

# An Empirical Study of One Participatory Defense Program Facilitated by a Public Defender Office

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## Abstract

*Criminal defendants and their family members often feel alienated from the court process. Participatory defense is a new initiative in criminal defense where family members actively involve themselves in their loved one's case. As participatory defense expands nationally, one strategy is to look to public defender organizations to help facilitate. This Article focuses on the potential obstacles facing public defender offices interested in initiating participatory defense programs. These obstacles are illustrated through three months of empirical observations of one public defender office starting a new participatory defense program. Findings present four interrelated obstacles that public defender organizations facilitating these types of programs may encounter: (1) finding ways to build community support, (2) maintaining a focus on participant leadership and agency, (3) creating a space where participants can freely monitor defense attorneys, and (4) balancing a focus on understanding the law with effecting systemic change.*

## I. INTRODUCTION

Criminal defendants and their family members often feel alienated from the legal system. Court proceedings can be difficult to understand and often overwhelm the lay people entrenched in the legal system.<sup>1</sup> Attorneys, including the public defenders and other defense attorneys who are appointed to represent indigent defendants, usually dominate the criminal court process.<sup>2</sup> Criminal defendants and their family members find they have few opportunities to voice their concerns with the justice system.<sup>3</sup> At the same time, criminal courts face

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<sup>1</sup> Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1493–94 (2005); see discussion *infra* Part II.B.

<sup>2</sup> Stephanos Bibas, *Bulk Misdemeanor Justice*, 85 S. CAL. L. REV. POSTSCRIPT 73, 76 (2012) (“Today, victims, ordinary citizens, and even defendants themselves are shut out of the system.”).

<sup>3</sup> Natapoff, *supra* note 1, at 1450; Liana Pennington, *Engaging Parents as a Legitimacy-Building Approach in Juvenile Delinquency Court*, 16 U.C. DAVIS J. JUV. L. & POL’Y 481 (2012).

entrenched problems that disproportionately affect the poor and members of racial minority groups.<sup>4</sup> These problems include wrongful charging practices, harsh sentencing guidelines, and racial profiling by police officers, prosecutors, and judges.<sup>5</sup>

Some public defender offices have looked to the participatory defense movement as an innovative way to better serve their clients and to address these systematic problems in the criminal justice system. Participatory defense is a strategy employed by community organizers that seeks to effect meaningful change in the criminal courts by bringing family members and loved ones of criminal defendants into the legal process. The aim of participatory defense is to make these family members “an essential and effective part of the defense team.”<sup>6</sup> Participatory defense strives to transform the current paradigm that allows systemic injustices to continue to a model where defendants, their loved ones, and community members can be “essential agents of change” in the criminal court process.<sup>7</sup>

Participatory defense is in the process of expanding from its original location in San Jose, California to becoming a national movement.<sup>8</sup> Trainings throughout the country have brought participatory defense to locations in different states such as Missouri, Pennsylvania, Alabama, California, Kentucky, North Carolina, and Tennessee.<sup>9</sup> Many of these trainings focus on partnering participatory defense with “preexisting community anchors,” such as churches, community centers, and

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<sup>4</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

<sup>5</sup> Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012) (characterizing the court system pertaining to misdemeanor prosecutions as “[m]assive, underfunded, informal, and careless”); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 275–88 (1999) (racial profiling by police officers). See generally MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1996) (stating that disproportionate arrest, prosecution, and sentencing occurs in minority communities).

<sup>6</sup> ACJPDebug, *Video: 5 Minute Talk on Participatory Defense at PopTech 2015!*, ALBERT COBARRUBIAS JUSTICE PROJECT (Nov. 7, 2015), <https://acjusticeproject.org/2015/11/07/video-5-minute-talk-on-participatory-defense-at-poptech-2015/> [<https://perma.cc/QAF7-9AK6>].

<sup>7</sup> Raj Jayadev, *Why We Must Teach Law to Those Who Need It Most*, TIME (June 29, 2015), <http://time.com/3940588/nonprofit-teaching-law-defense-families/> [<https://perma.cc/96AB-ZUR8>].

<sup>8</sup> ACJPDebug, *Raj Jayadev Selected as an Ashoka Fellow to Expand Participatory Defense Nationally*, ALBERT COBARRUBIAS JUSTICE PROJECT (Feb. 18, 2015), <https://acjusticeproject.org/2015/02/18/raj-jayadev-selected-as-an-ashoka-fellow-to-expand-participatory-defense-nationally/> [<https://perma.cc/D52B-Q6FH>].

<sup>9</sup> *Id.*; see also ACJPDebug, *Building with Gideon’s Promise in North Carolina*, ALBERT COBARRUBIAS JUSTICE PROJECT (Aug. 5, 2014), <https://acjusticeproject.org/2014/08/05/building-with-gideons-promise-in-north-carolina/> [<https://perma.cc/R8SE-ZQEJ>]; ACJPDebug, *Participatory Defense Launches in Memphis with Just City!*, ALBERT COBARRUBIAS JUSTICE PROJECT (May 3, 2016), <https://acjusticeproject.org/2016/05/03/participatory-defense-launches-in-memphis-with-just-city/> [<https://perma.cc/7UMY-XZDS>].

neighborhood organizations.<sup>10</sup> Participatory defense views partnering with local community groups as a way to broaden community support and to add “a huge number of strong new voices to the criminal justice reform movement.”<sup>11</sup> In its effort to expand to new locations, participatory defense encourages working and building partnerships with public defender offices.<sup>12</sup> As Jonathan Rapping, the founder of the organization Gideon’s Promise, says in reference to the ability of public defenders to bring about meaningful change in the justice system: “No group is better poised to form the core of this movement than our nation’s public defenders. Collectively, they serve as the voice of our marginalized populations in the criminal justice system.”<sup>13</sup> Public defender organizations that have started participatory defense programs call this new approach “a game changer for the indigent defense community.”<sup>14</sup>

No empirical research has examined how these programs operate.<sup>15</sup> In particular, no research examines the particular issues that a participatory defense program facilitated by a public defender office may face. This research uses three months of observations of the new participatory defense program Justice Now

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<sup>10</sup> Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1290 (2015).

<sup>11</sup> *Id.* at 1289; see also ACJPDebug, *The Story of How Participatory Defense Came to Be*, ALBERT COBARRUBIAS JUSTICE PROJECT (May 24, 2015), <https://acjusticeproject.org/2015/05/24/the-story-of-how-participatory-defense-came-to-be/#comments> [<https://perma.cc/X87C-3H97>] [hereinafter *The Story of Participatory Defense*] (participatory defense expanding to churches, community organizations, churches, and other neighborhood groups).

<sup>12</sup> St. Louis, Missouri, Birmingham, Alabama, Nashville, Tennessee, and Montgomery County, Pennsylvania are examples of locations where public defender offices have been involved in participatory defense training. ACJPDebug, *Video Recap: Building Partnerships in Participatory Defense With Communities Across the Country*, ALBERT COBARRUBIAS JUSTICE PROJECT (Apr. 14, 2015), <https://acjusticeproject.org/2015/04/14/video-recap-building-partnerships-in-participatory-defense-with-communities-across-the-country/> [<https://perma.cc/5Z4G-JZ9P>] [hereinafter *Building Partnerships*] (St. Louis, MO and Birmingham, AL); ACJPDebug, *Photo Recap: Participatory Defense Launches in Nashville!*, ALBERT COBARRUBIAS JUSTICE PROJECT (Jan. 22, 2016), <https://acjusticeproject.org/2016/01/22/photo-recap-participatory-defense-launches-in-nashville/> [<https://perma.cc/UN3R-G7Z9>] (Nashville, TN); Carl Hessler, Jr., *Innovative Montco Court Program Gets National Attention*, DAILY LOCAL NEWS (May 3, 2015) (describing participatory defense initiative started by public defender office in Montgomery County, PA).

<sup>13</sup> Jonathan Rapping, *Real Criminal Justice Reform Requires That We Change How We Think About Justice*, ALBERT COBARRUBIAS JUSTICE PROJECT (June 18, 2015), <https://acjusticeproject.org/2015/06/18/jonathan-rapping-real-criminal-justice-reform-requires-that-we-change-how-we-think-about-justice/> [<https://perma.cc/L52U-QMBB>] [hereinafter *Real Criminal Justice Reform*].

