Private Attorney or Public Defender?: Negotiating Plea Deals in an Age of Mass Incarceration

NATHAN WINSHALL*

INTRODUCTION

In an age of mass incarceration,[1] the overwhelming majority of criminal cases end in plea deals.[2] It is thus unsurprising that plea deals are the first decision in the criminal process that the Supreme Court has recognized as requiring the defendants' ultimate say.[3] Their final decision-making power notwithstanding, defendants are far from the only actors involved in shaping the plea deal: defense counsel and the prosecutor negotiate the deal with one another, a process that commentators and the Supreme Court have likened to "horse trading," and then a judge must approve the deal.[4] That a disproportionate number of American inmates are Black and Latino people adds a racial context to the dehumanizing nature of the "horse trading" and of mass incarceration generally.[5]

---

* J.D., Georgetown University Law Center (expected 2023); B.S.P.H., Tulane University (2017). I am thankful for Darius Wadia, Jacob Metz-Lerman, and Sarah Lubiner, each of whom pushed me to think about this topic in new ways. I am also extremely grateful for Kevin Tobia's notes on organizing, framing, and articulating my thoughts on the issue. Cythia Marie Karnezis provided invaluable editorial support. As with everything I do, Gail Levine, Daniel Winshall, and Lisa Winshall profoundly shaped my thinking on this topic. Any errors that remain are entirely my own.

1. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration; The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020) https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/25DS-AC7T] ("The U.S. locks up more people per capita than any other nation, at the staggering rate of 698 per 100,000 residents" or "2.3 million people" total).

2. *See* Clark Neily, *Prisons Are Packed because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal.*, CATO INSTITUTE (Aug. 8, 2019) https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal [https://perma.cc/GSV5-Y4PG] (citing statistics showing that 97% of federal criminal convictions and 94% of state criminal convictions are the result of plea deals); *see also* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do are Found Guilty*, PEW RESEARCH (Jun. 11, 2019) https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/72EH-2JDB] (citing statistics showing that 90% of federal criminal convictions are a result of plea deals).

3. Jones v. Barnes, 463 U.S. 745, 751 (1983). The subsequent three decisions the Supreme Court has recognized as belonging entirely to the defendant, and not merely their attorney, are "whether to testify at trial, whether to have a judge or jury trial, and whether to appeal the decision." Steven Zeidman, *What Public Defenders Don't (Have to) Tell Their Clients*, 20 CUNY L. Rev. F. 14, 17 (2016).

4. *See, e.g.*, Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1911–12 (1992); *see also* Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Scott & Stuntz).

5. *See* Ashley Nellis, Ph.D, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (Oct. 13, 2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/ [https://perma.cc/2JFR-RGA3] ("Black Americans are incarcerated in state prisons across the country at nearly five times the rate of whites, and Latinx people are 1.3 times as likely to be incarcerated than non-Latinx whites."); *see also* NAACP, *Criminal Justice Fact Sheet,* https://naacp.org/

Understandably, much of the scholarship and criticism of plea deals has focused on the role judges and prosecutors play in the process.[6] The criminal legal system tasks prosecutors with convicting people while judges preside over the post-arrest criminal process, where they are responsible for providing a stamp of approval on plea deals[7] and for sentencing when cases go to trial.[8] Understandably, less critical ink has been spilled on the role defense attorneys play in negotiating plea deals, as they are ostensibly supposed to *prevent* their clients from going to jail, or at least, lessen their sentence. This Note seeks to fill this scholarly gap by asking what role defense attorneys should play in advising their clients on whether they should accept a given plea deal. Specifically, it focuses on the role of public defenders, who represent the majority of criminal defendants in some jurisdictions,[9] and whose client relationships are profoundly impacted by social hierarchies, including race and class.[10] When speaking with clients about plea deals, public defenders should play an active role as counselor, urging their clients to look beyond their immediate, individualized interests, consider broader structural concerns, such as mass incarceration, and err on the side of taking cases to trial.

The first part of the Note lays out and critiques the arguments for a highly deferential approach to public defense. Particularly, Part I focuses on defendants' autonomy and a textualist reading of Model Rule 1.2 of the *Model Rules of Professional Conduct* that largely defers decision-making to the client. Part II critiques the textualist reading of Rule 1.2 and details the institutional expertise that public defenders develop. Part III argues that public defenders should play a more robust role in advising their clients regarding plea deals, looking beyond the

---

resources/criminal-justice-fact-sheet [https://perma.cc/NDG2-MVHX] ("32% of the US population is represented by African Americans and Hispanics, compared to 56% of the US incarcerated population being represented by African Americans and Hispanics.") (last visited Nov. 12, 2021).

6. *See generally* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1319 (2018) (recommending a variety of judicial interventions that could limit prosecutorial abuse in plea deal offers); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW 114–19 (2012) (describing the role that racial bias plays in prosecutorial discretion).

7. *See* Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STANFORD L. & POL'Y REV. 61, 63 (2015).

8. *See* United States Department of Justice, *Sentencing*, https://www.justice.gov/usao/justice-101/sentencing [https://perma.cc/B36D-62D7] (last visited Apr. 2, 2022). The exceptions to the general rule that judges are responsible for sentencing following a guilty verdict are cases involving the death penalty, which require jury sentencing. *Id.*

9. Bureau of Justice Statistics, *Defense Counsel in Criminal Cases*, DEPT. OF JUSTICE (Nov. 2000) https://bjs.ojp.gov/content/pub/ascii/dccc.txt [https://perma.cc/E8MM-GGME] (citing statistics that public defenders represent 66% of federal felony defendants and 80% of State felony defendants); Christopher Zoukis, *Indigent Defense in America: An Affront to Justice*, Crim. Legal News (Mar. 16, 2018), https://www.criminallegalnews.org/news/2018/mar/16/indigent-defense-america-affront-justice/ [https://perma.cc/7HDJ-8288] (citing statistics that "80% of criminal defendants cannot afford a lawyer").

10. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, YALE L. J. 2626, 2636–37 (2013); Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 665 (2017) (focusing on cases involving youth).

immediate interests of individual clients to include structural factors. Part IV makes the case that mass incarceration should be one of those factors. It then contemplates the limits of such an approach by teasing out a hypothetical situation in which all public defenders within a jurisdiction refused to accept plea offers in the hopes of disrupting the local court system, arguing that community buy-in is crucial for such a strategy to succeed.

I. DEFENSE ATTORNEY AS TRANSLATOR

Traditionally, criminal defense has been a client-centered endeavor. One approach a defense attorney may take to plea deals is to present clients with the offer and then get out of the way, providing little advice and playing as minimal a role as possible. There are many reasons to adhere to this approach, though I will primarily focus on just two of them. First, there are concerns that intrusion into the decision-making process will undermine the client's ability to make a decision that accurately reflects what they want. This may seem like an especially compelling reason given the power dynamics that often inhere in the client-public defender relationship. Second, it can be argued that the *Model Rules of Professional Conduct* appear to favor it.

A. ASYMMETRY IN THE CLIENT-PUBLIC DEFENDER RELATIONSHIP

The choice of whether to take a plea deal offer is a fundamental decision for any defendant.[11] While a plea deal can imply actual guilt, defendants may avoid a lengthy (or at least, lengthier) sentence than they would receive were they found guilty at trial.[12] The decision to avoid a longer sentence may also benefit people other than the defendant. Defendants often have family and friends who are invested in their well-being and likely depend on their serving as brief a sentence as possible. Moreover, going to trial, where witnesses and evidence will be produced, can be a humiliating and traumatizing experience for criminal defendants.[13]

The risk calculus for public defenders is very different. Instead of the potential risk of longer periods of incarceration and a humiliating trial, public defenders'

11. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983).

12. Exploiting many defendants' fears of a lengthy sentence, Congress has incentivized defendants to take plea deals by passing overly lengthy sentencing guidelines. *See* Rachel Barkow, *Separation of Powers and the Criminal Law*, STANFORD L. REV. 989, 1034 (2006) ("longer sentences exist on the books largely for bargaining purposes.").

13. *See* Jill Hunter & Aparna Rao, *Character Evidence in the Criminal Trial*, 20 INT'L J. EVIDENCE & PROOF 161, 166, 170 (2016) (explaining that character evidence introduced at trial can often humiliate criminal defendants); *see also* Michael L. Perlin & Naomi M. Weinstein, *Friend to the Martyr, a Friend to the Woman of Shame: Thinking about Law, Shame, and Humiliation*, 24 S. Cal. Rev. L. & Soc. Just. 1, 41, 41 n.252–53 (2014) (discussing the particularly humiliating trial experiences of sex offenders); Michael L. Perlin & Heather Ellis Cucolo, *"Something's Happening Here/but You Don't Know What It Is": How Jurors (Mis)Construe Autism in the Criminal Trial Process*, 82 U. PITT. L. REV. 585, 620 (2021) (discussing the humiliation autistic defendants experience at trial).

concerns implicate reputation and the maintenance of a reasonable case docket.[14] Especially in local communities of criminal attorneys, there can be reputational costs of taking a case to trial and losing; however, similar reputational damages may attach to the attorney who refuses to take any cases to trial.[15] Perhaps more compelling is the public defender's reasonable desire to limit their notoriously overwhelming caseloads.[16] Trials are time consuming and require public defenders to divert substantial energy and resources, resulting in attorneys placing other cases on the back burner.[17] Moreover, during the course of a trial, a public defender may be assigned additional cases that add to their overall caseload. Plea deals are an easy way to avoid such mounting dockets.[18]

Perhaps more concerning is the power dynamic that permeates the public defender-client relationship. Facing the states' condemnation, criminal defendants are exceptionally vulnerable to the humiliation, pain, and violence that constitute legal processes such as judgement and punishment.[19] Public defenders stand in sharp contrast—they face no threat to their life, liberty, or property and instead possess expertise in local rules governing criminal law and criminal procedure upon which their client depends.[20] Moreover, class and racial differences often characterize public defenders-client relationships as public defenders are highly educated and are overwhelmingly white,[21] while their clients are definitionally indigent, disproportionately Black and Latino and, overall, less educated than the general population.[22] Proponents of the deferential approach can point out that these power dynamics put public defenders at an increased risk of paternalistic behavior and of undermining the wishes of their clients, who may feel unduly influenced by their attorney's advice.[23] Indeed, clients of public defenders report that they often feel disrespected and ignored by their defense attorneys and that

---

14. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2476 (2004).

15. *See id*. at 2476, 2478 n.51.

16. *See id*. at 2476.

17. *See id*. at 2476–77.

18. *See id*.

19. *See* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607, 1607 n.16 (1986).

20. *See infra* part II.B.

21. Zippia, *Public Defender: Demographics and Statistics in the US* (Sep. 9, 2021) https://www.zippia.com/public-defender-jobs/demographics/ [https://perma.cc/92CW-GQV9] (illustrating that 80.3% of public defenders are white and 6.9% are Hispanic or Latinx, but no statistics are listed for Black people).

22. *See* Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment among Formerly Incarcerated People*, Prison Policy Initiative (Oct. 2018) (approximately 75% of formerly incarcerated individuals have received no education beyond high school or a GED) https://www.prisonpolicy.org/reports/education.html [https://perma.cc/79DY-42CQ].

