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Privileging Public Defense Research

by Janet Moore*

Ellen Yaroshefsky**

and Andrew L.B. Davies***

Abstract

Empirical research on public defense is a new and rapidly growing field in which the quality of attorney-client communication is emerging as a top priority. For decades, law has lagged behind medicine and other professions in the empirical study of effective communication. The few studies of attorney-client communication focus mainly on civil cases. They also tend to rely on role-playing by non-lawyers or on post hoc inquiries about past experiences. Direct observation by researchers of real-time defendant-defender communication offers advantages over those approaches, but injecting researchers into the attorney-client dyad is in tension with legal and ethical precepts that protect the very communication that is being studied. This Article discusses these problems and some responsive strategies. After assessing the available alternatives, the Article argues for judicial enforcement of an evidentiary privilege that protects and promotes empirical research on this high-priority topic.

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I. INTRODUCTION

Empirical research on public defense is a new and rapidly growing field.[1] The study of effective defendant-defender communication is emerging as a top priority.[2] There are many reasons to prioritize communication as a research topic. The Supreme Court of the United States has acknowledged that communication is a critical component of the right to counsel.[3] Yet recent studies document intense frustration with the amount, timing, and quality of communication between people who face criminal charges and the government-paid lawyers who represent them.[4]

Defendants who participate in these studies describe feeling unheard, silenced, and effectively erased from resolving their own cases.[5] In the words of one participant, "[T]hey just come down there with a paper . . . and he's tellin' you 'We gonna plead this.' Wait a minute, dude, we ain't even talk. 'And if we plead this the judge already said that he would do this.' When did that happen?! Where was I at?!"[6] Data from another study indicate that abysmal experiences degrade aspirations for improvement: "I think that you should be like, by law, allotted a minimal amount of time with your attorney. Not three minutes . . . you're allotted ten minutes to talk to this guy prior to your appearance in court."[7]

Defenders express similar frustration. When asked to identify their top-priority empirical research questions, they zeroed in on barriers to communication. Their questions were wide-ranging and evocative. Examples include: "Why don't my clients think I'm a real lawyer?"; "How do you deal with hostile clients who do not like you?"; "What can I do to get my clients to listen to my advice?"; "How many defendants are afraid

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1. Janet Moore & Andrew L.B. Davies, *Knowing Defense*, 14 OHIO ST. J. CRIM. L. 345, 346 & n.1 (2017).

2. *See* Christopher Campbell et al., *Unnoticed, Untapped and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 BEHAV. SCI. & L. 751, 761–64 (2015); Moore & Davies, *supra* note 1, at 361–63; Marla Sandys & Heather Pruss, *Correlates of Satisfaction Among Clients of a Public Defender Agency*, 14 OHIO ST. J. CRIM. L. 431, 434 (2017).

3. *See* Missouri v. Frye, 566 U.S. 134, 145 (2012); Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010); Geders v. United States, 425 U.S. 80, 88–90 (1976).

4. *See, e.g.*, Campbell et al., *supra* note 2.

5. *Id.* at 762–63.

6. *Id.* at 763; *see also* AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 11–23 (2009).

7. These data are emerging from a pilot study for which this Article's lead Author is the principal investigator. Janet Moore et al., *Reducing Mass Incarceration by Improving Public Defense: Defining and Assessing Quality Attorney-Client Communication* (Univ. of Cincinnati, IRB No. 2016-0313).

to tell our staff the truth?"; "[How can I] build trust . . . in order to avoid . . . surprises at trial?" and, in a mirror image of comments from the earlier study with defendants, "How can we ensure the client doesn't feel erased from the process?"[8]

However, these new studies reveal more than mutual frustration. They also reveal a shared awareness of the connection between communication, trust, case investigation, and successful advocacy.[9] The studies reveal a hunger not only for better communication, but also for research on strategies to achieve it.[10]

Part II of this Article discusses these and other reasons for prioritizing research on attorney-client communication in public defense. Part III describes the theory, methods, and findings of past studies and sketches a plan for future inquiry. Part IV tackles the complicated ethical and evidentiary issues implicated by such research and offers some responsive strategies. The alternatives are wide-ranging; for example, they include the use of machine-learning avatars in simulated defendant-defender communication.[11] After canvassing the alternatives, this Article argues for judicial enforcement of an evidentiary privilege that covers empirical research on public defense. Privileging public defense research is an optimal strategy for promoting greater understanding of a critically important but understudied subject.

II. WHY STUDY ATTORNEY-CLIENT COMMUNICATION IN PUBLIC DEFENSE?

There are many reasons to focus empirical research on attorney-client communication in public defense. The first involves the pivotal interests at stake. The right to counsel is "fundamental"[12] because it is "necessary to insure . . . life and liberty" against the exercise of concentrated government power.[13] Criminal prosecution and sentencing also threaten property and reputation; collateral consequences of conviction block access to jobs, housing, education, voting, jury service, and other opportunities for full participation in a democratic society; all of these impacts fall disproportionately upon poor people and people of color.[14]

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8. Moore & Davies, *supra* note 1, at 362–63.

9. *See supra* notes 1–2.

10. *See supra* notes 2, 7.

11. *See, e.g.*, Archie Zariski, *Avatars Go to Law School: Digital Standardized (and Not So Standard) Clients for Law School Teaching* (Athabasca Univ., Working Paper, 2010), https://auspace.athabascau.ca/handle/2149/2875 [https://perma.cc/ZTV9-XR2G].

12. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

13. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

14. AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 23–26 (2014); NAT'L RESEARCH COUNCIL,

Just as the criminal defendant's right to counsel is fundamental to the functioning of a healthy democracy, so too is attorney-client communication an essential component of the right to counsel.[15] This is so as a matter of law because the constitutional right to counsel requires lawyers to act reasonably based on existing attorney performance standards.[16] In enforcing the right to counsel, courts rely on performance guidelines, such as those issued by the American Bar Association, as evidence of what reasonable attorney performance should look like.[17]

Those attorney performance standards emphasize the duty to communicate.[18] They require lawyers to "seek to establish a relationship of confidence and trust" with each client, "keep the client informed" of all case developments, "advise the client on all aspects of the case," and "consult with the client on decisions relating to control and direction of the case."[19] Related legal ethics and evidence rules also prioritize confidential communications, trust, and loyalty.[20]

This interrelationship of performance standards and constitutional law means that pressure on one can reshape the other.[21] A leading example of this hydraulic relationship between praxis and constitutional meaning involves defendant-defender communication. In *Padilla v. Kentucky*,[22] the Court imposed a new constitutional requirement that

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THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 91–103, 233–58, 303–13 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) (discussing racially disparate impact of carceral systems, including creation of lower categories of citizenship and disenfranchisement); Michael Leo Owens, *Ex-Felons' Organization-Based Political Work for Carceral Reforms*, 651 ANN. AM. ACAD. POL. & SOC. SCI. 256–57 (2014); Loïc Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25 SOC. F. 197, 201–04 (2010).

15. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010).

16. Strickland v. Washington, 466 U.S. 668, 687 (1984).

17. *See Padilla*, 559 U.S. at 366–67.

18. AM. BAR ASS'N, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 15 (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/L938-DCWH] (citing standards).

19. *Id.* The United Nations has promulgated similar standards. *See* G.A. Res. 43/173, at princ. 18 (Dec. 9, 1988); G.A. Res. 67/187, at ¶ 28 (Mar. 28, 2013).

20. 1 MCCORMICK ON EVIDENCE § 87 (Kenneth S. Broun et al. eds., 6th ed. 2006) (describing the importance of attorney loyalty to the client); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966); Jancy Hoeffel, *Toward a More Robust Right to Counsel of Choice,* 44 SAN DIEGO L. REV. 525, 527–28, 541–43 (2007) (discussing importance of defendant-defender trust).

21. Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1707 (2016).

22. 559 U.S. 356 (2010).

counsel inform clients, before a plea is entered, about the deportation consequences of a conviction.[23] The Court's decision in *Padilla* led many defenders to find and use previously untapped information about immigration law in order to provide constitutionally compliant advice to the people they represented.[24]

Unfortunately, the lack of communication addressed in *Padilla* is all too common. In fact, communication problems have been cited as the most frequent basis of formal bar complaints against lawyers generally.[25] Indeed, early empirical research on attorney-client communication was motivated in part by survey data documenting perceptions of lawyers as "inattentive, unresponsive, insensitive, non-empathetic, uncooperative, and arrogant."[26]

These problems are even more intense in the public defense context, where a unique set of obstacles hinders communication.[27] The obstacles are reflected in the "Public Pretender" stereotype.[28] The stereotype has complex origins. As indicated by the study data offered in Part I, it is actualized in grim expectations and experiences of public defense representation on the part of defendants and defenders alike.