<sup>14</sup> Hessler, Jr., *supra* note 12; see Howard Franklin, *For Public Defenders ACJP is a Godsend*, ALBERT COBARRUBIAS JUSTICE PROJECT (Nov. 6, 2015), <https://acjusticeproject.org/2015/11/06/author-howard-franklin-for-public-defenders-acjp-is-a-godsend/> [<https://perma.cc/TY6Q-WHYZ>] (describing participatory defense as a “Godsend” for public defender offices).

<sup>15</sup> An extensive search was conducted of the literature in both law and social science to find empirical articles examining participatory defense programs. No relevant literature was found.

hosted by the Defender Project in an urban location in the United States.<sup>16</sup> Although partnering participatory defense with public defender offices may have tremendous potential for positive systemic change, there are potential obstacles relating to this close relationship. In many ways, participatory defense appears to treat public defender offices and community organizations similarly, not fully appreciating their differences.<sup>17</sup> Little attention has been paid to the potential complications with public defender offices taking a leadership role in participatory defense or how participatory defense programs facilitated by public defender offices may look different than programs hosted in more independent organizations.

This Article examines the obstacles faced by one public defender organization as it initiates and facilitates a participatory defense program. The next section, Part II, looks at the development of the participatory defense movement, its potential for reforming the criminal justice system, and the complex relationship between participatory defense and defense attorneys. Part III describes the empirical methods used in this research and provides an in-depth look at how participatory defense meetings operate at one location. Part IV analyzes this observational data, examining four interrelated obstacles that public defender organizations facilitating participatory defense programs may encounter: (1) finding ways to build community support, (2) maintaining a focus on participant leadership and agency, (3) creating a space where participants can freely monitor defense attorneys, and (4) balancing a focus on understanding the law with effecting systemic change. Part V, the conclusion, discusses policy implications from this research.

## II. PARTICIPATORY DEFENSE AND PUBLIC DEFENDER ORGANIZATIONS

### A. *The Evolution of Participatory Defense*

Participatory defense was developed by Silicon Valley De-Bug, a community organization in San Jose, California. De-Bug started as a grassroots movement in 2007 with two objectives: to build agency in the community and to hold the police accountable for misconduct.<sup>18</sup> As De-Bug began seeing success in police misconduct issues, they expanded their efforts to effect change in the criminal courts. De-Bug organizers started the Albert Cobarrubias Justice Project (ACJP) with the mission of increasing the power of defendants and their loved ones in the

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<sup>16</sup> Both Justice Now and the Defender Project are pseudonyms. The researcher agreed to not reveal the actual location of this organization as part of the human subjects' application to protect participants' confidentiality. In addition, all names of community participants and social workers involved with the meetings have been changed.

<sup>17</sup> See, e.g., *The Story of Participatory Defense*, *supra* note 11 ("Now we are going to communities across the country, meeting with families, organizers, pastors, public defenders on how they can start participatory defense in their regions.").

<sup>18</sup> *The Story of Participatory Defense*, *supra* note 11; see Moore et al., *supra* note 10, at 1282.

court process and bringing about meaningful, long-lasting positive change in the criminal justice system.<sup>19</sup> ACJP describes this process on their website:

We knew how to march, rally, hold press conferences. But when a case hit the most critical stage—the courts, we didn’t know how to flex that organizing power. Ironically, we were relinquishing the strength of collective action at the time it was most needed—when a case hit the judicial process.<sup>20</sup>

According to ACJP, participatory defense aims to help defendants’ family members “to impact the outcome of cases of their loved ones and change the balance of power in the courts.”<sup>21</sup> As described by Raj Jayadev, Executive Director of De-Bug, to achieve these objectives, in participatory defense, “the families become . . . an extension of the legal defense team.”<sup>22</sup> Participatory defense believes that defendants’ family members and loved ones have the skills, knowledge, and power to positively impact how the criminal courts operate.<sup>23</sup> Rather than viewing defendants and their family members as passive clients receiving legal services, participatory defense sees them as their own agents of positive change.<sup>24</sup> As Moore et al. states: “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.”<sup>25</sup>

ACJP holds regular family justice hubs. Family justice hubs are weekly meetings where families whose loved ones are facing criminal charges come together.<sup>26</sup> At family justice hubs meetings, family members come together to discuss the criminal cases faced by their loved ones. At a church or a youth media center, family members dissect police reports, consider the extenuating circumstances surrounding the incident, and build an action plan concerning the

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<sup>19</sup> *The Story of Participatory Defense*, *supra* note 11. The Albert Cobarrubias Justice Project is named after Albert Cobarrubias, a De-Bug member who was murdered. *Id.*; *see also* Moore et al., *supra* note 10, at 1283 n.3.

<sup>20</sup> *The Story of Participatory Defense*, *supra* note 11.

<sup>21</sup> *Id.* Unless otherwise specified, this Article describes participatory defense theory as articulated by De-Bug and the ACJP. Other organizations that now have participatory defense programs may utilize different approaches.

<sup>22</sup> ACJPDebug, *supra* note 8.

<sup>23</sup> *See* Moore et al., *supra* note 10, at 1281; David Bornstein, *Guiding Families to a Fair Day in Court*, N.Y. TIMES (May 29, 2015), [http://opinionator.blogs.nytimes.com/2015/05/29/guiding-poor-families-to-a-fair-day-in-court/?\\_r=0](http://opinionator.blogs.nytimes.com/2015/05/29/guiding-poor-families-to-a-fair-day-in-court/?_r=0) [<https://perma.cc/58P9-HE3X>].

<sup>24</sup> *See* Moore et al., *supra* note 10, at 1282.

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

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

case.<sup>27</sup> According to ACJP, the aim of family justice hub meetings is for family members to bring “their collective power, intelligence, and community resources to change the imbalance in the court system and free their loved ones.”<sup>28</sup> ACJP states that family justice hubs have had a real impact on case outcomes in the San Jose area, leading to acquittals, reduced and dismissed charges, and more humane sentences.<sup>29</sup>

### B. Potential Synergy of Participatory Defense and Public Defenders

Family members can provide defense attorneys with access to helpful information and support. Many public defender offices are chronically underfunded and cannot employ investigators, case advocates, social workers, or other professional support staff to help with case development and mitigation.<sup>30</sup> In these locations, family members can help to raise the quality of defense services in disadvantaged communities by having family members share some of this workload. Public defender offices with more resources can also benefit from more organized family member involvement. Family members and loved ones who know the defendant best can use their unique perspective to help defense attorneys humanize the defendant in the judicial system. Family members can provide defense attorneys with social biography packets, organize community support, and take a fresh look at the evidence.<sup>31</sup>

Participatory defense also works to make criminal courts more inclusive by increasing the influence of defendants, their family members, and the greater community in the judicial process. Some criticize criminal courts in the United

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<sup>27</sup> *Id.* at 1290; see also ACJPDebug, *Participatory Defense and Struggle for Criminal Justice Reform in Albany Law Review*, ALBERT COBARRUBIAS JUSTICE PROJECT (July 29, 2015), <https://acjusticeproject.org/2015/07/29/participatory-defense-and-struggle-for-criminal-justice-reform-in-albany-law-review/> [<https://perma.cc/7TZY-JKZY>] [hereinafter *Participatory Defense in Albany Law Review*].

<sup>28</sup> *Participatory Defense in Albany Law Review*, *supra* note 27.

<sup>29</sup> Moore et al., *supra* note 10, at 1287; *The Story of Participatory Defense*, *supra* note 11.

<sup>30</sup> Bibas, *supra* note 2, at 76 (describing the underfunding of indigent defense as “chronic and intractable”); Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197 (2013) (citing numerous studies finding inadequate funding of indigent defense across the country); NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50 (2009). See generally Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683 (2010) (finding that state legislatures and courts are unwilling to provide sufficient resources to provide adequate counsel to indigent defendants). Although criminal defendants have a constitutionally guaranteed right to the effective assistance of counsel, research finds that many court-appointed counsel have crushing caseloads and poorly prepare their cases. NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED 30 (2009).