23. *See* Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law,* 12 CALIF. L. REV. ONLINE 1 (June 2021), https://www.californialawreview.org/the-racial-reckoning-of-public-interest-law [https://perma.cc/4BRG-7W8W] (arguing that overwhelmingly white public interest attorneys, including public defenders, are often racially paternalistic toward their clients).

such feelings are factors that weigh heavily in determining their satisfaction with their advocate.[24]

B. THE MODEL RULES OF PROFESSIONAL CONDUCT

Beyond the ethical concerns in advising a client to reject a plea deal offer, there are professional issues as well. At first blush, the *Model Rules* seem to cut in favor of the deferential approach. Within Rule 1.2, there is a tension between 1) the deference an attorney owes to their client and 2) the defense attorney's role as an advocate.[25] On the one hand, the public defender must "abide by a client's decision" regarding the plea deal; however, this is only to be done after the client has "consult[ed] with the[ir] lawyer."[26]

Nevertheless, in light of a recent Supreme Court decision, some commentators have suggested that Rule 1.2 will begin to serve a robust role in moving plea-related decision-making away from the defense attorney and toward the client.[27] In *McCoy v. Louisiana*, the Court found a Sixth Amendment violation when, during a capital murder trial, a defense attorney admitted their client's guilt over the expressed wishes of their client.[28] Joseph R. Latham has argued that *McCoy* served as a rejection of the "paternalistic models of criminal defense out of respect for the objectives of the individual in defending himself against the state's accusations of wrongdoing."[29] Instead, "Rule 1.2(a)'s substantive effect, in requiring counsel to communicate plea offers from the prosecutor to the defendant, arguably ought to be viewed as requiring the [defense attorney] to walk a two-way street of prompt communication."[30] Under this expansive view of Rule 1.2(a)'s "abide by" clause, deference is not merely an approach, but rather a professional mandate. The role of the defense attorney, then, is to serve as plea deal translators, passing information between their client and the prosecutor and playing a restrained role in advising their client as to whether they should accept the offer.

II. THE LIMITS OF DEFERENCE

Problems abound with the deference approach. While the text of Rule 1.2 certainly leaves the ultimate decision in the client's hands, it does not clearly argue for a robust deference position. In fact, it counsels in favor of a robust adviser

---

24. *See* Marla Sandys & Heather Pruss, *Correlates of Satisfaction Among Clients of a Public Defender Agency*, 14 OHIO ST. J. CRIM. L. 431, 456 (2017).

25. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2020) [hereinafter MODEL RULES].

26. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

27. *See* Joseph R. Latham, Note, *The Real* McCoy: *Model Rule of Professional Conduct 1.2 as a Window to the Future of Sixth Amendment Rights*, ALA. C.R. & C.L. L. REV. 335 (2020).

28. McCoy v. Louisiana, 138 S. Ct. 1500, 1509 (2018).

29. Latham, *supra* note 27, at 345.

30. *Id.* at 351.

role for defense attorneys.[31] Policy considerations buttress this reading. To wit, public defenders are institutional experts in their local criminal legal system and removing them as much as possible from the decision-making process regarding a proposed plea deal is unlikely to be in the best interest of their client. Public defenders' knowledge extends beyond institutional expertise and includes wisdom gained from experience with past clients. They can predict problems that clients may face in their personal lives and advise according to how past clients have managed those problems.

A. RULE 1.2'S CONSULTATION CLAUSE

Rule 1.2 contains language that implicitly acknowledges experienced defense attorneys' institutional knowledge.[32] Emphasizing a textualist approach,[33] Latham focuses on the portion of the Rule that requires lawyers to "abide by the[ir] client's decision."[34] However, his analysis conveniently ignores the clause that immediately follows, which explains that a client should make their decision only "after consultation with the[ir] lawyer."[35] An interpretation that integrates Rule 1.2's consultation clause is more consistent with the overall spirit of the rule, which emphasizes collaboration between the attorney and the client. Other clauses in the Rule grant the attorney leeway to "take such action on behalf of the client as is impliedly authorized to carry out the representation,"[36] to "discuss the legal consequences of any proposed course of conduct with a client,"[37] and to "assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[38] Each of these clauses require consultation with an attorney and each imply that the attorney should advise their client. Understood in the context of the whole Rule, section 2(a) suggests defense attorney involvement in the plea-bargaining process beyond that of a mere translator. This interpretation is supported by more than just the text—it is also backed by on the ground practicalities and sound policy judgements.[39]

---

31. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

32. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) ("after consultation with the lawyer").

33. Latham, *supra* note 27, at 353.

34. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

35. *Id.* The two competing clauses in Rule 1.2—"after consultation" on the one hand, and "abide by the client's decision," on the other—underscore textualism's "choice of text" problem, which can in turn lead to a "gerrymandered text." When engaging in a textualist statutory interpretation, advocates, jurists, and scholars tend to emphasize the portion of the text that most favors their argument, and then pronounce that to be the objective meaning of the text. Victoria F. Nourse, *Textualism 3.0: Statutory Interpretation after Justice Scalia*, 70 ALA. L. REV. 667, 670–71 (2019).

36. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

37. MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

38. MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

39. *See infra* Part II.B.

B. INSTITUTIONAL AND PROFESSIONAL EXPERTISE

The practical issues with the defender-as-translator model are immediately obvious. After articulating the increased role that Rule 1.2 would play in shifting decision-making authority from the public defender to the client, Latham acknowledges the bevy of questions that such a shift would create: what if the defendant makes absurd demands that may upset the prosecutor and thereby undermine the defendant's own interests?[40] What if the defendant expresses interest early in the plea deal negotiation process, but would have received a more favorable deal had they waited longer to do so?[41] Public defenders' institutional expertise solves both of these problems. Their frequent interactions with not only the general criminal process, but also with specific prosecutors and judges, can help the accused bargain for reasonable plea deals and leverage timing to get the best offer possible.[42] It is this exact expertise that led the Court to conclude that "[t]he assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty."[43]

In few other fields would we expect expertise to take a backseat. Take, for example, the medical profession. It would be absurd for an oncologist to merely report back lab results without any additional information about prognosis and possible paths forward with likelihoods of success associated with each response. In fact, doctors are encouraged to approach giving difficult news in a collaborative manner, providing multiple options to their patients in a balanced, straightforward style, not sugar-coating anything, but also exhibiting empathy.[44] It would be strange not to take this approach in the criminal legal context, especially out of concerns of undermining the client's autonomy. Rather than working against a client's ability to self-determine, defense counsel should provide additional information such as the likelihood of success at trial, the quality of a plea offer, and facts that are not immediately obvious to a defendant, such as the dangerousness of prisons during the COVID-19 crisis, as these factors may help illuminate the decision-making process for the client.[45] Public defenders can also provide insight on more personal matters based on past client experiences, such as how to

---

40. Latham, *supra* note 27, at 351–52.

41. *Id.*

42. *See* Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 U. KAN. L. REV. 271, 272 (2016) ("attorneys who represent indigent criminal defendants almost always have a better understanding of the law and criminal court procedures. In the case of public defenders, who represent the vast majority of indigent defendants, experience with the courts and local judges and prosecutors can be invaluable.").