The origins of the Public Pretender stereotype lie in the sometimes complementary but often conflicting constitutional and cultural impulses that have shaped the right to government-paid counsel.[29] On one hand, that right is an idiosyncratic constitutional mandate to redistribute

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23. *Id.* at 374–75.

24. Joel L. Schumm, *Conference Report:* Padilla *and the Future of the Defense Function*, 39 FORDHAM URB. L.J. 3, 4–6 (2011).

25. Stephen E. Schemenauer, *What We've Got Here . . . Is A Failure . . . To Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629 (2007).

26. W.L.F. Felstiner, *Professional Inattention: Origins and Consequences*, *in* THE HUMAN FACE OF LAW: ESSAYS IN HONOUR OF DONALD HARRIS 122 (Keith Hawkins ed., 1997).

27. *Cf.* Don Peters & Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y. L. SCH. L. REV. 169, 172–73 (1990) (research-based models for achieving effective attorney-client communication "present only basic approaches which often need to be modified to meet the specific circumstances presented by particular clients and situations").

28. *See, e.g.*, Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 493 (2010) (quoting federal Congressional hearing testimony of exoneree Alan J. Crotzer regarding use of "Public Pretender" label in Florida).

29. *Cf.* Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 485 (1985) ("At various times and in different environments legal aid has been justified as advancing values that are not only divergent but often fundamentally inconsistent.").

resources from haves to have-nots[30] that is animated in part by libertarian commitments to methodological individualism and limited government power.[31] On the other hand, right-to-counsel doctrine is informed by egalitarian concerns—albeit concerns that seem to peak when the criminalization and racialization of poverty in the United States are under especially intense international scrutiny.[32] These libertarian and egalitarian impulses collude and collide with negative-rights constitutionalism, capitalist commitments to free markets and low taxes, and retributivist suspicion of the criminally accused as deserving punishment instead of a publicly funded defense.[33]

Amid these shifting constitutional and cultural impulses, austerity is a reliable constant that contributes to the Public Pretender stereotype and the related, often grim expectations and experiences of people who need and provide public defense representation.[34] The majority of criminal defendants need government-paid lawyers because they cannot afford private counsel.[35] Prevailing (and arguably mistaken) interpretations of Supreme Court case law prevent poor people from exercising the Sixth Amendment right to choose an available, qualified, willing attorney—a right enjoyed exclusively by defendants who can

30. *See* Janet Moore, *G Forces*: Gideon v. Wainwright *and Matthew Adler's Move Beyond Cost–Benefit Analysis*, 11 SEATTLE J. SOC. JUST. 1025, 1051–58 (2013).

31. *See* Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor*, POLITICO (Sept. 24, 2017), http://www.politico.com/magazine/story/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor-215635 [https://perma.cc/W7UN-8H7X]; *see also* Joseph Heath, *Methodological Individualism*, STANFORD ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., Spring 2015 ed.), https://plato.stanford.edu/archives/spr2015/entries/methodological-individualism/ [https://perma.cc/Q395-VBWP].

32. *See* Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1291–96 (2015).

33. *See, e.g.*, Sara Sun Beale & Richard E. Myers II, 27 DUKE J. COMP. & INT'L L. 1, 3 (2016) ("Criminal defense lawyers are both expensive and controversial"); Janet Moore, *Isonomy, Austerity, and the Right to Choose Counsel*, 51 IND. L. REV. 167, 185–87 (2018) (discussing funding in one Texas county).

34. *See* Moore, *supra* note 33, at 203–06; *see also supra* notes 2, 7.

35. *See, e.g.*, CAROLINE WOLF HARLOW, U.S. DEP'T JUST., NCJ 179023, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=772 [http://perma.cc/54XC-TNMS] (reporting that 82% of criminal defendants facing state-level felony charges in large counties were represented by court-appointed counsel); STEVEN K. SMITH & CAROL J. DEFRANCES, U.S DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, NCJ 158909, INDIGENT DEFENSE 1 (1996), http://www.bjs.gov/content/pub/pdf/id.pdf [https://perma.cc/A85F-PRHU] ("In 1989, nearly 80% of local jail inmates indicated that they were assigned an attorney to represent them for the charges on which they were being held.").

afford to hire counsel.[36] This overt, class-based discrimination in the vindication of a fundamental right contributes to perceptions that court-appointed lawyers do not work for the low-income defendants they ostensibly represent and that, instead, attorney loyalties lie with the government that pays for both the defense and the prosecution.[37]

Such perceptions are only strengthened by the fact that public defense lawyers are underfunded and overworked.[38] Few cases go to trial.[39] There is often little to no pre-plea communication.[40] Attorneys have little time to visit people who are incarcerated when they cannot make bond. Telephone contact between jails and defender offices is often sharply limited or costly. Low-income defendants who can make bond often lack access to the stable housing, electronic communication capacity, and transportation that are necessary to facilitate communication.

Thus, instead of counseling individual people, defenders often triage case types in a process that is fraught with conflicts of interest and susceptible to racial and other biases.[41] There is limited regulation of attorney performance.[42] On the rare occasions when defenders seek caseload relief pursuant to constitutional, statutory, or ethical rules, judicial concerns about separation of powers—whether coupled with or

36. *But see* Moore, *supra* note 21 (offering arguments for counsel choice in publicly-funded defense); Moore, *supra* note 33 (discussing a counsel-choice experiment in Comal County, Texas).

37. *See* Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, 666 CATO INST.: POL'Y ANALYSIS, Sept. 1, 2010; Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 75–76 (1993).

38. *See* NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), http://www.constitutionproject.org/pdf/139.pdf [http://perma.cc/3NGS-3EPM]; Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan: *Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2606 (2013).

39. *Frye*, 566 U.S. at 143–44; Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARVARD L. REV. 150, 150 (2012).

40. *See* BACH, *supra* note 6; Campbell et al., *supra* note 2; Dottie Carmichael et al., *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission* xvi, 20 (2015), http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf [http://perma.cc/DHJ7-XV7Q] (reflecting trial lawyers' recommendation that time spent communicating with clients should be more than doubled).

41. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013).

42. Moore, *supra* note 21, at 1714–15.

independent of legislative and executive resistance—often result in little more than instructions to continue triaging cases.[43]

These obstacles to effective attorney-client communication are significant, complex, and recalcitrant.[44] They interfere with fair, reliable case resolution and with perceptions of system legitimacy. As indicated in the Introduction, data from recent pilot studies vividly illustrate these harms, their psychic toll on both defendants and defenders, and a shared concern to prevent them in the future by improving defendant-defender communication.[45]

Empirical research cannot cure all of these problems, but it may be able to help address them.[46] In the shorter term, for example, research that focuses specifically on the unique obstacles to attorney-client communication in the public defense setting could strive to identify key performance indicators for making the most of the limited time that defendants and defenders have to communicate, or for overcoming the mistrust that many people feel toward government-paid criminal defense lawyers. Those performance indicators could then be used to strengthen training for law students who plan to handle public defense cases and for attorneys already practicing in that field.[47]

Evidence-based standards and training will do little to promote sustainable improvement, however, if research merely facilitates case triage within existing resource constraints.[48] In the longer term, data-informed performance standards could promote systemic change. By driving home the importance of communication, such performance standards could improve investigation, advocacy, and case outcomes.

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43. Moore et al., *supra* note 32, at 1301–09; *see, e.g.*, New Mexico *ex rel.* Bauer v. Shoobridge, No. 36,375 (N.M. Oct. 11, 2017) (denying relief in one-word order); *see* NORMAN LEFSTEIN, A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEF., SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011).

44. *See, e.g.*, Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15 (1967); Tigran Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333 (2012); Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 24 (2016).

45. *See supra* notes 4–9 and accompanying text.

46. *See, e.g.*, THE INTERNATIONAL LEGAL FOUNDATION, MEASURING JUSTICE: DEFINING AND EVALUATING QUALITY FOR CRIMINAL LEGAL AID PROVIDERS (2016) (describing national and international efforts); Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1069–81 (2015).

47. *See, e.g.*, THE SIMULATED CLIENT INITIATIVE, http://zeugma.typepad.com/ [https://perma.cc/72ZT-KVDE] (last visited Feb. 8, 2018) ("an international collaboration to develop a research base and resources for the use of simulated clients in legal education").

48. *See* Richardson & Goff, *supra* note 41; *cf.* Felstiner, *supra* note 26, at 140–42 (emphasizing need to address resource constraints to improve attorney-client relations).