<sup>31</sup> Moore et al., *supra* note 10, at 1284–87 (describing the various activities that take place during ACJP family justice hub meetings); *The Story of Participatory Defense*, *supra* note 11.

States for privileging the vantage point of lawyers, namely prosecutors, defense attorneys, and judges.<sup>32</sup> Criminal defendants and their family members have few opportunities for meaningful participation in most cases.<sup>33</sup> Lawyers expect non-lawyers to take a back seat in the courtroom, experiencing the court process as outsiders with little understanding of legal terms and court procedures.<sup>34</sup> In contrast, participatory defense emphasizes the valuable perspective that defendants and family members can bring to the court system. Participatory defense adds diverse viewpoints to the criminal courts.<sup>35</sup> Increasing the voice of community members can sensitize legal actors to the social circumstances leading to crime by providing the full context of defendants' lives and the realities of life in high-crime, impoverished areas.<sup>36</sup> In this way, providing space for more diverse viewpoints in the courts can potentially decrease the "institutional ignorance" of prosecutors and judges, leading to more humane sentences that keep defendants out of jail and in the community.<sup>37</sup>

The rise of participatory defense coincides with the focus of many public defender organizations to incorporate community-oriented approaches into their practice. Many public defender offices try to build stronger ties with the

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<sup>32</sup> Bibas, *supra* note 2 at 76. Bibas calls the loss of lay people's voices in the process "the downside of professionalization" in criminal courts. *Id.*

<sup>33</sup> Natapoff, *supra* note 1, at 1450 ("Defendant speech, however, has personal, dignitary, and democratic import beyond its instrumental role within the criminal case."). Natapoff argues that this silencing of defendants goes beyond courtroom procedure. "It is part of a larger phenomenon of expressive disempowerment of those disadvantaged groups who tend to become defendants: racial minorities, the poor, the undereducated or illiterate, juveniles, the unemployed, or people with criminal histories, mental health or substance abuse problems." *Id.* at 1452. Family members have even less opportunities for direct participation in the court process than criminal defendants. *See generally* Pennington, *supra* note 3; *see also* Neelum Arya, *Family-Driven Justice*, 56 ARIZ. L. REV. 623, 702 (2014) (advocating for a shift away from the traditional limited model of family engagement in the juvenile justice to a broader concept of "Family-Driven Justice").

<sup>34</sup> Natapoff, *supra* note 1, at 1493–94 (arguing that defendants' lack of opportunities to speak during the legal process results in "cognitive disengagement" and reinforces "defendants' psychological distance from court proceedings"); Pennington, *supra* note 3, at 492 (qualitative research with parents and juveniles in delinquency court finding that parents express that they experience the court process as outsiders).

<sup>35</sup> Raj Jayadev, "Participatory Defense"—*Transforming the Courts Through Family and Community Organizing*, ALBERT COBARRUBIAS JUSTICE PROJECT (Oct. 17, 2014), <https://acjusticeproject.org/2014/10/17/participatory-defense-transforming-the-courts-through-family-and-community-organizing-by-raj-jayadev/> [<https://perma.cc/26TT-VQSW>] [hereinafter *Transforming the Courts*].

<sup>36</sup> Natapoff, *supra* note 1, at 1498 (arguing that if defendants had more opportunity for speech in the court process, "[j]udges and prosecutors would learn about the social circumstances that breed crime and violence from the perspectives of those who must survive under them").

<sup>37</sup> *Id.* at 1498. Natapoff argues that a number of systemic harms result from the silencing of defendant speech in the legal process. These harms include increased "institutional ignorance" on the part of prosecutors and judges and the "social and discursive exclusion" of criminal defendants, rendering "defendants invisible." *Id.* at 1498, 1501.

surrounding community through outreach and education programs.<sup>38</sup> These organizations try to address some of the underlying social problems and collateral consequences of criminal convictions that can lead to re-offending.<sup>39</sup> To reach these objectives, community-oriented public defense programs utilize interdisciplinary teams that include social workers, client advocates, and civil attorneys.<sup>40</sup> Advocates for community-oriented defense argue that this approach provides more dignity and respect to clients, their family members, and the surrounding community than traditional public defense.<sup>41</sup>

### C. Complications to Participatory Defense/Public Defender Partnerships

While in some ways public defender offices and participatory defense may have a natural synergy, other aspects of participatory defense complicate its relationship with defense attorneys. Family members in family justice hub meetings either partner with the defense attorney or push to hold the attorney accountable, depending on the context of each individual case.<sup>42</sup> A central goal of participatory defense is to ensure that defendants' constitutionally guaranteed right to defense counsel is vindicated.<sup>43</sup> According to Raj Jayadev, participatory defense

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<sup>38</sup> Robin Steinberg, *Heeding Gideon's Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 979, 981 (2013) (describing community-oriented defense as a "public defender office with strong ties to, and knowledge of, the community it serves").

<sup>39</sup> Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215, 1216 (2015). *But see generally* Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, 30 N.Y.U. REV. L. & SOC. CHANGE 637 (2006) (discussing the "practical, professional, and ethical limitations" of holistic advocacy).

<sup>40</sup> Steinberg, *supra* note 38, at 963 ("interdisciplinary team of . . . criminal attorneys, social workers, civil attorneys, investigators" and client advocates); Lee et al., *supra* note 39, at 1228 (enhanced defense team of social workers, mitigation specialists, and investigators).

<sup>41</sup> Lee et al., *supra* note 39, at 1216. Interacting with defendants, their family members, and the greater community in more positive ways can help build more trusting relationships between public defenders and the community they serve. *See* Christopher Campbell, Janet Moore, Wesley Maier & Mike Gaffney, *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 BEHAV. SCI. & L. 751, 766 (2015) (public defenders who engage clients and listen to their needs to increase clients' trust).

<sup>42</sup> Moore et al., *supra* note 10, at 1285 (describing participatory defense as "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").

<sup>43</sup> *Id.* Moore et al. also states that [P]articipatory 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. *Id.* at 1300.



sees “quality representation as a non-negotiable.”<sup>44</sup> Family members are encouraged to educate themselves concerning the defense attorney’s responsibilities at different stages in the case and to scrutinize the attorney’s actions to ensure that he or she is doing what is necessary.<sup>45</sup> One ACJP document called “Six Actionable Steps a Family and Community Can Take to Impact a Case” includes as Step Five to “involve the supervisors if the relationship with the assigned attorney is not working to your satisfaction.”<sup>46</sup> When a case goes to trial, ACJP encourages family members to act as “court monitors,” watching the court proceedings and recording the attorney’s actions in case the family later needs to file an ineffective assistance of counsel motion.<sup>47</sup> Defense attorneys may be understandably reluctant to help family members with these efforts.

Unlike other community organizations partnering with participatory defense, the role of the defense attorney focuses on the individual client, not the client’s family members. Public defenders have specific ethical duties that they owe to their clients. These duties include to zealously advocate on behalf of the client,<sup>48</sup> to protect confidential information shared between attorney and client,<sup>49</sup> and to keep the client reasonably informed so that the client can make necessary decisions.<sup>50</sup> A lawyer owes these duties to the individual client alone, not to the client’s family members and loved ones.<sup>51</sup> Defense attorneys must follow the

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<sup>44</sup> Raj Jayadev, Presentation at the “Quality Legal Representation: Definition, Measurement, Theory and Practice” Conference (Oct. 29, 2015), [https://www.ils.ny.gov/quality\\_conference](https://www.ils.ny.gov/quality_conference) [<https://perma.cc/3SRD-JJV3>].

