avoid a regret that too often plagues them after sentencing. The common refrain that De-Bug organizers hear from families at that point is not “I wish this never happened,” but “I wish they knew him like we know him.” Social biography videos also address limitations that judges face when deciding another’s fate. Instead of freezing a person in the static moment of a charged offense, social biography videos show the dynamic lives of loved ones who have a past, a future, and the potential for change, redemption, and transformation like anyone else.

Thus, in the words of one trial court judge, the videos “humanize defendants, destroy stereotypes, and leave judges with a far better understanding of the persons standing before them.”<sup>5</sup> Gideon Project founder and MacArthur “Genius Grant” winner Jon Rapping<sup>6</sup> describes the additional, structural-reform potential contained in these videos. According to Rapping, the videos

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<sup>5</sup> Albert Cobarrubias Justice Project. (2014, June 4). *Social biography videos*. Retrieved from <http://acjusticeproject.org/social-biography-videos/>.

<sup>6</sup> MacArthur Fellows Program. (2014, September 17). *Jonathan Rapping*. Retrieved from <http://www.macfound.org/fellows/925/>.

mobilize an “army of advocates with a new tool to fight back against a system that has become complacent about processing people because it sees them . . . only as the crime with which they are accused.”<sup>7</sup>

The tangible impact of family and community participation on case outcomes is undeniable. The participatory defense model has led to acquittals, charges dismissed and reduced, and prison terms changed to rehabilitation programs. Even life sentences have been taken off the table. The movement recently celebrated a new benchmark by tallying the total transformation of “time served to time saved.” The tally compares the original maximum sentencing exposure faced by people charged with criminal offenses to the result after family and community intervention through the participatory defense model. The tally shows that, in just seven years, the movement has obtained over 1800 years of time saved.

These numbers indicate that participatory defense can create a new partnership of community and defender and be a real game-changer nationally. Eight out of ten of the roughly 2.5 million people currently incarcerated are eligible to receive public defense representation.<sup>8</sup> Improving public defense is arguably the least discussed, yet most promising, way to challenge mass incarceration. To that end, it is important to emphasize that participatory defense invariably finds ways for families and communities to partner with public defenders, or to push those lawyers if needed. Therefore, a third critical strategy of participatory defense pairs community action to promote system-wide reform through public protest and other advocacy with subsequent public celebration of shared successes.

### *C. Protest and Celebration*

Participatory defense holds criminal justice agencies accountable for their acts and omissions. For example, Gail Noble and her seventeen-year-old son Karim challenged both a defense lawyer’s failure to investigate and use available evidence of innocence and a judge’s racist assumptions that Karim’s summer job was “probably selling drugs.”<sup>9</sup> For Ms. Noble and her son, regardless of the

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<sup>7</sup> Albert Cobarrubias Justice Project, *supra* note 5.

<sup>8</sup> Harlow, C. W. (2000). *Defense counsel in criminal cases: Bureau of Justice Statistics special report*. Office of Justice Programs; U.S. Department of Justice, NCJ 179023.

<sup>9</sup> Noble, G. (2011, July 16). Standing up to the court. *Albert Cobarrubias Justice Project*. Retrieved from <http://acjusticeproject.org/keycases/standing-up-to-a-racist-court/>; *see also*

ultimate outcome “it was important to get all the issues my son had on record and for us to feel that we could speak and say something, instead of just allowing the racist behavior of the courts to continue, unchecked.”<sup>10</sup>

The participatory defense movement also has used public protest to spur systemic change. When the community learned that misdemeanor defendants were entitled to representation at arraignment, they met with the local defender leadership about the failure to provide that representation. When defender leadership explained that the office lacked resources to provide lawyers at arraignment, the community engaged in productive policy advocacy and joined forces with the local civil rights community to increase pressure for change. As a result, local authorities increased funding to provide the necessary representation.<sup>11</sup>

Finally, participatory defense celebrates success. For example, the Time Saved media project focuses on changing the negative narrative of the defender-community relationship. In fact, defenders often have the best justice success stories that the public never hears. De-Bug’s Time Saved documentaries tell those stories, as do the project’s public art works depicting time-served-to-time-saved transformations. Another major celebration was the Time Saved 1800 party, which gathered defenders and the community to thank one another for the years and lives saved through participatory defense.<sup>12</sup>

#### *D. Participatory Defense as a New Paradigm*

Many public defenders understand that the current moment offers historic opportunities for reform. Many are experiencing a shift of consciousness regarding the evolution of defense representation. They know that improving public defense is a

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Jayadev, R. (2008, January 16). Tales from a trial. *Metroactive*. Retrieved from <http://www.metroactive.com/metro/01.16.08/cover-0803.html>.

<sup>10</sup> See Noble, *supra* note 9.

<sup>11</sup> See Albert Cobarrubias Justice Project. (2012, January 30). *Santa Clara County courts: Now providing legal representation in misdemeanor court to anyone who can’t afford their own*. Retrieved from <http://acjusticeproject.org/2012/01/30/santa-clara-county-courts-now-providing-legal-representation-in-misdemeanor-court-to-anyone-who-cant-afford-their-own/>.

<sup>12</sup> Kaplan, T. (2014, December 18). Bay Area public defenders speak out for justice. *San Jose Mercury News*. Retrieved from [http://www.mercurynews.com/crime-courts/ci\\_27163533/bay-area-public-defenders-speak-out-justice](http://www.mercurynews.com/crime-courts/ci_27163533/bay-area-public-defenders-speak-out-justice). For coverage of the celebration, see Albert Cobarrubias Justice Project. (2014, December 20). *Video and media coverage of the Time Saved party: Celebrating 1862 years saved from incarceration!* Retrieved from <http://acjusticeproject.org/2014/12/20/photos-and-media-of-the-time-saved-party-celebrating-1862-years-saved-from-incarceration/>.

bigger task than they can tackle on their own. Limiting the discussion of criminal justice reform to lawyers is like leaving resolution of the health care crisis solely to doctors. Defenders are therefore seeking new strategies and new allies. Participatory defense offers both.

Evidence of this changing defender ethos includes the recent collaboration of several defender offices into a national Community Oriented Defenders Network. In this network, over 100 offices are sharing new approaches that challenge the status quo of indigent defense. In New York, the Neighborhood Defender Service of Harlem and the Bronx Defenders are practicing holistic defense, attacking the contextual issues of poverty that often force people into criminal justice systems. In the South, Gideon's Promise is giving elite training to defenders to face some of the toughest courts in the country. In California, the Alameda County Public Defender is now providing representation in immigration court, and the San Francisco office has launched a system-wide study of how racial discrimination plays out in the courts. Such programs are historically unprecedented approaches to public defense in that state.

But as forward-thinking as these developments are, they still focus on the question of what more lawyers can do instead of empowering those whom the lawyers represent to be change agents in their own right. Participatory defense can trigger exponentially greater change—indeed, a cataclysmic shake-up of the criminal justice system—by adding a huge number of strong new voices to the criminal justice reform movement.

Partnerships between defenders, on one hand, and people who are facing charges as well as their loved ones and communities, on the other, are powerful levers for opening up criminal justice systems and getting a good hard look under the hood. Community power can flex that lever to fix broken policies—whether those policies involve wrongful charging practices, mandatory sentences, or ensuring that defenders have the resources to do what the community needs them to do in order to bring their loved ones home.

All across the country, the infrastructure and organizing IQ necessary to practice and expand participatory defense already exists and is waiting to be tapped. Participatory defense can animate and challenge communities to step deeper into court processes that many thought were only the province of lawyers. In fact, the most effective participatory defenders may not necessarily

be those familiar with the criminal justice system, but the broader pool of community stakeholders. Thus, family justice hub meetings in San Jose are not held at a criminal justice reform organization, but rather at a church and a youth media center.

This broad network reflects the core question that drives the participatory defense movement: Who do people turn to, confide in, or call for solace when they learn they are facing a court case? Is it their family, their temple, the neighborhood association, the community organization at the corner block, their union? Any community touchstone can be a family justice hub simply by advocating for their loved one throughout the lifespan of the adjudication process. That same communicative action simultaneously and dramatically increases the number of people in the movement to challenge mass incarceration.<sup>13</sup>

Thus, preexisting community anchors already exist and often are already aware of their capacities for leveraging collective power to challenge powerful institutions that are injuring their congregant, neighbor, friend, or loved one. In marginalized communities, this is how schools get fixed, police agencies are held to account, and neighborhoods obtain investments of new resources. Participatory defense encourages community organizing intelligence and strength to penetrate and transform local court systems.

As you read this article, there are parents around the country sitting steadfast on courtroom back benches in solidarity with their children as they face a hearing. There are church pastors writing letters to judges to reduce an impending sentence. Such initiatives show the ubiquitous potential of participatory defense. If these actions are reimagined as part and parcel of a larger, named practice rather than isolated responses, then a more profound, sustained reshaping of the criminal justice system can occur—fueled by the people and communities most directly affected by crime and mass incarceration.