They could promote healthier defender cultures by strengthening recruitment and performance evaluation processes, as well as the self-perceptions of defenders regarding their role and mission.[49] Evidence-based standards for defendant-defender communication also could support demands for the lower caseloads and increased resources that would likely be required to meet those standards.[50]

Such demands could become more frequent and effective if defendants and their communities engage with research-based attorney performance standards through rights-information, satisfaction-feedback, and community organizing tools and strategies that increase pressure to achieve and exceed those standards.[51] As illustrated by the participatory defense movement, this type of concerted political pressure could productively disrupt courtroom workgroups that otherwise focus primarily on efficient case processing.[52] Since attorney performance standards are built into the substantive meaning of the right to counsel, the day-to-day, case-by-case enforcement of higher performance standards by people in the trenches of public defense systems should eventually receive judicial acknowledgment in court rulings, thereby strengthening the content of constitutional law.[53]

Research is needed to begin working toward these goals. Law lags far behind medicine and other professions in pursuing and using research on effective communication.[54] Moreover, the few published studies on

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49. *See, e.g.*, Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161 (2009).

50. *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf [https://perma.cc/Q2E9-D46U] (requiring defenders to decline new cases and, where necessary, seek to withdraw from current cases when excessive caseloads prevent compliance with constitutional and ethical standards); Moore et al., *supra* note 32, at 1303–09 (discussing system-impact litigation strategies); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1131 (2013) (discussing defender strategies).

51. Moore et al., *supra* note 32, at 1281–91, 1309–16; *see also* Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES, (Mar. 10, 2012), http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [http://perma.cc/A87K-7SWR] (discussing proposal of justice reform activist Susan Burton for mass rejection of plea offers in favor of demands to take cases to trial).

52. Moore et al., *supra* note 32.

53. Moore, *supra* note 21, at 1706–09, 1723–25.

54. Clark D. Cunningham, *Evaluating Effective Lawyer-Client Communication: An International Project Moving From Research To Reform*, 67 FORDHAM L. REV. 1959, 1959–64 (1999); *see also, e.g.*, Thijs Fassaert et al., *Active Listening in Medical Consultations: Development of the Active Listening Observation Scale (ALOS-Global)*, 68 PATIENT EDUC. & COUNSELING 258 (2007).

attorney-client communication often focus on civil cases. Those that touch on public defense rarely tap defendant perspectives. Researchers also tend to rely on role-playing simulations or on *post hoc* reflections of lawyers and clients instead of conducting direct observation of real-time communication. This is so in part because injecting researchers into the defendant-defender relationship implicates core principles of legal ethics, related constitutional and evidentiary rules, and federally-regulated research ethics. Parts III and IV explore these problems and offer possible strategies for addressing them.

III. RESEARCH QUESTIONS, METHODS, AND THEORIES

This Part describes research methods and theories that have been or could be applied in studying communication between government-paid criminal defense lawyers and the people who need them. Part III.A offers a brief overview of the relevant literature and highlights the lack of published studies focusing specifically on public defense. Part III.B suggests a strategy for filling that gap.

A. Accomplishments and Gaps in the Research

Research on attorney-client communication can be roughly categorized into three methodologies, each with a dominant theoretical approach. The first category involves direct observation of attorney-client communication. This category emerged with the law and society movement's promotion of interdisciplinary research on law as a social construct. The second category developed as ethical, legal, and practical barriers limited access to direct observation of attorney-client communications. Experts in clinical legal education led a shift toward the use of discourse analysis to evaluate simulated encounters. The third category uses mixed-method inquiries (interviews, focus groups, and surveys) to collect and analyze reported expectations, experiences, and perceptions of attorneys and clients. These studies often invoke procedural justice theory, which posits that perceptions of fair treatment outweigh substantive outcomes in generating expressions of satisfaction, appreciation for system legitimacy, and compliance with system directives. These three approaches are discussed serially in the subsections that follow.

1. Direct Observation of Attorney-Client Communication

Studies involving direct observation of attorney-client communication tend to interrogate those interactions as sites of negotiated power. They also tend to focus on two types of research settings. The first setting involves people who cannot afford to hire counsel, with research

occurring in public defense agencies, legal aid offices, or law school clinics.[55] The second setting involves private attorneys, who researchers describe as occupying a somewhat lower status vis-à-vis their peers, and whose financially-stressed clients seek assistance with divorce[56] or bankruptcy.[57]

These studies diverge in the extent to which researchers acknowledge and try to address the confidentiality and privilege issues triggered by researcher presence during attorney-client communication.[58] Rules of legal ethics and evidentiary privilege prioritize confidentiality, trust, and the privacy of communication.[59] In the context of criminal defense, the same interests implicate constitutional rights and duties.[60] The result is a cone of silence around attorney-client communication which, absent a waiver by the client or other narrow exceptions, protects those communications from disclosure.

Injecting a third party, such as a researcher, into attorney-client communication compromises the privilege and could lead to the forced disclosure of that communication in court. In the context of public defense research, prosecutors might issue such demands, but so might defense lawyers seeking information either to implicate a co-defendant or to support an ineffective assistance claim against a lawyer who participated in the study as a research subject.

The next two subsections trace the growing awareness among researchers of these confidentiality and privilege concerns. The first subsection discusses studies in which researchers report on direct observation of attorney-client communication without addressing the ethical and evidentiary issues implicated by their presence during those

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55. *See, e.g.*, Carl J. Hosticka, *We Don't Care about What Happened, We Only Care about What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599 (1978); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965).

56. Austin Sarat & William L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1669–70, 1670 n.41 (1989).

57. Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177 (1986).

58. *See* Clark D. Cunningham & Bonnie S. McElhinny, *Taking It to the Streets: Putting Discourse Analysis to the Service of a Public Defender's Office*, 2 CLIN. L. REV. 285, 286–87, 291–96 (1995).

59. MCCORMICK ON EVIDENCE, *supra* note 20; Freedman, *supra* note 20; Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications* (American Bar Association Center for Professional Responsibility, May 2007), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf [https://perma.cc/53FS-YEWT].

60. *See, e.g.*, ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 58–63 (2009).

communications. The second subsection discusses studies that highlight these ethical and evidentiary issues, the resulting difficulties in recruiting research participants, and a corresponding shift toward alternative methodologies and theoretical frameworks.

a. Direct-Observation Studies That Do Not Discuss Confidentiality and Privilege

Two studies involving direct observation of attorney-client communication in a public defense setting underscore the depressing lack of progress over the past half-century in improving either that communication or the meet-'em-and-plead-'em approach that feeds the Public Pretender stereotype.[61] To be clear, neither of these projects focused specifically on defendant-defender communication as a central subject of inquiry. Instead, the researchers embedded themselves in their research sites (a public defense office and a busy urban court system, respectively) for extended periods of time. Sudnow's 1965 study appears to be the earliest to report on defendant-defender exchanges, but those reports are a small part of a broader investigation into public defense as a social phenomenon shaped by criminal codes.[62] The 2016 study by Gonzalez Van Cleve offers data on defendant-defender communication that emerged during research on criminal legal systems as sites of ostensibly colorblind but thoroughly racist punishment.[63]

Despite the fact that neither of these studies focused specifically on attorney-client communication in the public defense context, the direct observation of defendant-defender interactions by these researchers revealed evidence of dehumanization that may have been otherwise invisible to a wider public.[64] Sudnow described the bulk of defender activity as the swift sorting of clients into case types—with little to no defendant-defender communication—to dispatch them efficiently through a courtroom workgroup.[65] In contrast, private counsel appeared as disrupters who challenged judges and prosecutors while fighting aggressively for individual people.[66]

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61. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT xiii-xiv, 3–6, 21–32 (2016); Sudnow, *supra* note 55, at 265–69.

62. Sudnow, *supra* note 55, at 264–66.

63. GONZALEZ VAN CLEVE, *supra* note 61, at xii–iv (describing how the project's 104 interviews engaged "judges, prosecutors, and public defenders" instead of people who needed public defense because "plenty of ethnographic studies turn the lens on marginalized populations").

64. *Id.* at 196; Sudnow, *supra* note 55, at 264–74.

65. Sudnow, *supra* note 55, at 264–74.

66. *Id.* at 273–74.

Gonzalez Van Cleve's clerkship with a public defense office allowed her to witness firsthand how a white lawyer's rejection of black speech shut down a potential avenue for investigation.[67] When the defendant, Tyrell, tried to describe an alibi witness, his lawyer, Kevin, asked,

> "What's his name?" [Tyrell] paused and said, "We call him 'Preacher.'" Kevin asked, "What congregation?" Tyrell snapped as though the question was irrelevant, "No congregation. We just call him dat." Kevin stopped writing and the pen slowed in his hand at the mention of a witness with a neighborhood nickname . . . . Once Kevin stopped writing, the conference ended. It was clear to me that he was not going to call this witness unless Tyrell called the Preacher by a name deemed credible within the court community, presumably a white name that would not be mocked.[68]

We need not argue that the methods or conclusions of this study were flawless[69] to make several points. First, the information about the effects of race on defendant-defender communication resonates with other studies and warrants further exploration.[70] Second, direct observation of attorney-client communications in both studies revealed additional details that may otherwise have remained hidden. Those details include the length or brevity of the communication, the quantity and type of information exchanged, the proportion of open-ended versus leading questions, and variations in responses to those different question types. Third, insights into such details could inform strategies to improve defendant-defender communication through additional empirical research and related, data-informed law student and attorney recruitment, training, and evaluation protocols.[71] Finally, the same information could inform rights-information and satisfaction-feedback

67. GONZALEZ VAN CLEVE, *supra* note 61, at 165–66.

68. *Id.*

69. *See* L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 *YALE L.J.* 864, 865–66 (2017) (critiquing focus on overt racial bias); *id.* at 873–74 (discussing limitations of qualitative analysis).