43. Gideon v. Wainwright, 372 U.S. 335, 343 (1963) (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938))

44. *See* Georgia Hardavella, Ane Aamli-Gaagnat, Armin Frille, Neil Saad, Alexandra Niculescu & Pippa Powell, *Top Tips to Deal With Challenging Situations: Doctor-Patient Interactions*, 13 BREATHE 129 (Jun. 2017).

45. *See* Alix M.B. Lacoste, Erika Tyagi & Hope Johnson, *Fast, Frequent, and Widespread*: *COVID-19 Outbreaks Inside Federal Prisons*, UCLA L. COVID BEHIND BARS DATA PROJECT (Nov. 2021). https://uclacovidbehindbars.org/assets/federalprisonoutbreaks.pdf [https://perma.cc/MJ4P-QZWZ] (describing recent COVID-19 outbreaks in federal prisons).

factor in dependent family members' concerns or how exposing, and potentially humiliating, a trial might be, along with other related issues.

To be clear, I do not intend to suggest that public defenders should ride roughshod over their clients' decision-making capacities. The concerns brought up by the deferential approach are legitimate and should inform how public defenders approach their clients. Nevertheless, it is not in the client's best interests for their attorney to step back and merely play translator. Public defenders play a crucial role in the plea deal process and bring considerable experience and expertise to the table. In the next section, this Note investigates the types of concerns public defenders should consider when advising their clients.

III. DEFENSE ATTORNEY AS ADVISOR

Generally, there are two types of concerns about which a defense attorney might want to advise their client. The first are internal concerns—those that bear directly on the client's specific case. These are largely the concerns mentioned at the end of Part I: the likelihood of success at trial, the relative quality of the plea deal, prosecutor, and judge, the potential for a humiliating trial, the danger of prison conditions at that moment, etc. As Part I detailed, public defenders possess the unique expertise that place these concerns squarely in their wheelhouse. Additionally, comments to the *Model Rules* explicitly encourage this form of advising, noting that "[p]urely technical legal advice. . . can sometimes be inadequate."[46] Thus, at a minimum, defense attorneys should advise their clients as to the internal concerns regarding their case, even if they extend beyond the directly legal context.

The second type of concerns are external concerns. These are the concerns that extend beyond the immediate welfare of the client. Included in this category are not only the interests of those who depend on the defendant, but also social, economic, and political concerns. Of particular interest here is the issue of mass incarceration and the extent to which it should inform the way defense attorneys advise their clients regarding plea deals. Section III grounds this more robust approach to advising clients in the *Model Rules*. Section IV makes the case that defense attorneys should take mass incarceration into account when advising their clients and then addresses the limits of such a proposal: a plea deal strike.

A. RULE 2.1

Rule 2.1 serves as one of the *Model Rules'* acknowledgements that a world of concerns exists beyond the precise legal problem at issue.[47] While little

46. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 2.

47. For other examples, *see* MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (requiring that "in representing a client," an attorney must refrain from using "means that have no substantial purpose other than to embarrass . . . or burden a third party"); MODEL RULES OF PROF'L CONDUCT R. 6.6 (encouraging attorneys to provide financial support to legal organizations that provide services to low-income individuals).

legislative history exists to help guide readers' understanding of the Rule, it likely resulted from a combination of two pre-existing Legal Ethics Canons that emphasize the role of an attorney as a party independent from their client and highlight that lawyers may look beyond purely legal matters in advising clients.[48] Rule 2.1's text is brief and provides: "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[49]

The normative values that Rule 2.1 represents, as well as its text and history, have led commentators to conclude that the Rule compels attorneys to consider extralegal values when advising clients, including in the criminal context.[50] Generally, scholarship has been critical of attorneys' support of corporate or financial crime and refer to ethical values that pertain to truth-telling, transparency, and acknowledgment of malfeasance.[51] However, the ethical considerations present in such criminal cases differ significantly from those that tend to involve public defenders. The core difference between these types of cases is the defendants' respective social power as measured by their wealth and social status. Corporate crime and financial crimes are more likely to have been committed by individuals from higher income brackets than are other crimes.[52] Access to resources is often what allows individuals to take advantage of financial systems and commit such crimes.[53] By contrast, the crimes that public defenders defend their clients against

---

48. *See* Amanda Boote & Anne H. Dechter, Note, *Slipped Up: Model Rule 2.1 and Counseling Clients on the "Grease Payments" Exception to the Foreign Corrupt Practices Act*, 23 GEO. J. LEGAL ETHICS 471, 476 (2010); *see also* Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 368–70 (2005).

49. MODEL RULES OF PROF'L CONDUCT R. 2.1.

50. *See generally* Boote & Dechter, *supra* note 48 (using Rule 2.1 to analyze the duty to advise corporate clients regarding "grease payments" to foreign governments as covered by the Foreign Corrupt Practices Act); Drew Hoffman, Note, *Martha Stewart's Insider Trading Case: A Practical Application of Rule 2.1*, 20 GEO. J. LEGAL ETHICS 707 (2007) (arguing that Martha Stewart's attorney ought to have urged Martha Stewart to be more forthcoming during her trial); Ted Weckel, *Helping Our Clients Tell the Truth: Rule of Professional Conduct 2.1 in Criminal Cases*, 20 UTAH B.J. 16 (Nov.–Dec. 2007) (arguing that in representing criminal defendants, defense attorneys should urge their clients to be honest with courts and admit to wrongdoing when guilty); *see also* Gantt, II, *supra* note 48, at 366, 405–06 (discussing increased scholarly interest in Rule 2.1 "in the wake of the Enron collapse," and later discussing the interaction between Rule 1.2 and Rule 2.1).

51. *See generally* Boote & Dechter, *supra* note 48; Hoffman, *supra* note 50; Gant, II, *supra* note 48, at 366 n.6 (collecting sources analyzing Enron's collapse).

