Transforming Indigent Appellate Advocacy

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Indigent appellate advocacy has long been confined to a narrow, technocratic model—one that prioritizes legal expertise over client autonomy and treats appellate cases solely as isolated legal battles rather than opportunities for systemic change. Unlike their trial-level counterparts, appellate attorneys representing indigent clients have received little scholarly attention, leaving critical questions about client participation, ethical representation, and social justice largely unexplored.

This Article challenges the status quo, arguing that appellate attorneys should rethink their role in ways that empower clients and confront the broader injustices shaping their cases. We introduce two alternative frameworks—client-centered appellate representation and participatory appellate representation—that draw on innovations from trial-level practice. Client-centered appellate representation encourages meaningful client communication, recognizes clients' holistic goals, and solicits their input in decisionmaking. Participatory appellate representation adapts insights from the participatory defense movement and other social justice lawyering models, creating opportunities for appellate attorneys to work collaboratively not only with clients, but also with their families, communities, and grassroots organizations.

These models respond to several pressing challenges in indigent appellate practice, including structural inequity, attorney burnout, and the erosion of trust between attorneys and clients. By adopting the models we describe and expanding beyond the four corners of the case, appellate attorneys can help both clients and communities challenge the systemic conditions fueling injustices in the legal system—broader goals that are particularly important in times of retrenchement.

This Article also grapples with the challenges of client-centered and participatory representation, including limited resources, professional norms, and ethical dilemmas. But it contends that implementing these models—whether piecemeal or wholesale—at the appellate level is both feasible and just.

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INTRODUCTION

Appellate attorneys who represent indigent clients rarely feature in discussions about justice-oriented lawyering—a term we use to describe legal advocacy that aims to advance both individual client outcomes and broader systemic change. This is in contrast to their trial-level counterparts, who are often celebrated as working on the front lines of poverty law. Yet many appellate attorneys who represent indigent clients are just as interested in comprehensive representation and systemic social change as their trial-level colleagues. Despite these aspirations, the scholarly discourse pays little attention to what indigent appellate representation looks like or what it could become.

Indigent appellate clients, meanwhile, face their own formidable challenges. Many are incarcerated or detained, miles away from their families and attorneys. They often lack basic access to legal information or meaningful communication with counsel. And because they have already experienced a trial that didn't go their way, they may come into the appellate process skeptical of the system and their attorney.[1] Unlike wealthy clients, they cannot demand more control over their appeals and threaten to take their money elsewhere. They are often unfairly targeted by law enforcement and suffer disproportionately poor outcomes.[2] Further, their legal issues are more often intertwined with, and compounded by, difficult circumstances that have resulted from systemic inequity.

Although many lawyers who represent indigent clients on appeal are driven to the work because of social justice goals, no extant scholarship provides an analytic framework for these appellate attorneys to incorporate their client's broader goals and address injustices that exist outside the four corners of their appeal. Although trial-level indigent representation has received considerable scholarly and practical attention, there is a striking lack of comparable attention paid to appellate representation. As a result, for many appellate lawyers representing indigent clients, the approach to client interaction remains guided by inherited professional norms rather than intentional strategy.[3] And the potential for appellate attorneys to engage in systemic reform remains largely unrealized.

This Article seeks to fill that gap. Specifically, we argue that appellate lawyers can draw both from the traditional appellate model and innovative trial-level models of representation to fulfill their dual commitments to client advocacy and social justice. In doing so, we recognize that all models have both positive and

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1. *See* JONAH SIEGEL, LEARNING CMTY. ON POVERTY & INEQUALITY, SCH. OF SOC. WORK, UNIV. OF MICH., NARRATIVES OF POST-CONVICTION PUBLIC DEFENSE: HOW ATTORNEYS, CLIENTS, AND JUDGES EXPERIENCE THE INDIGENT CRIMINAL APPELLATE PROCESS 9–11 (2015), https://www.sado.org/content/pub/10590_Narratives-of-Post-Conviction-Public-Defense.pdf [https://perma.cc/XUT6-95RG].

2. Nazgol Ghandnoosh, *One in Five: Disparities in Crime and Policing*, THE SENT'G PROJECT (Nov. 2, 2023), https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing [https://perma.cc/ZCU7-65XT].

3. For a discussion of professional norms, see Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 ALB. L. REV. 1215, 1228 (2015). See MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 1 (5th ed. 2019) for an example of an appellate practice guide taking a traditional view.

negative aspects, and the model an appellate attorney chooses may well be limited by the nature of their practice, office policy, case load, and other structural constraints. Still, we propose two models for appellate representation: client-centered appellate representation and what we term "participatory representation" in the appellate context.[4] Each model offers a distinct but complementary path toward more intentional and impactful advocacy.

The Article proceeds as follows: In Part I of this Article, we discuss the traditional model of appellate practice—the appellate attorney as legal technician. Picture the solitary appellate attorney, surrounded by case law and transcripts, working alone at a desk to craft precise legal arguments that will be delivered in a hushed courtroom, often to a mostly empty gallery and a panel of judges. Under this model, lawyers "exercise maximum professional control over strategic decisions with minimal consultation from clients."[5] This is the backbone of appellate practice. It provides real benefits for clients, including, most obviously, potential relief in their individual cases. Traditional indigent appellate representation has secured the rights of and gained relief for countless individual clients and advanced the law in ways that have benefitted clients and communities. And because it is efficient, it has enabled public-interest attorneys laboring under burdensome caseloads to represent a high volume of clients.

But the traditional approach to appellate representation has limits for both clients and attorneys. It often fails to accord to the client the dignity of recognizing them as a whole person who should have agency in their own appeal and who may have overlapping interests that a lawyer could serve.[6] Further, focusing solely on the four corners of the lower court case can leave appellate attorneys—whose chances of prevailing on appeal are remote—feeling pessimistic and burned out, resulting in attrition.[7] These shortcomings point to the need for a more client-centered approach to appellate representation.

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4. As discussed in more detail below, our proposal for participatory representation builds on the "participatory defense" movement, a grassroots effort that empowers individuals facing criminal charges, along with their families and communities, to actively collaborate with defense attorneys in shaping case strategies, advocating for systemic reforms, and challenging the inequities of the criminal legal system. *See infra* Part III; Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281–83 (2015). We argue that the participatory-defense model can be expanded to areas outside of the criminal defense context and into the appellate context.

5. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 128 (2010).

6. For example, a common critique of this framework is that lawyers are paternalistic and engage in "legal objectification" of their clients, tending to view them as merely "walking bundles of legal rights and interests rather than as whole persons whose legal issues often come deeply intertwined with other concerns—relationships, loyalties, hopes, uncertainties, fears, doubts, and values—that shape the objectives they bring to legal representation." *Id.* at 104.

7. *See, e.g.*, Margaret Reuter, Stephen A. Rosenbaum & Danielle Pelfrey Duryea, *Attorney as* Accompagnateur: *Resilient Lawyering When Victory Is Uncertain or Nearly Impossible*, 59 WASH. U. J.L. & POL'Y 107, 119 (2019) (recognizing that legal services attorneys facing uphill odds can suffer feelings of "fatigue and defeat").

In Part II, we review client-centered representation and propose ways that appellate attorneys can more fully include clients in the decisionmaking process.[8] Trial-level advocates have been both pushing for and implementing client-centered representation at the trial level for decades,[9] but no corresponding large-scale movement has taken hold at the appellate level, either in practice or in academic scholarship.[10] We argue that the animating goals of client-centered defense—including autonomy, respect for the client's story, and holistic problem solving—can and should guide appellate practice. We offer specific recommendations for incorporating these values into appellate representation, while recognizing the structural limitations of the appellate process.

In Part III, we build on critiques of client-centered lawyering to propose a social justice-oriented model of appellate advocacy that we term "participatory representation."[11] Under this model, lawyers view their role more expansively, to include community mobilization and participation.[12] This type of participatory lawyering recognizes that social transformation can only happen when driven by community members most affected by the inequalities and oppression they seek to change.[13] Therefore, lawyers working in this paradigm seek to forge community-driven strategies, redistribute power, and ultimately transform the legal systems that perpetuate inequality.[14] This type of advocacy has gained momentum at the trial

8. The client-centered lawyering movement has urged lawyers to center client voices and autonomy and address the overlapping, nonlegal aspects of a client's case. *See infra* Part II; Claire P. Donohue, *Client, Self, Systems: A Framework for Integrated Skills-Justice Education*, 29 GEO. J. LEGAL ETHICS 439, 449 (2016); Lee et al., *supra* note 3, at 1216; 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, 962–63 (2013).

9. *See* Steinberg, *supra* note 8. A holistic approach has been more widely implemented at the trial level in the criminal defense context than the immigration context. *See* Talia Peleg & Ruben Loyo, *Transforming Deportation Defense: Lessons Learned from the Nation's First Public Defender Program for Detained Immigrants*, 22 CUNY L. REV. 193, 251 (2018) ("While some have written about the benefits of a holistic or wrap-around model of legal services in the criminal justice context, little has been written about the value of such a model in the removal defense context, beyond the benefits of interdisciplinary collaboration with mental health experts and social workers in the context of asylum cases." (footnote omitted)).

10. Jonah A. Siegel, Jeanette M. Hussemann & Dawn Van Hoek, *Client-Centered Lawyering and the Redefining of Professional Roles Among Appellate Public Defenders*, 14 OHIO ST. J. CRIM. L. 579, 580 (2017) ("Although client-centered lawyering has gained enormous popularity in trial-level public defender offices across the United States, appellate-level defender offices have been slower to embrace the shift.").

11. Our label is inspired by the "participatory defense" movement, *supra* note 4, but because, as we argue in more detail in Part III, the model can be applied to both the appellate context and noncriminal contexts, we broaden the term to "participatory representation."

12. Social justice lawyering has multiple labels. *See* Christine Cimini & Doug Smith, *Modalities of Social Change Lawyering*, 26 LEWIS & CLARK L. REV. 1035, 1094–96 (2023); Monika Batra Kashyap, *Rebellious Reflection: Supporting Community Lawyering Practice*, 43 N.Y.U. REV. L. & SOC. CHANGE 403, 404 (2019) (explaining that community lawyering has "many incarnations" and labels that include: "rebellious lawyering, cause lawyering, political lawyering, social change lawyering, third-dimensional lawyering, collaborative lawyering, revolutionary lawyering, and law and organizing").

13. *E.g.*, Cimini & Smith, *supra* note 12, at 1053.

14. *See* Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613, 625–26 (2020); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1895–98 (2007).

level, including in grassroots defense hubs or campaigns for sentencing reform.[15] But there is little guidance for appellate attorneys who want to practice this way. We argue that participatory representation offers a new vision for appellate representation: one that allows attorneys to provide effective, zealous individual representation while also having a broader impact on systemic injustices that inhere in individual client cases. This approach expands the possibilities of appellate advocacy, demonstrating that even traditionally insular legal spaces can nurture community power and build momentum toward dismantling mass incarceration and other oppressive systems. We also address some of the challenges this model presents, including those relating to ethics, institutions, and logistics.

Throughout, we focus on lawyers who represent individual clients in the public interest—those who cannot afford to pay private counsel.[16] Our examples draw from criminal and immigration appeals,[17] since those are our areas of expertise.[18] Although the constitutional, administrative, and procedural frameworks for criminal and immigration appeals differ in certain respects, our clients and their communities share important characteristics. The stakes of our clients' cases are enormous: they may face removal from their families and communities, decades or a lifetime of incarceration, or deportation to a country where they face harm or even death. They are disproportionally targeted by law enforcement because of their race, class, and disabilities.[19] They are almost always appealing from a loss at the trial level, carrying with them a justified skepticism of the legal system and those who work within it.[20] Accordingly, we believe that any differences are

15. *See, e.g.*, *Our Mission*, GRASSROOTS LEADERSHIP, https://www.grassrootsleadership.org/mission [https://perma.cc/FDU4-8WYA] (last visited Jan. 1, 2026).

16. We do not focus on appellate attorneys doing impact work, who represent organizations, or who represent clients sentenced to death. Those areas have their own unique representation models and issues.

17. When we reference "indigent attorneys" or "indigent defense" in this Article, we mean this term to refer specifically to both indigent criminal and immigrant removal defense attorneys.

18. Estelle directs the Asylum and Convention Against Torture Appellate Clinic at Cornell Law School and teaches legal writing courses. Rachel was an appellate public defender in New York City and now directs the Appellate Criminal Defense Clinic at Cornell Law School.

19. As is well-documented, race and class deeply influence police decisions on stops, searches, arrests, and use of force—often independently of actual criminal behavior. *See, e.g.*, Ghandnoosh, *supra* note 2. Disability, especially when intersecting with race, increases vulnerability to deadly police encounters. Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1404–05 (2021). Further, in immigration enforcement, racial profiling patterns mirror those in domestic policing, disproportionately affecting noncitizens of color. *See, e.g.*, Zurie Pope, *Latino Neighborhoods Overwhelmingly Targeted in Immigration Raids, Rights Group Says*, L.A. TIMES (July 22, 2025, at 12:42 PT), https://www.latimes.com/california/story/2025-07-22/data-shows-evidence-of-racial-profiling-in-ice-raids-immigrant-rights-group-says [https://perma.cc/H9H4-P48S].

20. Individuals convicted of crimes do not have a constitutional right to appeal but do have a statutory right to a direct appeal in both federal and state systems. *See* Martinez v. Ct. of Appeal of Cal., Fourth App. Dist., 528 U.S. 152, 160 (2000) (noting that the right to appeal is "purely a creature of statute" (quoting Abney v. United States, 431 U.S. 651, 656 (1977))); Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("All of the States now provide some method of appeal from criminal convictions . . . ."). For an argument detailing avenues for expanding the right to counsel on discretionary criminal appeals, see Kimberly Thomas, *Reconsidering* Ross*: The Interplay of AEDPA, Criminal Appeals, and the Right to Counsel*, 52 U. MEM. L. REV. 421, 445–48 (2021).

largely irrelevant to the models that we explore below, and that these models can extend to clients in other areas of law. Just as the traditional model has been used by appellate lawyers representing individuals in many matters, the client-centered and participatory models can guide appellate lawyers working in a range of practice areas on behalf of indigent clients.

Ultimately, we argue that appellate lawyers have a critical role to play in advancing justice for their clients and their clients' communities. The frameworks of client-centered lawyering and participatory representation offer invaluable tools for achieving more impactful and fulfilling advocacy.

I. TRADITIONAL LAWYERING

This Part begins with the theoretical framework that has traditionally defined appellate practice. Within this framework, appellate lawyers are cast as expert technicians who have near-total control over strategic decisions with minimal client consultation. This Part then examines the sources that provide the foundation for this and other approaches: the ABA Model Rules of Professional Conduct and Supreme Court jurisprudence. This approach offers significant practical benefits—chief among them, efficiency—especially for overburdened public interest lawyers. But this kind of lawyering has significant disadvantages: it raises concerns about client disenfranchisement, missed errors, and the reproduction of systemic inequality.

A. THEORETICAL FRAMEWORK

The longstanding view of appellate attorneys, which is still common today,[21] is that they are legal technicians—intellectual experts in whose capable hands clients place their cases. In this approach to the lawyer–client relationship, lawyers "exercise maximum professional control over strategic decisions with minimal consultation from clients."[22] The lawyer's job is to find legal issues in the case, raise the strongest legal arguments possible in the briefing and any oral argument, and frame the facts in the manner most likely to win without violating ethical rules. The theory of appeal is whatever works best for the case.[23] For example, the goal in criminal cases would be a reversal or modification of the lower court order. In immigration cases, the goal would be a vacatur of the agency decision,

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In the immigration context, a noncitizen who is ordered removed by an immigration judge has an appeal as of right to the Board of Immigration Appeals (BIA) and may not be removed pending a decision. *See* Johnson v. Guzman Chavez, 594 U.S. 523, 527–28, 534–35 (2021). If the BIA affirms the order of removal, the noncitizen may typically file a petition for review in a U.S. Court of Appeals. 8 U.S.C. § 1252(b)(4). The noncitizen does not, however, have a right to remain in the country pending a decision on that petition. To remain, the noncitizen must file a motion to stay removal, which will be granted primarily on the likelihood of success on the merits. *See Guzman Chavez*, 594 U.S. at 534–35; Nken v. Holder, 556 U.S. 418, 434 (2009). Should that motion be denied, the noncitizen may be removed at any time. *See Guzman Chavez*, 594 U.S. at 535.

21. See *infra* notes 28–29, 74.

22. Kruse, *supra* note 5, at 128.

23. *See id*. at 114.

an outright grant of relief from removal if possible, or, at the very least, a remand for a new hearing.