70. *See, e.g.*, Campbell et al., *supra* note 2, at 764; Moore & Davies, *supra* note 1, at 362; Kenneth Troccoli, *"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns About Being Assigned a White Court-Appointed Lawyer*, 20 L. & INEQ. 1 (2002). For similar observations on the role of gender in structuring power and speech, *see, e.g.*, Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, 6–19 (1990).

71. *See* Rapping, *supra* note 49; Richardson, *supra* note 69, at 890–92.

tools to tap perspectives and promote effective reform-oriented community organizing among people who need public defense.[72]

While the foregoing studies involved public defense, other direct-observation research involved attorneys and clients in civil settings. Goldsmith was a pre-law student director of a university clinic for fellow students when he became concerned about obvious dissatisfaction with the clinic on the part of both students and their volunteer lawyers. Goldsmith designed a research project that included direct observation of initial attorney-client interviews. He found that lawyers perceived communication as more productive than did clients, with disparities including the role of emotion and the quality of information-sharing. Attorneys saw excessively emotional clients as disruptive, while clients were put off by the lack of attorney empathy. Attorney interruptions and leading questions shut down communication while open-ended questions were more productive.[73]

Hosticka reached similar conclusions after observing interviews in a legal aid office. He found that lawyers missed opportunities to share information and identify legal issues when they dominated discussion.[74] Conversely, lawyers invested more time and effort on clients who persisted in advancing their views (or from counsel's perspective, were disruptive).[75] Like Hosticka, Sarat and Felstiner investigated communications as a form of negotiation over power and meaning, but did so by observing attorney-client conferences in divorce cases.[76] They also differed from Hosticka in finding that clients were "rarely simply acquiescent" to attorney dominance but instead "maneuver[ed], more or less overtly, to get [their] ideas and interpretations heard and accepted."[77]

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72. *See* Campbell et al., *supra* note 2; Moore et al., *supra* note 32, at 1309–15; Sandys & Pruss, *supra* note 2; David W. Walker, *Citizen-Driven Reform of Local-Level Basic Services: Community-Based Performance Monitoring*, 19 DEV. IN PRAC. 1035 (2009).

73. John Daniel Goldsmith, *The Initial Attorney/Client Consultation: A Case History*, 45 S. SPEECH COMM. J. 394, 398–405 (1980).

74. Hosticka, *supra* note 55, at 609–10.

75. *Id.* at 607.

76. Sarat & Felstiner, *supra* note 56.

77. AUSTIN SARAT & WILLIAM FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS 7–8 (1995); *see also* Maureen Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 INT'L J. SOC. L. 331, 352–53 (1979) (reaching similar conclusions after observing communications between clients and four English solicitors in 82 cases). For examples of additional studies outside of the United States, *see* Karen Barton et al., *Valuing What Clients Think: Standardized Clients and Assessment of Communicative Competence*, 13 CLIN. L. REV. 1, 9–11, 9 n.17 (2006).

b. Direct-Observation Studies That Discuss Confidentiality and Privilege Issues

The authors of the foregoing studies did not discuss the ways that their activities implicated legal and ethical rules designed to protect the communication they were studying.[78] A different set of researchers recognized these concerns; some tried to address them while others minimized their importance. Neustadter, a law professor with a background as a legal aid attorney, warned lawyers and clients in bankruptcy cases that his presence could lead to the forced disclosure of their communications in court, although he described the risk as "very unlikely."[79] Like prior studies, Neustadter's research reveals how resource constraints can cause communication to be compressed, routinized, and dominated by counsel.[80] The author also emphasized that direct observation of attorney-client interactions can reveal insights into decision making that are otherwise inaccessible.[81]

Gellhorn et al. argued similarly that the rewards of observing interviews between supervised law students and clients in a disability rights clinic outweighed the risks that otherwise confidential and privileged communication could be subject to forced disclosure.[82] These authors concluded that their research provided "new and startling insights about the power of language and speech encounters," mainly by revealing tensions between the lawyer's need to gather information and the client's need to be understood at an affective as well as a cognitive level.[83] Unlike Neustadter, these social scientists did not inform clients of disclosure risks because they saw clinic cases as non-adversarial; believed the content of the communications had mostly been made public; viewed themselves as members of the legal team; and valued their work equally with interests protected by marital, journalistic, and other evidentiary privileges.[84]

Cunningham and McElhinny were the first scholars to conduct direct observation of attorney-client communication while providing in-depth analysis of the ethical and evidentiary problems triggered by their

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78. *See* Cunningham & McElhinny, *supra* note 58, at 286–87, 291–96.

79. Neustadter, *supra* note 57, at 280–83, 281 n.179; *see also* White, *supra* note 70, at 21 n.78 (addressing confidentiality concerns).

80. Neustadter, *supra* note 57, at 178.

81. *Id.* at 179.

82. Gay Gellhorn et al., *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 CLIN. L. REV. 245, 269–75 (1994).

83. *Id.* at 295.

84. *Id.* at 273–74. For development of the latter argument in the public defense context, *see infra* Part IV.

participant-observer status.[85] They also appear to be the first to focus their research specifically on communication in public defense. Like Neustadter—and unlike Sudnow and Gonzalez Van Cleve—Cunningham was a practicing lawyer before he undertook interdisciplinary empirical research.[86] He and McElhinny expanded on Gellhorn et al.'s proposal by embedding themselves as contributing members of the defense team who aimed to improve communication while maintaining confidentiality and all applicable privileges.[87]

Although Cunningham and McElhinny provide a thoughtful, detailed description of their project design and preliminary steps in implementation, it does not appear that data from this study were ever made public. Even so, taken as a body of literature, the available direct-observation research raises important questions for public defense. Those questions include whether, when, and how clients push back against attorneys who dominate discussions, express bias, neglect affect as a component of information sharing, or otherwise undermine effective communication. Additional questions include whether, when, and how such resistance can (as Hosticka's research indicates) reshape understandings, experiences, and expectations of the right to counsel—in part by motivating defenders to incorporate defendant input more fully, to work harder, and perhaps to achieve better results.[88]

2. Actors and Avatars: Evaluating Communication Through Role-Playing

Despite the productivity of direct observation, its use discourages participation by attorneys and clients alike.[89] Difficulties in recruiting participants for this type of research arise from concerns that a researcher's presence inevitably interferes with the attorney-client relationship, alters the flow and content of communication, and abrogates confidentiality and privilege protections.[90] As these concerns mounted, studies shifted toward the use of simulated encounters. This move was led by experts in clinical legal education who drew from training and evaluation programs for medical students. Their research

85. Cunningham & McElhinny, *supra* note 58.

86. *Id.* at 285–87.

87. *Id.*

88. Hosticka, *supra* note 55, at 609–10.

89. *See* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 179–80 (1974); Brenda Danet et al., *Obstacles to the Study of the Lawyer-Client Interaction: the Biography of a Failure*, 14 L. & SOC'Y REV. 905 (1980); Neustadter, *supra* note 57, at 177–78, 180–82.

90. Danet et al., *supra* note 89.

often focuses on analysis of speech patterns; it aims to produce reliable, measurable performance indicators; and, through the abundant energy of Cunningham and colleagues, it has expanded into an international research consortium.[91]

Simulations involve interactions between non-lawyer members of the community or actors who are trained to role-play clients seeking assistance from law students or bar candidates based on hypothetical fact patterns.[92] The "clients," "lawyers," or teacher-evaluators then assess "lawyer" performance and subsequent training addresses any identified deficits.[93] As summarized by Barton et al., prior research supported a "basic consensus" about strategies for improving communication: reduce interruption and reframing of client stories; provide more background information on the law to contextualize attorney questions and facilitate client comprehension; and share more control over the case with clients.[94] More detailed criteria involve body language, vocal modulation, translation of jargon, face-saving, and timing (including the strategic use of silence and sequencing)—all with the aim of ensuring that clients "understand and accept the . . . opportunities, risks, and consequences of law and process in their circumstances" while feeling "full trust and confidence in their lawyers' advocacy, competence, motive, and respect."[95]

Data from these simulations may be applicable to public defense, but it does not appear that these studies have accounted for the distinctive set of obstacles to defendant-defender communication embodied in the Public Pretender stereotype. For example, it is unclear whether simulations have involved the intensely compressed time periods, high stakes, and raucous jail pod or court hallway settings in which much defendant-defender communication occurs. Nor is it obvious that people who have the time and resources to role-play clients and evaluate students would be readily able to grasp and channel the experiences, expectations, and responses of people who need public defense representation.