52. *See* Michael L. Benson & Kent R. Kerley, *Life Course Theory and White-Collar Crime* 13, https://www.researchgate.net/figure/Demographic-Characteristics-of-White-Collar-and-Common-Offenders_tbl1_252990822 [https://perma.cc/9Z8Q-ZVSB] (finding that the typical perpetrator of white-collar crime is a middle-class person).

53. *Cf.* John Guyton, Patrick Langetieg, Daniel Reck, Max Risch, & Gabriel Zucman, *Tax Evasion at the Top of the Income Distribution: Theory and Evidence* (Wash. Ctr. for Equitable Growth, Working Paper no. 032221, Feb. 24, 2021), https://equitablegrowth.org/working-papers/tax-evasion-at-the-top-of-the-income-distribution-theory-and-evidence/ [https://perma.cc/6B3Z-CWA5] (explaining that tax evasion committed by those in the top 1% of income earners is dramatically undercounted).

necessarily do not require access to significant resources because such defendants are indigent. Moreover, the clients that public defenders defend are often subject to near constant police surveillance which stands in stark contrast to the comparatively lightly regulated financial industry where corporate and financial crime often takes place.[54] Thus, the nature of wealth inequality require different ethical considerations in advising clients.

Nevertheless, some commentators have urged public defenders to advise their clients to take plea deals in an effort to promote honesty.[55] Ted Weckel, a former public defender, argues that encouraging clients to accept plea deals when they are guilty "would develop our clients' character and weaken their ability to commit fraud upon the courts through their lawyers."[56] Weckel's argument is useful because its missteps—explicitly ignoring systemic disadvantages that criminal defendants face and conflating criminal guilt with moral culpability—illuminate the importance of focusing on structural issues instead of limiting the analytical focus to discrete cases.

To begin, Weckel "put[s] aside . . . the fact that some police officers not infrequently ignore the constitutional rights of our clients, trick them into confessing, fabricate evidence and 'testi-lie,' and that some prosecutors charge our clients with crimes for which they are not guilty."[57] But this is like asking about a car, setting aside how well it drives. Police misconduct[58] and prosecutorial overcharging[59] occur in a substantial number of criminal prosecutions. Moreover, in the past several decades, the Supreme Court has found a variety of aggressive police tactics, such as pretextual vehicle stops[60] and stops based on limited descriptors[61] to be constitutional, eroding the rights of criminal defendants.[62] The issues that

---

54. *See* Barton Gellman & Sam Adler-Bell, *The Disparate Impact of Surveillance*, THE CENTURY FOUND. (Dec. 21, 2017); *see generally* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003) (arguing that the poor are subject to greater intrusions of privacy in the criminal context); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999) (same).

55. *See, e.g.*, Weckel, *supra* note 50.

56. *Id.* at 16.

57. *Id.*

58. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 572–76 (2013) (detailing the extensive stop and frisk program initiated by the NYPD, which was ultimately found to be violative of the fourth and fourteenth amendments).

59. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 413 (2001) ("prosecutors frequently charge more and greater offenses than they can prove beyond a reasonable doubt" because "[t]his tactic offers the prosecutor more leverage during plea negotiations"); Eisha Jain, *Arrests as Regulation*, 67 STANFORD L. REV. 809, 821 (2015) ("Prosecutors have professional incentives to . . . overcharge"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1001 (2009) (identifying "prosecutors' self-interest in overcharging weak cases" as an issue to be addressed).

60. Wren v. United States, 517 U.S. 806, 812–13 (1996).

61. United States v. Sokolow, 490 U.S. 1, 4–5 (1989).

62. *See* Utah v. Strieff, 579 U.S. 232, 252–53 (2016) (J. Sotomayor, dissenting) (listing a series of Supreme Court decisions that cut back on defendants' Fourth Amendment rights); Allegra McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 Sup. Ct. Rev. 157, 159 (arguing that "a transformation of our constitutional discourse and imagination" is necessary to do away with police violence and provide

present in most run-of-the-mill criminal cases are not just the result of their discrete facts, they represent a larger structural problem.[63]

Weckel's second misstep is the conflation of a criminal act with a moral failure.[64] It is telling that he relies on an example involving a client facing drug charges to illustrate his point.[65] The "War on Drugs," an unprecedented dedication of law enforcement resources to incarcerating those who sell, buy, and possess drugs, has by many accounts fueled mass incarceration, particularly its most racialized components.[66] Yet for many defendants, selling drugs does not represent moral failure, but rather a desire to provide for one's family in the face of a lack of legal employment possibilities.[67] Professor and litigator David D. Cole illustrates the situation well:

> Upon graduation, one of my law school classmates became an Assistant United States Attorney (AUSA) in a major city in the Northeast, where he found himself prosecuting federal drug cases. Like Supreme Court Justice Clarence Thomas reportedly reacted upon seeing a man taken into custody, my friend had a "there but for the grace of God go I" reaction. My friend is an ambitious, smart white man who grew up in the Midwest, and worked hard to get where he is today. In his eyes, but for their race and class, the young men he was prosecuting were strikingly similar to himself. They were the entrepreneurs of their community-the ones with ambition, drive, and a willingness to work hard.[68]

Cole recontextualizes the lives and moral status of those charged with selling drugs by analogizing them to people who wield among the most legal power in the country. His story highlights how social factors, like wealth, race, and geography, can be the dividing line between a successful white-collar career and

---

adequate protection to criminal defendants); US v. Weaver, 9 F.4th 129, 174–75 (2021) (J. Calabresi, dissenting) (describing courts' slippery slope approach that has gradually eroded Fourth Amendment protections).

63. *See generally* Floyd, 959 F. Supp. 2d 540 (finding the NYPD's stop-and-frisk program to constitute a form of structural racism that thus violated the Equal Protection clause); Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 112 YALE L.J. 2176, 2190–98 (2013) (arguing that a focus on protecting the Sixth Amendment rights of criminal defendants, specifically the right to an attorney, has not been sufficient to prevent mass incarceration, and indeed, may serve to distract from its root causes).