Under this approach, an appellate attorney has little practical need to speak with their client.[24] There is no need for fact-gathering, since attorneys on appeal are limited to the record of proceedings before the lower tribunal.[25] Whereas a trial lawyer must conduct client interviews to obtain facts from the client, prepare the client for trial, investigate potential defenses against and support for the client's claims, and consult with the client on plea agreements and other litigation outcomes, an appellate lawyer only needs to raise issues that appear on the record of the proceedings below. Further, the litigation outcomes at this stage are typically limited to a reversal, modification, remand, or affirmance.[26]

Indeed, so little emphasis has been placed on communication between appellate attorneys and their clients that most treatises and textbooks on appellate practice say nothing at all about it, focusing solely on brief writing, argumentation, and strategy.[27] Others limit their discussion to how much clients can control

24. To be sure, appellate attorneys must consult with their clients regarding major decisions. *See infra* notes 31–34 and accompanying text. Immigration attorneys must consult their clients to determine whether they actually wish to appeal—there are unfortunately situations in which a client may wish to accept a removal order rather than remain in detention. Likewise, an immigration attorney must consult their client if an agreement with the government becomes a possibility, such as through mediation or a stipulated remand. In the criminal context, the appellate attorney must apprise the client of any potential risks in pursuing an appeal. For example, a client who pled guilty to lesser charges in exchange for a reduced sentence might have the original charges reinstated at a retrial. If the client does not want to risk a retrial, the attorney must only argue issues where relief would result in a sentence reduction or outcome in which the highest charges could not be reinstated. But apart from rare circumstances that require a client's informed consent, there is very little participation an appellate lawyer actually needs from their client to perfect the direct appeal.

25. *See, e.g.*, United States v. Ashimi, 932 F.2d 643, 648 (7th Cir. 1991) ("As a court of appeals does not hear evidence, our only source of information is the trial record."); United States v. Timbana, 222 F.3d 688, 700 (9th Cir. 2000) ("On a direct appeal, we are confined to ruling on error that is demonstrated in the record of the proceedings before the trial court."); People v. McLean, 931 N.E.2d 520, 523 (N.Y. 2010) (holding that the lack of an adequate record bars review on direct appeal wherever the record fails to conclusively establish the merit of the defendant's claim); 8 U.S.C. § 1252(b)(4)(A) ("[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based."); Getachew v. Immigr. & Naturalization Serv., 25 F.3d 841, 845 (9th Cir. 1994) (discussing how the Board of Immigration Appeals may consider "extra-record" adjudicative facts that are "not subject to reasonable dispute," whereas courts may not); *cf.* Camp v. Pitts, 411 U.S. 138, 142 (1973) ("In applying [the standard of review under 5 U.S.C. § 706(2)(A)], the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

26. In very rare cases, appellate courts hearing immigration appeals may themselves grant the petitioner (always the noncitizen) the humanitarian relief sought, rather than remanding for the lower tribunal—the Board of Immigration Appeals—to do so. But the appellate court will only do so when there are no other issues left for the agency to address, and nothing for it to do but grant the relief. *See, e.g.*, Kang v. Att'y Gen. of U.S., 611 F.3d 157, 167–68 (3d Cir. 2010) (granting the petitioner Convention Against Torture protection); Zi Zhi Tang v. Gonzales, 489 F.3d 987, 992 (9th Cir. 2007) (granting withholding of removal but remanding the asylum claim for the Attorney General to exercise discretion on whether or not to grant it).

27. *See, e.g.*, BEAZLEY, *supra* note 3, at 1. *See generally* MAYER BROWN LLP, FEDERAL APPELLATE PRACTICE (Brian D. Netter ed., 3d ed. 2018); ROBERT J. MARTINEAU, KENT SINCLAIR, MICHAEL

issues and arguments raised on appeal.[28] And still others appear to counsel against client participation altogether.[29]

What are the legal foundations of this approach to the lawyer–client relationship in the appellate context? As with all approaches to the lawyer–client relationship, it is helpful to look to the Model Rules of Professional Conduct promulgated by the American Bar Association ("ABA") and the Supreme Court. In the appellate context, the rules most applicable to attorney–client relations are Model Rules 1.2 and 1.4, which have been adopted by all the states.[30] On their face, the rules seem to greenlight and even privilege the traditional approach, in which the lawyer focuses most on the client's litigation objectives and minimally consults with the client regarding strategy. Model Rule 1.2, which outlines the scope of authority between the lawyer and client, requires that the lawyer "abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."[31] Thus, these rules leave the goals of litigation to the client but permit strategic decisions to remain in the hands of the attorney.[32] They "provide little guidance on where the veil between [objectives and means] is drawn,"[33] leaving the attorney with flexibility. In other words, these rules do not *prescribe* any particular kind of attorney–client relationship; they only define what an attorney must do to avoid discipline.[34] While allowing the traditional

E. SOLIMINE & RANDY J. HOLLAND, CASES AND MATERIALS ON APPELLATE PRACTICE AND PROCEDURES (2d ed. 2005); DANIEL P. SELMI, PRINCIPLES OF APPELLATE ADVOCACY (2013).

28. *See, e.g.*, URSULA BENTELE & EVE CARY, APPELLATE ADVOCACY PRINCIPLES AND PRACTICE 293–302 (3d ed. 1998).

29. *See* TESSA L. DYSART ET AL., WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 14 (2d ed. 2003). The one exception the authors found was the textbook *Advanced Appellate Advocacy*, in which two pages were devoted to addressing the importance of counseling clients about "the development of the law, the client's wishes, and . . . ethical obligations," including whether to settle and the risks of an adverse panel and of creating bad law or a circuit split. *See* SUSAN E. PROVENZANO, SARAH O. SCHRUP, CARTER G. PHILLIPS & JEFFREY T. GREEN, ADVANCED APPELLATE ADVOCACY 39–41 (2016).

30. *See Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules [https://perma.cc/7BS5-66NY] (last visited Jan. 1, 2026). California recently adopted Rule 1.2, with a few adjustments. *Compare* Order re Request for Approval of Proposed Amendments to the Rules of Professional Conduct of the State Bar of California, No. 5240991, at 2, 7 (Cal. May 10, 2018), *with* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

31. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983). Model Rule 1.4 also states that the attorney must "consult with the client about the means by which the client's objectives are to be accomplished." MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 1983).

32. *See* Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. RICH. L. REV. 1089, 1091 (2016).

33. Maeve Sullivan, McCoy v. Louisiana *and the Perils of Client Control of the Defense*, 96 DENV. L. REV. 733, 748 (2019).

34. Some scholars view ethics rules as doing more than merely setting limits, but as actually prescribing lawyering norms. *See infra* notes 203–06 and accompanying text. Others view ethics rules as no more than regulatory limits of lawyering conduct. *See, e.g.*, W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 8–9 (1999) (describing and critiquing the "regulatory model" of legal ethics). *See generally* Samuel J. Levine, *Taking Ethical Discretion*

approach, the Model Rules also permit the client-centered and participatory approaches, described below in Parts II and III, in which lawyers recognize that a client may have implicit objectives beyond litigation and try to make those implicit objectives explicit, and in which lawyers emphasize consultation with the client—and even the client's community—throughout the litigation. In so doing, lawyers are still "abid[ing] by [the] client's decisions concerning the objectives of representation and . . . consult[ing] with the client as to the means by which they are to be pursued."[35] But the Model Rules themselves do not single out any particular approach as more or less valuable than the others.

Supreme Court jurisprudence similarly does not require any particular approach to attorney–client relationships, but the Court's decision in *Jones v. Barnes*[36] and its subsequent jurisprudence have given its imprimatur to a model of appellate advocacy that prioritizes the strategic discretion of appellate lawyers over the autonomy and participation of indigent clients. In *Jones*, appointed appellate counsel for an indigent criminal defendant refused to raise multiple claims of error requested by the defendant.[37] Counsel justified his refusal on the ground that the claims would not help the defendant get a new trial and were not based on the record.[38] The Supreme Court held that an indigent criminal defendant has no constitutional right to compel their lawyer to raise claims of the defendant's choosing, even if those claims are nonfrivolous, as long as the lawyer decides, based on their professional judgment, not to do so.[39] The Supreme Court reasoned, "This Court . . . recognize[s] the superior ability of trained counsel in the 'examination into the record, research of the law, and marshalling of arguments on [the appellant's] behalf.'"[40] It chided the lower court for "seriously undermin[ing] the ability of counsel to present the client's case in accord with counsel's professional evaluation."[41] Accordingly, appellate lawyers are constitutionally permitted to control nearly all "strategic" and "tactical" litigation decisions.[42]

The Court based its rationale in part on the appellate lawyer's technical expertise, emphasizing the importance of streamlining the arguments:

> Experienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is

Seriously: Ethical Deliberation as Ethical Obligation, 37 IND. L. REV. 21, 21–24 (2003) (describing theories of legal ethics). How, exactly, the Model Rules should be viewed is a debate beyond the scope of this Article. Instead, we limit our inquiry to their impacts on the three approaches to lawyer–client relationships in the appellate context.

35. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983).
36. 463 U.S. 745, 751 (1983).
37. *Id.* at 747–48.
38. *Id.*
39. *Id.* at 751.
40. *Id.* (citation omitted).
41. *Id.*
42. *E.g.*, Berger, *supra* note 32, at 1091.

> strictly limited in most courts and when page limits on briefs are widely imposed. . . . [T]he advocate's role "requires that he support his client's appeal to the best of his ability." The appointed counsel in this case did just that.[43]

The Supreme Court has subsequently reinforced the importance of appellate attorneys' expertise at the expense of criminal defendants'. For example, unlike the right to represent themselves at trial, criminal defendants have no constitutional right to proceed pro se on direct appeal.[44] And unlike their right to be present at trial, they have no constitutional right to be present during appellate proceedings.[45]

Immigrants' constitutional rights to participate in removal proceedings are limited even further, and there is almost no case law describing which aspects of legal representation they have a constitutional right to control.[46] Immigrants with "established connections" in the United States have due process rights in their proceedings under the Fifth Amendment,[47] and some circuit courts have concluded that this amendment grants immigrants the right to effective counsel.[48] Within that context, the Ninth Circuit has held that immigrants have a right to effective assistance of counsel during the appeals process.[49] Other circuits have found that with this right, prejudice is not presumed[50] or that "there is a rebuttable presumption of prejudice."[51] Still other circuits find no constitutional right to effective counsel for immigrants in removal proceedings at all under the Fifth Amendment.[52] Those entering at the border do have such a right to the extent it is granted through statute and regulation.[53] Some federal appellate courts have held that these sources, when they grant the right to counsel, require counsel to be effective.[54] Others disagree.[55]

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43. *Jones*, 463 U.S. at 746 (citation omitted).

44. *See* Martinez v. Ct. of Appeal of Cal., Fourth App. Dist., 528 U.S. 152, 160 (2000).

45. *See* Schwab v. Berggren, 143 U.S. 442, 448–50 (1892).

46. But the rights of immigrants to participate in their own *criminal* proceedings are the same as for citizens in criminal proceedings. *See* Padilla v. Kentucky, 559 U.S. 356, 364, 366, 369 (2010) (analyzing a noncitizen's right to effective assistance of counsel under the Sixth Amendment and finding counsel was ineffective for failing to advise the petitioner of immigration consequences before the petitioner decided to plead guilty to drug trafficking).

47. *See* DHS v. Thuraissigiam, 591 U.S. 103, 107 (2020).

48. *See, e.g.*, Dakane v. U.S. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2005) (discussing the existence of a Fifth Amendment due process right to effective assistance of counsel in removal proceedings).

49. *See* Dearinger *ex rel.* Volkova v. Reno, 232 F.3d 1042, 1045 (9th Cir. 2000) (finding counsel ineffective under the Fifth Amendment and assuming prejudice because of his failure to timely file an appeal at his client's request).

50. *E.g.*, Franco-Ardon v. Barr, 922 F.3d 23, 25 (1st Cir. 2019).

51. *E.g.*, *Dakane*, 399 F.3d at 1274–75.

52. *See*, *e.g.*, Rafiyev v. Mukasey, 536 F.3d 853, 860 (8th Cir. 2008) (finding no constitutional right to effective assistance of counsel in removal proceedings).

53. *See* Freza v. Att'y Gen. U.S., 49 F.4th 293, 298 (3d Cir. 2022).

54. *See* Hernandez v. Mukasey, 524 F.3d 1014, 1017 (9th Cir. 2008).

55. Jezierski v. Mukasey, 543 F.3d 886, 888 (7th Cir. 2008) ("No statute entitles the alien to effective assistance of counsel . . . although he is allowed to have counsel at his own expense.").

All of this is to say that ethical rules and Supreme Court jurisprudence—the final legal authorities governing attorney–client relationships—give attorneys considerable latitude to decide how much to involve clients in appellate proceedings. The traditional approach takes little of that latitude, deemphasizing client consultation to the extent permitted. Instead, traditional appellate attorneys focus on brief-writing, strategy, and oral argument.[56]

B. BENEFITS AND CRITIQUES OF TRADITIONAL APPELLATE REPRESENTATION

The traditional approach to appellate representation has clear benefits. It is certainly, in the vast majority of cases, the most efficient means of representing criminal defendants or immigrants on appeal. And in an age of funding uncertainty, budget cuts, and immigrant targeting, this benefit may make the traditional approach the only realistic option for some overwhelmed public interest law offices. But this approach can also result in missed errors not visible in a paper record. More often, it emphasizes litigation success at the deeper cost of ultimately supporting structural inequities and dissuading clients from advocating for themselves.

1. Efficiency and Litigation Success

The traditional "legal technician" model for appellate lawyering may well be the most efficient way to practice while generally maximizing the chances of prevailing on appeal. Appellate attorneys who represent indigent clients may be overwhelmed with cases,[57] and the traditional appellate approach shifts the time necessary to develop a trusting relationship with each client[58] and devotes that time to the technical aspects of the appeal or to briefing appeals for a greater number of clients.[59] Although most indigent criminal and immigration appellants lose their cases,[60] countless thousands have received some form of relief. Moreover,

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56. *See supra* notes 22–26 and accompanying text.

57. *See infra* notes 250–52 and accompanying text; Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1256–57 (2004).

58. *See* Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 491 (2008) (exploring the importance of communication skills at the trial level to develop a trusting relationship with clients).

59. *See, e.g.*, J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: The "Ethical" Issue of Issue Selection*, 80 DENV. U. L. REV. 155, 155 (2002).

60. *See* Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1037 (2019). Recent statistics suggest that federal appellate courts remand between 17% and 25% of petitions for review from the Board of Immigration Appeals, although that percent varies wildly by circuit. These numbers are rough because the fiscal year dates for federal courts and the Board of Immigration appeals do not align. *Compare About the Data*, SYRACUSE UNIV.: TRAC, https://web.archive.org/web/20220218110948/https://trac.syr.edu/phptools/immigration/ntahist/about_data.html (last visited Jan. 1, 2026) (noting that the fiscal year for EOIR case statistics runs from October 1 through September 30), *with Federal Judicial Caseload Statistics 2024*, U.S. CTS., https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 [https://perma.cc/N5DR-W22B] (last visited Jan. 1, 2026) (noting the twelve-month reporting periods for federal appellate courts

traditional appellate advocacy has incrementally resulted in social change through landmark individual cases, such as *Gideon v. Wainwright*,[61] ultimately yielding significant precedent expanding the rights of indigent criminal defendants and immigrants.

a. Undermining Client Trust and Reinforcing Social Inequity

But the traditional model is also susceptible to critique.[62] One critique of the de-emphasis on client communication is that attorneys who do not create a relationship of trust and participation with their clients may miss errors that are grounds for collateral attack, such as ineffective assistance of trial counsel—which can only be revealed through discussion with a client. In the immigration context, there may also be other issues not evident from the paper record, such as problems with interpretation (when the client speaks a language other than English) and the effect of medication on a criminal defendant or immigrant.

Another critique is that this model is paternalistic[63] and, at worst, could breed contempt for clients.[64] Professor Gerald López applied this critique to progressive trial lawyers who serve indigent clients by centering themselves as the leading "problem-solvers," without understanding the cultural, political, and socioeconomic

ends March 31). For example, for the fiscal year ending on March 31, 2024, federal courts received 4,941 petitions for review of agency decisions, of which 80% were attributable to the Board of Immigration Appeals. *See Federal Judicial Caseload Statistics 2024*, *supra*. The BIA, in turn, received 689 remands from federal appellate courts in its fiscal year 2024, a 17.4% remand rate. *See* U.S. DOJ: EXEC. OFF. FOR IMMIGR. REV., ADJUDICATION STATISTICS: CIRCUIT COURT REMANDS 1 (2024), https://www.justice.gov/eoir/media/1376371/dl?inline.

61. 372 U.S. 335 (1963).

62. Most discussion of the problems with traditional lawyering has focused on trial lawyers. *See, e.g.*, Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 68–72 (2000). But these critiques but apply with as much force to appellate lawyers.

63. *See* Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLINICAL L. REV. 5, 11 (2016).

64. Consider the language in one popular textbook on appellate practice:

> Many lawyers are no longer able to control, or even to moderate, the demands of emotion-laden clients. Often, professional advice and wisdom are insufficient to curb the excesses of losing parties in lawsuits. Persons who would never dare to instruct a cardiovascular specialist on heart surgery have no qualms about instructing their lawyers when and how to prosecute appeals of highly technical cases. Such persons are everywhere. They are not restricted to any economic or social class. Appellants are rich or poor; from the east, west, north, and south; scarred by adverse jury verdicts or angered by judicial rulings. They are chief executive officers of multinational corporations who direct prestigious law firms on when to move and when not to move. They are impecunious defendants in criminal cases represented by court-appointed counsel who have nothing to lose by cluttering appellate dockets . . . . Most people think cases are retried on appeal *de novo*. They simply cannot recognize that courts of appeals have limited review powers.

RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 8 (2d ed. 2003). And when instructing readers how to narrow the issues on appeal, the textbook reads, "Having lost, you are understandably disturbed. . . . Cool it. Calm down. *Act like a lawyer, not like a client*. Analyze carefully to ascertain where there is an arguable question of trial court error, not simply an imaginable one." *Id*. at 125 (emphasis added).

structures of subordination.[65] These lawyers ultimately reinforced existing structures of inequity,[66] depriving their clients of "the opportunity to exercise their autonomy as moral agents" and depriving communities of "the opportunity to participate in their own collective self-determination."[67]

Appellate lawyers using the traditional approach center themselves as the "problem-solvers."[68] They can easily see themselves as the leaders of social change without truly addressing the cultural, political, and socioeconomic structures of subordination beyond individual appeals. Clients can contribute little apart from the ethically required input on major decisions. This disengagement of appellate clients from their appeals can leave both clients and their communities even more uninformed and less able to knowledgably advocate for their goals. Take an example in the area of immigration. Applications and appeals for asylum seekers are popular forms of pro bono work,[69] and certainly desperately needed.[70] But if appellate attorneys center themselves as leaders of social change because of this work, they ignore the increasingly oppressive systemic structures—including regulatory restrictions and federal and local policies—that make it all but impossible for individuals to actually obtain this form of humanitarian relief and to live securely with it.[71] And they lose the opportunity to help asylum seekers understand the law and advocate for themselves.[72]

The sidelining of clients in the appellate process is reinforced not only by traditional lawyering norms, but also by the structure and nature of appellate advocacy itself—a form of legal practice that is inherently less visible, less accessible, and, as suggested in *Jones*, more difficult for laypeople to understand than trial proceedings.[73] Unlike appeals, trials have been part of our cultural landscape. They are the scenes for turning points in the plots of novels, movies, and television

65. GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 23–24 (1992).

66. *See* Alfieri, *supra* note 63, at 10 (discussing Professor López's vision of lawyering as focusing on "client self-determination and client-lawyer collaboration" informing a commitment to "community education, organization, and mobilization" and believing traditional laywering keeps certain groups "at the margins" and on the bottom of society (footnotes omitted)).

67. *Id.* at 12.

68. *See* LÓPEZ, *supra* note 65, at 24.

69. *See* THOMSON REUTERS FOUND., 2024 TRUSTLAW INDEX OF PRO BONO 123 (2024), https://www.trust.org/wp-content/uploads/2025/01/2024-TrustLaw-Index-of-Pro-Bono.pdf [https://perma.cc/3AGF-KAG6] (44% of firms offer pro bono services for "immigration, refugees, and asylum," second most of all categories.).

70. *See supra* note 60.

71. For an excellent discussion of the systemic subordination of marginalized groups in administrative processes, see Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1650–61 (2024).

72. The Community Activism Law Alliance in Chicago is an example of the opposite of traditional lawyering. They involved multiple communities of support and forms of advocacy to assist an immigrant, gaining their expertise and assistance. *See* Jackie Casey, *Community Activism Law Alliance: Transforming Legal Aid*, AM. BAR ASS'N (Sep. 23, 2024), https://www.americanbar.org/groups/crsj/resources/newsletter/archive/community-activism-law-alliance-transforming-legal-aid. This kind of community-based lawyering is discussed *infra* in Part III.

73. Jones v. Barnes, 463 U.S. 745, 751, 763 (1983) (Brennan, J., dissenting).

shows, some of which are entirely structured around them. And compared to appeals, trials are, at least superficially, easier for a layperson to understand. They involve a prosecutor and an accused person, or an ICE attorney and an immigrant. A judge or a jury must decide who is telling the truth. The outcome is either guilt or innocence, relief or removal. And the client is in court, observing their lawyer's performance: how the lawyer speaks, how they respond to the judge and opposing counsel, and how they respond to the respect or lack thereof by the judge, jury, and opposing counsel.

In contrast, appellate lawyering tends to be "complex and technical . . . performed in the client's absence, and often cannot properly be evaluated simply by observing the results."[74] As Brad Wendel notes, "clients are therefore in a position of vulnerability, dependent for their well-being upon the professional's compliance with stringent standards of ethics."[75] This is true at the trial level, but even more so at the appellate level. Clients are often ill-equipped to evaluate the quality of an appellate brief—like most nonlawyers, they often have a difficult time understanding standards of review, preservation requirements, statutory construction, administrative deference, and other doctrines relevant to appeal. And appellate motions, like briefs, tend to be difficult for nonlawyers to understand. For example, a motion to stay removal, which is common in petitions for review of removal orders, has four distinct parts, the most significant of which is whether the noncitizen is likely to prevail on the merits and will suffer irreparable harm absent a stay.[76] Apart from oral argument, which in most cases is not guaranteed[77] and which clients may have no right to attend,[78] appellate briefs are the primary means for a client to evaluate the skills of an appellate lawyer.

A related critique of the traditional model is that it assumes knowledge of the client's objectives.[79] Katherine Kruse points out that pursuant to this model, lawyers engage in legal objectification of their clients, tending to view them as merely "walking bundles of legal rights and interests rather than as whole persons whose legal issues often come deeply intertwined with other concerns—relationships, loyalties, hopes, uncertainties, fears, doubts, and values—that shape the objectives they bring to legal representation."[80] Because the traditional model deprioritizes communication between lawyer and client, appellate lawyers can easily assume that their own reputational interests in succeeding on appeal are

74. W. Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on* McCoy v. Louisiana, 9 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 92, 118 n.108 (2018) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (AM. L. INST. 2001)).

75. *Id*. at 119.

76. *See* Nken v. Holder, 556 U.S. 418, 434 (2009).

77. *See* Daniel J. Bussel, *Opinions First—Argument Afterwards*, 61 UCLA L. REV. 1194, 1207 (2014).

78. *See supra* note 45 and accompanying text; ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 441–42 (1981) (discussing how some judges disfavor the presence of clients at appellate oral arguments).

79. Kruse, *supra* note 5, at 106.

80. *Id*. at 104.

consistent with their client's objectives.[81] In many cases, this will certainly be so, but clients may have other, nonlegal goals as well. One can imagine an individual deciding to appeal primarily as a means to have their story heard or to give them more time for a visa application to proceed. As a tragic example, asylum seekers can experience "detention fatigue" and shift their goals from obtaining asylum to actually returning to their home country despite danger—just to obtain release from detention.[82] An attorney single-mindedly pursuing an appeal would miss this shift in the client's goals.[83]

The nature of an appellate brief can further silence client input. Appellate lawyers, like trial attorneys, may rely on stock stories, narrative emphasis, and arguments that could prevail on appeal but inadvertently constrict the autonomy of a client and their community.[84] And in oral argument, appellate attorneys aim to satisfy the judges.[85] These strategies, however, can reinforce bias,[86] constrict a client's autonomy, and distort social conditions necessary for communities to campaign for justice.[87] Clients—their perspectives and their values—can fade into obscurity.[88] Further, the client's story may take a back seat to technical legal arguments because claims of legal error draw a far more generous standard of review

81. *Id.* at 140. Although attorneys who serve indigent clients do not have the same financial objectives as private attorneys, they do have reputational objectives, and pursuing appeals—particularly those likely to result in impactful and publicized outcomes—certainly benefit an appellate lawyer's reputation. *See id.* at 138.

82. *See, e.g.*, Jesse Imbriano, *From Humanitarian Crisis to Marauding Hordes: A Manufactured Outcome*, 50 CAL. W. INT'L L.J. 23, 75 (2019) (discussing how unaccompanied immigrant children may choose to abandon their claims and return to their countries of origin given the hostility of the U.S. government to immigration, increasingly narrow channels to remain in the United States, and their failure to obtain release from detention); Jocelyn B. Cazares Willingham, *Process [Ill]defined: Immigration Judge Reviews of Negative Fear Determinations*, 55 COLUM. HUM. RTS. L. REV. 103, 111, 169–70 (2024) (discussing detention fatigue as one reason immigrants fail to fully participate in the asylum process, inadvertently undermining their claims).

83. Even their legal goals might differ from what the lawyer assumes. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. c (AM. L. INST. 2000) ("One litigant might seek the greatest possible personal recovery, another an amicable or speedy resolution of the case, and a third a precedent implementing the client's view of the public interest.").

84. *See* Jaclyn Kelley-Widmer & Estelle McKee, *Essentializing Cultures in US Asylum Law*, 89 BROOK. L. REV. 443, 462–63 (2024) (tracing the use of "machismo"—a stock story in Latin American domestic violence asylum cases—to the stereotyping of Latinx cultures).

85. Indeed, at least one author has argued against the presence of clients at oral arguments:

> Occasionally clients wish to attend the arguments of appeals. . . . The fear is that counsel will tend to tailor his argument to what the client rather than the court wants to hear. A client may expect a polished oration containing flattering treatment of the good guy—himself, of course—and the opposite for the bad guy. . . . Particularly in criminal cases . . . a client's presence may be an embarrassment and should be avoided; the same may be true of civil litigation in which the client's integrity or morality is in issue.

STERN, *supra* note 78, at 441–42.

86. *See* Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747, 757 (2017).

87. *See* Alfieri, *supra* note 63, at 30.

88. *See* Kruse, *supra* note 5, at 132.

than claims of factual error.[89] From the traditional practitioner's perspective, the client's input can thus become irrelevant or even undermine the appeal.[90]

Ultimately, the traditional approach may be the only viable approach for appellate attorneys required to carry a heavy caseload. By limiting the time the attorney can spend with each individual client, the attorney can take on more cases, review more records, and write more briefs. But there are costs to this approach. Attorneys may miss errors that a paper record cannot reveal, or they may miss a client's shifting goals. And more broadly, this approach can cement structural inequity by reinforcing the paternalistic relationship between public-interest appellate lawyers and the communities they serve. Lawyers lead; clients follow.

II. CLIENT-CENTERED LAWYERING

A. THEORETICAL FRAMEWORK

The client-centered (or "holistic") model of lawyering emerged in the 1970s, primarily through clinical legal education, as a response to critiques of the traditionalist approach.[91] Whereas traditional lawyering deprives clients of autonomy, client-centered lawyering—done well—returns that autonomy to the client through client-directed, holistic approaches. This model recognizes that indigent litigants often have lay expertise about constitutional law and procedure, as well as about the practical and experiential effects the legal system has on their lives.[92] To gain trust and increase collaboration, client-centered lawyers decenter their own expertise and include individual clients in legal strategy. Client-centered lawyering is now the primary model taught in law school clinics.[93]

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89. *Compare* Tomczyk v. Garland, 25 F.4th 638, 643 (9th Cir. 2022) (as amended) ("We review legal questions raised in a petition for review . . . de novo."), *with* 8 U.S.C. § 1252(b)(4)(B) ("[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

90. *See* STERN, *supra* note 78, at 441–42.

91. Katherine Kruse provides an excellent historical analysis of client-centered lawyering. *See* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 381 (2006); Kruse, *supra* note 5, at 127.

92. *See* Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, 100 SOC. FORCES 194, 195 (2021). Professor Clair describes "lay expertise" as arising from efforts by disadvanted criminal defendants, who lack legal training, to "cultivate their own legal knowledge and skills in their communities, in jail, and through observation." *Id*. It is born of the cynicism such defendants feel about legal authorities' ability to address crime in their communities, and it is a means of resisting legal control. *See id*. Specifically,

> [L]ay expertise . . . includes basic knowledge of constitutional rights and formal court procedures such as motions and the presentation of mitigating evidence, as well as experiential knowledge of how court sanctions operate [and] contrasts with the professional expertise of court officials. . . . Professional expertise constitutes not just specialized knowledge about rights and procedures but also situated cultural knowledge about the unwritten expectations and preferences of, and working relationships with, other officials. Their knowledge is honed through routine engagement in the courtroom workgroup.

Id. at 199.

93. Susan Bennett et al., *Building a Culture of Scholarship with New Clinical Teachers by Writing About Social Justice Lawyering*, 31 AM. U. J. GENDER, SOC. POL'Y & L. 311, 347 (2023) ("Client-centered representation is the predominant method taught in clinical law school programs across the

Although scholars differ in where they place the emphasis, the client-centered approach is "a philosophy of lawyering that strives at once to be client-directed, holistic, respectful of client narrative, client-empowering, and partisan."[94] It is client-directed in that it elevates client decision-making, so that lawyers must pay attention to how they deliver information to avoid influencing clients' choices.[95] It is holistic in that it recognizes the importance of the client's nonlegal concerns, and it encourages lawyers to help clients find nonlegal solutions to these problems when the legal system cannot address them.[96] So, for example, client-centered law offices will often provide client services relating to housing, education, and employment.[97] This approach aims to empower clients by developing "egalitarian relationships of trust"[98] with clients, and teaching clients how to collaborate by bringing clients' experiences to bear on problem-solving.[99] It is respectful of client narrative in that the theory of the case and the litigation narrative are focused on clients' lives and are client-driven.[100] And it is partisan in that it is focused on preserving the clients' future options.[101]

Client-centered lawyering also appears to empirically benefit clients—at least at the trial level—resulting in improved litigation outcomes and increased client satisfaction regardless of the ultimate disposition of the case.[102] In the criminal context, for example, client-centered representation models result in fewer custodial sentences, shorter sentences, and fewer pretrial detentions, all at a reduced cost to taxpayers.[103]

Although criminal defendants' constitutional right to control their own cases is limited,[104] some of the rhetoric in Supreme Court opinions can be read as supportive

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nation."); Kruse, *supra* note 91, at 370–71 ("[T]he client-centered approach has so thoroughly permeated skills training and clinical legal education, it is not an exaggeration to say that client-centered representation is one of the most influential doctrines in legal education today."); *see* Wendel, *supra* note 74, at 98.

94. Kruse, *supra* note 91, at 371–72; *see* Kruse, *supra* note 5, at 127.

95. Kruse, *supra* note 5, at 132 & n.170 (citing William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 217–18 (1991)).

96. *See* Kruse, *supra* note 91, at 392–93, 421–22; Siegel et al., *supra* note 10, at 584.

97. *See, e.g.*, Steinberg, *supra* note 8, at 962–63.

98. Cimini & Smith, *supra* note 12, at 1048.

99. *See* Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1614 (1989).

100. *See* Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 503 (1994); Kruse, *supra* note 5, at 134–35; Wendel, *supra* note 74, at 135; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2139–40 (1991).

101. Kruse, *supra* note 91, at 397–98.

102. *See id.* at 381, 382–83.

103. James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 879, 885 (2019); *see* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1531–32 (2021) (acknowledging that giving clients more choice can improve outcomes, and analyzing whether indigent clients of color should be able to choose attorneys of their own race).

104. *See supra* notes 36–55 and accompanying text.

of the client-centered model.[105] For example, until fairly recently, the Supreme Court found that criminal defense attorneys must defer to their clients when making only four "fundamental" decisions: "whether to plead guilty, waive a jury, testify in [their] own defense, or take an appeal."[106] In 2018, the Court in *McCoy v. Louisiana* expanded the client's decisionmaking power, finding that a defendant has the constitutional right to maintain their innocence and that defense counsel cannot override that decision by conceding guilt, even if doing so would be a strategic mistake from the attorney's point of view.[107] The Court grounded its logic in dignitary and autonomy concerns, writing that "[t]o gain assistance, a defendant need not surrender control entirely to counsel."[108]

Advocates for the client-centered model have noted that the Court's recognition that "'[t]he right to defend is personal,' and a defendant's choice in exercising that right 'must be honored out of "that respect for the individual which is the lifeblood of the law"'"[109] telegraphs some support for client deference and autonomy.[110]

B. CLIENT-CENTERED LAWYERING AS APPLIED TO APPELLATE REPRESENTATION

The characteristics of client-centered lawyering at the trial level—respect for clients' personhood and autonomy, holistic problem-solving, and moral regard for the client—apply equally to appellate lawyering for indigent clients. And client-centered representation at the appellate level seems to be gaining traction in well-resourced indigent criminal defense offices—those that are able to adhere to the standards developed for appellate defender offices by the National Legal Aid & Defender Association ("NLADA").[111] As Jonah A. Siegel, Jeanette Hussemann, and

105. *See* Jones v. Barnes, 463 U.S. 745, 764 (1983) (Brennan, J., dissenting) ("Clients, if they wish, are capable of making informed judgments about which issues to appeal, and when they exercise that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court.").

106. *See id*. at 751.

107. 584 U.S. 414, 414–15 (2018). In the case, a capital defendant argued that his trial counsel was ineffective because counsel, reasonably believing this was the defendant's best chance to avoid a death sentence, conceded against the defendant's wishes that the defendant had shot his ex-wife and her family. *Id*.

108. *Id*. at 421.

109. *Id*. (citations omitted).