Consider the maturation of community-oriented defense. The first gathering of public defenders under this umbrella ten years ago had only eight participating offices. Over 100 offices were represented at the most recent gathering. Public defenders practiced community-oriented lawyering before they heard the term. Giving the practice a name promoted its growth and development.

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<sup>13</sup> Cf. Moore, J. (2014). Democracy enhancement in criminal law and procedure. *Utah Law Review*, 2014(3), 543–612, at 570–572.

In the same way, it is important not to freeze participatory defense as a static invention or program. Instead, participatory defense simply names an inclination that already exists in communities across the country as a way to advance its potency and impact. There is a forward-moving power in naming an impulse. As discussed in Part III, naming and claiming the justice-seeking impulse of participatory defense helps to locate the movement as one of several grassroots efforts that have shaped the historical development of right to counsel legal doctrine. More specifically, naming the impulse connects the movement closely with that doctrine's deep roots in the due process right to be *heard*.

### III. PARTICIPATORY DEFENSE, CONSTITUTIONAL CRISIS, AND THE DUE PROCESS RIGHT TO BE HEARD

Participatory defense is a logical response to the most recent phase of an ongoing public defense crisis.<sup>14</sup> People who face charges but cannot afford to hire lawyers comprise at least eighty percent of the criminal caseload in the United States.<sup>15</sup> The quality of public defense therefore has high salience in the best of circumstances. The current context is suboptimal. As indicated in Part II, defender systems are plagued with excessive workloads and underfunding. At the same time, the nation confronts the largest income and wealth gaps since the Gilded Age, increasingly insurmountable barriers to socioeconomic mobility, and record-breaking hyperincarceration patterns that disproportionately affect low-income people and people of color.<sup>16</sup>

In fact, the constitutional history of the indigent criminal defendant's right to counsel reveals that the right was born of a crisis in which it has remained enmired. The same history also reveals participatory defense to be the latest of several collective movements that have shaped the provision of defense services and, in turn, the content of the governing law. This phenomenon occurs as the Supreme Court gives a constitutional imprimatur to practices developed in the trenches by people who support and oppose the status quo operations of criminal justice systems.

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<sup>14</sup> See Moore, J. (2013). G forces: Gideon v. Wainwright and Matthew Adler's move beyond cost-benefit analysis. *Seattle Journal of Social Justice*, 11, 1025–1064, at 1026 n.4, 1058–1061 (discussing system failures).

<sup>15</sup> See Harlow, *supra* note 8.

<sup>16</sup> See Moore, J. (in press). Democracy enhancement and the Sixth Amendment right to choose. *William & Mary Bill of Rights Journal*, 24.

Those constitutional imprimaturs have invoked the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well as the Sixth Amendment “assistance of counsel” guarantee. The tangled doctrinal history traces to 1932, when *Powell v. Alabama*<sup>17</sup> was decided amid an increasingly international scandal over lynching in the United States.<sup>18</sup> Centrally at issue in *Powell* was the defendant’s due process right to be *heard*.<sup>19</sup>

*Powell* infamously involved nine young black men accused by two white women of the then-capital crime of rape.<sup>20</sup> The trial judge appointed the entire local bar to represent these young men, with the result that no attorney was individually accountable for any of their cases.<sup>21</sup> The Court described the resulting trials and death sentences as just shy of “judicial murder.”<sup>22</sup> The Court was otherwise circumspect about the highly-charged race, class, and gender identities at issue,<sup>23</sup> and about the battle between the Communist Party and the NAACP over control of the case.<sup>24</sup>

The Communists won that battle.<sup>25</sup> Party lawyers persuaded the Court to intervene in a previously sacrosanct sphere of state-controlled criminal procedure. *Powell* held that due process required appointment of counsel during the “critical period” of pretrial consultation and fact investigation, at least in capital cases with defendants who were young, illiterate, and far from home.<sup>26</sup>

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<sup>17</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>18</sup> Kelley, R. D. G. (1990). *Hammer and hoe: Alabama communists during the Great Depression*. Chapel Hill, NC: UNC Press, at 78–79; Carter, D. T. (1979). *Scottsboro: A tragedy of the American South*. Baton Rouge, LA: LSU Press, at 142–143.

<sup>19</sup> *Powell*, 287 U.S. at 57–58, 71.

<sup>20</sup> *Ibid.* at 64–65, 71. The youngest of the so-called Scottsboro Boys was 13; the eldest was 20. Klarman, M. J. (2006). *Powell v. Alabama: The Supreme Court confronts “legal lynchings.”* In C. B. Steiker (Ed.), *Criminal procedures stories* (pp. 1–44). New York, NY: Foundation Press/Thornton/West, at 1. The “boys” had names: Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery, Haywood Patterson, Charles Weems, Clarence Norris, Roy Wright, and Eugene Williams. Duru, N. J. (2004). The Central Park five, the Scottsboro boys, and the myth of the bestial black man. *Cardozo Law Review*, 25, 1315–1366, at 1320, 1334.

<sup>21</sup> *Powell*, 287 U.S. at 52–57.

<sup>22</sup> *Ibid.* at 72.

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

<sup>24</sup> Kelley, *supra* note 18, at 80–91; Colbert, D. L. (1990). Challenging the challenge: Thirteenth Amendment as a prohibition against the racial use of peremptory challenges. *Cornell Law Review*, 76, 1–128, at 81 & n.406 (citing Carter, *supra* note 18; McNeil, G. R. (1983). *Groundwork: Charles Hamilton Houston and the struggle for civil rights*. Philadelphia, PA: University of Pennsylvania Press, at 109–111, 119–121).

<sup>25</sup> Kelley, *supra* note 18, at 78–81 (discussing class-based tension between organizations and backlash against party for promoting racial equality, opposing lynching, and representing black defendants accused of rape); *see also* Colbert, *supra* note 24 (discussing tension and collaboration between organizations).

<sup>26</sup> *Powell*, 287 U.S. at 57–58, 71.

Thus, in the wake of public protest and legal battles over the injustice of the Scottsboro convictions, the *Powell* Court turned inward to emphasize the unique nature of the relationship between people facing charges and their lawyers, as well as the special role of the communication that occurs within that relationship.<sup>27</sup> Describing that relationship and communication as bearing the “inviolable character of the confessional,”<sup>28</sup> the Court reasoned that the due process right to counsel is the right to be *heard* by and through a dedicated advocate—one who bears the awesome responsibility of giving voice to another’s interests and concerns.<sup>29</sup> *Powell* held that relationship to be the necessary foundation for fulfilling counsel’s core duties to communicate, investigate, and advocate.<sup>30</sup> *Powell* further held that there is no substitute for that intersubjective work, including judicial oversight at trial.<sup>31</sup>

The *New York Times* praised *Powell* for soothing “the rancor of extreme radicals while confirming the faith of the American people in the . . . integrity of the courts.”<sup>32</sup> A deeply dissatisfied Communist Party begged to differ. The party pilloried the Court for issuing a how-to primer on legal lynching.<sup>33</sup> *Powell*’s holding was hardly radical. To the contrary, the Court gave a federal constitutional imprimatur to the broad national consensus mandating appointment of counsel in capital cases.<sup>34</sup> Michael Klarman further argues that the “quality of defense representation for indigent southern blacks did not significantly improve as a result of *Powell*” as the decision “len[t] legitimacy to a system that remained deeply oppressive.”<sup>35</sup>

Indeed, the Court has repeatedly underscored the “peculiarly sacred” nature of the federal constitutional right to counsel.<sup>36</sup> While the right comprises an idiosyncratic mandate to distribute resources to people who need them, it is systematically dishonored in the breach.<sup>37</sup> The 1940 case of *Avery v. Alabama* is one example among

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<sup>27</sup> *Ibid.* at 57.

<sup>28</sup> *Ibid.* at 61.

<sup>29</sup> *Ibid.* at 68–69.

<sup>30</sup> *Ibid.* at 57.

<sup>31</sup> *Ibid.* at 68–69.

<sup>32</sup> Gerhardt, M. J. (2002). The rhetoric of judicial critique: From judicial restraint to the virtual Bill of Rights. *William & Mary Bill of Rights Journal*, 10, 585–645, at 607.

<sup>33</sup> *Ibid.*

<sup>34</sup> Moore, *supra* note 14, at 1053.

<sup>35</sup> Klarman, M. J. (2009). Scottsboro. *Marquette Law Review*, 93, 379–431, at 429–431.

<sup>36</sup> *Avery v. Alabama*, 308 U.S. 444, 447 (1940) (citing *Lewis v. United States*, 146 U.S. 370, 374–375 (1892)).