64. Weckel, *supra* note 50, at 16 (arguing that admission of guilt would develop our clients' character and weaken their ability to commit fraud upon the courts through their lawyers," thereby assuming that a violation of the criminal code is an indication of a deficient character). Of course, from Jean Valjean to Martin Luther King, Jr. to Michael Hardwick, history and literature are filled with examples of people who violated the law yet were not deficient in character in any way relating to the crime they committed.

65. *Id.*

66. *See* ALEXANDER, *supra* note 6, at 5; 13TH (Kandoo Films 2016); *but see* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 17 (University of California Press 2007) (arguing that mass incarceration has been fueled by a complex combination of political, geographical, and social issues and thus cannot be reduced to a product of just the war on drugs).

67. *See* Jamie J. Felder, *"The Game Ain't What It Used to Be": Drug Sellers' Perceptions of the Modern Day Underground and Legal Markets*, 49 J. DRUG ISSUES 57, 57 (2019) (collecting sources indicating that "drug sellers' activities" are "an adaption to occupying precarious positions in the legal labor market").

68. David D. Cole, *Formalism, Realism, and the War on Drugs,* 35 SUFFOLK U. L. REV. 241, 241 (2001).

imprisonment. More generally, he reframes the problem, shifting away from a view like Weckel's, emphasizing individual responsibility, to one that highlights systemic disenfranchisement. The next section looks at two additional positions that public defenders may take, each more sympathetic to defendants than Weckel's, and continues to critique approaches that emphasize focus on individual cases at the expense of the system.

B. RIGHTS VERSUS DEFENDANTS

Before attending law school, I worked at a large public defender agency in New York City. The overwhelming majority of the attorneys there zealously represented their clients. However, the attorneys drew their motivation from different wells. Generally speaking, there were two camps. The first was composed mostly of older attorneys who believed in the work because they believed that their clients, like all criminal defendants, have the right to a robust defense. Underlying this belief is the assumption that the criminal legal system is just: while there undoubtedly could be some improvements here and there, the policy structures and criminal procedure doctrine are more or less correct and the attorneys are there to play their part in the properly functioning criminal legal system.[69] For this camp, among the most important pieces of the criminal legal system is the canonical case *Gideon v. Wainwright*, which constitutionalized a criminal defendant's right to an attorney, regardless of their ability to afford one.[70] Moving forward, I will refer to this camp as the "rights-oriented" camp. The second camp believed that the criminal legal system is fundamentally unjust and viewed their work as a form of resistance. They were more likely to be involved with political activism outside (and inside) the office walls and were less likely to form working relationships with local prosecutors, whom they viewed purely antagonistically.[71] I will refer to this group of attorneys as the "decarceral" camp.[72]

The two camps represent philosophical differences that run far deeper than those at the public defender's office. Professor Paul Butler argues that the rights-based approach, epitomized by *Gideon v. Wainwright*, has distracted political attention away from mass incarceration and "obscured th[e] reality" that

---

69. *See, e.g.*, Cliff Paylor & James Schaefer, *In Defense of Public Defense*, 69 Hennepin L. 12, 12, 16–17 (May 2000) (complimenting the efficiency of the Minnesota public defender system, while failing to recognize that public defenders were required to represent over 174,000 arrested individuals).

70. Gideon, 372 U.S. 335.

71. *See, e.g.*, Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 25 (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4003440 [https://perma.cc/AE3H-E85H].

72. The protests following George Floyd's death, which brought calls to defund and abolish the police into the political mainstream, highlighted the differences between these two camps. An attorney belonging to the first camp summed up the differences between the groups quite well. In discussing prison and police abolition, he noted that if those institutions were to be abolished, then the attorneys in the office would cease to have jobs.

"prison is for the poor."[73] Borrowing from critical legal studies, Butler launches a multi-pronged attack on the position held by the rights-oriented camp.[74] He first assails them for "overinvesting" in rights, arguing that *Gideon* has served to protect the *rights* of defendants, rather than defendants themselves:

> [E]ven if the defender community were victorious in getting what it wanted out of *Gideon* . . . American criminal justice would still overpunish black and poor people. That is the unfairness that the liberal investment in *Gideon* was supposed to contravene. A lawyer is supposed to be a means to an end, not an end in herself.[75]

Butler then turns his attention to the indeterminacy thesis, which provides that legal text, principles, and rules do not have definite and fixed meaning and may be disparately interpreted and applied by different judges.[76] Applying the thesis to *Gideon*, Butler illustrates that a constitutional guarantee to a defense attorney in the criminal context is too broad a proposition to give concrete meaning in each of the contexts in which the right arises.[77] For example, the text of the Sixth Amendment provides no clear answer as to whether a system in which court-appointed defense attorneys are assigned based on competing attorney's lowest bid is constitutional.[78] The indeterminacy thesis serves as an attack on the rights-oriented camp's gesture to rights as a legitimating component to the criminal legal system. If the meaning of rights is vague and variable, then reference to them as a reason to engage in public defense in incoherent, especially, when a judge determines that the contents of such rights are feeble.

Finally, Butler situates *Gideon* rights discourse within the conflict between an individualist approach to the criminal legal system and a structural one. First, Butler notes that dependence on *Gideon* erases the fact that poverty often leads to crime.[79] Emphasis on the existence of the right to an attorney may do little to help a client who is clearly guilty of a crime that they committed out of necessity.[80] Instead, he argues, protecting poor, and often Black, persons requires a shift in focus, from individual culpability to structural factors that lead to crime.[81] In this final turn, Butler aligns himself with the "decarceral" camp firmly asserting, "*Gideon* diverts attention from economic and racial critiques of the criminal justice system," and worse, "it provides legitimation of the status quo," namely, a

---

73. Butler, *supra* note 63, at 2178. Professor Butler is careful to note that in the criminal context, and perhaps generally, "it is impossible to disaggregate the effects of race and class" on mass incarceration. *Id* at 2180.

74. *Id* at 2187 n.50, 2190. In these portions of his paper, Butler often refers to what I've deemed the rights-oriented camp as "liberals."

75. *Id* at 2191.

76. *Id* at 2188–89.

77. *Id* at 2192.