<sup>45</sup> ACJPDebug, *6 Participatory Defense Steps for Effective Trial Monitoring*, ALBERT COBARRUBIAS JUSTICE PROJECT (Oct. 9, 2015), <https://acjusticeproject.org/2015/10/09/6-participatory-defense-steps-for-effective-trial-monitoring/> [<https://perma.cc/2KF4-BURL>] [hereinafter *6 Steps to Effective Trial Monitoring*]; Raj Jayadev, *Everyday Ideation: How Families Use ‘Cumulative Intelligence’ to Take on the Criminal Justice System*, ALBERT COBARRUBIAS JUSTICE PROJECT (Dec. 10, 2015), <https://acjusticeproject.org/2015/12/15/everyday-ideation-how-families-use-cumulative-intelligence-to-take-on-the-criminal-justice-system-by-raj-jayadev/> [<https://perma.cc/FM6H-QHPT>] [hereinafter *Cumulative Intelligence*].

<sup>46</sup> ACJPDebug, *Six Actionable Steps a Family and Community Can Take to Impact a Case* (not dated) (document on file with the author).

<sup>47</sup> *6 Steps to Effective Trial Monitoring*, *supra* note 45.

<sup>48</sup> See MODEL RULES OF PROF’L CONDUCT, Preamble (AM. BAR ASS’N 2016).

<sup>49</sup> See *id.*, at r. 1.6 (Confidentiality of Information).

<sup>50</sup> See *id.*, at r. 1.4 (Communications)

<sup>51</sup> See *id.*, at r. 1.6 (Confidentiality of Information). Conversations that defense attorneys have with family members are not protected under attorney/client confidentiality. Research in this area focuses on the relationship between parents of juvenile defendants and defense attorneys, but the same reasoning would apply with adult defendants and their family members. See Kristin Henning, *It Takes a Lawyer to Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 837 (2006) (stating that most attorneys now agree that juvenile delinquency cases represent the child’s expressed interests and that the juvenile client, and not family members, has the right to make key legal decisions in the case).

expressed interests of the client, even when the client's wishes conflict with those of his family members. While participatory defense encourages the active participation of family members in all aspects of the case, this may not always be in the client's legal interest. For example, defense attorneys may have valid reasons for counseling clients not to share confidential legal strategy with family members.<sup>52</sup>

There is also a potential conflict between the defense attorney's duty to zealously advocate for his or her client and the emphasis of participatory defense on process over outcomes. Defense attorneys try to obtain the best legal outcome for their client. In contrast, ACJP emphasizes: "The common theme of all our activities is the process, not the product."<sup>53</sup> Although believing that good legal outcomes are important, participatory defense values the process of transforming community members' "sense of power and agency" as the greater goal.<sup>54</sup> At times, family members' interest in having meaningful voice in the process may conflict with the defense attorney's legal duties, such as the need to protect the client against self-incrimination. Moore et al. recounts an incident where a mother active in participatory defense wants to speak with the judge directly about her son's case. This mother says: "[I]t 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>55</sup> Increasing family members' voice in the courtroom will concern defense attorneys, particularly when family members want to disclose confidential information or

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<sup>52</sup> Defense attorneys believe in the importance of protecting confidential communications between lawyer and client, such as the important decision of whether the defendant should testify in his or her defense. Participatory defense encourages family members to find out this information. See *6 Steps to Effective Trial Monitoring*, *supra* note 45 ("Step #4: Find Out if The Person Facing Trial is Testifying, and if so, Make Sure They Are Prepared").

<sup>53</sup> Raj Jayadev, *An 'Un-Organization' Thrives to 'De-Bug' the System*, EQUAL VOICE (Sept. 2, 2014), <http://www.equalvoiceforfamilies.org/an-un-organization-thrives-to-de-bug-the-system/> [<https://perma.cc/X3CW-7N86>]. See also Moore et al., *supra* note 10, at 1283 ("[P]articipatory defense offers a broader set of goals.") & 1285 (case outcome "not the only measuring stick").

<sup>54</sup> *The Story of Participatory Defense*, *supra* note 11 ("As organizers, our most important barometer is not only the outcome, but how the person is transformed in their sense of power and agency."); see Jayadev, *supra* note 53.

<sup>55</sup> Moore et al., *supra* note 10, at 1288; see also Gail Noble, *Standing Up to the Court*, ALBERT COBARRUBIAS JUSTICE PROJECT (July 16, 2011), <http://acjusticeproject.org/keycases/standing-up-to-a-racist-court/> [<https://perma.cc/LJ8Q-EX4S>]; Pennington, *supra* note 3, at 490-93 (2012) (empirical research finding parents in two juvenile delinquency courts want to speak with the judge directly in their child's case). This mother, Gail Noble, has become a leading figure in the participatory defense movement, presenting at trainings throughout the country. See, e.g., ACJPDebug, *Launching Participatory Defense in Alabama!*, ALBERT COBARRUBIAS JUSTICE PROJECT (Mar. 3, 2015), <https://acjusticeproject.org/2015/03/03/launching-participatory-defense-in-alabama/> [<https://perma.cc/XQS5-BD3F>].

make statements that may upset the judge.<sup>56</sup> Unlike other community organizations involved in participatory defense, public defender offices must prioritize the legal case.

### III. AN IN-DEPTH LOOK AT ONE PARTICIPATORY DEFENSE PROGRAM INITIATED BY A PUBLIC DEFENDER OFFICE

This empirical research concerns three months of observing the initial meetings of the new participatory defense initiative Justice Now. Justice Now is a program hosted by the public defender organization—the Defender Project. The Defender Project represents indigent clients in the city where its office is located, as well as suburban and rural areas of that county. The Defender Project is a new public defender office in the region and has been in operation less than two years before starting Justice Now. The Defender Project takes a holistic and community-oriented approach to public defense, employing social workers, case advocates, and investigators. Defender Project attorneys and social workers attended a training organized by ACJP approximately one month before starting their participatory defense program. Posters for Justice Now describe the program as “a supportive group environment, in which you will learn ways to take action to assist your loved one.”<sup>57</sup>

The guiding question in this research is to examine the extent to which participatory defense can transition from a grassroots movement to one that can be integrated into public defender offices nationwide. Other public defender offices interested in facilitating participatory defense programs may learn from obstacles experienced by this office. This empirical research includes a total of ten meetings observed over a three-month time period in 2015.<sup>58</sup> These observations start with

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<sup>56</sup> See Natapoff, *supra* note 1, at 1473. Natapoff discusses the tensions inherent in defense attorneys validating their clients’ need for voice in the court process with the attorney’s legal duties to protect clients’ rights, describing the conflict as a “double-edged sword.” *Id.* (“Attorney-client silencing in the criminal context is thus a double-edged sword. It is both required by the adversarial framework and inherently at odds with the client’s individual expression.”). This tension also exists with parents who want to speak in their child’s juvenile delinquency case. Liana Pennington, *A Case Study Approach to Procedural Justice: Parents’ Views in Two Juvenile Delinquency Courts in the United States*, 55 *BRIT. J. CRIMINOLOGY* 901, 912 (2015).

<sup>57</sup> Document on file with the author.

<sup>58</sup> This research was designed as a non-participant observation study where the researcher does not participate in the activities being observed in order to not affect the studied phenomenon. See NORMAN K. DENZIN & YVONNA S. LINCOLN, *THE SAGE HANDBOOK OF QUALITATIVE RESEARCH* (1994). My graduate student and I conducted the observations. Given the small group setting, on occasion we found it difficult to avoid participating entirely. Justice Now participants were aware that we were researchers wanting to learn more about participatory defense. The lead public defender at the Defender Project and the Defender Project social workers granted us permission to conduct these observations. The appropriate university human subjects’ board approved the methods used in this study.

the first Justice Now meeting and span the beginning few months of the initiative to capture the program's initial problems and successes. Generally, Justice Now meetings are held weekly. There are participants from the community at six of the ten observed meetings.<sup>59</sup> When there are community participants, meetings last approximately one hour. No one from the community attended four of the meetings held during the three-month time period.<sup>60</sup>

Social workers employed by the Defender Project run the Justice Now program, and attend Justice Now meetings on a rotating basis.<sup>61</sup> Three of the four Defender Project social workers took a leadership role within Justice Now at some point during the three months of this research. Towards the end of the research period, an investigator with a background in community organizing also became involved with the program. The social workers and other employees of the Defender Project involved in Justice Now were racially diverse. Two social workers, including the lead social worker, were white and two were African-American. Originally, Justice Now meetings were held in a large conference room inside the public defender's offices downtown. After five weeks, the meeting place was moved to a well-known church in a different part of the city due to difficulties with parking.<sup>62</sup> At the first meeting, multiple rows of chairs were set up facing the social worker at the front of the room. At the second meeting and all later meetings, social workers and participants sat in a circle to encourage more open participation. Attendance during the first three months was low, although a few participants came regularly over the course of the research. Five people came to the first meeting and six to the second meeting. After the second meeting, attendance decreased to no more than two people at each meeting during the first three months of the program. There were four meetings during the initial months of observation where no one from the community attended.<sup>63</sup>

Participants from the community attending the Justice Now meetings were predominantly African-American females.<sup>64</sup> Joyce, an African-American woman, attended meetings in support of her son, who faced a felony charge. Joyce

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<sup>59</sup> My graduate student and I took detailed field notes during observation times when taking notes would not disrupt the group dynamic. We later filled in our contemporaneous notes with more detailed description after the meeting was over.