<sup>37</sup> Moore, *supra* note 14, at 1053.

many. In *Avery*, the Court celebrated the “peculiarly sacred” due process right to counsel by affirming a murder conviction and death sentence.<sup>38</sup> The Court did so despite counsel’s protests that the few hours available between appointment and trial were inadequate to communicate, investigate, and advocate for a man showing symptoms of serious mental illness.<sup>39</sup>

Less than twenty years later, Alabama was in the headlines again as mass arrests during protests against racial and economic segregation coincided with the height of the Cold War. As was the case in the 1930s, highly politicized international attention—this time including critical coverage by Soviet and Chinese Communists seeking allies among postcolonial nations—focused on hypocrisies and failures of capitalism and liberal democracy.<sup>40</sup>

It was in this heated context, just weeks before Martin Luther King Jr. issued his Letter from Birmingham City Jail<sup>41</sup> and television cameras captured Bull Connor’s deputies attacking black children with dogs and fire hoses, that the Supreme Court issued two blockbuster opinions expanding the federal constitutional right to appointed counsel. *Douglas v. California* invoked both due process and equal protection to mandate appointment of appellate counsel in jurisdictions providing a right of direct appeal in criminal cases.<sup>42</sup> *Gideon v. Wainwright* also relied on due process—but only as a mechanism for incorporating the Sixth Amendment mandate for appointed counsel in the federal setting into state cases involving felony charges.<sup>43</sup>

The right to appointed counsel gradually expanded to cover juveniles<sup>44</sup> as well as adult misdemeanor charges,<sup>45</sup> probation cases with potential for incarceration,<sup>46</sup> pretrial settings<sup>47</sup> including plea bargaining,<sup>48</sup> sentencing,<sup>49</sup> first-tier petitions for discretionary

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<sup>38</sup> *Avery*, 308 U.S. at 445, 447, 453.

<sup>39</sup> *Ibid.* at 447–453.

<sup>40</sup> See, e.g., Dudziak, M. L. (2002). *Cold War civil rights: Race and the image of American democracy*. Princeton, NJ: Princeton University Press, at 3–6, 11–14.

<sup>41</sup> King, M. L., Jr. (1995). Letter from Birmingham City Jail. In S. Lynd & A. Lynd (Eds.), *Nonviolence in America: A documentary history* (pp. 254–268). Maryknoll, NY: Orbis, at 254.

<sup>42</sup> *Douglas v. California*, 372 U.S. 353, 356–358 (1963).

<sup>43</sup> *Douglas*, 372 U.S. at 339.

<sup>44</sup> *In re Gault*, 387 U.S. 1, 41 (1967).

<sup>45</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

<sup>46</sup> *Alabama v. Shelton*, 535 U.S. 654, 658, 674 (2002).

<sup>47</sup> *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194 (2008).

<sup>48</sup> See, e.g., *Lafler v. Cooper*, 132 S. Ct. 1376, 1390–1391 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1410–1411 (2012).

<sup>49</sup> See, e.g., *Williams v. Taylor*, 529 U.S. 362, 390–399 (2000).

appellate review,<sup>50</sup> state postconviction proceedings,<sup>51</sup> and advice on the collateral consequence of deportation that attaches to any potential plea agreement.<sup>52</sup>

Yet as the scope of the right expands, its enforceability with respect to the quality of representation remains weak. Thirty years ago, *Strickland v. Washington* established an onerous two-part test for people who challenge the quality of defense lawyering. They must prove both that their attorneys engaged in unreasonable acts or omissions according to prevailing professional standards, and a reasonable probability that those failures altered the outcome of their cases.<sup>53</sup> Under *Strickland* and accompanying cases,<sup>54</sup> constitutional standards are so low that lawyers hurdle them while asleep,<sup>55</sup> habitually drunk,<sup>56</sup> and (while awake and apparently sober) failing to investigate and present readily available evidence of actual innocence in capital murder cases.<sup>57</sup>

This brief doctrinal history reveals that, every thirty years or so, as this country's distinctively intransigent intersection of race, crime, and poverty<sup>58</sup> sparks another round of politicized and international uproar,<sup>59</sup> the right to counsel lurches in a new direction. The most recent cycle has seen heightened attention to the record-breaking hyperincarceration of low income and minority people in the United States.<sup>60</sup> That cycle has coincided with

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<sup>50</sup> *Halbert v. Michigan*, 545 U.S. 605, 610–611 (2005).

<sup>51</sup> See *Martinez v. Ryan*, 132 S. Ct. 1309, 1320–1321 (2012) (ineffective assistance on first-tier collateral review may defeat procedural default defense to federal habeas claim); see also *Maples v. Thomas*, 132 S. Ct. 912, 927 (2012) (applying *Martinez* where postconviction counsel abandoned client without notice).

<sup>52</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

<sup>53</sup> *Strickland v. Washington*, 466 U.S. 664, 688 (1984).

<sup>54</sup> See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335, 348–350 (1980) (establishing test for conflict of interest).

<sup>55</sup> See *Muniz v. Smith*, 647 F.3d 619, 623–625 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1575 (2012) (discussing “sleeping lawyer” cases).

<sup>56</sup> *Frye v. Lee*, 235 F.3d 897, 907 (4th Cir. 2000), *cert. denied*, 533 U.S. 960 (2001) (affirming death sentence while “troubled” by capital defense lawyer’s “decades-long habit” of drinking “twelve ounces of rum” nightly during trial); see also Tabak, R. R. (2003). Why an independent appointing authority is necessary to choose counsel for indigent people in capital punishment cases. *Hofstra Law Review*, 31, 1105–1115, at 1112–1113.

<sup>57</sup> See *Scanlon v. Harkleroad*, 740 F. Supp. 2d 706, 728–730 (M.D.N.C. 2010), *aff’d per curiam*, 467 Fed. App’x 164 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 164 (2012) (denying defendant new trial despite ineffective assistance in guilt/innocence phase). The author represented Petitioner Donald Scanlon in state and federal appellate and postconviction challenges to his convictions and death sentence. *Ibid.* at 708.

<sup>58</sup> See Moore, *supra* note 13, at 551–563.

<sup>59</sup> See Dudziak, *supra* note 40.

<sup>60</sup> Wacquant, L. (2010). Class, race and hyperincarceration in revanchist America. *Daedalus*, 139(3), 74–90, at 78–79; see also Lacey, N. (2008). *The prisoner’s dilemma: Political economy and punishment in contemporary democracies*. Cambridge: Cambridge University

expansions of the right to appointed counsel in pretrial and posttrial settings.<sup>61</sup> As a result—and in keeping with the prescient recommendations of certain Antifederalists<sup>62</sup>—the right to counsel has largely been socialized, with the vast majority of criminal defendants facing felony charges receiving government-funded defense services.<sup>63</sup>

Of course, economic need seldom qualifies people for special constitutional consideration. To the contrary, as Julie Nice argues, poverty law has been effectively deconstitutionalized in the United States.<sup>64</sup> Nor are indigent criminal defendants typically viewed as among the “deserving poor.”<sup>65</sup> To the contrary, “[l]egislators have declined to protect criminal defendants, except in rare and narrowly circumscribed circumstances when powerful constituencies (the press, lawyers) have been threatened.”<sup>66</sup> In light of that observation, a cynic might explain the idiosyncratic constitutional mandate to provide government-funded criminal defense attorneys as a redistribution of assets to one set of lawyers (defenders) that makes life easier for other lawyers (prosecutors and judges) through a pro forma greasing of the carceral state’s machinery.

That explanation appears less cynical given the contemporary degradation of the “peculiarly sacred” right to counsel and the underlying fundamental due process right to be heard into a grim complex of plea mills<sup>67</sup> and debtor’s prisons.<sup>68</sup> For attorneys who

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Press, at xv, 156–169 (citing “general and depressing” agreement on inevitable export of U.S. “penal populism,” but disputing that thesis).

<sup>61</sup> See *supra* notes 48–49, 51–53 and accompanying text.

<sup>62</sup> Warren, C. (1911). *A history of the American bar*. Boston, MA: Little Brown, at 219, 221–223 (quoting Antifederalists who urged that the legal profession be “annihilated” or completely socialized through the creation of “a State Advocate-General, to appear for all persons indicted”).

<sup>63</sup> See Harlow, *supra* note 8.

<sup>64</sup> Nice, J. A. (2008). No scrutiny whatsoever: Deconstitutionalization of poverty law, dual rules of law, & dialogic default. *Fordham Urban Law Journal*, 35, 629–671, at 629–636; see also Barnes, M. L., & Chemerinsky, E. (2009). The disparate treatment of race and class in constitutional jurisprudence. *Law and Contemporary Problems*, 72, 109–130, at 122–126 (probing causes of varying judicial scrutiny afforded to class-based and race-based claims for redress).

<sup>65</sup> See, e.g., Dripps, D. A. (1993). Criminal procedure, footnote four, and the theory of public choice; Or, why don’t legislatures give a damn about the rights of the accused? *Syracuse Law Review*, 44, 1079–1102, at 1089–92; see also Moore, *supra* note 14, at 1028 & n.13 (discussing empirical research indicating that a significant minority of jurors believe defendants “must have done something” to warrant criminal charges).