78. Butler, *supra* note 63, at 2192–93.

79. *Id* at 2195.

80. *Id*.

81. *Id* at 2195–98.

system that targets poor and black people for incarceration on an immense scale.[82]

IV. TAKING MASS INCARCERATION INTO ACCOUNT

So, what can public defenders do about the structural nature of mass incarceration? Butler posits that public defenders should continue to litigate aggressively to reduce their clients' prison time (or better yet, get crucial evidence thrown out, charges dropped, or secure an acquittal at trial) and fight for additional resources to ensure adequate defenses for all clients.[83] In addition to Butler's recommendations, public defenders should also always discuss mass incarceration with their clients, encouraging them to err on the side of rejection when evaluating whether to accept a plea offer. Two postures are available to the public defender seeking to include mass incarceration in their counseling. First is the standard case: cases are treated discretely and there is no communication or cooperation between defendants. Under these circumstances, mass incarceration may be one of many considerations a public defender might want to discuss with their client and may only push the defendant to reject a plea offer in borderline cases. The second posture is one involving a plea deal strike. In these cases, the very nature of mass incarceration may result in a jurisdiction wide agreement between public defenders and the community they represent not to accept any plea offers. Here, a public defender will much more forcefully urge their client to reject plea offers. While a plea strike would more effectively increase prosecutor workloads, it also presents an ethical conundrum with the public defender caught between their clients' interest in decreased jailtime and the values of decarceration and solidarity.

A. THE STANDARD CASE

In an office that is not engaged in a plea strike, mass incarceration will be one of many factors to weigh when considering whether to accept a plea deal. Some cases will require public defenders to advise their client to accept plea deals. For example, if video footage clearly captures the defendant stealing from a store, they will be exceedingly likely to lose at trial. If a generous plea deal is on the table, the attorney should advise their client to accept the offer in order to reduce their client's sentence. But such a recommendation is not entirely inconsistent with concerns about mass incarceration—a lesser prison sentence, as opposed to a longer one, improves the client's life and decreases the total number of inmates at a given time.

In other situations, however, it will be less clear whether there is sufficient evidence for the prosecution to secure a conviction at trial. Under such circumstances, and when incarceration is on the table, public defenders should advise their clients to reject plea offers and to take their cases to trial more often than they

82. *Id* at 2196–97.
83. *Id* at 2202.

currently do.[84] Taking such cases to trial will have multiple benefits that may result in decarceration. First and most obviously, in the cases in which the defendant succeeds, they will not spend any time in prison.[85] Second, refusing plea offers may reduce prosecutors' ability to leverage their ability to overcharge. Prosecutors often use overcharging as a tactic to induce a plea deal on a weak case that they do not believe they could win at trial.[86] Calling prosecutors on their bluff may discourage future overcharging, especially if defendants are victorious at trial. Finally, if public defenders and their clients are able to refuse a sufficient number of plea offers such that prosecutors' dockets swell to an unsustainable level, prosecutors would need to dismiss their weaker cases lest defendants' right to a speedy trial be violated.[87]

When incorporating mass incarceration into the advice they give their clients, public defenders should still be wary of many of the concerns brought up by the deferential approach.[88] Racial and class dynamics still permeate many public defender-client relationships, and it is important that attorneys avoid adopting a paternalistic posture with their clients, leaving the ultimate decision of whether to accept the plea deal with their client. After all, it is months or years of the client's life at stake. Defense attorneys should be especially careful not to use their clients primarily as a means of achieving their preferred policy outcomes that are detached from the actual desires of their clients or their communities.[89] Defense attorneys should avoid falling into this trap by actively discussing with their clients the internal and external concerns that cut both in favor and against accepting a plea offer; however, mass incarceration ought to be part of this discussion, most often as a factor counseling against accepting a plea deal.

---

84. Because I am focused on mass incarceration, this discussion is only focused on cases that involve prison sentences. Many criminal cases involve a monetary fine instead of imprisonment. These fines can be serious and crippling and can contribute to future incarceration; however, because I am focused on mass *incarceration*, such instances are beyond the scope of this Note. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1312, 1326 (2012).

85. The word "prison" is used intentionally here as many defendants, disproportionately poor people of color, will spend time in pretrial detention, which is technically jail. *See Pretrial Detention*, PRISON POLICY INITIATIVE (Dec. 24, 2021), https://www.prisonpolicy.org/research/pretrial_detention/ [https://perma.cc/R238-UDKG] (indicating that approximately half a million people, disproportionately of color, serve in pretrial detention, often because they cannot afford bail). However, such considerations are beyond the scope of this Note.

86. *See* Bibas, *supra* note 59, at 1001 ("centralized charging units, staffed by prosecutors who will not try the cases themselves, eliminate prosecutor's self-interest in overcharging weak cases so that they can later charge-bargain them away.").

87. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial").

88. See discussion, *infra* at Part I.

89. *Cf.* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482 (1976) (criticizing civil rights attorneys for placing their values of desegregation above the desires of the communities they served and the actual educational well-being of Black children).

B. PLEA STRIKES

The second posture a public defender might take is a categorical opposition to accepting plea offers.[90] Taking the structural nature of mass incarceration and plea deals to its logical end, some commentators have suggested that public defender offices might pursue a strategy of refusing all plea deal offers.[91] The goal of such a strategy would be to inundate prosecutor offices with cases such that they would be overwhelmed and likely dismiss the weaker cases. This strategy would require sacrifices—defendants against whom prosecutors had strong arguments would not have plea deals available to them and would likely have to serve longer sentences if and when they lost at trial. Thus, an ethical dilemma surfaces: on the one hand, mass incarceration, and the role plea deals play in driving it, are clearly against the best interests of public defenders' clients generally. On the other hand, Rule 1.2 binds defense attorneys to their individual clients' final decisions on plea deals.[92]

In a forthcoming article, Professor (and former public defender) Andrew Manuel Crespo has set forth a compelling case for a plea deal strike that in part seeks to solve the ethical dilemma.[93] Crespo is optimistic that a plea deal strike could be successful, exploiting many of the components of the criminal process that are often cited as reasons the system is "flawed, failing, or unjust."[94] Crespo acknowledges that it would put some defendants in a literal prisoners' dilemma: those who faced a high likelihood of going to jail would be incentivized to break with the strike if offered a lesser sentence;[95] however, he rebuts this, emphasizing

---

90. The precise contours of a plea deal strike, with respect to duration, number of jurisdictions involved, and other factors, would likely depend on community needs. The plea deal strike orchestrated by defendants whose arrests stemmed from President Trump's inauguration may provide something of a roadmap for future plea deal strikes. There, 210 of 230 people who were arrested following President Trump's inauguration agreed with one another not to accept a plea deal. The only convictions secured were from the twenty individuals who pled guilty. *See* Crespo, *supra* note 71, at 21–22.