<sup>60</sup> See discussion *infra* Part IV.

<sup>61</sup> We observed a total of four social workers involved in Justice Now during our three months of observation. A number of social work interns also attended meetings and contributed to discussions.

<sup>62</sup> Justice Now meetings were moved back to the downtown Defender Project location after the time period involved in this research. Justice Now meetings now take place at the local branch of a national organization dedicated to civil rights.

<sup>63</sup> This Article focuses on the first three months of the Justice Now program. Despite its initial difficulties, a Defender Project social worker reports that participation in Justice Now is increasing. She attributes this increase to informal recruitment by current Justice Now participants.

<sup>64</sup> The city served by the Justice Network is over 70% African-American.

attended four meetings in total during the initial three months. She continued to attend meetings for a short time after her son's case was finished and he began to serve his sentence. Another regular participant was Donna, an African-American woman whose husband was being detained on a felony charge. At the second meeting, Donna declined to talk about her husband's case, saying that she was "just listening." At a later meeting she opened up to the social workers and shared details about the legal case, asking for advice. Donna's two daughters also attended occasionally but rarely spoke during meetings. Donna attended five meetings in total during the first three months. Another frequent attendee was Kay. Kay, an African-American woman, worked at a community organization assisting released offenders. During meetings, Kay was very open about her felony record and her own experiences with the criminal justice system. She attended four meetings during the time of this research. She encouraged the other participants "to let [their] guards down a bit" and to share more openly with the social workers. A male defendant and his wife, both white, attended the second meeting but did not return during the three months of observations.

Although the Defender Project social workers appeared dedicated to making participatory defense work, they often seemed unsure how to proceed during meetings. Defender Project social workers encouraged participants to talk about their family members' cases and to express their concerns, but they had difficulty making participatory defense work in practice. The first meeting, and many later meetings, began with a video featuring Raj Jayadev, Executive Director of ACJP/De-Bug, who explained the goals of participatory defense. After showing the video, Carla, the lead social worker at the Defender Project, explained that she had "no strict agenda" for the meeting, this was her first time conducting a meeting like this, and that she was "just winging it." She asked Tyler, a Defender Project employee in the room to set up the audio-visual equipment, if he would be willing to talk for five minutes about criminal procedure. Tyler was an attorney, but he did not currently practice law. He looked surprised at the request, but spent the next fifteen minutes discussing how a felony progresses through the court system and answering participants' questions. At later meetings, Tyler was again there to set up the same video and fielded more of the participants' legal questions.

Justice Now meetings follow a similar pattern, particularly as less people attend the later sessions. Typically, the meetings started with a social worker asking participants if there were any updates on their loved one's cases. At the second meeting, one social worker, a black woman named Ann, asked each participant what he or she can do in the next week to help the family member's case, creating the framework for later meetings. The typical action discussed by the participants was contacting the defense attorney for updates and more information. For example, at an early meeting Joyce said that she was going to call the defense attorney so she could know when her son will next be in court. Donna said she would call her husband's attorney to figure out what the attorney planned to do for the next court date. During meetings, questions and suggestions were made back and forth between the participants and the social workers, with

little interaction between participants. Generally, participants were very quiet and seemed reluctant to talk, only answering questions if asked directly. Ann asked participants to use nametags at the fourth meeting in the hope that people would feel more comfortable; however, Joyce was the only participant in attendance that day. The rotation of the Defender Project social workers from week to week seemed to disrupt the relationships forming between social workers and participants. At one meeting near the end of the three months, Donna became very upset when she learned that the social worker Carla would not be at the meeting that day. Donna said “[I] was expecting her to be here” and that she did not want to have to tell her story from the beginning again. Not having the same social workers consistently present affected the comfort level and flow of the meetings. Consequently, this led to family members being less willing to share with the group and hindered the ability of Justice Now to effect meaningful change in the justice system.

#### IV. FINDINGS

This section discusses four main findings that emerged from analysis of the observation data.<sup>65</sup> I frame these findings as potential challenges to participatory defense initiatives that are hosted and facilitated by public defender offices. First, I will discuss the need of these participatory defense initiatives to find innovative ways to build community support so they can attract and retain participants. Second, I examine the particular difficulties these programs may have developing participants’ leadership and agency. Third, I look at how participants attending meetings facilitated by public defender offices may have more difficulty freely monitoring defense attorneys. Finally, I discuss how these initiatives may need to find innovative ways to balance a focus on understanding the law with effecting systemic change.

##### *A. Obstacle 1: Finding Ways to Build Community Support*

Ideally, participatory defense is fueled by broad support from the community.<sup>66</sup> The ACJP in San Jose has never formally recruited for meetings.<sup>67</sup>

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<sup>65</sup> Research data were analyzed using a grounded theory method. Grounded theory is an inductive analytical strategy where theory is developed through systematic data analysis as relevant patterns and ideas emerge from the data. ANSELM STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES* 12–13 (2d ed. 1990). In this research, the computer software program, NVivo, was used to code the observational data, first using descriptive codes line-by-line, and then using more abstract axial and selective coding to break down the data into different analytic constructs. See DENZIN & LINCOLN, *supra* note 58 (describing the process of open, axial, and selective coding in grounded theory analysis).

<sup>66</sup> Moore et al., *supra* note 10, at 1289. Moore et al. states that systemic change in the criminal justice system will only happen with a diversity of perspective. “Limiting the discussion of

Participants find out about family justice hubs and other participatory defense activities through informal channels, usually from other families involved in participatory defense. ACJP describes the reason behind not having to do outreach: “There is a common yearning to find support and navigation amongst families facing the courts, as well as an inclination to see how they can assist in changing the outcome of the case.”<sup>68</sup> In contrast, Justice Now had immense trouble recruiting and retaining participants during its first three months. The first two meetings had the highest number of participants, five and four respectively, and then attendance steadily decreased. After the first two weeks, each meeting had no more than two participants and four meetings were cancelled because no one from the community attended.

Unlike De-Bug, Defender Project spent many hours conducting outreach in the community. Social workers tried to recruit participants from the line of family and loved ones waiting to see people in jail, otherwise known as the “jail line.” They also asked the public defenders in their office to hand out fliers to their clients and family members in court and at client meetings. Justice Now employees posted fliers at the courthouse that encouraged family members affected by the criminal justice system to attend a meeting or to contact them for additional information. Justice Now recruitment efforts appeared to have reached saturation in the community. According to social workers and social work interns, many people told them that they had heard about the initiative but they were not interested. One intern said that she felt a strong sense of disinterest from those to whom she tried to give fliers.

One likely reason for the low participation in Justice Now is that the Defender Project had been operating for less than two years and had not established a positive reputation in the community. Public defender offices in this state are rare. Before the Defender Project, indigent defense services in this location were provided through a highly criticized court-appointed counsel system and the Defender Project had inherited their poor standing in the community. Donna, one of the more active participants at Justice Now, expressed concern that people in the jail line see the flier and “may think it’s a trick.” Generally, indigent defense counsel, both public defenders and court-appointed lawyers, are viewed negatively in the community.<sup>69</sup> Unlike De-Bug and participatory defense initiatives facilitated

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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.” *Id.*

<sup>67</sup> *Transforming the Courts*, *supra* note 35; see also Moore et al., *supra* note 10, at 1284 (stating “it is important to emphasize that the participatory defense movement has never conducted outreach to drum up attendance at the family justice hub meetings”).