110. *See* Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 501 (2022) ("The innovation in *McCoy* was to frame the right to the assistance of counsel as one intended to protect the defendant's autonomy in [their] relationship with their attorney, rather than one intended to ensure that a defendant is protected from enduring an unfair trial in which they do not have the capacity to adequately defend themself."); Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 393 (2021); Wendel, *supra* note 74, at 100 (noting that Justice Ginsburg picked up on arguments from the client-centered representation movement when she reasoned that the client's objective may not be simply to avoid death, but possibly the "opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.").

111. *See Standards and Evaluation Design for Appellate Defender Offices (Black Letter)*, NAT'L LEGAL AID & DEF. ASS'N, https://www.nlada.org/defender-standards/appellate/black-letter [https://perma.cc/5UMJ-MQAL] (last visited Jan. 1, 2026). Examples of offices that embrace a client-centered approach to appellate public defense work include New York's Center for Appellate Litigation, CTR.

Dawn Van Hoek note, "the concept of client-directed relief and the pursuit of nonlegal goals are slowly gaining support among appellate stakeholders, challenging traditional conceptions of appellate lawyering as a 'hands-off' profession."[112] Yet despite its popularity and success at the trial level and emerging recognition at the appellate level, there has been a dearth of scholarship on the applicability of client-centered representation in the appellate context. Below, we sketch the contours and limitations of such an approach.

1. Client Communication

As with trial representation, client-centered lawyering in appellate representation requires the attorney to spend significant time with their client to understand their values and goals. Without this attorney–client connection, there is no way that appellate representation can be consistent with the qualities of client-centered lawyering, especially the requirement that lawyering be client-directed, holistic, respectful of client narrative, and client-empowering.

To start, the first meeting with the client should be conceived of as an introduction rather than an "interview." There is little need for an "interview" in which the attorney asks a series of questions designed to elicit legally relevant facts from the client.[113] Instead, as with trial attorneys, the first meeting with the client should be focused on developing rapport and trust and eliciting the client's goals.[114] To the extent the attorney may be concerned about issues outside the record that can be raised on appeal,[115] it is this trust, together with the attorney's familiarity with the record, that will surface such issues, not scattershot questioning about the proceedings.[116] Rapport and trust are particularly important for appellate attorneys because of the inability of nonlawyers—including clients—to

FOR APP. LITIG., https://appellate-litigation.org [https://perma.cc/RVZ5-3TJX] (last visited Jan. 1, 2026) (utilizing "a model of holistic representation"); New York's Office of the Appellate Defender (OAD), THE OFF. OF THE APP. DEF., https://oadnyc.org [https://perma.cc/DB3G-A388] (last visited Jan. 1, 2026) (using "a national model of effective, innovative, and holistic defense representation"); the Michigan State Appellate Defender Office, *Mission and Values*, MICH. STATE APP. DEF. OFF. & CRIM. DEF. RES. CTR., https://www.sado.org/Page/1/SADO-Mission-and-Values [https://perma.cc/XTF9-89EK] (last visited Jan. 1, 2026) ("We . . . strive to right systemic wrongs, achieve redemption, center human dignity, and help those we represent to reclaim their lives."); and Public Defender Service for the District of Columbia, *The Story of PDS: 65 Years as a Model Defender Program*, PUB. DEF. SERV. FOR THE D.C., https://www.pdsdc.org/about/historical-timeline (last visited Jan. 1, 2026) (representation includes legal services and extralegal support including social workers, special education resources, reentry services, and other advocacy services).

112. Siegel, *supra* note 10, at 583.

113. *See* Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLINICAL L. REV. 541, 549 (1995) (quoting DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 2 (1977)); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 62 (1990).

114. *See* Laila L. Hlass & Lindsay M. Harris, *Critical Interviewing*, 2021 UTAH L. REV. 683, 691 (2021) (describing pedagogical goals for students conducting initial client interviews).

115. *See supra* Part I for examples of such issues.

116. Although there is no empirical evidence comparing appellate success rates arising from particular modes of client communication, there is evidence that close collaboration with clients does yield higher success rates at the trial level. *See* John J. Donahue & Eric A. Baldwin, *The Crisis of*

readily evaluate attorneys' work.[117] It is also important because, unless the client was pro se below or has the same attorney on appeal as at trial, the client has already developed a relationship with another attorney. If that relationship was positive, it may predispose the client to think well of appellate counsel, and rapport may be more easily established. In cases of severely traumatized clients who have developed close relationships with trial counsel, establishing rapport with new counsel may be difficult and may even require the assistance of trial counsel.[118] On the other hand, where a client has had a negative relationship with trial counsel, that relationship may hamper the development of trust in appellate counsel. In either case, the appellate attorney will need to spend more time with the client to understand the client's perspective and what happened below.

As the appeal proceeds, the attorney should continue to spend time with their client, employing the same listening techniques that trial lawyers use, in an effort to understand what kinds of outcomes the client desires and how the client wishes to go about pursuing those outcomes.[119] This is not to say that attorneys must call their clients every day, ask the clients to review every brief draft, or update the client on every team meeting. Rather, the attorney should give careful consideration to the client's position vis-à-vis the attorney and how likely it is that the client has truly clarified their goals to the attorney.

The amount of time attorneys should take with their clients will depend on the individual client. Some clients want to provide considerable input into their appeals. For such clients, the attorney should offer every opportunity to participate in the appeal, within the time constraints of a public interest appellate law practice. But other clients are more reticent. These latter clients may need careful attention to ensure that they are participating to the fullest extent they wish.[120] Are they comfortable leaving the litigation in the hands of the attorney, or are

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America's Public Defenders, PROJECT SYNDACITE (Oct. 8, 2024), https://www.project-syndicate.org/commentary/new-public-defender-model-could-transform-us-criminal-justice-by-john-donohue-and-eric-a-baldwin-2024-10 [https://perma.cc/V2AT-C9XW]. And scholars—especially those in clinical teaching—have long known that it is impossible to closely collaborate with one's client without time and effort devoted to establishing rapport at the start of the client relationship. *See* Linda F. Smith, *Professional Identity Formation Through Pro Bono Revealed Through Conversation Analysis*, 68 CLEV. ST. L. REV. 250, 279 (2020) ("All the legal interviewing texts emphasize the importance of developing rapport with one's client by expressing empathy for the client."); Ana M. Otero, *Tinkering with the Machinery of Death in Texas: A Chronicle of Unbridled Injustice and Abuse*, 16 C.R. L.J. 183, 235 n.349 (2006) (emphasizing the importance of taking time to develop rapport with capital clients and stating that "[a]n occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post conviction review, or clemency" (quoting Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1008 (2003))).

117. *See supra* notes 75–78 and accompanying text.

118. One of the authors had a client who was fearful of meeting appellate counsel for the first time and asked to have trial counsel present. Trial counsel eventually assisted with the appeal and applications for prosecutorial discretion, ultimately becoming a critical part of the appellate team. That is not the norm, however.

119. *See, e.g.*, Kruse, *supra* note 5, at 133.

120. *See, e.g.*, Cazares Willingham, *supra* note 82, at 173–75 (articulating questions a lawyer can ask a client on appeal in the immigration context).

they intimidated by the attorney to the point that they may not be able to voice questions or concerns? The time necessary to answer this question will vary depending on the client and the nature of the litigation.

A client's goals on appeal may initially appear transparent. Of course, the client will want the appeal to succeed. But does the client understand what that means? Clients often do not realize that winning on appeal does not necessarily mean release from detention or incarceration. It does not usually mean a grant of asylum or dismissal of criminal charges. Most often, it means a remand, perhaps a round of agency briefing, and potentially another hearing or trial.[121] An appellate lawyer may well celebrate such an outcome, but many clients do not. For an immigrant client, it may mean another appearance in immigration court, at which they must testify again: a frightening prospect. For these clients, "winning" just means an extended period of anxiety. For a criminal defendant, a remand usually means a transfer back to local jail—where conditions are often even worse than in prison—followed by a potentially lighter plea offer or another trial whose outcome is uncertain.[122]

Further, the client may value other outcomes—legal and nonlegal—that the appellate lawyer may not discover without a trusting relationship. For example, immigrant clients petitioning the federal courts for review of removal orders certainly desire to stay in the country. But they may also have more immediate concerns, including release from detention or obtaining a work permit to address income problems. Sometimes these concerns are so pressing that it may appear to the attorney that the client is less invested in the appeal than the attorney is. And it may be necessary to assist the client with these other concerns to enable the client to continue with the appeal.[123]

Throughout the appellate process, the client-centered attorney should remain attentive to the broader support their clients may want or need, offering assistance directly or through referrals. For example, the attorney could ensure the client is getting adequate medical and mental health care while detained or incarcerated. If the client desires, the attorney can help directly advocate for improved detention or incarceration conditions by communicating with detention and prison

121. *See, e.g.*, Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 575 (2005) ("[F]or many victims, even a successful legal outcome does not promise much satisfaction, because their goals are not congruent with the sanctions that the system imposes.").

122. *See* Jessica L. Adler & Weiwei Chen, *Jail Conditions and Mortality: Death Rates Associated with Turnover, Jail Size, and Population Characteristics*, 42 HEALTH AFFS. 849, 849 (2023) (finding that certain jail conditions such as high turnover rates, population size, and health care management related to mortality rates).

123. As noted above, clients may decide not to pursue appeals because of detention fatigue. *See* Cazares Willingham, *supra* note 82, at 169–70. But even clients who are not detained may have other difficulties that interfere with their ability to pursue their appeals. For example, clients who lose their homes, face food insecurity, or have mental health issues may simply disappear. *See generally* Robert M. Jarvis, *The Missing Client: An Ethical Quagmire*, 87 FLA. BAR J. 8 (2013) (discussing the professional obligations to absent clients). In such cases, the appeal may prevail but to no benefit of the client, who will not receive notice of a new hearing or other critical information, such as the requirement to make a biometrics appointment to receive asylum. *See* 8 C.F.R. § 103.2 (b)(9) (2025).

officials. Attorneys can also assist in defending clients against disciplinary infractions during incarceration or represent them at parole board hearings. When a client is nearing release, the appellate lawyer can connect them with reentry organizations and refer them to civil legal aid attorneys or advocates to help with collateral consequences of their conviction.

As noted above, close communication takes significant effort. Detained clients are often located far from the attorney and may be transferred across the state or country at any moment.[124] Opportunities to establish real trust and rapport with a client are limited when the client is detained or incarcerated, especially given difficulties with communication in detention facilities.[125] And in immigration appeals, clients often speak another language, requiring an interpreter at every interview.

In the clinical field, the value of in-person visits is well-known. As Timothy Everett points out, in-person visits "exhibit[] respect for the personhood of appellate clients . . . [and have] consistently proven to be the best way of beginning to establish a respectful and effective attorney/client arrangement."[126] Such visits are not always possible for appellate attorneys because of heavy caseloads and budget constraints. But to the extent that appellate attorneys are able to visit their clients—especially indigent, detained clients—they should make every effort to do so.[127] And regardless of how the attorney is best able to communicate with their client, the nature of the communication should be treated as part of the appeal itself, as important as brief writing and oral argument, and deserving of the same attention.

2. Client Direction in Appellate Strategy and Argument

To encourage client engagement with the appeal, appellate counsel should be open to hearing the client narrate the events underlying the litigation, as long as the client is willing to do so. This narration can shed light on the record and assist

124. Patrick G. Lee, *Immigrants in Detention Centers Are Often Hundreds of Miles from Legal Help*, PROPUBLICA (May 16, 2017, at 16:00 ET), https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help [https://perma.cc/E5RR-Z962] (documenting the burdens on detainees held in remote facilities).

125. It is not uncommon for detention facilities to have flawed telephone and video lines in which static or other noise interferes with communication. *See, e.g.*, Brief for Petitioner-Appellant at 19, Black v. Decker, 103 F.4th 133 (2d Cir. 2024) (No. 22-70). In one author's experience, facilities have also simply shut down these means of communication when they experience technical difficulties. *See* Zachary Manfredi & Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communication in Immigration Detention*, 95 N.Y.U. L. REV. 130, 133, 135 (2020) (describing how the difficulties immigration detainees experience finding and communicating with attorneys violate Fifth Amendment due process).

126. Timothy H. Everett, *On the Value of Prison Visits with Incarcerated Clients Represented on Appeal by a Law School Criminal Defense Clinic*, 75 MISS. L.J. 845, 867 (2006).

127. *Id.* at 853. In the authors' experience, institutional legal providers with multiple clients at a single prison or detention center may be able to "bundle" visits, so that one legal representative meets with all clients there during the same visit. Although this may not always permit a meeting with clients at the start of the representation, it can nonetheless enhance rapport and build trust.

counsel with developing of a theory of appeal.[128] In the criminal appeals context, the facts the client provides could help an attorney uncover grounds for a meritorious post-conviction motion. Binny Miller discusses how trial attorneys can work with clients in this manner by developing and discussing with the client the available options for a case theory based on the client's narrative.[129] The same advice applies to appellate attorneys: a client who is willing to discuss the facts underlying the litigation and arising from the trial itself may be able to add life to an otherwise dry record in a manner that expands and enhances the stories that can be pulled from it. As one example, one of the authors appealed an immigration judge's finding that a Cameroonian immigrant was not credible. The immigration judge found that the client was inconsistent about whether he had injured his wrist or his arm. Had the author and her clinic students not spoken to her client, they would not have learned that the words for "wrist" and "arm" in the client's language were the same—they were simply interpreted differently at different times.[130] This is perhaps an extreme example of how a client can shed light on a record, but it nonetheless illustrates the importance of communicating with one's client and hearing the client's experience. Further, because an appellate lawyer draws facts from the record rather than testimony, there are no ethical concerns like those that could arise from a client's materially false statements during trial preparation or negotiations.[131]

A caveat: in some cases, asking a client to revisit their experiences may be deeply traumatizing. Especially in the immigration field, clients will already have discussed their experiences with trial counsel, testified about them in a merits hearing, and testified in response to questions about them from their own attorney, the immigration judge, and government counsel. Asking clients to relive their trauma yet again with an appellate attorney may cause more harm than is warranted by the relatively small likelihood that of improving client engagement and succeeding on appeal. Indeed, revisiting these experiences might actually have the opposite effect, causing the client to withdraw.[132] But often, clients do want to relate their experiences. If so, appellate counsel should give them opportunities to do so.

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128. *See* Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 11 (2005) (discussing how a theory of the case can be developed from narrative).

129. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 513 (1994).

130. Order Granting Motion to Stay, Tebah v. Garland, No. 20-61209 (5th Cir. Apr. 15, 2021).

131. *See* Stephen Ellmann, *Truth and Consequences*, 69 FORDHAM L. REV. 895, 908 (2000) (discussing how lawyers might have to curb what they hear from clients to avoid ethical binds).

132. *See* Herman, *supra* note 121, at 581 (describing the need of trauma victims to "establish a sense of power and control over their lives . . . tell their stories in their own way, in a setting of their choice . . . [and] control or limit their exposure to specific reminders of the trauma"); Alesha Durfee, *"Usually It's Something in the Writing": Reconsidering the Narrative Requirement for Protection Order Petitions*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 469, 482 (2015) ("[F]or many [abuse victims] the physical act of writing a narrative of abuse will remain a traumatic and revictimizing experience. In order to write the narrative of abuse, a victim must relive acts of victimization and recall specific details about events that they have repressed simply in order to survive.").

3. Contours of Client-Oriented Legal Decisionmaking

Although the Supreme Court has held that an attorney is not bound to raise a nonfrivolous error or argument at the client's direction when the attorney deems it of little merit,[133] should the attorney do so anyway? The client-centered model dictates that the attorney should. First, doing so encourages client participation, treats the client as a partner in the litigation, and puts indigent clients on equal footing as paying clients, since an attorney is far less likely to refuse such a request from a paying client and risk termination. Further, including such arguments may increase the trust between the client and the attorney.[134]

There may be limits, however. Even client-centered lawyering would not require an attorney to include numerous meritless arguments in her brief. After all, the client-centered quality of partisanship[135] counsels against doing so.[136] The extent to which the client should be permitted to include weak arguments in an appellate brief, versus the extent to which the attorney should control the arguments, is an appellate version of one of the "problem cases" that Katherine Kruse addresses.[137]

In her article, Kruse discusses the problem of a client who makes a decision their lawyer believes is imprudent.[138] As one example, Kruse discusses a client who resists mediation despite its likelihood of offering the client a better outcome than litigation.[139] Before pursuing a conversational strategy of dislodging the client's "litigation narrative," which Kruse describes as a "particularly invasive kind of intervention," the lawyer should first ask herself the question: how does this "comport with client-centered representation?"[140] To answer this question, the details of the dispute and the options available matter.[141] Based on these

133. Jones v. Barnes, 463 U.S. 745, 751 (1983).

134. *See* Sullivan, *supra* note 59, at 164 (discussing Justice Brennan's dissent in *Jones*).

135. *See supra* notes 98–101 and accompanying text.

136. *See* Sullivan, *supra* note 59, at 156 (quoting U.S. Supreme Court Justice Robert Jackson as saying,

> The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one . . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMPLE L.Q. 115, 119 (1951)).