91. I first heard this argument in 2018 while interviewing in a public defender office that I wound up not working in. However, scholarly and popular engagement with this idea predates my conversation with that public defender. *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. Times (Mar. 10, 2012). https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/5WA4-EKR9]; Butler, *supra* note 63, at 2204 (discussing Alexander's article); Crespo, *supra* note 71, at 3–4 (same); Ian Millhiser, *If Most Defendants Insisted on their Right to a Jury Trial, the Criminal Justice System Would Collapse Under the Weight*, THINKPROGRESS (Mar. 12, 2012), https://archive.thinkprogress.org/if-most-defendants-insisted-on-their-right-to-a-jury-trial-the-criminal-justice-system-would-af1f5e30936f/ [https://perma.cc/58AR-WXZD] (same). In her article, Alexander attributes this idea to a formerly incarcerated woman, Susan Burton. She also quotes Angela J. Davis as having previously discussed this concept. I have been unable to find the source from which Alexander quotes.

92. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (requiring defense attorneys to abide by their clients ultimate decision on whether or not to accept a plea deal offer).

93. Crespo, *supra* note 71, at 25.

94. *Id* at 6. The four components that Crespo highlights are the criminal legal system's "massive scale, its concentration of harm in discrete communities, its internal fragmentation, and its formal proceduralism."

95. *Id* at 17.

the power of community organizing, solidarity, and pointing out that recently, small-scale plea strikes have been successful.[96]

Finally, Crespo turns to the role of the public defender in a plea strike:

> Building . . . collective power is not primarily the work of public defenders. It is the work of organizers. But for it to succeed, we will need a fundamentally new model of public defense . . . One that shares insiders' system knowledge generously with organizers developing campaign strategies outside the context of individual cases. And one that, within those individual cases, suppresses the knee-jerk instinct to caution clients against trusting one another—and that learns instead to listen closely when clients express interest in or curiosity about banding together. Most of all, we will need public defenders to counsel such clients thoughtfully, honestly, and ably not just about the risks of such solidarity, but about its potentially radical decarceral power, too. Simply put, when your clients are in a union, the client-centered thing to do is to support their collective action.[97]

Crespo's move here mirrors the one that Butler makes, urging public defenders to move away from the traditional individualism that has dominated public defense philosophy and to adopt a more communitarian stance.[98] To successfully and ethically execute a plea deal strike, public defender offices must work closely with the communities they represent. Already, public defender offices have begun advertising their commitment to proactively engaging the communities they represent to form mutually beneficial partnerships.[99] This is an important place to begin as developing trust client-attorney trust is crucial when pursuing a legal strategy that may put some clients at increased risk of extended jailtime. The end result of such an agreement may not be a complete plea strike, but might just be an agreement between public defenders and the community they represent to take more cases to trial. What is important, is that the legal strategy reflects the desires and priorities of the community.

---

96. *Id* at 18–22.

97. *Id* at 25.

98. *See infra* Section III.B.

99. *See, e.g.*, *About*, NEIGHBORHOOD DEFENDER SERVICE, (last visited Jan. 9, 2022), https://neighborhooddefender.org/about/ [https://perma.cc/L22Z-63VA] (emphasizing its holistic approach and noting that it is an "active member" of the Harlem and Detroit "communities, establishing meaningful relationships with clients and their families. NDS hosts frequent education and outreach events to support its neighbors and participate in local events."); *see also Community Engagement*, BROOKLYN DEFENDER SERVICES, https://bds.org/our-work/community-engagement [https://perma.cc/LL8C-7PWQ] ("Since 2017, we have operated a walk-in Community Office in East New York. The BDS Community Office allows us to provide direct services to people who need them in the community in which they live.") (last visited Jan. 9, 2022); *Our Community and Clients*, THE BRONX DEFENDERS, https://www.bronxdefenders.org/clients-community/community/ [https://perma.cc/3PVV-HGXH] ("The strength and dynamism of this community is what makes real change possible. The Bronx Defenders works closely with Bronx civic leaders, elected officials, tenants associations, and local activists to foster deep and ongoing relationships with the community and to combat entrenched injustices affecting Bronx families.") (last visited Jan. 9, 2022).

CONCLUSION

Mass incarceration continues to plague the United States. To dismantle it, immense political, legal, and social effort will be required and many contend that components of the system will need to be dramatically restructured or torn down.[100] One place to begin is the subsystem of plea deals, which form the basis of the overwhelming number of convictions throughout the country. While judges and prosecutors wield immense power in facilitating plea deals, so do defense attorneys. They have the ability not only to negotiate plea offers with the prosecutor on the case, but to discuss and advise their clients on the offer. In these counseling sessions, attorneys should discuss mass incarceration as an external political consideration under Rule 2.1, while nevertheless being careful not to substitute policy desires for the well-being of their clients. Ultimately, true reform of the plea deal system must be rooted in a democratic desire to change and uproot the system of mass incarceration and public defender offices should seek to partner with the communities they represent to achieve this result.

100. *See* GILMORE, *supra* note 66, at 17 (noting that mass incarceration has been fueled by a complex combination of political, geographical, and social issues); *What Does the End of Mass Incarceration Look Like?*, Institute to End Mass Incarceration, https://endmassincarceration.org/what-does-the-end-of-mass-incarceration-look-like/ [https://perma.cc/E9VF-NWBM] (last visited, Mar. 19, 2022).