<sup>68</sup> *Transforming the Courts*, *supra* note 35.

<sup>69</sup> Mark C. Milton, *Why Fools Choose To Be Fools: A Look at What Compels Indigent Criminal Defendants To Choose Self-Representation*, 54 ST. LOUIS U. L.J. 385, 410–12 (2009) (finding that many criminal defendants have a “fundamental distrust” of court-appointed counsel, choosing instead to proceed pro se); Campbell et al., *supra* note 41, at 763–64 (clients of public

by community organizations, Justice Now has to combat the negative views of the public defender office when building its program. To combat this distrust, Defender Project social workers tried to distance themselves from the public defender organization at meetings and during community outreach. For example, Carla told participants that all are welcome whether the defendant has a public defender or not.

Participatory defense initiatives facilitated by public defender organizations face different issues recruiting and maintaining membership than independent community organizations. When De-Bug started ACJP and its family justice hubs, De-Bug was already a known presence in the community through its work on police brutality. De-Bug grew out of a community organizing movement that operated as a check on the criminal justice system. Participatory defense was a natural outgrowth of this work. In contrast, public defender offices are often viewed as part of an unjust system. Placing participatory defense within a public defender network may necessitate additional outreach in the community to assure participants that public defenders are truly working on behalf of criminal defendants and their family members. This is an additional hurdle for programs facilitated by public defender offices, but family members' participation in participatory defense programs may eventually increase community trust in public defense. A family member, who has had an active role working with the defense attorney through providing social history information, finding supporting witnesses, or reviewing police reports, is likely to have a more positive view of the defense lawyer and his or her office.<sup>70</sup> However, a public defender office which tries to build a new initiative while also working to increase trust in the community may find that it has taken on too much.

### B. *Obstacle 2: Maintaining a Focus on Participant Leadership and Agency*

The transformative aspect of participatory defense is its focus on developing the power and agency of family members in their loved one's case. Originating out of a community-organizing model, the strength of participatory defense is that

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defenders have little trust that their attorneys provide them with competent representation); ACJPDeBug, *Why Public Defender Offices Should Have Public Information Officers*, ALBERT COBARRUBIAS JUSTICE PROJECT (Feb. 25, 2013), <https://acjusticeproject.org/2013/02/25/gideon-needs-a-public-information-officer-the-right-to-counsel-and-the-nitty-gritty-of-public-opinion/> [<https://perma.cc/D5UJ-3ABU>] (advocating for a "Public Information Officer" in public defender offices who can help combat low trust of public defenders in the community).

<sup>70</sup> See Campbell et al., *supra* note 41, at 763–64 (clients who felt more included and informed about the legal process had more positive views of their defense attorneys). Generally, individuals who perceive themselves as having a meaningful voice in the court process have more positive views of the legal system. See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30 (2007). Having opportunities to meaningfully participate is also important to defendants' family members, at least parents of juveniles in delinquency court. Pennington, *supra* note 3, at 493.



its leadership comes from community members and not from legal professionals. ACJP states: “As organizers, our most important barometer is not only the outcome, but how the person is transformed in their sense of power and agency.”<sup>71</sup> During family justice hub meetings at AJCP in California, participants themselves take turns facilitating the meetings and determine what happens during the sessions.<sup>72</sup> ACJP does not use the word client to refer to either criminal defendants or their family members, arguing that this label “reduces people into recipients of services, actions, or change provided or caused by another.”<sup>73</sup> Power in family justice hub meetings lies with the community participants themselves, not professionals such as social workers or lawyers.

Programs based in public defender offices may find it more difficult to develop participant leadership and agency than do programs led by community organizations. During the three months of this research, Justice Now meetings were facilitated by Defender Project social workers and not participants from the community. Social workers organized the meetings, decided on an action plan, and called on participants to share information. While encouraging family members to participate, the professionals determined the meeting agenda. Participants were generally quiet and often did not want to talk about their loved ones or the facts of their cases. Also, social workers did not always pick up on participants’ contributions. For example, at a meeting where Tyler, the lawyer there to set up the audio-visual equipment, was discussing the steps in a felony case, Carla, the lead social worker, asked: “Don’t they sometimes do video arraignments?” Tyler answered that he did not know and Carla responded that they need to find that out. As this exchange happened in the front of the room, in the back, Donna and her two daughters nodded yes and indicated that they do video arraignments. Neither Tyler nor Carla saw or heard them. During the meeting, most information flowed one way—from Defender Project professionals to community participants.

Developing participant agency is particularly difficult when there is a high ratio of professionals to community members in the room. At a meeting one

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<sup>71</sup> *The Story of Participatory Defense*, *supra* note 11; *see also* Jayadev, *supra* note 7 (describing participatory defense as a “ground-up movement where people are ‘looking under the hood’ of the court system, and seeing where change needs to happen”).

<sup>72</sup> *The Story of Participatory Defense*, *supra* note 11 (“We rotate facilitators, so families who first started coming for their own family members, end up leading the meetings as well.”). Raj Jayadev characterizes this part of participatory defense as the “un-organization.”

We say to the person entering our space—bring all of your audacious dreams as well as all of your personal baggage, and you lead us. We will follow and support your direction, and you will expand us in the process. In this way, everyone is an architect of our institution, rather than merely a caretaker of something others have constructed. This allows for a stronger sense of ownership.

Jayadev, *supra* note 53.

<sup>73</sup> Moore et al., *supra* note 10, at 1285; *see also* Jayadev, *supra* note 7 (“The essential agents of change don’t have to be lawyers or judges.”).

month after Justice Now began, Joyce, the mother whose son was detained, was the only participant from the community. There were three professionals from Defender Project in the room, including one social worker, a social work intern, and the lawyer there to operate the audio/visual equipment.<sup>74</sup> Joyce was reluctant to discuss any details about her son or his criminal case. Joyce was much more forthcoming when asked what bothers her with the case: “When the policemen writes up the report, it’s not fair. They put things that are not true.” The social worker asked her about the defense attorney’s actions in the case, rather than following up on the comment about the unfair report. From a participatory defense vantage point, this is a missed opportunity to discuss possible exculpatory or mitigating information known to the family member and to build support to tackle the injustices faced by his or her community in the court system.

Public defender offices facilitating participatory defense initiatives, even those using social workers to organize the meetings, may find it difficult to make developing participant leadership and agency the main focus. Social workers enter relationships with a particular perspective and skill set as a result of their training.<sup>75</sup> One social worker said that running Justice Now meetings was “all about support for her.” This focus may provide needed guidance and caring to participants as they endure the judicial process, but it is different than centering meetings on increasing participants’ power in the system. Unifying the community around issues of power in the criminal court system and developing participants’ ability to effect meaningful change is a driving force of participatory defense. Raj Jayadev says that participatory defense asks as its defining question, “Has someone been transformed in their own capacity to make change?”<sup>76</sup> This transformation was not apparent in the participants attending Justice Now meetings, at least in the first few months of the initiative. In addition, Justice Now was not particularly successful in helping participants support each other, although the social workers worked hard to support participants. The participatory defense movement strives to bring together community members in collective action and to break through the individual walls of isolation and embarrassment that can result when a family member is arrested.<sup>77</sup> Justice Now participants interacted mainly with the social workers and rarely with each other during these three months. In contrast to the ACJP family justice hubs, where participants take turns running the

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<sup>74</sup> Since this is non-participant observation research, I am not including myself in this count, although my presence likely also added to this dynamic.

<sup>75</sup> See Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 2123, 2126–28 (1999) (discussing how the social worker perspective differs from the attorney perspective).

<sup>76</sup> Jayadev, *supra* note 44.

<sup>77</sup> Moore et al., *supra* note 10, at 1284 (“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.”).

meetings, Justice Now meetings were facilitated by social workers who were supportive of participants' needs but who found it natural to take charge.