137. *See* Kruse, *supra* note 91, at 426–37 (describing the issues of applying the client-centered approach when the client is poised to take an imprudent or immoral action).

138. *Id.* at 427.

139. *Id.*

140. *Id.* at 428.

141. *See id.* at 429–30. Kruse provides three hypothetical examples whose factual differences emphasize how the choice between various client-centered approaches is fact-specific: a dispute between long-term neighbors, between a gay couple and a county preventing the licensing of the couple's foster home on discriminatory grounds, and between a student and their school district over the dress code. A holistic approach would be better for the neighbors given their need to maintain future peaceful relations. In contrast, a narrative integrity approach would be better for the parents, given the

details, the lawyer's decision must balance partisanship against the values of client-directed litigation, respect for client narrative, and client empowerment. So, for example, the values of client narrative and client empowerment may favor including an argument on bias in the courtroom if doing so has great importance for the client, even if it does not otherwise fit with the theory of the appeal, and even if it is highly unlikely to succeed. On the other hand, including seven arguments repackaging the same bias narrative in different ways may require a different balance of the client-centered values.

Whatever the ultimate balance, these situations call for an honest conversation with the client about the arguments the attorney *does* plan to make, why they have merit, and other options that might be available to the client, such as a judicial conduct complaint.[142] Whether or not the attorney tries to persuade the client that their proposed arguments are meritless, though, calls for another reflection on the balance of client-centered values at play.

4. Strategies for Public Defender and Removal Defense Offices

Jonah Siegel, Jeanette Hussemann, and Dawn Van Hoek analyzed, in an ethnographic study published in 2017, the concrete measures taken by appellate attorneys in a public defender's office to enhance client-centered representation.[143] The authors noted that the office revised checklists and manuals to focus on client-led decisionmaking and nonlegal advocacy.[144] The office also instituted formal trainings on appeals and prison-related problems for the inmates' community of friends and family, as well as postconviction advocacy.[145] Further, the office made reentry resources on education, food services, housing, drug and alcohol treatment, and other topics available online for staff and outside attorneys.[146] Lastly, several appellate defenders were embedded into a community of activists who could identify gaps in service for clients.[147] By including support structures into legal practice, the office not only helped clients feel more empowered and engaged in their own cases, but also addressed critical practical needs—such as accessing reentry services, navigating conditions of confinement, and maintaining communication with support networks.[148] These resources allowed clients to better prepare for life after incarceration and, in some cases, to challenge prison-related issues that would otherwise go unaddressed. Even when appellate relief

benefit of them sharing their own story. Lastly, a partisan approach may be best for the student, given the approach's protection of the client's future rights. *See id.*

142. *See, e.g.*, 28 U.S.C. § 351 (stating that a person who alleges a judge has engaged in prejudicial conduct to the administration of justice may file a complaint); *Judicial Conduct*, U.S. CT. APPEALS FOR SECOND CIR. (Sep. 13, 2021), https://www.ca2.uscourts.gov/judges/judicial_conduct.html [https://perma.cc/QSY9-BJ9L].

143. Siegel, *supra* note 10, at 581.

144. *Id.* at 593.

145. *Id.*

146. *Id.*

147. *See id.*

148. *See id.*

was not obtained, these efforts ensured that the legal process had meaningful and tangible value for clients' broader well-being.

These attorneys, too, agreed that client-centered representation presented challenges but was the best course of action, even if no relief was obtained: "We pursued appeal, we fought, but [my client] was thrilled that I had fought for him. He felt that was a successful appeal. And I felt good at the end because he felt so good."[149] And by "good," the attorney meant that the client had felt empowered, had discovered that he could advocate for himself, and had developed a greater understanding and acceptance of the litigation outcome.[150]

Although Siegel's and his co-authors' analysis addressed a criminal defense office, similar measures can be taken in offices serving noncitizens facing removal. Many of these offices have already provided online guidance to noncitizens on how to pursue an appeal to the Board of Immigration Appeals and a petition for review in federal appellate court, seek bond or habeas relief from detention, and obtain services after removal.[151] Similar to the training on postconviction advocacy discussed by Siegel, further training could be provided to immigration attorneys on postremoval advocacy: how to prepare clients' communities for negative outcomes and assist clients with obtaining help in their countries of removal. And in the authors' experience, the immigrant activist community welcomes any assistance appellate attorneys can provide, from advising detainees to providing limited assistance with their appeals to full representation.

C. CHALLENGES OF INCORPORATING CLIENT-CENTERED LAWYERING IN APPELLATE REPRESENTATION

The client-centered model takes far more resources than the traditional model. Accordingly, the most compelling reason for the traditional practice framework discussed above could be that appellate lawyers representing indigent clients are simply too overwhelmed by the needs of their client population to adopt any other approach. Transitioning to client-centered defense may not be feasible for indigent defense offices already under significant financial strain and for individual attorneys already overburdened with traditional casework. Changing entrenched norms of a traditional office can add even more stress.[152] Those committed to a traditional model could point out that devoting efforts to encouraging clients to participate in the appellate process wastes time on what is likely to be a largely unsuccessful endeavor[153] and takes time away from arguing complex legal issues,

149. *Id.* at 596.

150. *See id.*

151. *See, e.g.*, *How to Defend Your Own Case*, FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT, https://firrp.org/resources/prose [https://perma.cc/R3JU-JKW5] (last visited Jan. 2, 2026); *Crossing South*, AM. FRIENDS SERV. COMM., https://afsc.org/crossing-south [https://perma.cc/DZ6G-3FYX] (last visited Jan. 2, 2026).

152. *See* Siegel, *supra* note 10, at 580.

153. *See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 553 (1990) ("The [client-centered] lawyer's relationship with [their client] is . . . apt to be more satisfying in the long-run, even if less efficient and more time-consuming.").

especially those that could result in a precedential decision. Similarly, without empirical evidence to suggest that case outcomes are improved with client-centered representation on appeal, it is valid to question whether indigent clients would be better served by lawyers who devote their efforts to the litigation rather than the client. Although clients may feel more positive about the client-centered representation regardless of whether they succeed in their appeal, there is no data to show whether legal outcomes on appeal actually improve under this model. Nonetheless, indigent clients, who are already on unequal economic and likely educational footing with their lawyers, should not be given any shorter shrift than paying clients. Viewing indigent clients as a population, rather than individuals, risks turning legal offices into litigation mills, with lawyers making assumptions about client goals, treating clients paternalistically, and ultimately reinforcing inequity.

Client-centered lawyering also presumes the client has the desire and capacity to fully participate in the litigation. This is not necessarily true for clients who have cognitive or developmental disabilities, struggle with mental health issues, or are children.[154] In cases where the client's capacity to fully participate in the litigation is in doubt, Brad Wendel has suggested balancing client autonomy against the need for partisanship by using a sliding scale approach, overriding the client's instructions only where the client's interests are significant and the consequences severe.[155] And if the lawyer lacks evidence of what the client would have preferred, the lawyer may move forward and make the decision by relying on an objective reasonable person standard.[156]

One of the most serious critiques of client-centered lawyering involves attorney burnout. Attorneys who observe their clients' problems beyond litigation will likely question whether they are truly promoting social justice—the problems their clients face will always be numerous, complex, and even intractable.[157] Although the "we're in it together" camaraderie of many legal services and public defense offices may stave off burnout for a while, it is often not enough for long-term work in the field.[158] Some scholars argue that lawyers for indigent clients can survive on empathy and heroism and that if attorneys develop a close relationship with their clients, their clients can provide them with the drive to overcome burnout.[159] But such empathy and close relationships can also magnify

154. *See* Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1661 (1996); Wendel, *supra* note 74, at 130.

155. Wendel, *supra* note 74, at 128–29. Wendel cautions that a lawyer must carefully determine whether a client truly lacks capacity before ignoring the client's desires, and not "construe as proof of disability a client's insistence on a view of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views." *Id*. at 128.

156. *Id*. at 128.

157. *See* Smith, *supra* note 57, at 1233.

158. *See id*. at 1213–14.

159. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1273–74 (1993).

grief[160]—grief that a lawyer is more likely to feel if the litigation fails, which is common when representing indigent clients, particularly on appeal. The repeated emotional rollercoaster of a close relationship with clients may be all the more likely to result in lawyer burnout.

One solution to this burnout is the conception of the attorney as "accompagnateur." This idea, first proposed by Margaret Reuter, Stephen A. Rosenbaum, and Danielle Pelfrey Duryea in their seminal article, *Attorney As Accompagnateur: Resilient Lawyering When Victory Is Uncertain or Nearly Impossible*, can be summarized as follows:

> [A] lawyer's internalization of her role as *accompagnateur* to her clients can gird and enable her to sustain motivation to fight the good fight. Namely, the first or foundational professional value is to *accompany* her client—stand beside, stand up for, and give respect and voice to the client's story—irrespective of victory. In so doing, the lawyer's deepest source of professional identity and purpose is in accompanying the client well.[161]

This solution embraces the aspects of client-centered lawyering that focus on autonomy and respect for the client's personhood, while recognizing that although indigent clients often lose their cases, the lawyer can still have a positive impact on their clients' lives.

The idea of the lawyer as "accompagnateur" has as much resonance at the appellate level as at the trial level. At the trial level, the client likely has greater immediate anxiety because of the necessity of appearing in court and participating in the litigation, so the accompaniment of the attorney is essential. But if there is an appeal, the client has most likely lost below[162] and has diminished hope of success. Without a close connection to their attorney, a client can feel buried under the stress of lengthy litigation. Further, clients on appeal—at least in the criminal and immigration context—are often in prison or immigration detention, far from loved ones or other support. Therefore, the appellate attorney's accompaniment and engagement with the client remains crucial.

Framing appellate attorneys' client-centered work as accompaniment can be helpful to the attorney as well as the client. Unlike a loss at trial, after which an

160. *See id.* at 1367.

161. Reuter et al., *supra* note 7, at 108.

162. Although the state cannot appeal the judgment in criminal cases without placing the client in double jeopardy, ICE attorneys have no restrictions on their ability to appeal. *See* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 495 (2018) (listing cases). Nonetheless, noncitizens are responsible for the vast majority of appeals from immigration court decisions. *See* David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1193 (2016) (finding that "[m]ore than half of all immigrants with lawyers appeal if they lose before the immigration judge, while only 3% of immigrants without lawyers appeal," but "government appeals are rare no matter what the immigration judges decide: they only appeal in about 3% of cases in which the immigration judge grants the respondent permission to remain in the United States"). Further, noncitizens are the sole parties authorized to petition for federal court review. 8 U.S.C. § 1252(a)(5) permits judicial review of certain removal orders, whereas no statute permits review of orders granting relief from removal.

attorney may still hold out hope for success on appeal, a loss after an appeal often means the end of litigation. And because appeals by indigent clients rarely win, the stakes—and the potential for attorney stress and anxiety—are higher. Repeated losses are demoralizing and may cause appellate attorneys, like trial attorneys,[163] to question whether they are having any positive impact at all on their clients' lives.[164] In fact, one author, early in her career, had a talented supervisor tell her that the work of appellate criminal defense is akin to the job of a pallbearer: it provides the trappings of dignity to a process that has an inevitably sad end.[165] Even if appellate attorneys do not feel quite so cynical, the crushing feeling of repeated losses is acute when the impact of appellate representation is solely measured in terms of litigation success.

However, if it is measured in terms of accompanying a client through what will likely be one of the most difficult periods of their life, then perhaps the attorney will feel less demoralized and more able to pursue the difficult work of indigent defense. For example, one of the authors, who was working with a client serving a lengthy sentence, was able to help get the client transferred to a facility closer to his mother and secure treatment for his worsening hepatitis, which his prison had not adequately addressed. Although the appeal was ultimately unsuccessful, the client described the representation as helpful and positive—not because it changed his legal status, but because it had a material benefit that made him feel informed and cared for. For the attorney, that engagement offered a measure of success that was rooted in relationship, not just result.

Finally, although client-centered lawyers seek to understand the ways that systemic inequalities contribute to their clients' lives,[166] they often do not explicitly address the causes of systemic injustice. True, a reported decision that applies widely, such as a federal appellate court decision or state high court decision that renders an oppressive statute unconstitutional, can benefit entire communities. Even unreported decisions can have an impact beyond the parties to the case, since such decisions still appear in online legal databases and can be cited by other attorneys. But decisions that actually expand access to justice or address drivers of mass incarceration and deportation are few and far between.

Ultimately, the client-centered approach affords both clients and their appellate attorneys significant benefits. It increases client satisfaction and empowerment; it surfaces potential arguments and legal issues not clear from the record; it can help clients address holistic needs; and it offers a means to avoid burnout and offer the client hope and encouragement. But to address systemic inequality and

163. *See* Smith, *supra* note 57, at 1235–36.

164. *See generally* Lindsay M. Harris & Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 WAKE FOREST L. REV. 733 (2021) (detailing the traumatic structure and impacts of asylum law on clients and attorneys).

165. Smith makes this observation as well. *Supra* note 57, at 1256.

166. *See, e.g.*, Steinberg, *supra* note 8, at 963–64 (describing the client-centered approach of listening to clients to understand community-level issues and conerns); Siegel et al., *supra* note 10, at 584 (arguing that "public defenders can best serve clients when they begin to take into consideration the non-legal issues in cases").

subordination, and to "avoid re-enacting the very sort of subordinating relations clients seek help in combating,"[167] those representing indigent clients at trial have begun incorporating social justice models that have, until recently, primarily applied to impact and movement lawyering. Below, we discuss their applicability to appellate representation.

III. PARTICIPATORY LAWYERING

In contrast to client-centered lawyering—which emphasizes collaboration with clients to achieve their individual goals—social justice lawyering adopts a more expansive view of a lawyer's role that includes community mobilization and participation. For the social justice lawyer, the fight is not confined to the person charged with a crime or facing deportation. Instead, it extends to the wider systems that enable racialized mass incarceration and deportation in the first place. Structural injustice, as scholars have noted, often "land . . . upon the body" in ways that shape the lived experience of individuals and the communities in which they live, making it difficult to draw a clean line between the systemic and the personal.[168] Recognizing that whole communities are both impacted by and should have an impact on the resolution of such issues at the individual and social level, social justice lawyers focus on wider community participation than client-centered lawyers.

Existing scholarship on social justice lawyering focuses on the ways that *trial* lawyers can partner with underresourced communities to address social issues while representing individual clients. As we detail below, the nature of appellate work makes it structurally more difficult to engage in the kind of community-focused lawyering that social change advocates call for. Still, we argue below that appellate attorneys should, where feasible, incorporate elements of this kind of lawyering in their practice, even with those constraints. We call this "participatory lawyering."[169] Before exploring what that might look like in practice, we review the theoretical roots and development of participatory representation as an evolving subset of social justice lawyering.

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167. Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 547 (2006); *see* Bonnie Allen, Barbara Bezdek & John Jopling, *Community Recovery Lawyering: Hard-Learned Lessons from Post-Katrina Mississippi*, 4 DEPAUL J. SOC. JUST. 97, 98–99 (2010) ("Community lawyering . . . . requires lawyers and law students to confront the legitimate fear in many communities that attorneys will dominate the representation, replicating systems of subordination with which they already struggle, and derail community efforts to change those systems and gain greater social, economic and political equality.").

168. *See* TA-NEHISI COATES, BETWEEN THE WORLD AND ME 10 (2015); Sally Haslanger, *Systemic and Structural Injstice: Is There a Difference?*, 98 PHIL. 1, 2 (2023); David Estlund, *What's Unjust About Structural Injustice?*, 134 ETHICS 333, 334 (2024).

169. Amna Akbar, Sameer Ashar, and Jocelyn Simonson call for scholars committed to social change to "focus . . . on creating space within legal scholarship to think alongside social movements." Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 826 (2021). This Part of our Article is inspired in part by their call.

A. THEORETICAL FRAMEWORK

A major critique of client-centered lawyering from the social justice perspective is that, even at its best, it fails to engage in the larger structural changes required to empower communities, redistribute wealth and power, reduce mass incarceration, and end punitive immigration practices. Transforming the systems that reproduce inequality is crucial to achieving lasting justice beyond individual outcomes. For example, Vincent Southerland makes the case that trial-level public defenders should embrace an "abolitionist ethic" that combines zealous, holistic defense of individuals with structural advocacy to dismantle the unfair criminal legal system.[170] By integrating principles of racial justice, movement lawyering, and resistance to carceral logic, he argues, public defenders can help build a more just and equitable society.[171]

Recognizing that structural challenges are a major barrier to justice, many lawyers—including lawyers who practice traditional and client-centered models—know that individual representation alone will not impact the social problems that motivate so many public interest attorneys in the first place.[172] Given that tackling social problems requires more than merely working with one client at a time on a discrete legal issue, social justice lawyers work with, and defer to, community members and organizations with on-the-ground knowledge, experience, and expertise.

Social justice lawyers recognize that social transformation can only happen when driven by communities and community members[173] most affected by the inequalities and oppression they seek to change.[174] Social justice lawyers began incorporating that knowledge into their practice decades ago,[175] and have since articulated both ends-oriented and means-oriented justifications for their approaches.