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91. Barton et al., *supra* note 77, at 1; Wilson Chow & Michael Ng, *Legal Education Without the Law—Lay Clients as Teachers and Assessors in Communication Skills*, 22 INT'L J. LEGAL PROF. 103 (2015); THE SIMULATED CLIENT INITIATIVE, *supra* note 47.

92. Barton et al., *supra* note 77, at 1.

93. *Id.*

94. *Id.* at 8; ROSENTHAL, *supra* note 89, at 3 (reporting that greater client participation improves case outcomes).

95. MARJORIE CORMAN AARON, CLIENT SCIENCE 2, 4-7, 9-18, 25-27 (2012); *see also* Linda F. Smith, *Client-Lawyer Talk: Lessons From Other Disciplines*, 13 CLIN. L. REV. 505 (2006); Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLIN. L. REV. 541 (1995).

Given these challenges, the early state of simulation studies, and the time- and labor-intensive nature of even the most efficient approaches to role-played interactions, advancing knowledge through the use of machine-learning computer avatars might seem less far-fetched than on first glance. Indeed, that approach may offer levels of efficiency and accessibility particularly well-suited to the unique needs of public defense. Recent advances in technology have laid the foundation for creating "a sufficiently authentic simulated digital client."[96] Machine learning may allow virtual clients to alter responses by responding to environmental cues,[97] including body language.[98] Gaming technology could mimic time constraints and other environmental challenges.[99] Thus, in the not too distant future, for simulation studies of attorney-client communication in the public defense context, there could be "an app for that."[100]

3. Mixed Methods and Procedural Justice

While awaiting the development of machine-learning client avatars as the next wave of simulation studies on attorney-client communication, there is a third category of relevant research that largely avoids both the ethical and evidentiary concerns raised by direct observation and the authenticity and replicability concerns raised by using role-played simulations. This third category of research uses mixed method inquiries (interviews, focus groups, and surveys)[101] with lawyers and clients to collect and analyze their reported expectations, experiences, and perceptions about their interactions. As discussed in a comprehensive literature review by Sandys and Pruss, these studies underscore the relationship between communication, investigation, and advocacy and are often informed by procedural justice theory.[102] That approach frames perceptions of fair treatment as having greater salience than substantive

96. Zariski, *supra* note 11, at 4–5.

97. Yuesheng He & Yuan Yan Tang, *Autonomous Behaviors Of Graphical Avatars Based On Machine Learning*, 26 INT. J. PATT. RECOGN. ARTIF. INTELL. 1251002 (2012).

98. Fatma Nasoz & Christine L. Lisetti, *MAUI Avatars: Mirroring the User's Sensed Emotions Via Expressive Multi-Ethnic Facial Avatars*, 17 J. VISUAL LANGUAGES & COMPUTING 430 (2006); George Veletsianos et al., *Conversational Agents in Virtual Worlds: Bridging Disciplines*, 41 BRIT. J. EDUC. TECH. 123 (2010).

99. Zariski, *supra* note 11, at 6–8.

100. Riley v. California, 134 S. Ct. 2473, 2490 (2014).

101. *See* JOHN CRESWELL & VICKI L. PLANO CLARK, DESIGNING AND CONDUCTING MIXED METHODS RESEARCH (2011).

102. Sandys & Pruss, *supra* note 2, at 435–44; *see also* ROSENTHAL, *supra* note 89, at 5 (discussing use of interviews and surveys in civil setting).

outcomes in generating reports of participant satisfaction as well as belief in, and deference to, system legitimacy.[103]

These mixed-method studies tend to support inferences from direct-observation and simulation research by documenting unique obstacles to communication in public defense,[104] identifying mismatches between attorneys and clients in assessing the importance of interpersonal skills,[105] and highlighting the value of attorney openness to client input and participation.[106] These studies also offer measures and tools that may be helpful both in advancing next-stage mixed-methods research and adapting direct-observation and simulation methods to the public defense context.[107]

However, future research agendas might benefit from exploring alternatives to procedural justice theory and the related emphasis on satisfaction and compliance. Moreover, regardless of the theory undergirding mixed-methods research, there are several reasons why direct, real-time observation offers advantages over those methods. The following section develops these ideas while sketching strategies for future research on attorney-client communication in the public defense setting.

B. Designing Future Research

Research on public defense faces a conundrum. There is a significant need both for sound social science research on the quality of attorney-client communication in public defense and for strategies to address the

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103. *See, e.g.*, Campbell et al., *supra* note 2. For additional descriptions and critiques of procedural justice theory, *see, e.g.*, Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119 (2012); Devon Johnson, Edward R. Maguire & Joseph B. Kuhns, *Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean*, 48 L. & SOC'Y REV. 947 (2014); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 188–93 (2005); Justice Tankebe, *Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy*, 51 CRIMINOLOGY 103 (2013).

104. Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4, 4–5 (1971).

105. Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 L. & PSYCHOL. REV. 81, 96 (2001).

106. Marcus T. Boccaccini et al., *Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development*, 22 BEHAV. SCI. & L. 197 (2004).

107. *See, e.g.*, Sandys & Pruss, *supra* note 2, at 451, 456–57 (describing survey prompts such as "My attorney does what s/he says s/he will do"; "My attorney tries to get me the help that I need"; "My attorney has a team in his office that helps with my case").

ethical and legal concerns implicated by such studies. Such research has the potential to spur the development of evidence-based communication techniques, thereby offering (as in other evidence-based domains) prescribed techniques and interventions that are effective. Just as research might show a treatment program is (or is not) effective and can (or cannot) be replicated elsewhere, research could be used to develop guidance on how to achieve high quality defendant-defender communication. Research could tell us what works, what does not, and what we should change.

A sample research plan for building that foundation would begin with researchers identifying the meaning of "good" communication in terms of behaviors and outcomes: clients who are fully informed of all requisite information, who trust their lawyers, and feel empowered to make important decisions, for example.[108] Researchers would determine ways to measure these factors, incorporating prior research as well as new exploratory observations of attorney-client communication to be sure their decisions are grounded in basic knowledge of the phenomenon under study. Additional mixed-method tools (interviews, focus groups, group-level assessments, and surveys) would help establish conceptual clarity around the nature of "good" communication.

After identifying indicators that are of interest and can be feasibly observed, researchers would conduct those observations and analyze the results. In an iterative process, those results would likely inform new, more precise measurement tools. Should early work identify the use of legal jargon as a barrier, for example, subsequent research could investigate the terminology used and assess the impact of alternative language. Variations in the timing, type, and frequency of communication could be evaluated. For example, might holding regular office hours for pretrial detainees who otherwise have limited access to their public defense lawyers improve communication, investigation, and advocacy?[109]

Research could also explore links between communication and other matters of interest, such as how cases are resolved as well as life trajectories of defendants and broader reform in public defense and criminal legal systems. Intriguing questions include: What factors enable people to experience public defense as an opportunity to exercise agency and to act on that opportunity? Can those experiences and activities promote sustainable improvement in case outcomes and system operations? If so, under what conditions? How do "taken for granted" background assumptions, such as excessive attorney workloads and lack

108. *See* AARON, *supra* note 95, at 4–9.

109. The Authors are grateful to Marla Sandys for posing this question.

of resources, become subject to effective challenge? Do rights-information and satisfaction-feedback tools change the calculus?[110]

The latter questions could be grounded in theoretical approaches that respond to some limitations in the procedural justice framework. For example, while mixed-method studies applying that framework tend to explore the relationship between satisfaction, perceptions of system legitimacy, and compliance, it is important to note that the relationship between satisfaction and the actual quality of products or services is complex and contested, including in research fields such as consumer sciences and medicine that are much further advanced on the issue than law.[111] Put bluntly, expressions of satisfaction in the public defense context may reflect the boiled-frog perspective: people are so accustomed to abysmal conditions and performance, and their expectations are so badly degraded, that satisfaction could signal harm instead of health. The suggestion of one research participant, noted in the Introduction, that the time allocated for defendant-defender communication be increased from three to ten minutes illustrates this phenomenon.

In searching for alternative theoretical frameworks to support inquiries into defendant-defender communication as a potential site of productive disruption instead of satisfaction and compliance, researchers might look to Silbey's work on legal consciousness.[112] Silbey's prescriptions for research on the social construction of legal meaning offers conceptual support for inquiry into explanations for the presence or absence of the discontent and resistance that may be needed to spark sustainable improvement of overloaded, under-resourced public defense systems.[113]

If methodology follows theory, there is little question that direct observation has significant potential for productive disruption. To be sure, mixed-methods approaches and simulation studies offer important insights and must be incorporated into any future agenda for research on communication in public defense. Nevertheless, those methods share a significant limitation: neither involves the *sine qua non* of the scientific method, which is direct observation of the subject at issue.