<sup>66</sup> Lerner, C. S. (2004). Legislators as the “American criminal class”: Why Congress (sometimes) protects the rights of defendants. *University of Illinois Law Review*, 2004, 599–672, at 604–613. But see Wright, R. F. (2004). Parity of resources for defense counsel and the reach of public choice theory. *Iowa Law Review*, 90, 219–268, at 263–268.

<sup>67</sup> See, e.g., Wilbur v. City of Mt. Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

strive to provide not merely constitutionally effective but high quality defense services, onerous workloads and fee caps create agonizing choices. In 2006, for example, misdemeanor counsel in Knox County, Tennessee, averaged nearly 1700 cases each, and had less than an hour to spend on any given case.<sup>69</sup> Two points of contrast throw these statistics into sharp relief. First, the Tennessee lawyers were assigned nearly eight times the number of misdemeanor cases allowed under weighted workload standards in other states, such as Massachusetts.<sup>70</sup> Second, recent major weighted caseload studies indicate that the average misdemeanor case should take approximately twelve hours of competent, diligent attorney effort to reach a satisfactory level of representation.<sup>71</sup>

Unfortunately, workload standards remain rare. Enforceable standards are even rarer.<sup>72</sup> This is so despite the American Bar Association's 2006 Ethics Opinion requiring indigent defense attorneys to reject cases for which they cannot provide competent, diligent representation—with “competence” and “diligence” comprising the core duties to communicate, investigate, and advocate.<sup>73</sup> The costs of overloaded, underresourced indigent defense are significant. To cite one example, a Florida attorney was juggling fifty felony cases at a time, or nearly half the felony caseload that a Massachusetts lawyer may accept in an entire year.

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<sup>68</sup> See, e.g., *Fant v. City of Ferguson*, 4:15-cv-253 (E.D. Mo. Feb. 2, 2015) (class action complaint); Shapiro, J. (2014, August 25). In *Ferguson*, court fines and fees fuel anger. *NPR*. Retrieved from <http://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fue-l-anger>.

<sup>69</sup> National Right to Counsel Committee. (2009). *Justice denied: America's continuing neglect of our constitutional right to counsel*. Washington, DC: The Constitution Project and the National Legal Aid & Defender Association, at 68. Retrieved from <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

<sup>70</sup> Committee for Public Counsel Services. (2011). *Policies and Procedures Governing Billing and Compensation*, Rule 16. Retrieved from [http://www.publiccounsel.net/private\\_counsel\\_manual/CURRENT\\_MANUAL\\_2010/MANUALChap5links3.pdf](http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf).

<sup>71</sup> RubinBrown LLP for the ABA's Standing Committee on Legal Aid and Indigent Defendants. (2014). *The Missouri Project: A study of the Missouri defender system and attorney workload standards*. Chicago, IL: American Bar Association. Retrieved from [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/ls\\_sclaid\\_5c\\_the\\_missouri\\_project\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf); Carmichael, D., Clemens, A., Caspers, H., Marchbanks, M. P., & Wood, S. (2015). *Guidelines for indigent defense caseloads: A report to the Texas Indigent Defense Commission*. College Station, TX: Public Policy Research Institute, at 50 & Figure 8-1.

<sup>72</sup> Lefstein, N. (2011). *Securing reasonable caseloads: Ethics and law in public defense*. Chicago, IL: American Bar Association, at 42–48.

<sup>73</sup> ABA Committee on Ethics and Professional Responsibility, Formal Opinion 06-441. (2006, May 13). Retrieved from [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ethics\\_opinion\\_defender\\_caseloads\\_06\\_441.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf).

As a result, she failed to communicate a plea offer to a client. The prosecutor withdrew the offer, and the client's sentence was quintupled.<sup>74</sup>

Such system failures underscore the timeliness and importance of the participatory defense movement. This Part has sought to locate that movement within a crisis-ridden doctrinal history and, in particular, as closely linked to the fundamental due process right to be *heard*. Within that context, participatory defense holds promise as a form of grassroots lawmaking. Throughout the history of the right to counsel, public pressure has sparked legal change, often as the Supreme Court grants a constitutional imprimatur to practices and standards developed in the trenches of criminal justice systems.

Reform advocates should therefore welcome participatory defense as a new and powerful force for improving attorney performance standards. Raised performance standards should gradually improve *Strickland* and other legal rules that incorporate those practices into the substantive law. In addition, improved defense performances can rebalance power disparities badly skewed by historically unprecedented concentrations of prosecutorial authority.<sup>75</sup> That rebalancing in turn can strengthen rapidly diminishing rights, such as the right to jury trial and the due process right to be heard.<sup>76</sup>

In support of those goals, Parts IV through VI offer additional analysis of the participatory defense movement. Part IV offers a theoretical foundation, placing participatory defense within an innovative democracy-enhancing approach to criminal law and procedure. Part V reveals ways that participatory defense can strengthen reform litigation and policy advocacy by pairing the due process right to be heard with corresponding duties to communicate, investigate, and advocate. Part VI offers practical tools for amplifying the voices of people facing charges, their families, and their communities in the struggle for criminal justice reform.

#### IV. PARTICIPATORY DEFENSE AND DEMOCRACY ENHANCEMENT

The foregoing doctrinal discussion underscores the “peculiarly sacred” nature of the federal constitutional right to counsel as one that is systematically dishonored in the breach. Based on that history, the participatory defense movement and the due process

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<sup>74</sup> National Right to Counsel Committee, *supra* note 69, at 69.

<sup>75</sup> See Moore, *supra* note 13, at 555 & n.70 (citing authorities).

<sup>76</sup> See *supra* notes 67–75 and accompanying text.

roots of right to counsel doctrine may appear a barren source of amusement for reform advocates. This Part seeks to strengthen the case for participatory defense and the due process right to be heard by framing both within a democracy-enhancing theory of criminal justice.<sup>77</sup>

That theory moves beyond dominant utilitarian-retributive justifications for criminal law, as well as the dominant fairness-law enforcement justifications for criminal procedure. The theory does so in two interrelated ways. First, the theory emphasizes equality in the generation and administration of the governing law. Second, by promoting greater equality in effective personal and communal self-governance, the theory aims at reciprocal reductions in the scope and impact of the carceral state.<sup>78</sup>

The theory's commitments to equality and effective self-governance resonate with the core commitments of the participatory defense model and with the values embodied in the fundamental due process right to be heard. Those core commitments and values can in turn transform the currently minimal content of the constitutionally protected relationship between a lawyer and a person facing criminal charges. Reimagining that relationship in light of these core commitments and values opens a distinctive space for the vindication of human dignity. This is so in part because the relationship can and should serve as a bulwark against the concentrated power of the prosecuting governmental authority and the collective will that authority claims to represent.

Yet as indicated in Part III, within a democracy-enhancing theory of criminal justice the participatory defense model promises even more. The relationship between a person facing charges and his or her attorney is an important site for communicative action. Within that relationship, participants can acknowledge and critique the law while shaping its application. As indicated in Part II's discussion of the participatory defense movement, that communicative action may be cooperative or disruptive.<sup>79</sup> In either case, it can and should be seen as a form of grassroots lawmaking.<sup>80</sup>

Of course the immediate focus of this law formation and application will be the individual case at hand. Nevertheless, as a distinctive form of communicative action, relationships between lawyers and people facing criminal charges can yield broader and

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<sup>77</sup> See Moore, *supra* note 13, at 546 n.13, 563–573.

<sup>78</sup> *Ibid.* at 563–565.

<sup>79</sup> See *ibid.* at 543–612.

<sup>80</sup> Cf. Moore, *supra* note 16.

longer-term improvements in the accountability, transparency, and fairness of the law and its administration.<sup>81</sup> In the context of right to counsel doctrine, participatory defense provides the pressure necessary to push relationships between people facing criminal charges and their lawyers—and through those relationships, to push the constitutional content of the right to counsel—toward fuller vindication of the core rights and duties to communicate, investigate, and advocate.

Through this productive tension, participatory defense presses to improve standards of attorney performance. As those improved standards gain sufficient traction, they will redefine the substantive meaning of effective representation under *Strickland* as well as the content of *Powell*'s distinctive due process right to be heard. Thus, framing participatory defense within a democracy-enhancing theory of criminal justice takes the unique communicative action that is nascent in the right to counsel to a more powerful level. Viewed in that framework, the relationship connotes expressive activity that is as much a mode of democratic self-governance as participating in a debate at a town hall meeting, casting a ballot in a voter's booth, or deliberating over the application of law to evidence in a jury room.

To be sure, the grim history of the constitutional right to counsel dims any utopian visions. It also is true that the Supreme Court has openly denigrated the importance of the attorney-client relationship.<sup>82</sup> Nevertheless, reframed by a democracy-enhancing theory of criminal law and procedure that supplements Sixth Amendment doctrine with due process and equal protection principles, participatory defense is a new and powerful way to reshape the right to counsel as a unique form of politically effective intersubjectivity. This innovative model for criminal justice reform can strengthen partnerships between defense lawyers and people who face charges, their families, and their communities. Part V encourages reform advocates to apply these principles in future litigation and policy advocacy that aims to improve public defense systems while reducing the footprint of the carceral state.