*C. Obstacle 3: Creating a Space Where Participants Can Freely Monitor Defense Attorneys*

In family justice hub meetings, loved ones are encouraged to do whatever is necessary to ensure that their family member receives a quality defense. According to Raj Jayadev, participatory defense views "quality representation as a non-negotiable."<sup>78</sup> As discussed above,<sup>79</sup> participatory defense either supports or pushes defense attorneys depending on the context of each individual case. Moore et al. describes this as a "productive tension" which serves to increase the quality of representation provided by defense attorneys.<sup>80</sup> To fully realize their potential, family justice hub meetings must create a space where family members can monitor and criticize defense attorneys when necessary.

Meeting this objective of participatory defense is more difficult when a public defender office initiates and facilitates meetings. At Justice Now, participants' interest in monitoring defense attorneys led to uncomfortable interactions with Defender Project social workers. When participants criticized defense attorneys, social workers seemed defensive, often jumping to the attorneys' rescue. For example, at an early meeting, Joyce complained about her son's defense attorney by saying: "It's like the lawyer is afraid of the district attorney." Carla responded that she had seen this lawyer in court and the lawyer did not seem like someone who would be afraid of the prosecutor. She further explained that before trial, defense attorneys often try to get along with the district attorney, which can result in better deals for the defendant. Joyce did not look satisfied with Carla's response but did not say more about her son's attorney. This is another example of a missed opportunity to examine broader issues facing the court system, such as the prevalence of plea negotiations over challenges to the prosecutor's evidence at trial. Another awkward situation develops when social workers place themselves in the position of checking up on defense attorneys. At a later meeting, Donna complained that her husband's attorney failed to show up to court for a number of scheduled hearings. Carla told her that she would look into this issue for her, thereby creating a situation where she will be monitoring a defense attorney in a different office.

Participatory defense initiatives facilitated by employees of public defender offices may find it particularly difficult when their own defense attorneys are criticized. In this research, Justice Now social workers emphasized that they are there for everyone in the community and not only the public defender clients. In

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<sup>78</sup> Jayadev, *supra* note 44.

<sup>79</sup> See discussion *supra* Part II.

<sup>80</sup> Moore et al., *supra* note 10, at 1300.

addition, no one who attended the participatory defense meetings happened to have a family member who was represented by the Defender Project. However, Defender Project social workers appeared defensive when they believed that participants were disparaging defense attorneys from their office. At one meeting, Joyce complained about the conduct of her son's lawyer in court and said: "I was so disgusted." She added: "When you have money it talks." Her son's lawyer was a court-appointed attorney not affiliated with the public defender office. Carla responded that she knows that it is not true of all defense attorneys appointed by the court, but that the attorneys in her office "are really good." Carla also noted that attorneys from her office would be better at returning family members' calls than the attorneys they were discussing. Yet in other ways, social workers' close affiliation with public defenders can potentially help bridge the gap between family members and defense attorneys. Carla discussed writing the defendant's "life story" for the defense attorney as one way that family members can help in the case. Carla explained that "sometimes attorneys are uncomfortable with or don't have the time to dig deep" into why the clients are there and who they are. She explained that when attorney caseloads are really high they tend to focus on the more narrow part of the case, meaning only the legal issues.

Public defender offices that initiate and facilitate participatory defense initiatives should be sensitive to the reality that they are not independent players in the court process. In this way, public defender offices are different than "preexisting community anchors" involved in participatory defense, such as churches, youth centers, and neighborhood associations.<sup>81</sup> Unlike these community organizations, the public defender office has a more complex relationship with family members and the community because of the defense attorney's role in the court system. Participatory defense programs that closely work with public defender offices can use this affiliation to their benefit, teaching participants how public defenders approach cases and how to most effectively work with defense attorneys. As many public defender organizations strive to forge closer connections with the community,<sup>82</sup> those interested in participatory defense must consider how they will address the important component of helping others monitor defense counsel.

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<sup>81</sup> *Id.* at 1290; ACJPDeBug, 3 *Communities, 2 Organizers, 1 day—Sharing Participatory Defense to Diverse Bay Area Stakeholders Who Are Impacted by Incarceration*, ALBERT COBARRUBIAS JUSTICE PROJECT (Apr. 1, 2015), <https://acjusticeproject.org/2015/04/01/3-communities-2-organizers-1-day-sharing-participatory-defense-to-diverse-bay-area-stakeholders-who-are-impacted-by-incarceration/> [<https://perma.cc/2UTH-9FT5>] (discusses partnering with independent community organizations in California who are not involved with indigent representation).

<sup>82</sup> Steinberg, *supra* note 38, at 963; Lee et al., *supra* note 39, at 1228. One leader of a public defender organization, Kira Fonteneau of the Community Law Office in Birmingham, Alabama, explains why she connected with De-Bug: "I wanted the Community Law Office to be a part of the community and not separated from the community. We wanted to have strong ties within the communities that we serve and be seen as a resource." *Building Partnerships*, *supra* note 12.

D. *Obstacle 4: Balancing a Focus on Understanding the Law with Effecting Systemic Change*

Participatory defense programs facilitated by public defender offices may have difficulty finding the right balance between educating family members on the law and finding ways to effect systemic change in the court system. Participatory defense meetings are not set up to be legal clinics.<sup>83</sup> Raj Jayadev describes meetings as “a horizontal space—half support group, half strategic planning session.”<sup>84</sup> According to ACJP, the objective of family justice hub meetings is to transform the criminal justice system into a more just and humane place through developing family members’ agency in the legal process.<sup>85</sup> To achieve this, family justice hub meetings use the collective knowledge of their participants rather than relying on the expertise of legal professionals. No lawyers attend ACJP meetings, “[b]ut week in, week out, the group translates the legalese to one another, navigates each other through the maze of a court system and finds ways to affect the outcome of cases.”<sup>86</sup> Participatory defense labels this dynamic as “cumulative intelligence,” emphasizing the value of processing the legal issues together as a group and building on each other’s individual experiences.<sup>87</sup> Together family members and loved ones learn how to obtain police reports and transcripts, how to build effective relationships with defense attorneys, and what to expect at different stages of the court process.<sup>88</sup> The goal of these meetings is to have family members “‘looking under the hood’ of the court system, and seeing where change needs to happen.”<sup>89</sup>

In contrast, the initial three months of Justice Now meetings focused on family members understanding the legal process rather than looking for ways they can bring about change in the court system. This occurred, at least in part, because of participant interest. Family members at Justice Now said that learning about the law was the primary reason they were interested in the meetings. Both Joyce and Donna told the social workers that reviewing the steps in the criminal court process the week before was helpful. Donna said “I didn’t understand that before” and that

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<sup>83</sup> *Transforming the Courts*, *supra* note 35 (“There are no lawyers in the room, but in many respects, that is the point.”).

<sup>84</sup> *The Story of Participatory Defense*, *supra* note 11.

<sup>85</sup> *Id.*

<sup>86</sup> *Cumulative Intelligence*, *supra* note 45.

<sup>87</sup> *Id.* (“[Cumulative intelligence] is a dynamic form of thinking and learning that is inherent to grassroots organizing—an IQ that is baked into the very nature of taking on an issue as a group rather than alone. It is the nature of faithfully meeting and collectively solving a problem until the issues is decided, and of respecting the personal experience of those most affected.”).

<sup>88</sup> Moore et al., *supra* note 10, at 1285 (“Participants learn to dissect, use, and challenge information in police reports and court transcripts.”).

<sup>89</sup> Jayadev, *supra* note 7.

her husband's attorney had not explained the court process to her. Carla, the lead social worker, said that often family members do not understand what is going on in the court process: "The more educated you are, the better off you'll be." Family members asked the social workers specific questions about the legal process, such as whether or not a spouse can be forced to testify against a family member at trial and what the burden of proof is at a competency hearing. At times, neither the social workers nor the attorney there to set up the audio-visual equipment could answer their legal questions. For example, one participant asked if all federal charges were brought by indictment and no one knew the answer. The objectives of the early Justice Now meetings regarding its law-related education mission were unclear. One Defender Project social worker, Ann, said the meetings "offer a mix of education and emotional support," but admitted that she cannot always answer the legal questions. Carla remarked that it is hard to decide whether or not to have a lawyer in the room during meetings. She added that a lawyer could change the dynamic, but social workers without legal training are not always in the position to educate.