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110. *See supra* notes 49–53 and accompanying text.

111. *See, e.g.*, RICHARD L. OLIVER, SATISFACTION: A BEHAVIORAL PERSPECTIVE ON THE CONSUMER (2d ed. 2010); Matthew P. Manary et al., *The Patient Experience and Health Outcomes*, 368 NEW ENG. J. MED. 201 (2013); Melissa Bekelja Wanzer et al., *Perceptions of Health Care Providers' Communication: Relationships Between Patient-Centered Communication and Satisfaction*, 16 HEALTH COMM. 363 (2004).

112. Susan Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323 (2005).

113. *Id.*; *see also* Danet et al., *supra* note 89. Moore et al., *supra* note 7 explores such theoretical reframing.

For example, mixed-method research has revealed that people who have had public defense lawyers in the past and who report that their attorneys listened to them also state that they were more satisfied with those attorneys.[114] Yet we should be cautious before concluding that by listening, better attorneys can make their clients more satisfied. These researchers did not observe how much attorneys actually listened but rather asked clients how much they thought their attorneys listened. The research finding is therefore a statistical correlation between two client perceptions: first, that lawyers were attentive and, second, that attorney performance was satisfactory overall. All such research can tell us is that clients who perceived their attorneys in such ways were more satisfied; it cannot tell us what produced those perceptions, let alone whether they are related to how the attorney and client actually communicated. Without observing attorney-client communication itself, therefore, there are significant limitations to our ability ever to develop an evidence-based approach to the subject.

A recent study quantitatively expressed the limitation imposed by the inability to observe attorney-client communication. When defendants and defenders who had litigated a case together were asked if they had ever disagreed with each other during the case, over twice as many defendants than defenders said yes (50%–20%); on the other hand, defenders were far more confident than defendants (93%–67%) that defendants understood the defender's role.[115] These disparities are important and warrant further investigation, but neither simulation approaches nor mixed-method approaches could reveal why defendants and defenders remember things so differently. Was the attorney not speaking loudly enough? Were there language barriers? Are some people simply bad at signaling, or recognizing signals of, confusion, boredom, or disengagement? Do attorneys and clients distrust, fear, or dislike one another? Do attorneys simply avoid admitting that their clients might have misunderstood them? What amounts of disregard, delusion, or dissembling are at play? Are any of these factors distinctive to the public defense setting? Without observing attorney-client communication directly, the quantitative differences in attorney and client perceptions reported by the researchers defy interpretation.

Direct observation of attorney-client communication allows researchers to explore these and other questions by collecting data that

114. Campbell et al., *supra* note 2; Sandys & Pruss, *supra* note 2.

115. Chelsea Davis et al., *"A Little Communication Would Have Been Nice, Since This Is My Life": Defendant Views on the Attorney Client Relationship*, THE CHAMPION 28, at 29, 31 (2016); *see also* Goldsmith, *supra* note 73 (noting disagreements in post-hoc evaluations by attorneys and clients of their interactions).

are unavailable by any other method. Only direct observation can reveal content, terminology, body language, tone of voice, and context: how crowded or noisy is the space? Are participants being hurried along? Direct observation can also expose otherwise unnoticed or unreportable factors such as misheard comments and moments of distraction, repetition, or irritation.

By juxtaposing these observations with information on what participants in these conversations recalled, researchers could see what was different about conversations that resulted in higher levels of comprehension, agreement, or trust. That foundation could support an evidence-based communication practice that offers guidance for making communication more successful. Important extensions would also be possible. Research could examine differences in predictors of success for cross-racial or cross-gender attorney-client dyads, for example, or adjust for communication that occurs electronically or within different time limits, across different time spans, and with different degrees of frequency.

Of course, even observation of communication has its limitations. For example, one cannot observe a person's motivations directly. If attorneys communicate in a certain style because they are fearful of their client, are intrinsically aloof, or are simply very hungry, one will not necessarily know it from observing the communication.

Another important concern arises from a variation of the Heisenberg uncertainty principle:

> Every observation in a social context *changes* the object of observation . . . this transaction . . . is one of the most dreaded characteristics of knowledge production in the social sciences. If the act of perception itself modifies the epistemic object, any claim to objective measurement is questioned in a fundamental way.[116]

Although "some social scientists spend much effort" on addressing this problem,[117] at least one set of researchers on attorney-client communication discounted it on the basis that practice and personality

116. Franz Breuer & Wolff-Michael Roth, *Subjectivity and Reflexivity in the Social Sciences: Epistemic Windows and Methodical Consequences*, 4 FORUM: QUALITATIVE SOC. RES., art. 25, sec. 1.4, para. 7 (2003), http://nbnresolving.de/urn:nbn:de:0114-fqs0302258 [https://perma.cc/67PE-AK95].

117. *Id.* Social scientists label the problem "the Hawthorn effect." Barbara L. Paterson, *A Framework to Identify Reactivity in Qualitative Research*, 16 W. J. NURSING RES. 301 (1994). The Authors thank participants in the Indigent Defense Research Association [IDRA] listserv for insight on this point.

leave lawyer behavior "so ingrained" that researcher presence would have little effect.[118]

Whether or not the latter assumption is accurate regarding attorney behavior, the assumption does not account for the possible effects of researcher presence on the client. Nor does it account for the reciprocal possibility that the people and behaviors observed could affect the researcher.[119] Neustadter provides a salient illustration of the latter problem, explaining that he self-censored his report on attorney-client interactions in order to avoid offending his lawyer-subjects and deterring attorney participation in future studies.[120]

Despite all of the foregoing concerns with direct observation, the method offers otherwise unavailable insights into the quality of defendant-defender communication, including correlations between what actually happens in the room and what the participants recall later. These insights, in turn, could provide a foundation for recommending interventions or course corrections that could alter behavior and outcomes for the better. As such questions are explored through increasingly refined research, and as findings from different projects refute or reinforce one another, a clear set of guidelines could emerge for promoting optimally effective defendant-defender communication and related outcomes. Part IV addresses a major hurdle to progress on this front: the need for robust protection of confidential information to which researchers may have access during the data collection process.

IV. PRIVILEGING RESEARCH ON COMMUNICATION IN PUBLIC DEFENSE

Obstacles to undertaking the research plan sketched in Part III.B include ethical and legal rules that protect the very defendant-defender communication that is to be studied. This Part summarizes strategies for addressing those concerns. Part A sets the context by highlighting intersections between two areas of law that are rarely analyzed in tandem. The first area of law involves research ethics, a complex body of federal regulations that tends to draw little attention from legal scholars. The second area of law involves the confidentiality concerns that animate legal ethics and evidentiary privilege rules. Part B examines the intersection between these two areas of law more closely. This section explains how protections that are mandated by research ethics can be supplemented by development of an evidentiary privilege to shield observed defendant-defender communications from forced disclosure.

118. Neustadter, *supra* note 57, at 181 & n.10 (discussing grant proposal drafted by Felstiner et al.).

119. *See* Paterson, *supra* note 117.

120. Neustadter, *supra* note 57, at 181–82.

Because such protections remain nascent and uncertain, public defense researchers must be rigorous in project design and implementation to avoid harming the people who engage with them as research subjects.

A. Communication Research and Research Ethics

Injecting researchers into the attorney-client dyad implicates core principles of legal ethics and professionalism, related constitutional and evidentiary rules, and federally mandated regulations governing research ethics. Rules of legal ethics and evidentiary privilege prioritize confidentiality, trust, and the privacy of communication.[121] In the context of criminal defense, the same interests implicate constitutional rights and duties.[122]

These protections have overlapping and distinguishing characteristics. We use the term "confidentiality" to refer to information provided by a client or potential client to an attorney that relates to the representation and is protected by rules of professional conduct that are enforced by disciplinary actions bodies.[123] Attorney-client privilege is an evidentiary rule that is enforced by judges in court and encompasses communications from a client to his or her counsel or counsel's agent about the subject of the representation, made in confidence, and provided with the aim of obtaining legal advice and not advice for a future crime or fraud.[124] The result is a cone of silence around attorney-client communication, which, absent a waiver by the client or other narrow exceptions, protects those communications from disclosure.

Research ethics protect a different set of interests. This system has three core principles: respect for persons, beneficence, and justice. Correlative duties include preventing unnecessary risks to people who participate as subjects of research while providing special protections for vulnerable populations; ensuring that research benefits outweigh any risks; and promoting fair distribution of those risks and benefits. Researchers must also ensure that people who participate as subjects of research do so only after providing fully informed, voluntary consent, and must protect participants' privacy and the confidentiality of any data

121. MCCORMICK ON EVIDENCE, *supra* note 20; Freedman *supra* note 20; Michmerhuizen, *supra* note 59.

122. *See, e.g.*, NATAPOFF, *supra* note 60.

123. *See* Michmerhuizen, *supra* note 59.