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<sup>81</sup> See, e.g., Moore, J. (2012). Democracy and criminal discovery reform after Connick and Garcetti. *Brooklyn Law Review*, 77, 1329–1388, at 1332–1333, 1371–1387 (discussing litigation and policy history of full open file discovery reform).

<sup>82</sup> See Moore, *supra* note 16 (discussing *Montejo v. Louisiana*, 556 U.S. 778, 784 (2009), and *Morris v. Slappy*, 461 U.S. 1, 14 (1983)).

## V. PARTICIPATORY DEFENSE AND FOURTH-GENERATION PUBLIC DEFENSE REFORM

Parts II through IV introduced the core concepts and strategies of the participatory defense movement and analyzed that reform model within innovative doctrinal and theoretical frameworks. This Part discusses a recent wave of public defense reform projects and describes how reform advocates can strengthen future efforts by combining participatory defense with a renewed focus on the due process right to be heard. Part V.A surveys scholarly proposals for public defense reform. Part V.B identifies arguments that gained traction in the Missouri and Florida Supreme Courts. Part V.C discusses the relative inattention that courts and commentators have afforded to due process and to voices of the key stakeholders in the public defense reform movement: people facing charges, their families, and their communities.

### A. *Scholarly Reform Proposals*

Scholars have offered many constitutional solutions for the indigent defense crisis beyond the Sixth Amendment's demonstrably ineffective ineffectiveness test. Some invoke separation of powers doctrine, that is, a court's inherent authority and responsibility as an independent third branch of government to regulate judicial proceedings.<sup>83</sup> Others advocate equal protection claims grounded in the fundamental right of access to the courts.<sup>84</sup> Cara Drinan proposes federal legislative solutions,<sup>85</sup> while Ronald Wright describes how arguments for resource parity between prosecution and defense can yield reform.<sup>86</sup> Janet Moore, a coauthor of this article, points to additional strategies of vindicating the indigent defendant's right to choose an attorney<sup>87</sup> and adopting full open file discovery policies.<sup>88</sup>

Addressing the workload issue more specifically, scholars

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<sup>83</sup> Darwall, J., & Guggenheim, M. (2012). Funding the people's right. *New York University Journal of Legislation and Public Policy*, 15, 619–665, at 633–648; Logan, W. A. (2010). Litigating the ghost of Gideon in Florida: Separation of powers as a tool to achieve indigent defense reform. *Missouri Law Review*, 75, 885–906, at 903–906.

<sup>84</sup> See Lucas, L. S. (2013). Reclaiming equality to reframe indigent defense reform. *Minnesota Law Review*, 97, 1197–1267.

<sup>85</sup> Drinan, C. H. (2010). The National Right to Counsel Act: A congressional solution to the nation's indigent defense crisis. *Harvard Journal of Legislation*, 47, 487–522.

<sup>86</sup> Wright *supra* note 66, at 221, 253–262.

<sup>87</sup> Moore, *supra* note 16.

<sup>88</sup> *Ibid.*

highlight debiasing strategies to address counsel's cognitive blinders to their workload-created ethical dilemmas,<sup>89</sup> and suggest that *Cuyler v. Sullivan* offers a more forgiving conflict-of-interest standard through which to obtain reform.<sup>90</sup> Still others, despairing of the resources necessary to improve overloaded and underfunded systems, recommend overt triage by formally restricting the scope of the right to counsel<sup>91</sup> or by focusing resources on death penalty cases or colorable innocence claims.<sup>92</sup> Counterarguments favor reverse triage, which stems the tide of low-level cases that swamp criminal justice systems<sup>93</sup> at an astonishing cost.<sup>94</sup>

In what Professor Drinan presciently termed the "third generation of indigent defense litigation,"<sup>95</sup> some of the foregoing arguments are gaining traction in state courts. Recent decisions of the Missouri and Florida supreme courts are exemplary. Studying these cases reveals, however, that due process and the opportunity to be heard play as minor a role in the judicial analyses as they do in recent scholarship. Courts and commentators are similarly reticent regarding the experiences and perspectives of the key stakeholders: people facing criminal charges, their families, and their communities. In keeping with the analysis in Parts II through

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<sup>89</sup> Eldred, T. W. (2013). Prescriptions for ethical blindness: Improving advocacy for indigent defendants in criminal cases. *Rutgers Law Review*, 65, 333–394; see also Freedman, M. H. (2005). An ethical manifesto for public defenders. *Valparaiso Law Review*, 39, 911–923 (arguing against triage and urging defenders to withdraw and inform clients and courts when overload threatens competent and diligent performance); Robbennolt, J. K., & Sternlight, J. R. (2013). Behavioral legal ethics. *Arizona State Law Journal*, 45, 1107–1183 (noting cognitive blind spots that prevent attorneys from recognizing and acting on ethical problems).

<sup>90</sup> Anderson, H. R. (2012). Funding Gideon's promise by viewing excessive caseloads as unethical conflicts of interest. *Hastings Constitutional Law Quarterly*, 39, 421–456.

<sup>91</sup> Dripps, D. A. (2012). Up from Gideon. *Texas Tech Law Review*, 45, 113–137, at 124–130 (proposing reductions in scope of right and in credentialing of indigent defense service providers).

<sup>92</sup> See Mosteller, R. P. (2010). Protecting the innocent: Part of the solution for inadequate funding for defenders, not a panacea for targeting justice. *Missouri Law Review*, 75, 931–988, at 959–973 (critiquing proposals for triage or reassignment in, e.g., Brown, D. K. (2005). The decline of defense counsel and the rise of accuracy in criminal adjudication. *California Law Review*, 93, 1585–1646); see also Barton, B. H., & Bibas, S. (2012). Triage of appointed-counsel funding and pro se access to justice. *University of Pennsylvania Law Review*, 160, 967–994, at 990–995 (arguing for triage in counsel appointments).

<sup>93</sup> See generally Boruchowitz, R., Brink, M., & Dimino, M. (2009). *Minor crimes, massive waste: The terrible toll of America's broken misdemeanor courts*. Washington, DC: National Association of Criminal Defense Lawyers. Retrieved from [www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808).

<sup>94</sup> Braun, E. (2010). *\$42,000 for a courthouse hour: The cost of processing adult criminal cases in Hamilton County, Ohio*. Cincinnati, OH: Ohio Justice and Policy Center, at 6. Retrieved from <http://www.ohiojpc.org/text/publications/court%20cost.pdf>.

<sup>95</sup> Drinan, C. H. (2009). The third generation of indigent defense litigation. *New York University Review of Law and Social Change*, 33, 427–478, at 462.

IV of this article, this Part argues that reform advocates should strengthen their efforts by partnering with the participatory defense movement and renewing their focus on the indigent defendant's due process right to be heard.

*B. Prospective Relief and Triage in Missouri and Florida*

Missouri is one of the few jurisdictions in which attorneys may withdraw from or refuse cases due to overwhelming workloads.<sup>96</sup> In contrast, Florida expressly forbids lawyers from withdrawing from or declining cases due to case overload.<sup>97</sup> Yet in each of these jurisdictions, public defenders persuaded their state supreme court to vindicate counsel's duties to decline or withdraw from additional cases when workloads outstrip resources.<sup>98</sup>

These cases are remarkable in several respects. First, over sharp dissents, each court broke *Strickland v. Washington's* case-by-case, ex post stranglehold on right to counsel analysis to order class-based, prospective relief. Second, each court blended rules of ethics into this prospective Sixth Amendment analysis. Third, defenders and their allies made these rulings possible by building rich factual records that documented the degradation of the indigent defense lawyer into a mere mouthpiece for prosecutors' charging and plea decisions.<sup>99</sup>

Finally, in terms of remedy, each court required system stakeholders—including prosecutors and trial judges as well as defenders—to collaborate on reducing defender workloads. Those requirements raise significant separation of powers issues. They also intensify the burden of excessive caseloads on indigent defendants charged with lower-level offenses. The decisions

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<sup>96</sup> *Missouri Public Defender Commission v. Waters*, 370 S.W.3d 592, 599–601 (Mo. 2012) (discussing Mo. Code Regs. Ann. tit. 18, § 10-4.010 (2010)); Lefstein, *supra* note 72, at 42 (citing Langton, L., & Farole, D. J., Jr. *Public defender offices, 2007—Statistical tables*. Washington, DC: Bureau of Justice Statistics, U.S. Dept. of Justice, at tbl. 7a) (discussing comparable provisions in eight additional states)).

<sup>97</sup> Logan, *supra* note 83, at 886–887 (citing Fla. Stat. § 775.24(1) (2010); Colo. Rev. Stat. § 21-2-103(1.5)(b)–(c) (2009)).