It is likely that having a public defender office facilitate these meetings affected participants' expectations regarding the program's focus.<sup>90</sup> Educating family members on legal issues seems like an important and valid goal of Justice Now in this community, but it is quite different than the participatory defense model advocated by ACJP. As a transformative paradigm, participatory defense seeks to effect meaningful change in the court process. ACJP wants participants to look beyond understanding the legal process as it currently is and instead apply pressure to change what the legal process could be.<sup>91</sup> Yet it may be that organizing a critical mass of community participants interested in learning the law is a crucial pre-condition to getting some participatory defense initiatives off the ground. Family members attend Justice Now meetings because they understand very little about the legal system and they want to learn more about the court process. ACJP's notion of cumulative intelligence is only successful if there are already community participants with a basic understanding of the legal process that they can share with the group. Forming a group of family and community members who meet regularly to focus on understanding the legal process can be an important first step in developing a larger program with a broader social justice focus. Programs in public defender offices are uniquely situated to help provide this foundation.

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<sup>90</sup> This law-related focus remained even after the physical location of the meetings changed from the public defender office downtown to a church location. Even outside the public defender office, participants remained primarily interested in better understanding the legal issues in their loved one's cases.

<sup>91</sup> *Transforming the Courts*, *supra* note 35 ("[C]ommunity power can also be flexed to change policies and bring loved ones home, whether that be wrongful charging practices, mandatory sentences or even ensuring that public defenders are given the budgetary resources to do what the community needs them to do.").

## V. CONCLUSION

This research examined the first three months of one participatory defense program initiated and facilitated by a public defender office. The participatory defense movement is in the process of expanding into more locations nationally, including training defense attorneys at a number of public defender offices. Public defender offices are different in many respects than independent community organizations without a defined role in the court process. This research found that the program Justice Now operating out of the Defender Network faced particular obstacles as a participatory defense initiative facilitated by a public defender program. These obstacles are: (1) Finding ways to build community support—public defender offices may face particular hurdles attracting and retaining participants if they have a negative reputation in the community; (2) Maintaining a focus on participant leadership and agency—the success of participatory defense programs depends on social workers, defense attorneys, and other employees of public defender offices breaking out of the traditional paradigm of treating defendants and family members as clients needing services; (3) Creating a space where participants can freely monitor defense attorneys—one important component of participatory defense is pushing the defense attorneys when necessary, which may be more difficult when the program is facilitated by the public defender office; and (4) Balancing a focus on understanding the law with effecting systemic change—programs facilitated by public defender offices may end up focusing on legal education more than programs organized by independent community organizations, which may dilute their efforts to bring about transformative change in the criminal justice system.

These findings suggest that public defender offices interested in facilitating participatory defense programs should consider these obstacles and find creative ways to confront these challenges. Pivotal to the participatory defense movement is the relocation of agency and power from legal professionals to family members and others in the community. Public defenders and social workers in their office can be sensitized to the need to allow defendants and family members to take the lead in participatory defense initiatives,<sup>92</sup> but there are aspects to the defense attorney role that make this difficult. The role of defense attorney continues to include speaking for his or her client and being the voice of others.<sup>93</sup> Participatory

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<sup>92</sup> Some public defenders are able to take a step back and see the value of relinquishing some power/agency to clients and family members. See Sajid Khan, *A Public Defender Reflects on the Power and Responsibility of Trust*, ALBERT COBARRUBIAS JUSTICE PROJECT (July 2, 2015), <https://acjusticeproject.org/2015/07/02/a-public-defender-reflects-on-the-power-and-responsibility-of-trust/> [<https://perma.cc/DA54-TJJ4>] (a public defender reflecting on his interactions with clients). In many ways, Justice Now demonstrates the work of caring and professional defense attorneys and social workers who want to meet the needs of participating family members, however they could.

<sup>93</sup> See discussion *supra* Part II. See generally Natapoff, *supra* note 1. Jonathan Rapping states: “These men and women rely on public defenders to speak for them in a system that has

defense/public defender partnerships need to work toward finding ways to achieve the right balance between developing agency of family and community members and obtaining good legal outcomes.

Public defenders can become important allies to the participatory defense movement, even with these obstacles. Public defender offices have legal knowledge, organizational networks and other resources that can help expand participatory defense. The participatory defense movement is sufficiently flexible to allow growth in different ways depending on the needs and resources of different locations. As Moore et al. states: “[I]t 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.”<sup>94</sup> When implementing participatory defense programs, public defender offices should be mindful of the extent to which they are following participatory defense as set out by ACJP or creating their own program with different objectives. Public defender offices should be particularly careful that they do not substitute the goal of agency development, the objective that makes participatory defense transformative and powerful, with goals that maintain the traditional power dynamic between the public defender office as a service provider and defendants and their family members as clients. Public defender offices should develop a clear mission statement concerning providing law-related education, building emotional support, and developing participatory agency. Both facilitators and participants should evaluate their progress towards meeting these objectives on a regular basis. Although public defender offices should be commended for their efforts, programs that just improve defense services may be worthwhile but will not be truly participatory defense.<sup>95</sup>

There are a number of limitations to this research. The data and findings here are limited to one initiative facilitated by a single public defender office. The findings presented may not be generalizable to programs facilitated by other public defender offices in other locations. In addition, these observations were conducted over three months, a relatively short period of time, and with a small number of participants. However, given that the main inquiry of this research is to examine the extent to which a public defender office can successfully initiate and facilitate a new participatory defense program, focusing on the first months of the new program fits this objective. Further research is needed that examines participatory defense programs in other locations and over a longer period of time. In addition,

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accepted routine injustice. These defenders have the power to remind the system of the humanity of those they represent and of what justice demands.” *Real Criminal Justice Reform*, *supra* note 13.

<sup>94</sup> Moore et al., *supra* note 10, at 1291.

<sup>95</sup> See *Transforming the Courts*, *supra* note 35 (“But as forward thinking these advancements of public defender offices are, they are still inherently limited to the question of what more the lawyer can do, rather than those they represent.”).



the non-participant observation method has its own limitations. Non-participant researchers must maintain a certain distance from their subjects, which may limit the quality and depth of data that is obtained. In this research, my graduate student and I were non-participant observers in a small setting. Subjects were aware that we were researchers and it is possible that participants may have been more reluctant to discuss the legal cases of their loved ones because of our presence. However, no participant vocalized any discomfort with us being at any meeting and the Defender Project social workers reported a similar dynamic at meetings when we were not present.

Even given these limitations, this empirical research suggests that public defender offices may face certain obstacles as they engage with participatory defense. The rapid expansion of participatory defense may necessitate the leadership of public defender offices, if only in the short term. Public defender offices can still have an important role in growing the participatory defense movement, helping to fill a gap when there are no independent community organizations willing to step in and lead new initiatives.<sup>96</sup> Yet participatory defense may risk losing what makes it unique and powerful when its meetings are hosted by public defender offices. Public defender offices facilitating programs like Justice Now must act carefully to ensure that the objectives of participatory defense are being met. To be more effective long-term, public defender offices should find ways to partner with independent community organizations when possible to maintain the original character of the ACJP family justice hub meetings. As stated by Raj Jayadev: “[U]ltimately this work is still about what it started as—families sitting around a table seeing how they can bring their collective power, intelligence, and community resources to change the imbalance in the court system and free their loved ones.”<sup>97</sup> Participatory defense initiatives may start to lose sight of this goal when public defender offices take a leadership role.

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<sup>96</sup> Carla, the lead social worker, says that she knows that other participatory defense locations do not hold their meetings in the public defender office, but there was “just not anyone else who could do it.” The hope of Justice Now was that an independent community organization would eventually take over running the program in the long-term.

<sup>97</sup> *Participatory Defense in Albany Law Review*, *supra* note 27.