124. *See* MCCORMICK ON EVIDENCE, *supra* note 20.

they provide.[125] These obligations are embodied in the Code of Federal Regulations and are referred to collectively as "The Common Rule."[126]

Research ethics requirements give rise to distinctive concerns in the context of defendant-defender communication. Those concerns have received little attention in the literature. There are several possible explanations for this inattention. Social science research on public defense is a relatively new field. People who study public defense—and the institutional review boards that enforce research ethics requirements—may lack legal training, trial experience, or experience working within criminal defense or public defense systems.[127] As a result, there may be limited sensitivity to the distinctive ethical and legal concerns that arise from studying attorney-client communication in those contexts.

However, those concerns warrant heightened attention when research subjects are low-income people who require government-paid criminal defense counsel. That status entails certain vulnerabilities toward which ethical and legal rules are rightly attentive.[128] Indeed, attorney-client relationships in this context often are already fraught due to the frustrations and low expectations embodied in the Public Pretender stereotype.[129] Introducing a third-party observer into that relationship requires particularly careful navigation of competing needs and interests. At the same time, where there is reason to believe that an intervention can improve representation, additional research ethics concerns arise if experimental design grants that potential benefit to one group and denies it to another.[130] These concerns must be accounted for as researchers work with defendants and defenders in designing and implementing studies that focus on the quality of communication in public defense.

This Article cabins difficult questions about whether and under what conditions people who need public defense representation should be asked for permission to allow researchers to inject themselves into

125. Carol A. Heimer & JuLeigh Petty, *Bureaucratic Ethics: IRBs and the Legal Regulation of Human Subjects Research*, 6 ANN. REV. L. & SOC. SCI. 601, 606 (2010) (citing 45 CFR 46.102).

126. *Id.* at 602.

127. *See generally supra* Part III.A. Investigating IRB membership at eight of the top twenty universities ranked by U.S. News and World Report's *Top Universities of 2017* indicated that, among the 169 of 173 members (including alternates) for whom information was available, 12 (7%) held JD degrees; for the ten of these twelve for whom information was available, none practiced criminal law or, more specifically, criminal defense.

128. *See* Heimer & Petty, *supra* note 125, at 614–15.

129. *See supra* notes 4–8, 27–45 and accompanying text.

130. The Authors are grateful to Meg Ledyard for raising this point.

defendant-defender relationships—whether or not those researchers do so as members of the defense team. Space limitations also prevent full discussion of important questions regarding whether and how researcher participation alters the very communication that are under review. Instead, this Article aims to build on prior arguments for developing an evidentiary privilege for researchers. More specifically, we explore how research ethics can work in tandem with that evidentiary privilege to encourage research on communication in the public defense context.

B. Research Ethics and the Evidentiary Privilege

The attorney-client privilege does not protect communications involving a third party; such communications are not deemed "confidential."[131] Moreover, at common law there was no researcher's privilege.[132] Thus, at the time of Neustadter's study, he was right to warn participating lawyers and clients that he and they might face a choice between jail for contempt of court or the forced disclosure of communications that would have been protected if Neustadter had not been present to observe them.[133]

Today, however, enforcement of a researcher's privilege is not a novel idea. The United States Court of Appeals for the First Circuit pioneered the practice years ago in an antitrust case[134] and applied it more recently in criminal proceedings.[135] Congress and the Supreme Court anticipated such judicial development of privilege doctrine "in the light of reason and experience" when they respectively drafted and approved Federal Rule of Evidence 501.[136] Nevertheless, the researcher's privilege, like all privileges, is not absolute; despite criticism from some commentators, disclosure of privileged information is subject to case-by-case, item-by-item balancing tests.[137]

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131. *See supra* notes 121–24 and accompanying text. In disciplines other than law, the term *confidentiality* is often used interchangeably with *privacy* or *privilege*. *See, e.g.*, Paul Stiles & John Petrila, *Research and Confidentiality Legal Issues and Risk Management Strategies*, 17 PSYCHOL. PUB. POL'Y & L. 333 (2011).

132. Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977) (describing common law privileges).

133. Neustadter, *supra* note 57, at 280–83; *see also In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) (enforcing contempt order against researcher; rejecting First Amendment privilege to withhold information obtained from confidential sources in course of sociological research).

134. Cusumano v. Microsoft Corp., 162 F.3d 708, 714–15 (1st Cir. 1998).

135. United Kingdom v. Trustees of Boston College, 718 F.3d 13, 27–28 (1st Cir. 2013).

136. FED. R. EVID. 501.

137. Robert H. McLaughlin, *From the Field to the Courthouse: Should Social Science Research Be Privileged?*, 24 L. & SOC. INQUIRY 927, 932 (1999); John Lowman & Ted Palys, *Protecting Research Confidentiality: Towards a Research-Participant Shield Law*,

Thus, the current state of the law makes it is impossible to guarantee to research subjects that their words will be shielded from forced disclosure. The discussion below offers a belt-and-suspenders approach to reducing that risk in the context of research on attorney-client communication in public defense. The belt comprises protections mandated by federally regulated research ethics. The suspenders are the nascent, evolving researcher's privilege.

We offer this approach because the risk of forced disclosure of researcher-observed communication has chilled the pursuit of knowledge on a critically important topic. The harm is significant, documented, and increasing, particularly in an era when empirical research is often acknowledged as a foundation for positive systemic change.[138] We argue that the importance of pursuing data-informed improvement of attorney-client communication in public defense, and the lack of alternatives to achieve the same results by other means, warrant robust judicial enforcement of privilege protections for scholars who investigate this topic.

We emphasize judicial enforcement of an evidentiary privilege for research while recognizing and applauding arguments that favor statutory reform.[139] We do so because courts bear ultimate responsibility for the quality of public defense representation,[140] and therefore have a strong stake in the production of empirical research that can aid them in that task. Absent judicial enforcement of a privilege for this research, data necessary to improve communication in public defense are likely to remain largely inaccessible. The next subsection offers additional evidence that an evidentiary privilege is needed by explaining the strengths and weaknesses of protections that are mandated by research ethics. We argue that courts should weigh all of these factors heavily in favor of protecting and promoting public defense research through enforcement of the researcher's privilege.

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21 CAN. J.L. & SOC. 163, 165–66 (2000); Katherine Adams, *The Tension Between Researcher Ethics and Legal Ethics: Using Journalist's Privilege State Statutes as a Model for a Proposed Researcher's for Privilege*, 27 GEO. J. LEGAL ETHICS 335, 347 (2015) (quoting scholar Jeffrey Nestler in stating that Wigmore factors "have been superseded by a more expansive vision of evidentiary privileges" and arguing that privileges should be analyzed in a more modern way).

138. *See, e.g.* Danet et al., *supra* note 89; Adams, *supra* note 137.

139. *See* Lowman & Palys, *supra* note 137.

140. *See* Beale & Myers, *supra* note 33, at 8–9.

1. Researcher-Driven Protections of Confidential Information

Even as we call upon courts to privilege public defense research, we acknowledge that researchers themselves create layers of protection to shield confidential information from disclosure; after all, confidentiality is firmly "embedded as an ethical principle in codes of research ethics."[141] Researchers must anonymize data and build firewalled, secure systems for collecting, maintaining, and reporting data. They must do so to prevent the release of personally identifying information, that is, information with which the public could connect research data to the people who provided it when they participated as subjects in the study.[142] These protections can be further strengthened in some circumstances by obtaining federally sanctioned certificates of confidentiality that prevent compelled disclosure of identifying information "in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding[s]."[143]

Despite these multiple layers of protection, researchers who seek to investigate defendant-defender communication could augment them by following Cunningham and McElhinny. Those researchers embedded themselves as members of the defense team, serving as attorney consultants and agents who were specifically tasked with improving communication and who therefore shared the full protections of attorney-client privilege.[144] Unfortunately, this approach has significant drawbacks. Benefits from the knowledge generated would accrue to particular legal teams and defender agencies; however, broader dissemination of that knowledge to improve communication practices in other locations, and opportunities to refine the work through additional research, would be sacrificed.

Another way to reduce the risk that public defense research will result in forced disclosure of protected defendant-defender communication may be to focus research on the lower-level cases that are swamping criminal

141. Stiles & Petrila, *supra* note 131, at 335; McLaughlin, *supra* note 137, at 960–62.

142. *See supra* notes 125–26 and accompanying text.

143. 42 U.S.C. § 241(d)(1)(D) (2018). While these certificates may not offer absolute protection, they can weigh into the analysis of a case-by-case privilege for the researcher. Leslie E. Wolf et al., *Certificates of Confidentiality: Protecting the Human Subject Research Data in Law and Practice*, 43 J. L. MED. & ETHICS 594 (2015).