<sup>98</sup> *Public Defender v. Florida*, 115 So. 3d 261 (Fla. 2013); *Waters*, 370 S.W.3d at 592; *cf. Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (holding county systems unconstitutional); *see also Simmons v. State Public Defender*, 791 N.W.2d 69, 89 (Iowa 2010) (rejecting hard fee cap as unenforceable due to “chilling effect on the constitutional rights of criminal defendants”).

<sup>99</sup> *Public Defender*, 115 So. 3d at 273–274 & nn. 6–8 (noting that the twenty-six-volume record showed a “systemic inability of the public defender attorneys” to “interview clients, conduct investigations, take depositions, prepare mitigation, or counsel clients about pleas offered at arraignments”).

expressly contemplate diluting speedy trial rights for such defendants. They also threaten to create additional effective assistance issues by promoting inexperienced volunteer counsel as a “stellar example of creative problem-solving.”<sup>100</sup>

### 1. Missouri: A System Under Water

*Missouri Public Defender Commission v. Waters* arose after a public defender’s office was certified pursuant to an administrative rule to be unavailable for additional appointments due to excessive caseloads. A trial judge nevertheless concluded that he “had no choice” other than to assign Jared Blacksher’s case to a public defender from that overloaded office.<sup>101</sup> The public defender sought a writ of prohibition. The state supreme court reversed the trial court’s appointment order by the narrowest possible four-to-three margin.<sup>102</sup>

The majority and dissenting opinions clashed on two key points. The first was whether the case was moot because Blacksher pled guilty while the petition for the writ was pending. The second and related issue was whether the Sixth Amendment and cognate state constitutional law allowed class-based, prospective relief or instead required petitioners to prove that Blacksher was prejudiced by his lawyer’s unreasonable performance.

The majority applied the public interest exception to mootness doctrine. The court concluded that the issue was capable of repetition but evaded review, and noted that the threat of contempt hung over counsel forced to choose between complying with an appointment order, on one hand, or with the administrative rule, “their ethical obligations and the Sixth Amendment” on the other hand.<sup>103</sup> The majority further concluded that since the petition did not seek to vacate a conviction, *Strickland*’s case-by-case, ex post performance-and-prejudice test did not apply.<sup>104</sup>

The majority read U.S. Supreme Court Sixth Amendment cases as holding that, because the right to effective counsel applies at all critical stages of a case, it is “a prospective right to have counsel’s advice . . . and not merely a retrospective right to have a verdict or plea set aside if one can prove that the absence of competent counsel

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<sup>100</sup> *Waters*, 370 S.W.3d at 611.

<sup>101</sup> *Ibid.* at 597.

<sup>102</sup> *Ibid.* at 612.

<sup>103</sup> *Ibid.* at 604–605.

<sup>104</sup> *Ibid.* at 606–607.

affected the proceeding.”<sup>105</sup> Curiously, the majority cited *Missouri v. Frye*, which applied *Strickland*’s retrospective test to plea bargaining, and *Iowa v. Tovar*, which had little to do with effective assistance or excessive caseloads.<sup>106</sup>

After concluding that the Sixth Amendment required prospective analysis of attorney effectiveness, the *Waters* majority noted that ethical rules proscribe the conflicts of interest that “inevitably” result from excessive caseloads.<sup>107</sup> Notably, the majority did not cite *Cuyler v. Sullivan*’s onerous conflict-and-prejudice Sixth Amendment test. With respect to remedy, the majority invoked the courts’ inherent “authority and . . . responsibility to manage their dockets in a way that . . . respects the constitutional, statutory, and ethical rights and obligations of the defendant, the prosecutor, the public defender, and the public.”<sup>108</sup>

The majority stated that courts could use this inherent authority to “triage” cases involving the most serious charges or defendants unable to make bail.<sup>109</sup> The majority acknowledged the speedy trial implications of resulting delays for the presumably less culpable and dangerous indigent defendants who are charged with lower level offenses or are able to obtain pretrial release. The court anticipated “modify[ing] time standards” in such cases to accommodate “delays necessitated by the insufficient public defender resources.”<sup>110</sup>

The majority also advised trial courts to “hold meetings” with prosecutors and defenders on the record, with evidentiary hearings as needed, to resolve excessive caseload problems. The majority recommended this strategy despite the findings of a special master, whom the court appointed during the pendency of the *Waters* petition, that such discussions, although already mandated by the

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<sup>105</sup> *Ibid.* at 607.

<sup>106</sup> *Ibid.* at 606–607 (citing *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Iowa v. Tovar*, 541 U.S. 77 (2004)). *But see Frye*, 132 S. Ct. at 1408–1411 (applying *Strickland* standard); *Tovar*, 541 U.S. at 91–93 (addressing voluntary waiver issue).

<sup>107</sup> *Waters*, 370 S.W.3d at 607 (citing *In re Edward S.*, 92 Cal. Rptr. 3d 725, 746–747 (Ct. App. 2009)); *Waters*, 370 S.W.3d at 610 (holding that “the Sixth Amendment and this Court’s ethics rules require that a court consider counsel’s competency” before appointment).

<sup>108</sup> *Waters*, 370 S.W.3d at 610–611.

<sup>109</sup> *Ibid.* at 611.

<sup>110</sup> *Ibid.* at 611–612. For a telling example of indigent-defense jujitsu, see *People v. Roberts*, 321 P.3d 581 (Colo. App. 2013) (citing *Waters* to deny an indigent defendant’s speedy trial claim). Although Colorado bars counsel from withdrawing from or refusing cases due to excessive caseloads, see Colo. Rev. Stat. § 21-2-103(1.5)(b)–(c) (2009), the *Roberts* court reasoned that the trial court could have granted such a motion and therefore the defendant could not prove up his speedy trial claim.

administrative rules, were utterly fruitless.<sup>111</sup>

## 2. Getting Lucky in Florida

In *Public Defender v. Florida*, the state supreme court confronted a statute that expressly forbids trial judges from granting motions to withdraw by public defenders who claim that excessive caseloads create conflicts of interest. A five-to-two majority held the statute unconstitutional as applied.<sup>112</sup> The ruling was issued nearly a year after *Waters*, and shares threads of similar reasoning and remedies. But the Sunshine State court did not cite the work of its Show Me State sister court. Instead, the Florida court provided an arguably more compelling doctrinal analysis to support its ruling.

The reasoning of the cases was similar in several respects. Both courts cited ethical rules to support their decisions, as well as courts' inherent supervisory authority to intervene in the respective crises. The Florida court expressly cited separation of powers doctrine as well, no doubt due to that court's longstanding battle with the state legislature over indigent defense issues.<sup>113</sup> In terms of remedy, where *Waters* required stakeholder consultation to triage cases, the Florida trial court allowed defenders categorically to refuse appointments in low-level felony cases. Affirming the judge's authority to issue such an order, the state supreme court nevertheless remanded for the judge to reevaluate the situation and ensure that "the same conditions" still warranted that relief.<sup>114</sup>

The Missouri and Florida cases also are different in two significant doctrinal ways. The Florida Supreme Court relied heavily on *Luckey v. Harris*, a 1988 Eleventh Circuit decision, to transform *Strickland's* case-by-case, ex post performance-and-prejudice ineffectiveness test into a class-based, prospective avenue toward relief.<sup>115</sup> The Florida court also provided a more persuasive explanation for invoking *Missouri v. Frye* and related cases to work around *Strickland*.

In *Luckey*, a three-judge panel held that a Georgia defendant articulated an actionable civil rights claim under 42 U.S.C. § 1983. The defendant sought injunctive relief against an overloaded, underfunded state indigent defense system. The panel concluded

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<sup>111</sup> *Waters*, 370 S.W.3d at 610–611.

<sup>112</sup> *Public Defender v. Florida*, 115 So. 3d 261 (Fla. 2013).

<sup>113</sup> *Ibid.* at 271–272.

<sup>114</sup> *Ibid.* at 264, 280.

<sup>115</sup> *Ibid.* at 276–277 (citing *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988)).

that Luckey could proceed on his claim that this broken system created “the likelihood of substantial and immediate irreparable injury” in light of “the inadequacy of remedies at law.”<sup>116</sup>

Four years later, the case was dismissed on federal abstention grounds.<sup>117</sup> Nevertheless, the Florida Supreme Court found compelling the original panel’s conclusion that *Strickland’s* case-by-case, ex post performance-and-prejudice test was “inappropriate” for evaluating comparable claims of system-wide failure.<sup>118</sup> Equally compelling for the Florida court was the federal panel’s reasoning (expressed *sotto voce* in *Waters*) that the finality and other concerns animating *Strickland’s* rigorous test are not present in claims for prospective relief.<sup>119</sup> “The sixth amendment,” the Florida court approvingly quoted, “protects rights that do not affect the outcome of a trial.”<sup>120</sup>

By distinguishing the harm alleged from the relief sought, the Florida court framed *Missouri v. Frye* and other recent Supreme Court cases as modifying *Strickland’s* prejudice test to fit more precisely when effective assistance claims arise from pretrial processes such as plea bargaining. In keeping with that interpretation, the Florida court drew its ex ante prejudice standard for excessive caseload motions from the text of the ethical rule governing conflicts of interest. To prevail on the motion, claimants must show a “substantial risk that the representation of [one] or more clients will be materially limited by the lawyer’s responsibilities to another client.” The court found “substantial evidence to support the trial courts’ findings and conclusions of law to that effect.”<sup>121</sup>

### C. *The Sound of Silence*

*Waters* and *Public Defender v. Florida* are important ripples in the current wave in indigent defense reform. But these cases also raise difficult questions. At a practical level, these decisions

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<sup>116</sup> *Harris*, 860 F.2d at 1017.