Primarily, social justice lawyering targets structural and systemic injustice not just through individual representation, but by building individual and institutional power using political and organizing strategies and tactics.[176] Social justice lawyers center the power in local communities and individuals most impacted by criminal, immigration, and other legal schemas, even while engaging in individual representation.

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170. *See* Vincent M. Southerland, *Public Defense and an Abolitionist Ethic*, 99 N.Y.U. L. REV. 1635, 1635–36 (2024).

171. *See id.* at 1636.

172. *See* Cimini & Smith, *supra* note 12, at 1053 ("[C]ommunity lawyering seeks to represent communities, as well as individual clients."); Ashar, *supra* note 14, at 1917–18.

173. We recognize that the term "community" can be overly generic and totalizing. *See* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 687 (2020) ("[T]he word 'community' is itself fraught, carrying with it associative dangers of vagueness and co-optation."). Nonetheless, we use the term as a shorthand term here, following the lead of community-based activists and lawyers engaged in this kind of advocacy.

174. *See, e.g.*, Cimini & Smith, *supra* note 12, at 1053 (noting "recognition that social change is only effective when people most impacted lead the change").

175. *See id.* at 1044.

176. *See* Corey S. Shdaimah, *Lawyers and the Power of Community: The Story of South Ardmore*, 42 J. MARSHALL L. REV. 595, 611–12 (2009).

In an early piece on contemporary social justice lawyering, Ascanio Piomelli described the social justice framework as one in which "lawyers consider clients not just sources of information on the problems they face, but active partners in working collectively to solve those problems. These lawyers work alongside individual clients, organized and informal groups, and any allies they can enlist, in joint, multidimensional efforts to advocate for justice."[177]

Social justice lawyering is a broad category, and several scholars have attempted to describe its various subfields.[178] For example, in community lawyering, attorneys support community-led work for a specific neighborhood or group rather than providing legal services for an individual or class.[179] Unlike traditional lawyers, community lawyers work on issues, cases, and causes that highlight community concerns, rather than (or in addition to) individual concerns.

Somewhat relatedly, in movement lawyering, lawyers work with and for organized social movement groups by helping empower and increase the influence of social movement actors.[180] Movement lawyers lend litigation expertise, provide informal legal advice, help exert political influence in unresponsive bureaucratic systems, and help provide community education.[181] But because they have agency relationships that differ from the obligations of a lawyer representing an individual indigent client, community and movement lawyers' goals and tactics are too distinct from the work of direct appellate representation to discuss in detail here.

Most relevant to the appellate representation context is a movement called "participatory defense."[182] Participatory defense aims to empower individuals, families, and community members as they engage in systemic reform.[183] The movement "sharply highlights the defendant as a person embedded in a community and focuses on empowering that community to successfully impact both

177. Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1385 (2009).

178. *See* Cimini & Smith, *supra* note 12, at 1094–95 (providing a taxonomy of various models of social change lawyering); Orihuela, *supra* note 14, at 623–26 (explaining models of lawyering in immigration law); Kashyap, *supra* note 12, at 404.

179. *See* Orihuela, *supra* note 14, at 625 (2020) ("A defining aspect of community lawyering is case selection that prioritizes community over individual."); Ashar, *supra* note 14, at 1917; Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195, 197 (2002) ("[I]t is necessary to develop broad strategies in collaboration with members of the community."); Shdaimah, *supra* note 176, at 607.

180. For overviews of movement lawyering, see Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 578–86 (2021); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 447–48 (2001); Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1495–506 (2017); Alexi Nunn Freeman & Jim Freeman, *It's About Power, Not Policy: Movement Lawyering for Large-Scale Social Change*, 23 CLINICAL L. REV. 147, 164–65 (2016).

181. *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1684, 1691 (2017); Shdaimah, *supra* note 176, at 600, 620–21.

182. *See* Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 716 (2018).

183. Moore et al., *supra* note 4, at 1283.

individual cases and the broader court system."[184] As Alexis Hoag-Fordjour notes in her article describing four trial-level public defender offices that offer similar "community responsive" representation, "[s]imply providing legal representation to individual defendants is not enough to slow the tide of mass criminalization nor alleviate the racial disparities that exist. To address these structural issues, public defenders' roles must be more expansive than serving individual clients."[185]

A major goal of participatory defense is to change the focus of power and agency from the lawyer to the perspective of the individuals[186] and communities impacted by mass incarceration,[187] while at the same time ensuring that each lawyer remains focused on advancing their individual client's interests.[188] Another major goal is an abolitionist one: to bring about the end of mass incarceration through that shift in relationship.[189] The idea is that giving individuals and communities more agency in the legal process will help build the political movements that can dismantle the carceral state.[190] Indeed, the participatory defense model has had successes in both individual cases and on the larger institutional level.[191]

Although the participatory defense movement had its genesis in the criminal defense context, it has grown to partner with communities and individuals impacted by the immigration and deportation systems as well.[192] For that reason, we propose the broader term "participatory representation" to both reflect and encourage the use of the movement's strategies and goals in other kinds of high-stakes, individual indigent representation, such as in the immigration context.

In the participatory representation model, attorneys acknowledge the collective stakes of each case. Impacted individuals may share information, law, and stories with neighbors, community organizations, and justice-involved organizations.[193] And where interested clients do not have the time or resources—or, by nature of their incarceration, the practical ability—to consider, plan, and implement

184. Godsoe, *supra* note 182, at 716.

185. Alexis Hoag-Fordjour, *Community Responsive Public Defense*, 92 FORDHAM L. REV. 1309, 1312 (2024).

186. The participatory defense community avoids using the term "client" because it positions individuals as passive supplicants in need of services rather than as active agents who can engage in the legal and political processes. *See* Moore et al., *supra* note 4, at 1285.

187. *See* Moore et al., *supra* note 4, at 1283; Clair, *supra* note 92, at 197.

188. *See* Hoag-Fordjour, *supra* note 185, at 1317.

189. For more on abolitionist legal work, see generally Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018) (discussing radical social justice movements and their aims to abolish and transform oppressive frameworks); and Patrisse Cullors, AN ABOLITIONIST'S HANDBOOK: 12 STEPS TO CHANGING YOURSELF AND THE WORLD 6–11 (2021) (explaining abolition and social justice movements as work that can transform social structures).

190. Moore et al., *supra* note 4, at 1285.

191. Godsoe, *supra* note 182, at 716. But see John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 719 (2020), discussed *infra* Section III.B.3, arguing that empirical data has yet to support the claims of efficacy.

192. See, for example, Grassroots Leadership, a decades-old civil rights advocacy organization based in Texas that organizes both criminal and deportation-focused participatory models. *Our Mission*, *supra* note 15.

193. Clair, *supra* note 92, at 207.

systemic change strategies, lawyers can work with community members on behalf of their incarcerated or detained clients.[194]

For example, in "family justice hubs," families and community members meet weekly—without attorneys present—to discuss ways to partner with or push their lawyers to be more responsive and to share organizing strategies.[195] Lawyers train family and community members to make mitigation or "social biography" videos to play at bail or sentencing hearings.[196] And, on a broader level, families, community members, and formerly incarcerated individuals engage in protests, celebrations, and other social actions focused on local, specific issues to help bring about change.[197]

Participatory representation also encourages grassroots efforts to widen participation in the criminal legal system as a whole through collective actions like court watching, cop watching, and community bail funds.[198] To court watch, lay people observe court proceedings and interactions by police officers to both show support for community members and collect information on law enforcement and court actors. Activists can use this data in legislative and other organizing campaigns.[199] Immigrant activists have started similar programs in which volunteers accompany immigrants to immigration court, ICE check-ins, civil and criminal court, schools, hospitals, and elsewhere.[200]

Scholars Jocelyn Simonson, Sabeel Rahman, and Ascanio Piomelli argue that movements like participatory representation are a deeply democratic way of ensuring rights.[201] After all, the First Amendment protects freedom of dissent through assembly and speech, and the Sixth Amendment enshrines public participation in the adjudicatory process by guaranteeing the right to a lay jury and a public audience.[202] Participatory representation and community lawyering, then, are rooted in the most foundational values meant to ensure fairness and justice.

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194. *Id.*

195. Moore et al., *supra* note 4, at 1285.

196. *See id.* at 1286; Godsoe, *supra* note 182, at 721.

197. Moore et al., *supra* note 4, at 1288.

198. *See* Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1612 (2017).

199. *See* Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 34–35 (2022); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2183 (2014); CT. WATCH NYC, https://www.courtwatchnyc.org [https://perma.cc/2SLY-9J32] (last visited Jan. 2, 2026).

200. *See, e.g.*, *Accompaniment*, JUST. POWER, https://justicepower.org/accompaniment [https://perma.cc/63LD-3VRQ] (last visited Jan. 2, 2026) ("Accompaniment provides a space for volunteers and family members to join immigrants as they navigate a complicated, often terrifying system. . . . Accompaniment programs provide emotional and physical solidarity to those navigating the system, and signal to authorities that immigrant allies are watching.").

201. *See generally* Simonson, *supra* note 198 (arguing bottom-up forms of participation are "crucial for democratic criminal justice"); K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 CONTEMP. POL. THEORY 41 (2016) (promoting participatory involvement against economic regulation); Piomelli, *supra* note 167 (detailing the democractic roots of collaborative lawyering).

202. *See* Simonson, *supra* note 198, at 1613–14.

Legal ethicist Cynthia Godsoe argues that participatory representation in particular is consistent with, and helps advance, the ABA ethical rules.[203] She argues that the ABA's Model Rule 1.14, which governs the representation of incapacitated clients and mandates that attorneys take protective measures only in extreme circumstances, demonstrates that the field "strongly discourages paternalism."[204] Similarly, Rule 1.2, which requires that attorneys "abide by a client's decisions concerning the objectives of representation," signals that "client autonomy is particularly important" in high-stakes litigation contexts like criminal and immigration defense.[205] While participatory representation honors these ethical foundations by privileging client autonomy, it also expands the lawyer's orientation outward. Participatory representation recognizes the shared stakes communities hold in legal outcomes. When community and client interests diverge, the attorney must still, of course, prioritize the client's directives—but participatory representation encourages attorneys to help clients consider and engage with community perspectives wherever possible. In this way, participatory representation bridges individual representation and collective empowerment, reinforcing the antipaternalistic, collaborative possibilities embedded in the ethical rules.[206]

B. PARTICIPATORY LAWYERING AS APPLIED TO APPELLATE REPRESENTATION

Indigent criminal defendants and individuals targeted for immigration enforcement actions must have a zealous appellate advocate devoted primarily to gaining immediate relief. Yet many of the appellate attorneys who represent these indigent clients, including the authors, recognize that the structural barriers that marginalize their clients and deprive them of resources will not change based solely on the individual representation they provide. So how can appellate attorneys engage in participatory representation in a way that is consistent with their ethical and professional obligations to their clients? This Section provides some suggestions. Ultimately, our argument is that individual representation and collective strategies are both critical, but that some appellate advocates can, where feasible, incorporate participatory representation into their practice without detracting from their primary obligations.

First, a note on the significant constraints—aside from financial constraints—that indigent appellate attorneys face that make it particularly difficult to engage in community-focused lawyering. Unlike trial-level participatory defenders, appellate attorneys are fundamentally bound by the record on appeal. Moreover, standards of review require appellate courts to be highly deferential to trial courts and administrative agencies on most factual issues, and some legal issues.[207]

203. Godsoe, *supra* note 182, at 733.

204. *Id.* at 734.

205. *See id.* at 736; MODEL RULES OF PRO. CONDUCT r. 1.4 (AM BAR ASS'N 1983).

206. Godsoe, *supra* note 182, at 737.

207. For example, a finding of fact made by an immigration judge cannot be reversed by the Board of Immigration Appeals unless it is "clearly erroneous." *See* 8 C.F.R. § 1003.1(d)(3)(i) (2025). Federal courts, in turn, cannot reverse the immigration judge's findings of fact unless a reasonable adjudicator

Although the funding structure of some appellate providers may allow attorneys to file collateral trial court motions and thus expand the record or present new evidence and arguments,[208] appellate attorneys, by and large, cannot raise legal issues that appear outside of the record.[209] Unlike some other forms of social justice advocacy, indigent defense work is fundamentally reactive by design and necessity.

Further, appellate attorneys work in the adversarial court system that privileges punishment and deportation over transformative justice and focuses on individual rather than collective responsibility. By definition, most of the work of indigent appellate counsel cannot be abolitionist or even particularly transformative—unless we happen to win a case that changes one corner of the law.

For that reason, some social change lawyers will likely believe that our proposals do not go far enough in disrupting the traditional and oppressive hierarchy between lawyer and client, and do not go far enough to address systemic injustice. Indeed, our work as appellate attorneys is open to the critique that we legitimize and even perpetuate an unfair system. That said, appellate attorneys with indigent clients can have a broader impact by incorporating approaches advocated by participatory lawyering as described below. Our proposals share abolitionist goals in that they seek to reduce the carceral footprint and aim to divert resources away from the mass punishment and deportation systems and into communities.[210]

On the other hand, we recognize that the proposals below will make some traditional appellate advocates deeply uncomfortable, believing that our arguments create ethical problems and detract from our core obligations. Concerns from both the radical and traditional corners deserve serious engagement. Still, we contend that participatory representation provides a reimagining of the appellate attorney's role that more fully embraces the pursuit of justice for marginalized clients and their communities. Below, we offer concrete suggestions that appellate attorneys may be able to draw on to expand their practice.

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would be "compelled" to find otherwise. *See* 8 U.S.C. § 1252(b)(4)(B). In the criminal context, questions of fact can only be reversed if the court committed "clear error," and procedural questions (including matters like evidentiary rulings, jury instructions, and severance) can only be reversed if the trial court abused its discretion. *See* 1 BENNETT L. GERSHMAN, CRIMINAL TRIAL ERROR AND MISCONDUCT § 6-1 (2025).

208. Immigration attorneys can file a motion to reopen the proceedings in the Board of Immigration Appeals (which does not expand the appellate record, but which does enable the immigrant to submit new evidence and obtain a remand for a new trial-level decision). 8 C.F.R. § 1003.2(c)(1) (2025). Immigration attorneys can also move the Board to take administrative notice of updated evidence of country conditions. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (2025) (authorizing the Board to take administrative notice of "commonly known facts such as current events or the contents of official documents"). But in federal appellate court, there is no way to expand the record apart from a motion for the court to take judicial notice of new facts. *See* Najjar v. Ashcroft, 257 F.3d 1262, 1278–79 (11th Cir. 2001), *overruled on other grounds by* Patel v. U.S. Att'y Gen., 971 F.3d 1258 (11th Cir. 2020).

209. *See supra* note 25 and accompanying text.

210. *See* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544. 1553–54 (2022) (offering a framework for abolitionist and radical reforms aimed at prison abolition).

1. Centering Client and Community Voices

Appellate attorneys can become involved in community organizing efforts that aim to make concrete social changes throughout the wider client community. This could look like traditional activist campaigning, but appellate attorneys could also use their access to elite spaces to argue for changes that their clients and client communities request. They can work with service providers and impacted populations to write legislation, educate legislators and powerful entities about issues, and collaborate with community organizations to draft amicus briefs that bring in data and lived experience to contextualize the broader harms caused by a challenged statute or enforcement policy.

Just as participatory representation at the trial level encourages community members to keep lawyers accountable, participatory representation at the appellate level can empower clients and family members to become more actively involved in the client's case.[211] Appellate attorneys can provide information about the appellate process, collaborate more closely on issue selection, and invite accountability for high-quality representation.

Appellate attorneys can ally with community organizations and individuals, bringing their voices into legal spaces and offering legal expertise, knowledge, and skills to those organizations. For example, in an analogue to the social biography videos used at the trial level,[212] appellate attorneys can help support such videos in the parole advocacy and postconviction collateral contexts. Where parole boards disallow video media, families and friends can use text-based media to serve the same purpose: to provide a contextualized story that explains the effects of addiction, mental illness, racism, and disinvestment in poor communities. These kinds of messages can help remind decisionmakers that people convicted of crimes or who are in the United States unlawfully have stories that connect to resource scarcity and larger systems of injustice.

Appellate attorneys can make efforts to raise arguments that are consistent with their client's goals and that align with larger social reform movements. For example, building on the work of the collective efforts of trial attorneys and communities, appellate attorneys could work with community organizations to find out what kinds of unlawful and unfair enforcement practices are happening on the ground and, where possible, raise those arguments on appeal. Such practices could include, for example, recurring use of gang enhancements based solely on neighborhood affiliations, police fabricating consent searches in traffic stops involving minors, or arrests by ICE in private areas. This kind of collaboration could, in turn, help attorneys spot appealable issues they might not otherwise notice based solely on the transcript and precedential case law. In this way, appellate attorneys can lay the groundwork for postconviction collateral appeals that could allow for new evidence.

211. *See* Godsoe, *supra* note 182, at 719–20 (describing participatory defense's similar goal at the trial level).

212. *See id*. at 720.