144. *See supra* note 58 and accompanying text; *see also* Spencer Rand, *Hearing Stories Already Told: Successfully Incorporating Third Party Professionals Into the Attorney-Client Relationship*, 80 TENN. L. REV. 1 (2012) (where third party professionals are acknowledged as essential to the representation, their inclusion in the communications does not vitiate attorney-client privilege).

legal systems.[145] Improving representation at this case level is a high priority.[146] Moreover, given the astonishingly high case numbers, plea rates, and processing speed—and the correspondingly limited amount of defendant-defender communication occurring in these cases—there may be a lower risk of harm from forced disclosure of protected content. At the same time, such research could illuminate strategies for making the most of limited resources while also offering new data to support caseload reduction or other reforms.

Yet another approach for shielding defendant-defender communication from forced disclosure is to obtain a written agreement with the prosecution that waives access to information that researchers collect. Although there is one example of such an agreement from the 1970s, the circumstances appear idiosyncratic and the breadth and enforceability of such a contractual obligation is unclear.[147] Nor does there appear to be evidence that many researchers have followed Rosenthal's recommendation that researchers obtain an *ex ante* court order, in cooperation with local legal luminaries, such as a bar official or law dean, that would "permit social science access, under appropriately controlled circumstances, to attorney-client consultations without thereby waiving the privilege against revealing what was said in a legal proceeding."[148]

2. Evidentiary Protections

Ultimately, concerns about the adequacy of researcher-driven protections to prevent forced disclosure of defendant-defender communication underscore the need for a robust researcher's privilege. As a general matter, the classical recipe for successful invocation of an evidentiary privilege requires that (1) communications are coupled with

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145. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 279–81 (2011); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320–21 (2012).

146. Roberts, *supra* note 145, at 281–90.

147. SHOOTING OF BIG MAN: ANATOMY OF A CRIMINAL CASE, HBO (1979), https://www.youtube.com/watch?v=HSHXZ-tCXBg [https://perma.cc/J4WZ-9P5R]. The film-maker sought and obtained permission of the Seattle King County Public Defender Office to film the murder case of Jack Jones from arraignment through verdict. They filmed lawyer-client communications in the jail and in the courtroom as well as other significant parts case preparation and trial. Defense lawyers obtained oral consent from the prosecutors not to seek the footage of lawyer-client communications or to subpoena the filmmakers. Interview with Eric Salzman, filmmaker, and Mark Leemon, former felony supervisor at the King County Public Defender.

148. *See* Douglas E. Rosenthal, *Comment On "Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure,"* 14 L. & SOC'Y REV. 923, 928 (1980).

reliance that they will remain confidential; (2) confidentiality is essential to maintaining the relationship in question; (3) the public has an interest in fostering that relationship; and (4) the harm from disclosure outweighs the benefit (defined as a contribution that helps to ensure the correct resolution of the case).[149] However, as scholars have noted, over the past century these factors "have been superseded by a more expansive vision" that accommodates contemporary realities.[150] Those contemporary realities include the growing importance of empirical research to the public.

Thus, in *Cusumano v. Microsoft Corp.*,[151] an antitrust action, the United States Court of Appeals for the First Circuit enforced a researcher's privilege.[152] In *Cusumano*, Microsoft subpoenaed researcher notes, transcripts of conversations, and other materials used in a book about corporate competition to market Web browsers. Microsoft claimed that conversations between the author and officials from other companies would aid its defense.[153] The panel turned to the journalist's privilege as an apt analogy and concluded that

> courts ought to offer similar protection to academicians engaged in scholarly research. After all, scholars too are information gatherers and disseminators. If their research materials were freely subject to subpoena, their sources likely would refuse to confide in them. As with reporters, a drying-up of sources would sharply curtail the information available to academic researchers and thus would restrict their output. Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.[154]

After acknowledging the importance of knowledge production, the panel balanced the necessity and materiality of the information sought against the harm of production and quashed the subpoena. The panel reasoned that Microsoft had substantial interests at stake but could obtain the information elsewhere, whereas compelled disclosure of the confidential information would chill the use of interviews to research

149. 8 WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

150. Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of a Journalist's Privilege*, 154 U. PENN. L. REV. 201, 213 (2005).

151. 162 F.3d 708 (1st Cir. 1998).

152. *Id.* at 711.

153. *Id.*

154. *Id.* at 714. The roles of the First Amendment and academic freedom in protecting the free flow of information for academic scholarship are beyond the scope of this Article.

business management practices.[155] Similar reasoning has led to similar results in other cases. For example, one court applied Federal Rules of Civil Procedure 26 and 45 to quash a drug company's subpoena for peer review comments on articles that had been submitted for publication, but were rejected by the *New England Journal of Medicine*.[156] The court reasoned that the company's own experts could review the state of scientific knowledge on the safety of its products and that disclosure would irrevocably compromise the peer review process.[157]

The First Circuit applied the same balancing test in a criminal case, partly enforcing and partly rejecting a research privilege in *United Kingdom v. Trustees of Boston College*.[158] In that case, the U.S. government acted on British authorities' invocation of treaty rights by seeking information from a research project on former members of the Irish Republican Army who were suspects in a kidnapping and murder.[159] Despite the researchers' belt-and-suspenders attempts to protect the information—including non-disclosure agreements with the interview subjects—the court required disclosure of a subset of materials deemed relevant to the investigation.[160] The court expressly rejected a request to provide "special protection, in the form of 'heightened sensitivity'" to the academic research materials at issue, reasoning that "the strength of the governmental and public interest in not impeding criminal investigations," particularly in a case involving an international treaty, warranted review under an "ordinary relevance" test.[161]

However, the First Circuit also emphasized that, despite the strong interest in not impeding criminal investigations, analysis of the researcher's privilege is a case-by-case, fact-specific inquiry.[162] Thus, the specific significance of research to advancing scientific inquiry is a key criterion for enforcing the privilege. As one scholar put it, the issue "is not . . . a simple question of disclosure or nondisclosure, but rather one aspect of the highly nuanced field of what sorts of truth are most valuable

155. *Id.* at 716–17.

156. *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., 249 F.R.D. 8, 13-15 (D. Mass. 2008).

157. *Id.*; *see also In re* American Tobacco Co., 880 F.2d 1520, 1530–31 (2d Cir. 1989) (issuing protective order for medical research); Dow Chem. Co. v. Allen, 672 F.2d 1262, 1276 (7th Cir. 1982) (quashing subpoena of research on herbicides).

158. 718 F.3d 13 (1st Cir. 2013).

159. *Id.* at 16–17.

160. *Id.* at 34.

161. *Id.* at 20, 23–25.

162. *Id.* at 23–25.

in the context of specific events occurring in particular social spaces and at certain moments in time."[163]

There are a number of compelling interests weighing in favor of robust protection for research on attorney-client communication in the public defense setting. The efficacy and legitimacy of U.S. criminal legal systems are highly contested,[164] and public defense plays a crucial role in that contest.[165] Courts have acknowledged the critical role of attorney-client communication to effective representation[166] and have the ultimate duty of enforcing the right to counsel.[167] Thus, courts occupy a distinctive "social space and . . . moment[] in time"[168] that should encourage their enforcement of a privilege protecting empirical research on communication between government-paid criminal defense lawyers and the people who need them. Indeed, a contrary result would leave U.S. courts and researchers increasingly isolated on the national stage.[169]

V. CONCLUSION

An early advocate of empirical research on attorney-client relations noted that they are a unique site of "conflict between democratic control by lay citizens and authoritative policy direction by specialists" that raise "a classical problem of politics, and perhaps, in a democratic society, *the* classical problem."[170] Twenty years later, another leading researcher in the field insisted that "there are sound theoretical reasons to believe that lawyer neglect of clients is a serious social problem" requiring reform efforts grounded in empirical investigation.[171] These observations are all the more salient today in the public defense context, given the fundamental nature of the right at issue, the critical role of courts in enforcing that right, the size and complexity of the barriers to quality communication in public defense, and the dearth of evidence-informed strategies for systemic improvement. By highlighting these problems and opportunities, this Article aims to spark scholarly engagement with empirical investigations into the quality of attorney-client

163. McLaughlin, *supra* note 137, at 932.

164. *See* Moore, *supra* note 33, at 176–79.

165. *See supra* notes 12–14 and accompanying text.

166. *See supra* notes 15–20 and accompanying text.

167. *See* Beale & Myers, *supra* note 33, at 8–9.

168. *See* McLaughlin, *supra* note 137.

169. Frank Murray, *Boston College's Defense of the Belfast Project: A Renewed Call for a Researcher's Privilege to Protect Academia*, 39 J. COLLEGE & UNIV. L. 659, 661, 680–88 (2013).

170. ROSENTHAL, *supra* note 89, at 4.

171. Felstiner, *supra* note 26, at 124, 144.

communication in public defense, to focus attention to the ethical and legal issues implicated by such research, and to heighten judicial interest in protecting and promoting that work through robust enforcement of an evidentiary privilege for researchers who heed the call.