<sup>117</sup> *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992). The case’s tortuous history is discussed in, e.g., Citron, R. (1991). (Un)Luckey v. Miller: The case for a structural injunction to improve indigent defense services. *Yale Law Journal*, 101, 481–504, at 493–494.

<sup>118</sup> *Public Defender*, 115 So. 3d at 276–277.

<sup>119</sup> *Ibid.* at 276.

<sup>120</sup> *Ibid.* (quoting *Harris*, 860 F.2d at 1017).

<sup>121</sup> *Public Defender*, 115 So. 3d at 279 (citing *Lafley v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); R. Regulating Fla. Bar 4-1.7(a)(2)); see also *Simmons v. State Public Defender*, 791 N.W.2d 69, 86–89 (Iowa 2010) (citing *Luckey* to impose ex ante effectiveness test and allow appointed counsel to challenge fee caps).

expressly or implicitly require prosecutors, defenders, and trial judges to cooperate in winnowing the defense workload down to a manageable burden. How are these stakeholders to negotiate separation of powers doctrine and other concerns that affect charging, plea, diversion, and sentencing decisions? How will speedy trial rights be protected? To what extent will overextended appointed counsel be called upon to fill the breach?<sup>122</sup> And perhaps most significantly, how will the voices of the key stakeholders—the people facing criminal charges, their families, and their communities—inform the process?

At a theoretical level, while the Florida Supreme Court's Sixth Amendment analysis bears more scrutiny than the reasoning in *Waters*, there is reason to be circumspect about the long-term prospects of a robust class-based, prospective *Strickland* standard. As discussed in Part III, on right to counsel issues the U.S. Supreme Court has acted consistently with its overall approach to constitutional criminal procedure rights; the Court gives with one hand only to take with the other. The Court establishes a right, then promptly ensures its weak enforceability—often with high-flown language and self-congratulations. *Gideon v. Wainwright*<sup>123</sup> and *Strickland*<sup>124</sup> form an illustrative pair in the right to counsel context. *Brady v. Maryland*<sup>125</sup> and *United States v. Bagley*<sup>126</sup> illustrate the same pattern with respect to prosecutorial discovery duties. Likewise, *Batson v. Kentucky*<sup>127</sup> and *Purkett v. Elem*<sup>128</sup> respectively proclaimed, then weakened, the equal protection rights of prospective jurors to be free from invidious discrimination.

Given the Court's constitutional give-and-take, the fourth generation of indigent defense reform litigation may find due process to be a critical complement to the Sixth Amendment in securing more robust assessment of, and prospective relief for, excessive workload claims. This may be especially true with respect to the due process duties to communicate and investigate, which are prerequisites for satisfying the duty to advocate. Yet due process is barely mentioned by the courts and commentators discussed above.

Most significantly, a due process strategy would actively involve

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<sup>122</sup> See, e.g., *Simmons*, 791 N.W.2d at 89.

<sup>123</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>124</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>125</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>126</sup> *United States v. Bagley*, 473 U.S. 667 (1985).

<sup>127</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>128</sup> *Purkett v. Elem*, 514 U.S. 765 (1995).

the reform movement's most powerful allies: the people engaged in participatory defense. Amplifying the voices of the most important stakeholders in the reform struggle promotes the fundamental due process right to be heard. This strategy also increases the transparency and accountability that are necessary for sustainable improvement not only in indigent defense systems themselves, but also in right to counsel doctrines that tend historically to emerge from in-the-trenches praxis.

Part VI dives into that practical application of this article's doctrinal and theoretical analysis. As discussed below, innovative empirical research offers new sources of support for reform advocates by amplifying the voices of people who face criminal charges along with the voices of their families and communities.

#### VI. "WHERE WAS I AT?!" PARTICIPATORY DEFENSE AND PRACTICAL TOOLS FOR REFORM

This article argues that participatory defense is a powerful new model for vindicating the due process right to be *heard* through public defense reform. Participatory defense demonstrates that some of the most important agents for change are the people with the most skin in the game: people facing charges, their families, and their communities. This Part offers practical tools for helping these stakeholders to understand the rights triggered by criminal charges and lawyers' corresponding duties. By using those tools, these key stakeholders will be in a better position to support lawyers' demands for the time and resources necessary to fulfill their ethical and legal obligations.

An easy way to amplify stakeholder voices is through rights-information and satisfaction-feedback procedures. This Part discusses two examples studied in Ohio and Indiana. The first was implemented through the Indigent Defense Clinic (IDC) at the University of Cincinnati College of Law. The IDC partners with the local public defender's office to provide every client with a succinct statement of the attorney's duties to communicate, investigate, and advocate. A wallet-size, trifold rights-information card is below.

**RIGHT TO COUNSEL**

If you are arrested and might go to jail or prison, you have the right to get help from a lawyer. You also have the right to talk to a lawyer before you talk to anyone else about your case.

**YOUR LAWYER SHOULD:**

**LISTEN TO YOU** about what you want to happen in your case and who or what might help

**TALK TO YOU** about what is happening in your case and how you can get in touch

**KNOW THE LAW** and be able to tell you why it matters in your case

**LOOK FOR INFORMATION** that can help you, including information police and prosecutors might have

**HELP YOU** get the best possible result in your case by:

- Trying to get you released if you are in jail before trial
- Trying to keep illegal evidence out of court
- Preparing for trial
- Arguing for the best plea and sentence possible

**YOU CAN ASK YOUR LAWYER TO DO THESE THINGS FOR YOU OR TO EXPLAIN WHY THEY ARE NOT BEING DONE**

The same jurisdiction successfully beta-tested a client satisfaction survey, which probed the extent to which indigent defendants understood their rights and counsel's efforts to fulfill corresponding duties.<sup>129</sup> The results of that research were sufficiently revealing that other jurisdictions agreed to serve as sites for broader implementation of the protocol.

The project relied on prior empirical research that highlights the importance of client trust in the criminal defense setting not only for attorney-client cooperation, but also for perceptions of system legitimacy and willingness to comply with the law.<sup>130</sup> The project included qualitative and quantitative analysis. A convenience sample of volunteers was drawn from people represented by the Hamilton County, Ohio, public defender's office. The qualitative analysis involved a small focus group discussion, while the quantitative analysis relied upon surveys.<sup>131</sup>

At about the same time, a similar study was conducted with a public defender agency in a rural Indiana county. For this project, everyone who had a public defender assigned to a current case was invited to participate in the study and respond to questions regarding satisfaction with counsel. The overwhelming majority of

<sup>129</sup> Campbell, C., Moore, J., Maier, W., & Gaffney, M. (in press). Unnoticed, untapped, and underappreciated: Clients' perceptions of their public defenders. *Behavioral Sciences and the Law*.

<sup>130</sup> See, e.g., Boccaccini, M. T., Boothby, J. L., & Brodsky, S. L. (2004). Development and effects of client trust in criminal defense attorneys: Preliminary examination of the congruence model of trust development. *Behavioral Sciences and the Law*, 22, 197–214; Tyler, T. R., Braga, A., Fagan, J., Meares, T., Sampson, R., & Winship, C. (2007). Legitimacy and criminal justice: International perspectives. In A. Braga, J. Fagan, T. Meares, R. Sampson, T. R. Tyler, & C. Winship (Eds.), *Legitimacy and criminal justice* (pp. 9–30). New York, NY: Russell Sage.

<sup>131</sup> Campbell, Moore, Maier, & Gaffney, *supra* note 129.

those who agreed to participate were in jail, awaiting case disposition. Participants were administered a questionnaire, one-on-one, in individualized visiting rooms at the beginning of their cases (T1). A second round of postdisposition (T2) surveys is underway.

The research results, regardless of jurisdiction, underscore the important ways that communication between people facing charges and their lawyers affects the charged individuals' level of satisfaction with the relationship and the process, as well as their perceptions of system fairness and legitimacy. The research also reveals that amplifying the voices of the most important stakeholders in the struggle for public defense reform—the people facing charges and incarceration—can provide new evidence and other support for reform advocacy.