Appellate attorneys are trained to recognize gaps or unsettled areas of the law to benefit their clients. They could combine these abilities with knowledge gleaned from community collaboration to further push the law in ways that also help their clients' wider communities. For instance, appellate attorneys could create memoranda for trial and pro se litigants that discuss such gaps and suggest ways to argue and preserve legal issues that could help move the law forward on appeal. Or, they could solicit input from community members on memoranda topics.[213] These memoranda could explain the importance of the legal argument to clients and their communities, provide the legal framework and rules governing the issue, frame specific arguments to make at trial, and offer strategies to preserve losing issues for appeal.

Appellate attorneys can also decipher and explain labyrinthine procedural and substantive legal arguments and opinions so that they are digestible for lay audiences. This can lay the groundwork for larger organizing around seemingly dry appellate issues and shed light on often obscure, but significant, arguments in state and federal appellate courts.

2. Opening Access to Elite Spaces

Court watching in the appellate context can play an important role in holding appellate courts accountable to stakeholders in a particular case and to larger democratic systems as a whole. According to Simonson, who argues for increased audience attendance in criminal courts at the trial level, "Audience members watch the players in the courtroom; they react to what they see and hear through facial expressions, laughs, and grumbles. Most of all, they sit, look, and listen. Their presence can have a palpable effect on the speakers in the courtroom."[214] In particular, a packed audience of the accused person's community and family members can help remind the judge that their decisions have effects beyond those on the defendant.[215]

Family and community presence might even be more effective in the appellate context. Unlike trial court, which is usually bustling with litigants, family members, and community members,[216] in our experience, appellate courtrooms are usually staid, quiet, and empty but for the attorneys arguing and, occasionally, representatives of the moneyed corporations whose cases are also being argued. Appellate attorneys committed to social change and community involvement can

213. For example, the New Sanctuary Coalition hosts pro se legal clinics where community members meet and decide the legal issues they want to know more about, and attorneys stand by to offer advice. *Pro Se Legal Clinics*, JUST. POWER, https://justicepower.org/pro-se-legal-clinics [https://perma.cc/G3CM-MRHS] (last visited Jan. 2, 2026).

214. Simonson, *supra* note 199, at 2182.

215. *Id.* at 2227.

216. *Id.* Removal hearings at which evidence will be presented on a claim for asylum or similar humanitarian relief are open to the public unless the respondent requests closure. *See* 8 C.F.R. § 1240.10 (b) (2025); EXEC. OFF. FOR IMM. REV., IMM. CT. PRAC. MANUAL § 4.9(a)(1) (2023), https://www.justice.gov/eoir/reference-materials/ic/chapter-4/9 [https://perma.cc/RT2A-DFC8]. But an immigration judge "may limit attendance or close a hearing to protect parties, witnesses, or the public interest." 8 C.F.R. § 1003.27(b) (2025).

encourage and help facilitate their clients' family and community members' attendance at oral argument. At the beginning of the argument, the attorney can point out to the court that the client's community is present, which will provide a tangible and physical reminder about the stakes of the court's decisions.

Of course, some individuals in affected communities are justifiably concerned that their very presence in courtrooms could trigger an arrest or detention, given that, under the Trump Administration, ICE has arrested immigrants who have attended their mandatory immigration hearings.[217] But attorneys can help welcome and organize individuals who do want to attend, while at the same time working to keep courts safe, public spaces for vulnerable populations.

Further, coordinated court watching can help spur organizing in affected communities, hold law enforcement accountable, and provide important information used in larger reform and abolition campaigns.[218] Literature on court watching at the trial level argues that courtrooms can function as critical sites of accountability in a democracy.[219] Even the ABA encourages court watching, reminding the public on its website that, "You can and should watch courts!" and that court watching "provides an important check on the potential for abuse of power, allowing observers to better understand how the justice system operates and enhancing public confidence in the courts."[220]

Observing court provides a way of participating in the democratic process: the public can watch legal disputes and gather information that they can use in civil debate, voting, and protest. Further, in the court-watching movement, which has taken hold at the trial level, volunteers sit in courtrooms at regular intervals, compile information about the proceedings, and provide reports about their observations to the public.[221]

Appellate attorneys could help facilitate and encourage organized court watching at the appellate level as well. Community members can attend oral arguments,

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217. *See* Angélica Franganillo Díaz & Priscilla Alvarez, *ICE Targets Migrants for Arrest at Courthouses as Trump Administration Intensifies Deportation Push*, CNN: POLITICS (June 2, 2025, at 05:00 EDT), https://www.cnn.com/2025/06/02/politics/ice-arrests-migrants-courthouse [https://perma.cc/UH8V-T74A]. On President Trump's first full day in office in his second term, on January 21, 2025, his administration began to allow ICE to engage in civil immigration enforcement in courthouses, reviving a practice from his first term. Memorandum from Caleb Vitello, Acting Dir., U.S. Immigr. and Customs Enf't, Dep't of Homeland Sec., to All ICE Employees, Interim Guidance: Civil Immigration Enforcement Actions in or near Courthouses (Jan. 21, 2025), https://www.ice.gov/doclib/foia/policy/11072.3_CivilImmEnfActionsCourthouses_01.21.2025.pdf [https://perma.cc/9L6J-T52K].

218. *See* Simonson, *supra* note 199, at 2183; Clair & Woog, *supra* note 199, at 35; *see also Court Monitoring Project*, POLICE REFORM ORG. PROJECT, http://www.policereformorganizingproject.org/court-monitoring-project/ [https://perma.cc/Y2SB-VUK7] (last visited Jan. 2, 2026) ("Using data and stories from its Court Monitoring work, PROP regularly publishes reports about the NYPD's discriminatory and abusive arrest practices").

219. Simonson, *supra* note 199, at 2182–83; Simonson, *supra* note 198, at 1618, 1621.

220. *ABA Court Watching*, AM. BAR ASS'N (Sep. 6, 2023), https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/court-watching0/aba-court-watching [https://perma.cc/8SAK-VHYR].

221. For example, Baltimore Court Watch has observed over 6,000 bail hearings since August of 2023 and published data on the bail requests and outcomes of those hearings. *Data*, BALTIMORE COURTWATCH (Apr. 31, 2023), https://baltimorecourtwatch.org/data [https://perma.cc/WDX9-DYHP].

translating and recording for the public the types of issues the judges ask about, the arguments appellate attorneys make, the outcomes of the cases, and other information about the disputes—similar to the work court watchers do at the trial level.

Appellate attorneys can also collaborate with trial attorneys who help collect and share information about unfair practices in proceedings at the trial level. Trial-level attorneys have already been engaged in such work. For example, the Legal Aid Society began keeping records about misconduct on the part of police officers and correctional officers; the "Law Enforcement Lookup" database, which is now public, includes almost a quarter of a million searchable records involving law enforcement misconduct.[222] These records allow community members and lawyers to "investigate and pursue accountability for police misconduct."[223] Appellate attorneys could share information with trial-level attorneys and community members about unfair practices that routinely appear in their own cases, such as patterns of prosecutorial misconduct or ethical violations, persistently inadequate defense representation, judicial practices or courtrooms that consistently undermine litigants' rights, and other institutional failures. In turn, community members and advocacy organizations can use this information to bring attention to systemic problems through public campaigns, litigation strategies, and legislative testimony. Tracking repeat actors and sharing this data can help build the factual foundation for judicial complaints, policy reform proposals, or broader efforts at systemic oversight. In this way, appellate collaboration does not just expose misconduct but can help create a roadmap for holding bad actors accountable and pushing for structural change.

Similarly, appellate attorneys working with incarcerated or detained clients have access to on-the-ground knowledge of prison and detention center conditions. While safeguarding their clients' privacy and safety, they can use this information to help spur conditions-of-confinement litigation and support grassroots abolition and reform movements.[224] They can also work with movement leaders

222. *The Cop Accountability Project*, THE LEGAL AID SOC'Y, https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project [https://perma.cc/DUF5-E9GA] (last visited Jan. 2, 2026).

223. *Id.* Another example is the Equity and Justice Group, founded by Anthony Powers (a formerly incarcerated person), which tracks conviction and sentencing disparities by race and provides a publicly available dashboard. *Conviction Proportionality (2023)*, AM. EQUITY & JUST. GRP., https://americanequity.org/dashboard.html [https://perma.cc/2AKV-HACG] (last visited Jan. 2, 2026).

224. An example of successful collaboration between attorneys and grassroots organizations over conditions of confinement is taking place in New York City. In 2024, attorneys with the Legal Aid Society and the New York Civil Liberties Union sued the State Department of Corrections and Community Supervision, charging them with violating solitary confinement rules. *See* Jan Ransom, *N.Y. Prisons Holding Mentally Ill People in Solitary, Lawsuit Says*, N.Y. TIMES (May 8, 2024), https://www.nytimes.com/2024/05/08/nyregion/ny-prisons-solitary-confinement.html; Hurubie Meko, *N.Y. Prisons Have Ignored Lmits on Solitary Confinement, Judge Finds*, N.Y. TIMES (June 20, 2024), https://www.nytimes.com/2024/06/20/nyregion/new-york-state-prisons-solitary-limit.html. In addition to pursuing litigation, these organizations also work to support grassroots efforts like Jails Action Coalition and the Campaign for Alternatives to Isolated Confinement. *See The Prisoners' Rights Project*, THE LEGAL AID SOC'Y, https://legalaidnyc.org/programs-projects-units/the-prisoners-rights-project [https://perma.cc/H6SD-K9RS] (last visited Jan. 2, 2026).

and clients to coordinate the publication of compelling stories in the mass press, local press, and social media outlets. Some, but certainly not all, clients may be open to media attention as a means of spotlighting injustices in their own cases as well as on a broader scale. Although many appellate attorneys may not be at ease speaking with reporters, coordinating litigation with client- and community-directed campaigns may be an effective way for attorneys to empower both clients and communities.

Ultimately, fostering ongoing relationships among appellate attorneys, trial attorneys, clients, and community organizations can help build mutual trust and alignment of goals. That trust, in turn, may make it more likely that trial attorneys will shape the trial record in ways that would surface social justice-oriented concerns, thus preserving issues for review on appeal. Stronger relationships ultimately expand the appellate attorney's ability to raise arguments rooted in broader systemic injustice.

3. Shifting Power Through Narrative

Appellate attorneys working for indigent clients always use their considerable rhetorical power to try to shift narratives and arguments about their clients and law enforcement. After all, "[l]awyers have an important role to play as insiders in exposing courts as tools of systemic oppression, through storytelling both within and outside courtrooms."[225] For decades, scholars of narrative theory—and critical race and feminist scholars in particular—have argued that stories not only can help shape and influence the reception of texts and arguments, but also help shape our social realities.[226]

It is beyond the scope of this Article to fully explore the ways that appellate attorneys can collaborate with clients and community members to create narratives that reduce harm to our clients and their communities. We hope that others will take up that important work. Here, we will point out what is perhaps obvious: that, wherever possible, appellate attorneys can use their briefs and oral arguments to resist dominant, damaging narratives about their clients and communities.[227] Beyond the legal issues raised in the briefs, attorneys can use rhetoric and storytelling to help shift power.

Appellate attorneys can include contextual background material, even where not necessarily required to make a specific legal point, to connect the client's specific facts to wider social issues. Despite the traditional requirement that appellate courts cannot consider new evidence, many appellate courts will accept reference to legislative or adjudicative facts not on the record.[228] While doing so might prompt an adversary to request that a particular fact be struck from the appellate

225. Clair & Woog, *supra* note 199, at 35.

226. For a helpful overview of applied legal storytelling scholarship, including critical race and feminist theories, see J. Christopher Rideout, *Applied Legal Storytelling: An Updated Bibliography*, 18 LEGAL COMM. & RHETORIC 221, 222–23 (2021).

227. For a discussion of the ways that essentializing and stereotyped stories can harm both clients and advocates, see Kelley-Widmer & McKee, *supra* note 84, at 484.

228. *See* Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016, 2017–18, 2039 (2012) (examining the myriad types of new evidence that appellate courts generally consider despite the seeming conflict with the well-settled record-review doctrine).

brief, appellate attorneys could nonetheless include references to undisputed statistics about racialized law enforcement actions, unfair confinement conditions, underresourced and disinvested social services, and other issues. For example, an appellate defense attorney could include—in an argument that a sentence above the minimum was excessive—citations to studies showing that increasing rates of incarceration have minimal impacts on crime rates. In the immigration context, attorneys challenging mandatory detention statutes have pointed to the ruthless means ICE officers use to arrest detainees, the long length of removal proceedings, harsh detention conditions, and the community members who rely on the detainees for financial or other support, thus bringing to light the realities that detainees, their family members, and immigrant communities face.[229]

Moreover, activists, organizers, and members of communities impacted by the criminal and immigrant legal systems can be unsurpassed storytellers. Appellate attorneys can collaborate with clients and community organizations who can help lawyers consider narratives and stories from multiple perspectives. They can help disrupt the stock stories that make our clients seem defenseless, evil, or that otherwise stereotype them. They can make rhetorical choices that are consistent with campaigns and movements on the ground.[230] Even small narrative and linguistic interventions—both in appellate briefs and in the popular press—can help shift power and perceptions over time, so making choices that benefit not just individual clients but their communities as a whole can be a productive act of resistance and transformation.

C. CHALLENGES OF INCORPORATING PARTICIPATORY LAWYERING IN APPELLATE REPRESENTATION

Incorporating participatory representation into indigent appellate practice raises both theoretical and practical concerns. First, some scholars and practitioners have critiqued the model itself—highlighting the ethical tensions that arise when balancing individual and community interests, or questioning whether lay community involvement meaningfully improves outcomes. Second, even among those persuaded by the promise of participatory representation, there are significant structural, cultural, and resource-based barriers to implementing this model in appellate advocacy. In what follows, we address both sets of concerns:

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229. *See, e.g.*, Brief for Petitioner-Appellant at 17–22, Black v. Decker, 103 F.4th 133 (2d Cir. 2024) (No. 22-70). Although briefs in immigration cases are typically closed to the public, the facts highlighted in the briefs may appear in published decisions, and thus have positive impacts beyond the litigation itself. *See, e.g.*, *Black*, 103. F.4th at 151 (describing how petitioners' prolonged detention caused their families to suffer, and noting that one petitioner—Keisy G.M.—was arrested by ICE while two of his children were at home).

230. See, for example, Cimini's report on the S-Comm Campaign, in which lawyers worked with community members to develop and maintain a consistent message. Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 GEO. IMMIGR. L.J. 431, 470–71, 74 (2021) ("The campaign to dismantle S-Comm had a clear and consistent message that never wavered, in contrast to the government's message that continuously shifted. The shifting positions played into the anti-S-Comm narrative that the government was hypocritical, at the least, and perhaps even intentionally misleading." (footnote omitted)).

the broader critiques of participatory representation and then the specific challenges appellate attorneys face in adopting this model.

Tensions can arise when lawyers and communities collaborate, in part because of the inherent structural misalignments in the approaches to advocacy.[231] For example, litigation often requires specialized, focused, single-authored written work, while social movement actors favor deliberation and multivoiced responses.[232] This tension between movement-based transparency and legal confidentiality obligations highlights a broader challenge for appellate attorneys seeking to integrate participatory representation: how to align evolving models of advocacy with enduring ethical commitments.

Although most community-engaged work would not create actual or perceived conflicts with clients, some aspects of participatory representation can pose real risks to client outcomes and to both attorney–client privilege and the broader ethical duty of confidentiality.[233] To take an obvious example, lawyers are bound by confidentiality rules, which conflict with organizing's typical goal of sharing information and resources.[234] While attorney–client privilege protects communications from compelled disclosure in legal proceedings, the ethical duty of confidentiality—codified in ABA Model Rule 1.6—is far broader, prohibiting attorneys from revealing any information relating to the representation of a client without the client's informed consent, regardless of the source.[235] Involving third parties in conversations about a client's case can break the privilege and violate the duty of confidentiality. Lawyers who discuss a client's case with family members or community members must therefore be exceedingly careful not to engage in conversations that could breach these obligations without the express, informed consent of the client.

Moreover, participatory representation risks blurring the line between zealous individual advocacy and responsiveness to collective goals. The client might feel pressured by their family or community to take actions they might not otherwise want to take. Cynthia Godsoe, in her overview of the participatory defense movement, points to one such point of tension: pleading guilty might serve an individual client's goals, but might be in conflict with the community's desire to challenge a particular police action in a case.[236] Or, as John Blume posits in an

231. *See* Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PENN. J.L. & SOC. CHANGE 25, 40–41 (2011); Jayesh Rathod, *Transformative Immigration Lawyering*, 132 YALE L.J.F. 632, 639–40 (2022) (noting the tension that can arise between incrementalist reformers and those directly engaged in community activism).

232. *See* Grinthal, *supra* note 231, at 40.

233. *See* Godsoe, *supra* note 182, at 717, 726 n.42.

234. *See* Grinthal, *supra* note 231, at 39.

235. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2013) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."). Comment 3 to Rule 1.6 clarifies that this duty "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Id.* r. 1.6 cmt. 3. This ethical duty is broader than attorney–client privilege, which applies only to confidential communications for the purpose of legal advice and may be waived or overridden under certain conditions. *Id.*

236. Godsoe, *supra* note 182, at 728.

almost inverse scenario, the collective refusal by a jurisdiction's defense bar to accept any guilty pleas could lead to a massive shift in charging and sentencing schemes—but would be impossible to achieve given the duty of loyalty to individual clients.[237] Or, to take another example, an immigrant appealing a removal decision may wish to avoid speaking to the press or filing a civil rights complaint to challenge detention center conditions, despite community pressure to join a campaign to shut down the facility.

These examples highlight a core challenge of participatory representation: How should an attorney respond when a client's interests and the movement's goals diverge? While participatory representation expands the scope of who influences legal strategy and narrative, it does not displace the ethical obligations at the heart of client-centered representation. Rather, it broadens the lawyer's lens to include collective concerns—so long as those efforts remain consistent with the client's wishes and best interests. Ideally, such conflicts would be resolved through communication, with the lawyer explaining risks to their client and to community members.[238] Nonetheless, a criminal defense lawyer or immigration lawyer whose ethical duty is to their individual client will undoubtedly find moments of tension, or even conflict, with other stakeholders, and must defer to their clients' interests and wishes.[239] Participatory representation, therefore, requires careful boundary drawing and ethical clarity so that efforts to create structural change do not come at the expense of client autonomy and trust.

A direct critique of the movement to include more community participation comes from John Rappaport, a scholar of U.S. law enforcement. He argues that efforts to "democratize" the criminal legal system are well-intended—that amplifying the voice and power of lay people in an effort to make the unjust legal system less severe and less unfair has both rhetorical and theoretical appeal.[240] However, he posits that calls for increased community involvement will likely have unintended consequences.[241] Current empirical evidence suggests that, left to lay people, decisions about criminal and immigration cases will not necessarily be more lenient or less biased than objective courts' decisions.[242] While remaining skeptical of what he terms the democratizing movement, Rappaport calls for more empirical studies that shed light on the efficacy of the community-led social movements in transforming the carceral state.[243]

To be sure, questions of interest-group capture, power imbalance, and the political insulation of bureaucracies are important when considering models of governance

237. John H. Blume, *How the "Shackles" of Individual Ethics Prevent Structural Reform in the American Criminal Justice System*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 23, 29–30 (2016).
238. Godsoe, *supra* note 182, at 738.
239. *Id*. at 728.
240. Rappaport, *supra* note 191, at 718–19.
241. *Id*. at 719.
242. *Id*. at 768.
243. *Id*. at 810–11.

and control over social institutions. But beyond these theoretical critiques, incorporating participatory representation into appellate practice presents unique challenges of its own. The remainder of this Section addresses those practical and structural obstacles specific to the appellate context.

Appellate attorneys who wish to engage in social justice work face significant structural and cultural barriers. To begin, because of entrenched practice norms and because of the nature of the work, appellate attorneys do not have as much connection to their clients' lives and communities as trial attorneys do.[244] Unlike trial attorneys, who must engage in ground-level investigative work to present cases and who often consult with family members and others when counseling clients about the direction of a case, appellate attorneys generally work alone or only with the client. This challenge is compounded by geographic disparities in access to experienced appellate counsel. Communities in rural or underresourced areas may lack access to appellate specialists altogether, or may rely on attorneys based far away, further weakening opportunities for trust-building, collaboration, and meaningful engagement with the client's local context.[245]

Further, the power differential at the trial level between assigned counsel and clients and their communities is magnified at the appellate level, creating an even wider chasm to bridge. As noted above,[246] appellate attorneys have minimal obligations to even communicate with clients, let alone work with clients and their families on larger social-change projects. So the conventions of traditional appellate offices can be even harder to shift than in trial-level offices, which have a more robust history of innovation, client collaboration, and activism.

And, due to a combination of legal doctrine and professional culture discussed above, clients appealing criminal and immigration cases have even less control over their cases than trial-level clients. Appellate attorneys, in turn, are even less accountable to those they represent. Compounding this challenge is the significant time and trust it takes to develop the deep, sustained collaboration needed for participatory representation, especially when attorneys are already overworked and underresourced. Appellate attorneys, who often work in isolation and are trained in a highly formal, precedent-focused style of advocacy, may be reluctant to share power or allow themselves to be guided by their clients or community members. As a result, any serious effort to integrate this model into appellate practice must acknowledge the professional and institutional shifts that such collaboration entails.[247]

Further, given the nature of the work, appellate attorneys may tend to be more introverted. Appellate practice relies on solitary tasks: reading dense records,

244. Kruse, *supra* note 5, at 128.

245. *Fact Sheet: Access to Justice is Rural Access*, U.S. DOJ: OFF. FOR ACCESS TO JUST. (Feb. 20, 2025) https://www.justice.gov/atj/fact-sheet-access-justice-rural-access [https://perma.cc/X2F9-E5B4].

246. *See supra* Part I.

247. *See* Godsoe, *supra* note 182, at 725–27 (describing trial-level public defenders' resistance to the participatory defense model).

writing detailed briefs, and engaging in highly structured, formal argument.[248] The nature of appellate work that requires individualized focus and independent analysis seems far removed from the interpersonal and dynamic demands of grassroots activism. As a result, the kind of collaborative lawyering that requires frequent engagement, trust-building, and ongoing collaboration may feel unfamiliar or even uncomfortable. So it may take time and effort for social justice-oriented appellate attorneys to build meaningful relationships with their clients and their communities.[249]

Especially serious for us are concerns about resources. Indigent appellate attorneys—like their trial-level colleagues—are underresourced and overworked.[250] The ACLU has sued over a dozen states to try to force them to fund indigent defense offices at a level that would allow attorneys to provide constitutionally effective representation.[251] As a last resort, public defender offices themselves have refused to take on new cases because doing so would force them to provide inadequate representation.[252]

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248. *See* Sullivan, *supra* note 59, at 156.

249. Appellate attorneys can help foster trust in small ways by, for example, providing some of their office space for impacted community members to meet in support networks after work hours or on weekends.

250. *See* Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 128 (2003); Ellen C. Yaroshefsky, *Duty of Outrage: The Defense Lawyer's Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System Is Unjust*, 44 HOFSTRA L. REV. 1207, 1207 (2016) (noting that the American public defense system is widely recognized to be in a "permanent state of crisis"); Eve Brensike Primus, *Defense Counsel and Public Defense, in* 3 THE ACAD. FOR JUST., REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 121–30 (Erik Luna ed., 2017) (describing reasons for dysfunctional and underfunded public defense systems); John Gross, *Reframing the Indigent Defense Crisis*, HARV. L. REV.: BLOG (Mar. 18, 2023), https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis [https://perma.cc/ZE8E-QBE4] (same).

That said, it is worth noting that public defenders "may be among the happiest" lawyers. Abbe Smith, *Martyrdom and Criminal Defense*, 28 BERKELEY J. CRIM. L. 169, 173 & n.14 (2023) (citing Douglas Quenqua, *Lawyers with Lowest Pay Report More Happiness*, N.Y. TIMES: WELL (May 12, 2015, at 14:42 ET), https://archive.nytimes.com/well.blogs.nytimes.com/2015/05/12/lawyers-with-lowest-pay-report-more-happiness).

251. *See* Emma Andersson, *If You Care About Freedom, You Should Be Asking Why We Don't Fund Our Public Defender Systems*, ACLU (Mar. 8, 2022), https://www.aclu.org/news/criminal-law-reform/if-you-care-about-freedom-you-should-be-asking-why-we-dont-fund-our-public-defender-systems [https://perma.cc/3MUK-FEVA] (noting that the ACLU filed suit in Maine, Missouri, Idaho, Nevada, California, South Carolina, Washington, Montana, Utah, New York, Pennsylvania, Connecticut, Massachusetts, Michigan, and Louisiana to force those states to adequately fund their public defender offices).

252. For instance, cities like New Orleans, see Derwyn Bunton, *When the Public Defender Says, 'I Can't Help'*, N.Y. TIMES (Feb. 19, 2016), https://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html, and Miami, see Rachel M. Zahorsky, *Public Defenders Can Reject Cases Because of Excessive Workloads, State Supreme Court Rules*, ABA J. (May 28, 2013, at 11:30 CDT), https://www.abajournal.com/news/article/state_supreme_court_says_public_defenders_can_reject_cases_due_to_overload [https://perma.cc/FH55-DJCL], and states as diverse as New Mexico, see Morgan Lee, *New Mexico Considers Limits for Overworked Public Defenders*, AP NEWS (May 21, 2018, at 18:12 ET), https://www.apnews.com/article/1e21aa6f75104484abcefae2580d418d [https://perma.cc/2K2D-APEY], and Montana, see Andersson, *supra* note 251, have refused to take on additional cases.

Changing an appellate practitioner's model to provide more autonomy to clients, engage in public advocacy, and partner with community members and organizations would add to an already overwhelming workload—not to mention disruption to entrenched office norms. Asking underpaid defense and immigration attorneys to take on additional labor beyond their excessive caseloads seems unfair, at best—a concern that applies to the client-centered model as well. At worst, it would do a tremendous disservice to indigent clients. Given that indigent defense offices are already unable to meet their constitutional obligations,[253] adding additional labor to the model would only exacerbate the problem. It could contribute to a further erosion of an adversarial system that already heavily favors the state and has resulted in racialized, overly punitive system.

The most effective solution to this crisis lies not in expanding individual capacity, but in reducing the need for representation altogether—through decarceration and a collective reckoning with the scale and function of our criminal and immigration systems. But in the short term, we can look to funding and support resources that can make participatory representation feasible.

For example, law school clinics, often on the vanguard of legal movements, may be able to help fill in gaps that indigent appellate offices cannot fill. They are relatively well-resourced, and often have more time and flexibility than most indigent attorneys. They also, unlike most indigent appellate attorneys, have the luxury of selecting their cases. So clinic directors can choose cases that are amenable to participatory representation.

Another possible solution is targeted funding for indigent appellate offices to support participatory work. This funding could be used to hire community liaisons, client advocates, or mitigation specialists whose roles explicitly include collaborating with families, collecting community-based evidence, and facilitating communication between the attorney and outside stakeholders. These positions would ease the burden on appellate lawyers while allowing offices to institutionalize participatory practices in a sustainable way. Grants from private foundations or state allocations could help launch these efforts.

Finally, pro bono partnerships may offer an additional source of capacity. Appellate representation in particular is often a good fit for large law firms' litigation experience. Coordinated pro bono programs, overseen by experienced appellate defenders at institutional provider offices, could channel these resources into cases where participatory practices are appropriate. Such partnerships must be carefully structured to ensure community responsiveness and client-centered alignment, but with training and supervision, they could help alleviate the burden on appellate public defenders while expanding the reach of participatory representation.

Even with additional resources, some may remain skeptical—not because of workload alone, but because of a deeper concern that widening the appellate model could compromise the single-minded devotion to clients that lies at the

253. *See* Andersson, *supra* note 251.

heart of indigent criminal defense and immigration work. Below, we explore arguments that expanding the appellate model could dilute zealous advocacy, strain ethical boundaries, and disproportionately benefit clients with strong community support.

Preeminent legal ethicist and criminal defense lawyer Abbe Smith argues that, in our adversarial system, in which the stakes of criminal cases are so very high, "zeal and confidentiality trump most other rules, principles, or values."[254] Smith focuses on trial-level indigent defense, but her argument pertains to the immigration context as well.[255] Although participatory defense advocates argue that their work makes relief for their clients more likely, ethicists and practitioners like Smith would urge the utmost caution to ensure that the interests of family members and community members and even larger social justice goals do not trump the individual client's interests.[256]

Further, the singular focus on an individual client can help establish a more trusting attorney–client relationship, because the attorney can say to their client, honestly, that they have no goal but to get their client relief.[257] Perhaps most importantly, singular devotion to an indigent criminal or immigration client's interests is a question of justice. As Smith puts it, "[t]he only way to compensate for the disadvantage in resources and power is to allow a more fiercely adversarial ethic on behalf of intimidated and isolated clients who lack the means to hire their own attorneys. Only through zealous advocacy can there be meaningful access to justice."[258]

Additionally, Smith argues that the ethic of zealous representation is protective of the attorneys themselves: it provides moral authority for representing those clients who have committed the kinds of acts that society condemns most severely.[259]

Taking Smith's positions seriously—as we do—requires indigent appellate attorneys to consider whether, and how much, widening the scope of their practice could dilute the obligation to zealously represent their individual client. Participatory representation advocates would probably respond that zealous representation and community involvement are not incompatible. Individual attorneys can incorporate some participatory work while providing excellent individual representation. Well-resourced offices can provide both, by having both community advocates and more conventional attorneys on staff. But, given that time and other

254. Smith, *supra* note 250, at 89.

255. The heightened stakes of a criminal case are also present in the immigration context, as the Supreme Court recognized in *Padilla v. Kentucky*, when it held that immigration consequences are a direct, rather than collateral, consequence of criminal convictions and, as such, are entitled to Sixth Amendment protections. 559 U.S. 356, 366 (2010). Seven years later, in *Lee v. United States*, the Court reiterated that "[d]eportation is always 'a particularly severe penalty'" and that "'preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." 582 U.S. 357, 370 (2017) (quoting *Padilla*, 559 U.S. at 365, 368).

256. *See Smith, supra* note 250, at 119.

257. *See id*. at 122.

258. *Id*. at 136.

259. *Id*. at 119. Of criminal defense work, Smith writes, "[n]o other field of law practice is so fraught. The moral dilemmas in civil law practice cannot compete with those in criminal defense." *Id*. at 116.

resources are finite and particularly scarce in indigent representation, advocates should be careful to ensure that this work complements, rather than detracts from, their core obligations.

Finally, but no less important for us, the participatory representation model can favor individuals who have families and communities with time and resources to devote to their loved one's release. Many indigent appellate attorneys, like their trial-level colleagues, represent clients who do not have family members with the ability to, or interest in, leveraging community involvement. Many of our clients have no family or community support at all.[260] Many of our clients would not draw wide sympathy from their communities.[261] We represent people who have committed violence against their own community members, and whose only ally is their attorney.[262] For these reasons, the model is open to the critique that it only applies to "good" indigent clients—those who might be materially and structurally disadvantaged, but who have support networks and whose personal circumstances can elicit some sympathy.

Ultimately, despite the real and significant challenges, participatory representation offers a path toward a more responsive appellate practice by surfacing overlooked issues, amplifying community insight, and resisting the isolation that too often defines appellate work. Participatory representation may not be appropriate or possible in every case. But in a legal system shaped by imbalance and exclusion, even modest steps toward a more expansive practice can serve not only individual clients but also our broader communities.

CONCLUSION

This Article has sought to illuminate the often overlooked role of indigent appellate attorneys as advocates for both individual clients and systemic change. We've offered frameworks for how appellate lawyers can support their clients and communities in broader, more intentional ways. In Part I, we began by identifying the contours and limitations of the prevailing traditional model of appellate practice—one that emphasizes strategic decisionmaking and written advocacy conducted largely in isolation from the client. This model has real strengths. Traditional appellate representation has led to meaningful relief for countless indigent clients and has incrementally expanded rights and protections for broader communities. But it often fails to address a wider range of client goals or intervene in the larger systemic issues that shape the cases that appellate lawyers take on. Therefore, the rest of the Article explores how client-centered and participatory representation, long embraced by some trial-level attorneys, could apply at the appellate level.

In Part II, we described the origins and core principles of the client-centered model, emphasizing its centrality in ensuring zealous, ethical representation. The client-centered model centers client autonomy and would encourage appellate

260. *See id.*at 181–82.
261. *See id*. at 116.
262. *See* Smith, *supra* note 57, at 1244–45.

attorneys to help pursue client goals that extend beyond legal relief. Such engagement can lead to greater client satisfaction, even when the appellate outcome itself is unfavorable, by validating client experiences and objectives throughout the legal process. Additionally, adopting a client-centered approach can help attorneys, too, by enhancing their feelings of fulfillment and purpose through deeper, more meaningful advocacy.

In Part III, we introduced participatory appellate representation. Drawing from participatory defense in particular, we described how social justice trial attorneys center collaboration and the work outside the four corners of a case. We outlined how this model could apply in the appellate context, offering concrete strategies for integration while also acknowledging the ethical, structural, and resource-based barriers to doing so.

Ultimately, we make the case for a hybrid approach to indigent appellate advocacy. Rather than choosing one model over the other, we suggest that appellate lawyers can draw from all three. The technical precision and devotion to success on appeal remain essential and primary to our representation. Client-centered representation ensures that advocacy aligns with client goals and values. And participatory representation creates opportunities to root appellate work in broader efforts for structural change. These models are not mutually exclusive. Zealous, loyal advocacy for an individual client can coexist with collaboration and accountability to the client's communities. And systemic reform can be pursued in ways that support—not distract from—individual legal representation.

Throughout, we have acknowledged real challenges of changing the work of indigent appellate representation, including ethical concerns, entrenched professional norms, limited resources, and the risk of reinforcing inequities between clients with differing levels of community support. But despite these challenges, we hope that these models offer ways to empower clients, help keep appellate attorneys motivated and sustained in the face of long odds, and align indigent appellate representation with larger social justice goals.