#### *A. Focus Group Discussions: Ohio*

Comments from the Ohio focus group discussions reveal a sharp awareness that indigent defense attorneys are overworked and underresourced. One participant acknowledged that his public defender was “not making as much money” as private attorneys despite “a caseload that’s ridiculous,” and that his lawyer simply didn’t “have the time . . . to put into an individual.”<sup>132</sup> Another participant put it bluntly: “There’s not enough of ‘em to go around to all the guys that can’t afford attorneys so they’re using one public defender for a whole pile of people.”<sup>133</sup>

Participants were equally clear about the effects of system overload and, in some instances, defenders who appeared less than fully engaged, particularly with respect to attorney-client communication. One individual stated, “I feel like I was sold. I was sold to the judge. . . . We didn’t really sit down and talk about this case or nothing. Next thing I know when I came to court—‘sign this,’ which says ‘no contest.’”<sup>134</sup> The same person contrasted the experience of being “sold” to what he would have expected from a “paid lawyer”:

“You pay for this time, so what you want to do?” “I wanna do this.” He gonna sit back and listen. He ain’t gonna say nothing to you. He’s going to sit back and say nothing and after you tell him what’s going on, he’s gonna tell you our

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

best route. . . . Public defender ain't gonna do that.<sup>135</sup>

Still another participant expressly equated the lack of communication and advocacy with the lack of due process:

Again, my statement is due process and equal justice under the law. I mean come on, man. I understand I don't have the money to pay for this lawyer, and the state's payin' it, but I still deserve to be treated like anybody else . . . black, white, rich, yellow, it doesn't matter . . . . Fair is fair. And you all want me to state that I'm willing to give you the maximum where this other guy comes in with a paid lawyer, he gets probation. Wait a minute, hold up, back up.<sup>136</sup>

Yet another focus group participant linked the core duties to communicate, investigate, and advocate:

Will one of them take the time and say that, this is what I see we can do? Come to the cell block, talk to me and say, "Uh, ok, what happened here?" Have me explain exactly what happened, so he can get an idea of "Hey, I might actually have something to work with here." That don't happen.<sup>137</sup>

In a similar vein, one of the most poignant participant statements described the attorney-client relationship as an absence or erasure:

Once they see what you in there for, they already know, they just come down there with a paper and it's got your name on it, all your charges, all your history on it, and he's tellin' you, "We gonna plead this." Wait a minute, dude, we ain't even talk. "And if we plead this the judge already said that he would do this." When did that happen?! Where was I at?!<sup>138</sup>

### *B. Perceptions of the Ideal Attorney: Indiana*

The project in Indiana did not include a focus group.<sup>139</sup> Instead,

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<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> There was an attempt to conduct a focus group, as part of a class project, in order for people who were facing charges to have input in developing the data collection instruments. The attempt was unsuccessful because the invitees failed to attend the scheduled meeting with the students. Instead, Sandys took groups of students to the jail and met with pretrial detainees, one detainee at a time, to review the questionnaires. The primary purpose of those discussions was to determine whether the proposed instruments covered all aspects of attorney-client satisfaction, whether there were any additional questions that should be asked, and whether any of the questions were confusing or needed to be clarified.

participants in the Indiana study were asked to describe the ideal attorney. Their responses fell squarely within the duties of an attorney to communicate, investigate, and advocate. For example, the very first client interviewed responded that the ideal attorney would “fight for me, not the county.” In that simple sentence, the client expresses the importance of having an attorney who is a true advocate. That sentiment was echoed by another client, who described the ideal attorney as “someone that’s going to be on my side and fight for what’s in my best interests.” Another client went straight to the point: “Fight for me, try hard. Don’t just take the first offer. Be an advocate.”

While the participants in Indiana did not mention the term investigation specifically, several of them pointed to the importance of attorneys being familiar with the case. For example, one client noted that an ideal attorney would “have knowledge of my case, have helpful information pertaining to me and my case.” Another person said that an ideal attorney “takes time getting to know the case.” Likewise, another person pointed to the importance of “pay[ing] attention to what the case entails, listen[ing] to the story, facts, circumstances.”

Interestingly, several of the people with whom Marla Sandys, a coauthor of this article, spoke referenced paid attorneys in their descriptions of an ideal attorney. This fact is noteworthy because the survey question asked for a description of an ideal attorney; it did not ask for descriptions of an ideal public defender. Yet regardless of the precise framing of the question, several respondents provided their description of an ideal attorney as one who is paid for quality services. In the words of these respondents, such an attorney would:

Do everything they can do for me, just like a paid lawyer would. . . . Be on the ball with things, act like case was important, treat it the same as if they were being paid privately. . . . Care[] like a paid attorney, [be] concerned . . . tend to my case like he is paid.

Even more respondents, however, referenced the duty to communicate in their descriptions of an ideal attorney. In the view of these respondents, such a lawyer:

Comes to see me in a timely fashion; keeps me well-informed; takes notes, [and] acts interested. . . . Would just get back to you and let you know status of [your] case. [Would come] see you once in a while to let you know what’s going on. . . . Get[s] a hold of me, keep[s] me informed, let[s]

me know what's going to happen good or bad.

Yet another participant succinctly expressed the ethical duty of zealous advocacy by describing the ideal lawyer as “[s]omeone that listens and tries to understand [the] situation; [is] not afraid to fight for you in court.”

### C. Survey Results

A sample of 156 survey respondents was obtained in Ohio after reaching out to 568 clients through mail, telephone, and on-site distribution. The survey did not closely examine the connection between client experience, client satisfaction, and case outcome. While further research on this point is needed, prior analyses indicate a weak connection between satisfaction and outcome.<sup>140</sup> Instead, the variables focused on the extent to which clients felt their voices were heard.<sup>141</sup>

The resulting “client-centered representation scale” tended to corroborate the focus group reports. Client satisfaction was most closely linked with the extent to which attorneys listened to the clients, sought client input, investigated cases, and informed clients about case progress and possible consequences.<sup>142</sup> A majority (52.6%) of surveyed clients reported overall satisfaction with their public defenders’ performance.<sup>143</sup> Curiously, even larger percentages (63%) reported on one hand that they were not asked for their views on the issues in their cases, but on the other, that they felt their lawyers did investigate their cases.<sup>144</sup>

The findings from Indiana are similar even though those initial (T1) interviews were conducted while the case was ongoing. That is, findings from the T1 interviews in Indiana reveal what clients experience early on in their relationship with their attorney, whereas the findings from Ohio reflect experiences after the case was resolved.

Overall, at T1 the Indiana clients also were satisfied with their attorney (mean = 3.98 on 10-point scale with low numbers indicating greater satisfaction). Moreover, the clients expressed the greatest agreement with items that tapped into communication (“I want my lawyer to bring me every plea offer” and “it is important to

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<sup>140</sup> *Ibid.* (citing Tyler et al., *supra* note 130).

<sup>141</sup> Campbell, Moore, Maier, & Gaffney, *supra* note 129.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.* at tbl. 3.

<sup>144</sup> *Ibid.*

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me to know step-by-step what is going to happen in my case”) and being heard (“It is important that my lawyer listen to my story”).

One of the more interesting apparent anomalies to emerge across jurisdictions is the disconnect between consultation and investigation. While clients believe that their cases are being investigated, they also express concern that they are not consulted throughout the case. One explanation for this apparent anomaly may be a perceived distinction among survey respondents between consultation about the issues before and after investigation occurs, or between investigation and the plea bargaining or case resolution phases. Or, more generally, it may be that participants were uncertain as to what constitutes investigating a case. Granted, when cases go to trial, people who are facing charges should have had an opportunity to understand the evidence against them and to know the defense strategy. In contrast, in the vast majority of cases that are plea bargained, they may hear an offer but may be unaware of any investigation that went into securing that offer.

Such questions, along with the small sample size and early phase of data assessment, concededly warrant cautious interpretation and application of the research results. The fact that similar findings emerged regardless of jurisdiction, or stage of the case at which the interview was conducted, nevertheless suggests that investigating the role of client voice in a client-centered indigent defense setting warrants expansion through further research.

At minimum, the results suggest that indigent defendants who understand what the investigative process should look like, and who are communicating effectively with their attorneys, may be more likely to be satisfied with the representation that they received. It may also be true that the quality of representation under those circumstances will in turn be improved. It also is possible that when people who are facing charges are empowered with knowledge of their rights during the critical communication and investigation stages, they may be better positioned to make their voices heard in the ongoing struggle to improve indigent defense systems.

## VII. CONCLUSION

Participatory defense is a powerful new model for pursuing criminal justice reform generally and public defense reform specifically. The model is a crucial tool for expanding the due process right to be heard in criminal courts. That right is vindicated in part through communication between people who face

charges and their lawyers. That communication is a necessary foundation for fulfilling the related rights and duties of investigation and advocacy. Findings from studies in Ohio and Indiana reveal that people facing charges want, above all, substantive communication with their lawyers.

The participatory defense model harnesses that energy and offers an effective way to improve defense performance and, in turn, the governing legal standards that courts draw from in-the-trenches practice. Improved defense standards also can gradually rebalance skewed power disparities and strengthen diminishing cognate rights such as the right to jury trial. Thus, by making a new and powerful set of voices heard, participatory defense is an important mode of grassroots lawmaking that can force greater transparency, accountability, and fairness from criminal justice systems while reducing the footprint of the carceral state.